

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Review and Compliance  
Student Hearing Office

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**Confidential**

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STUDENT HEARING OFFICE  
2009 MAY 11 AM 8:00

STUDENT <sup>1</sup> , by and through his Parent  Petitioners,  v.  DCPS  Respondent.    Case	<b>HEARING OFFICER'S DETERMINATION</b>  Hearing Date: April 28, 2009  <u>Representatives:</u>  Counsel for Petitioners: Chike Ijeabunwu, Esq. 6495 New Hampshire Avenue Suite 211 Hyattsville, MD 20783-3245  Counsel for DCPS: Candace Sandifer, 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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<sup>1</sup> 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 April 28, 2009, at the Van Ness School, 1150 5<sup>th</sup> 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 March 27, 2009, alleging the issues outlined below.

## **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 1-9 and DCPS Exhibits 1-2) <sup>2</sup> which were admitted into the record.

## **ISSUE(S):** <sup>3</sup>

Did DCPS deny the student a free and appropriate public education by failing to comply with the October 31, 2008, HOD?

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<sup>2</sup> DCPS disclosed its documents to Petitioner in less than five days prior to the hearing and Petitioner objected to their admission. However, the Hearing Officer admitted the documents as the HOD was also disclosed by Petitioner and the response and letter of invitation were services on Petitioner within the required time following the filing to the complaint.

<sup>3</sup> 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 FACT 4:**

1. The student is \_\_\_\_\_ years old, currently attends School A and resides in the District of Columbia with her parent(s). (Petitioner's Exhibits 6 & 7)
2. On October 31, 2008, this Hearing Officer issued a Hearing Officer's Determination (HOD) directing DCPS, inter alia, to fund and the parent to obtain an independent comprehensive psychological evaluation and DCPS to convene an eligibility meeting within fifteen business days of its receipt of the independent evaluation. (Petitioner's Exhibit 7)
3. The independent comprehensive psychological evaluation was conducted in October 2008 diagnosed the student with Attention Deficit/Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder and Depressive Disorder and recommended that the student met the criteria for Other Health Impaired and Emotionally Disturbed under IDEA and was in need of an individualized education program as a result. (Petitioner's Exhibit 6)
4. The student has a history of exhibiting negative behaviors in school and at home; fighting and exhibiting physical and verbal aggression towards peers; being disrespectful and exhibiting physical aggression towards adults; and struggling in academics, and performing below level since enrollment in school. (Petitioner's Exhibit 7).
5. On January 16, 2009, the parent, through counsel, provided copies of the evaluation report to DCPS, through its attorney and to the Special Education Coordinator (SEC) and School A and requested that DCPS convene an eligibility meeting for the student. DCPS failed to convene the meeting despite the HOD and the request. Consequently, Petitioner filed the current due process complaint on March 27, 2009. (Petitioner's Exhibit 2 & 5)
6. The SEC received the evaluation report but could not read the entire document and requested a second copy be sent by mail. That second copy of the evaluation report was received by DCPS by early February 2009. The SEC was under the impression that she needed the parent's consent to review the evaluation prior to convening an eligibility meeting. She was not aware consent was not required and the meeting was to be convened within 15 business days of her receipt of the independent evaluation. (Ms. Morse's testimony, Petitioner's Exhibit 4).
7. Pursuant to the HOD the student's eligibility meeting was to have been convened sometime prior to the beginning of March 2009. (Petitioner's Exhibit 7)

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<sup>4</sup> 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 randomly only cite only one party's exhibit as the source of the finding rather than both simply for administrative efficiency.

8. The student is exhibiting increasing negative behavior and has, among other things, begun to steal. The student continues to struggle in academics, and is performing below level. (Parent's testimony)
9. DCPS sent a letter of invitation to Petitioner to convene the student's eligibility meeting in April 2009. (DCPS 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.<sup>5</sup> 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 October 31, 2008, HOD?C conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.306 provides:

(a) General. Upon completion of the administration of assessments and other evaluation measures-- (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. (b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part-- (1) If the determinant factor for that determination is-- (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);(ii) Lack of appropriate instruction in math; or (iii) Limited English proficiency; and(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a). (c) Procedures for determining eligibility and educational need. (1) In interpreting evaluation data for the purpose of determining if a child is a child with a

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<sup>5</sup> 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.

disability under Sec. 300.8, and the educational needs of the child, each public agency must-- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1414(b)(4) and (5))

As of the date the due process complaint was filed and as of the date of the due process hearing DCPS had not complied with the HOD and had not timely convened the student's eligibility meeting. The student has continued to exhibit behavior and academic difficulties and the failure to timely convene the meeting has 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. In addition, there is a presumption of a denial of FAPE under the Blackman/Jones Consent Decree where DCPS fails to comply with HODs.

**ORDER:**

1. 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, determine the student's eligibility for special education services, determine if additional evaluations are necessary.
2. If the student is determined eligible, the MDT shall develop an individualized educational program (IEP) and discuss and determine an appropriate placement.
3. If the student is determined to be ineligible DCPS shall issue a notice of ineligibility.
4. The MDT meeting shall be scheduled through counsel for the student and parent.
5. 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).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: April 28, 2009**