

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: March 28, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

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 alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a Free Appropriate Public Education (FAPE) by failing to find him eligible for special education services.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's due process complaint, filed on January 13, 2015, named DCPS as respondent. The parties

¹ Personal identification information is provided in Appendix A.

met for a resolution session on February 9, 2015 and did not reach an agreement. The 45-day period for issuance of this decision began on February 13, 2015. On February 2, 2015, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on March 17, 2015 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 EVALUATION COORDINATOR and by DCPS' COUNSEL.

At the due process hearing, Petitioner's Counsel made an opening statement. Petitioner testified and called as witnesses SCHOOL PSYCHOLOGIST and AUDIOLOGIST. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST (SLP) and Evaluation Coordinator. Petitioner's Exhibits P-1 through P-7, P-10 through P-17, P-20 and P-21 were admitted into evidence, including Exhibits P-6, P-12, P-13 and P-14 which were admitted over DCPS' objections. DCPS' objections to Exhibits P-18 and P-19 were sustained. Exhibits P-8 and P-9 were withdrawn. DCPS' Exhibits R-1 through R-4 were admitted into evidence without objection. Exhibit R-5 was not offered. At the conclusion of Petitioner's case-in-chief, DCPS' Counsel made an oral motion for a partial directed finding, which I denied. Counsel for both parties made closing arguments. Neither party requested leave to file post-hearing written argument.

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 issues for determination were certified in the February 2, 2015 Prehearing Order:

- Whether, as part of its initial special education eligibility evaluation in the 2013-2014 school year, DCPS failed to ensure that Student was appropriately tested in all areas of suspected disabilities, including for speech language and other health impairment disabilities; and
- Whether the DCPS eligibility team erred in determining at a February 2014 initial eligibility meeting that Student was not a child with a disability in need of special education and related services.

For relief, Petitioner requests that the Hearing Officer determine that Student is a child with a disability and order DCPS to ensure that an appropriate IEP is developed for him, and/or order DCPS to conduct or fund appropriate assessments of Student including a comprehensive psychological, speech-language and ADHD assessments. In addition, Petitioner reserved any right to request a compensatory education award hereafter, if Student is determined eligible for special education services.

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 resides with Petitioner in the District of Columbia. Testimony of Mother. Student has never been determined eligible for special education and related services. Testimony of Evaluation Coordinator.
2. Student is in his second year at CITY ELEMENTARY SCHOOL where he is

currently in GRADE. Testimony of Mother.

3. Since the fall of the 2013-2014 school year, Mother has been concerned about Student's academic difficulties, including his letter and number recognition and difficulty expressing himself. Mother expressed her concerns to Student's teacher at City Elementary School. The teacher told Mother that she felt Student needed services, but he had to go through the evaluation process first. In November 2013, Student was referred for an initial special education eligibility evaluation by DCPS DIAGNOSTIC CENTER (DDC). Testimony of Mother, Exhibit R-2.

4. Student was seen at DDC for an initial speech-language evaluation on December 19, 2013. At DDC, SLP assessed Student using several assessment instruments including the Clinical Evaluation of Language Fundamentals Preschool - Second Edition (CELF-P2), Receptive One-Word Picture Vocabulary Test - 4th Edition (ROWPVT-45) the Expressive one-Word Picture Vocabulary Test - 4th Edition (EOWPVT-4) and the Goldman-Fristoe Test of Articulation-2 (GFTA-2). The CELF-P2 was administered to evaluate Student's receptive and expressive oral language skills. His Core Language standard score was within the Average Range. SLP was not able to complete that ROWPVT-4 and EOWPVT-4 due to Student's test-fatigue. On the Expressive Vocabulary subtest of the CELF-P2, Student demonstrated age appropriate expressive vocabulary skills. SLP determined that Student demonstrated many age-appropriate verbal and nonverbal pragmatic skills. SLP performed an oral examination to assess the structure, strength and function of Student's oral mechanism for speech purposes. She found that the structure, strength and function of Student's articulators were within functional limits and adequate for normal speech development. Student's articulation and phonology were assessed using the results from the GFTA-2 and by

transcribing and analyzing his spontaneous productions. Student received a Standard Score of 63 on the GFTA-2, which was more than two standard deviations below the mean. Student's speech intelligibility was found by SLP to be age appropriate. Student's speech fluency was informally assessed and judged by SLP to be within normal limits. SLP assessed the pitch, quality, resonance and volume of Student's voice, which she judged to be within normal functional limits. Exhibit P-15.

5. SLP interviewed student's 2013-2014 classroom teacher by telephone. The teacher told her that Student was very social, that he followed three-step directions, that he followed stories, and that she understood 75 percent of what Student said. The teacher said that Student was not "shutting down" in class and that his articulation errors were not causing education or socialization concerns. Testimony of SLP.

6. Prior to the DDC speech-language assessment, student's hearing was screened with an otoacoustic emission test (OET), which suggested normal cochlear function. The OET test confirmed that Student could hear all speech frequencies. SLP determined that additional hearing testing was not warranted. Testimony of SLP.

7. In her February 11, 2014 report, SLP summarized that Student presented with age appropriate receptive and expressive language skills, that his articulation and phonology were below age expectations and that his speech intelligibility was age appropriate. She reported that according to Student's classroom teacher, Student's speech errors were not impeding him from accessing the general education curriculum. SLP concluded that there were no speech or language concerns that were impacting Student's educational performance or his ability to access the general education curriculum. SLP recommended that Student be referred to the school Student Support Team (SST) and school speech pathologist for Response to Intervention (RTI) services. Exhibit P-15.

Testimony of SLP.

8. Evaluation Coordinator conducted an Educational Assessment of Student on February 7, 2014. She administered the Battelle Developmental Inventory, 2nd Edition (BDI-2) to assess Student's performance in the Adaptive, Personal-Social, and Cognitive domains. Student's Standard Scores in these domains were all in the Low Average or Average ranges, within normal limits, compared to same-aged peers. Exhibit R-2, Testimony of Evaluation Coordinator.

9. Mother reported to SLP that during a routine screening at his pediatrician's office, Student tested positive for elevated lead levels. Lead had been found behind wall paper in the house where the family was previously living after Student was born. After Student was retested, his pediatrician was not concerned. Exhibit P-15.

10. On February 11, 2014, an eligibility meeting for Student was convened at DDC. Mother attended the meeting. After reviewing comments from Mother, a report from Student's teacher, Evaluation Coordinator's Educational Assessment and SLP's February 11, 2014 Initial Speech-Language Evaluation report, the team determined that Student has a Speech-Language Articulation impairment, but that Student was not eligible for special education services, because there was no adverse effect on Student's educational performance. Exhibit R-2. Mother initialed the Eligibility Determination Report to indicate that she agreed with the eligibility determination. Exhibit R-2, Testimony of Mother.

11. On November 5, 2014, the office of Petitioner's Counsel emailed a request to DCPS and to the principal at City Elementary School for Student to be evaluated for special education and related services, to include a comprehensive psychological

evaluation with clinical components including a Conner's rating scale for Attention Deficit-Hyperactivity Disorder, speech and language evaluation and an auditory processing assessment. Exhibit P-12.

12. On November 17, 2014, Petitioner's Counsel wrote the principal at City Elementary School to request a multidisciplinary team (MDT) meeting be convened to discuss the parent's concerns and Student's speech-language issues. Exhibit P-13.

13. On December 16, 2014, the office of Petitioner's Counsel emailed a request to DCPS, repeating the November 5, 2014 request for Student to be evaluated again for special education and related services. Exhibit P-14.

14. On January 13, 2015, Petitioner, by Petitioner's Counsel, filed her Due Process Complaint Notice in this case. At a Resolution Session Meeting on February 9, 2015, DCPS stated that it would conduct new initial eligibility evaluations of Student. Exhibit R-3. The week before the March 17, 2015 due process hearing in this case, DDC conducted new evaluations of Student. As of the hearing date, the evaluation results had not been provided to Mother. Testimony of Mother.

15. Mother works in the disability services field. She feels she can identify speech-language disabilities. Her biggest concern for Student is his speech-language issues. 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

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. As part of its initial special education eligibility evaluation in the 2013-2014 school year, did DCPS fail to ensure that Student was appropriately tested in all areas of suspected disabilities, including for speech-language and other health impairment disabilities?

In this case, Petitioner first contends that when DCPS evaluated Student prior to the February 11, 2014 eligibility meeting, the District did not appropriately test him in all areas of suspected disabilities. DCPS responds that Student was appropriately evaluated and that the eligibility team’s determination that Student did not require special education services was correct.

This claim by Petitioner implicates DCPS’ “Child Find” obligation. “School districts have a continuing obligation under the IDEA . . . — called ‘Child Find’— to identify and evaluate all students who are *reasonably suspected* of having a disability under the statutes.” *D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir.2012) (emphasis in original) (citations and internal quotations omitted.) Consequently, “[a] school’s failure to comply with Child Find may constitute a procedural violation of the IDEA.” *See id.* Furthermore, “a poorly designed and ineffective round of testing does not satisfy a school’s Child Find obligations.” *Id.* at 250. “Rather, IDEA requires that initial evaluations upon suspicion of a disability:

- (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent . . . [;]

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.”

Id. (quoting 20 U.S.C.A. § 1414(b)(2)(A)-(C); 34 C.F.R. § 300.304(b)(1)-(3)). The IDEA “further mandates, among other things, that evaluation materials be ‘used for purposes for which the assessments or measures are valid and reliable’ and that children be ‘assessed in all areas of suspected disability.’” *Id.* (quoting 20 U.S.C. § 1414(b)(3)(A)(iii), (B); 34 C.F.R. § 300.304(c)(1)(iii), (4)). But while an evaluation should be tailored to the specific problems a potentially disabled student is having, it need not be designed to identify and diagnose every possible disability. *Id.*

In November 2013, Student was referred to DDC for an initial eligibility evaluation due to speech concerns raised by the parent and Student’s teacher. After reviewing existing data and conducting a telephone screening, Evaluation Coordinator decided that speech and language and development/educational assessments were needed for Student. Evaluation Coordinator administered the Battelle Developmental Inventory, 2nd Edition (BDI-2) to assess Student in the Adaptive, Personal-Social and Cognitive domains. On these measures, Student scored in the Low Average to Average range, within normal limits, compared to his same-aged peers.

Student was referred to SLP for an initial Speech-Language evaluation. SLP reviewed Student’s records, interviewed Mother and Student’s teacher about their concerns and interviewed Student. On December 19, 2013, SLP examined Student, conducted informal speech and voice assessments and administered a battery of speech language tests. SLP found that Student presented in the age-appropriate, average range, except for articulation/phonology, where Student’s Standard Score were more than two deviations

below the mean. SLP concluded that there were no speech or language concerns that were impacting Student's educational performance or his ability to access the general education curriculum.

Appropriateness of Educational Assessment

Petitioner's expert, School Psychologist, was critical of the February 2014 educational assessment of Student conducted by Evaluation Coordinator. School Psychologist testified that she would have administered more extensive behavioral assessments such as the Conners Behavioral Rating Scales and the Behavior Assessment System for Children (BASC) to assess Student for social-emotional disabilities. School Psychologist also stated that she would have recommended a comprehensive psychological evaluation of Student. I did not find School Psychologist's opinion to be persuasive. Evaluation Coordinator testified that she selected the BDI-2 because of Student's young age. The BDI-2 included assessments of Student in the Adaptive, Personal-Social and Cognitive domains. School Psychologist did not contend that the BDI-2 test was a not reliable instrument for assessing a child as young as Student or that the score obtained were not valid. Moreover, Student's 2013-2014 classroom teacher reported that she had no concerns about Student's academic performance or social interactions. School Psychologist's opinion that additional assessments were needed was based solely upon her review of the hearing exhibits. She has never met Student and did not participate in the initial edibility process. I found Evaluation Coordinator to be a more credible witness and conclude that Petitioner has not established that Evaluation Coordinator's education assessment of Student, including the BDI-2, was not an appropriate evaluation of Student in the areas of his reasonably suspected disabilities.

Appropriateness of Speech Language Evaluation

Petitioner's expert, Audiologist, opined that the DCPS' speech-language evaluation of Student was not adequate because, due to Student's test-weariness, SLP was unable to complete the receptive and expressive vocabulary measures in the ROWPVT-4 and EOWPVT-4 one-word picture tests. Audiologist also opined that Student required an auditory processing test and a test of his ability to hear.

The DCPS speech-language evaluator, SLP, testified that even though Student was unable to complete the ROWPVT-4 and EOWPVT-4 tests, she was able to measure Student's expressive language abilities using the CELF-P2 Expressive Vocabulary subtest and that Student was well within normal limits for expressive vocabulary. She testified that she did not do further testing because a child's receptive vocabulary is usually higher than his expressive vocabulary. SLP testified that she was confident that she obtained appropriate information on Student's receptive vocabulary. SLP also testified that there was no need for an auditory processing evaluation because Student was within normal limits for receptive language and because there was no indication from the parent or Student's teacher of an auditory processing disorder. Finally, SLP testified that the Otoacoustic Emissions Test (OET) was appropriate to screen this Student's hearing, because the OET can be used for little children and does not require the child to do anything. The results of the OET let SLP know that Student could hear all speech frequencies and she determined that additional testing of Student's hearing was not warranted.

While Audiologist has decades of experience in the speech-language field, SLP also has been a practicing Speech Language Pathologist for 15 years. She is certified by the American Speech-Language-Hearing Association. Importantly, SLP interviewed

Student and personally conducted all of the speech-language assessments, except for the OET screening. From her informal assessment of Student's social language skills, she observed that Student used language for a variety of purposes, that he would make eye contact, that he was attentive, and that "everything seemed within normal limits." SLP also interviewed Mother and Student's teacher. I found her to be a more credible witness than Audiologist who based his opinions solely upon a review of Student's records. I conclude that Petitioner has not established that SLP's Initial Speech-Language Evaluation of Student was not an appropriate or adequate assessment of Student's communication skills and speech-language needs.

Evaluation for Other Health Impairment – Lead Poisoning

Petitioner also contended that Student should have been assessed for an Other Health Impairment – lead poisoning disability. The IDEA regulations define "Other health impairment" as,

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as . . . lead poisoning . . . ; and
- (ii) Adversely affects a child's educational performance.

34 CFR § 300.8(c)(9). It was noted in the February 12, 2014 Initial Speech Language Evaluation report that Student's medical history was significant for lead exposure. Lead was reportedly found behind wall paper in a house where the family lived after Student was born. Apparently based upon that information, Petitioner's expert, School Psychologist, testified that she would have had Student's pediatrician determine Student's blood lead level. However, there was no indication in the record that Student has a suspected disability resulting from lead exposure. In fact, Mother told SLP in

December 2013 that Student had been retested for lead poisoning and Student's pediatrician was not concerned. I find that Petitioner has not established that Student has a reasonably suspected lead poisoning disability for which he should have been evaluated by DCPS.

In sum, I find that Petitioner has not met her burden of proof that, in DCPS' initial special education eligibility evaluation of Student in the 2013-2014 school year, the District did not ensure that Student was appropriately tested in all areas of reasonably suspected disabilities.

2. Did the DCPS eligibility team err in determining at the February 2014 initial eligibility meeting that Student was not a child with a disability in need of special education and related services?

The "IDEA identifies a disabled student as 'a child . . . (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.' 20 U.S.C. § 1401(3)(A)." *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). Counsel for Petitioner argued at the due process hearing that the DCPS February 11, 2014 eligibility team had enough information to determine that Student was eligible for special education services. However, the eligibility team concluded that although Student had an Articulation impairment, the impairment did not adversely impact Student's educational performance to the extent that he required specially designed instruction. At the time the determination was made, Mother agreed with the team's decision.

Petitioner's expert witnesses opined only concerning the appropriateness of the

initial evaluations of Student. Neither witness testified that Student had an IDEA disability or that he should have been found eligible for special education services at the February 11, 2014 meeting. I find, therefore, that Petitioner has not met her burden of proof that the February 2014 eligibility team erred in determining that Student was not a child with a qualifying IDEA disability in need of special education and related services.

Prior to the March 17, 2015 due process hearing, DCPS conducted new evaluations of Student to determine whether he is eligible for special education services. The appropriateness of the current evaluations, which had not yet been considered by Student's eligibility team, was not at issue in this case. My decision here will be without prejudice to Petitioner's due process rights pertaining to the current evaluations.

ORDER

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

ORDERED:

All relief requested by Petitioner herein is denied, without prejudice to Petitioner's rights, if any, to seek relief hereafter for matters pertaining to evaluations of Student conducted after the due process complaint in this case was filed or for any eligibility determination made subsequent to the due process hearing.

Date: March 28, 2015

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).