

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

STUDENT,¹ by and through his Parent,

Petitioners,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: September 3, 2009

Decided: September 11, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARINGS OFFICE
2009 SEP 11 PM 3:47

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The Due Process Complaint in this matter was filed July 29, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint alleges that Respondent District of Columbia Public Schools ("DCPS") denied the Student a free appropriate public education ("FAPE") by (a) failing timely to determine eligibility for special education, and (b) failing to conduct and review evaluations in all areas of suspected disability. Specifically, Parent-Petitioner alleges that she requested DCPS to evaluate the Student on or about March 31, 2009, but that DCPS has never taken any steps to do so. When the complaint was filed, more than 120 days had elapsed since the date of the request.

On August 3, 2009, DCPS agreed to waive resolution and requested that the case proceed to a due process hearing on the merits. The 45-day timeline was therefore adjusted to begin 8/3/09.

On August 20, 2009, DCPS filed a late Response, which asserted that the Student has not been denied FAPE and requested that Petitioners' request for relief be denied. The Response further stated that DCPS had no record of the parent making any request for evaluation, but that in response to the complaint DCPS had issued an authorization letter for an independent comprehensive psychological evaluation and an independent speech/language evaluation ("IEE letter"). As a result, DCPS contends that any alleged violation of IDEA or denial of FAPE is not ripe and cannot be determined at this time.

¹ Personally identifiable information is attached as an Appendix to this decision and must be removed prior to public distribution.

On August 21, 2009, a Prehearing Conference ("PHC") was held to discuss the pleadings and requested relief, which appeared to raise primarily legal rather than factual issues. The Due Process Hearing was scheduled for September 3, 2009. However, at the PHC, Petitioners' counsel stated that he intended to file a motion for summary adjudication by August 26, and it was agreed that DCPS would file any response to the motion by August 31, 2009. A Prehearing Order was issued August 25 which included this agreement and directive.

Petitioners filed their motion for summary adjudication on August 26, and filed their five-day disclosures on or about August 27, 2009. The motion was accompanied by a memorandum of law and documentary exhibits consisting of correspondence between Petitioners' counsel and DCPS.² On August 31, 2009, DCPS informed the Hearing Officer in writing that it would not be filing a response to Petitioners' motion.

On September 2, 2009, prior to the due process hearing, the Hearing Officer informed the parties in writing as follows: ***"In light of Petitioners' motion for summary adjudication and DCPS' decision not to file a written response, which is taken as a concession of the motion under SOP Section 401 C. 5, the DPH scheduled for 9/3/09 9:00 am will NOT be required. The Hearing Officer will issue a written decision setting forth findings of fact, analysis of the law, and final order granting the motion."***³ No objection has been raised regarding this procedure.

This ruling constitutes the Hearing Officer's decision and determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Sections 800.1 (6) and 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioners, along with the pleadings filed by both parties and the unopposed motion for summary adjudication, has resulted in the following issue being presented for determination:

Whether DCPS has denied FAPE to the Student by failing to conduct and review evaluations in all areas of suspected disability, and determine eligibility, within the time period required by law.

The relief sought by Petitioners consists of: (1) a finding that DCPS has denied FAPE to the Student through its actions above; (2) funding of independent evaluations; and (3) an order directing DCPS to convene an MDT meeting within 15 days of receiving the evaluations to determine eligibility, develop an appropriate IEP, and determine an appropriate placement.

It was recognized that DCPS' issuance of the IEE letter, subsequent to the filing of the complaint, may moot or otherwise affect certain portions of the requested relief (*i.e.*, funding of independent evaluations).

² *Petitioners' Memorandum of Law and Motion for Adjudication on the Pleadings ("Motion")*, filed Aug. 26, 2009.

³ *Email Correspondence from Hearing Officer*, dated 9/2/09 (emphasis added).

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia who is currently attending a DCPS Elementary School. She enrolled at the school at the start of the 2008-2009 school year. *See Complaint, Facts ¶1-2. (These facts are not disputed.)*

2. On or about April 1, 2009, Petitioners, through counsel, submitted a written request to DCPS for the Student to be evaluated for special education and related services. Petitioners requested a comprehensive evaluation, including but not limited to (1) psycho-educational, (2) clinical psychological, (3) speech and language, (4) social history, (5) formal classroom observation, and (6) vision and hearing screenings. The request included a signed parental consent for DCPS to evaluate the Student. *Motion, Exhibit 1.*

3. Petitioners' April 1, 2009 written request was delivered, via facsimile, to the DCPS school attended by the Student. *See Motion, Exhibit 1, p. 7* (fax confirmation to [202] 645-3758); *id., Exhibit 2, p. 3* (DCPS school directory identifying the school's fax number).

4. Petitioners' April 1, 2009 written request was also delivered to the DCPS Office of Special Education and the Office of General Counsel. *See Motion, Exhibit 1, pp. 8-9* (fax confirmations to [202]442-5518 (OSE) and [202]442-5098 (OGC)).

5. DCPS took no steps to complete any evaluations of the Student or to determine her eligibility for specialized instruction and related services between April 1, 2009 and July 29, 2009, the date that Petitioners filed the instant complaint. *See DCPS' Response, Aug. 20, 2009, at 1* ("in response to the instant complaint, DCPS has issued an authorization letter for an independent evaluation to be conducted on the student."). *(This fact is not disputed.)*⁴

6. In August 2009, subsequent to the filing of the complaint, DCPS issued an IEE letter authorizing an independent comprehensive psychological evaluation and an independent speech/language evaluation of the Student, at DCPS expense. *See DCPS' Response, Aug. 20, 2009, at 1. (This fact is not disputed.)*

7. Other than recently issuing the IEE letter, DCPS has taken no steps to complete evaluations of the Student and determine her eligibility for specialized instruction and related services to date. *(This fact is not disputed.)*

8. As of the date of the scheduled due process hearing, DCPS had not completed its evaluation of the Student, had not convened an MDT meeting to review evaluation results, and had not determined the Student's eligibility for special education and related services. *(These facts are not disputed.)*

⁴ Petitioners filed an earlier due process complaint on June 12, 2009, also alleging that DCPS had failed timely to conduct and review evaluations of the Student. *Motion, Exhibit 3.* Following a pre-hearing conference in that case (2009-0877), Petitioners withdrew their June 12, 2009 complaint, and the Hearing Officer issued an Order closing that case on July 5, 2009. *Motion, Exhibit 4.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary Adjudication Standards

1. Based on the pleadings, the undisputed facts, and the argument and evidence contained in their motion, Petitioners request that the Hearing Officer grant summary adjudication on their claims and order the relief requested in the complaint.

2. Under ordinary civil procedure rules, summary judgment is appropriate when the motion papers, affidavits, and other submitted evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whether a fact is "material" is determined in light of the applicable substantive law invoked by the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In light of the applicable substantive law, a "genuine issue of material fact" is a fact that is determinative of a claim or defense, and therefore, affects the outcome of the case. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248. The moving party bears the initial burden of demonstrating that no genuine issues of material fact are in dispute. Upon such a showing, the burden then shifts to the non-moving party to demonstrate that genuine issues of material fact are in dispute. The court is precluded from weighing evidence or finding disputed facts and must draw all inferences and resolve all doubts in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

3. Similar standards should apply in IDEA cases, where "the hearing is not governed by formal rules of procedure or evidence." *SOP, Section 700.4*. The Hearing Officer must "attempt to ensure that all parties have an adequate opportunity to present their cases" and that "the hearing will proceed in an orderly fashion." *Id.* Pre-hearing motions for summary adjudication are deemed authorized, where appropriate, under the *SOP*. Moreover, Section 401(C) (5) requires that "[r]esponses contesting facts shall so state and supply supporting affidavits, declarations or documents as appropriate." *SOP, Section 401 (C) (5)*. *See also* 71 Fed. Reg. 46,706-07 (Aug. 14, 2006).

4. Because DCPS elected not to file any response to the motion, let alone a factually supported response, its failure to respond "may be taken as [a] concession of the motion" and "may result in granting of the motion...." *SOP, Section 401 (C) (5)*.

5. In any event, the Hearing Officer concludes that Petitioners have met the standards for summary adjudication in that the motion, undisputed facts, and other submitted evidence demonstrate that no genuine issue of material fact exists and that Petitioners are entitled to judgment as a matter of law.

B. Issue/Alleged Denial of FAPE

6. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see 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). For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof.

7. Under its “child find” mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). D.C. law further requires that DCPS “shall assess or evaluate a student, who may have a disability and who may require special education services, within 120 days from the date that the student was referred for an evaluation or assessment.” D.C. Code §38-2561.02 (a).

8. DCPS “must conduct a full and individual initial evaluation” within the District of Columbia’s time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); DCMR §5-3005.2. In conducting such evaluation, DCPS must (*inter alia*) ensure that the child “is assessed in all areas related to the suspected disability,” and that the evaluation is “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child [is] classified.” 34 C.F.R. §300.304 (c) (4), (6).

9. DCPS must not only complete and review the evaluations, but must also determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within the prescribed time line. *See Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); *see also* DCMR §§ 5-3002, 5-3013.

10. In this case, it is undisputed that DCPS failed to take any action to evaluate the Student in response to the parent’s request within the statutory period. It was only *after* a second complaint had been filed by Petitioners – and *after* the 120-day evaluation period had already elapsed – that DCPS acted at all, by issuing a letter authorizing independent evaluations that must still be completed and reviewed. DCPS must then determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement. Over *five months* have now passed since the parents first requested that the Student be evaluated for special education.

11. DCPS is therefore in violation of D.C. Code § 38-2561.02 (a) and DCPS’ obligations under IDEA. Contrary to DCPS’ contention, this violation is ripe and can be determined at this time.

12. Moreover, the failure to complete timely initial evaluations has been held to constitute a substantive deprivation of FAPE.⁵ Here, as in *Harris*, the Hearing Officer concludes that “[t]he intransigence of DCPS as exhibited in its failure to respond quickly to [parent’s] simple request has certainly compromised the effectiveness of the IDEA as applied to [the Student], and it thereby constitutes a deprivation of FAPE.” *Harris v. District of Columbia*, 561 F. Supp. 2d at 69.

⁵ *See, e.g., IDEA Public Charter School, supra* (failure to perform child-find duty and comply with DC’s 120-day timeline constitutes denial of FAPE); *Hawkins, supra* (same); *Abramson, supra* (noting that DCPS is obligated to “offer FAPE by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement”). *See also Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008) (failure to act on request for independent evaluation is not a “mere procedural inadequacy”; “such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA”)

13. Finally, even assuming *arguendo* that DCPS' failure to complete the eligibility process in a timely manner could be characterized as a mere "procedural violation," the Hearing Officer concludes that such procedural inadequacy has affected the Student's substantive rights in this case by (i) impeding the child's right to a FAPE, and (ii) significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. See 34 C.F.R. §300.513(a) (2); see also 71 Fed. Reg. 46,707 (Aug. 14, 2006) ("hearing officers also may find that a child did not receive FAPE based on the specific procedural inadequacies set out in §300.513(a)(2)"). The violation will continue to have these effects until the Student's eligibility is finally determined.

C. Appropriate Relief

13. The IDEA authorizes district courts and hearing officers to order "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 v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

14. In this case, the Hearing Officer has exercised his discretion to order appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) and denial(s) of FAPE adjudicated herein. The appropriate relief is set forth in the Order below.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, including the finding that DCPS did not timely conduct and review evaluations of the Student and determine her eligibility as required under the IDEA, it is hereby ordered:

1. DCPS shall reimburse reasonable and documented fees incurred by Petitioners for an **independent comprehensive psychological evaluation** and an **independent speech/language evaluation** of the Student, which have been authorized by DCPS.
2. Within **15 days** of receiving the results of both evaluations, DCPS shall convene a **meeting of the Student's MDT team** for the following purposes:
 - a) to review the independent comprehensive psychological and speech/language evaluations;
 - b) to determine the Student's eligibility for specialized instruction and related services;
 - c) if determined eligible, to develop an individualized education program ("IEP"), and to discuss and determine an appropriate placement; and
 - d) to issue a Prior to Action Notice that identifies the actions being proposed or refused by DCPS and the basis for those decisions.
3. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Zachary Nahass, Esq., via facsimile (202-742-2098), or via email (znahass@jebllaw.biz).

4. Any delay in meeting the deadlines in this Order caused by Petitioners or Petitioners' representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: September 11, 2009



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 District of Columbia 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).