

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

OSSE
Office of Dispute Resolution
July 5, 2023

PARENTS,
on behalf of STUDENT,¹

Date Issued: July 5, 2023

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2023-0051

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: June 26 and 27, 2023

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (the parents) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In their due process complaint, the parents allege that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to evaluate their child for special education eligibility and develop an appropriate IEPs in the 2021-2022 and 2022-2023 school years.

Petitioners’ Due Process Complaint, filed on March 24, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on March 27, 2023. On

¹ Personal identification information is provided in Appendix A.

April 5, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On April 6, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this case was originally due by June 7, 2023. The earliest due process hearing dates, mutually available to the parties and counsel, were June 26 and 27, 2023. To accommodate these hearing dates, on April 14, 2023, I granted DCPS' motion, opposed by the parents, to extend the final decision due date to July 14, 2023.

On June 20, 2023, the parents, by counsel, filed a motion for partial summary disposition. On Jun 23, 2023, DCPS, by counsel, filed a cross-motion for partial summary disposition and its opposition to the parents' motion. I took both motions under advisement.

With consent of the parents, the due process hearing was held online and recorded, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on June 26 and 27, 2023. Both parents appeared online for the hearing and were represented by Petitioners' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioners made an opening statement. Mother testified and called EDUCATIONAL ADVOCATE 1 as the parents' only other witness. DCPS' Counsel waived making an opening statement and called RESOLUTION SPECIALIST as DCPS' only witness. Petitioners' Exhibits P-1 through P-35, with the exception of page 13 of

Exhibit P-4, Exhibit P-22 and Exhibit P-25, were admitted into evidence, including Exhibits P-1 through P-5, P-12 through P-14, P-17, P-18, P-29 and P-35 admitted over DCPS' objections. I sustained DCPS' objections to Exhibit P-22 and to Page 13 of Exhibit P-4. DCPS offered Exhibits R-4, R-12, R-15, R-16, R-18, R-19, R-29, R-33, R-34, R-36, R-40, R-46, R-48, R-49 and R-53 were admitted into evidence without objection. Exhibit R-60 was admitted over the parents' objection. I also admitted, as hearing exhibits, Exhibits 029, 036 and 038 included with DCPS' June 23, 2023 cross-motion for summary disposition.

Following presentation of the evidence, counsel for the respective parties made oral closing arguments. Neither party requested leave to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3029.

ISSUES AND RELIEF SOUGHT

There were five issues for determination in this case certified in the April 5, 2023 Prehearing Order. At the due process hearing, Petitioners, by counsel, withdrew with prejudice Issues 3, 4 and 5 as well as claims concerning the 2020-2021 school year in Issue 1. The remaining issues for determination are:

1. Whether DCPS denied Student a FAPE by failing to evaluate him/her for special education and develop an IEP during school years 2021-2022 and 2022-2023 and
2. Whether DCPS denied Student a FAPE by failing to evaluate him/her for

special education eligibility and develop an IEP following a September 2021 written request from the parent and continuous subsequent requests.

For relief, the parents seek reimbursement from DCPS for the expenses they incurred to obtain an independent neuroeducational evaluation of Student and for academic tutoring.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with the parents. Testimony of Mother. On January 3, 2023, Student was determined eligible for special education under the Other Health Impairment disability classification based on Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit R-18.

2. Student is in GRADE at CITY SCHOOL. Student has struggled with academic problems for several years. During this time, Mother has been in regular contact with DCPS staff seeking help for dealing with Student's academic struggles. Testimony of Mother, Exhibit P-28.

3. At least since the 2020-2021 school year, Student had a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) for ADHD and Irritable bowel syndrome (IBS). In October 2021, Student's Section 504 Plan was updated to provide for small-group testing as an accommodation. Exhibit P-3.

4. On September 20, 2021, Mother wrote COUNSELOR at City School by

email to request to discuss having Student tested for ADHD and having a psychoeducational evaluation done. Mother wrote that on the i-Ready test for math, Student had recently scored below grade expectations. She wrote that Student was also talking about it being more difficult to concentrate. Mother received an automatic out-of-office reply from Counselor stating Counselor would respond upon her return on September 21, 2022. Exhibit P-2. Mother never received any other response to the September 20, 2021 email. Testimony of Mother.

5. On June 16, 2022, City School acknowledged receipt on June 15, 2022 of the parents' referral for an initial special education evaluation of Student. On or about July 22, 2022, City School completed an Analysis of Existing Data (AED) report for Student. The report indicated that Student was reading three years below grade level expectation and was one-two years below grade level in math. Exhibit P-6.

6. On June 22, 2022, Mother signed written consent for Student to be evaluated for special education eligibility. Exhibit P-7. The team proposed to conduct cognitive and educational achievement testing of Student. Exhibit P-8.

7. On August 5, 2022, a special education staff member at City School conducted the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH). The results were reported incorrectly and had to be re-scored. Testimony of Mother, Exhibit P-9. The cognitive assessment of Student was never completed by DCPS. Testimony of Mother.

8. On October 27, 2022, ASSISTANT PRINCIPAL wrote Mother by email

that City School would hold another AED meeting on November 1, 2022 as the next step in the evaluation process. By email response, also on October 27, 2022, Mother objected to DCPS' restarting the evaluation process and requested public funding for an Independent Educational Evaluation (IEE), asserting that DCPS had not completed the evaluation process after 4 months. Exhibit P-14. Assistant Principal did not respond to the IEE funding request. Testimony of Mother. City School conducted the second AED meeting on November 1, 2022. It was reported then that Student was still below grade level in reading and math. Exhibits P-16, P-17.

9. After the November 1, 2022 meeting, the parents decided to have Student independently evaluated by PSYCHOLOGY GROUP. Mother informed City School by email of November 13, 2022 that Student had been independently evaluated the day before and that the parents would send the results on to City School when received. DCPS received the independent assessment of Student on or about December 2, 2022. Exhibit P-20.

10. In the December 2, 2022 Neuroeducational Evaluation Report, Psychology Group reported that Student's overall profile indicated average verbal comprehension, working memory and fluid reasoning abilities. Weaknesses included impaired verbal and visual memory, visual motor integration and visual spatial ability, and protracted processing speed ability. When integrated, these weaknesses hindered Student's daily learning and performance to a marked degree and lead to significant daily academic frustration. Student's level of attention-based symptoms and executive functioning

deficits were consistent with a diagnosis of the neurodevelopmental disorder, ADHD - Mild. Student's overall reading skills were developed below age and grade level expectations in several areas. His/her primary weaknesses were slow reading rate, inconsistent comprehension, inaccurate reading, tracking deficits, and slow phonemic proficiency. Student presented with Specific Learning Disability in Reading. Student's writing skills were developed below age and grade level expectations. His/her sentence composition skills were below average, and Student struggled with thematic development and essay composition. Student's visual-motor integration, slow processing speed, and writing skills deficits. indicated Specific Learning Disability in Writing. Student's math skills were developed close to age and grade level expectations. His/her math fluency was impaired consistent with his/her slow processing speed.

Exhibit P-19.

11. DCPS SCHOOL PSYCHOLOGIST conducted an evaluation of the IEE report on December 5, 2022. DCPS School Psychologist concluded that the report was valid and that a DCPS assessment would be waived. DCPS School Psychologist reported that based on Student's most recent report card, existing supports for Student were sufficient and an IEP was not warranted. Exhibit P-20.

12. On January 3, 2023, DCPS issued a PWN notifying the parents that Student had been determined to qualify for special education services. This PWN stated that the action was taken upon the parents' referral of request for special education services "beginning in September of 2021." Exhibit P-23. The qualifying eligibility

classification was OHI-ADHD. Exhibit P-24.

13. DCPS completed an initial IEP for Student on February 3, 2023. The IEP identified Math, Reading and Written Expression as areas of concern and provided for 2 hours per month [*sic*] of special education services in Reading, 2 hours per week in Written Expression and 4 hours per week in Mathematics. All services were to be provided in the general education setting. Exhibit P-24. The IEP was amended on April 24, 2023. The amended IEP provided for Student to receive 12 hours per week of special education services, including 4 hours for Reading, 4 hours for Written Expression and 4 hours for Math. New accommodations were also added. Exhibit P-27.

14. The parents paid \$4,000 for Psychology Group's November 2022 Neuroeducational evaluation of Student. Testimony of Mother.

15. For the period of October 11, 2020 through January 29, 2023, the parents obtained out-of-school academic tutoring for Student from a contractor with TUTOR A, an online platform. The total cost paid to Tutor A by the parents was \$3,574. Testimony of Mother, Exhibit P-31.

16. For the period of October 5, 2021 through December 15, 2022, the parents obtained out-of-school academic tutoring for Student from TUTOR B. Tutor B is Mother's sister and has over 20 years experience as a teacher. The total cost paid to Tutor B by the parents was \$9,850. Testimony of Mother, Exhibits P-30, P-33.

17. The private tutors were in constant communication with Student's SECTION 504 CASE MANAGER at City School. 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, 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 the local education agency, in this case DCPS, the agency 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 agency. In this case, the Petitioners must bear the burden of persuasion. 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 evaluate him/her for special education and develop an IEP during school years 2021-2022 and 2022-2023?
- Did DCPS deny Student a FAPE by failing to evaluate him/her for special education eligibility and develop an IEP following a September 2021 written request from the parent and continuous subsequent requests?

In this proceeding, the parents allege that DCPS violated the IDEA's child find mandate by not timely evaluating Student for special education eligibility following Mother's September 2021 request for Student to be evaluated. I agree.

As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017),

A school district must "evaluate a student who may have a disability and who may require special education services." D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any "child suspected of having a disability who may need special education." 5–E D.C. Mun. Regs. § 3004.1(a) (emphases added); see 34 C.F.R. § 300.111(c)(1) (extending duty to "[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade"). **Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process "as soon as a student is identified as a potential candidate for special education services."**

Davis, supra, 244 F. Supp. 3d at 49, citing *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (emphasis supplied). An LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent provides consent for the evaluation or assessment. D.C. Code § 38–2561.02(a)(2)(A).

On September 20, 2021, Mother made an email request to City School to discuss having Student tested for ADHD and have a psychoeducational evaluation done. Mother wrote of her concern that Student had recently scored below grade expectations on a math assessment and that Student was also talking about it being more difficult to concentrate.

DCPS did not respond at the time to Mother's evaluation request. Eventually, on July 22, 2022, after further prodding from Mother, City School did start the evaluation process by holding an AED meeting. However, the evaluation process was further delayed, apparently because there was no school psychologist assigned to City School. When a special education eligibility team finally met for Student on January 3, 2023, Student was found eligible for special education as a child with an OHI disability, based primarily upon an independent neuroeducational assessment obtained by the parents in November 2022.

I find that by Mother's September 20, 2021 email, Student was identified to DCPS as a potential candidate for special education services. Under D.C. Code § 38-2561.02(a)(2)(A), DCPS was obliged to complete its initial special education evaluation of Student within 60 days, that is by November 19, 2021. By not completing the evaluation and eligibility process until January 3, 2023, DCPS violated the IDEA's child find mandate.

Failing to timely evaluate a child suspected of having a disability, as required by the child find obligations of the IDEA, is a procedural violation of the statute. *See Simms v. District of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *12 (D.D.C. July 26, 2018), *report and recommendation adopted*, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018). Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the student's right to a FAPE;

(ii) Significantly impeded the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or

(iii) Caused a deprivation of educational benefit.

See 34 C.F.R. § 300.513(a)(2).

In this case, when DCPS did evaluate Student in January 2023, it determined that Student was, in fact, a student with an OHI disability. Student's initial IEP, as amended on April 24, 2023, provided for Student to receive 12 hours per week of special education services. Based on the record in this case, that is, *inter alia*, Student's below grade level results in norm-based testing in mathematics and reading, as well as Psychiatric Group's findings in the neuroeducational evaluation report, if DCPS had timely evaluated Student, it is more likely than not that Student would have been determined eligible for special education by November 20, 2021. On that timeline, Student's initial IEP should have been developed by December 20, 2021 and City School should have started implementing the initial IEP, at latest by January 3, 2022, when children returned to classes after the winter holiday break. I find, therefore, that DCPS' procedural violation of not evaluating Student for special education eligibility until January 2023 impeded Student's right to a FAPE and caused a deprivation of educational benefit. This was a denial of FAPE.

Remedy

For relief in this case, the parents requested that DCPS be ordered to reimburse

them for the cost of the independent neuroeducational evaluation they obtained for Student in November 2022 and for tutoring services they obtained for Student from two separate providers from September 2020 to January 2023.

Tutoring

Reimbursement for private tutoring is available under the IDEA. Equitable considerations are relevant in fashioning relief. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374, 105 S. Ct. 1996, 2005, 85 L. Ed. 2d 385 (1985). Such reimbursement may be appropriate if the hearing officer finds that the school district denied FAPE to the student and that the private tutoring service is appropriate. *See E.L. v. Bedford Cent. Sch. Dist.*, No. 18 CIV. 3062 (NSR), 2022 WL 3667189, at *14 (S.D.N.Y. Aug. 25, 2022). *Cf. Leggett v. District of Columbia*, 793 F.3d 59, 66-67 (D.C. Cir. 2015) (School districts must reimburse parents for private-school expenses if: (1) school officials failed to offer the child a FAPE; (2) the private-school placement chosen by the parents was otherwise proper under the IDEA; and (3) the equities weigh in favor of reimbursement.)

In this decision, I have determined that DCPS denied Student a FAPE by not timely completing an initial eligibility evaluation and having an initial IEP in place for Student by January 3, 2022. When the DCPS IEP team developed Student's initial IEP in 2023, the IEP team determined that Student needed 12 hours per week of special education services. Because DCPS did not start providing special education to Student until after February 3, 2023, Student missed some 39 school weeks, approximately 468

hours, of special education services.

The parents seek reimbursement for their tutoring expenses incurred for Student before the initial IEP was developed. Student's City School Section 504 case manager was in constant communication with the private tutors and they collaborated on meeting Student's educational needs. DCPS has not contended that the tutoring services the parents obtained for Student from Tutor 1 and Tutor 2, including services over summer 2022, were not appropriate or that the parents otherwise acted unreasonably. *See Leggett, supra*, 793 F.3d at 67 (requirement that the "equities weigh in favor of reimbursement — that is, the parents did not otherwise act 'unreasonabl[y].'")

I find that the parents are entitled to reimbursement from DCPS for part of their tutoring expenses for Student. Because I have determined that the denial of FAPE in this case began on or about January 3, 2022, following the end of winter break, I conclude that the parents are not entitled to reimbursement from DCPS for private tutoring services obtained before January 3, 2022.

Taking into account the above considerations and in my equitable authority as an impartial hearing officer, I find that the parents are entitled to reimbursement from DCPS for their tutoring expenses incurred for Student from January 9, 2022 through January 29, 2023 (Tutor A) and from January 4, 2022 through December 15, 2022 (Tutor B).

Reimbursement for Independent Evaluation

With regard to the independent neuroeducational evaluation obtained for

Student in November 2022, DCPS agreed in the resolution process to reimburse the parents \$4,000 for the evaluator's fee, upon receipt of required documentation. At the due process hearing, DCPS' witness, Resolution Specialist, testified that the only documentation still needed from the parents is an itemized invoice from the independent evaluator which breaks down charges for the testing sessions, report writing, etc. and copy of the parents' bank statement showing that their check to the evaluator cleared the bank. The parents complain that DCPS has required redundant or unnecessary proof of their payment. It is not the place of the hearing officer to determine what proof of payment the District should require for reimbursement purposes and I decline to intervene in that process.

In light of my determinations in this decision, I deny the Parents' June 20, 2023 Motion for Partial Summary Adjudication and DCPS' June 23, 2023 Cross-Motion for Summary Adjudication.

ORDER

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

ORDERED:

1. Upon receipt of documentation of payment by the parents as may be reasonably required, DCPS shall, without undue delay, reimburse the parents their costs for tutoring fees paid to Tutor A from January 9, 2022 through January 29, 2023 and to Tutor B from January 4, 2022 through December 15, 2022, inclusive of summer tutoring services;
2. Because DCPS has agreed to reimburse the parents for their cost for the November 2022 independent neuroeducational evaluation by Psychology Group, I deny, without prejudice, the parents' request for the hearing officer to order

DCPS to reimburse them for that payment and

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

Date: July 5, 2023

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