

DISTRICT OF COLUMBIA
Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office

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Confidential

2009 JUN 26 PM 3:53
STUDENT HEARING OFFICE

<p>STUDENT¹, by and through guardian, Petitioner, <i>vs.</i> District of Columbia Public Schools, Respondent.</p>	<p><u>HEARING OFFICER'S DETERMINATION</u></p> <p>Counsel for Petitioner/Guardian: Fatamta Barrie, Esq.</p> <p>Asst. Attorney General for DCPS: Harsharen Bhuller, Esq.</p> <p><u>Impartial Hearing Officer</u> H. St. Clair, Esq.</p>
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¹ Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

BACKGROUND

A Hearing Officer's Determination/Decision (HOD) was issued in this matter on September 12, 2009 wherein it was found that DCPS had failed to deliver special education services to the student from August 25, 2008 thru November 6, 2008.

On April 6, 2009, the MDT/DCPS exited the student from special education services.

On April 20, 2009, Counsel for the Guardian filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Guardian complained DCPS inappropriately exited the student from special education services on April 6, 2009 and failed to consider compensatory education for the student as ordered in the September 12, 2009 HOD. An order to DCPS to reinstate the student's eligibility for special education services was requested as relief.

A Pre-hearing Conference Order was issued in this matter on May 18, 2009. The Order determined the issues as setout below under ISSUES.

The hearing in this matter was scheduled for 1:00 P.M., June 28, 2009 but, on Petitioners' motion was continued to 1:00 PM, Thursday, June 18, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 6B, Washington, D.C. 20003. The hearing convened as rescheduled.

JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

- ISSUES:**
- 1. Was the April 6, 2009 exit of the Student from special education services appropriate?**
 - 2. Did DCPS fail to deliver special education services to the Student from the beginning of the 2008-09 School Year until her exit on April 6, 2009?**
 - 3. Did DCPS violate the February 12, 2009 HOD?**

FINDINGS of FACT

By facsimile dated May 20, 2009, the parent disclosed 10 witnesses and 16 documents.

By facsimile dated May 19, 2009, DCPS disclosed 6 witnesses and 3 documents.

The documents were admitted into the record and are referenced/footnoted herein where relevant.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. The February 12, 2009 HOD found that DCPS had failed to deliver special education services to the Student from August 25, 2008 thru November 6, 2008 and further failed to complete comprehensive psychological, psychiatric and speech/language evaluations, an occupational therapy assessment and a social history. The HOD ordered completion of the said evaluations/assessments and an MDT/IEP meeting with 15 schooldays of receipt of the completed evaluations; at the meeting, the IEP and the need for compensatory education for any deficits caused by the non-delivered services were to be discussed.²
2. The March 12, 2009 IEP disability coded the Student Specific Learning Disabled (LD) with 10 hours of specialized instruction, 30 minutes per week of Behavioral Support Services and 30 minutes per week Speech/ Language Pathology.³
3. On April 6, 2009, the MDT considered the completed evaluations and exited the Student from special education services. At the same meeting, the MDT decided the Student did not warrant compensatory education.
4. The March 3, 2009 Psychiatric Evaluation⁴ diagnosed the student with Dysthymia and Learning Disorder, NOS, and recommended smaller classroom size; the evaluation did not recommend medication.
5. The January 22, 2009 Comprehensive Psychological Evaluation⁵ diagnosed the student with Reading Disorder and Mathematics Disorder and recommended special education services in both areas. The evaluating psychologist did not testify and did not diagnose the student

² Par. Doc. No 14

³ Par. Doc. No 8

⁴ Par. Doc. No 5

⁵ Par. Doc. No 4

with a social/emotion problem. The Psychologist that supervised and countersigned the evaluation testified via telephone that the Student was prematurely exited from special education services. Referring to the evaluation Appendix, the Psychologist pointed to the Student's FSIQ score at 93, well within the average range, and to her very low grade equivalency in Pseudoword Decoding score on the WIAT II, and opined that the Student functioned a little lower in the language area than she should and would benefit from special education services. The Psychologist thought the Student should be disability coded Learning Disabled (LD) and Emotionally Disturbed (ED); that the Student was not at grade level and should be in a full-time special education program with both outside and in-school psychological counseling. While the Psychologist thought the Student had not made progress, the Student's previous achievement data had not been consulted. The Psychologist thought the April 6, 2009 MDT had abused their discretion when deciding to exit the Student from special education services.⁶

6. The Student thought she benefited from special education services and should not have been exited from the services; that she would better her education with special education. The Student thought she needed help with reading and mathematics and thought she made more progress in mathematics than in reading. The Student did not attend the after school tutoring program even though her teachers and Grandmother had encouraged her to attend. When questioned about her absences from school, the Student thought she would do better in school if her attendance improved.⁷

7. The Grandmother/Guardian thought the Student had not made sufficient progress and that the Student needed help; that the Student should return to special education services.⁸

8. The DCPS Psychologist attended the April 6, 2009 MDT meeting during which the Student was exited from special education services; that he reviewed the Student's records and behavior and the psychiatric⁹ and comprehensive psychological¹⁰ evaluations. The DCPS Psychologist determined that the Student did not meet either of the four criteria of the ED disability coding: the inability to get along with others, inappropriate

⁶ -testimony of the private Psychologist

⁷ -testimony of the Student

⁸ -testimony of the Grandmother/Guardian

⁹ *ibid*, No 3, above

¹⁰ *ibid*, No 4, above

behavior under normal circumstances, depression or physical symptoms over a long period of time or to a marked degree. Referring to the standard scores as opposed to the grade equivalency of the WIAT II in the Appendix of the psychological evaluation, the DCPS Psychologist opined that the standard scores were consistent with the Student's IQ and, with the exception of Pseudoword Decoding, did not suggest the presence of a learning disability; that IQ should be considered in relation to standard scores as opposed to grade equivalency when considering the LD disability coding for a student; that the Student would make more progress if her school attendance improved.¹¹

9. The Special Education Coordinator (SEC) testified via telephone that she was familiar with the Student and that she concurred with the April 6, 2009 MDT decision to exit the Student from special education services; that all of the Student's teachers concurred with the decision and that only the Grandmother and educational advocate disagreed. The SEC recommended to the Grandmother that the Student attend the after school and Saturday morning tutoring programs at the school but that the Student did not attend any of the programs; that the Grandmother was not satisfied with the Student's progress and just wanted help for the student, not necessarily special education services.¹²

10. The March 3, 2009 Speech/Language Evaluation Review at Recommendation No 1 read: "Given that [the Student] has already been identified as an eligible student for special education services, therapy services are recommended to supplement specialized instruction."¹³ At the April 6, 2009 MDT meeting, the Reviewer was noted as stating that the Student's speech/language scores fell within normal limits and did not qualify for speech/language services independent of eligibility for special education services; that no longer eligible for special education services, speech/language services were not recommended for the Student.¹⁴

11. The April 6, 2009 MDT decision to exit the Student from special education services was appropriate.

12. The April 6, 2009 MDT decision not to provide compensatory education to the student was appropriate.

¹¹ -testimony of the DCPS Psychologist

¹² -testimony of the Special Education Coordinator

¹³ Par. Doc. No 12, page 3

¹⁴ DCPS Doc. No 1, page 1

CONCLUSIONS of LAW

DCPS is required to make FAPE available to all children with disabilities within the jurisdiction of the District of Columbia. *IDEIA 2004* requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 21, determine eligibility for special education services and, if eligible, provide same through an appropriate IEP and Placement.

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a).

District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by preponderance.

ONE

The April 6, 2009 exit of the Student from special education services was appropriate.

The last IEP for the Student, the March 12, 2009 IEP, disability coded the Student Specific Learning Disabled or LD with 11 hours of special education services; the Student was not disability coded ED. The Student was exited from special education services on April 6, 2009.

Regulations 34 CFR 300.307–.311 set out the procedure for the Specific Learning Disability disability coding. While 300.309(1) refers to “grade –level standards” it also permits reference to the adequacy of achievement for the student’s age. At 34 CFR 300.307(a)(3), alternative research based procedures – standard scores – can be used to determine the appropriateness of the LD disability coding for a student.

Regulation 34 CFR 300.8(c)(4) defines Emotional Disturbance. At this point it is mentioned that Emotional Disturbance is a disability coding or classification under *IDEIA 2004* as opposed to mental disorders defined in the DMS IV;¹⁵ they are different.

At regulation 34 CFR 300.305(e), an evaluation of a student is required before exiting the student from special education services or determining that the child is no longer a child with a disability.

Also mentioned here is that MDT decisions relating to eligibility or continued eligibility for special education services necessarily require the exercise of reasoned discretion on the part of the MDT.

The record in this matter did not show a violation of either of the above set out regulations, nor was arbitrariness or an abuse of discretion on the part of the April 6, 2009 MDT established.

¹⁵ DSM IV: Diagnostic and Statistical Manual of Mental Disorders 4th Ed.

TWO

This issue was decided in the February 12, 2009 HOD.

This issue was decided in the February 12, 2009 HOD. FINDINGS OF FACT No 3 in the HOD states: [D]CPS failed to provided the Student the services required by her IEP from August 25, 2008 through November 6, 2008.

THREE

DCPS did not violate the February 12, 2009 HOD.

The basis of this issue was the order in the February 12, 2009 HOD to the MDT to consider compensatory education for the Student for the special education services not delivered from August 25, 2008 through November 6, 2008, and the MDT decision on April 6, 2009 that compensatory education for the Student was unwarranted; the MDT decided not to provide compensatory education after deciding to exit the Student from special education services. Both decisions were appropriate, neither violated a regulation nor was either an abuse of the April 6, 2009 MDT's discretion.

Compensatory education is an equitable award, not a damage award.

In *Reid vs the District of Columbia* 401 F3rd 516 (D.C. Cir. 2005), the Court amplified compensatory education in the District of Columbia.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individual assessments.

Some students may only require short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

In every case, however, the inquiry must be fact specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefit that likely would have accrued from the special education services the school district should have supplied in the first place.

The purpose of compensatory education is to place a student who has been denied FAPE in the educational place he or she would have been but for the denial. Where the

student would have been but for the denial does not necessarily mean at grade level. For some children with learning disabilities, it may mean grade level.

In this matter, we know the Student *needed* special education services on March 12, 2009 but did not *need* those services on April 6, 2009; this decision necessarily means that the Student was where she should have been educationally, whether the result of the general education only she receive from August 25, 2008 through November 6, 2008 or the combination of general and special education services she received thereafter until April 6, 2009, notwithstanding. The Student did not warrant compensatory education because, in the reasonably exercised discretion of the April 6, 2009 MDT, she was then where should have been educationally; if she had not been, she would have continued to be eligible for special education services, and possibly, compensatory education.

SUMMARY of the DECISION

The outcome of this matter hinged on the appropriateness of the April 6, 2009 exit decision; if appropriate, the DCPS prevailed, if not, then the Grandparent prevailed. True, the decision to exit the Student from special education services was based on evaluations that recommended the continuation of those services. However, to set aside the MDT decision, it not being a violation of any regulation, it must have been arbitrary or an abuse of MDT discretion and such was not shown in the record.

The Student was never ED disability coded, but the psychiatric evaluation diagnosed her with Dysthymia, a mental disorder that could support an ED disability coding. The DCPS Psychologist did not dispute the diagnosis but could not, however, identify in the Student one of the manifestations of the mental disorder that matched either of the four requirements in the definition of the ED disability coding, only one of which required to supported the disability coding. The decision was not an abuse of the MDT's discretion and was appropriate.

The April 6, 2009 MDT decision concerning the LD disability coding for the Student was much closer; it could easily have been to continue the Student's eligibility for special education services. The question for the April 6, 2009 MDT was whether the Student *needed* special education services, not whether she could have done better academically with the services. Most students do better with tutoring and one-on-one instruction. As opposed to grade levels, the DCPS Psychologist compared the Student's standard scores on the WIAT II to her FSIQ of 93 and did not find a discrepancy between her achievement and her ability. *IDEIA 2004* prohibits the use of a *severe* discrepancy test, not a discrepancy test and permits the use of alternative research based procedures. Here again, the undersigned could not find arbitrariness or abuse of discretion on the part of the April 6, 2009 MDT.

The Parent did not meet her burden in this matter.

In consideration of the foregoing, the hearing officer made the following

ORDER

WITH PREJUDICE, the herein
Complaint is DISMISSED.

Dated this *26th* day of *June*, 2009

/s/ H. St. Clair

H. St. Clair, Esq., Hearing Officer

This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.