

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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Student Hearing Office
August 06, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 6, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools’ (“DCPS”) has denied Student a Free Appropriate Public Education (“FAPE”) by failing to find him eligible for special education and related services.

¹ Personal identification information is provided in Appendix A.

Student, an AGE boy, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 10, 2013, named DCPS as respondent. The parties met for a resolution session on June 19, 2013 and were unable to reach an agreement. On July 2, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on August 1, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witness EDUCATIONAL ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-16 were admitted into evidence without objection. DCPS' Exhibits R-1 and R-2 were admitted without objection. Exhibits R-3, R-4 and R-5 were admitted over Petitioner's objections. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

This issue to be determined in this case is:

- Whether DCPS failed in its child-find obligations and denied Student a FAPE by failing to find him eligible for special education and related services by October 26, 2012.

For relief, Petitioner seek a determination by the Hearing Officer that Student is a child with a disability eligible for special education and related services and an order for DCPS to convene an Individualized Education Program (“IEP”) team to develop an appropriate IEP for Student. Petitioner also seeks an award of compensatory education to compensate Student for DCPS’ failure to find him eligible for special education services.

On July 25, 2013, DCPS filed a motion for summary adjudication against the Petitioner contending that, the IDEA’s statute of limitations provision bars this complaint; that Petitioner would be unable to meet her burden of proof; that Petitioner’s proposed expert witness had not evaluated the student and would be relying on outdated assessments; and that DCPS has offered to reevaluate Student for eligibility. On July 30, 2013, following a telephone hearing with counsel, I issued an order denying DCPS’ motion.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE boy, resides with Mother in the District of Columbia.

Testimony of Mother.

2. For the 2012-2013 school year, Student was enrolled in GRADE at CITY ELEMENTARY SCHOOL. Testimony of Mother.

3. Mother began having concerns for Student when he was in kindergarten at PUBLIC CHARTER SCHOOL. She observed that Student’s in-school behavior was a problem, he was not focusing and not staying on task. Mother made her concerns known to the school principal, Student’s teachers and other school workers. The next school year, Student was transferred to City Elementary School, where he repeated his kindergarten year. Testimony of

Mother, Exhibit P-6.

4. In Spring 2010, Student was referred to the DCPS Student Support Team (SST) to determine strategies and interventions to help modify his behaviors that were affecting his classroom performance. Exhibit P-6. At that time, DCPS evaluated Student with a social work assessment, a psychological evaluation, and a functional behavioral assessment. Exhibits P-1, P-4 and P-6. In July 2010, Student was referred to LICENSED PSYCHOLOGIST for an independent Clinical Evaluation to assess his emotional and social functioning. Exhibit P-2.

5. The DCPS Social Worker reported that Student presented serious behavioral challenges in the classroom and that interventions through the SST team had yielded minimal success. In spite of his behavior problems, Student was able to perform well academically. Exhibit P-6.

6. DCPS PSYCHOLOGIST reported that based upon the Wechsler Individual Achievement Test 2nd Edition (WIAT-2) results, Student's IQ was average. According to the DCPS psychologist, the results of the Connor's III Teacher Form suggested areas of concern in the "severely clinical range," including hyperactivity, and several of the DSM categories such as Conduct Disorder and Oppositional Defiant. The results of the BRIEF Teacher Form revealed substantial executive dysfunction in all areas. DCPS Psychologist reported there was some concern that Attention Deficit Hyperactivity was impacting on Student's ability to sit and learn. He concluded that there were no clear academic concerns for Student, that the classification of Emotional Disturbance (ED) should "be held in abeyance," and there was no other IDEA disability classification that Student was close to meeting. Exhibit P-1.

7. In her August 2, 2010 independent Clinical Evaluation report, Licensed Psychologist diagnosed Student with Attention Deficit Hyperactivity Disorder (ADHD)

Combined Type, Anxiety Disorder, NOS and Encopresis (By History). Licensed Psychologist recommended, *inter alia*, that the data did not suggest that Student met the criteria for eligibility for special education services under the ED criteria. However, the data did support Student's classification of Other Health Impaired (OHI) based upon his history of neurocognitive dysfunction and the diagnosis of ADHD. She recommended that Student's Multidisciplinary team (MDT) consider the OHI classification and the provision of accommodations to Student through a 504 Plan [Section 504 of the Rehabilitation Act of 1973]. Exhibit P-2.

8. On September 23, 2010, Student's MDT team met at City Elementary School. The team concluded that Student was not a student with a disability who needs special education and related services. Exhibit R-4. Mother and Student's stepfather attended the MDT meeting and agreed with the ineligibility decision. *Id.* DCPS provided the parent a Prior Written Notice that it refused to identify Student as a student with a disability as defined in IDEA, based on the MDT team's review of Student's assessments and its determination that he was not eligible. *Id.*

9. City Elementary School implemented a 504 Plan for Student. The hearing evidence does not establish the commencement date for the 504 Plan. Under the 504 Plan, Student receives counseling for approximately 40 minutes, 3 times per week. Testimony of Mother.

10. At an October 26, 2012 Section 504 Plan Annual Review meeting at City Elementary School, Mother requested that Student be evaluated for special education eligibility. Testimony of Mother. The MDT team recommended that Student be reevaluated by a psychologist because his last clinical evaluation had been done in August 2010. Mother agreed to take Student for evaluation to a psychologist of her choice. Exhibit P-7. The school social worker provided Mother a referral to FOUNDATION to have Student evaluated. At Foundation,

a doctor talked with Mother and Student and provided Mother with a referral to have Student tested at CITY HOSPITAL. In March 2013, Mother took Student to City Hospital for testing. However, after consulting with her attorney, Mother “stopped everything.” She did not obtain the City Hospital test results. She did not follow up with Foundation and she never checked with City Elementary School to inquire whether the assessment reports were received.

Testimony of Mother.

11. At the June 19, 2013 Resolution Meeting for this case, DCPS offered to conduct a Comprehensive Psychological Evaluation of Student, and, after the start of the 2013-2013 school year, to conduct a Functional Behavioral Assessment. DCPS also agreed to convene a special education eligibility meeting for Student after the new evaluation reports were received. Exhibit R-1. At the due process hearing, DCPS Counsel represented that DCPS remains willing to reevaluate Student for eligibility.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

HAS DCPS FAILED IN ITS CHILD-FIND OBLIGATIONS AND DENIED STUDENT A FAPE BY FAILING TO FIND HIM ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES?

The IDEA Child-Find Requirement

Petitioner contends that as of the October 26, 2012 504 Plan annual review meeting, Student should have been found eligible for special education services. Under the IDEA's child-find requirements, 34 CFR § 300.111(c), "[a]s soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *See Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Id.* (quoting D.C.Code § 38-2561.02(a)). *See, also, D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012) (School districts have a "continuing obligation" to identify and evaluate all students who are reasonably suspected of having a disability.)

On September 23, 2010, the DCPS MDT team determined that Student was ineligible for special education services.² Under the IDEA's continuing child-find requirement, DCPS was required to revisit its September 23, 2010 ineligibility determination if, subsequent to that decision, Student was again reasonably suspected of having a disability. However, when a school district has conducted a comprehensive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required. *See Ridley School Dist. v. M.R.*, 680 F.3d 260, 273 (3rd Cir.2012).

² Petitioner is barred by the IDEA's two-year statute of limitations from requesting a hearing on the September 23, 2010 ineligibility decision. *See* 34 CFR § 300.511(e).

I find that DCPS did not violate the IDEA's child-find requirement in this case. At the October 26, 2012 Section 504 Plan meeting, two years after the MDT team determined that Student was ineligible for special education, Mother requested that Student be evaluated again. The MDT team decided that Student should be reevaluated by a psychologist because his last clinical evaluation was over two years old. Mother agreed to take Student to a psychologist of her choice. Following the meeting, DCPS' social worker provided Mother a referral for Student to be evaluated at Foundation, which, in turn, referred Student to City Hospital for further testing. Mother did not take Student for testing at Hospital until March 2013. Then, after consulting with her attorney, Mother "stopped everything." I conclude, therefore, that any delay in completing Student's eligibility reevaluation, following the October 26, 2012 referral, was the result of Mother's decision to curtail the Foundation-City Hospital evaluation of Student. Petitioner has not shown that DCPS denied Student a FAPE by failing to timely evaluate and make an eligibility determination for him.³

Eligibility for Special Education and Related Services

Neither has Petitioner met her burden of proof to show that Student is a child with a disability eligible for special education and related services. In her complaint, Petitioner alleges that Student should have been found eligible as having a specific learning disability and/or other health impairment (OHI). To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs

³ At the due process hearing, DCPS' Counsel affirmed that DCPS is prepared to conduct a new eligibility evaluation for Student upon receipt of the parent's consent.

special education and related services. 34 CFR § 300.8 (emphasis supplied.) *See Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).

At the due process hearing, Petitioner did not offer any evidence whatever that Student has a specific learning disability. *See* 34 CFR § 300.8(c)(10) (Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.) The 2010 assessments of Student do support an OHI-ADHD disability. In her August 2, 2010 independent psychological evaluation of Student, Licensed Psychologist concluded that Student should be classified as Other Health Impaired, based upon his history of neurocognitive dysfunction and diagnosis of ADHD. However, Licensed Psychologist recommended that Student's OHI disability be accommodated with a Section 504 plan. Her report did not assert that Student needed special education and related services. In his May 12, 2010 report, DCPS Psychologist reported there was some concern that Attention Deficit Hyperactivity was impacting on Student's ability to sit and learn. DCPS Psychologist concluded that Student did not have an IDEA disability. "[A] classification of emotional disturbance should be held in abeyance and not offered at this time. There is no other classification [Student] is close to meeting." Both of these reports are over two years old. At the due process hearing, Petitioner offered no current evaluations or expert opinions to establish that Student is eligible for special education services as a child with a disability.

Summary

Petitioner's burden of proof in this case was to establish that DCPS failed to meet its child-find obligation to identify Student as a child with a disability and/or failed to evaluate him as a child who was reasonably suspected of having a disability. I conclude that Petitioner has not met her burden of proof as to either issue.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Petitioner in this matter is denied.

Date: August 6, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).