

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

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STUDENT HEARING OFFICE
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on behalf of,
, Student
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Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

Hearing: February 25, 2009
Decided: March 7, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This due process complaint was filed on January 26, 2009, on behalf of an year old student (the "Student") who resides in the District of Columbia and attends

Petitioner was represented by Zachary Nahass, Esq., of Tyrka & Associates, LLC, and Respondent District of Columbia Public Schools ("DCPS") was represented by Candace Sandifer, Esq., Assistant Attorney General for the District of Columbia. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations.

The complaint alleges that DCPS (1) failed to provide information about where an independent developmental visual evaluation may be obtained, and (2) failed timely to conduct and review evaluations in all areas of suspected disability, specifically an audiological evaluation found warranted at a November 11, 2008 MDT meeting. DCPS filed a response on February 6, 2009, which asserted that DCPS has not denied the Student a free appropriate public education ("FAPE") and that the Student's audiological evaluation was in the process of being conducted.

A prehearing conference ("PHC") was held on February 11, 2009, and the parent elected for the hearing to be closed. The Due Process Hearing convened on February 25, 2009. At the hearing, six documentary exhibits submitted by Petitioner (identified as -1" through 6") and one documentary exhibit submitted by DCPS (identified as "DCPS-1") were admitted into evidence without objection. In addition, two Hearing Officer Exhibits were marked and admitted.¹ Petitioner presented no witnesses, and DCPS presented one witness – Ms. Breona Harrison, Placement Specialist, Office of Special Education.

¹ "HO-1" is a copy of the MDT meeting notes of 2/19/09, and "HO-2" is a copy of a DCPS independent evaluation authorization letter dated 2/25/09.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As discussed and agreed at the prehearing conference and the outset of the due process hearing, the following issues were presented for determination:

- a. *Whether DCPS failed to provide information about where an independent developmental visual evaluation may be obtained;*
- b. *Whether DCPS failed timely to conduct and review evaluations in all areas of suspected disability, specifically an audiological evaluation as directed by the Student's MDT on 11/11/08? and*
- c. *Whether DCPS' violations resulted in a denial of FAPE or otherwise constitute substantive grounds for relief under 34 CFR 300.513?*

As relief, Petitioner requests that DCPS (i) fund an independent audiological evaluation of the Student, at market rate, (ii) within 10 days of receiving results of the independent evaluations, convene a MDT meeting to review all current evaluations, and to review and revise the Student's IEP as appropriate; and (iii) also discuss and determine any appropriate compensatory education services at the MDT meeting. *See DW-1.*

III. FINDINGS OF FACT

1. The Student is an _____ year old resident of the District of Columbia whose date of birth is _____. The Student currently attends _____; DCPS Testimony.
2. At a November 11, 2008, meeting of the Student's Multi-disciplinary Team ("MDT"), the team determined that an audiological evaluation and a developmental visual evaluation of the Student were warranted. _____-3; DCPS-1. The team also authorized Petitioner to obtain the developmental visual evaluation independently. _____-3, p. 2.
3. On November 25, 2008, Petitioner through counsel requested that DCPS provide a list of qualified evaluators to perform a developmental visual evaluation. DW-5.
4. It is undisputed that, as of the filing of the due process complaint, DCPS had not provided Petitioner any information about where an independent developmental visual evaluation could be obtained.
5. It is undisputed that, as of the filing of the due process complaint, DCPS had not performed an audiological evaluation of the Student.
6. On February 19, 2009, between the dates of the PHC and due process hearing, DCPS convened a further meeting of the Student's MDT. The meeting was held for the purpose of addressing the evaluations ordered at the 11/11/08 meeting. *See HO-1; DCPS Testimony.* At the 2/19/09 meeting, it was determined that DCPS would issue an independent evaluation letter for the audiological evaluation, and the Student's educational advocate ("EA") stated that the developmental evaluation would be completed in early March. *Id.* (Petitioner later corrected this

statement to provide that the Student's appointment is in early April. *See* Petitioner's Post-Hearing Memorandum of Law, filed Feb. 27, 2009, p.3.)²

7. On February 25, 2009, the same date as the due process hearing, DCPS through the Office of the Chancellor issued an independent evaluation authorization letter ("IEE letter") to Petitioner's counsel. The IEE letter authorized Petitioner "to obtain an independent audiological evaluation at the expense of DCPS." HO-2. As is customary with such letters, the IEE letter states that "DCPS will reimburse reasonable and documented fees for this Student's requested evaluation." *Id.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to provide required special education and related services.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

(1) *Whether DCPS failed to provide information about where an independent developmental visual evaluation may be obtained.*

3. Petitioner first claims that DCPS failed timely to provide information about where an independent developmental visual evaluation could be obtained in response to Petitioner's November 25, 2008 request. The Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

4. IDEA and its implementing regulations require DCPS "to provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained...." 34 C.F.R. §300.502(a)(2). *See also* DCMR 5-3027.2.

² The DCPS LEA Monitor also inquired at the 2/19/09 meeting if there was a need to develop a compensatory education plan due to the passage of time since the audiological evaluation was ordered 11/11/08. The Student's EA stated that she did not believe compensatory education could be determined until the results of the audiological evaluation were received. HO-1. However, the 2/19/09 meeting notes indicate that compensatory education for the delayed audiological evaluation, as well as issues with OT and PT, were not granted "due to no harm done to the [S]tudent." *Id.*, p.3.

5. In this case, there is no dispute that Petitioner requested information from DCPS as to where she could obtain a developmental visual evaluation of the Student, and there is no dispute that DCPS never provided the requested information. Accordingly, the Hearing Officer concludes that DCPS violated Section 300.502(a)(2), as well as DCMR 5-3027.2..

(2) ***Whether DCPS failed timely to conduct and review evaluations in all areas of suspected disability, specifically an audiological evaluation as determined at the 11/11/08 MDT meeting.***

6. Petitioner next claims that DCPS failed to conduct and review an audiological evaluation of the Student within a reasonable time. The Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

7. The IDEA and its implementing regulations require DCPS to evaluate children in all areas related to suspected disabilities and in a manner that is sufficiently comprehensive to identify all of a child's special education and related services needs. *See* 34 C.F.R. §300.304 (c) (4), (6). *See also* DCMR 5-3002.1 (d), (f). However, other than for initial evaluations, neither IDEA nor D.C. law establishes a timeline for completing evaluations, leaving the standard as a reasonable period of time under the circumstances of the particular case. *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254 (D.D.C. 2008).

8. In this case, the Student's MDT determined on 11/11/08 that both an audiological evaluation and a developmental visual evaluation were warranted. An audiological evaluation was found necessary to address the S/L pathologist's "major concern" that the Student's hearing aids were not working properly and "can be impacting her academic day." -3. Despite this concern, DCPS appears to have taken no steps to complete and review an audiological evaluation during the next 75 days before the due process complaint was filed, or approximately 105 days before the date of hearing.³ DCPS did not attempt to remedy the matter with an IEE authorization letter until February 25, 2009 (the day of the hearing), resulting in up to 3 ½ months of unnecessary delay, as DCPS could have authorized an independent audiological evaluation on the same date (11/11/08) that it authorized the developmental visual evaluation. By the date of this decision, nearly four months of the current school year have now elapsed without the MDT being able to judge the impact of the evaluation results on the Student's IEP.

9. The Hearing Officer concludes that DCPS' delay in conducting the audiological evaluation found warranted by the MDT nearly four months ago was unreasonable under the circumstances.⁴ Accordingly, the Hearing Officer concludes that DCPS violated its obligations under IDEA Section 300.304 (c), as well as DCMR 5-3002.1.

³ The statements in DCPS' response filed February 6, 2009, that the Student's audiological evaluation was "ordered in mid-November" and was "currently in the process of being conducted" appear to have been in error, based on the record developed at hearing.

⁴ DCPS cites the *Herbin* case for the proposition that a "four-month delay was not unreasonable for the School District to conduct Re-Evaluations." (DCPS' "Supplemental Case Law to Due Process Hearing Record," filed Feb. 27, 2009, at II.) However, the circumstances addressed in *Herbin* were quite different, where (i) reevaluations were requested by the parent only a few months after a comprehensive reevaluation had occurred, (ii) the school had to assess the need for the requested evaluations in the absence of reasons given by the parent, and (iii) the delay was not due solely to the school's lack of diligence. *See* 362 F. Supp. 254; 43 IDELR 110. As the *Herbin* court noted,

(3) ***Whether DCPS' violations resulted in a denial of FAPE or otherwise constitute substantive grounds for relief under 34 CFR 300.513.***

10. Petitioner argues that the failure to conduct timely evaluations and/or "denial of access to warranted evaluations" is a substantive, not procedural, violation of IDEA. Alternatively, Petitioner claims that even if DCPS' failures in this case are viewed as procedural, the procedural violations denied FAPE to the Student within the meaning of 34 C.F.R. §300.513. DCPS argues that no relief is appropriate in this case because its procedural errors do not affect the Student's substantive rights and do not rise to a denial of FAPE. For the reasons discussed below, the Hearing Officer agrees with Petitioner.

11. The failure to complete a warranted evaluation may, in appropriate cases, constitute a substantive deprivation of FAPE. Under the circumstances of this case, the Hearing Officer concludes that DCPS' failure to complete audiological and developmental visual evaluations that the MDT found warranted on 11/11/08 is not a mere procedural violation. *See, e.g., Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008) ("failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole intent of Congress' objectives in enacting the IDEA.").⁵

12. Alternatively, even if DCPS' failure were viewed only as a "procedural violation" under the IDEA and its implementing rules, the Hearing Officer concludes that such procedural inadequacies in this case have impeded the Student's right to a FAPE. The Student's MDT team has not had the benefit of these evaluations in assessing any appropriate revisions to her IEP for nearly four months of the current school year. Thus, DCPS' failure to respond more quickly "has certainly compromised the effectiveness of the IDEA as applied to [the Student], and it thereby constitutes a deprivation of FAPE." *Harris*, 561 F. Supp. 2d at 69. Moreover, the failure has significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student by effectively frustrating further input from the parent as to how the evaluations may affect the educational needs of the child and/or the development of appropriate programming to address those needs. *See* 20 U.S.C. §1415(f)(E)(ii); 34 C.F.R. §§300.305(a)(2), 300.324(b)(1)(ii)(C), 300.513(a)(2)(i), (ii).⁶

13. Finally, the Hearing Officer disagrees with DCPS that his authority to grant relief is limited to violations of IDEA that constitute denials of FAPE. As 34 C.F.R. §300.513(a)(3) and the U.S. Department of Education's discussion of the rules make clear, "Hearing Officers continue to have the discretion to ... make rulings on matters in addition to those concerning the

this type of decision involves a "necessarily fact-specific and discretionary determination of reasonableness by a hearing officer...." *Id.*

⁵ In contrast, the procedural violations involved in *O.O. ex rel Pabo v. District of Columbia*, 108 LRP 50102 (D.D.C. 2008), cited by DCPS, consisted of failing to convene a dispute resolution session, failing to produce transcripts of the hearing, and failing to issue a timely HOD.

⁶ For example, by the time Petitioner was able to identify an appropriate developmental visual provider on her own (without benefit of the information requested from DCPS), the first available appointment for the Student was in March or April.

provision of FAPE, such as the matters mentioned in §300.507(a)(1),” which includes matters relating to the evaluation of a child with a disability. 71 *Fed. Reg.* 46,707 (Aug. 14, 2006).

C. Relief

14. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23.

15. In addition to the above findings, Petitioner requests an order requiring DCPS to fund an audiological evaluation of the Student “at market rate,” claiming that the IEE letter’s commitment to reimburse “reasonable and documented fees” is insufficient. However, in interpreting Section 300.502, the U.S. Department of Education has reaffirmed its “longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs” and recognized that “it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents.” 71 *Fed. Reg.* 46,689 (Aug. 14, 2006). The public agency must also “provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency’s cost containment criteria.” *Id.* at 46,690. Accordingly, the Hearing Officer declines to grant the specific relief requested by Petitioner regarding reimbursement for the independent evaluations at this time.

16. Petitioner also requests an order requiring DCPS to convene an MDT meeting within 10 days of receiving the results of both the audiological and developmental visual evaluations to (a) review all current evaluations, (b) review and revise the Student’s IEP as appropriate, and (c) discuss and determine appropriate compensatory education to compensate for DCPS’ denials of FAPE. This request will be granted in part, as set forth in the Order below.⁷ The Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violations adjudicated herein.

⁷ The Hearing Officer notes that he may not determine that a student is entitled to compensatory education services, but then delegate to the IEP team the authority to reduce or terminate the award. *Reid*, 401 F. 3d at 526; *see Board of Education of Fayette County v. L.M.*, 478 F.3d 307, 317-18 (6th Cir. 2007); *Gregory-Rivas v. District of Columbia*, 108 LRP 51949 (D.D.C. 2008). However, this does not preclude the Student’s MDT – as part of reviewing and revising an IEP prospectively – from discussing and determining, as appropriate, whether any additional services are required to meet the unique needs of the student in light of any past failures or denials of FAPE. *See, e.g., Gregory-Rivas*, slip op. at 2-4. Whether or not the MDT chooses to call such revisions a “compensatory education plan” is largely irrelevant. In any event, Petitioner has not sought an award of compensatory education relief in this proceeding.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. An independent audiological evaluation and independent developmental visual evaluation of the Student shall be completed at DCPS expense, as agreed by the parties, as soon as practicable.
2. DCPS shall convene an MDT/IEP team meeting within **10 school days** of receiving the results of the foregoing independent evaluations.
3. At the above-referenced MDT/IEP team meeting, DCPS shall: (a) review all current evaluations of the Student, and (b) review and revise the student's IEP as appropriate. As part of its review of the IEP, the MDT/IEP team should discuss and determine whether any revisions and/or additional services are needed to address the Student's unique needs in light of the evaluation results as well as DCPS' delay in completing and reviewing the independent evaluations.
4. All written communications concerning scheduling of meetings should include counsel for Petitioner, Zachary Nahass, Esq., via facsimile (202-265-4264), or via email (znahass@trykalaw.com).
5. Any delay in meeting the deadline in this Order due to delays caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
6. This case shall be, and hereby is, **CLOSED**.

Dated: March 7, 2009

/s/ Bruce D. Ryan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).