

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

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

OSSE
STUDENT HEARING OFFICE
2012 JAN 17 AM 9:24

PETITIONER,
on behalf of STUDENT,¹

Date Issued: January 14, 2012

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 ("D.C. Regs."). In her Amended Due Process Complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by not finding him eligible for special education services, and that DCPS

¹ Personal identification information is provided in Appendix A.

failed to issue a required Prior Written Notice and to provide Petitioner full access to Student's educational records.

Student, an AGE boy, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 7, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 11, 2011. The parties met for a resolution session on October 19, 2011 but did not come to an agreement.² DCPS file a motion to dismiss on October 20, 2011. Following an October 13, 2011 telephone hearing, the Hearing Officer denied in part, and granted in part, the motion to dismiss. Petitioner was granted leave to amend her due process complaint. On November 9, 2011, Petitioner filed her Amended Due Process Complaint Notice. The timelines for the resolution meeting and the time period to resolve the complaint began anew with the filing of the amended complaint. The 45-day time line for issuance of this HOD began on December 10, 2011. On November 30, 2011, the Hearing Officer convened a prehearing telephone 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 January 11, 2012 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 COUNSEL.³

The Petitioner testified and called, as witness, EDUCATIONAL ADVOCATE 2. DCPS called, as witnesses, COMPLIANCE CASE MANAGER 1, SPED TEACHER, SPED

² No Resolution Period Disposition Form has been filed in this case.

³ DCPS Counsel requested permission for a DCPS party representative, who would also be a DCPS witness, to "attend" the entire hearing by telephone. The Hearing Officer denied this request.

COORDINATOR, and COMPLIANCE CASE MANAGER 2. Petitioner's Exhibits P-1 through P-30 and DCPS' Exhibits R-1 through R-9 were admitted into evidence without objection.

At the conclusion of Petitioner's case-in-chief, DCPS made an oral motion for a directed finding in its favor. The Hearing Officer denied the motion.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS VIOLATED THE REQUIREMENTS OF THE IDEA BY NOT ISSUING A PRIOR WRITTEN NOTICE AT THE CONCLUSION OF A MARCH 8, 2011 MULTIDISCIPLINARY TEAM ("MDT") MEETING;
- WHETHER DCPS HAS FAILED TO PROVIDE PARENT FULL ACCESS TO STUDENT'S EDUCATIONAL RECORDS; and
- WHETHER STUDENT IS A CHILD WITH A DISABILITY ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES.

For relief, Petitioner seeks a declaration of Student's eligibility for special education services and an order for DCPS to provide Petitioner access to Student's educational records. In addition, Petitioner seeks an award of compensatory education.⁴

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 is an AGE resident of the District of Columbia. Testimony of Mother.

⁴ At the beginning of the due process hearing, Mother withdrew her claim that DCPS violated the IDEA by holding the March 8, 2011 MDT meeting without her being present. Student's great grandmother and Mother's educational advocate from the office of Petitioner's Counsel attended the meeting.

2. Student has attended CITY ELEMENTARY SCHOOL ("CES") since he was three years old. He is currently in the GRADE. Testimony of Mother, Exhibit P-10.

3. Mother filed a previous due process complaint against DCPS on or about July 12, 2010, which was resolved by an August 10, 2010 settlement agreement. Under the settlement agreement, DCPS agreed, *inter alia*, to fund independent Comprehensive Psychological, Speech Language (S/L), Auditory Processing and Occupational Therapy (OT) evaluations of Student. Exhibit P-2.

4. On February 17, 2011, Petitioner's Counsel wrote the CES principal to advise that the independent evaluations had been completed and to request an MDT meeting. Exhibit P-15.

5. DCPS convened an MDT team meeting at CES on March 8, 2011 to determine student's eligibility for special education services. Exhibit R-1. Mother did not attend the meeting because she had to work. GREAT GRANDMOTHER and LAW FIRM EDUCATIONAL ADVOCATE represented Mother at the meeting. Mother authorized Great Grandmother and Law Firm Educational Advocate to speak on her behalf. Testimony of Mother.

6. At the March 8, 2011 MDT meeting, SCHOOL PSYCHOLOGIST reported that Student's scores reflected difficulty with attending and Attention Deficit Hyperactivity Disorder ("ADHD"), and that there was an impact with regard to reading and numerical operations. School Psychologist stated that the ADHD impacts Student's overall ability and that would mean he qualifies for special education as Other Health Impaired ("OHI"). The DCPS audiologist reported that Student was not eligible for special education based upon a S/L impairment. The DCPS Occupational Therapist reported that Student was not a candidate for OT services. Exhibit R-1.

7. During the due process hearing, DCPS, by counsel, stipulated that the March 8, 2011 MDT team determined that evaluations of Student reflected a qualifying special education disability of OHI-ADHD. Stipulation of DCPS Counsel. The MDT team, except for Great Grandmother, felt that Student was eligible for special education services. Testimony of Compliance Case Manager 1.

8. At the March 8, 2011 MDT meeting, Great Grandmother refused special education services for Student. She was adamant that Student not receive services. Law Firm Educational Advocate said, at the meeting, that Student could not receive special education services because Great Grandmother was in disagreement. Because of Great Grandmother's refusal, the MDT team did not find Student eligible for special education services. Testimony of Compliance Case Manager 1.

9. DCPS did not issue a Prior Written Notice ("PWN") after the March 8, 2011 MDT meeting. See DCPS' Amended Response, p. 3.

10. After the March 8, 2011 MDT meeting, Great Grandmother informed Mother that she had told the MDT team that she did not want Student in special education. Mother told Great Grandmother that she wanted Student to receive special education, but not to be pulled out of the regular education classroom. Mother never went back to CES to inform the school staff that she disagreed with Great Grandmother or that Great Grandmother had not been correct to refuse services. Testimony of Mother.

11. On May 4, 2011, a paralegal from the office of Petitioner's Counsel wrote SPED Coordinator a fax letter to request an MDT meeting to "determine Student's eligibility with the parent present." Exhibit P-16. The letter makes no reference to the March 8, 2011 MDT meeting, at which Great Grandmother refused services for Student. On July 11, 2011, the

paralegal wrote another fax letter to SPED Coordinator, again requesting an MDT meeting and requesting copies of Student's records. Exhibit P-17. SPED Coordinator denies receiving either letter. Testimony of SPED Coordinator. I find that the evidence does not establish that either fax letter was received by DCPS.

12. Petitioner filed her original due process complaint in the present case on October 7, 2011.

13. Educational Advocate 2 met SPED Coordinator at CES in November 2011 to examine Student's educational records. SPED Coordinator provided copies of the records which he had and advised Educational Advocate 2 that he would need to obtain any other records from DCPS Central Office. Testimony of Educational Advocate 2, Testimony of SPED Coordinator. Educational Advocate 2 did not communicate with the DCPS Central Office. Testimony of Educational Advocate 2. Compliance Case Manager 2 mailed copies of all of Student's records, which she had in her possession, to the office of Petitioner's Counsel. These included the independent evaluations and meeting notes. Testimony Compliance Case Manager 2.

14. Prior to the hearing in this case, DCPS agreed to identify Student as eligible for special education services. On December 27, 2011, Compliance Case Manager 2 offered to "complete the eligibility form" for Student and schedule an IEP meeting. Exhibit P-17. On December 30, 2011, Compliance Case Manager 2 wrote Petitioner's Counsel to request that Parent execute an "Eligibility Waiver" form drafted by SPED Coordinator. Exhibit R-7. The reason for the waiver request was that, SPED Coordinator was informed that under DCPS protocols, he could not submit a special education eligibility form without holding another MDT team meeting, unless Mother waived the eligibility meeting in writing Testimony of SPED Coordinator. On January 4, 2012, Petitioner's Counsel wrote Compliance Case Manager 2 that

Mother was not going to waive the eligibility process without some assurance that CES was going to find Student eligible. Exhibit P-28. Student's special education eligibility was not resolved prior to the due process hearing.

CONCLUSIONS OF LAW

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

DISCUSSION

In this case, Petitioner seeks a determination that Student is eligible for special education services. In addition, she seeks relief for DCPS' not issuing a PWN after the March 8, 2011 MDT meeting and for DCPS' alleged failure to provide her full access to Student's educational records. DCPS denies any violation of the IDEA and contends that the due process complaint should be dismissed. For the reasons set forth below, I find that Student is a child with a disability and eligible for special education and related services. I further find that the evidence does not establish that DCPS has violated the IDEA or denied Student a FAPE.

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* D.C. Regs. 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

1. IS STUDENT A CHILD WITH A DISABILITY?

Before a State or local educational agency may commence the initial provision of special education services, it must first determine whether a student is a “child with a disability.” A “child with a disability” is (i) a child with a listed condition or “specific learning disabilities” who, (ii) “by reason thereof, needs special education and related services.” *See, e.g., Hawkins v. District of Columbia*, 539 F.Supp.2d 108, 109 (D.D.C. 2008), citing 20 U.S.C. § 1401(3)(A). DCPS stipulates that the first condition is met – namely that Student has a listed disability condition, OHI-ADHD, and it is not contested because of his ADHD, Student needs special education services. School Psychologist informed the March 8, 2011 MDT eligibility team that ADHD definitely impacts Student’s overall ability. DCPS’ witness, Compliance Case Manager 1, testified that everyone at the March 8, 2011 MDT eligibility meeting, with the exception of Great Grandmother, felt that Student should be eligible for special education services. I find, therefore, that Student is a child with a disability and he is eligible for special education and related services.

The evidence also establishes that Student’s MDT team would have found him eligible for special education services at the March 8, 2011 eligibility meeting. However, Great Grandmother, who was authorized to speak for Mother at the meeting, refused all special education services for Student.⁵ Because of Great Grandmother’s refusal of services, the MDT

⁵ At the due process hearing, Petitioner’s Counsel argued, erroneously, that when Great Grandmother refused services, DCPS was obliged to file a due process complaint to seek an order to override the refusal of services. Under the IDEA, if a parent refuses to consent to the initial provision of special education and related services, the public agency--

- (i) May not use mediation or due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;
- (ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and
- (iii) Is not required to convene an IEP Team meeting or develop an IEP for the child.

team curtailed its eligibility determination. DCPS' failure to develop an IEP or otherwise offer FAPE to Student at that point in time was not a denial of FAPE. *See Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46632 (2006)* (The FAPE requirements in 34 CFR §§ 300.101 through 300.112, consistent with section 612(a) of the IDEA, apply only to a child with a disability, as defined in § 300.8 and § 602(3) of the Act. A child would not be considered a child with a disability under the Act if the child has not been evaluated in accordance with 34 CFR §§ 300.301 through 300.311 and determined to have one of the disabilities in § 300.8(a), and because of that disability, needs special education and related services. *Id.*)

On May 4, 2011 and July 11, 2011, subsequent to Great Grandmother's refusal of special education services for Student, a paralegal from the office of Petitioner's Counsel faxed letters addressed to SPED Coordinator at CES requesting an MDT team meeting to determine Student's eligibility, with the parent present. The evidence does not establish that these fax letters were received by SPED Coordinator or by DCPS. In any event, in her complaint for due process, Petitioner did not allege that she had requested additional MDT meetings after March 8, 2011 and DCPS' response, or lack of response, to these alleged requests was not identified as a hearing issue in the November 30, 2011 Prehearing Order. I decline to consider the lack of a response from DCPS to requests for meetings, made after March 8, 2011, as an issue in this proceeding. In sum, I find that Student is a child with an OHI-ADHD disability and he is eligible for special education and related services. However, because Great Grandmother, as Mother's representative, refused services for Student, DCPS' non-determination of eligibility was not a denial of FAPE. DCPS prevails on this issue.

See 34 CFR § 300.300(b)(3).

2. DID DCPS VIOLATE THE IDEA BY NOT ISSUING A PRIOR WRITTEN NOTICE AFTER THE MARCH 8, 2011 ELIGIBILITY MEETING?

Parent contends that DCPS violated the IDEA by not issuing a Prior Written Notice (“PWN”) after the March 8, 2011 MDT meeting. DCPS responds that no PWN was required, because Student was not found ineligible at the meeting and the eligibility determination process was curtailed because Great Grandmother refused special education services.

Pursuant to 34 CFR § 300.503(a)(2), written notice must be given to the parents of a child with a disability a reasonable time before the public agency “refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” *Id.* In the present case, DCPS did not refuse, at the March 8, 2011 meeting, to initiate the identification, evaluation or educational placement of Student, or the provision of FAPE to him. Great Grandmother, who had authority to speak on behalf of Mother, refused special education services for Student. Petitioner has cited no legal authority, which would require DCPS to provide PWN, when a parent exercises her right to refuse consent to the initial provision of services. *Cf.* 34 CFR § 300.300(d)(4)(i) (If, at any time **subsequent** to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency may not continue to provide special education and related services to the child, but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services.)

Even if a PWN had been required, unless the failure to provide the notice affects a parent’s “primary procedural protection,” the omission of the notice is not considered a violation of a parent’s rights under the IDEA. *See Shaw v. District of Columbia*, 238 F.Supp.2d 127, 188 (D.D.C. 2002). In this case, the omission of a PWN did not affect Mother’s procedural

protections. The purpose of the PWN “is to provide sufficient information to protect the parents’ rights under the [IDEA] and to enable parents to make an informed decision whether to challenge the DCPS’ determination and to prepare for meaningful participation in a due process hearing on their challenge.” *Kroot v. District of Columbia*, 800 F.Supp. 976, 982 (D.D.C. 1992). Here, Great Grandmother and Law Firm Educational Advocate attended the March 8, 2011 MDT meeting. Law Firm Educational advocate said, at the meeting, that Student could not receive special education services because Great Grandmother was in disagreement. Great Grandmother informed Mother that she had refused special education services for Student and Mother did not inform DCPS that she disagreed. Ultimately, Mother filed her request for a due process hearing, where she was represented by able counsel. Accordingly, even if a PWN had been required after the March 8, 2011 MDT meeting, I find that DCPS’ omission of the notice did not affect Mother’s primary procedural protection and, hence, did not violate her rights under the IDEA. DCPS prevails on this issue.

3. DID DCPS VIOLATE ITS OBLIGATION TO PROVIDE PARENT FULL ACCESS TO STUDENT’S EDUCATIONAL RECORDS?

Under 34 CFR § 300.501(a), the “parents of a child with a disability” must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child.⁶ On July 11, 2011, a paralegal in the office of Petitioner’s Counsel faxed a letter to SPED Coordinator requesting copies of “incident reports, IEP report cards, work portfolios, and teacher’s notes” relating to Student. However

⁶ DCPS contends that because Student had not been determined to be a child with a disability, the IDEA did not require DCPS to provide Parent access to his educational records. In my order denying, in part, DCPS’ motion to dismiss in this case, I held that although Student was not found eligible as a child with a disability at the March 8, 2011 MDT eligibility meeting, Petitioner was nonetheless entitled to access to his educational records. See Decision and Order on Motion to Dismiss, October 31, 2011. DCPS’ continued exception to this ruling was noted at the due process hearing.

SPED Coordinator denied receiving the letter and Petitioner's evidence does not establish whether it was delivered. Subsequently, in November 2011, Educational Advocate 2 visited CES and was allowed to inspect all education records relating to Student at the school. He was referred to the DCPS Central Office to obtain additional records. Educational Advocate 2 did not follow up with the Central Office. Compliance Case Manager 2 also emailed to Petitioner's Counsel the records in her possession concerning Student. Petitioner's evidence does not establish what other records, with respect to the identification, evaluation, and educational placement of Student, if any, she was not afforded the opportunity to inspect. Petitioner, therefore, fails to meet her burden of proof on this issue.

Summary

In summary, I have found that the evidence establishes that Student is eligible for special education and related services as a child with a disability, but that DCPS did not deny Student a FAPE by not identifying him as eligible for special education services prior to the commencement of this case. I have further found that DCPS was not required to give Mother Prior Written Notice, following the March 8, 2011 MDT meeting, and that Mother has not met her burden of proof to establish that DCPS failed to provide her access to Student's education records.

ORDER

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

– Within 10 school days of this determination, DCPS shall convene Student's IEP team to develop an IEP for Student in accordance with 34 CFR §§ 300.320 through 300.324.

Further ORDERED that all other relief requested by Petitioner herein is denied.

Date: January 14, 2012

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).