

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, N.E., 3rd Floor
Washington, DC 20002

PETITIONERS, on behalf of)	Date Issued: January 24, 2019
STUDENT, ¹)	
)	
Petitioners,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2018-0303
)	
DISTRICT OF COLUMBIA)	Hearing Date: January 11, 2019
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 112
Respondents.)	Washington, D.C.
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on November 21, 2018, named District of Columbia Public Schools (DCPS) as respondent. The undersigned hearing officer was appointed on November 26, 2018. Although a resolution meeting was scheduled for this case, the meeting was twice postponed when the Petitioners or DCPS were not able to attend. In the end, no resolution meeting was held. On November 30, 2018, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. My final decision is due by February 4, 2019.

¹ Personal identification information is provided in Appendix A.

The due process hearing was convened before this impartial hearing officer on January 11, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Both parents appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Both parents testified and they called, as additional witnesses, EDUCATIONAL ADVOCATE and INDEPENDENT PSYCHOLOGIST. DCPS called as witnesses SCHOOL PSYCHOLOGIST and LEA REPRESENTATIVE. Petitioners' Exhibits P-1 through P-20 and DCPS' Exhibits R-1 through R-13 were admitted into evidence without objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the November 30, 2018 Prehearing Order, as subsequently pared by Petitioners' Counsel prior to the hearing:

- A. Whether DCPS has denied Student a FAPE since the beginning of School Year 2016-2017 by failing to conduct an initial eligibility evaluation of Student and
- B. Whether DCPS denied Student a FAPE since the 2011-2012 school year by failing to provide the parent IDEA-mandated prior written notices and notices of procedural safeguards when it refused the parents' request to evaluate Student for special education eligibility.

For relief, the parents request that DCPS be ordered to:

- Fund or reimburse the parents for an independent Woodcock Johnson assessment of Student, which the parents arranged;
- Review the independent psychological evaluation attached to the Due Process Complaint and the Woodcock Johnson assessment and to provide a written Review Report to the parents' counsel within 10 school days of receiving the reports;
- Convene a multidisciplinary team (MDT) meeting within a date certain to review the psychological and Woodcock-Johnson evaluations and develop an IEP for Student. At the meeting, DCPS will be fully prepared to discuss Student's school avoidance issue and whether an interim placement is appropriate;
- Conduct a comprehensive Functional Behavioral Assessment of Student (not a Level 1 screener) and
- Conduct Speech/Language and Occupational Therapy evaluations of Student and convene a second MDT meeting following the completion of these valuations.

In addition, the parents request that the hearing officer craft and order an appropriate compensatory education plan to compensate Student for the denials of FAPE alleged in the complaint or at the request of the parents, reserve compensatory education until Student is fully and comprehensively evaluated.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the argument of counsel, this hearing officer's Findings of Fact are as follows:

1. Student resides with the parents in the District of Columbia. Exhibit P-10.
2. Student has been enrolled in CITY SCHOOL, a DCPS public school since the 2016-2017 school year. Student is now in GRADE. Testimony of Father.
3. Student was determined eligible for special education by DCPS in 2009 as a student with a Developmental Delay. Exhibit P-8. Student continued to have a DCPS Individualized Education Program (IEP) at least until January 2012. Exhibit R-6. At

some point after January 2012, Student was exited from special education services.

Testimony of Father.

4. Student's grades for the 2016-2017 school year were average to good. Student was socially awkward but school staff did not notice extreme behavior challenges until the following school year. Testimony of LEA Representative.

5. A Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) was developed for Student at City School on June 14, 2018. The Section 504 Plan identified Emotional Regulation, Homework, Group Work, Individual Work and Concentration as areas of impact of specific challenge. Exhibit P-9.

6. For the 2017-2018 school year, Student failed Math and English and was required to attend summer school. Even though Student failed the summer school classes, Student was still promoted to Grade. Testimony of Father.

7. Student and Mother both have case workers provided by a non-governmental family services agency in Washington, D.C. Educational Advocate testified that she was told by the case workers that they had been requesting that Student be evaluated for special education since the 2015-2016 school year. Testimony of Educational Advocate. DCPS' witnesses, LEA Representative and School Psychologist testified that they were unaware of any requests for Student to be evaluated prior to the fall of 2018. Testimony of LEA Representative, Testimony of Educational Advocate. Neither case worker identified by Educational Advocate testified at the hearing to confirm that they had requested that Student be evaluated. However, Father testified that he was at a meeting at City School in the second half of the 2017-2018 school year, where Mother's case worker asked for Student to be evaluated. Testimony of Father. At

that meeting, City School decided to develop the Section 504 Plan for Student and await the results of a parent-initiated psychological evaluation by HOSPITAL. Testimony of LEA Representative. In June 2018, City School developed the Section 504 Plan for Student. I find, based upon the preponderance of the evidence, that Student's parents or their representatives requested that Student be evaluated for special education eligibility on or about May 2018, before the end of the 2017-2018 school year.

8. School Psychologist knew about the decision to develop a Section 504 Plan for Student and that Mother was having Student evaluated at Hospital. School Psychologist suspected that Student does have a disability based upon information that Student's grades were declining in the 2017-2018 school year. Testimony of School Psychologist.²

9. On November 2, 2018, there was an incident in physical education class at City School when Student was hit in the face with a ball. Student had a "melt-down." Father was called to the school and Mother spoke to Student by telephone. Student had to be physically restrained. Testimony of Father, Testimony of LEA Representative. Since that occurrence, the parents have not sent Student back to school because, in Father's opinion, the school is not able to protect Student. Testimony of Father.

10. On November 8, 2018, DCPS received a referral for an initial eligibility

² School Psychologist testified that he was working under the assumption that Student would have a 504 Plan because a child cannot have a 504 Plan and be eligible for special education at the same time. This assumption was incorrect. A student's having a Section 504 Plan does not preclude special education eligibility. *See. N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 29 (D.D.C. 2008) (rejecting argument that because parent's expert also recommended "educational accommodations" under Section 504, District had no obligation under the IDEA to conduct special education evaluation.)

evaluation of Student. Exhibit R-7. On November 13, 2018, Father was at City School and LEA Representative requested that he sign a parental consent form for Student to be evaluated. Father declined and referred LEA Representative to Mother. LEA Representative made several attempts to obtain evaluation consent from Mother by telephone and in a written request sent home. Testimony of Father, Testimony of LEA Representative, Exhibit R-10. On November 28, 2018, Petitioners' Counsel emailed the consent to evaluate form, signed by Mother, to LEA Representative. Exhibit P-11.

11. The parents had Student evaluated by Hospital beginning on October 29, 2018 with a Psychological and Social Communication Evaluation. The Hospital psychologist determined that Student meets criteria for Autism Spectrum Disorder with Accompanying Language Impairment and that Student presents with deficits in social communication and social interaction. Student also demonstrated problems with inattention, meeting criteria for Attention Deficit/Hyperactivity Disorder – Inattentive Presentation. Student also showed elevated levels of anxiety and depressed mood/sadness which stem from significant life stressors and meet criteria for Adjustment Disorder with Mixed Depressed Mood and Anxiety. The Hospital psychologist recommended, *inter alia*, that Student requires proactive and intensive special education support to teach both social skills and coping skills. Exhibit P-10.

12. Petitioners' Counsel provided the Hospital psychological report to City School on November 28, 2018. Exhibit P-11.

13. In her November 28, 2018 email, Petitioners' Counsel expressly withheld parental consent for DCPS to conduct a Woodcock-Johnson educational assessment of Student because the parents were obtaining that assessment on their own. Petitioners'

Counsel also expressly withheld parental consent for DCPS to perform its own psychological evaluation. Exhibit P-11.

14. On December 7, 2018, Independent Psychologist conducted a Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) assessment of Student. This assessment report was first provided to DCPS as part of Petitioners' prehearing disclosures. Exhibit P-12, Representation of Counsel.

15. Since November 19, 2018, DCPS has repeatedly affirmed its willingness to conduct an initial eligibility evaluation of Student upon receipt of parental consent. Since then, the evaluation has been delayed both by the parent's not initially providing consent and their unwillingness to bring Student to school to be evaluated. Exhibit R-10, Testimony of LEA Representative.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioners in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioners shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be

met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). On the issues alleged in this case, the parents hold the burden of persuasion.

Analysis

Child-Find Claim

Has DCPS has denied Student a FAPE since the beginning of the 2016-2017 School Year by failing to conduct an initial special education eligibility evaluation?

Under the IDEA’s child-find requirement, the District of Columbia must “ensure that ‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005); 20 U.S.C. § 1412(a)(3). “As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). “The ‘child find’ duty extends even to ‘[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. § 300.111(c)(1).” *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010); *Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 157–58 (D.D.C. 2016).

In this case, there was no evidence that prior to November 2018, the parents made a written request for Student to be evaluated. The parents assert, however, that DCPS had cause to suspect that Student had an IDEA disability as early as the 2016-2017 school year. DCPS’ expert, LEA Representative, testified, credibly, that in the 2016-2017 school year, Student’s grades were average to good and Student’s behavior at

school, although exacerbated by social awkwardness, was no worse than age-appropriate conflicts. I find that the parents did not meet their burden of persuasion that in the 2016-2017 school year, DCPS had reason to suspect that Student had an IDEA disability.

LEA Representative acknowledged that Student's behavior challenges increased in the last half of the 2017-2018 school year and that Student's grades declined as a result. Moreover, I have found that in a meeting at City School on or about May 2018, Student's and Mother's case workers requested the school team to evaluate Student for special education eligibility. On these facts, I find that by May 2018, DCPS had cause to suspect that Student was a student with a disability and therefore was required to evaluate Student for special education eligibility. Prior to July 1, 2018, District of Columbia special education regulations required that the District must evaluate a student for special education eligibility within 120 days of referral. *See* 5E DCMR § 3005.2. I find, therefore, that DCPS had a duty to complete its evaluation of Student and the initial eligibility determination by the end of September 2018.

Rather than proceed immediately with an initial special education evaluation following the May 2018 meeting, City School staff decided to develop an Section 504 Plan for Student and to await Student's evaluation by Hospital, which the parents were arranging. As of the due process hearing date, DCPS still had still not completed Student's evaluation or eligibility determination. I conclude that this was a violation of the IDEA's child find mandate.

Procedural Safeguards

Did DCPS deny Student a FAPE since the 2011-2012 school year by failing to provide the parents IDEA-mandated prior written notices and notices of

procedural safeguards when it refused the parents' request to evaluate Student for special education eligibility?

The IDEA requires that the LEA must give the parents a procedural safeguards notice upon initial referral or parent request for evaluation and must also provide prior written notice before the LEA refuses to, *inter alia*, initiate an evaluation of a student with a disability. See 34 CFR §§ 300.503(a), 300.504(a). Assuming there was a refusal by DCPS to evaluate Student, Petitioners did not offer probative evidence at the due process hearing that DCPS did, or did not, provide the parents with a prior written notice or an IDEA procedural safeguards notice. I find that Petitioners did not meet their burden of persuasion on this procedural violation claim.

Relief Requested

For relief, the parents request that DCPS be ordered to complete its initial eligibility evaluation of Student, and if warranted, ensure that an appropriate IEP is developed. In addition, the parents seek a compensatory education award for the denials of FAPE alleged in the complaint. The parents also seek reimbursement from DCPS for Independent Psychologist's fee to administer the Woodcock Johnson educational testing (WJ-IV ACH) of Student.

With regard to reimbursement for the Woodcock Johnson, a parent is entitled to an independent educational evaluation at public expense when the District conducts an evaluation with which the parent disagrees. See 34 CFR § 502(b)(5). In this case, Petitioners' Counsel expressly withheld parental consent for DCPS to conduct a Woodcock-Johnson educational assessment of Student because the parents were obtaining that assessment on their own. That is, there was no achievement testing conducted by DCPS with which the parents disagreed, because the parents did not allow

DCPS to conduct the assessment. While DCPS must ensure that Independent Psychologist's WJ-IV ACH report is considered by Student's eligibility team, *see* 34 CFR § 502(c)(1), the parents are not entitled to reimbursement for the expense of this parent-initiated evaluation.

It is unnecessary for the hearing officer to order DCPS to conduct a special education evaluation of Student because the hearing evidence, including the testimony of LEA Representative and written communications with Petitioners' Counsel, establish that, at least since the complaint was filed in this case, DCPS has been diligently attempting to complete the initial eligibility evaluation. However, DCPS' evaluation has been stalled due to the parents' not providing written consent until November 28, 2018³ and their unwillingness to send Student back to City School since the November 2, 2018 "melt-down" incident. At the due process hearing, the parents indicated that they will now make Student available for testing either at the school or another agreed location.

Lastly, the parents request a compensatory education award for Student. Where a hearing officer concludes that the school district denied a student a FAPE, he has "broad discretion to fashion an appropriate remedy, which may include compensatory education." *B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). In this

³ In her November 28, 2018 email to DCPS, Petitioners' Counsel wrote that the parents did not consent to DCPS' conducting its own psychological evaluation or a Woodcock-Johnson educational assessment of Student. Exhibit R-12. The IDEA regulations provide that the eligibility evaluation must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability. *See* 34 CFR § 300.304(b)(1). IDEA evaluations depend upon the exercise of professional judgment by the student's educators, which is entitled to a reasonable degree of deference. *See County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005). Counsel's unilateral limitation on the scope of DCPS' initial evaluation may therefore be problematical.

decision, I have found that DCPS failed to meet its IDEA child find obligations when it did not initiate a special education eligibility evaluation of Student following the May 2018 meeting with Father and the case workers. A school's failure to comply with child find may constitute a procedural violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *See, also, G.G. ex rel. Gersten v. District of Columbia*, *supra*, 924 F. Supp. 2d at 280 (School district's failure to adequately evaluate student was a procedural error.)

Procedural violations may only be deemed a denial of FAPE 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.

34 CFR § 300.513(a)(2). As I explained to counsel and the parties at the beginning of the due process hearing on January 11, 2019, whether compensatory relief may be awarded to Student will depend upon whether Student is ultimately determined to be a student with disability and hence entitled to a FAPE. *See* 34 CFR § 300.1(a) (Purpose of IDEA to ensure that all children with disabilities have available to them a free appropriate public education.) Pending completion of a comprehensive evaluation and eligibility determination, which DCPS has agreed to do, it is premature to conclude that Student is a student with a disability entitled to a FAPE from the District. At this juncture, I am not able to decide whether DCPS' child find procedural violation may be deemed a denial of FAPE under § 300.513(a)(2). Therefore, I will deny, without

prejudice, Petitioner's request for compensatory education for Student.

ORDER

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

ORDERED:

All relief requested by the Petitioners herein is denied, without prejudice to the parents' right to have Student evaluated for special education eligibility and, if determined eligible, to seek a compensatory education remedy for DCPS' not completing its initial special education eligibility evaluation of Student by September 2018.

Date: January 24, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team