

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹
through the Parent,

Petitioner,

v.

Respondent.

Date Issued: April 13, 2011

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Date: 04/07/11 Room: 2009

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the father of grade Student who attended a public elementary school in the District of Columbia, filed a due process complaint notice on 02/09/11, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner complained that the District of Columbia Public Schools ("DCPS") had denied Student a FAPE by failing to evaluate Student within 120 days of the initial referral for evaluation. Petitioner alleged that he had sent a written request for evaluation to DCPS on 08/24/10 and that as of the date of the due process hearing, the initial evaluation had not been completed. Petitioner alleged that the reason he asked that Student be evaluated for special education services was because of her inability to maintain focus on schoolwork, her difficulty with writing and pronouncing words, her inability to sit still and his perception that Student was not making any progress in academics from year to year. For relief, Petitioner requested that DCPS fund several independent evaluations and convene an appropriate Multidisciplinary Team ("MDT") to review the completed evaluations, determine Student's eligibility for special education services and develop an IEP, as appropriate.

A stipulated fact led to the easy conclusion that Petitioner's request for an initial evaluation had been properly sent to the principal of the elementary school that Student was attending. However, DCPS argued that even if DCPS had committed a procedural violation of

¹ Personal identification information is provided in Appendix A.

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the IDEA by not completing a timely initial evaluation, Petitioner failed to demonstrate any harm by the violation because Student's academic performance was not below standard or grade level.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and D.C. Code 38-2561.02(a).

Procedural History

This Hearing Officer was assigned to the case on 02/10/11. A resolution meeting took place on 02/28/11 at which time an agreement was not reached. In the complaint, Petitioner waived the resolution meeting. By electronic correspondence (e-mail) dated 03/02/11, DCPS agreed to proceed to a due process hearing. Therefore, the 30-day resolution period ended on 03/02/11, the 45-day timeline to issue a final decision began on 03/03/11, and the final decision is due by 04/16/11. 34 C.F.R. 300.510, 300.515.

The due process hearing was a closed hearing that began and concluded on 04/07/11. Petitioner was represented by Olekanma Ekekewe-Kauffman, Esq. and DCPS was represented by Daniel McCall, Esq.

Petitioner presented himself as his only witness. DCPS presented a DCPS compliance case manager as its only witness. Both witnesses appeared in person.

The Rescheduling Order issued in this case on 03/17/11 stated that objections to the disclosures of the opposing party were to be made in the form of a pleading to be filed simultaneously with the Student Hearing Officer and the Hearing Officer by close of business on 04/05/11. Neither party filed a formal objection in the form of a pleading. At the due process hearing, DCPS argued that it had stated its objections to Petitioner's disclosures via an e-mail dated 03/31/11. The Hearing Officer ruled that absent the timely filing of a formal pleading, DCPS' objections would not be considered on the record. Thus, the disclosures of both parties, subject to corrections made to Petitioner's disclosures, were admitted into evidence without objection.

Petitioner's disclosures dated 03/24/11, contained a witness list and referenced three documents as disclosures. The disclosures actually contained two documents; i.e., Petitioner's disclosure CM-1, Request for Psychological Evaluation dated 08/24/10 and Petitioner's disclosure CM-2, Classroom Observation dated 10/14/10. These two documents, properly labeled in the disclosures, along with the witness list, were admitted into evidence without objection.

DCPS' disclosures dated 03/31/11, contained a witness list and Exhibits DCPS-1 through DCPS-8, and were admitted into evidence without objection.

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The parties stipulated to the following facts:

Stipulation #1 – The facsimile number for _____ is (202) 724-5606.

Stipulation #2 – The due process complaint was filed on 02/09/11.

Both parties waived opening statements, but presented closing statements.

At the due process hearing, the following issues were withdrawn and dismissed by the Hearing Officer without prejudice, as the claims were not ripe for litigation:

(1) Whether Student was denied a FAPE when DCPS failed to provide Student with an Individualized Education Program (“IEP”). This claim was premature. Without completed evaluations, eligibility could not be determined, and without a determination of eligibility, DCPS would not have been required to develop an IEP for Student.

(2) Whether Student was denied a FAPE when DCPS failed to provide Student with appropriate special education services. Similarly, this claim was premature. Without an IEP, DCPS would not have been required to provide Student with special education services.

(3) Whether Student was denied a FAPE when DCPS failed to afford Petitioner the opportunity to participate in a placement meeting. This claim was also premature. Without Student having an IEP, DCPS would not be required to include Petitioner in a meeting to determine placement for Student.

Pursuant to the Prehearing Order, Petitioner’s claim for compensatory education for DCPS’ failure to timely conduct an initial evaluation was dismissed without prejudice.

The sole issue to be determined in this Hearing Officer Determination is:

Whether DCPS failed to timely conduct an initial evaluation of Student to determine her eligibility for special education services, and if so, whether this failure resulted in the denial of a FAPE.

For relief, Petitioner seeks DCPS funding for an independent comprehensive psychological evaluation (to include the clinical component and social history), an occupational therapy evaluation and a speech-language evaluation; an IEP meeting within 10 days of DCPS’ receipt of the last of the independent evaluations to review the evaluations and determine Student’s eligibility for special education services; and DCPS to develop an IEP as appropriate and discuss an appropriate placement where the IEP may be implemented.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:

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#1. Student lives in the District of Columbia. Student attended _____ grade at _____ during the 2009-2010 school year and 4th grade at _____ during the 2010-2011 school year.²

#2. Since the beginning of the 2009-2010 school year, Petitioner voiced concerns to DCPS personnel about Student's inability to stay focused on schoolwork, her inability to sit still, her inability to print or write cursive, her problems pronouncing words, and his perception that Student was not making any progress with academics from year to year. In November 2009, Petitioner specifically approached the principal of the school with a verbal request that Student be evaluated to determine her academic level of functioning and her need for special education services.³

#3. On 08/24/10, the principal at _____ received a written request from Petitioner to conduct a complete psychological evaluation of Student and to meet to develop an evaluation plan so that Student's need for special education services could be determined.⁴

#4. Since 08/24/10, DCPS did not contact Petitioner to discuss Petitioner's concerns about Student's educational progress or set up a plan to evaluate Student.⁵ The due process complaint was filed on 02/09/11,⁶ and as of that date, DCPS had not taken any steps to begin an initial evaluation to determine Student's eligibility for special education services.⁷ The first time DCPS took an affirmative action to begin an initial evaluation was on 03/02/11 when DCPS attempted to obtain Petitioner's written consent to evaluate Student.⁸

#5. As of 09/30/10, Student's school progress report indicated that Student's academic progress was average for that time of year. As of 12/03/10, Student's school progress report indicated that Student's academic class work was above average, her reading and math test scores were average, and Student had difficulty with controlling talking at inappropriate times.⁹

#6. As of 01/21/11, Student's report card for the 2010-2011 school year indicated that Student had basic or proficient grade level skills/concepts.¹⁰

Conclusions of Law

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

² Testimony of Petitioner.

³ *Id.*

⁴ Stipulation #1: 1.

⁵ Testimony of Petitioner.

⁶ Stipulation #2.

⁷ *Id.*

⁸ DCPS-1.

⁹ DCPS-4.

¹⁰ DCPS-2.

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“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

The sole issue to be determined is whether DCPS failed to timely conduct an initial evaluation of Student to determine her eligibility for special education services, and if so, whether this failure resulted in the denial of a FAPE.

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. See 34 C.F.R. 300.1. To that end, DCPS must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111.

In furtherance of its Child Find obligations under 34 C.F.R. 300.111, DCPS must conduct a full and individual initial evaluation upon the request of a parent to determine if the child is a child with a disability. 34 C.F.R. 300.301. This initial evaluation must be conducted by DCPS within 120 days from the date that the student was referred for an evaluation or assessment. 34 C.F.R. 300.301(c), D.C. Code 38-2561.02(a).

In this case, it is undisputed that on 08/24/10, Petitioner complied with the statutory initial evaluation request procedures by making a formal written request for an initial evaluation to the appropriate entity, i. e., the principal of the school that Student was attending.¹¹ D.C. Code 5 E-3004.1(a), E-3004.1(b) states that the referral shall be made in writing and submitted by the parent to the building principal of his or her home school if the child attends a D.C. public school. Thus, DCPS was required to conduct an initial evaluation of Student no later than on or about 12/24/10, and the wording of the statute does not suggest that the timeframe is negotiable.

DCPS' Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). Receipt of a referral for an initial evaluation triggers certain procedural safeguards or requirements for DCPS to follow. Among them is the requirement that DCPS provide Petitioner with notice about the identification and evaluation process, the right of Petitioner to receive notice of the school's refusal of a request for pre-placement evaluation, the requirement that DCPS take steps to obtain informed written consent from Petitioner in order to begin the initial evaluation process, and the requirement that DCPS review existing evaluation data that includes input from Petitioner and

¹¹ Finding #3.

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classroom-based observations. 34 C.F.R. 300.300, 300.305, 300.503. In *Long*, the school district's failure to complete all necessary evaluations resulted in a substantive denial of FAPE which resulted in harm to the disabled child. The court in *Long* determined that in the absence of necessary and appropriate evaluations the district could not develop a program that was tailored to the student's unique needs and reasonably calculated to enable the child to receive educational benefits.

There was no evidence in this record that DCPS took any of the procedural steps required under the IDEA until 03/05/11 when DCPS sent to Petitioner a consent to evaluate form,¹² and this initial affirmative action by DCPS occurred approximately 60 days after DCPS was required to complete the initial evaluation process. Thus, the Hearing Officer determines that DCPS' failure to comply with its statutory obligation to evaluate Student within 120 days of the initial referral was a procedural violation of the IDEA.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. See 34 C.F.R. 300.513(a). In the pending case, the evaluation data was needed to determine whether or not Petitioner's concerns about his child's academic problems would translate into the need for special education services.

In *Scottsdale Unified School District*, 38 IDELR 204 (2003), the failure of the district school system to notify the parent about her rights concerning the identification and evaluation process resulted in a denial of a FAPE because it seriously infringed the parent's opportunity to participate in the IEP formulation decision. As well, in *Scottsdale*, the school district's failure to comply with the process and timeframes for identifying the student as a child with a suspected disability and making a timely decision concerning whether or not to evaluate him, seriously infringed the parent's opportunity to participate in the process, because it inordinately delayed it, and resulted in a denial of FAPE.

Similarly, in the pending case, the Hearing Officer determines that DCPS' failure to notify Petitioner of his procedural rights, DCPS' failure to meet with Petitioner to begin data collection, and DCPS' failure to take any step to begin the initial evaluation process until 60 days after the statutory 120 day period had expired and after Petitioner had filed a due process complaint, was a clear infringement on Petitioner's right to significantly participate in the decision-making process regarding the provision of a FAPE to his child. This failure also impeded the child's right to a FAPE because in the absence of the evaluations, a program that is tailored to Student's unique needs and reasonably calculated to enable her to receive educational benefits cannot be developed, if one is warranted.¹³

¹² Finding #4.

¹³ See *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011).

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Whether or not Student's report card and progress reports evidenced a need of special education¹⁴ is irrelevant to the determination of whether or not Student was denied a FAPE because DCPS is obligated to make sure that a FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. 34 C.F.R. 300.101(a), 300.101(c). And to that end, DCPS is required to evaluate Student to determine whether or not services are needed.

Petitioner met his burden of proof that DCPS denied Student a FAPE.

DCPS is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 34 C.F.R. 300.304(b)(1). Additionally, DCPS must assess the child in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4). Therefore, Petitioner is entitled to the relief requested; i.e., an independent comprehensive psychological evaluation (to include a clinical component and a social history), an occupational therapy evaluation and a speech-language evaluation.

ORDER

(1) No later than ten (10) business days from the date of this Order, DCPS shall provide to Petitioner, with a copy to Petitioner's Attorney, a letter authorizing funding for an independent comprehensive psychological evaluation (to include a clinical component and a social history), an occupational therapy evaluation and a speech-language evaluation;

(2) No later than 15 school days after receipt of the last of the independent evaluations, DCPS shall conduct written reviews of each independent evaluation and provide a copy to Petitioner's Attorney at least two business days prior to any meeting where the results of the independent evaluations will be discussed; and

(3) No later than 10 school days after DCPS' receipt of the last of the independent evaluations, DCPS shall make efforts to schedule with Petitioner and Petitioner's Attorney, a mutually agreeable date to convene an appropriate MDT to review the independent evaluations and determine Student's eligibility for special education services, and DCPS shall take steps to timely develop an appropriate IEP and discuss and determine an appropriate placement, if warranted.

IT IS SO ORDERED.

¹⁴ Findings #5, #6.

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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).

Date: April 13, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (U.S. mail)

Petitioner's Attorney: Olekanma Ekekwe-Kauffman, Esq. (electronically)

DCPS' Attorney: Daniel McCall, Esq. (electronically)

DCPS (electronically)

SHO (electronically)