

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

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Confidential

STUDENT,¹ by and through Parent,

Petitioner,

VS.

Respondent.

**HEARING OFFICER'S
DETERMINATION**

Counsel for Petitioner/Parent:
Roberta Gambale, Esq.

Counsel for
Tiffany R. Winters, Esq.

Impartial Hearing Officer
H. St. Clair, Esq.

2009 MAY 13 PM 2:02

STUDENT HEARING OFFICE
OSSF

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¹ Identifying personal information is attached to this ORDER as Appendices A & B and must be detached before public distribution.

BACKGROUND

Prior to attending the the student attended a DCPS elementary school where he was identified as Learning Disabled (LD). At the beginning of the 2008-09 School Year, the student began to attend Even though the student was attending on September 26, 2008, DCPS completed a psychological evaluation of the student that indicated he was no longer LD. On November 17, 2008, the MDT/IEP convened at and completed an IEP that disability coded the student LD with 10 hours of special education services; the team then recommended a speech/language evaluation of the student. At the meeting, the Parent stated that she wanted the student's misbehavior addressed. On January 12, 2009, the MDT reconvened, reviewed the speech/ language evaluation and added an hour of counseling; the Parent and Advocate requested an auditory processing evaluation and again stated they wanted the student's misbehavior addressed.

On January 14, 2009, Counsel for the Parent filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining its own LEA, denied the student a Free Appropriate Public Education (FAPE). For relief, a clinical psychological evaluation was requested.

On January 22, 2009 filed a Motion to Dismiss Due to Improper Service and on February 2, 2009 filed an Amended Motion to Dismiss. The Parent effected proper service mooting the two motions to Dismiss. On February 11, 2009 filed a Motion to Continue, and on March 13, 2009, an Interim Order on Continuance Motion was issued. filed an Answer on February 27, 2009.

A Pre-hearing Conference Order was issued in this matter on March 23, 2009. The Order determined the issues as setout below.

The Student Hearing Office, OSSE, scheduled a hearing in this matter for March 17, 2009 that on the joint motion of the parties was rescheduled for to 11:00 A.M., Monday, March 30, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 4A, Washington, D.C. 20003. The hearing convened as rescheduled but could not conclude in the allotted time. On the record, the continuation was scheduled to convene on April 28, 2009 for further evidence but did not convene. On the subsequent April 9, 2009 Motion for Continuance, the hearing was continued to May 4, 2009. The continuation convened at 11:00 A.M., Monday, May 4, 2009 in Hearing Room 4B.

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 November 17, 2008 IEP appropriate (MDT make-up, disability coding, behavior interventions, counseling, hours of special education services and goals) for the student?
2. Was the January 12, 2009 IEP appropriate (MDT make-up, disability coding, behavior interventions, counseling, hours of special education services and goals) for the student?
3. Did [redacted] inappropriately fail to evaluate the student's auditory processing?
4. Did [redacted] inappropriately fail to complete a functional behavior assessment (FBA) of the student?

FINDINGS of FACT

By facsimile dated February 6, 2009, the Parent disclosed 8 witnesses and 27 documents.

By facsimile dated March 20, 2009, DCPS disclosed 9 witnesses and 20 documents.

[redacted] objected to the Parent's disclosure as late and specifically objected to Parent Documents 16, 18 & 23 as non-official meeting notes. The hearing officer determined that the disclosure were delivered to [redacted] during the 5th day before the hearing and was timely within the custom and practice of 34 CFR 300.507(a) hearings in the District of Columbia. The hearing officer noted the distinction between the official MDT meeting notes and the Advocate's notes and **OVERRULED** the objection to the Advocate's notes. Parent Document No 23 was Counsel for the Parent's notes of the Resolution Session; Counsel for the Parent withdrew Parent Document No 23. The remaining documents were admitted into the record and are referenced/footnoted herein where relevant.

At the May 4, 2009 continuation, the Parent disclosed documents 29 thru 33.

[redacted] objected to Parent Documents 28 thru 32 as being concerned with events after the date of the herein January 14, 2009 Complaint. The hearing officer **SUSTAINED** the objection to Documents 28, 29, 30 and 32 and denied them admission into the record.

[redacted] withdrew the objection to Document No 31, a report card that covered the first part of the 2008-09 School Year.

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

1. For the _____ grade, the 2007-08 School Year, the student attended a DCPS elementary school where he was identified as LD.
2. While at the DCPS school, the student's psychoeducational evaluation expired, and DCPS agreed to update the evaluation. The DCPS September 11, 2008 Psychological Evaluation indicated the student as no longer Learning Disabled.²
3. _____ convened the MDT on November 17, 2008 and completed an IEP for the fifth grade student that disability coded him LD with 10 hours of special education services - 5 hours in the General Education Setting and 5 hours in the Special Education Setting. The MDT decision to continue special education services for the student was to ease for the student the transition back to the General Education Setting. The MDT referred the student for a speech/language evaluation. The MDT/IEP membership was appropriate; the Parent, a special education teacher that understood the instructional implications of evaluations, a regular education teacher and an LEA representative were members.³
4. The Advocate began advocating for the student on December 2008 and, upon review of the November 17, 2008 IEP, opined that the IEP should have indicated more hours of special education services given the student's Present Education Performance Levels as indicated on page 2 of the IEP. The Advocate observed the student during classes at _____ on January 8, 2009 and attended the first MDT/IEP meeting on behalf of the Parent and student on January 12, 2009.
5. The December 3, 2008 Children's Hospital Patient Discharge Summary diagnosed the student with Depression.⁵
6. The Parent delivered the December 3, 2008 Children's Hospital Patient Discharge Summary to _____ on December 4, 2008.⁶ The Parent thought the student should have received more specialized instruction and so informed _____ at the January 12, 2009 MDT/IEP meeting.⁷
7. The Student Support Coordinator was familiar with the student, taught the student's social studies class and delivered specialized instruction to the student in the regular education classroom and in the resource room;

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² Document No 4, page 16

³ -testimony of the Student Support Coordinator and the _____

Psychologist

⁴ -testimony of Educational Advocate

⁵ Parent Doc. No 6

⁶ _____ February 27, 2009 Answer, paragraph 8

⁷ -testimony of the Parent

the Coordinator conducted the November 17, 2009 and January 12, 2009 MDT/IEP meetings for the student and thought the student had made good progress at _____, both academically and behaviorally. The Coordinator received the December 3, 2008 Children's Hospital Patient Discharge Summary from the Parent on December 4, 2008. In January 2009, the Parent informed the Coordinator that the student was being medicated for Depression. Still, the January 12, 2009 MDT/IEP meeting did not suspect the student of being Emotionally Disturbed and denied the Advocate's request for a functional behavior assessment.⁸

8. _____ reconvened the IEP team on January 12, 2009 at which time the November 23, 2008 Speech/Language Evaluation⁹ was reviewed and 1 hour of counseling added to the IEP in response to the December 3, 2008 Discharge Summary; no goal for counseling was included in the IEP.¹⁰ The Advocate requested an FBA and an auditory processing evaluation; the latter request was based on the student's Slightly Below Average Classifications in four subtest of the CELF-4¹¹ listed in the Appendix to the speech/language evaluation. The team denied the FBA and the auditory processing evaluation. Also at the meeting, the IEP team concluded that the student's social/emotional concern was from the death of a close family member; a psychologist or social worker was not a member of the team.¹²

9. The Audiologist for the Parent reviewed the November 23, 2008 Speech/Language Evaluation¹³, pointed to the four Slightly Below Average Classifications in four subtest of the CELF-4 listed in the Appendix to the evaluation and opined that scatter in the scores – each was more than a standard deviation – made an evaluation of the student's auditory processing a necessity. The Audiologist had not reviewed the February 4, 2009 Addendum¹⁴ to the evaluation and had not met with the student.

10. The first MDT/IEP meeting in which the _____ counselor participated was the February 10, 2009 meeting, after the herein January 14, 2009 Complaint.¹⁵

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⁸ -testimony of Student Support Coordinator,

⁹ Doc. No 2

¹⁰ Doc. No 11

¹¹ CELF-4: the Clinical Evaluation of Language Fundamentals-Fourth Edition

¹² -testimony of Educational Advocate

¹³ *ibid*, 9, above

¹⁴ Doc. No 3

¹⁵ -testimony of the _____ Counselor

11. The student's fifth grade math & science Teachers at thought, so far during the 2008-09 School Year, the student had made good progress in math & science; that he received a "C" because he did not turn in all work assignments on time.¹⁶

12. The Speech/Language Therapist reviewed her November 23, 2008 evaluation and explained why she did not consider an auditory processing evaluation necessary. (The testimony of Therapist was not recorded. The hearing officer summarized the Therapist's testimony for the parties and gave each of the parties the option to recall the Therapist. The Therapist was not recalled.)

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 November 17, 2008 IEP was appropriate.

The DCPS September 11, 2008 Psychological Evaluation stated that the student was no longer Learning Disabled. No one contested the appropriateness of the evaluation, and the Parent did not request an independent educational evaluation under 34 CFR 300.502. Still, at the November 17, 2009 MDT/IEP meeting, determined the student eligible for special education services as an LD student and completed an IEP that indicated 10 hours of special education services. The MDT/IEP team membership was appropriate, particularly as the current evaluation did not recommend special education services for the student. was a new LEA for the student; a psychologist, a special education teacher and a general education teacher were members of the MDT. No one at the hearing argued that the LD disability coding for the student was inappropriate. The record in this matter did not establish that the MDT/IEP had abused their discretion when making decisions concerning behavior interventions, hours of special education services and goals for the student. The MDT/IEP could have

¹⁶ -testimony of the student's math & science Teacher

completed behavior interventions and added more hours of services, but again, not doing so did not amount to a denial of FAPE. True, the Parent disagreed, but parental disagreement with an MDT/IEP decision does not alone establish inappropriateness of the decision.

The November 17, 2008 IEP met the requirements at 34 CFR 300.320 and was reasonably and individually calculated to provide educational benefit to the student.

TWO

The January 12, 2009 IEP was inappropriate in that it was not based on a full assessment of the student's suspected disability, specifically, Emotional Disturbance.

At regulation 34 CFR 300.304, the obligation of the LEA to assess a student in all areas of the suspected disability is set out. At paragraph (c)(1)(iv) of the regulation, the requirement that the assessment be “. . . administered by trained and knowledgeable personnel” is set out, and at paragraph (c)(4) of the regulation, it reads, the assessment must be “. . . in all areas related to the suspected disability, including, if appropriate, . . . emotional status . . .” On December 4, 2008, the Parent delivered the December 3, 2008 Children's Hospital Discharge Summary to APAPCS; the summary diagnosed the student with Depression, an Axis I diagnosis in the DSM-IV and was alone enough to support the Emotional Disturbance (ED) disability coding for the student. Moreover, at regulation 34 CFR 300.8(4)(i) where Emotional Disturbance is defined, “depression” is mentioned in part of the definition at clause (4)(i)(D).

As the January 12, 2009 MDT/IEP meeting decided not to disability code the student ED, at a minimum, the team was legally required to refer the student for evaluation appropriate to assess for the ED disability coding. **The failure of the January 12, 2009 MDT/IEP meeting to refer the student for evaluation for the ED disability coding amounted to a denial of FAPE.** The discussion by the MDT of what was considered appropriate services for the student's depression was not a substitute for an evaluation by trained personnel, i.e., a psychologist nor was an hour of counseling. First is evaluation, then coding and a present level of performance, after which a goal is formulated and services delivered, not the reverse.

THREE

The decision by the MDT not to refer the student for an auditory processing evaluation was not a denial of FAPE.

An auditory processing evaluation is not generally thought of as part of an initial evaluation; the speech/language evaluation is generally a part of an initial evaluation and, if needed, recommends an auditory processing evaluation. At the January 12, 2009

MDT/IEP meeting the Educational Advocate noted the four subtest in the CELF-4 on which the student was classified Slightly Below Average and requested an auditory processing evaluation; it was declined. Although not in existence when the Complaint was filed on January 14, 2009, the February 4, 2009 Addendum to the November 23, 2008 Speech/Language Evaluation did not address the subtests about which the Educational Advocate had stated concerns but simply emphasized the subtests of the CELF-4 on which the student was classified Average. The Audiologist for the Parent stated clearly that an auditory processing evaluation of the student should be completed. Still, as competent professionals can disagree about the same data, the evaluator's conclusions were accepted.

FOUR

In this case, *IDEIA 2004* did not mandate an FBA of the student.

The need for a functional behavior assessment (FBA) is within the discretion of the MDT/IEP meeting except in the circumstance of a manifestation determination (MD). An MD is required whenever the LEA has caused a change in placement for a student. An FBA is mandated when the MDT/IEP determines during the course of the MD that the behavior underlying the suspension(s) of the student was a manifestation of the student's disability. *See* 34 CFR 300.536 and 300.530(e) and (f). In this matter, there was no change of placement for the student, and the MDT/IEP did not abuse their discretion.

SUMMARY of the DECISION

The Parent met her burden as to Issue Two.

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

ORDER

1. According to DCPS Superintendent's Directive 530.6, will fund a clinical psychological evaluation of the student. Within 15 school/business days of receipt of the said evaluation report, will convene an MDT/IEP/Placement meeting during which evaluations will be reviewed, the IEP reviewed and revised as appropriate and placement discussed and determined. If can implement the IEP, a Notice of Placement will be issued at the said meeting; if cannot implement the IEP,

will notify OSSE.

2. For the said MDT/IEP/Placement meeting, scheduling is to be through and notices are to be sent to Counsel for the Parent except that, for everyday of unavailability of parent/educational advocate/Counsel for the Parent, the deadline herein will be extended one day. In the event of an independent evaluation sent to Counsel for the Parent will verify by telephone the receipt of the evaluation report copy by the person addressee. For disputes under this paragraph, documentation of the parties will be relied upon to determine the good faith of each party.

Dated this 13th day of May, 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.