

<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</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Michael Eig, Esq. 5454 Wisconsin Avenue Suite 760 Chevy Chase, MD 20815</p> <p>Counsel for DCPS: Linda Smalls, 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* (I.D.E.A.), 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:

The matter was decided based on a due process complaint submitted by the counsel for the parent and student filed on April 27, 2009, alleging the issues outlined below. The original hearing date was set for June 18, 2009. A pre-hearing conference was conducted on May 18, 2009, with parties present by telephone. The parties agreed that the Hearing Officer would render a decision in the case after submission of disclosures. The disclosures were submitted to the Student Hearing Officer (SHO) on May 27, 2009. Hearing Officer obtained the disclosure documents on June 18, 2009.²

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 and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-35 and DCPS Exhibits 1- 14) which were admitted into the record.

ISSUE(S):³

Did DCPS deny the student a free and appropriate public education by failing to complete to evaluate and/or determine the student's eligibility for special education services within the 120-day time line as required by the IDEA and by failing to timely provide her an IEP and an appropriate placement?

² Included in DCPS's response to the complaint was a motion to dismiss which was addressed during the prehearing. The Hearing Officer concluded there were issues of fact in dispute as DCPS as pointed in its response to the Petitioner's motion for summary judgment. Consequently, the Hearing Officer concluded that neither the motion to dismiss nor Petitioner's motion for summary judgment would be granted. The Hearing Officer stated that unless after review of the disclosures it was determined there was need testimony by witnesses the case would be decided on the merits after submission of disclosures.

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. Although Petitioner enumerated additional issues in the complaint the issue as stated summarizes and combines the issue into a single statement.

FINDINGS OF FACT ⁴:

1. The student is _____ years old, currently attends School A, a private full time special education school and resides in the District of Columbia with her parent(s). (Petitioner's Exhibit 19, DCPS 5, 9)
2. The student has a primary diagnosis of autism in addition the student also experiences pervasive difficulty in the areas of speech, language, attention, and executive functioning. (Petitioner's Exhibit 11 & 12)
3. The student began attending School A in at the start of the 2007-08 school year. The student was placed there by her parent and funded by the parent. Prior to attending School A the student attended Montgomery County Public Schools and was a part of that school systems Autism Program. The parent sought reimbursement from Montgomery County Schools for the student's tuition at School A. The matter went to due process hearing in Maryland and the parent was not granted reimbursement. (Petitioner's Exhibits 7, 8, 9,10, 11, 12, 14, 15)
4. The parent and student relocated to the District of Columbia. On December 10, 2008, the student's parent registered the student as a non-attending student with the District of Columbia Public Schools ("DCPS"). The parent requested at that time that the student be evaluated and provided special education and related services. DCPS completed, on that date, a "Private-Religious School Student Referral for Special Education Services" form. (DCPS 4, 5 & 9, Petitioner's Exhibit 19)
5. The student most recent individualized educational program (IEP) was developed at School A on January 13, 2009, and prescribes a full time special education program and with specialized instruction and 90 minutes of speech/language therapy and 30 minutes of occupational therapy per week. (Petitioner's Exhibit 22, DCPS 12)
6. At School A, during the 2008-09 school year the student was in a high school class with eight peers ages 14-18. The classroom team consisted of one special education teacher, two assistant teachers and four 1to1 aides for other students. The student also received the services of an occupational therapist and speech/language therapist, a social worker, and a behavior resource specialist. The student's teacher made a request that the student receive extended school year (ESY) services in the summer of 2009. The student has made progress in academics, social/emotional and life skills since attending School A. (Petitioner's Exhibits 13 & 21)
7. On February 5, 2009, the parent sent an email to the DCPS Liaison for Private and Religious Schools inquiring as to the status of the student's registration since the student was registered with DCPS on December 10, 2009. The parent requested that DCPS provide the name of the student's home school so the parent could visit. After having received no response from the email the parent sent another email on February 16, 2009,

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

from which she received a response stating the student's case had been assigned to a DCPS staff member who would contact the parent soon. (Petitioner's Exhibit 25)

8. On February 24, 2009, DCPS conducted a meeting which the parent and DCPS social worker attended. The parent stated at the meeting that student had recently been evaluated at School A in December 2008 and that she would provide DCPS that and any other information that may be more current. The meeting notes indicate that once the information was received it would be referred to DCPS evaluators for review and/or reevaluation and a classroom observation would be conducted. A student evaluation plan (SEP) form was prepared that indicated that it would be determined if the student's existing evaluations would simply be reviewed by DCPS evaluators or new evaluations conducted. The parent signed a consent form for the student to be evaluated. (Petitioner's Exhibit 23 & 24, DCPS Exhibit 6, 7, 8)
9. On March 31, 2009, a DCPS psychologist completed a psychological reevaluation of the student. The evaluator conducted a classroom observation and a teacher interview and administered or attempted to administer assessments of the student including the TONI-3, and subtests of the WIAT-II. The evaluator concluded the student is in need of "an intensive program that will provide emotional supports, behavioral supports, functional academics, life skills training, social skills training, and vocational skills training." (Petitioner's Exhibit 27, DCPS 11)
10. On April 1, 2009, a DCPS Speech-Language Pathologist conducted an observation of the student. She also reviewed the student's IEP, a Functional Communication Profile-Revised than had previously been administered along with other data. She concluded based upon the documents review and the classroom observation that the student "demonstrates an academically significant speech and language impairment...and continues to be eligible for speech language services..." (Petitioner's Exhibit 27, DCPS 10)
11. On April 14, 2009, Petitioner's counsel filed the current complaint alleging DCPS has not completed the evaluation process within the required 120 day timeframe using December 10, 2009, as the point from which the 120 days allegedly should be measured. Petitioner is seeking funding by DCPS for the student's attendance at School A for the 2008-09 school year or at least since the April 2009 date when FAPE should have been provided by DCPS. (Petitioner's Exhibit 1)
12. As of the date of the pre-hearing conference on May 18, 2009, DCPS had not convened a multidisciplinary team (MDT) meeting to review the DCPS and there was still an outstanding occupational therapy evaluation that DCPS had yet to conduct. (Undisputed)
13. On May 21, 2009, a DCPS representative sent an email to Petitioner's counsel stating that the DCPS occupational therapist had conducted an evaluation of the student and the report would be forwarded to him by no later than Tuesday May 26, 2009, along with a letter of invitation for an eligibility meeting for the student. (Petitioner's Exhibit 1)

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.⁵ 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 complete to evaluate and/or determine the student's eligibility for special education services within the 120-day time line as required by the IDEA and by failing to timely provide her an IEP and appropriate placement? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 20 U.S.C. 1414 initial evaluation shall consist of procedures (I) to determine whether a child is a child with a disability (as defined in 1401) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child.

Title 5 of the District of Columbia Municipal Regulations Chapter 30 provides:

§3005.1 The LEA shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine: (a) if the child is a "child with a disability" under this Chapter; and (b) the educational needs of the child.

§3005.2: The IEP team shall conduct an initial evaluation of a child within a reasonable time of receiving a written referral and parental consent to proceed and within timelines consistent with Federal law and D.C. Code § 38-2501(a).

DC Code §2501 required DCPS to evaluate and determine a student's eligibility within 120 days of the request that the student be evaluated. However, that section was replaced by DC Code §38-2561.02.

⁵ 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.

D.C. Code § 38-2561.02 provides: (a) DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the student was referred for an evaluation or assessment. (b) DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA. Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter:

- DCPS schools, or District of Columbia public charter school pursuant to an agreement between DCPS and the public charter school,
- Private or residential District of Columbia facilities; and Facilities outside of the District of Columbia.

If the 120 days is measured from December 10, 2009, the student should have been evaluated and provided services on April 10, 2009. If, on the other hand, as DCPS asserts the 120 time line should run from the date the parent granted consent to evaluation – February 24, 2009, the time line would not have expired until June 24, 2009.⁶

However, the Hearing Officer does not accept DCPS's argument. When the parent requested provision of special education services in December 10, 2009, the parent made clear to DCPS that the student was a student with Autism and the student was currently attending School A, a full time special education placement. The parent on two occasions in February 2009 apparently had to prompt DCPS to convene the meeting at which the parent signed the consent form and a SEP was developed. It is apparent that the parent when she registered the student with DCPS and the "Private-Religious School Student Referral for Special Education Services" form was completed that the parent was then requesting the student receive special education services. There is no apparent reason why the parent was not provided the required consent form at that time rather than having to wait over sixty days before the consent form was provided to her and her signature requested. The parent repeatedly asked that she be provided the student home school so that she could visit.

Although the DC Code section was amended and evaluation(s) are to be conducted within 120 days, the plain language of the IDEA §1414(a) indicates that the evaluation includes a determination of whether the student is a child with a disability. This necessitated that an eligibility determination be made within that 120 days. The Hearing Officer hereby concludes the 120 days began to run as of December 10, 2009, and the student evaluations and eligibility determination should have thus been completed by April 10, 2009. The Hearing Officer concludes that DCPS's failure to timely conduct the student's evaluations and timely determine the student's eligibility and educational placement significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE and caused the child a deprivation of educational benefits.

⁶ DCPS submitted two cases in support of a finding that Petitioner should not be reimbursed for private school placement. This Hearing Officer concludes that these cases do not correspond to the facts in this case where the student has not yet attended or been provided services by DCPS public schools.

Petitioner has requested as relief for a denial of FAPE that the parent be reimbursed for the student's tuition at School A for the 2008-09 school year. However, the Hearing Officer concludes based on his the holding above that any reimbursement if appropriate is only from the date DCPS was required to have evaluated the student.

The U.S. Supreme Court held in *Burlington and Florence County School Dist. Four v. Carter*, 510 U. S. 7, that §1415(i)(2)(C)(iii) authorizes reimbursement to parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate.

IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special-education services through the public school.

Consistent with the Supreme Court's decisions in *Burlington* and *Carter*, the Supreme Court concluded IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school. The Court stated "When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. *Forest Grove School Dist. V. T. A. Syllabus* No. 08-305. Argued April 28, 2009—Decided June 22, 2009 Cite as: 557 U. S. ____ (2009)

The record reflects that the student is receiving educational benefit at her current education placement School A. The student has a current IEP and is being provide specialized instruction and related services at School pursuant to her IEP. The Hearing Officer concludes, therefore, that DCPS shall, as a remedy for the denial of FAPE, reimburse the parent for the student's tuition at School A from April 10, 2009, until the end of ESY services for school 2008-09 or until such time as DCPS provides the student an appropriate placement pursuant to the Order below.

ORDER:

1. DCPS shall reimburse the parent the cost of the student's tuition from April 10, 2009, at School A for the 2008-09 school year, including any portion of ESY services following the date of this Order, until such time as DCPS complies with the remaining provisions of this Order.
2. DCPS shall within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review the student's existing evaluations and determine the student's eligibility for special education services.
3. If the student is determined eligible, the MDT shall develop an individualized educational program (IEP) and discuss and determine an appropriate placement.

4. If the student is determined to be ineligible DCPS shall issue a notice of ineligibility.
5. The MDT meeting shall be scheduled through counsel for the student and parent.
6. 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: June 23, 2009