

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case # 2009-1303</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: November 25, 2009</p> <p>Date of Complaint: September 17, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Harsharen Bhuller, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened November 25, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on September 17, 2009, alleging the issues outlined below. Respondent, DCPS, filed responses to the complaints on September 25, 2009 and on November 16, 2009.² Respondent did not challenge the sufficiency of the complaint.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-14 and DCPS Exhibits 1-5) which were admitted into the record.

ISSUE(S):³

Did DCPS deny the student a free and appropriate public education ("FAPE") by failing to comply with the August 28, 2009 Hearing Officer's Decision and Order?

² DCPS' response was also titled motion to dismiss. DCPS asserted that although a MDT meeting had not been conducted prior to the complaint being filed and within the time frame prescribed by the HOD, because a MDT meeting was scheduled the complaint should be dismissed. The Hearing Officer addressed DCPS' response during the pre-hearing conference. The Hearing Officer concluded the motion to dismiss was unsupported by evidence and the mere fact that a MDT meeting had been scheduled did not form a sufficient basis for the complaint to be dismissed prior to a hearing on the merits.

³ The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

FINDINGS OF FACT⁴:

1. The student is an [REDACTED] resident of the District of Columbia who recently graduated at the end of the 2008-09 School Year (“SY”) from School A, a private special education school located in Laurel, Maryland. The student is a child with a disability under IDEA and a classification of emotional disturbance (“ED”). The student’s attendance at School A was funded by the District of Columbia Public Schools (“DCPS”). (Petitioner’s Exhibit 11).
2. In April 2009 the student’s individualized educational program (“IEP”) was updated at School A. The IEP prescribed 29 hours of specialized instruction weekly and 4 hours per month of behavioral support services. (Petitioner’s Exhibit 11)
3. On June 22, 2009, Petitioner’s counsel filed a due process complaint alleging DCPS failed to timely conduct the student’s evaluation. The complaint resulted in a Hearing Officer’s Determination (“HOD”) issued August 26th 2009, which directed that DCPS fund an independent clinical evaluation and convene a MDT meeting within fifteen calendar days of the date the HOD was issued. (Petitioner’s Exhibit 7)
4. On July 22, 2009, an independent comprehensive psychological evaluation⁵ of the student was conducted and an evaluation report completed. The evaluated recommend “a strong social network to assist in preventing depression, family education and involvement to assist addressing the student’s major depressive disorder, 45 minutes of individual counseling for emotional concerns, involvement in a structured group activity.” (Petitioner’s Exhibit 13)
5. On September 4, 2009, Petitioner’s counsel sent the independent comprehensive psychological evaluation report to DCPS. (Petitioner’s Exhibit 14)
6. On September 17, 2009, Petitioner (the student’s mother) filed a Due Process Complaint alleging DCPS failed to provide a FAPE to the student by failing to comply with the August 28, 2009 Hearing Officer’s Decision and Order (“HOD”).
7. In correspondence dated September 21, 2009, School A sent an invitation to Petitioner’s counsel for the student’s multidisciplinary team (“MDT”) meeting to be convened. The letter of invitation proposed three dates for the meeting: October 5th, 9th, and 13th. The letter stated that the issues to be addressed at the meeting included review of the student’s recent evaluation, compliance with the HOD, and to address compensatory education. (Petitioner’s Exhibits 8&9)

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. For administrative efficiency when citing an Exhibit that has been submitted by both parties separately the Hearing Officer may cite only one party’s Exhibit.

⁵ The evaluation included assessments of the student’s cognitive abilities, educational achievement, behavioral and emotional functioning and was conducted June 9, 2009.

8. On September 22, 2009, Petitioner's counsel sent a letter of confirmation for the MDT meeting to be convened October 13, 2009. (Petitioner's Exhibit 10)
9. On October 13, 2009, the MDT meeting was convened. The student, her parent and their educational advocate attended the meeting. The MDT reviewed the student's evaluation and updated her IEP. **The MDT acknowledged in the IEP that DCPS had not completed the student's updated evaluations timely and prescribed as a result of the recent evaluation that the student receive two (2) 45 minute sessions of counseling per week to be obtained independently and independent family therapy for 1 hour per month. (This service was added as transition services to the IEP to be provided the student for one year following the MDT meeting.)**⁶ At the meeting the student and parent requested that DCPS fund the student's tuition at [REDACTED] to "address the area of harm stated in the clinical evaluation." DCPS did not agree to fund the tuition but offered the student group therapy to address social skills addressed in the evaluation and also offered career counseling. (Petitioner's Exhibit 11&12)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁸ In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Did DCPS deny the student a free and appropriate public education by failing to comply with the August 28, 2009 Hearing Officer's Decision and Order? Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

⁶ These services are outlined in the student's October 13, 2009, IEP and meeting notes and are to be independent services reimbursed to the parent by DCPS for the services rendered by independent providers. The services were incorrectly outlined as compensatory education

⁷ The parent believed the student attending and completing such a program would impact the student self-esteem issues cited in the recent comprehensive psychological evaluation. (DCPS Exhibit 3)

⁸ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

DCPS acknowledged that the MDT meeting was held beyond the required time prescribed by the HOD. The HOD directed that DCPS convene a MDT meeting to review the independent evaluation within fifteen days of the issuance of the HOD. The HOD was issued on August 26, 2009. The MDT meeting should have, therefore, been convened on or about September 10, 2009. Petitioner's counsel sent DCPS the independent evaluation on or about September 4, 2009. However, a letter of invitation was not sent by DCPS to Petitioner to convene the meeting until after the due process complaint was filed on September 17, 2009.

According to the *Blackman/Jones* Consent Decree a rebuttable presumption of harm is created whenever DCPS fails to do, inter alia, comply with hearing officer determinations. *See also Hawkins v. District of Columbia*, Civil Action No. 07-0278 (JDB)(March 7, 2008)

There was no evidence presented to rebut the presumption of harm. Therefore, the Hearing Officer concludes the student was denied a FAPE as a result of DCPS' failure to timely comply with the HOD.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" *Id.* citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" *Id.* "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." *Id.*

In *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education."

At the October 13, 2009, MDT meeting and at the due process hearing for the current complaint DCPS acknowledged the student's evaluation was not conducted timely and that the HOD was not complied with timely. At the meeting and at the hearing DCPS offered services as compensatory education. At the meeting the parent and her advocate did not agree with or accept the compensatory education offered by DCPS. During the due process hearing, however, Petitioner reconsidered DCPS' offer and agreed to accept the services offered. Accordingly, the Hearing Officer, based on DCPS' offer and Petitioner's acceptance of the offer, adopts the compensatory education due the student as a result of the delay in evaluation and delay in compliance with the HOD is stated below and concludes that these services are reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place.

ORDER:

1. DCPS shall provide the student as compensatory education the following: four months of independent group therapy services - one hour per week and four months of independent career counseling - one hour per week.
2. DCPS shall, within fifteen (15) business days of the issuance of this Order, provide Petitioner's counsel a document that will allow for parental reimbursement of independent group therapy and career counseling; and allow for parental reimbursement of the independent individual therapy and family counseling the MDT agreed to provide at the October 13, 2009, meeting.
3. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: December 1, 2009