

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: July 18, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2018-0136

v.

Hearing Date: July 13, 2018

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 112
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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 (DCMR). In her Due Process Complaint, Petitioner contends that Respondent District of Columbia Public School (DCPS) has denied Student a free appropriate public education (FAPE) by refusing her request for a new initial eligibility evaluation of Student, who was exited from special education by another local education agency in August 2017.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 25, 2018, named DCPS as respondent. The parties met for a resolution session on June 22, 2018 and did not reach an agreement. On June 11, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. My final decision in this case is due by July 25, 2018.

The due process hearing was held before this Impartial Hearing Officer on July 13, 2018 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. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE and INDEPENDENT PSYCHOLOGIST. DCPS called SPECIAL EDUCATION COORDINATOR as its only witness. Petitioner's Exhibits P-1 through P-5 and P-8 through P-30 were admitted into evidence, including Exhibits P-15 through P-19 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-6 and P-7. DCPS' Exhibits R-1 through R-17 were admitted into evidence without objection. Counsel for both 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 DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issue for determination was certified in the June 11, 2018

Prehearing Order:

Whether DCPS failed to timely and comprehensively evaluate the student in response to the parent's written requests for evaluations beginning in February 2018.

For relief, the Petitioner requested in her due process complaint that the hearing officer order DCPS to conduct an initial special education eligibility evaluation of Student, to include a comprehensive psychological evaluation; order DCPS to provide counseling to Student to address Student's social-emotional needs and award compensatory education to Student for the denials of FAPE alleged in the complaint. At the beginning of the due process hearing on June 13, 2018, I ruled that because Student had not yet been evaluated for special education eligibility and determined to be a child with a disability, I would not be able to award compensatory education or order special education or related services in this proceeding.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student has Autism Spectrum Disorder (ASD). Prior to the 2017-2018 school year, Student was enrolled in PUBLIC CHARTER SCHOOL (PCS), a separate local education agency in the District of Columbia. Testimony of Mother. PCS was not named as a respondent in this proceeding.

3. Student's first IEP was developed when the child was in 2nd Grade.

Testimony of Mother. Student's last IEP at PCS, developed on May 16, 2017, identified Student as having an ASD disability. The IEP identified Adaptive/Daily Living Skills; Emotional, Social and Behavioral Development and Motor Skills/Physical Development as areas of concern for Student. The IEP reported that while Student had shown mastery of grade-level standards, Student struggled to successfully adapt to classroom settings, particularly in the areas of following routines, adapting to changes and with demonstrating appropriate peer interactions without multiple prompts and accommodations, and that Student had difficulties in tolerating changes to environment and routine, in successfully engaging in activities and relationships with peers and inappropriately responding to peers in social situations. The IEP also stated that Student presented with difficulties producing legible handwriting. The IEP provided for 2.5 hours per week of Specialized Instruction in the general education setting, 1 hour per month of Occupational Therapy (OT) in general education, 2 hours per month of Behavioral Support Services outside general education and 2 hours per month of OT outside general education. Exhibit P-4.

4. In July 2017, PCS contracted with an independent psychologist to conduct an educational evaluation of Student. The evaluator reported that Student scored well on all of the academic assessments, obtaining Average scores for math, reading and on a spontaneous writing sample. This evaluator recommended that based on her findings, Student was not eligible for specialized academic instruction because Student's scores fell within the Low Average and Average range and Student's assessed academic skills appeared commensurate with Student's then-current grade level. Exhibit P-12.

5. On August 22, 2017, Student's IEP team at PCS met for an eligibility meeting. Student's recent educational evaluation was reviewed for the team. Over

Mother's disagreement, the team determined that Student was no longer eligible for special education. The team adopted a 504 Plan (Section 504 of the Rehabilitation Act of 1973) to meet Student's ongoing needs. (The correctness of PCS' determination that Student was no longer eligible for special education is not an issue in this proceeding.)

6. Student continued to be enrolled at PCS at the beginning of the 2017-2018 school year. After returning to PCS, Student reportedly attempted to commit suicide by self-hanging in response to alleged bullying. Because of that incident, in October 2017, Mother withdrew Student from PCS and enrolled Student in CITY SCHOOL. When she came in to register Student, Mother informed Special Education Coordinator about the reasons for moving Student to City School, the fact that Student had previously had an IEP at PCS and described Student's issues and Student's ASD impairment. Mother provided City School a copy of Student's last PCS IEP. Testimony of Mother.

7. By an email letter of October 11, 2017, Petitioner's Counsel wrote the principal at City School to request that Student be evaluated for special education and related services, to include a speech/language evaluation, a comprehensive psychological evaluation and an adaptive assessment. The attorney wrote that the comprehensive psychological was being requested to gauge Student's current need for services as well as Student's emotional state in light of Student's recent attempt to commit suicide. Exhibit P-19.

8. At a City School multidisciplinary team (MDT) meeting on October 30, 2017, the team noted that in exiting Student from special education, PCS had not conducted a comprehensive evaluation to determine Student's eligibility. SCHOOL PSYCHOLOGIST suggested that the team wait to the next progress report to determine how Student was doing and then look at all of the information, including the

comprehensive psychological, grades, reports from general education teachers and autism checklists to determine if Student was eligible. She stated that the only other information needed would be the autism checklists. Exhibit R-11. Educational Advocate, who attended the meeting for Mother, agreed that they would start the evaluations near the beginning of the next semester after Student became more academically acclimated to City School. Testimony of Educational Advocate.

9. On December 21, 2017, a meeting was held at City School to review Student's academic and social-emotional and behavioral progress. At that time, Student's grades were all B's except an F in Science. Exhibit P-16, Testimony of Educational Advocate.

10. On February 6, 2018, Educational Advocate wrote an email to Special Education Coordinator to inquire if the autism checklist, Gilliam Autism Rating Scale (GARS), had been completed. Special Education Coordinator responded that a meeting had been set for February 15, 2018 to review the data and determine whether Student should be further evaluated. Exhibit P-22.

11. The MDT team met again at City School on February 15, 2018. The parent's representative asserted that Student's IEP should be reinstated and repeated the parent's request for a comprehensive psychological evaluation. Testimony of Educational Advocate. The consensus of the school representatives at this meeting was that Student was progressing nicely with Student's 504 Plan and that Student's ASD was not having a negative impact on Student's academic achievement. The school declined to conduct a special education eligibility evaluation of Student. Exhibits R-12, R-13. The school did not issue a Prior Written Notice to the parent to explain why it refused to conduct the evaluation. Testimony of Special Education Coordinator.

12. In emails to Special Education Coordinator in April and May 2018, Petitioner's Counsel and Educational Advocate continued to request a comprehensive psychological evaluation of Student and requested that City School authorize funding for an Independent Educational Evaluation (IEE). On May 9, 2018, Special Education Coordinator responded by emails that at the February 15, 2018 MDT team meeting, the school representatives did not feel that an evaluation was necessary. She asserted that the notes from the meeting "did not show any regression behaviorally or otherwise" and that Student was expected to receive all A's and B's on the next report card. Exhibits P-24, P-25. As of the due process hearing date, DCPS had not evaluated Student.

Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer 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 Petitioner 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 Petitioner 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).

Analysis

Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate the student in response to the parent's written requests for evaluations beginning in February 2018?

The sole issue in this case is whether DCPS denied Student a FAPE by not conducting an initial evaluation, upon the request of the parent first made in October 2017, to determine if Student was a student with a qualifying IDEA disability.² Student, who is diagnosed with Autism Spectrum Disorder, had an IEP from the 2nd Grade year until August 2017, when Student's prior LEA, PCS, determined that Student was no longer eligible for special education because on a recent educational evaluation, Student's academic scores were commensurate with grade level. Following Student's reported suicide attempt at PCS in October 2017, Mother moved Student to City School. Soon after Student's enrollment, Mother's representatives made a written request for City School to conduct a special education eligibility evaluation of Student. At a meeting with school staff, Mother's representative agreed to defer the evaluation until the middle of the school year to see how Student did at City School. At an MDT meeting on February 15, 2018, Mother's representative renewed her request for Student to be evaluated. The school representatives refused the request because Student appeared to be progressing well at City School with the supports of a Section 504 Plan. Mother

² Student was exited from special education at PCS in August 2017. For purposes of the IDEA's evaluation requirements, after a child has been exited from special education, a subsequent evaluation request is considered a request for an initial evaluation, not a reevaluation. *Cf.* U.S. Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46579, 46682 (August 14, 2006) (The evaluation conducted by the new public agency would be to determine if the child is a child with a disability and to determine the educational needs of the child. Therefore, the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency, which would require parental consent.)

alleges that DCPS' failure to ensure that Student was evaluated upon her request was a denial of a free appropriate public education (FAPE). I agree.

The IDEA regulations at 34 CFR § 300.301(b) allow a parent to request an initial evaluation at any time to determine if a student is a student with a disability. If the District does not suspect that the child has a disability, and denies the request for an initial evaluation, the District must provide written notice to the parent explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision. 34 CFR § 300.503(a) and (b). *See Memorandum to State Directors* (OSEP Jan. 21, 2011). In this case, although in May 2018 Special Education Coordinator sent Mother's representatives the school's notes from the February 15, 2018 MDT meeting, DCPS did not provide a contemporaneous written notice to the parent explain why it was refusing to conduct the initial evaluation.

Moreover, DCPS had cause to reasonably suspect in the 2017-2018 school year that Student had an IDEA disability. School staff knew that Student was diagnosed with an ASD disability. Mother had provided Student's May 16, 2017 PCS IEP, which reported that while Student had shown mastery of grade-level standards, Student struggled to successfully adapt to classroom settings, particularly in the areas of following routines, adapting to changes and demonstrating appropriate peer interactions without multiple prompts and accommodations, and that Student had difficulties in tolerating changes to environment and routine, in successfully engaging in activities and relationships with peers and with inappropriately responding to peers in social situations. The IEP also stated that Student presented with difficulties producing legible handwriting.

The correctness of PCS' August 2017 determination that Student was no longer eligible is not at issue in this case. However, the PCS team made its decision without obtaining a comprehensive special education reevaluation of Student and the suspicion that Student had a disability was not eliminated. Moreover, subsequent to the PCS' eligibility team's decision, Student attempted suicide, reportedly in response to bullying. Petitioner's expert, Independent Psychologist, opined credibly that after the suicide attempt, DCPS should have assessed Student's social-emotional functioning.

DCPS' expert, Special Education Coordinator, attributed the school's decision not to conduct a special education eligibility evaluation in part to the fact that Student was getting everything Student needed in the Section 504 Plan. However, whether Student was able to make academic progress with a Section 504 Plan has no bearing on Student's special education eligibility. Providing a Section 504 Plan does not suffice for a student who is entitled to an IEP. "[T]he requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute." *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n. 5 (6th Cir.2003) (citing *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 100 n. 2 (2d Cir.1998)). *Cf. 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 its own evaluation of the student.) Moreover, the fact that Student achieved satisfactory grades did not relieve DCPS of conducting the requested evaluation. *See Lawrence County School District v. McDaniel*, 72 IDELR 8, 118 LRP 12451 (E.D. Ark. 2018) (Decision not to evaluate autistic student because of his strong academic performance violative of procedural right to adequate assessment and

evaluation under IDEA.) I conclude, therefore, that DCPS' failure to conduct an initial eligibility evaluation of Student following the February 15, 2018 MDT team meeting, as requested by the parent, violated the IDEA's child find and evaluation mandates.³

The failure to conduct a required IDEA evaluation is a procedural violation of the Act. *See, e.g. 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 that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) 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).

I find that DCPS' failure to ensure that Student was evaluated by City School, since the February 15, 2018 MDT team meeting, has impeded the parent's opportunity to meaningfully participate in eligibility and IEP meetings. Further, it has impeded Student's right to a FAPE, because without an updated evaluation, the City School eligibility team and the parent lacked sufficient data to determine whether Student is eligible for special education and an appropriate IEP.

³ Whether Student will ultimately be found to be a student with a disability and eligible for special education remains to be determined following completion of the initial evaluation. I make no finding as to Student's eligibility for special education and related services.

Remedy

For relief in this case, the Petitioner requested in her due process complaint that the hearing officer order DCPS to conduct an initial special education eligibility evaluation of Student, to include a comprehensive psychological evaluation; order DCPS to provide counseling to Student to address Student's social-emotional needs and award compensatory education to Student for the denials of FAPE alleged in the complaint. At this stage, while Student's eligibility for special education has not yet been determined, the only remedy available is to order a comprehensive initial eligibility evaluation. Whether Student may ultimately be entitled to further relief will depend upon whether it is determined that Student is a student an IDEA disability, and, if so, whether Student has been harmed by DCPS' failure to conduct the initial eligibility evaluation. Petitioner shall not be precluded from filing a new due process request to seek compensatory education if warranted.

ORDER

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

ORDERED:

1. Within 10 business days of the date of this decision, DCPS shall convene a Student Study Team (SST), including the parent, to determine what assessments are needed at this time, which shall include but not be limited to a comprehensive psychological evaluation, to determine whether Student is a student with a disability who needs special education and related services, as defined in 34 CFR § 300.8, and the nature and extent of the special education and related services that Student may need. DCPS shall ensure that the appropriate evaluations are promptly conducted and Student's eligibility for special education and related services is determined without undue delay. If Student is determined eligible, DCPS shall ensure that an IEP team is convened without delay to develop Student's initial IEP;
2. Compensatory education relief for DCPS' failure to timely conduct an initial eligibility evaluation of Student is denied without prejudice,

pending a determination of Student's eligibility for special education and related services and

3. All other relief requested by the Petitioner herein is denied.

Date: July 18, 2018

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
Student Hearing Office
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team