

DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

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OFFICE OF COMPLIANCE AND REVIEW

<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: August 4, 2009</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On June 19, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to locate, identify and evaluate the Student for special education needs, and failing to provide appropriate services.

The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and ordered to complete all necessary evaluations convene a multidisciplinary team meeting to determine eligibility and issue a prior notice of placement to an appropriate educational placement agreeable to the Petitioner.

On June 24, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

After various attempts the undersigned Hearing Officer held a pre-hearing conference call with Counsel for both parties for the above reference matter on July 10, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent alleged that it had received a request to evaluate on April 9, 2009 and the 120 days timeline for evaluating the Student have not expired. Furthermore, the Respondent alleged the Student would not cooperate with the evaluator. The Respondent was ordered to file a written Response by July 10, 2009.

On July 10, 2009 the DCPS filed a Response to the Complaint, reasserting the oral argument made earlier that day.

A July 13, 2009 Order required the Petitioner to demonstrate at a hearing when and how the Respondent became aware that the Student could be a child in need of special education services, and what services was the Student denied. The Petitioner was also to demonstrate how the alleged failures have caused the Student or Petitioner harm. The Respondent was ordered to show when it received a request to evaluate; how the Student failed to cooperate and that the Student was not denied a FAPE.

A hearing was held on July 29, 2009, the Petitioner presented a disclosure letter dated July 21, 2009 to which nine documents were attached, labeled P-1 through 9 and which listed two witnesses. One witness testified. The Respondent presented a disclosure letter dated July 22, 2009 identifying three witnesses and to which no document was attached and one witness testified.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal

Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”).

II. ISSUE(S)

1. Did the Respondent fail to locate, identify and evaluate the Student for special education needs in a timely manner?
2. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was enrolled in a DCPS during the 2008-2009 school year.²

2. The Student was suspended in various occasions for behavior problems. The Petitioner requested in April 2009 the Student be evaluated for special education need; two weeks later the Petitioner received a call to request her consent to evaluate and she signed a consent form. The Evaluator called the Petitioner to inform her that attempts were made to evaluate the Student and he left the room.³

3. The Student’s report card shows F’s and D grades for the advisory ending on March 20, 2009. The Student was promoted to the next grade.⁴

4. The consent to evaluate was received April 21, 2009, the referral was passed to the School Psychologist, the Psychologist attempted to evaluate the Student unsuccessfully because the Student left the room. The Student was suspended from school on various occasions and then the end of the school year arrived without the evaluation of the Student being performed. There was no further communication between the parties to coordinate evaluations for the Student.⁵

IV. CONCLUSIONS OF LAW

Motion to Dismiss

The Respondent argued that the Petitioner claims of “child find⁶” are moot, as the child has been found, and no other claim is ripe until eligibility decision has been made. Furthermore the Respondent argues the protections that the Petitioner sought, i.e. “Stay Put”, protection under

² P#1, June 19, 2009, Due Process Complaint

³ Testimony of the Special Education Coordinator.

⁴ Testimony of the Mother and P #12, Report card dated March 20, 2009.

⁵ Testimony of the Special Education Coordinator and testimony of the Mother.

⁶ LEAs have an affirmative duty to identify, locate and evaluate a potentially disabled child. *See: Hawkins ex rel. D.C. v. District of Columbia*, 593 F. Supp. 2d 108, 113-14 (D.D.C. 2008).

the procedural safeguards is moot and there is no relief available under 34 C.F.R 300.534 to the Petitioner.

Where the challenged conduct ceases or is alleviated, and there is no reasonable expectation that the wrong will be repeated," a case is rendered moot because it has "become [] impossible for the court to grant any effectual relief whatever to [the] prevailing party, and any opinion as to the legality of the challenged action would be advisory." *Green v. Dist. of Columbia*, Civ. No. 05-550, 2006 WL 1193866, at *9 (D.D.C. May 2, 2006) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (internal quotation marks omitted) .

The Hearing Officer considered the Motion to Dismiss but is not persuaded that the claim is moot or that any evidence presented by the Respondent was sufficient to cause the dismissal of the Complaint. The Petitioner has a right to a determination on the non compliance with the IDEIA obligation to identify, locate and evaluate (child find) and a determination on the whether the Student was denied a FAPE are pending, both issues which are ripe for a decision by the Hearing Officer.

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the 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 a FAPE.

The Respondent met its legal obligation under the IDEIA. Here is why.

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.⁷

The Supreme Court defined FAPE: The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of the IDEA and permit the child to benefit from the instruction. See: *Bd. of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690 (1982),

Time Frame for Initial Evaluations

⁷ IDEIA § 1400(d)(1)(A).regulations at 34 C.F.R. § 300.17

The Petitioner alleged the Respondent failed to locate, identify and evaluate the Student for special education needs in a timely manner.

The IDEIA⁸ requires that the Respondent have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. Similarly 5 D.C.M.R. § 3000.1 (2003) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services.

According to D.C. Code § 38-2501, initial evaluations are to be completed "within 120 days from the date that the student was *referred* for an evaluation." Emphasis added. While D.C. Mun. Regs. Tit. 5 § 3004.1 (b) (1) and (c), states that a referral for evaluations can be made *by* the parent, in writing, to the school principal. *See also Kruvant v. District of Columbia, CA No. 03-1402 (JDB) (D.D.C. 2005).*

Before proceeding with the evaluation, the LEA is required to provide notice to and obtain consent from the parent of the child. If the student is classified as eligible for special education then the child should be placed in "an appropriate program of special education services" within that 120 day period⁹ The LEA is relieved of its duty to complete this process within the prescribed time frame where:

- (1) The parent of a child repeatedly fails or refuses to produce the child for evaluation; or
- (2) A child enrolls in a school of another public agency after the relevant time frame ... has begun, and prior to a determination by the child's previous agency as to whether the child is a child with a disability.

The parent testified that she personally requested school personnel in April 2009 for testing. For the evaluation process to begin, the parent must consent to the evaluation by Respondent. The evidence was the consent to evaluate was signed during mid-April, 2009. Within two weeks steps were taken by the Respondent to evaluate the Student. The eligibility process was delayed for a number of reasons: the Student did not cooperate with an Evaluator, the Student was suspended and then classes end for the school year 2008-2009. The evidence also was that the Petitioner was informed the Student would not cooperate and she made no efforts to assist in the evaluation process. The parent was not able to present any evidence beyond her testimony that DCPS had knowledge prior to April 2009 of their obligation to evaluate for special education.

⁸ 20 U.S.C. 1412(a)(3), and 34C.F.R. § 300.111

⁹ 34 C.F.R. §§300.301, 300.304.

In the present case the Hearing Officer finds that the Respondent presented credible evidence that efforts were made to evaluate the Student.

Local law allows the Respondent up to 120 days to complete the initial evaluation process. Therefore the Respondent's obligation to perform the evaluations in conformity with the regulation expires on or about August 10, 2009. Moreover the parties acknowledged at the beginning of the hearing that the Respondent agreed to evaluate and a date was set for the evaluation to be performed at end of July 2009.

While there is evidence that the Student has behavioral problems the evidence does not establish a nexus between the alleged failure to evaluate the Student and a resulting educational harm.

V. SUMMARY OF DECISION

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

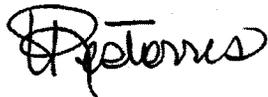
VI. ORDER

ORDERED, the Compliant is Dismissed.

This order resolves all matters presented in the Petitioner's June 19, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



Wanda Iris Resto - Hearing Officer

Date: August 4, 2009