

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
January 29, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2015-0370
v.)	
)	Date Issued: January 29, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

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 BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on November 16, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On November 24, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on December 1, 2015. The parties did not reach a full agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on December 17, 2015, and 45-day period concludes on January 30, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on November 13, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by December 31, 2015 and that the DPH would be held on January 7,

¹ Personal identification information is provided in Appendix A.

2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on December 11, 2015.

The DPH was held on January 7, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL] and DCPS was represented by [RESPONDENT’S COUNSEL A] and [RESPONDENT’S COUNSEL B].

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-14 were admitted without objection. Respondent’s exhibits R-8, R-22, R-23, R-30, R-31, R-32, R-33, R-34 were admitted without objection. Respondent’s exhibits R-1 through R-7, R-9 through R-21, and R-24 through R-29 were admitted over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Former Attorney
- (c) Educational Advocate

Respondent called the following witnesses at the DPH:

- (a) Special Education Coordinator
- (b) Location Coordinator
- (c) Compliance Case Manager

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues, as modified during the DPH,² were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to adequately evaluate Student, including failing to evaluate Student at Parent’s request, failure to perform triennial evaluations and/or failure to evaluate Student in all areas of suspected disability from June 5, 2015 through the present time.
- (b) Whether DCPS denied Student a FAPE by failing to provide an appropriate placement for Student from June 5, 2015 through the present time.

² At the start of the DPH, Petitioner withdrew with prejudice issue (a) as listed in the PHO – “Whether DCPS denied Student a FAPE by failing to comply with the December 3, 2013 HOD,” and issue (c) as listed in the PHO – “Whether DCPS denied Student a FAPE by failing to hold annual reviews and revise Student’s IEP from June 2014 through the present time.” Additionally, Petitioner narrowed the applicable time period for issues (b) and (d). Respondent objected due to the late notice of the changes.

RELIEF REQUESTED³

Petitioner requested the following relief:⁴

- (a) an Order that DCPS fund an independent functional behavioral assessment and an independent assistive technology evaluation;
- (b) an Order that DCPS convene an MDT meeting to review all evaluations and develop an IEP to include placement/location of services;
- (c) an Order that DCPS immediately place and fund at Nonpublic School.

FINDINGS OF FACT

1. Student is [AGE] years old and resides with his mother (“Petitioner”/”Parent”) in Washington, D.C.
2. Student was determined eligible for special education and related services at least of August 4, 2011, with the disability classification Autism Spectrum Disorder/Autism.⁵
3. For various reasons, including related to Student’s health, Parent’s safety and other concerns regarding the educational setting DCPS proposed for Student, and legal challenges Parent was pursuing, Student has not attended school since approximately fall 2012.⁶
4. Student received a neuropsychological evaluation in or around November 2010 and in or around April 2012; an assistive technology evaluation in or around January 2011; an adaptive physical education evaluation in or around March 2012; a behavioral assessment in or around April 2013; and a developmental vision evaluation report in or around June 2013.⁷
5. Student’s most recent IEP is from December 13, 2013. The IEP was not able to include present levels of performance for Student, because Student has not attended school since fall 2012.⁸ The IEP calls for Student to receive 22 hours per week of specialized instruction outside the general education setting, 30 minutes per week of adapted physical education outside the general education setting, 30 minutes per week of specialized instruction inside the general education setting, 4 hours per month of speech-language pathology outside the general education setting, 240 minutes per month of occupational therapy outside the general education setting, 30 minutes per day of recreation outside the general education setting, use of a Tech Talk augmentative communication device, extended school year services, and a number of other classroom aids and services.⁹

³ The PHO reflected an additional request for relief – “an Order that DCPS fund a clinical psychological evaluation of Student, as well as a speech and language evaluation and occupational therapy evaluation.”

⁴ During the DPH, Petitioner withdrew with prejudice certain of the requests for relief reflected in the PHO, including the requests for an independent comprehensive psychological evaluation and independent occupational therapy evaluation, the request that all independent evaluations be funded at market rate, and the request for compensatory education.

⁵ R-8-2.

⁶ Testimony of Parent; R-4-57; R-8-4; R-17-1.

⁷ P-2; P-3; P-4; P-5; P-6; P-7; P-8.

⁸ R-8.

⁹ R-8.

6. On December 5, 2013, a previous hearing officer issued an HOD (“December 5, 2013 HOD”) finding, among other things, that DCPS did not deny Student a FAPE in not selecting a nonpublic special education day school as Student’s educational setting in conjunction with his June 11, 2013 IEP (a different previous hearing officer had made a similar finding as to the 2011-2012 and 2012-2013 school years). Certain forms of relief ordered in the December 5, 2013 HOD were conditioned on Petitioner enrolling Student in City School (a DCPS school), and Petitioner appealed the HOD.¹⁰

7. Including through Compliance Case Manager, DCPS made numerous attempts to comply with the December 5, 2013 HOD, including various efforts at outreach to Parent. Petitioner opted not to participate in DCPS’ efforts to comply with the HOD during her appeal process.¹¹

8. On February 24, 2014, in response to an inquiry from DCPS regarding whether Student would be returning to a DCPS school so that it could complete the evaluations ordered by the December 5, 2013 HOD, Petitioner’s previous legal representative (not connected to the instant action, as counsel or as a witness) indicated in writing to DCPS that “As for the HOD and [Student’s] future with DCPS, [o]nce all federal court actions have been exhausted, my client will decide what her position is regarding DCPS . . . There is no need for further communication between us until that time.”¹² Petitioner’s legal representative was authorized to communicate with DCPS on her behalf.¹³

9. On or around March 5, 2014, DCPS provided Petitioner an initial case closure letter, indicating that it would soon be closing out the process of complying with the December 5, 2013 HOD if Petitioner did not enroll Student in school.¹⁴ On April 7, 2014, DCPS provided Petitioner a final case closure letter, closing the process of complying with the December 5, 2013 HOD because Petitioner had not enrolled Student in school.¹⁵ Both letters listed Compliance Case Manager as Petitioner’s point of contact for further assistance.

10. Petitioner did not follow up with Compliance Case Manager when she was ready to reenroll Student in school.¹⁶

11. As of the 2015-2016 school year, Student had aged out of City School. Student’s home school for the 2015-2016 school year is Area School. Petitioner did not attempt to enroll Student in Area High School, and Student has never attended Area High School.

12. On or around September 9, 2015, Petitioner through Former Attorney provided a letter to District High School requesting that DCPS conduct “initial evaluations” to determine if

¹⁰ R-4; R-5; R-6; R-15.

¹¹ R-6.

¹² R-15-1.

¹³ Testimony of Parent.

¹⁴ R-16-2.

¹⁵ R-18-2.

¹⁶ Testimony of Parent; testimony of Compliance Case Manager.

Student were eligible for special education and related services, and attaching a June 11, 2013 IEP, with Student's name and date of birth redacted from the IEP copy.¹⁷ Parent was not seeking to have Student attend District High School or any other DCPS school; however, she desired DCPS to find a placement for Student.¹⁸

13. On September 9, 2015, Special Education Coordinator informed Former Attorney that District High School was not Student's home school that she would not be able to make a placement decision for Student, and that District High School's autism program was full. On September 9, 2015, Special Education Coordinator referred Former Attorney to the school district wide autism coordinator by carbon copying him on the electronic mail correspondence with Former Attorney.¹⁹

14. On November 2, 2015 (regarding a DPC filed on or around October 22, 2015) and December 1, 2015 (regarding the instant DPC, alleging the same or substantially the same allegations as the October 22, 2015 DPC) the parties convened resolution session meetings, during which DCPS agreed among other things to: (1) fund an interim placement at a nonpublic school of Parent's choice, through a date certain or until the DPH, whichever came earlier; (2) fund independent assessments (a comprehensive psychological, assistive technology occupational therapy, and functional behavior assessment); (3) convene an IEP meeting within a certain number of days of Parent providing DCPS all independent assessment reports; (4) provide a location of services within a certain number of days of Student's new IEP being completed.²⁰

15. At least as of December 1, 2015 Parent had engaged with Nonpublic School regarding the possibility of Student attending Nonpublic School. At least as of December 1, 2015, DCPS also offered Parent the option of allowing Student to attend District High School.²¹

16. On or around December 23, 2015, DCPS issued the formal written authorization for the independent comprehensive psychological, occupational therapy and assistive technology evaluations.²²

17. In mid-December 2015, DCPS sent out a number of referral packets to nonpublic schools for Student. On or around January 4, 2016, DCPS sent an email to Petitioner and her counsel requesting their preferred contact information to set up intake interviews for Student with various nonpublic schools. As of the DPH, DCPS had not received a response to this request.²³

¹⁷ R-22; R-23.

¹⁸ Testimony of Parent.

¹⁹ R-22-1 through R-22-3.

²⁰ R-24; R-25.

²¹ R-25-2.

²² R-30.

²³ Testimony of Location Coordinator; stipulation of the parties.

18. Student's least restrictive environment ("LRE") is indicated on his most recent IEP, which is from December 13, 2013. Implementation of the IEP is a nonpublic separate day school, which at this time is an appropriate location of services.²⁴

CONCLUSIONS OF LAW

"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*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 Student'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. 34 C.F.R. 300.513(a).

(a) Whether DCPS denied Student a FAPE by failing to adequately evaluate Student, including failing to evaluate Student at Parent's request, failure to perform triennial evaluations, and/or failure to evaluate Student in all areas of suspected disability from June 5, 2015²⁵ through the present time.

Each of the two issues as Petitioner frames them is premised on an assertion that Petitioner provided a letter to DCPS on or around June 5, 2015, requesting that DCPS evaluate Student for eligibility for special education and related services. The evidence at the DPH, however, was clear that while the letter Petitioner ultimately provided to DCPS bears the date June 5, 2015, Petitioner did not in fact provide the letter to DCPS on that date. Petitioner testified that she hand delivered to District High School the letter dated June 5, 2015 requesting that Student be evaluated at some point in the middle of June 2015. The evidence does not establish by a preponderance of the evidence, however, that delivery of the letter was effectuated by mid-June 2015. Petitioner was not certain during her testimony of a number of key details, such as the precise date she delivered the letter, whether or not school was in session that day (she testified that students were in the building, but that she was not sure whether it was a school day), and the names of the people she encountered in the office. Petitioner testified that due to a lack of interest office staff demonstrated in assisting her, she ultimately placed the letter on the

²⁴ Stipulation of the parties.

²⁵ Petitioner argues that facts preceding June 5, 2015 (the starting date for the remaining issues in the case) are irrelevant. However, some facts prior to June 5, 2015 are relevant, as the specifics of the LEA's obligations to Student and Parent turn in part on Student's eligibility status and needs at the time Petitioner returned to DCPS for Student's evaluation and placement. This HOD considers facts prior to June 5, 2015 to the extent necessary to decide the issues presented.

counter and walked out of the building. Petitioner nor any of her representatives followed up on the letter until Former Attorney communicated with Special Education Coordinator about it on or around September 9, 2015. Petitioner bears the burden of proving the manner and timing of her request for evaluation. Without any electronic or paper confirmation to the contrary, the earliest date the record clearly establishes for the evaluation request is September 9, 2015, particularly because the Hearing Officer found to be credible Special Education Coordinator's testimony regarding the procedures District High School uses as a matter of course when receiving evaluation requests. Special Education Coordinator's testimony that September 9, 2015 was the first time District High School became aware of Student, or of Parent's desire have Student evaluated, was more specific, less equivocal, and more credible than Petitioner's testimony regarding the date the request letter was delivered.

Petitioner's evaluation request letter requested an "initial evaluation." Though Student had previously been determined eligible, a request for an initial evaluation was proper, because Parent had effectively revoked her consent for the LEA to provide special education and related services to Student through the February 24, 2014 correspondence from her previous counsel. DCPS' March 5, 2014 and April 7, 2014 case closure letters to Parent were effectively a prior written notice that it was discontinuing services in accordance with Parent's wishes. "Once a parent authorized to do so revokes consent, the LEA must provide prior written notice in accordance with 34 C.F.R. §300.503, cease providing the services, and treat a subsequent evaluation request by [the] parent as a request for an initial evaluation." *Letter to Cox*, 54 IDELR 60 (OSEP 2009); 34 C.F.R. §300.9(c) Additionally, an LEA is not obligated to provide special education services, including triennial evaluations, to a student when a parent has opted out of special education services, such as by keeping the child out of school for an extended period of time and not making the child available for evaluations. *Letter to Harris*, 20 IDELR 1225 (OSEP 1993). A parent is fully empowered and within their right to decide whether or not to allow their child to participate in special education services.²⁶ Student had not attended any school setting for approximately three years and his most recent IEP was from December 13, 2013.

In the District of Columbia, an LEA must complete initial evaluations within 120 days of a parent's request, which in this instance would have been by approximately January 7, 2016. DCPS agreed to authorize an independent comprehensive psychological, assistive technology occupational therapy and functional behavior assessment on November 2, 2015; had issued independent evaluation authorizations to Petitioner by December 23, 2015 for the comprehensive psychological, occupational therapy and assistive technology evaluations; and had also offered the nonpublic placement of Parent's choice as an interim placement for Student on November 2, 2015. DCPS took the appropriate steps prior to January 7, 2015.²⁷ Petitioner did not meet the burden of proof on this issue.

²⁶"Federal rules . . . do not establish or eliminate any right of a parent to refuse to allow the child to participate in special education activities when the parent's decision is that the child should not participate." *Letter to Wierda*, 213 IDELR 148 (OSEP 1988).

²⁷ Had Petitioner's request actually been a request for a reevaluation rather than an initial evaluation, the Hearing Officer would nonetheless have concluded that the timeline was reasonable in this instance, for reasons discussed with respect to Issues (a) and (b).

(b) Whether DCPS denied Student a FAPE by failing to provide an appropriate placement for Student from June 5, 2015 through the present time.

The December 5, 2013 HOD ordered that Student be evaluated in a particular DCPS school, under the presumption that Student would be attending that school. By the time DCPS received the evaluation request on September 9, 2015, Student had aged out of that school. It was incumbent upon DCPS to inform Parent what school to take Student to so that he could be evaluated. However, given Parent's concerns about Student returning to any DCPS school, the length of time he had been away from school, and Student's unique needs and the lack of updated knowledge DCPS had regarding him, it was prudent for DCPS to reconvene Student's IEP team before selecting a school for him to attend. On November 2, 2015 DCPS offered to place Student in an interim nonpublic placement of Parent's choice for purposes of having Student evaluated in an educational setting, and it provided Parent authorizations for independent evaluations on December 23, 2015.²⁸ By mid-December, DCPS began sending application packets to nonpublic schools for Student.

Given that DCPS did not receive Petitioner's evaluation request until September 9, 2015, the somewhat opaque nature of Petitioner's evaluation request,²⁹ Petitioner's discomfort with sending Student to any DCPS school, the fact that Student had not been in any educational setting for a considerable length of time, and the importance of DCPS convening Student's IEP team prior to selecting a school for Student to be evaluated in and receiving evaluation data before finalizing an IEP and educational setting for Student, the timeline on which DCPS operated does not rise to the level of a denial of FAPE. When it comes to a student's education, time is of the essence. The record is void to sparse concerning any communications between the parties between September 9, 2015 and November 2, 2015. To the extent that there was any undue delay, the record does not establish that the LEA was primarily responsible for it. *See Hawkins v. District of Columbia*, 692 F. Supp. 2d 81 (2010). Petitioner did not meet the burden of proof on this issue.

ORDER

As no denial of FAPE is found, all relief Petitioners requested in the complaint is **DENIED**, and the DPC is dismissed with prejudice.

²⁸ Petitioner did not accept the offer for an interim nonpublic placement. Her concern about the potential for Student being uprooted from the nonpublic school after a relatively short time period is understandable. However, it would be important for the LEA to have current data on which to base a permanent placement decision, and the December 5, 2013 HOD had indicated that Student needed to be evaluated in an educational setting.

²⁹ Petitioner made the request for evaluations to a school other than Student's assigned school for the 2015-2016 school year, and to a school that had never known Student. Petitioner did not reach out to Compliance Case Manager, the designated point of contact within DCPS regarding Student's needs, and who had a clear understanding of Student's situation. Petitioner also provided an IEP to District High School that was not Student's most recent IEP and, more significantly, had some of Student's key identifying information such as his name and date of birth redacted. The record does not indicate that Petitioner provided any further background information regarding Student with the request, but rather left it to DCPS to piece the situation together.

2015-0370
Hearing Officer Determination

IT IS SO ORDERED.

Date: January 29, 2016

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney: Carolyn Houck, Esq. (electronically)

DCPS' Attorney: Tanya Chor, Esq. and Steven Rubenstein, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).