

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
October 24, 2015

Student, ¹)	Date Issued: 10/24/15
through her Parent,)	
Petitioner,)	Case No.: 2015-0295
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date and Location:
("DCPS"),)	10/15/15, ODR Room 2006
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, filed a due process complaint on 9/1/15, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS did not timely evaluate Student despite repeated requests by Petitioner and her counsel. DCPS responded that it had not denied Student a FAPE as it may not have received the requests to evaluate and, in any case, is now conducting needed evaluations.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

Procedural History

Following the filing of the due process complaint on 9/1/15, the case was assigned to the undersigned on 9/2/15. DCPS’s response to the complaint was timely filed on 9/11/15 and did not challenge jurisdiction.

¹ Personally identifiable information is provided in Appendix A, including terms initially stated in italics.

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The Resolution Session Meeting (“RSM”) took place on 9/17/15, but the parties neither settled the case nor terminated the 30-day resolution period early, which ended on 10/1/15. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 11/15/15.

The due process hearing took place on 10/15/15. The hearing was closed to the public. Petitioner was represented by *Petitioner’s Counsel*. DCPS was represented by *Respondent’s Counsel*. Counsel discussed settlement near the beginning of the hearing without success. Petitioner was present at the hearing through the presentation of her case-in-chief, before leaving due to child care and health issues.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Respondent’s counsel formally stated for the record that DCPS will have completed a Comprehensive Psychological evaluation and an Occupation Therapy (“OT”) evaluation and will be prepared for an eligibility meeting by 11/18/15.

Petitioner’s Disclosure statement, submitted on 10/7/15, consisted of a witness list of 3 witnesses and documents P1 through P12. Petitioner’s Disclosure statement and documents were admitted into evidence without objection. After the due process hearing, Petitioner submitted corrected Disclosures to substitute for her initial Disclosures, at the request of the undersigned, in order to redact the name of Student’s sibling, which was inadvertently included on 4 pages of the initial filing.

Respondent’s Disclosure statement, submitted on 10/8/15, consisted of a witness list of 7 witnesses and documents R1 through R8, although Respondent did not offer R6 or R8 into evidence. On 10/13/15, Petitioner filed timely objections to Respondent’s Disclosures in accordance with the 9/29/15 Prehearing Order (Modified) (“PHO”) because Respondent’s Disclosures were filed after the 10/7/15 deadline in the PHO, which was 5 business days prior to the due process hearing. After hearing argument from counsel, the undersigned sustained Petitioner’s objections as to all documents (noting that some of Respondent’s documents were included in Petitioner’s Disclosure) and as to all witnesses except for the 3 witnesses listed by Respondent in the PHO.

Petitioner’s counsel presented Parent as the only witness in Petitioner’s case-in-chief (*see Appendix A*) and presented no rebuttal witnesses.

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Teacher* (Student’s Kindergarten teacher, 2014/15 school year)
2. *School Psychologist*

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The sole issue² to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to: comprehensively evaluate Student in all areas of suspected disability, including Student's academic delays, speech concerns/delays, motor issues, and vision issues, although repeated requests for evaluation were made; determine eligibility; provide an IEP; and offer an appropriate placement.

Petitioner seeks the following relief³:

1. A finding that Student was denied a FAPE by DCPS.
2. DCPS shall fund the following independent evaluations⁴:
 - a. Comprehensive psychological (including academic, cognitive, and social/emotional testing);
 - b. Comprehensive occupational therapy; and
 - c. Comprehensive vision.
3. DCPS shall convene an MDT/IEP team meeting within 10 business days after receiving all of the evaluations in paragraph 2 to determine eligibility, develop an IEP if eligible, and determine placement.
4. Any other relief that is just and fair.

An oral opening statement was made by Petitioner's counsel and was waived by Respondent's counsel. Oral closing arguments were made by counsel for both parties at the

² Petitioner expressly withdrew a second issue at the due process hearing:

“Whether DCPS denied Student a FAPE by failing to comply with its affirmative Child Find obligations no later than Spring of the 2014/15 SY by identifying, evaluating, determining eligibility, providing an IEP, and offering an appropriate placement, where (a) Student has academic delays, speech concerns/delays, motor issues, and vision issues, and (b) detailed requests for comprehensive evaluations were made at a minimum on 4/17/15, 4/29/15, 6/2/15, 6/5/15, and 7/24/15, but no evaluations have been conducted or even scheduled.”

³ At the due process hearing, Petitioner expressly withdrew without prejudice and reserved her claim for compensatory education for any denial of FAPE. As noted in footnote 2 of the PHO, “So far as Petitioner's request for compensatory education depends on the findings of evaluations that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student's evaluations and a determination of eligibility for special education and related services.”

⁴ Petitioner is no longer concerned about Student's speech issues and, at the due process hearing, expressly withdrew her request for a comprehensive speech/language evaluation.

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end of the due process hearing. Both parties were permitted to submit legal citations after the hearing, which Respondent's counsel provided by email on 10/16/15.

Credibility

Each of the witnesses in this case was fundamentally credible, although some of the details raised questions in the mind of the undersigned. Parent testified that she had attended 3 or 4 parent-teacher conferences between March and June 2015, although Teacher credibly testified that only 1 such conference had occurred during that period, at the end of the 3rd quarter, which cast doubt on Parent's credibility.

On the other side, School Psychologist declined to forthrightly answer questions from the undersigned about how quickly she has seen independent educational evaluations ("IEEs") completed, responding each time with the longer amount of time she views as typical. Further, School Psychologist believed that DCPS had not agreed to conduct an OT evaluation of Student at the RSM, notwithstanding clear RSM notes to the contrary, which DCPS prepared. The formal statement for the record by Respondent's counsel that DCPS will have completed an OT evaluation by 11/18/15 indicates that the RSM notes are correct.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age* and in *Grade* during the relevant time period.⁷
2. Parent is concerned that Student may need special education services, particularly relating to her vision and reading abilities, as Parent does not want Student to fall behind her classmates.⁸ Student often gets certain letters backwards, such as "b" and "d," and Parent is concerned that she may be dyslexic.⁹ Student also has an eye that turns away from the other one.¹⁰ Parent has been seeking an evaluation of Student since at least November 2014 in

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent; Due process complaint.

⁷ Parent; P8-2.

⁸ Parent.

⁹ *Id.*

¹⁰ P8-2; Parent.

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order to figure out what supports Student may need at school and at home; the lack of evaluation harms her ability to participate in decision-making relating to Student's education and to help Student with her schooling.¹¹

3. Parent may have orally requested an evaluation when enrolling Student in *Public School* in March 2015 and at other times, due to concern about Student's eyes/vision and possible dyslexia.¹² While Public School reported that Student is basically doing fine academically and is receiving additional assistance where she needs it, Parent has credible concerns that Student is not doing fine from working with her at home.¹³ There is no dispute that Student is cooperative and pleasant at school and exhibits no behavioral problems.¹⁴

4. Parent, through counsel, requested a comprehensive evaluation of Student by letter faxed to the Principal of Public School on 4/17/15.¹⁵ The LEA of Public School responded by fax on 4/29/15 asking that the request be resubmitted to him by email.¹⁶ Parent's counsel responded that same day, retransmitting the initial request for evaluation.¹⁷ Parent's counsel followed up on 5/28/15, noting that she had not received any response to the request for evaluation.¹⁸

5. In mid-May 2015, Parent's counsel spoke to School Psychologist in person and followed up by email with School Psychologist on 6/2/15 asking about evaluation of Student and who should be contacted.¹⁹ School Psychologist responded on 6/3/15 that she would try to find someone on the summer team.²⁰ Parent's counsel indicated on 6/5/15 that she would appreciate any follow-up information, but did not receive anything further.²¹ School Psychologist did not send any further information because her inquiries within DCPS yielded no helpful information.²² School Psychologist is a 10-month DCPS employee, so did not work during the summer of 2015.²³ School Psychologist did not have an out-of-office auto-response on her email so that Parent's counsel would know why School Psychologist did not reply to her email on 7/24/15.²⁴

¹¹ P7-1; Parent.

¹² Parent.

¹³ P11-1; Parent.

¹⁴ Teacher; School Psychologist.

¹⁵ P1-1.

¹⁶ P2-1.

¹⁷ P3.

¹⁸ P4-1.

¹⁹ P5-1.

²⁰ *Id.*

²¹ *Id.*

²² School Psychologist.

²³ *Id.*

²⁴ School Psychologist; P6-1.

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6. Teacher never participated in a team meeting to determine whether Student needed to be evaluated prior to the RSM on 9/17/15, and never discussed whether Student needed special education services.²⁵ DCPS never discussed evaluation of Student with Parent until the RSM.²⁶

7. At the RSM, Public School agreed to conduct both a Comprehensive Psychological evaluation and an OT evaluation.²⁷ School Psychologist is conducting the Psychological evaluation, which includes an Educational assessment.²⁸

8. Parent does not have concerns about Student's speech now, and Public School reported at the RSM that Student is proficient in all areas, so DCPS plans to monitor Student's speech but not conduct a Speech/Language evaluation.²⁹

9. As for vision, DCPS stated at the RSM that it needs an "eye medical" to begin a vision eligibility screening report, and would give Parent a template, entitled Eye Report for Children with Visual Problems ("Eye Report"), for an ophthalmologist to complete.³⁰ Student did receive a DCPS screening for distance vision recently, which she barely passed with 20/40 vision in one eye, 20/30 in the other, and 20/30 using both eyes.³¹

10. No evaluations were begun by DCPS until after consent from Parent was given on 9/30/15; DCPS had not requested consent from Parent prior to the RSM.³²

11. Parent has no concerns with DCPS conducting evaluations of Student, but prefers an IEE if quicker.³³

12. DCPS has made progress with the Comprehensive Psychological evaluation; School Psychologist interviewed Student's current teacher and conducted a background educational review, in preparation for testing Student.³⁴ The evaluation is due by 11/14/15 and School Psychologist hopes to complete it sooner.³⁵ DCPS has scheduled 11/18/15 to review the results with Parent and her counsel if they are available then.³⁶

²⁵ Teacher.

²⁶ Parent; P8-1.

²⁷ P8-2.

²⁸ School Psychologist.

²⁹ Parent; P8-2.

³⁰ P8-2; P12.

³¹ School Psychologist.

³² Parent; P8; P10-1.

³³ Parent.

³⁴ School Psychologist.

³⁵ *Id.*

³⁶ *Id.*

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13. IEEs typically take at least 2 months to conduct an evaluation and prepare the report, and then the school may need another couple of weeks to review the report before an eligibility meeting can be held.³⁷ Conducting the same evaluation twice in a short period of time requires coordination so that different instruments can be administered.³⁸

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. 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 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

³⁷ *Id.*

³⁸ *Id.*

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“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue: *Whether DCPS denied Student a FAPE by failing to: comprehensively evaluate Student in all areas of suspected disability, including Student’s academic delays, speech concerns/delays, motor issues, and vision issues, although repeated requests for evaluation were made; determine eligibility; provide an IEP; and offer an appropriate placement.*

Parent is concerned that Student may need special education services, particularly relating to her vision and reading abilities, in order to keep her from falling behind her classmates. Whether or not Parent herself ever made requests for evaluation of Student, it is clear that Parent’s counsel repeatedly requested evaluation of Student in writings faxed and emailed to Public School. These requests for evaluation were virtually ignored until the due process complaint was filed and the parties finally met at the Resolution Session Meeting. For the reasons discussed below, this Hearing Officer concludes that DCPS’s failure to evaluate Student following Parent’s 4/17/15 request via counsel was a violation of the IDEA and a denial of FAPE, as it interfered with Parent’s participation in decision-making about what is needed for Student to receive a FAPE.

The IDEA is unambiguous that upon the request of a parent a school must conduct a “full and individual initial evaluation” to determine if the student is a child with a disability. 34 C.F.R. 300.301(a),(b). This initial evaluation must be conducted within 120 days from the date that Student was referred for evaluation. 34 C.F.R. 300.301(c); D.C. Code 38-2561.02(a); *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 56 (D.D.C. 2011). Here, Parent through counsel requested an evaluation of Student in writing on 4/17/15, 4/29/15, 6/2/15, 6/4/15, and 7/24/15. Thus, the 120 days allowed for evaluation following Parent’s first written request ended on 8/15/15. Yet, even after the filing of the due process complaint, DCPS did not begin to evaluate Student for several more weeks. This Hearing Officer concludes that DCPS’s failure to evaluate Student after receiving Parent’s request on 4/17/15 was a violation of the IDEA.

A procedural violation of the IDEA does not, by itself, mean Student was denied a FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). Only violations of the IDEA that seriously deprive parents of their participation rights, or impede the child’s right to a FAPE, or result in deprivation of educational opportunity for the child are actionable. *See Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). In this case, DCPS’s months-long delay in evaluation interfered with Parent’s ability to engage in decision-making concerning what services might be necessary for Student to receive a FAPE. DCPS’s delay in evaluating Student also harmed Parent’s ability to know how best to help Student with her schooling now, whether or not she is determined to have a disability. Further, the delay impeded Student’s right to a FAPE by preventing evaluations

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that might have resulted in needed special education services being promptly provided to her. Accordingly, this Hearing Officer concludes that DCPS did deny Student a FAPE by failing to evaluate her for 5 months.

Moreover, in conducting the evaluation required by 34 C.F.R. 300.301, the public agency must ensure that the child is “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. 300.304(c)(4). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993).

Here, the evaluations at issue were all considered by DCPS at the RSM on 9/17/15. At that point, DCPS agreed to conduct Comprehensive Psychological and OT evaluations. Parent has no concern with the quality of DCPS evaluations, but is understandably concerned about whether DCPS evaluations will be completed promptly, given that nothing was done for months. However, School Psychologist is now under way with a Comprehensive Psychological evaluation, and DCPS’s counsel stated for the record that both the Comprehensive Psychological and OT evaluations will be completed and DCPS will be prepared for an eligibility meeting on 11/18/15. While the IEEs sought by Petitioner conceivably might be completed in less than a month, given the need for scheduling school observations and teacher interviews, this Hearing Officer concludes that the best path for expeditious evaluations and a prompt eligibility meeting is to continue with the DCPS Comprehensive Psychological and OT evaluations, rather than beginning IEEs at this point. However, given DCPS’s delay, Parent should not be required to take DCPS’s word at this late date. Accordingly, DCPS is ordered below to complete its evaluations and be ready for an eligibility meeting by 11/18/15, as it has committed.

As for Student’s vision, “visual impairment” is a disability defined in 34 C.F.R. 300.8(c)(13) as “an impairment in vision that, even with correction, adversely affects a child’s educational performance.” DCPS stated at the RSM that its Eye Report (P12) needs to be completed by an outside ophthalmologist. Given DCPS’s delay in responding to Parent’s concerns about Student’s vision, DCPS is ordered below to promptly fund an independent vision evaluation with an ophthalmologist who can complete the DCPS Eye Report and conduct any further vision evaluation needed.

ORDER

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS denied Student a FAPE by failing to evaluate her following requests made by Parent through counsel on 4/17/15 and thereafter.

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- (2) DCPS shall complete a Comprehensive Psychological evaluation and Occupational Therapy evaluation of Student and hold an eligibility meeting for Student no later than 11/18/15, unless a later date is agreed to by Parent.
- (3) DCPS shall fund within 5 business days an independent Vision evaluation with an ophthalmologist in order to (a) complete the DCPS Eye Report for Children with Visual Problems, and (b) conduct any further evaluation of Student's vision needed.
- (4) All claims for compensatory education are reserved.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

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