

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

Petitioner is the parent of a -year-old, learning-disabled, special education student (“Student”) at a District of Columbia public elementary school. On February 17, 2009, Petitioner filed a Due Process Complaint Notice (“Complaint”) alleging that the District of Columbia Public Schools (“DCPS”) had denied the Student a free, appropriate, public education (“FAPE”) by failing to (1) perform triennial evaluations of the Student (2) evaluate the Student in all areas of suspected disability; and (3) convene a meeting of the multidisciplinary team (“MDT”) to review the reports of the Student’s evaluations. The relief Petitioner sought was an order finding that DCPS had denied the Student a FAPE and ordering DCPS to perform all necessary evaluations and convene an MDT meeting to review the evaluations when they are completed.

On March 6, 2009, counsel for DCPS filed a Response to Parent’s Administrative Due Process Complaint (“Response”).² The Response asserted that a triennial evaluation was performed for the Student. The Response further asserted that, at an April 9, 2008,³ meeting, the MDT reviewed the current and past assessment materials and determined that no additional assessments were necessary. Nonetheless, the MDT ordered an educational evaluation, the only other testing that was required. It asserted that the Student was evaluated in all areas of suspected disability. The Response further asserted that, at the April 9, 2008, meeting, Petitioner agreed that no additional testing was required. Finally, the Response asserted that a meeting was held to review the educational evaluation in 2008 and the parent was present.

Petitioner was present at the hearing. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing. A DCPS psychologist and the special education coordinator at the Student’s school testified by telephone.

² This Response was untimely but Petitioner conceded that he was not prejudiced after the original hearing date was continued and occurred eight days after the originally scheduled date.

³ The Response asserted that the meeting was held on April 9, 2009, but counsel for DCPS later acknowledged the typo and stated that the meeting was on April 9, 2008. This assertion is corroborated by the MDT meeting notes, entered into evidence as DCPS Exhibit during the due process hearing.

III. RECORD

Due Process Complaint Notice, filed February 17, 2009;
DCPS Response to Parent's Administrative Due Process Complaint Notice, filed March 6, 2009;
Letter Motion for Continuance, filed March 9, 2009;
DCPS Five-Day Disclosures, filed March 11, 2009 (Exhibits 1-6 attached);
Petitioner's Five-Day Disclosure, filed March 20, 2009 (Exhibits 1-6 attached);
Letter Motion for Continuance, filed March 23, 2009;
Order Granting Motion for Continuance, issued March 28, 2009;
Attendance Sheet, dated March 26, 2009;
Order Granting Motion for Continuance, issued April 5, 2009;
Attendance Sheet, dated April 7, 2009;
Compact Disc of Hearing conducted March 26, 2009; and
Compact Disc of Hearing conducted April 7, 2009.

IV. ISSUES PRESENTED

1. Whether DCPS denied the Student a FAPE by failing to perform triennial evaluations of the Student;
2. Whether DCPS denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability; and
3. Whether DCPS failed to convene a meeting of the MDT to review the reports of the Student's evaluations.

V. FINDINGS OF FACT

1. The Student is -year-old, -grade, learning-disabled student who attends a District of Columbia elementary school.⁴ When she was in kindergarten, the Student was evaluated and deemed eligible for special education.⁵ A DCPS psychologist conducted a psycho-educational evaluation of the Student in June 2005.⁶ The evaluation showed that the Student had a high discrepancy between ability and achievement that would normally warrant a diagnosis of learning disabled.⁷ While the evaluation indicated that the Student had normal/average cognitive abilities and an average IQ, she had significant visual perception delays and slightly below average visual-motor coordination

⁴ Testimony of Petitioner.

⁵ *Id.*

⁶ Petitioner Exhibit 6.

⁷ *Id.* at 5.

skills.⁸ The evaluation also revealed that the Student performed in the below-average range in written language.⁹

2. It could not be determined at that time if the Student actually was learning disabled because of the Student's high rate of absenteeism and chronic tardiness.¹⁰ The Student had not benefited from exposure to the kindergarten curriculum in a consistent and sequential manner.¹¹ The evaluator recommended that MDT put interventions in place and work with the Student's family to improve the Student's attendance record.¹² Once these interventions were in place, the Student was to be re-evaluated.¹³

3. The Student had to repeat kindergarten in 2005 because she was not developing age-appropriate skills.¹⁴ After kindergarten, the Student skipped first grade and placed in second grade.¹⁵

4. Petitioner was identified as learning disabled and placed in special education while in eleventh grade and is still illiterate.¹⁶ Upon meeting the Special Education Coordinator ("SEC"), who previously worked at the Student's school, Petitioner informed the SEC that she was illiterate.¹⁷

5. The Student's homeroom teacher humiliates her with references to the fact that the Student is in special education for many of her classes.¹⁸ This teacher's remarks embarrassed the Student and made her feel stigmatized about being a special education student.¹⁹ Petitioner found out about the teacher's remarks in January 2009.²⁰ In March 2009, Petitioner spoke to the principal and the school counselor about the teacher's remarks.²¹ The principal promised to speak to the teacher, but the next week when Petitioner observed the Student in her homeroom class, the teacher was still making rude remarks about the Student.²²

⁸ *Id.*; Testimony of DCPS psychologist.

⁹ Petitioner Exhibit 6 at 13.

¹⁰ *Id.*; testimony of DCPS psychologist.

¹¹ *Id.*

¹² Testimony of DCPS psychologist.

¹³ *Id.*

¹⁴ Testimony of Petitioner.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* This SEC left the Student's school before this school year and thus was not the current SEC who testified at the hearing. This SEC was never identified by name.

¹⁸ Testimony of Petitioner.

¹⁹ *Id.*; DCPS Exhibit 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

6. The Student has earned a “D” grade in most of her classes, and her marks in behavior are also unsatisfactory. One of the Student’s teachers told Petitioner that the Student’s behavior is worsening.²³

7. The Student has experienced a lot of violence in her neighborhood.²⁴ She was close to her father but he is not a steady presence in her life due to his drug habit.²⁵ The Student’s father also was violent toward her mother.²⁶

8. The Student is still not functioning on grade level.²⁷ On December 12, 2008, counsel for Petitioner sent a letter to the current SEC at the Student’s school requesting that DCPS perform another comprehensive psychological evaluation for the Student, which counsel described as a triennial evaluation.²⁸ On February 12, 2009, counsel for Petitioner sent a second letter to the SEC reiterating the request.²⁹ The requests did not include the requisite form granting consent to evaluate the Student and signed by Petitioner.³⁰ DCPS has never received a signed consent form.³¹

9. Petitioner has attended every one of the MDT meetings for the Student.³² Despite that Petitioner had been represented by counsel “for years,” she had always attended MDT meetings for the Student without being accompanied by her attorney or an educational advocate.³³

10. On April 9, 2008, Petitioner attended an MDT meeting for the Student.³⁴ The MDT consisted of Petitioner, the Student’s special education teacher, the Student’s general education teacher, and a representative of DCPS.³⁵ They informed Petitioner about the Student’s progress in school and her IEP goals. At the meeting, the SEC typed up paperwork for the Student and asked Petitioner to sign the documents.³⁶ One of those documents was a consent form for evaluations.³⁷ Neither the teacher nor the SEC explained the content of the documents to Petitioner.³⁸ They did not explain that the evaluation that Petitioner consented to that day was an educational and not a psycho-

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Petitioner Exhibit 3.

²⁹ Petitioner Exhibit 2.

³⁰ *Id.*; testimony of the current SEC.

³¹ Testimony of Petitioner, current SEC.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

educational evaluation.³⁹ Petitioner signed the forms because she trusted the school.⁴⁰ Neither the teacher nor the SEC gave the Petitioner copies of the forms she signed; they promised to send the paperwork home with the Student.⁴¹

11. A psychological evaluation, which is included in a psycho-educational evaluation, examines a child's cognitive ability.⁴² A child need not undergo a psychological evaluation every three years unless the child's IQ falls in the borderline range, i.e., it is difficult to determine whether the child should be classified as either learning disabled or mentally retarded.⁴³

12. Here, the Student has already been found to be learning disabled.⁴⁴ Her IQ is in the average range.⁴⁵ A second psychological evaluation will only reconfirm that the Student's IQ is in the average range.⁴⁶ Rather, future evaluations should examine the Student's academic progress.⁴⁷ If she has made no progress, the MDT team should examine and perhaps increase the amount of specialized instruction the Student receives on her IEP.⁴⁸

13. During the 2007-2008 school year, DCPS ordered academic testing for the triennial evaluations of the Student.⁴⁹ A Woodcock-Johnson academic assessment was conducted on March 17, 2008.⁵⁰

14. At the April 9, 2008, MDT meeting, the MDT developed an individualized educational program ("IEP") for the Student.⁵¹ The IEP classifies the Student as learning disabled and states that the Student "requires a small, structured environment to accommodate disabilities."⁵² It requires the Student to receive 18.75 hours of specialized instruction each week, and to be out of the general education setting for 58 percent of the time she is in school.⁵³

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Testimony of DCPS psychologist.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Testimony of current SEC. This SEC was not working at the Student's school during the 2007-2008 school year.

⁵⁰ DCPS Exhibit 2.

⁵¹ DCPS Exhibit 1.

⁵² *Id.*

⁵³ *Id.*

15. At the April 19, 2008, MDT meeting, the team also reviewed the current assessment data for the Student.⁵⁴ The team reviewed the 2008 Woodcock-Johnson evaluation.⁵⁵ The 2008 Woodcock Johnson found that the Student's overall level of achievement is very low (compared to other students at her age level).⁵⁶ Her performance is low average in mathematics and math calculation skills, and very low in broad reading, written language, and written expression.⁵⁷

16. After the MDT meeting, Petitioner learned that one of the forms she signed was a form by which she agreed that no further evaluations of the Student were needed. Petitioner then stopped attending MDT meetings without her attorney.⁵⁸

17. Petitioner did not receive a letter of invitation for an MDT meeting to discuss the Student in February 2009; nor was she aware that the current SEC sent her a letter of invitation.⁵⁹ She received a letter of invitation for her other child, but not for the Student.⁶⁰ She was not aware that the meeting was to be for both students.⁶¹

18. The current SEC sent letters of invitation by facsimile to counsel for Petitioner on February 3, 2009, proposing three meeting times on February 18 and February 23, 2009.⁶² On February 23, 2009, the current SEC sent a letter of invitation by facsimile to counsel proposing three meeting dates and times on March 11, and March 16, 2009.⁶³ Counsel for Petitioner never responded by phone, email, or fax to the letters of invitation.⁶⁴

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found Petitioner credible. Her testimony was largely corroborated by the witnesses for DCPS. She also was forthright about her own disabilities and appeared to earnestly desire a better education for her daughter.

This Hearing Officer also found the DCPS psychologist credible. His testimony was corroborated by the evaluation he conducted in June 2005. He provided mostly background testimony on the psycho-education evaluation and the reasons for conducting

⁵⁴ DCPS Exhibit 2.

⁵⁵ *Id.*

⁵⁶ DCPS Exhibit 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² DCPS Exhibit 6 at 1-2.

⁶³ *Id.* at 3-6

⁶⁴ Testimony of current SEC; representation of counsel for Petitioner.

this evaluation. His testimony was not contradicted by the evidence and testimony presented at the hearing.

This Hearing Officer found the current SEC credible. Her testimony was mostly corroborated by the testimony of Petitioner.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

IDEIA requires DCPS to assure a “free appropriate public education” (“FAPE”) for all disabled children. 20 U.S.C. § 1412(1). FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”⁶⁵ FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁶⁶ DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.”⁶⁷

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of

⁶⁵ 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

⁶⁶ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

⁶⁷ 34 C.F.R. § 300.101.

educational benefits.⁶⁸ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.⁶⁹

VIII. DECISION

A. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Failed to Conduct Triennial Evaluations for the Student and/or Evaluate the Student in all Areas of Suspected Disability.

Reevaluations should be conducted in a "reasonable period of time," or "without undue delay," as determined in each individual case.⁷⁰ Any child whose classroom performance appears to be negatively affected due to a disability must be evaluated in all areas of suspected disabilities.⁷¹ Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.⁷²

The testimony of the DCPS psychologist established that requiring DCPS to conduct another psychological evaluation for the Student would have produced no new data and that the only evaluation that would produce any meaningful data was an assessment of the Student's academic functioning. Petitioner presented no evidence to show that any other assessments were needed. Thus, DCPS conducted the required triennial evaluation: a Woodcock-Johnson assessment.

Moreover, Petitioner produced no evidence to show that the failure to perform a psycho-educational evaluation in any way harmed the Student. Thus, Petitioner failed to establish by a preponderance of the evidence that DCPS failed to develop an appropriate IEP.

⁶⁸ 20 U.S.C. § 1415 (f)(3)(E)(ii)

⁶⁹ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

⁷⁰ *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

⁷¹ 34 C.F.R. §300.304(c)(4).

⁷² 34 C.F.R. §300.303(b)(2).

A. Petitioner Failed to Establish by a Preponderance of the Evidence that DCPS Failed to Hold an MDT Meeting to Review the Student's Recent Evaluations.

As stated above, DCPS held an MDT meeting on April 19, 2008. At the MDT meeting, the team reviewed the current assessment data for the Student, i.e., the 2008 Woodcock-Johnson evaluation.

Before Petitioner filed the Complaint in this case, DCPS sent a letter of invitation to her counsel that proposed three meeting dates and times. Rather than respond to the invitation, counsel for Petitioner reiterated his request for a psycho-educational evaluation. Counsel for Petitioner ignored the next letter of invitation as well. Worst of all, counsel never even informed his client of the proposed dates and times for the meeting or that DCPS was attempting to schedule a meeting to discuss her child's IEP.⁷³

Counsel should not expect to prevail when he intentionally slept on his client's rights, i.e., the right to an annual meeting to review and revise the Student's IEP, and then turned around and filed a due process complaint on that very issue. Thus, Petitioner failed to prove that DCPS (a) failed to timely hold an annual MDT meeting and/or (2) invite Petitioner to that meeting.

ORDER

Upon consideration of Petitioner's Due Process Hearing Notice, the Response thereto, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 17th day of April hereby:

ORDERED that this Complaint is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that this Order is effective immediately.

/s/

Frances Raskin
Hearing Officer

⁷³ Testimony of Petitioner.

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Copies to:

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