

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
October 27, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: October 26, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

PUBLIC CHARTER SCHOOL,

Office of Dispute Resolution,
Washington, D.C.

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 Public Charter School (“PCS”) has denied Student a free appropriate public education (“FAPE”) by failing to fund an Independent Educational Evaluation (“IEE”) requested by Mother in May 2014.

Student, an AGE child, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on August 5, 2014, named PCS as respondent. The original

¹ Personal identification information is provided in Appendix A.

complaint included disciplinary issues which required an expedited hearing. The parties did not meet for a resolution session. On August 22, 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 scheduled for September 18, 2014.

On September 17, 2014, Petitioner's Counsel requested a continuance of the expedited due process hearing due to an emergency in counsel's family. Because the IDEA requires that an expedited due process hearing must occur within 20 school days of the filing of the due process complaint, it was not possible to reschedule the September 18, 2014 due process hearing within the 20 school day period. *See* 34 CFR § 300.532(c)(2). Petitioner's Counsel then requested leave to withdraw without prejudice Petitioner's discipline claim. Over the objection of PCS' Counsel, I granted the request to dismiss the discipline claim without prejudice. The due process hearing on the remaining non-expedited claim was scheduled for October 24, 2014. By order entered October 16, 2014, the Chief Hearing Officer granted Petitioner's unopposed request for a continuance, which extended the due date for the Hearing Officer's final decision for 19 calendar days, to November 7, 2014.

On October 13, 2014, Petitioner filed a motion for summary judgment. Following receipt of PCS' email objection to the motion, by order entered October 14, 2014, I denied the motion as untimely.

The due process hearing was convened before the undersigned Impartial Hearing Officer on October 24, 2014 at the Office of Dispute Resolution 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. PCS was represented by PCS' COUNSEL.

Petitioner testified and called no other witnesses. PCS called as witnesses PCS TEACHER, SCHOOL PSYCHOLOGIST and SPECIAL EDUCATION DIRECTOR. Petitioner's Exhibits P-1 through P-20 and PCS' Exhibits R-1 through R-29 were admitted into evidence without objection. 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

With Petitioner's withdrawal of the discipline claim in her due process complaint, the only issue remaining to be determined in this case is:

- Whether PCS violated the IDEA by failing to authorize an independent psychological evaluation of the student when requested by the parent.

For relief, Petitioner requests that PCS be ordered to fund an independent comprehensive psychological evaluation of Student at market rate, to include cognitive, academic, and clinical assessments and a comprehensive social history and to convene an MDT meeting within ten business days of receiving the evaluation to determine Student's special education eligibility, develop an IEP, and determine placement.

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 child, resides with Mother in the District of Columbia.

Testimony of Mother.

2. PCS is a public charter school located in the District of Columbia. It serves as its own local education agency (“LEA”) within the meaning of the IDEA. Hearing Officer Notice. PCS is the successor to OLD PCS. PCS was established as a new entity in the summer of 2014. Testimony of Special Education Director. Hereinafter in this decision, I will refer to the school as PCS, whether the facts pertain specifically to Old PCS or to PCS.

3. Student first began attending PCS at the beginning of the 2013-2014 school year. Before the start of the school year, Mother requested that Student be evaluated for special education eligibility because he had been bullied at his prior school and had experienced a change in his attitude. Testimony of Mother.

4. At a multidisciplinary team (MDT) meeting at PCS on October 18, 2013, the school agreed to have Student evaluated with a comprehensive psychological assessment and a functional behavioral assessment (FBA). Exhibit P-5. The psychological assessment was conducted by School Psychologist. She issued her evaluation report on November 15, 2013. Exhibit P-7. The FBA report was completed on December 3, 2013. Exhibit P-8.

5. In conducting the Comprehensive Psychological Evaluation, School Psychologist administered a battery of cognitive, educational, visual-motor and social-emotional tests, interviewed Mother and Student, spoke to Student’s teacher and made a classroom observation. The tests and questionnaires administered were;

Wechsler Intelligence Scale for Children 4th Edition (WISC-IV)
Woodcock-Johnson Tests of Achievement, 3rd Edition (WJ-III), Form A,
Normative Update
The Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI)
Behavior Assessment System for Children-2, Parent Rating Scale (PRS-C)
Behavior Assessment System for Children-2, Teacher Rating Scale (TRS-C)
Conners Third Edition, Teacher Short Form

Conners Third Edition, Parent Short Form
Children's Depression Inventory (CDI) (Content analysis only)
The Revised Children's Manifest Anxiety Scale (RCMAS)
Children's Apperception Test
House-Tree-Person Projective Test

Exhibit R-6.

6. In the November 15, 2013 Comprehensive Psychological Evaluation report, School Psychologist reported that her findings indicated that Student's overall level of intellectual functioning was Average when compared to his same aged peers. He exhibited difficulty with self-regulation to include regulating his attention, activity level, and impulses, as well as managing his feelings. Although, Student exhibited these difficulties, there did not appear to be an educational impact given his High Average performance on the Woodcock-Johnson III tests of achievement. School Psychologist concluded that it did not appear that Student met criteria for special education and related services under the classification of Other Health Impairment (OHI) or Learning Disability (LD). With respect to OHI, she reported that although Student exhibited elevated symptoms of inattention and hyperactivity, his inattention and restlessness were likely related to a moderate degree of transient emotional distress, accounted for by emotional, environmental, or cultural factors, and that these difficulties did not appear to adversely impact his ability to access the general curriculum. With respect to SLD, School Psychologist reported that Student demonstrated mastery of grade level content, that he possessed and has maintained adequate academic progress based on age and grade level standards and that Student did not exhibit a pattern of strengths and weakness or deficits in information processing relevant to a learning disorder. School Psychologist recommended that Student would benefit from a 504 plan (Section 504 of the Rehabilitation Act of 1973) with targeted interventions to help him learn to exhibit

appropriate behaviors at school, communicate more effectively, regulate his emotions, and develop better adaptive skills. Exhibit R-6.

7. Special education eligibility committee meetings for Student were convened at PCS over several days in December 2013 and January 2014. The team determined on January 28, 2014 that Student was not a child with an IDEA disability who needed special education and related services. Exhibit R-13.

8. On March 10, 2014, a Section 504 meeting was convened for Student at PCS. A Section 504 Plan was developed. Exhibit R-15, R-16. On March 11, 2014, a Behavior Intervention Plan (BIP) was developed for Student. Exhibit R-17.

9. On May 7, 2014, following a school disciplinary incident with Student, Mother sent an email to Special Education Director in which she requested all of Student's education records "that caused him to be suspended." In that email, Mother wrote, "I also am requesting need to have a out source value iee" [*sic*]. Special Education Director responded in an email sent the same day that "We will discuss your request for an Independent Evaluation at the May 16th meeting." Exhibit R-19.

10. A meeting was convened at PCS on May 16, 2014. Mother and FORMER ATTORNEY attended. Exhibit R-20. Following the meeting, PCS provided Mother an authorization to obtain an independent FBA at the school's expense. In a May 16, 2014 email to Former Attorney, PCS' Counsel wrote,

Attached is a letter authorizing an independent FBA at [PCS'] expense. [PCS] believes that the FBA it conducted is appropriate, but also believes that the team would benefit from some additional data relating to the student's behavior. Since your client would like a fresh perspective, [PCS] is willing to fund an independent FBA.

However, [PCS] is not willing to fund an independent comprehensive psychological evaluation. At today's meeting, your client did not actually express disagreement with the comprehensive psychological evaluation completed by

[PCS]. Rather, she stated that she would like a new psychological evaluation in light of the fact that Romello received a mental health diagnosis by an outside provider after the comprehensive psychological evaluation was completed. This is not a basis for requesting an independent educational evaluation under IDEA.

It is my hope that [PCS'] willingness to fund an independent FBA will be sufficient to satisfy the parent's concerns. In light of what has been outlined here, please let me know if the parent would be willing to withdraw her request for an independent comprehensive psychological evaluation. If she is not willing to do so, [PCS] will have to explore whether it is necessary to file a due process hearing request to establish the appropriateness of its evaluation.

Exhibit R-21.

Parent's Former Attorney responded by email the same day as follows,

As illustrated by [Mother's] disagreement with Student's previous eligibility determination under the IDEA and her desire to re-open the discussion, insofar as much as [School Psychologist's] report indicates that "there does not appear to be an educational impact" and his "difficulties do not appear to adversely impact his ability to access the general education curriculum" (see pg. 13), [Mother] does not agree with the report and its conclusions.

I will pass this information along to [Mother], inform of the school's position and ask her whether she will consider withdrawing her request. [*sic*]

Exhibit R-21.

11. On May 20, 2014, Former Attorney again wrote PCS' Counsel by email, as follows:

After passing along the letter of authorization to FBA and the other information requested to [Mother], [Mother] has expressed to me that she remains interested in obtaining an Independent Educational Evaluation on the psychological evaluation and report conducted by [School Psychologist]. Thus, we continue to request a letter of authorization permitting [Mother] to pursue an independent evaluation at public expense.

As indicated in my last email [Mother] does not agree with [School Psychologist's] report and her conclusions, including but not limited to the report's conclusion that [Student's] difficulties do not appear to adversely impact his ability to access the general curriculum. Furthermore, [School Psychologist's] report seems to indicate that [Student's] emotional issues can mostly be attributed to familial transitions and traumatic events. As [Mother] indicated at the last meeting, being that [Student] is the only one of her children exhibiting these types of behaviors, she does not agree with [School Psychologist's]

conclusions on this matter either. [Mother] continues to believe that [Student] qualifies under the IDEA as a student with an emotional disturbance who requires specialized instruction and related services in order to be able to access the general education curriculum. [School Psychologist's] report indicates on pg 12 that "given that childhood is a period of cognitive, social, and emotional growth, [Student's] behaviors should be monitored. If his behaviors increase in frequency and severity, a re-evaluation of his behavior and social-emotional functioning might be warranted." In this case, due to the increase in frequency and severity of his behaviors noted at the last meeting, even [School Psychologist] in her report recognized that further investigation of [Student's] functioning and behaviors is warranted. For this, [Mother] would appreciate an independent review and perspective, as is her right when she disagrees with the school's evaluation.

Please let us know as soon as possible how [PCS] plans to proceed. [*sic*]

PCS' Counsel responded by email the same day that she was in the process of discussing Former Parent's Attorney's email with PCS and that as soon as they made a decision on how to proceed, she would let her know. Exhibit R-21.

12. On May 30, 2014, PCS' Counsel wrote Former Attorney by email that PCS was still deciding on how to proceed with Mother's request for an independent evaluation. She inquired if Mother and the attorney were available on June 13, 2014 to come back together to discuss eligibility and revisions to the Student's program. In her June 4, 2014 email response, Former Attorney wrote that Mother was no longer using the law office's services and that PCS should contact Mother directly about Student's education matters. Exhibit R-21.

13. There was a meeting or meetings at PCS toward the end of the 2013-2014 school year which Mother attended without an attorney. Because Mother did not have an attorney, PCS' Counsel did not attend either. It was agreed at the meeting that an independent FBA would be conducted at the beginning of the 2014-2015 school year. Special Education Director's impression from that meeting was that Mother was satisfied with receiving authorization for the independent FBA and the independent

evaluation request was resolved. Testimony of Special Education Director, Exhibit R-22. Mother never agreed “to change her mind” about requesting an independent psychological evaluation. Testimony of Mother.

14. At the end of May 2014, the principal at PCS resigned and an interim principal was appointed. Effective June 30, 2014, PCS disaffiliated with the Old PCS network. A new principal was appointed around July 1, 2014. Special Education Director resigned from PCS around July 10, 2014 and took a similar position at a different charter school. Testimony of Special Education Director.

15. After July 4, 2014, Mother and Student attended a meeting with the new principal at PCS. The new principal told them that the school would take the discipline history out of Student’s record and start fresh – make the record blank. The new principal made Student sign some papers stating that he would “be good.” By this point, Mother had already obtained Student’s admission to another school, but because the principal said they were going to help Student, she decided to give PCS another chance. At that meeting with the new principal, there was no discussion of Mother’s request for an IEE. Mother did not raise the issue because the principal said that this was a new school year. Testimony of Mother.

16. On August 1, 2014, Petitioner’s Counsel informed PCS’ Counsel by email that she was now representing Mother. Petitioner’s Counsel requested a new IEE authorization for the FBA because the original funding authorized was insufficient. In the email, Petitioner’s Counsel also asserted that Mother had not withdrawn her request for PCS funding for an independent psychological evaluation and noted that PCS had neither granted the IEE authorization request, nor filed a due process complaint to defend its evaluation. Petitioner’s Counsel wrote that Mother had contracted to obtain

an evaluation from an independent psychologist and would ask PCS to fund the evaluation at the market rate. By email of August 2, 2014, PCS' Counsel requested that Mother hold off on any independent evaluation until they had a chance to discuss the issues further. Exhibit R-22. No resolution was reached and Petitioner's Counsel filed a due process complaint on behalf of Mother on August 5, 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, DL v. District of Columbia*, 730 F.Supp.2d 84, 94 (D.D.C.2010), citing *Schaffer v. Weast*, 546 U.S. 49, 51, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)) (Plaintiffs have the burden of proving a violation of the IDEA). In the present case, PCS has asserted a counterclaim, pursuant to 34 CFR § 300.502(b)(2)(i), to establish that its November 15, 2013 psychological evaluation of Student was appropriate. I find that PCS has the burden of proof on this issue. *See, e.g., Dobyys v. United States*, 2014 WL 4628560, 33 (Fed.Cl. Sep. 16,2014) (Defendant must carry the burden of proof on its counterclaim.)

Analysis

Did PCS violate the IDEA by failing to authorize an independent psychological evaluation of the student when requested by the parent?

In early May 2014, Mother requested PCS to provide an independent educational evaluation of Student. The request was confirmed and formalized in a May 20, 2014

email from the parent's Former Attorney, in which the attorney wrote that Mother disagreed with the conclusions of School Psychologist in her November 15, 2013 Comprehensive Psychological Evaluation and requested a letter of authorization for Mother to obtain an independent evaluation at public expense. Mother contends that PCS' ongoing failure to authorize a PCS-funded IEE psychological evaluation of Student violates the IDEA. PCS responds that it has not violated the IDEA and seeks to establish in this proceeding that its psychological evaluation of Student was appropriate.

Under 34 CFR § 300.502(b), subject to certain limitations, a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. The relevant regulations provide as follows:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under § 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation but not at public expense.

34 C.F.R. § 300.502(b)(1)–(3).

In this case, it is undisputed that PCS did not provide an IEE evaluation, after Former Attorney informed PCS in May 2014 that Mother disagreed with the November 15, 2013 psychological evaluation conducted by School Psychologist, and that she

requested an IEE psychological evaluation at PCS expense. However, PCS contends that by the proceedings in this case, it has initiated a hearing to show that its evaluation was appropriate, “without unnecessary delay.” Petitioner maintains that the three months lapse between May 20, 2014, when Former Attorney requested the IEE evaluation, to August 19, 2014, when PCS filed its counterclaim in this proceeding, constitutes unnecessary delay.

Significance of due process hearing being initiated by Mother – not by PCS.

Although the language of the § 300.502(b) contemplates that the local education agency will initiate the due process hearing to show that its evaluation is appropriate, I find that as a preliminary matter, it makes no difference here whether PCS or the parent initiated the due process hearing. As the Sixth Circuit Court of Appeals explained in *P.R. v. Woodmore Local School Dist.*, 256 Fed.Appx. 751 (6th Cir. 2007), the object of the independent educational evaluation regulations “is to afford Parents an opportunity to challenge and the School District to defend the appropriateness of its Evaluation in an impartial hearing As long as the object of the regulations is accomplished, there is no reason to exalt form over substance. Their purpose is not served by holding that there must be reimbursement at public expense when it is the parents rather than the public agency that initiates the due process hearing where the appropriateness of the School District’s Evaluation is challenged and confirmed.” *Id.* at 755. In the present case, Mother has availed herself of the opportunity to challenge PCS’ psychological evaluation and PCS has taken the opportunity to defend its appropriateness.

Was there “unnecessary delay” in initiating this hearing?

Whether or not there has been an unnecessary delay in initiating a hearing to defend an agency evaluation must be determined given the facts of each particular case.

See J.P. ex rel., E.P. v. Ripon Unified School Dist., 2009 WL 1034993, 7-8 (E.D.Cal.2009). The time line alone cannot satisfy the considerations necessary to determine unnecessary delay under the Act. It is necessary “to assess the substantive events that occurred within the relevant time between the parents’ objecting to the evaluation and the District initiating the due process hearing.” [sic] *DeMerchant v. Springfield School Dist.* 2007 WL 2572357, 5 (D.Vt. Sept.4,2007).

Here, the circumstances proven at the due process hearing inform the consideration of the three month interval in this case. Former Attorney requested an IEE psychological evaluation of Student on May 20, 2014. On May 30, 2014, PCS’ Counsel responded that PCS was still deciding on how to proceed with the request and asked if Mother and Former Attorney were available to come back together to discuss eligibility and revisions to the Student’s program. On June 4, 2014, Former Attorney wrote that she no longer represented Mother and that PCS should contact Mother directly about Student’s education matters. Thereafter, toward the end of the 2013-2014 school year, Mother and PCS staff had a meeting, without attorneys present, where it was agreed that an independent FBA would be conducted at the beginning of the 2014-2015 school year. PCS Special Education Director came away from the meeting with the impression that Mother was satisfied with receiving authorization for the independent FBA and that the independent evaluation request was resolved. In July 2014, Mother and Student attended a meeting with the new principal at PCS. Mother did not mention her request for an IEE psychological evaluation at that meeting. On August 1, 2014, Petitioner’s Counsel informed PCS’ Counsel that she was now representing Mother. In her email, Petitioner’s Counsel asserted that Mother had not withdrawn her request for PCS funding for an independent psychological evaluation. On August 2, 2014, PCS’

Counsel requested that Mother hold off on any independent evaluation until they had a chance to discuss the issues further. Three days later, on August 5, 2014, Petitioner's Counsel filed the present due process complaint on behalf of Mother.

Based upon these circumstances, notably that from his meetings with Mother near the end of the 2013-2014 school year, Special Education Director was left with the impression that the IEE request had been resolved, as well as the fact that Mother did not bring up her request for an IEE psychological evaluation in the July 2014 meeting with the new PCS principal, I find that Petitioner has not established that there was unnecessary delay in PCS' initiating the hearing to show that its evaluation of Student was appropriate.

Appropriateness of PCS Psychological Evaluation

As stated above in this decision, under 300 CFR § 300.502(b)(2)(i), PCS has the burden of proof to establish that its November 15, 2013 comprehensive psychological evaluation of Student was appropriate. If PCS has met that burden, it need not fund an IEE psychological evaluation.

To determine whether PCS' evaluation was "appropriate," the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine his eligibility in all areas of suspected disability and whether the evaluation was sufficiently comprehensive to identify all of the child's needs. *See South Kingstown School Committee v. Joanna S.*, 2014 WL 197859, 8 (D.R.I. Jan. 14, 2014), citing 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6); and state regulations. "Sec. 300.304(b)(1) provides that an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental,

and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under Sec. 300.8 . . .” Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46690 (August 14, 2006).

School Psychologist, who testified at the due process hearing, was qualified as an expert in the area of school psychology. She holds a doctorate in school psychology and has conducted at least 400 psychological assessments of students. I found her testimony to be credible. In conducting her comprehensive psychological evaluation of Student in the fall of 2013, School Psychologist interviewed Student and Mother, observed Student in the classroom, and spoke to his teacher. She administered a battery of tests designed to measure Student’s cognitive, academic, visual-motor and social-emotional functioning. School Psychologist opined, without contradiction, that her testing results were valid and reliable.

Mother offered no evidence at the due process hearing that the November 15, 2013 psychological evaluation was not sufficiently comprehensive to identify Student’s needs or that School Psychologist did not adequately gather functional, developmental and academic information about Student’s needs for the PCS MDT team to determine his eligibility. As is clear from Former Attorney’s May 20, 2013 email confirming Mother’s request for an IEE evaluation, Mother’s disagreement was with School Psychologist’s conclusions from her testing – specifically that Student’s behavioral difficulties did not appear to adversely impact his ability to access the general curriculum. However, whether School Psychologist’s conclusions were correct or whether Student should have been determined eligible for special education services, *i.e.*, whether he is a child with a disability in need of special education and related

services, are not issues before me. With respect to the limited issue of whether the November 15, 2013 psychological evaluation of Student met the appropriateness requirements of the IDEA, specifically 34 CFR § 300.304(b) and (c), I find that PCS has met its burden of proof and has established that its psychological evaluation was appropriate. Therefore, Petitioner is not entitled to relief on her claim. Of course, Mother still has the right to an independent educational evaluation but not at PCS expense. *See* 34 C.F.R. § 300.502(b)(3).

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: October 26 , 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).