

**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
April 03, 2014

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Hearing Date: April 1, 2014

Student Hearing Office,
Washington, D.C.

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 conduct audiological and auditory processing evaluations requested by the parent in January 2014.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 23, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on January 27, 2014. The parties met for a resolution session on February 7, 2014 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on February 23, 2014. On March 5, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on April 1, 2014 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. Respondent DCPS was represented by DCPS AUDIOLOGIST and DCPS' COUNSEL.

Petitioner testified and called as witness PRIVATE AUDIOLOGIST. DCPS called as witness DCPS Audiologist. Petitioner's Exhibits P-1 through P-10 were admitted into evidence with the exceptions of Exhibit P-5 and P-9, which were not offered. Exhibits P-1, P-2, P-4 and P-10 were admitted without objection. Exhibits P-3 and P-6 through P-8 were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-5 and R-10 through R-14 were admitted into evidence. Exhibits R-1, R-2, R-13 and R-14 were admitted over Petitioner's objections. Exhibits R-3 through R-5, R-10 through R-12 and pages 71 through 75 of Exhibit R-15 were admitted without objection. (The remainder of Exhibit R-15 – pages 68 through 70 and 76 through 82 – was not offered.) Petitioner's objections to Exhibits R-6 through R-9 were sustained. Counsel for Petitioner made an opening statement. At the conclusion of Petitioner's case in chief, counsel for DCPS made an oral motion for a directed finding in DCPS favor, which I denied. Counsel for

the respective parties made 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.

ISSUE AND RELIEF SOUGHT

- Whether DCPS has denied the student a FAPE by its refusal to conduct an Audiological Evaluation and an Auditory Processing Evaluation, as recommended in evaluations of Student, and which were requested by the parent.

For relief, Petitioner requests an order for DCPS to conduct the requested audiological and auditory processing evaluations or fund an Independent Educational Evaluation (IEE) audiological and auditory processing evaluation at the rate charged by Private Audiologist, and, upon completion of the assessments, to convene a meeting of Student's multidisciplinary team (MDT) to review the evaluations and revise, as appropriate, his IEP. In her due process complaint, Petitioner also reserved the right to seek an award of compensatory education to compensate Student for educational harm resulting from DCPS' alleged failure to conduct the requested evaluations.

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 adolescent, resides with Mother in the District of Columbia. Student is currently enrolled in GRADE at DCPS PUBLIC CHARTER SCHOOL. Testimony of Mother. DCPS Public Charter School has elected to have DCPS serve as its Local Education Agency (LEA) for purposes of the IDEA. Hearing Officer

Notice.

2. On November 12, 2013, Student was initially determined eligible for special education and related services under the primary disability classification, Multiple Disabilities, based upon the combination of underlying impairments, Emotional Disturbance (ED) and Other Health Impairment (OHI). Exhibit R-10.

3. The November 12, 2013 eligibility determination followed a Hearing Officer Determination issued August 4, 2013 by Impartial Hearing Officer Coles B. Ruff. In the August 4, 2013 HOD, Hearing Officer Ruff ordered, *inter alia*, that DCPS fund an independent comprehensive psychological evaluation of Student and, upon receipt of the evaluation, convene an eligibility meeting to determine whether Student was eligible for special education and related services. Exhibit R-3.

4. In September 2013, DCPS SPEECH/LANGUAGE PATHOLOGIST conducted a Speech and Language assessment of Student. She reported that Student's profile was not consistent with a speech and/or language impairment. At the request of Petitioner's Counsel at the November 12, 2013 eligibility meeting, DCPS authorized Mother to obtain an IEE Speech/Language evaluation of Student at DCPS expense. Exhibit P-5.

5. At an IEP meeting on November 26, 2013 at DCPS Public Charter School, Student's Individualized Education Program (IEP) team developed Student's initial IEP, which provided Student ten hours per week of Specialized Instruction in the General Education setting and 90 minutes per week of Behavioral Support Services. Exhibit R-10.

6. On December 11, 2013, Private Audiologist conducted an independent Speech/Language evaluation of Student. In his report, Private Audiologist

recommended, *inter alia*, based upon his assessment and the findings in Student's independent psychological and DCPS speech/language evaluations, that Student should have a comprehensive audiological and auditory processing assessment to rule out possible auditory-linguistic integrative processing deficits and possible underlying listening/ auditory processing deficits (APD). Exhibit P-2.

7. On January 7, 2014, Petitioner's Counsel emailed a copy of Private Audiologist's speech/language evaluation report to DCPS' COMPLIANCE CASE MANAGER. In the email, Petitioner's counsel stated that Private Audiologist had recommended an Auditory Processing evaluation for Student and she requested that Compliance Case Manager advise her of DCPS' position regarding conducting the evaluation. Exhibit P-6. Two days later, on January 9, 2014, Petitioner's Counsel again emailed Compliance Case Manager and requested that he let her know by January 10, 2014 what was DCPS' position regarding the requested Auditory Processing evaluation. Exhibit P-7. By letter of January 10, 2014, Petitioner's Counsel wrote the principal and Special Education Coordinator at DCPS Public Charter School to request that Student "be evaluated for special education and its related services," to include, but not be limited to an Auditory Processing Evaluation. Exhibit P-8.

8. On January 8, 2014, DCPS provided Private Audiologist's speech/language evaluation to DCPS Speech/Language Pathologist for review. On February 14, 2014, DCPS' Speech/Language Pathologist issued her report on Private Audiologist's Speech/Language evaluation of Student. In her recommendations, DCPS Speech/Language Pathologist stated that she did not agree with Private Audiologist's recommendations and opined that Student did not require further testing. Exhibit R-14. DCPS Speech/Language Pathologist did not testify at the due process hearing. On

January 23, 2014, Petitioner’s Counsel filed the due process complaint in this case alleging that DCPS had denied Student a FAPE by its “refusal” to conduct an audiological evaluation and auditory processing evaluation requested by the parent. The record does not establish that prior to the filing of the complaint, the parent had expressly requested an audiological assessment, in addition to her request for an auditory processing evaluation, or that DCPS had refused to conduct either evaluation. In its February 3, 2014 response to the due process complaint, DCPS averred that it was in the process of “officially reviewing” Private Audiologist’s report and that, “[i]f there are areas of concern, the DCPS’ Audiologist can look at the findings and determine if any further testing is needed.” *See* Due Process Complaint, January 23, 2014; District of Columbia Public Schools’ Response, February 3, 2014.

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 normally 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 DENIED STUDENT A FAPE BY FAILING TO CONDUCT AUDIOLOGICAL AND AUDITORY PROCESSING EVALUATIONS REQUESTED BY MOTHER?

In this case, Mother alleges that DCPS denied Student a FAPE by not conducting

an audiological assessment and an auditory processing evaluation requested by Petitioner's Counsel beginning on January 7, 2014. Because Student was initially evaluated and determined eligible for special education and related services in November 2013, Mother's subsequent requests for audiological and auditory processing evaluations are deemed requests for reevaluations. *See, e.g., Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010); Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46640 (August 14, 2006) (Once a child has been fully evaluated [the "initial evaluation"], a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a "reevaluation.")

As regards reevaluations, the IDEA requires that a public agency must ensure that they be conducted, *inter alia*, when the child's parent or teacher requests a reevaluation, subject to the limitation that a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Once a reevaluation has been requested, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, 71 F.R. at 46641.

In her due process complaint, Petitioner alleged that DCPS violated the IDEA by its "refusal to conduct" the audiological assessment and auditory processing evaluation she requested. However, there was no evidence that DCPS refused to conduct the

evaluations. Following his December 2013, speech/language evaluation of Student, Private Audiologist recommended that Student should have a comprehensive audiological assessment and auditory processing evaluation. On January 7, 2014, Petitioner's Counsel forwarded Private Audiologist's speech/language evaluation by email to DCPS' Compliance Case Manager. In the same email, Petitioner's Counsel requested that an auditory processing evaluation be conducted, based on Private Audiologist's recommendations. The next day, DCPS provided Private Audiologist's report to DCPS' Speech/Language Pathologist for her to review Private Audiologist's recommendations. DCPS Speech/Language Pathologist issued her report on February 12, 2014. She wrote that she did not agree that Student required any further testing and she offered alternative recommendations for Student's MDT/IEP team to consider. In the normal course, the next step would have been for the MDT/IEP team to consider the respective reports and recommendations of Private Audiologist and DCPS Speech/Language Pathologist, as well as any input from Mother and other IEP team members, in order to identify what additional data were needed to determine Student's educational needs. 34 CFR § 300.305(a). Unfortunately, Petitioner short-circuited the MDT/IEP team review process by filing her due process complaint barely two weeks after providing Private Audiologist's evaluation to DCPS.

Neither was DCPS untimely in responding to Petitioner's evaluation request. The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.*

(quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith, supra* at 3.

Here, the day after Petitioner's Counsel sent Private Audiologist's report to DCPS, the agency referred the evaluation to its Speech/Language Pathologist to review.

Speech/Language Pathologist completed her review report within five weeks. In the meantime, Petitioner had already filed her due process complaint in this case. I find that Petitioner has not shown that this was "undue delay." *See, Smith, supra*.

Moreover, even if Petitioner had shown that DCPS had not moved quickly enough on her request for audiological and auditory processing evaluations of Student, she has not established a denial of FAPE. "A failure to timely reevaluate is at base a procedural violation of IDEA." *Smith, supra* at 3 (citations omitted.) Procedural violations of the IDEA do not, in themselves, mean a student was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). A parent is required to demonstrate that the student suffered an "educational harm" in order to establish that he was denied a FAPE by a procedural violation of the IDEA. *See, e.g., Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011). Petitioner's Counsel, citing *Harris v. District of Columbia*, 561 F.Supp.2d 63, 64-65 (D.D.C.2008), argues that a failure to reevaluate is not a mere procedural violation of IDEA. In *Harris*, however, DCPS took no action for over two years in response to a parent's request for reevaluation of her child's functional behavior. Here the supposed delay was a matter of days, not years. To say the least, Petitioner has not established that Student's education would have been different but for this "delay," or that Student suffered any educational harm as a result. *See Smith, supra* at 4.

In summary, Petitioner has not shown either that DCPS refused to conduct the audiological or auditory processing evaluations she requested or that DCPS unduly delayed acting on her request. I conclude, therefore, that Petitioner has not established that DCPS denied Student a FAPE by failing to conduct the requested evaluations.²

ORDER

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

ORDERED:

All relief requested by Petitioner herein is denied. This order is without prejudice to the parent's rights to seek future relief under the IDEA in the event that DCPS or Student's IEP team hereafter determines that an audiological assessment and/or an auditory processing evaluation are not needed to determine Student's educational needs.

Date: April 3, 2014

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).

² I make this finding without reaching this question of whether an audiological assessment or an auditory processing evaluation is needed to determine Student's educational needs. That is a decision to be made, in the first instance, by Student's IEP team. *See* 20 U.S.C. § 1414(c)(1)(B); 34 CFR § 300.305(a). DCPS Audiologist, testified that she agreed that Student should have an audiological assessment and, possibly, an auditory processing evaluation provided that the latter assessment were controlled for whether Student is regularly taking his medications prescribed for his Attention Deficit Hyperactivity Disorder impairment. Testimony of DCPS Audiologist.