

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
STATE ENFORCEMENT AND INVESTIGATION DIVISION**

-----x
a minor, by
and through her Parent(s),

Petitioners,

SHO Case No.

- against -

Deusdedi Merced, Hearing Officer

District of Columbia Public Schools,

Respondent.
-----x

Student I.D. Num.:

Attending School:

School

Home School:

School

CSSE
STUDENT HEARINGS OFFICE
2009 MAR -2 PM 5: 29

MEMORANDUM OPINION

I. INTRODUCTION

Petitioners, through their attorney, Kimberly Glassman, James E. Brown & Associates, PLLC, have filed a Motion for Judgment on the Pleadings. Specifically, Petitioners aver that they are entitled to judgment as a matter of law because Respondent denied the student a free and appropriate public education (hereinafter, "FAPE") when it failed to conduct an initial evaluation of the student in a timely manner, and Respondent has admitted that it failed to conduct a timely initial evaluation. Response to DCPS Notice of Insufficiency and Request for Hearing Officer Determination on the Pleadings (hereinafter, "Motion for Judgment on the Pleadings") at 2.

The District of Columbia Public Schools, Respondent, through its Assistant Attorney General, Kendra Berner, Office of the General Counsel, avers that Petitioners Motion for Judgment on the Pleadings should be denied on the grounds that the student

Petitioners again requested copies of the student's educational records, including evaluations and assessments. Id.

The request for evaluation was not acted upon. Complaint at 3. On or about February 5, 2009, Petitioners filed the herein Complaint alleging that Respondent denied the student a FAPE when it failed to complete an initial evaluation of the student upon parental request in a timely manner. Id. at 4. On or about February 23, 2009, Respondent filed its Response to the Complaint stating that "[i]nitial evaluations have not been completed. A letter authorizing independent evaluations is being sent to Petitioner." Response to Complaint at 2. On February 24, 2009, an IEE letter was transmitted to Petitioners' counsel.

III. ANALYSIS

A. Notice of Insufficiency

Respondent has filed a Notice of Insufficiency on the grounds that the parent has not signed the Complaint, "though such a signature is required by § 301.2.C.e of the [SOPM]." Response to Complaint at 1. Petitioners aver that the parent's signature is not required. Motion for Judgment on the Pleadings at 1.

The Individuals with Disabilities Education Improvement Act (hereinafter, "IDEIA"),¹ 20 U.S.C. § 1400 et seq., and its implementing regulations, 34 C.F.R. § 300 et seq., provides that the content of a due process complaint must include –

- (1) The name of the child;
- (2) The address of the residence of the child;
- (3) The name of the school the child is attending;

¹ In 2004, Congress reauthorized the Individuals with Disabilities Education Act (hereinafter, "IDEA") as the IDEIA. See Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005.

- (4) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and,
- (5) A proposed resolution of the problem to the extent known and available to the party at the time.

34 C.F.R. § 300.508 (b). Respondent correctly points out that SOPM § 301.2.C.e does require the signature of the parent or complaining party on the due process complaint. This provision is inconsistent with IDEIA and, therefore, IDEIA governs. See SOPM § 200. The Complaint does not require the signature of the parent. Accordingly, the Complaint is deemed sufficient.

B. Standard to Apply in a Motion for Judgment on the Pleadings

IDEIA does not speak to whether hearing officers can utilize, or entertain, motions to address issues raised in a hearing. However, hearing officers are “expected to ensure that the due process hearing services as an effective mechanism for resolving disputes between parents” and school districts. Letter to Anonymous, 23 IDELR 1073 (OSEP 1995). Apart from the hearing rights listed in IDEIA and its implementing regulations, the conduct of hearings “are left to the discretion of the hearing officer,” subject to review under 34 C.F.R. §§ 300.514, 300.516. Id. While a hearing officer is not governed by federal or state court rules, the Federal Rules of Civil Procedure provide guidance in handling Petitioners’ motion, and the undersigned Hearing Officer exercises his discretion to conduct this hearing as he sees fit to effectively and efficiently resolve the underlying dispute and hereby accepts, and rules upon, Petitioners’ motion.

The analogous federal rule would be Federal Rule of Civil Procedure 12(c) (hereinafter, “FRCP”), which provides that, “[a]fter the pleadings are closed ... a party may move for judgment on the pleadings.” See Fed. R. Civil P. 12(c). A Motion of

Judgment on the Pleadings is a device of disposing of a claim when the material facts are not in dispute and only a question of law is involved. “Thus, ‘[a] judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.’” Brandon E. et. al v. Dept. of Educ., State of Hawaii, 49 IDELR 219 (D. Haw. 2008) quoting Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th Cir. 1997) (citing McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996)).

C. Initial Evaluation

1. Student's right to timely initial evaluation

IDEIA, and its implementing regulations, grant Petitioners the right to file a due process complaint on any matters relating to the identification, evaluation or educational placement of the child with a disability, or the provision of a FAPE to the child. 20 U.S.C. § 1415 (b)(6); 34 C.F.R. § 300.507 (a). A parent of a child may initiate a request for an initial evaluation to determine if the child is a child with a disability. 20 U.S.C. § 1414 (a); 34 C.F.R. § 300.301 (b).

While there appears to be controversy in this jurisdiction about the timeframe within which DCPS must conduct an initial evaluation,² I need not address the issue in this matter at this time, as Respondent has admitted that it has not completed the initial

² D.C. MUN. REGS. tit. 5, § 300.5.2 (2007) provides that an “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)*.” D.C. Code § 38-2501(a) had set the time frame by which an evaluation had to be completed to within 120 days from the date that the student was referred for an initial evaluation. However, D.C. Code § 38-2501(a) was repealed effective March 14, 2007. D.C. Code § 38-2561, Placement of Students with Disabilities in Nonpublic Schools, approved on December 28, 2006 and effective on March 14, 2007, sets the timeframe to 120 days from the date the student was referred for an evaluation or assessment. See D.C. Code § 38-2561.02. Petitioners’ counsel avers that D.C. Code § 38-2561.02 is only applicable to students who are in non-public schools. Motion for Judgment on the Pleadings at 3. With respect to students who are sitting in the D.C. Public Schools who are initially referred for an initial evaluation, Petitioners’ counsel maintains that the timeframe by which an initial evaluation must be completed is within 60 days, as established by 20 U.S.C. § 1414 (a) and 34 C.F.R. § 300.301 (b).

evaluations, has issued an IEE letter, and approximately 240 days have elapsed since the parent requested the initial evaluation.³ It is not in dispute that, as of the date of the Complaint, i.e., February 5, 2009, Respondent had not completed an initial evaluation of the student. Response to Complaint at 2. Nor has Respondent alleged any justification on why an initial evaluation of the student has not been completed. See id. In fact, post the filing of the Complaint, Respondent issued the IEE letter authorizing initial evaluations and assessments. Motion for Judgment on the Pleadings, Exhibit 3. It is reasonable to infer from these undisputed facts that Respondent's issuance of the IEE letter resulted from its failure to timely evaluate the student as required pursuant to 20 U.S.C. § 1414 (a) and 34 C.F.R. § 300.301 (b) *and Petitioners filing of the Complaint.*

Accordingly, I find that Respondent failed to timely conduct an initial evaluation of the student and that the issuance of the IEE letter resulted from the filing of the Complaint.

2. Procedural inadequacies and the denial of FAPE

Petitioners' counsel asserts that the student was denied a FAPE resulting from Respondent's failure to timely evaluate the student. Motion for Judgment on the Pleadings at 3. Respondent avers that the Petitioners have failed to make a showing that the student suffered any substantive harm and that, without the results of the evaluations, Petitioners will not be able to demonstrate a denial of FAPE at the hearing. Motion to Dismiss at 2.

A procedural violation of the IDEIA "can itself constitute the denial of a free appropriate [public] education." Blackman v. Dist. of Columbia, 277 F. Supp. 2d 71, 79

³ Whichever view one subscribes to, i.e., 60 days or 120 days, in this instance, it is clear that the student has not been evaluated within either timeframe.

(D.D.C. 2003). A procedural violation alone, however, without a showing that the child's education was substantively affected, does not establish a failure to provide a FAPE. See Lesesne v. Dist. of Columbia, 447 F.3d 828 (D.C. Cir. 2006); Pabo v. Dist. of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008). A hearing officer may find a child did not receive FAPE only if the procedural inadequacies:

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513 (a)(2).

In the instant matter, it is not necessary that I determine whether the student was denied a FAPE, as the claim is premature given that Respondent has not completed any evaluations and, in the absence of the evaluations, I cannot assess whether the student's education was substantively affected by Respondent's inaction. However, I am not precluded from making rulings on matters in addition to those concerning the provision of FAPE, relating to the identification, evaluation or educational placement of a child with a disability. See Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46707 (August 14, 2006). The applicability of 34 C.F.R. § 300.513 (a)(1) and (2) is limited to matters where the issue before the hearing officer *is the provision of FAPE* to a child with a disability. Extending its applicability to issues relating to, for example, the identification and evaluation of the student, would require, as in this matter, the parent to show that the student was denied FAPE without the aid of the very evaluations that the parent seeks in order to obtain the FAPE the student might be

entitled to had she been evaluated in the first place. Such preposterous proposition, would turn 20 U.S.C. § 1414 (a) on its head.

Accordingly, I find that Respondent failed to timely conduct an initial evaluation of the student as required by 20 U.S.C. § 1414 (a) and 34 C.F.R. § 300.301 (b) and decline to dismiss Petitioners' Complaint on the grounds stated in Respondent's Motion to Dismiss.

D. Prevailing Party Status

Pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(I), a "court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party." In determining prevailing party status, the U.S. Supreme Court requires, at a minimum, some "judicially sanctioned change in the legal relationship of the parties," such as a judgment on the merits or a court-ordered consent decree. Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 35 IDELR 160 (2001). Presumably, the question for a court of competent jurisdiction to decide is whether Respondent, by virtue of the issuance of the IEE letter resulting from Petitioners' filing of the Complaint, changed the legal relationship of the parties. Admittedly, Respondent appears to have changed the legal relationship of the parties. In the Response, Respondent's counsel writes, "Initial evaluations have not been completed. A letter authorizing independent evaluations is being sent to Petitioner." Response to Complaint at 2. As I am charged with the responsibility of determining who prevailed on what issue, see SOPM § 1003, I find, as stated *supra*, that Respondent's issuance of the IEE letter was a direct result of Petitioners

having filed the Complaint and that Respondent failed to timely conduct an initial evaluation of the student.⁴

IV. CONCLUSION

For the reasons stated above, Petitioners' Motion for Judgment on the Pleadings is granted, in part, Respondent's Motion to Dismiss is denied, and Respondent's Notice of Insufficiency is also denied. The undersigned Hearing Officer concludes that, although Petitioners requested an initial evaluation on July 1, 2008, Respondent failed to timely evaluate Petitioner student as required by 20 U.S.C. § 1414 (a) and 34 C.F.R. § 300.301 (b) and that Respondent's issuance of the IEE letter was a direct result of Petitioners having filed the Complaint.

V. Order

The following order is hereby entered:

1. Petitioners are to have the authorized evaluations completed within 45 calendar days from the date on this Memorandum Opinion.
2. Upon completion of the evaluations, Petitioners and/or Petitioners' counsel is hereby directed to provide copies of the reports to both the Special Education Coordinator assigned to Cardozo Senior High School and the OSE Resolution Team in the Office of Special Education (facsimile num. (202) 645-8828).
3. Respondent shall, within 10 school days of receipt of the last of the evaluations, convene an IEP Team meeting to consider all current evaluations,

⁴ It is unclear from the SOPM whether the undersigned Hearing Officer's responsibility to determine who prevailed on what issue defines prevailing party status in the matter, and whether his decision would have the effect of being a "judicially sanctioned change in the legal relationship of the parties." Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 35 IDELR 160 (2001). It is unlike that the undersign Hearing Officer's decision on the issues confer prevailing party status to Petitioners. However, Petitioners may be entitled to attorneys' fees should a court of competent jurisdiction deems it so.

assessments, and any other pertinent information, determine the student's eligibility for special education and related services, and, if found eligible, recommend an appropriate program of special education and related services for the student. Should the student be determined to be eligible for special education and related services, the IEP Team shall also consider and discuss whether the student is entitled to compensatory educational services.

4. Consistent with 34 C.F.R. § 300.503 relating to prior written notice, should the student be found eligible and recommended for a public school placement, Respondent shall issue a prior written notice within five (5) school days of the IEP Team meeting date. However, should the recommended placement be for a non-public school, Respondent shall issue a prior written notice within 30 calendar days of the IEP Team meeting date.

5. Any delay in meeting the deadline set forth in paragraph 3 above because of an act or acts of Petitioners and/or their representatives, will extend the deadlines set herein by the number days attributable to Petitioners and/or Petitioners' representatives' actions. Respondent shall document any delays caused by Petitioners' and/or Petitioners' representatives.

6. Nothing in this Memorandum Opinion should be construed for the proposition that the undersign has determined that the student was denied a FAPE.

7. Petitioners' success as a matter of law on the issue of whether Respondent denied the student a timely initial evaluation makes Petitioners the prevailing party on this issue.

IT IS SO ORDERED.

DATED: March 2, 2009

Deusdedi: Mercedes
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NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. § 1415(i)(2)(B).