

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

OSSE
Office of Dispute Resolution
November 17, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 14, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
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 alleges that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to timely conduct an initial special education eligibility evaluation, following the parent's May 2014 request.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 15, 2014, named DCPS as Respondent. The parties met for a resolution session on October 2, 2014 and did not reach an agreement. On October 3, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on October 16, 2014.

On November 12, 2014, counsel for DCPS filed a motion for dismissal, or in the alternative for a 30-day continuance, on the grounds that DCPS had agreed to evaluate Student for special education eligibility and an initial eligibility meeting was scheduled for December 4, 2014. Petitioner's Counsel opposed the motion. At the beginning of the due process hearing on November 13, 2014, I denied DCPS' motion, on the record, as untimely.

The due process hearing was held before this Impartial Hearing Officer on November 13, 2014 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 witness INTAKE COORDINATOR. DCPS called SCHOOL PSYCHOLOGIST as its only witness. Petitioner's Exhibits P-1 through P-18 and DCPS' Exhibits R-1 and R-2 were admitted into evidence without objection. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The following issue for determination was certified in the October 3, 2014

Prehearing Order:

Whether DCPS denied the student a FAPE by failing to conduct initial special education eligibility evaluations pursuant to a request from the parent in May 2014.

For relief, Petitioner requested an order requiring DCPS to conduct or fund a comprehensive psychological evaluation, functional behavioral assessment (FBA), an occupational therapy (OT) assessment, a physical therapy (PT) assessment and any other assessments that are indicated; and that DCPS be ordered to timely convene an eligibility meeting for Student to review the evaluation results and develop an Individualized Education Program (IEP). Petitioner also reserved the right to seek a compensatory education award should Student ultimately be determined to be a child with a disability.

FINDINGS OF FACT

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

1. Student, an AGE child, resides in the District of Columbia, primarily with his father. Student has never been determined to be a "child with a disability" as defined by the IDEA. Testimony of Mother.
2. For most of the 2013-2014 school year, Student attended PUBLIC CHARTER SCHOOL (PCS). Testimony of Mother. PCS elected to be treated as an "LEA

Charter," *i.e.*, as its own LEA for purposes of part B of the IDEA. *See* 5E DCMR § 923.3.
Hearing Officer Notice.

3. In March 2014, concerned about Student's behaviors and perceived developmental issues, Mother requested PCS to conduct an initial special education eligibility evaluation of Student. PCS agreed to conduct the evaluation. However, in May 2014, before the PCS assessments were conducted, Mother transferred Student to DCPS PUBLIC SCHOOL due to a report that Student had been sexually assaulted by another student at PCS. Testimony of Mother.

4. On May 14, 2014, Petitioner's Counsel made a written request to DCPS Public School for DCPS to evaluate Student for eligibility special education and related services. Exhibit P-1. This request was repeated by facsimile letters sent June 12, 2014, August 12, 2014 and September 8, 2014. Petitioner's Counsel attached to each request a Parental/Guardian Consent to Evaluate form, dated March 28, 2014, signed by Mother. Exhibits P-1, P-2, P-3, P-4. DCPS received the initial evaluation request on or about May 14, 2014. Stipulation of DCPS' Counsel.

5. At the time she enrolled Student at DCPS Public School, Mother spoke to the school principal and requested that Student be evaluated for special education. The principal told Mother there was nothing they could do to help Student and that she should transfer him to another public charter school. Mother did not withdraw Student from DCPS Public School. At the end of the 2013-2014 school year, DCPS Public School staff contacted Mother to obtain more information about how Student acted at school and about Student's medications. Mother referred school staff to Student's father, because Student was living with his father. Testimony of Mother.

6. Student did not attend school over the summer of 2014. Testimony of

Mother.

7. On October 2, 2014, after Mother filed her due process complaint in this case, a Resolution Session Meeting (RSM) was convened at DCPS Public School. At the meeting, DCPS agreed to evaluate Student and Mother signed a DCPS consent-to-evaluate form. Testimony of School Psychologist, Exhibits R-1 and R-2. Before that meeting DCPS had not requested Mother to sign a consent form. Testimony of Mother.

8. DCPS' initial eligibility evaluation of Student is currently under way. Testimony of Mother. The assessments being conducted include a comprehensive psychological evaluation, an FBA, and OT and PT assessments. All of the assessment reports are scheduled to be completed by November 17, 2014. An initial eligibility meeting for Student was scheduled for November 20, 2014, but at the request of Petitioner's Counsel, the eligibility meeting was rescheduled for December 4th, 2014. Testimony of School Psychologist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the 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, § 3030.3. *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

Did DCPS deny Student a FAPE by failing to conduct initial special education eligibility evaluations pursuant to a request from the parent in May 2014?

On or about May 14, 2014, Petitioner made a written request, through her attorney, for DCPS to conduct an initial evaluation of Student to determine whether he was eligible for special education and related services. Although DCPS received the parent's request, DCPS Public School did not start the evaluation process until October 2, 2014 when it requested and obtained the parent's written consent for evaluations. Petitioner contends that DCPS violated the IDEA and the District of Columbia Code (D.C. Code) by not conducting the initial evaluation on a timely basis.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). Under the Act's "child-find" requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (citing *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Id.* (quoting D.C.Code § 38–2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP

within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). I find that DCPS violated the IDEA and D.C. Code § 38-2561.02(a) by not conducting the initial eligibility evaluation of Student by September 11, 2014, that is, within 120 days from May 14, 2014, when Mother made her written request.²

Remedy

Having determined that DCPS violated the IDEA's child-find mandate and the D.C. Code by not conducting Student's initial eligibility evaluations within 120 days from Mother's written request, I turn next to whether a remedy is appropriate. A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir.2005)).

For her proposed resolution in the due process complaint, Petitioner requested the Hearing Officer to order DCPS to,

[C]onduct or fund the following evaluations of the student comprehensive psychological evaluation, functional behavioral assessment, Occupational Therapy assessment, Physical Therapy assessment and any other assessments that are indicated; and that DCPS shall timely convene an eligibility meeting for this student to review the evaluation results and develop an Individualized Education Program (IEP).

DCPS' Counsel contends that Petitioner has already received all of the relief she requested and that this case should be dismissed. It is undisputed that since DCPS obtained Mother's written consent on October 2, 2014, all of the evaluations requested

² Whether Student was also denied a FAPE cannot be determined based upon the evidence before me, because it is not yet established that he is a child with a disability. *See* 20 U.S.C. § 1400(d)(1)(A). (Purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education.)

by the parent either have been conducted or are under way, and that the initial eligibility meeting for Student is scheduled for December 4, 2014. (The meeting date was postponed from November 20, 2014 to December 4, 2014 to accommodate the schedule of Petitioner's Counsel.)

In an analogous child-find decision, the U.S. District Court for the District of Columbia wrote,

Plaintiff seeks redress for alleged violations by DCPS of the "child find" provision of the IDEA. . . . If it were granted, such redress from this Court would consist of an order requiring DCPS to evaluate A.G. in order to determine his eligibility for special education and other related services. However, since December 8, 2012, when the HOD was issued, DCPS has conducted a comprehensive psychological evaluation of A.G., after which an MDT determined that A.G. was eligible for special education. . . . Thus, as "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future," this Court can find no remaining justiciable issue in this case, and plaintiff's claim must therefore fail as moot. *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990).

Boose v. District of Columbia, 2014 WL 2156802, 2 -3 (D.D.C.May 22, 2014). Similarly in this case, were I to grant the relief requested by Petitioner, the redress would consist of an order requiring DCPS to do what it is already doing – namely, to complete without undue delay Student's initial special education eligibility evaluation and determination. Petitioner's Counsel argues that Mother requires an "enforceable remedy" to ensure that DCPS will follow through on its undertaking to complete its initial evaluation of Student. However, counsel has pointed to no evidence which would warrant a concern that DCPS will not now timely complete the eligibility determination process. *Cf. Boose, supra* (Court should refrain from deciding case if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.) Accordingly, I conclude that ordering DCPS to complete

its eligibility evaluation of Student would not be an appropriate remedy in this case.³

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by Petitioner herein is denied, without prejudice to Student's right to be evaluated for special education eligibility and to be provided an IEP if determined eligible, or to Petitioner's right, if any, to seek a compensatory education remedy hereafter, should Student be determined to be a child with a disability.

Date: November 14, 2014

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).