

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],¹

Date Issued: October 20, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 OCT 20 PM 4:05

HEARING OFFICER DETERMINATION

I. BACKGROUND

The Complaint in this matter was filed with the Student Hearing Office (SHO) on September 6, 2011.

A prehearing notice was sent September 7, 2011, and the Respondent was ordered to “provide to the Petitioner, through counsel, a list of all types and locations of education records for the Student collected, maintained, or used by the Respondent with its response to the complaint.” This was not done. The order was repeated in a prehearing order issued October 4, 2011, and the order was complied with. A resolution meeting was held on September 16, 2011, and did not result in any agreements. A response to the complaint was filed on September 20, 2011. A prehearing conference was convened on Monday,

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

September 26, 2011, at 2:00 p.m. Only the Respondent's Counsel participated. Respondent's Counsel moved for dismissal based on Petitioner's Counsel failing to prosecute the matter. The Petitioner was given the opportunity to show cause why the case should not be dismissed. The Petitioner was able to do so and the Respondent's motion was denied. A second prehearing was convened on Tuesday, October 4, 2011, and a prehearing order was issued on that date.

During the prehearing conference on October 4, 2011, the Petitioner was ordered to permit the Student to enroll in his neighborhood school as it was alleged that the Respondent refused to let the Student enroll because proper paperwork had not been filed. The Respondent moved to vacate this order on October 7, 2011, asserting the Student was enrolled at another high school in the District. The Petitioner filed a reply to this motion, opposing it, on October 12, 2011. The motion was discussed as a preliminary matter at the due process hearing and the motion was granted because it was agreed that the Student was, in fact, enrolled in school.

The hearing was convened and held on October 18, 2011,

Neither party to the hearing showed, only their counsel. Only the Petitioner's Counsel was authorized to fully handle the case as Respondent's Counsel lacked authority to settle the matter. The Petitioner's Counsel advised the Independent Hearing Officer (IHO) that the Petitioner was no longer seeking a determination that the Student is eligible for special education and related services, but rather only a team meeting to review and make an eligibility determination based on the independent education evaluation (IEE) that had been conducted for the Student. Respondent's Counsel advised that the Respondent could hold such a meeting and that she could not resolve the case because she was not provided authority to do so. Respondent's Counsel was directed to get an agency representative with such authority on the phone so that litigation would not have to continue. Counsel attempted to do so and was

unsuccessful. Respondent, despite the ultimate conclusion in this case, unreasonably protracted litigation because it did not comply with the prehearing order to have an agency representative present at the hearing whom could settle the matter or, alternatively, provide its counsel with authority to settle the matter with an agreement to convene a meeting to make an eligibility determination.

At the conclusion of the Petitioner's case, the Respondent moved for directed verdict (more accurately a motion on partial findings) because the evidence Petitioner presented did not support her claim. Following a brief discussion, this IHO granted the Respondent's motion and advised that it would be followed with a written order. This Hearing Officer Determination (HOD) is the result. The due date for this HOD is November 20, 2011. This HOD is issued on October 20, 2011.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it did not evaluate the Student within 120 days of a referral for an evaluation by the Petitioner on December 17, 2010?

The substantive requested relief at the time of hearing is a meeting to discuss an IEE and make an eligibility determination.

The Petitioner failed to show a referral was made on December 17, 2010, and was not able to show precisely when the referral was made. Assuming the initial evaluation of the Student was not completed within the required 120 days, the evidence does not show the Student's right to a free appropriate public education (FAPE) was impeded, that the Petitioner's right to be involved in the decision-making process concerning the provision of FAPE to the Student was significantly impeded, or that the Student suffered a denial of educational benefit.

IV. EVIDENCE

In support of its motion for dismissal prior to the presentation of cases the Respondent put on two witnesses:

1. Alton West, DCPS Investigator/Compliance Case Manager (A.W.)
2. Special Education Coordinator,

One witness testified at the hearing for the Petitioner: Renee Elzie Watts, Office Manager for Petitioner's Counsel (R.E.)

The parties were required to provide trial briefs to show "what documents will show or prove and what witnesses will testify about" at the hearing. The parties were informed that:

All disclosed documents will be entered into the record prior to the presentation of cases unless no trial brief has been provided describing the purpose of each document to meeting the elements of the party's case or if the opposing party objects to a document. Documents that are not entered into the record prior to the presentation of cases may be offered for inclusion in the record as part of the presentation of a case.

Petitioner's Counsel did not provide any description of the purpose of the Petitioner's ten disclosed documents and so was directed to offer them as part of the presentation of the

Petitioner's case. The following three of the Petitioner's ten documents were admitted into the record:²

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	June 7, 2011	Faxed letter from Price to Principal/Special Education Coordinator, Fax Log
P 6	December 17, 2010	Faxed letter from Price to Principal/Special Education Coordinator, Consent to Evaluate
P 7	April 15, 2011	Faxed letter from Price to Principal/Special Education Coordinator, Fax Log

Four labeled exhibits were disclosed by the Respondent with the requisite explanation of their purpose and all were admitted into evidence. The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	September 16, 2011	[Student] Resolution Meeting Notes
R 2	October 7, 2011	Attendance Summary
R 3	October 7, 2011	Transcript, Letter of Understanding
R 4	[Undated]	Archived Attendance History

V. 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:

1. The Petitioner, through Counsel, attempted to refer the Student for an initial evaluation for special education eligibility on December 17, 2010.³ The referral was only faxed and it was faxed to an incorrect number.⁴
2. The Petitioner, through Counsel, attempted to make a second referral on April 15, 2011, again via facsimile.⁵ The referral letter was written with the incorrect fax number which was

² P 5 was offered and objected to by Respondent. It was not accepted because it was an email from the Petitioner's Counsel and the witness had no knowledge of it or its contents.

³ P 6.

⁴ P 6, P 4, Testimony (T) of R.E.

⁵ P 7.

crossed out and a different number added.⁶ The facsimile went through to the new number, but it is unclear who received the facsimile.⁷

3. On June 7, 2011, a third referral as well as copies of two assessment reports were attempted to be faxed to the two schools the Student attended during the 2010-2011 school year.⁸ One fax number was the same incorrect number used previously and no pages were transmitted.⁹ The other fax number resulted in a successful transmission of 21 pages, but it is not known who received the facsimile.¹⁰
4. The Respondent did not receive the independently provided educational evaluations (IEEs) from the Petitioner by the time the resolution meeting in this case was held.¹¹
5. The Respondent will hold an eligibility meeting now that it has the IEE assessment reports.¹²

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008);

⁶ P 7.

⁷ P 7, T of R.E.

⁸ T of R.E., P 4, R 4.

⁹ P 4.

¹⁰ T of R.E., P 4.

¹¹ R 1.

¹² T of A.W, T of D.W.

Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. An initial evaluation of a student must be completed within 120 days of a referral for such evaluation. *See* DC ST § 38-2561.02(a).
3. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

4. 34 C.F.R. § 300.513(a) provides that:

[a] determination of whether a child received FAPE must be based on substantive grounds.

(2) 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.

5. The Petitioner was not able to show what the sequence of events for the referral of the Student in this case was. No referral was sent or received on December 17, 2010, as evidenced by the fax number on the letter which later fax logs show does not accept faxes. The April 15, 2011 letter went through to someone, but no evidence of to whom is in the record and so it cannot be concluded that this referral was the trigger. Likewise, the June 7, 2011 referral went to one of two numbers, and again it is not established to whom the fax number belongs. The Petitioner did obtain some IEEs, as evidenced by the Respondent's request for same at the resolution meeting. The record is not clear as to whether these were obtained by the Petitioner at her own expense or at public expense. It is also not clear

whether the purportedly sent assessment reports noted in the June 7, 2011, letter were the IEEs the Respondent referred to at the resolution meeting. The Petitioner attempted to request the same five assessments in December, April and June. Assuming that a referral was made at some point and the initial evaluation was not completed within 120 days as required by District of Columbia law, there is no evidence that the Student's right to a FAPE was impeded (it has not yet been determined the Student is entitled to a FAPE under IDEA), that the Petitioner's opportunity to be involved in the decision-making process has been significantly impeded (the Respondent sought IEE data from her at the resolution meeting), or that the Student has been deprived of educational benefit (the evidence shows the Student fails to attend school, which may be a reason the Petitioner has concerns about his academic performance.) The Petitioner declined to present evidence demonstrating that, as she alleged in her complaint, the Student is a child with a specific learning disability.

VII. DECISION

The Respondent prevails because the Petitioner has not shown when the 120 day evaluation timeline began and has not shown that even if there was a delay in completing the initial evaluation that the Student's right to FAPE has been impeded, that the Petitioner's opportunity to participate in the decision-making process concerning the provision of FAPE to the Student has been significantly impeded, or that the Student has suffered a deprivation of educational benefit.

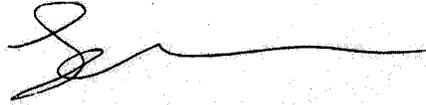
VIII. ORDER

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

1. The complaint is dismissed with prejudice.¹³

IT IS SO ORDERED.

Date: October 20, 2011



Independent Hearing Officer

¹³ The dismissal of this complaint does not relieve the Respondent of its obligation to convene an eligibility meeting and make an eligibility determination within 120 days of referral, whenever the referral was made.

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 USC §1415(i).