

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

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

PETITIONER, on behalf of
[CHILD],¹

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: April 20, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: April 12, 2011

Student Hearing Office, Room 2004
Washington, D.C.

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), 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 Due Process Complaint, Parent alleges that District of Columbia Public Schools ("DCPS") denied Child a free appropriate public education ("FAPE") by failing to conduct an initial special education evaluation when requested by Parent in April 2009. In addition, Parent alleges that DCPS violated the IDEA by not

¹ Personal identification information is provided in Appendix A.

providing Parent's attorney access to Child's educational records. Parent seeks an order requiring DCPS to complete an initial eligibility evaluation of Child, and, if Child is found eligible for special education services, that Child's IEP team develop an appropriate Individualized Education Program ("IEP") and make an appropriate educational placement.

The student, an AGE child, is a resident of the District of Columbia. As of the hearing date, she had not yet been evaluated for special education eligibility. The Parent's Due Process Complaint, filed on February 22, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on February 24, 2011. The parties met for a resolution session on March 9, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. On March 15, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on April 12, 2011 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 Parent was represented by counsel and testified by telephone. Respondent DCPS was represented by counsel. The Parent called ADVOCATE as witness. DCPS called as witnesses TEACHER, SPED COORDINATOR, and CHILD FIND COORDINATOR. Parent's Exhibits P-1 through P-4 and P-6 through P-7 were admitted without objection. Exhibit P-5 was admitted over DCPS's objection. DCPS's Exhibits R-1 through R-11 were admitted into evidence without objection.

At the conclusion of the Parent's case, DCPS made a motion for a directed finding against the Parent on the grounds that Parent's original concerns underlying her 2009 request for

an eligibility evaluation “went away” in the months before the hearing. I denied the motion because reasonable inference could be drawn from Parent’s evidence that the Child had been denied FAPE. *See, e.g., Poirier v. Plymouth*, 374 Mass. 206, 212 (1978), (Whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.)

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

1. Whether DCPS denied Child a FAPE by failing to conduct an initial special education eligibility evaluation when requested by Parent in 2009; and
2. Whether DCPS violated the IDEA by denying Parent’s representative the opportunity to inspect and review Child’s education records.

Parent seeks an order to require DCPS to complete an eligibility evaluation of Child and to determine Child’s eligibility for special education services. At the hearing, counsel for Parent expressly disclaimed a request for compensatory education.

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. Child is an age resident of the District of Columbia. Testimony of Mother
2. For the last three years, Child has been taught by Teacher in a Montessori program at ELEMENTARY SCHOOL. For the 2010-2011 school year she is enrolled in GRADE. Testimony of Teacher

3. On April 9, 2009, after regular school hours, Advocate faxed a letter (the "April 9, 2009 Request"), dated April 7, 2009, to Elementary School principal to request that Child be evaluated for special education eligibility. Specifically, Advocate requested "a full educational battery, including social work and clinical psychological assessments." Advocate stated in the request that Child had been exhibiting serious emotional/behavioral and academic problems for some time. Advocate attached a DCPS form, signed by Parent, agreeing to an initial evaluation of Child. Exhibit P-6

4. Also on April 9, 2009, Advocate faxed a separate letter (dated April 6, 2009) to Elementary School principal requesting the opportunity to inspect and review all of Child's education records. Exhibit P-7

5. On May 13, 2009, the Elementary School registrar wrote Advocate forwarding "the attendance for [Child]" and informing him that Child's teacher was on jury duty and the other information would be completed upon the teacher's return. Exhibit P-5 Advocate did not receive a follow-up letter from DCPS. Testimony of Advocate

6. DCPS never conducted the evaluations requested by Advocate. Until Parent filed her complaint for due process on February 22, 2011, neither Parent nor Advocate took any action to get DCPS to act on Parent's 2009 evaluation request. Testimony of Advocate

7. On March 9, 2011, at the resolution meeting in this case, DCPS offered to fund an Independent Educational Evaluation ("IEE") of Child. Advocate declined the offer because of his concern that accepting an IEE, not incorporated into a settlement agreement, could affect an attorney's fee award. DCPS issued the authorization for the IEE anyway. Testimony of SPED Coordinator, Exhibits R-5, R-6 The Parent was not aware that DCPS had offered to pay for an IEE. Testimony of Parent

8. In March 2011, Child was referred to DCPS DIAGNOSTIC CENTER for a developmental screening. When Child Find Coordinator contacted Parent to schedule the evaluation, Parent requested a delay because Parent's mother has just died in a traffic accident. Child Find Coordinator agreed to delay the screening and evaluation process until Parent was ready. Testimony of Child Find Coordinator, Exhibits R-10, R-11

9. Prior to March 18, 2011, Parent made an appointment with SPED Coordinator to examine Child's education records on March 18, 2011 at 3:00 p.m. Testimony of SPED Coordinator, Exhibit R-8 On that date, at around 11:00 a.m., Advocate arrived at Elementary School, without an appointment, and sought to examine Child's educational records. Testimony of SPED Coordinator, Testimony of Advocate The records were in the custody of SPED Coordinator, who was off site for the morning. Testimony of SPED Coordinator SPED Coordinator spoke by telephone with Advocate and offered to make the records available at 3:00 p.m. that day. Advocate declined. Id. SPED Coordinator offered to reschedule a date and time for Parent or Advocate to review the records. Exhibit R-8 Neither Parent nor Advocate responded to the offer. Testimony of SPED Coordinator

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

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Parent 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).

1. DID DCPS DENY CHILD A FAPE BY FAILING TO CONDUCT INITIAL EVALUATION?

On or about April 9, 2009, Parent, through her Advocate, made a written request for an initial evaluation of Child. DCPS failed to evaluate the Child until after the Parent filed her complaint for due process on February 22, 2011.² The Parent contends that DCPS's failure to evaluate Child was a denial of FAPE. The IDEA provides:

(A) A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability . . .

(B) . . . either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) . . . [The] initial evaluation shall consist of procedures — (I) to determine whether a child is a child with a disability . . . within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child.

20 U.S.C. § 1414(a)(1). The timeframe established by the District of Columbia for DCPS to assess or evaluate a student who may have a disability and who may require special education services is “within 120 days from the date that the student was referred for an evaluation or assessment.” D.C. Code Ann. § 38-2561.02(a) (2001).

DCPS and other LEAs have an affirmative duty to identify, locate and evaluate a potentially disabled child. The failure to do so constitutes a denial of FAPE. *Integrated Design and Electronics v. McKinley*, 570 F.Supp. 2d 28, 30 (D.D.C. 2008) (citations omitted). I find that DCPS's failure to conduct the evaluation of Child within 120 days of Parent's 2009 request

² The record does not establish why DCPS did not act on Parent's 2009 evaluation request or why Parent took no further action for almost two years.

violated the IDEA and District of Columbia law. The failure to timely conduct an initial evaluation is a procedural violation of the IDEA. *See, e.g., Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233, 44 IDELR 127 (D.C.Cir. 2004). An IDEA claim is viable only if the procedural violation affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). As of the hearing date, the Child had not yet been evaluated and whether she is a "child with a disability" as defined by the IDEA³ was not yet established. If Child should be determined to be a child with a disability, then Child's substantive rights would have been violated by DCPS's failure to provide special education and related services from the time when an eligibility determination should have been made in 2009. However, whether Child's substantive rights were violated cannot be determined on the current record.⁴

As a remedy for DCPS's failure to evaluate, Parent seeks an order for DCPS to complete its initial eligibility evaluation for Child (undertaken after this case was filed) and to convene Child's multi-disciplinary team ("MDT") to make an eligibility determination. The hearing evidence establishes that since Parent filed her due process complaint on February 22, 2011, DCPS has moved expeditiously to schedule an initial eligibility evaluation and has also authorized an IEE for Child. Due to a family emergency in March 2011, Parent requested DCPS to defer Child's evaluation and DCPS complied. There is no evidence that since this case was filed, DCPS has in any way opposed or delayed conducting the initial evaluation. Therefore,

³ See 34 CFR § 300.8.

⁴ At the hearing, counsel for Petitioner expressly disclaimed, for purposes of this hearing, any request for compensatory education, the presumptive remedy if Child were denied FAPE by DCPS's failure to evaluate.

there is no need for an order for DCPS to complete the evaluation and such an order would be inappropriate.

2. DID DCPS DENY PARENT'S ADVOCATE THE OPPORTUNITY TO INSPECT AND REVIEW CHILD'S EDUCATION RECORDS?

The Parent contends that DCPS failed to provide her Advocate access to Child's school records when Advocate made a request in 2009. On or about April 6, 2009, Parent's Advocate made a written request to Elementary School principal to inspect and review all of Child's educational records. On May 13, 2009 the registrar at Elementary School wrote Advocate that she was faxing "the attendance" for Child and that the other information would be completed when Child's teacher returned from jury duty. Advocate testified that no follow up letter was received. The IDEA requires that an LEA must permit parents to inspect and review any educational records relating to their Child. *See* 34 CFR § 300.613. However, an LEA is not normally required to provide copies of the records. *Cf.* 34 CFR § 300.613(b)(2) (Parent's right to copies "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records.") No evidence was offered that Parent or her Advocate sought additional information from the registrar or from Child's teacher after receipt of the registrar's May 13, 2009 letter. Nor was there evidence that Parent was denied the right to examine Child's educational records at Elementary School.

At the hearing, Advocate testified that he appeared at Elementary School, without an appointment, on the morning of March 18, 2011 and was unable to examine Child's records. However, Parent had made an appointment with SPED Coordinator to examine the records at 3:00 p.m. that day. SPED Coordinator, who had custody of the records, was off-site when Advocate arrived. DCPS cannot be faulted for not having the educational records available when Advocate arrived hours before the scheduled appointment. Neither Parent nor Advocate

availed themselves of SPED Coordinator's offer to reschedule the appointment to examine Child's records. I find therefore that Parent has not established that, either in 2009 or 2011, she was denied her right to inspect and review Child's educational records.

SUMMARY

In summary, I find that DCPS violated the IDEA and District of Columbia law when it failed to conduct an initial eligibility evaluation of Child when requested by Parent in April 2009. However, no remedy is available for this procedural violation because the record does not establish that the violation affected Child's substantive rights and because Parent disclaimed a request for compensatory education. I further find that the evidence does not establish that Parent was denied her right to inspect and review Child's educational records.

ORDER

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

All relief requested by the Parent in her Due Process Complaint is denied. This case is dismissed without prejudice to any future claim for an award of compensatory education for DCPS's failure to conduct an eligibility evaluation of Child in 2009.

Date: April 20, 2011

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).