District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

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Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools "DCPS" Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Dates: May 20 & 21 2009 <u>Representatives:</u> Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street NW Suite 700 Washington, DC 20002 Counsel for DCPS: Nia Fripp, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

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STUDENT HEARING OFFICE
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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:

A Due Process Hearing was convened May 20, 2009, and concluded on May 21, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to an amended due process complaint submitted by the counsel for the parent and student filed on March 23, 2009, alleging the issue(s) outlined below. Petitioner originally filed the complaint against DCPS on January 29, 2009. In a Pre-Hearing Order dated March 12, 2009, Petitioner was granted leave to amend the complaint to include School A as a respondent. The amended complaint was filed March 23, 2009, naming both DCPS and School A as respondents. In a stipulated agreement School A was removed as a respondent which was incorporated into the Pre-Hearing Order issued in this matter in May 2009.

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 1-36, Hearing Officer's Exhibit 1-18[2] and DCPS Exhibits 1-6 which were admitted into the record.

ISSUE(S): [3]

Did DCPS fail to provide the student with a free and appropriate public education by failing to complete the student's triennial evaluations in accordance with 34 C`.F.R. Sec. 300.303(a)(2) of the IDEIA?

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[2] Documents attached to School A's motion to dismiss were included at the parties request as Hearing Officer's Exhibits.

[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.

RELIEF SOUGHT:

Petitioner sought, inter alia, the following relief:

1. A finding that DCPS denied the student a Free and Appropriate Public Education (FAPE) by failing to conduct the student's triennial evaluations.

2. DCPS funding of independent psycho-educational evaluation, clinical psychological evaluation (including ADHD testing), and occupational therapy evaluations.

3. DCPS/School A convene the student's multidisciplinary team (MDT)/individualized educational program (IEP) meeting to review the evaluations and update the student's IEP as appropriate.

4. The DCPS/School A at the MDT/IEP meeting also discuss and determine what amount of compensatory education the student is owed and that DCPS be responsible for funding the student's compensatory education plan.

FINDINGS OF FACT [4]:

1. The student is years old, currently attends School A and resides in the District of Columbia with the student's parent(s), (hereinafter "Petitioner" or "Parent"). The student is currently eligible to receive special education and its related services as a result of his being specific learning disabled. (Petitioner's Exhibit 12)

2. The student, during the 2007-2008 school year, attended School B. The District of Columbia Public Schools ("DCPS") is the Local Education Agency (LEA) responsible for ensuring that the special education needs of students attending School B are met. (Undisputed)

3. The student's psycho-educational evaluation was conducted August 9, 2004, and expired August 9, 2007. His occupational therapy evaluation was conducted July 29, 2004, and expired July 29, 2007. (Petitioner's Exhibit 24 & 25)

4. The student was suspended several times during the 2007-08 school year at School B. (Parent's testimony)

5. On December 7, 2007, a MDT/IEP meeting for the student was convened at School B. The MDT recommended that a functional behavior assessment be conducted. (Petitioner's Exhibit 12)

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[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. If both parties disclosed the same document the Hearing Officer may have cited only one party's exhibit rather than both.

6. At a subsequent MDT/IEP meeting on May 22, 2008, the MDT determined that that a clinical psychological evaluation would be conducted to assess for Attention Deficit Hyperactivity Disorder (ADHD). The parent signed a consent form for the evaluations to be conducted. (Petitioner's Exhibit 13)

7. The comprehensive psychological evaluation was conducted by DCPS on August 6, 2008. (Petitioner's Exhibit 15)

8. The student received failing grades in his final report card for the 2007-08 school year at School B and it was recommended the student repeat the seventh grade. Other than the August 2008 psycho-educational evaluation School B or DCPS did not conduct any evaluations of the student prior to the student's enrollment at School A. (Parent's testimony, Petitioner's Exhibit 23)

9. DCPS authorized Petitioner to obtain independent clinical psychological evaluation and an occupational therapy evaluation. Petitioner's counsel submitted the independent clinical psychological evaluation to DCPS. The independent occupational therapy evaluation was completed just prior to the due process hearing and presented to DCPS once completed. There is no evidence that DCPS School B or DCPS conducted the FBA that was ordered at the December 7, 2007, MDT meeting. (Parent's testimony, Petitioner's Exhibits 30 & 36)

10. The student, at the beginning of the 2008-2009 school year enrolled in the seventh grade at School A, a District of Columbia Public Charter School which is its own LEA for special education purposes. (Undisputed)

11. Other than the August 2008 psycho-educational evaluation DCPS did not conduct any evaluations of the student prior to the student's enrollment at School A. (Parent's testimony)

12. The student's behavior and academic performance has improved since he began attending School A. However, he has not yet been promoted to the eighth grade. The parent has not yet attended a MDT/IEP meeting at School B and participated in a review of the student's recent evaluations. (Parent's testimony)

13. There has been not yet been a review by a MDT of the independent occupational therapy evaluation. (Undisputed)

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 fail to provide the student with a free and appropriate public education by failing to complete the student's triennial evaluations in accordance with 34 C.F.R. Sec. 300-303(a)(2) of the IDEIA? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

Petitioner alleges the harm to the student in the triennial evaluations not being conducted is demonstrated by the student receiving failing grades in his final year and School B and repeating the seventh grade at School A.

According to 34 C.F.R. Sec. 300.303(a)(2) of the Individuals with Disabilities Education Improvement Act (IDEIA) "a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300/304-300.311 if the public agency determines that the educational or related services needs, including improved academic achievements and functional performance, of the child warrant a reevaluation, or child's parent or teacher requests a reevaluation, but at least once every three years.

In *Cartwright v. District of Columbia,* 267 F. Supp. 2d 83 (D.D.C. 2003)(the court held that given the plain language of the regulations and the absence of a condition precedent to be met by a parent requesting a reevaluation, [the school's] failure to comply with [that parent's] request clearly violates the language of the regulation. Upon receipt of...the request, [the school] should have reevaluated [the student]."

In the instant case, DCPS, by failing to conduct the student's recommended triennial reevaluation has significantly impeded the parent's opportunity to participate in the decisions making process regarding the provision of a free and appropriate public education, and further impeded the child's right to receive a free and appropriate public education. The evidence demonstrates that the student was suspended on several occasions during the 2007-08 school year at School B and failed the seventh grade.

Petitioner has requested as relief for the delay in conducting the student's triennial evaluations and the evaluations ordered at the December 2007 and May 22, 2008, MDT meetings, that a MDT consider and determine if the student is entitled to compensatory education for the delay and if so develop a compensatory education plan.

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[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.

However, Reid 401 F. 3d at 524 clarifies that only the Hearing Officer can order a compensatory education award, where warranted, that is tailored to restore to students the educational benefits they would have received but for the denial of some services by a school district. See. Reid does not, however, allow Hearing Officers to delegate the determination of compensatory education awards to MDTs.

Although it is apparent the student failed seventh grade at School B, the parent credibly testified the students behavior and academic performance has improved since he began attending School A. There was insufficient evidence presented for the Hearing Officer to make a determination for a compensatory education award. Petitioner did not quantifiably identify what the student lost as a result of a denial of a free appropriate public education by comparing his academic status before and after the alleged denial and to demonstrate what services, if any, can compensate the student for any loss of educational opportunities. As result the Hearing Officer can grant no relief in this regard.

ORDER:

1. Petitioner shall participate in a multidisciplinary team (MDT) meeting at School A to review the student's existing evaluations, review and revise the student's IEP as appropriate.

2. The MDT meeting should be scheduled through counsel for the student and parent.

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: May 30, 2009