District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	**Room: 2006**
Petitioner,	)	**Hearing: 5/19**
	)	**HOD Due: May 31, 2016**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2016-0064**
District of Columbia Public Schools,	)	**Issue Date: May 31, 2016**
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently ineligible for services. (the "Student")

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 17, 2016 in regard to the Student. On March 25, 2016, Respondent filed a response. A resolution meeting was held on April 20, 2016. The resolution period expired on April 16, 2016.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

[1]Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On April 22, 2016, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order issued on April 27, 2016, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There was one hearing date in this case, May 19, 2016. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved in Exhibits 1-12, exclusive of Exhibit 5. There were no objections. Exhibits 1-12, exclusive of Exhibit 5, were admitted. Respondent moved into evidence Exhibits 1-11. There were no objections. Exhibits 1-11 were admitted.

At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: Petitioner; the Student's sister; and Witness A, a psychologist (expert: clinical psychology). Respondent presented: Witness B, a teacher; and Witness C, Director, Student Support Services.

IV. Credibility.

I found all witnesses to be credible in this case. All were relatively consistent with each other, and no witnesses were impeached by any prior statements.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did Respondent fail to complete an evaluation of the Student after the request for an evaluation in September, 2015, and thereby fail to classify the child and fail to provide the Student with an IEP? If so, did DCPS violate D.C. Code Sect. 38-2561.02(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

2. Did Respondent violate "Child Find" when it failed to evaluate the Student after receiving an assessment in April, 2015? If so, did DCPS violate 20 U.S.C. Sect. 1412(a) (3) (A), 34 C.F.R. Sect. 300.111(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

3. Did Respondent fail to review the independent evaluations provided by the parent? If so, did DCPS violate 34 CFR Sect. 300.305(a)(1)(i)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks reimbursement for the I.E.E. written by Witness A, a psychologist. Petitioner also seeks a meeting to review the Student's eligibility for services.

Respondent's position was that there was no request for an evaluation, that they did not fail to review any evaluations provided by the parent, that there is no record of any independent assessment provided in April, 2015, and that they will conduct a psychological evaluation of the Student.

VI. Findings of Fact

1. The Student is a product of a difficult childhood. After being subject to abuse by the Student's biological mother, the Student was adopted by the Petitioner.

The Student has been diagnosed with Post Traumatic Stress Disorder ("PTSD") and has had nightmares, flashbacks, depression. (Testimony of Witness A; P-9-2; P-3-1)

2. Nevertheless, the Student is eager to learn and asks good questions at school. The Student is considered a "joy" to have in class. (R-3-1)

3. During the 2014-2015 school year, the Student experienced difficulty in school in Virginia. The Student would frequently go to counseling and was having trouble concentrating. At home, the Student was "like a Jekyll and Hyde" and could "act like a wild animal in the street." The Student had thoughts of self-injury at this time. The Student then moved to a school in the District of Columbia, School B, for the remainder of the school year. (P-3-1-2; Testimony of Petitioner)

4. For the 2015-2016 school year, the Student started at School A, a DCPS school. Near the start of the school year, Petitioner talked to a special education teacher at School A about getting the Student evaluating for special education services. She was told that she needed to speak to Witness C, the Director of Student Support Services, to request the evaluation. She then called Witness C, and was told to write a letter to the school requesting an evaluation. (Testimony of Petitioner)

5. At this time, the Student was being dropped off at school by a sibling. This sibling, a sister ("the Sister"), is an adult who is a parent. Toward the start of the school year, Petitioner gave the Sister a letter requesting an evaluation of the Student. Petitioner told the Sister to give it to the school. The Sister read the letter and confirmed that the letter was a request for an evaluation. The letter was written on "loose-leaf" paper. The Sister then gave the letter to Ms. H. at School A, who told her that she was going to give the letter to Witness C. (Testimony of Sister)

6. The school did not provide the Student with an evaluation at this time or acknowledge receipt of the letter. (Testimony of Petitioner)

7. During the first part of the 2015-2016 school year, the Student was generally quiet, attentive and complaint. However, there were also "clinically significant" issues with internalizing problems and somatization. The Student was often alone, "always" had reading problems, "almost always" had trouble with math, often had spelling problems, often had trouble keeping up in class, and "almost always" got failing grades. (P-9-8-9)

8. A Student Support Team ("SST") meeting was therefore held for the Student on February 19, 2016. Attending were the Student's ELA teacher, Witness B, the Student's math teacher, the Student's academic support teacher, the Student's grandmother, and Witness C. The grandmother contended that the Student was struggling and asked for extra help. A teacher stated that the Student was at "Level M" in reading, which is below grade level. According to teachers, the Student was having trouble accessing grade level work. (R-2-1-8)

9. As a result of the information discussed at the meeting, the Student received additional interventions. The Student was to receive guided reading from another teacher 30-45 minutes per day in a small group. In ELA, the Student was to use "Raz Kids" (three times a week, thirty minutes), and in math, the Student was to receive drills (daily, five minutes). The Student also received simplification of oral directions, repetition of directions, and extended time. (R-2-1-8)

10. The interventions have resulted in improvements. Running records show that the Student now has is functioning at reading "Level U." The Student has also

grown with respect to math fluency, in particular with respect to double digit numbers. (Testimony of Witness B; Testimony of Witness C; R-4-2)

11. In May, 2016, the Student was tested by Witness A, a private psychologist. Woodcock-Johnson IV Tests of Cognitive Abilities testing put the Student in the 49th percentile for general intellectual ability. Woodcock-Johnson IV Tests of Achievement form A and Extended put the Student at the 26th percentile in reading skills, 14th percentile in math skills, and 15th percentile in written language. Overall academic skills were at a 15th percentile. (P-9-15)

12. BASC-2 Questionnaires filled out by the ELA teacher, Witness B, who indicated that the Student has clinically significant issues with internalizing problems and somatization. He stated that the Student will complain a lot about health at school. It was reported that the Student is always alone, always has reading problems, almost always has trouble with math, often has spelling problems, often has trouble keeping up in class, and almost always gets failing grades. (P-9-8)

13. BASC-2 Questionnaires filled out by the math teacher also found the Student to be clinically significant with respect to internalizing problems and somatization. There were the same reports about complaining about health, feeling friendless, almost always having reading and math problems, almost always having trouble keeping up in class, often having spelling problems, often getting failing grades in school, and almost always complaining that the lessons go too fast. (P-9-9)

14. The Student's grades during the 2015-2016 school year ranged from good to poor. In math, the Student received a B+ for first term, a D for second term, and a C+ for third term. In ELA, the Student received a D for first term, an F for second term and

a C for third term. The report card specifically mentioned that the Student struggles in reading. In particular, the report card stated that the Student needs to understand the main idea in nonfiction, draw conclusions/make inferences in non-fiction and fiction, and understand figurative language in texts. (R-3-1)

VII. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded 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 Sect. 300.513(a).

1. Did Respondent fail to complete an evaluation of the Student after the request for an evaluation in September, 2015, and thereby fail to classify the child and fail to provide the Student with an IEP? If so, did DCPS violate D.C. Code Sect. 38-2561.02(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

Federal regulations at 34 C.F.R. Sect. 300.301(b) provide that, "(c)onsistent with the consent requirements in 34 C.F.R. Sect. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability." District of Columbia law, at DC Code Sect. 38-2561.02(a) implements this provision. The Code reads as follows: "DCPS shall assess or evaluate a student who

may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment."

Petitioner's daughter, who is the Student's sister, testified credibly that she usually brought the Student to school during the 2015-2016 school year. Early in the school year, she brought a letter to a Ms. H at School A. Ms. H works as a receptionist at the school. This letter, which was written on "loose-leaf" paper, requested an evaluation for the Student. According to the Sister, Ms. H then said that she would bring the letter to Witness C, who is the Director of Student Support Services at School A.

The parent testified consistently with this testimony. She testified that, early on during the 2015-2016 school year, she talked to a special education teacher further to getting the Student evaluating. The teacher told her that she needed to speak to Witness C, which she did through a phone call. Witness C then told her to write a letter, which was the letter that she sent into school with the Sister.

The key question here is whether the Sister actually provided this letter to Ms. H. However, Ms. H was not called as a witness to rebut the contentions of Petitioner and the Sister. Moreover, Respondent was unable to impeach the Sister, who came across as particularly credible. The preponderance of the evidence here established that the Sister did provide Ms. H at School A with a request to evaluate the Student.

There has been no reaction to the request, even to this day. DCPS's position is that general education interventions provided through an SST meeting should be attempted before the evaluation should proceed.

The appropriateness of using such interventions instead of evaluating students has been discussed in governmental memoranda. In Questions and Answers on Response to

Intervention and Early Intervention Services (United States Department of Education, January 2007)(available at www.idea.ed.gov), the Department of Education asked rhetorically whether an LEA must evaluate a child upon the request of the parent at any time during the RTI process. In answering, the Department of Education pointed out that 34 CFR Sect. 300.301(b) allows a parent to request an evaluation at any time. According to the Department of Education, if an LEA declines the parent's request for an evaluation, the LEA must issue a prior written notice as required under 34 CFR Sect. 300.503(a)(2), which the parent can challenge this decision by requesting a due process hearing to resolve the dispute regarding the child's need for an evaluation.

Even more definitively, OSEP issued a letter in 2011 on a similar issue. In Memorandum to: State Directors of Special Education, 56 IDELR 50 (OSEP January 21, 2011), OSEP Director Melody Musgrove stated "(t)he regulations at 34 CFR Sect. 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR Sects. 300.304-300.311, to a child suspected of having a disability under 34 CFR Sect. 300.8."

Here, DCPS failed to react to the parent's request for an evaluation. At this point, their theory is that they wanted to try certain interventions to see if special education was necessary for the Student. As it turns out, at least some of those interventions worked, as discussed by the frankly impressive testimony of the Student's ELA teacher, Witness B. Still, the success of such interventions does not allow DCPS to ignore a parent's request to evaluate. While the position of the school is somewhat understandable in this regard, a school district does not have the choice to offer

interventions instead of evaluating a Student upon parental request. A school may use interventions in tandem with an evaluation, in particular to determine if a student is eligible for services as a student with a Specific Learning Disability. 5E DCMR 3006.4(d); 34 CFR Sect. 300.309(a)(2)(i). However, if a parent asks for an evaluation, the school district has to provide it under the law. Accordingly, DCPS violated 34 CFR Sect. 300.301(b), and D.C. Code Sect. 38-2561.02(a).

2. Did Respondent violate "Child Find" when it failed to evaluate the Student after receiving an assessment in April, 2015? If so, did DCPS violate 20 U.S.C. Sect. 1412(a) (3) (A), 34 C.F.R. Sect. 300.111(a) and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

The "child find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "[a]l1 children with disabilities residing in the State ... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. Sect. 1412(a) (3) (A); 34 C.F.R. Sect. 300.111(a). Child find must include any children "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c) (1).

Federal case law indicates that these provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108

(D.D.C. 2008). Consistent with the statutory language, the "child find" obligation "extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

In closing, Petitioner pointed to incidents that occurred during the 2015-2016 school year to establish a child find violation. However, this specific child find claim, as outlined in the pre-hearing order, relates to an event during the prior school year at School B wherein, allegedly, the school was given Exhibit P-3.

The parent did not testify this way, at least at first. Initially, she testified that the Sister gave Exhibit P-3 to Ms. H at School A. She did not mention giving this document to School B at all at first. Then, upon leading questioning from counsel, she corrected herself, stating that she also gave P-3 to School B during the end of the 2014-2015 school year.

There was no clear testimony from the Sister to the effect that she provided Exhibit P-3 to a school. Moreover, Petitioner did not provide many details on these events. For instance, there is no testimony on the person that Petitioner gave P-3 to at School B during the 2014-2015 school year. I agree with Respondent that this testimony is too vague, brief and confusing to support this contention.

Parenthetically, merely submitting an evaluation to a school district does not necessarily trigger “Child Find” obligations. The evaluation has to be a credible one, and the document at P-3 – which is a “Magellan Assessment” -- is not especially well written. Moreover, this assessment tends to focus on the Student’s activities outside of school and does not contain references to any observations of the Student at the school.

While there is a reference to the Student having difficulty concentrating and has high anxiety at school due to Post-Traumatic Stress Disorder, the evaluation also mentions that the Student is receiving passing grades in school.

Under the circumstances, Petitioner did not meet her burden of persuasion on this claim, which must be dismissed.

3. Did Respondent fail to review the independent evaluations provide by the parent? If so, did DCPS violate 34 CFR Sect. 300.305(a)(1)(i)? If so, did DCPS deny the Student a FAPE?

As part of any evaluation, the IEP Team must review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers. 34 CFR Sect. 300.305(a)(1)(i).

Petitioner's argument in this connection is the same as the argument for Issue #2, namely that DCPS did not review Exhibit P-3. However, as I discussed in regard to Issue #2, I have found that Petitioner did not establish that this assessment was actually provided to DCPS. Petitioner's testimony was, at first, that she gave this document to School A through her child. Then, upon leading from counsel, she added that she gave the document to School B. The Sister did not testify about providing this document to either school, and Petitioner provided no details about how the document was provided to School B.

This claim is dismissed.

VIII. Relief

As relief, Petitioner seeks funding of the evaluation by Witness A, and an

eligibility meeting to review this evaluation. Though Petitioner's Due Process Complaint references compensatory education, this was not discussed at the pre-hearing conference or at the hearing. I will therefore consider the request for compensatory education to be withdrawn.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated: "the statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

As I have found, the Student should have been evaluated after the parent requested it. When the District simply would not evaluate the Student, it was reasonable, in my view, for the parent to initiate an evaluation of the Student. The parent did not rush to have the Student evaluated in this regard. The evaluation written by Witness A was completed about eight months after the evaluation request, by which time almost an entire school year had elapsed.

DCPS appears to seek another evaluation of the Student at this point. However, to require an additional evaluation by another evaluator would slow this process down even more and likely burden the Student with unnecessary and duplicative testing. DCPS also objects to Petitioner's choice of evaluator, Witness A, who, they claim, is charging too much for the evaluation. A review of the evaluation reveals that it is a professionally written evaluation by a qualified provider. DCPS presents no authority

for the proposition that they can set price limits on an evaluation that they should have conducted themselves.

Still, evaluators *certainly* should not charge school districts high fees that are beyond those which are reasonable and customary in the community. Accordingly, I will order that Evaluator A be reimbursed for her evaluation at a rate that is usual and customary in the community. The eligibility team will reconvene within ten school days of the date of this decision to review that document and all other relevant documents to determine if the Student should be deemed eligible for services.

IX. Order

As a result of the foregoing:

1. Respondent shall reimburse Witness A for her evaluation at a usual and customary rate in the community;

2. Respondent is hereby ordered to convene the eligibility team within 10 school days of the issuance of this decision to review the Student's possible eligibility for services. During this meeting, the team shall carefully review the evaluation of Witness A.

Dated: May 31, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. Notice of Appeal Rights

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 USC §1415(i).

Date: May 31, 2016

Michael Lazan
Impartial Hearing Officer