

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Date: 10/2/19, Room 423
)	Hearing Officer: Michael Lazan
)	Case No. 2019-0190
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently ineligible for services. 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 July 31, 2019. The Complaint was filed by a parent of the Student (“Petitioner”). On August 12, 2019, Respondent filed a response. The resolution period expired on August 30, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 USC 1400 et seq., its implementing regulations, 34 CFR 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

III. Procedural History

A prehearing conference was held on September 13, 2019. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioner, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on September 18, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination (“HOD”) due date was October 14, 2019.

On September 25, 2019, one week before the hearing, Respondent moved to dismiss the case, claiming it was moot. Respondent alleged that it had offered Petitioner the relief she sought, in the form of an authorization for a psychological evaluation, occupational therapy evaluation, and speech and language evaluation for the Student. On September 27, 2019, Petitioner submitted opposition, contending that she requested more relief than the three evaluations. Petitioner also pointed out that the Complaint’s claim relating to records was entirely unaddressed by Respondent’s motion. At the hearing on October 2, 2019, this Hearing Officer denied Respondent’s motion because, indeed, it does not address the Complaint’s claim pertaining to educational records. The denial of the motion was also necessary because Petitioner is seeking an order stating that the file date for the instant litigation be deemed the accrual date (for statute of limitations purposes) for certain future due process that may demand compensatory education. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 833 (D.C. Cir. 2006) (after the hearing officer dismissed on mootness grounds, the court reversed because the complaint sought compensatory education); see also Flores v. District of Columbia, 437 F. Supp. 2d 22, 29 (D.D.C. 2006) (same).

The hearing proceeded on October 2, 2019. Petitioner was represented by Attorney A, Esq., and Attorney B, Esq. Respondent was represented by Attorney C, Esq. After the hearing, oral closing arguments were presented, on the record. This was a closed proceeding. Petitioner moved into evidence exhibits 1-17. There were no objections. Exhibits 1-17 were admitted. Respondent moved into evidence exhibits 1-13. There were no objections. Exhibits 1-13 were admitted.

Petitioner presented as witnesses: herself and Witness A, an expert in special education. Respondent did not present any witnesses.

IV. Issues

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

1. Did DCPS fail to evaluate the Student after the Student’s teacher requested an evaluation in or about October, 2018? If so, did DCPS act in contravention of 34 CFR 300.301(c)(1), D.C. Code 38-2561.02, and related provisions? If so, did DCPS deny the Student a Free Appropriate Public Education (“FAPE”)?

2. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner is seeking a full evaluation of the Student, including a psychological evaluation, a speech and language evaluation, and an occupational therapy evaluation. Petitioner also seeks an eligibility meeting, records, and a right to file an additional complaint due to DCPS’s refusal to evaluate and/or provide records.

V. Findings of Fact

1. The Student attends School A, a public elementary school. The Student has been at this school since pre-kindergarten. Testimony of Petitioner.

2. Academically, the Student functions below grade level. The Student has issues with forgetting what s/he has learned and significant trouble with letter formation and spacing. The Student is not able to say all of the letter sounds. The Student is unable to name opposites and cannot differentiate between upper and lower case letters. The Student also has no understanding of how to add or subtract, though the Student is able to count to thirty-nine. Testimony of Petitioner; Testimony of Witness A.

3. The Student was tested pursuant to the “i-Ready” measure in or about September, 2018. The Student was determined to be at the “emerging kindergarten” level in math overall, with one subtest (algebra) scored at the “approaching kindergarten” level. The test results suggested that the Student would benefit from a review of pre-kindergarten skills in quantitative reasoning, number recognition, and counting. P-7-1-2.

4. During the 2018-2019 school year at School A, the Student struggled and received “Response to Intervention” (“RTI”) services. Even though the Student’s lessons were delivered in a small group with scaffolding, the Student showed an overall inability to make progress. The Student had particular difficulty in both math and reading. The Student did not participate in lessons or activities and struggled to write the letters in his/her name. P-5; P-6-1-2.

5. In or about October, 2018, Petitioner had a conference with the Student’s teacher, Teacher A, outside the Student’s classroom. Teacher A told Petitioner that the Student needed additional services and indicated that the Student had done poorly on a test. Teacher A also indicated to Petitioner that the Student needed further evaluations. Petitioner indicated that she agreed with the teacher. Testimony of Petitioner.

6. Petitioner met with a team about testing the Student on reading and mathematics. Petitioner then signed a document consenting to that testing for the Student. Testimony of Petitioner.

7. On or about May 3, 2019, the Student was again referred for an evaluation pursuant to the IDEA. Thereafter, Case Manager A created a document entitled “Analysis of Existing Data,” which reviewed the Student’s DIBELS testing and RTI data. The document stated that, despite small group intervention, 1:1 assistance, and modified assignments, the Student’s test scores reflected regression in math. P--6-1-2

8. In or about May, 2019, the Student’s scores on the i-Ready measure indicated that the Student was at the mid-kindergarten level overall, with sub-test scores at the “emerging kindergarten” level in “number and operations.” P-7-3.

9. For the first two terms of the 2018-2019 school year, the Student needed frequent prompting in class and did not always complete work on time. The Student also misused time in class, failed to complete homework, and did not respect the property of others. The Student’s academic grades were mostly at the “2” level, indicating “approaching expectations,” with “1” grades in reading and writing and language, reflecting “below basic” skills. P-8-1, 4.

10. The Student’s report card for the third term of the 2018-2019 school year indicated that the Student had a helpful nature and made progress during the year, and that the Student was reading at an “A” level. The Student reportedly made progress in inferencing to aid in communication in reading, as well as in asking questions about the text. It was also reported that the Student had a basic understanding of addition, subtraction, geometry, and measuring skills. For this term, the Student received a “3” in

social studies and science, a “2” in math, reading, and speaking and listening, and a “1” in writing and language. P-9-1.

11. On or about July 16, 2019, Petitioner sought educational records from Respondent, including progress reports, Individualized Education Programs (“IEPs”), standardized test scores, class schedules, evaluations, assessments, multidisciplinary meeting notes, report cards, portfolios, charts, observations, letters, memos, notes, emails, “data compilations,” “letters of understanding,” disciplinary records, service trackers, and related service provider logs. P-10.

12. On or about July 25, 2019, Petitioner wrote a letter formally requesting evaluations for the Student. This letter mentioned that Petitioner previously requested that the Student be evaluated during the 2018-2019 school year. Petitioner sought an occupational therapy evaluation, speech and language evaluation, and comprehensive psychological evaluation for the Student. The psychological evaluation was to include testing to determine whether the Student should be diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). P-13-1.

13. On August 26, 2019, Respondent issued a letter to Petitioner authorizing a comprehensive psychological evaluation, at a maximum cost of \$2,500.00; a speech and language evaluation, at a maximum hourly cost of \$108.33 and a maximum total cost of \$866.64; and an occupational therapy evaluation, at a maximum hourly cost of \$130.38 and a maximum total cost of \$782.28. R-1; R-6.

14. Petitioner received documents in response to her document request of July 16, 2019. However, Petitioner did not receive some of the requested documents, including DIBELS testing reports, “Foundations” testing reports, the Student’s Term 1 and

Term 4 report cards, documents relating to RTI work, work samples, and meeting notes.
Testimony of Witness A.

VI. Conclusions of Law

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

The burden of persuasion for District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. With the passage of this law, in special education due process hearings initiated by a parent, the burden of persuasion falls on the public agency, if the dispute concerns "the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency" (provided that the party requesting the due process hearing shall establish a prima facie case). The burden of persuasion must be met by a preponderance of the evidence. D.C. Code 38-2571.03(6)(A)(i).

Here, neither issue directly involves the appropriateness of the Student's educational program or placement. As a result, the burden of persuasion must be on Petitioner for both issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to evaluate the Student after the Student's teacher requested an evaluation in or about October, 2018? If so, did DCPS act in contravention of 34 CFR 300.301(c)(1), D.C. Code 38-2561.02, and related provisions? If so, did DCPS deny the Student a FAPE?

Federal regulations at 34 CFR 300.301(b) provide that, "(c)onsistent with the consent requirements in §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.” A referral for an initial evaluation may be oral or written. 5-E DCMR 3004.5. Pursuant to both federal law and District of Columbia law, the initial evaluation must be conducted within sixty days of receiving parental consent for the evaluation. 34 CFR 300.301(c)(i); 5-E DCMR 3005.2(a). District of Columbia law also provides that the local educational agency (“LEA”) “shall not delay or deny a timely initial evaluation to conduct screenings or implement pre-referral interventions,” and that the LEA shall notify the parent of receipt of any referral received. This notification must include information regarding the initial evaluation process, parental consent requirements, and resources the parent may contact for assistance. 5-E DCMR 3004.3; 5-E DCMR 3004.4.

Petitioner presented un rebutted, credible testimony that in October, 2018, the Student’s teacher, Teacher A, told her that the Student had issues in reading and needed to be evaluated for special education services. Petitioner also expressed to the teacher that she agreed with this evaluation, thereby consenting to it. Respondent did not dispute this contention during argument or call any witnesses to refute this contention. As a result, it must be concluded that Respondent was obligated to evaluate the Student and complete this evaluation in or about December, 2018.

However, no evaluation was initiated by Respondent until May, 2019, when a Prior Written Notice was sent to the parent indicating that another referral had been initiated on May 3, 2019. Respondent contended that Petitioner did not consent to the Student being evaluated, but this contention is unsupported by any witness or document in the record. Respondent therefore violated the IDEA and the DCMR when it failed to evaluate the Student within sixty days after the teacher’s referral in October, 2018.

2. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

An LEA must grant parents access to the educational records of their children no more than forty-five days after the request. 20 USC 1232g(a)(1)(A). The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 CFR 300.501(a). The term “education records” means the type of records covered under the definition of “education records” in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 232g (“FERPA”)). 34 CFR 300.611-300.625. Education records as defined under FERPA are “directly related to a student” and “maintained by an educational agency or institution or by a party acting for the agency or institution.” The term does not include “records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.” “Record” means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 CFR 99.3.

On or about July 16, 2019, Petitioner sought educational records from Respondent. Petitioner sought attendance records, progress reports, IEPs, standardized test scores, class schedules, evaluations, assessments, multidisciplinary meeting notes, report cards, portfolios, charts, observations, letters, memos, notes, emails, “data compilations,” “letters of understanding,” disciplinary records, service trackers, and

related service provider logs. Witness A testified that Respondent did not provide Petitioner with the Student's Term 1 and Term 4 report cards for the 2018-2019 school year, complete copies of the Student's i-Ready and Dibels testing reports, the Student's work samples, RTI documentation, and meeting notes.

DCPS should, of course, provide Petitioner with all of her child's available educational records. But Petitioner bears the burden of persuasion on this claim, and Petitioner did not specifically link her requests for educational records to the Student's education at School A. United States Magistrate G. Michael Harvey recently opined on a similar case where a parent contended that DCPS's failure to produce education records amounted to FAPE denial under the IDEA. Magistrate Harvey ruled that a parent must be specific when alleging that a denial of education records amounts to a denial of FAPE.

As explained by Magistrate Harvey:

Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing. Rather, she paints in the broadest of strokes, asserting that the evidence “would have provided the basis for services” and that they “related to the identification, evaluation, and educational placement” of M.S. [Dkt. 22 at 4–5]. While that might establish a procedural violation of the IDEA, it does not provide a “rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits.

Simms v. D.C., No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (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); compare Amanda J. v. Clark Cty Sch. Dist., 267 F.3d

877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by her parents or IEP team).

Since Petitioner did not show that DCPS's failure to provide records had any substantive impact on the Student, this claim must be dismissed.

RELIEF

As relief, Petitioner is seeking a full evaluation of the Student, including a psychological evaluation, a speech and language evaluation, and an occupational therapy evaluation. Petitioner also seeks an eligibility meeting, records, and a right to file an additional complaint due to DCPS's refusal to conduct evaluations and/or provide records.

Hearing officers have wide discretion to ensure that students receive a FAPE. As the United States Supreme Court has stated, the statute directs a hearing officer to "grant such relief as [he or she] determines is appropriate." Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." 20 USC 1415(i)(2)(C)(iii).

Petitioner is seeking a psychological evaluation, a speech and language evaluation, and an occupational therapy evaluation. However, DCPS provided Petitioner with authorizations for all three such evaluations. Petitioner expressed no specific complaint about the way these evaluations were characterized in the authorization letter, or the rates referenced in the authorization letter. The terms of the letter will therefore be ordered as relief in this HOD.

Petitioner is also seeking an eligibility meeting. There was no objection from DCPS to this request. As a result, such a meeting will be ordered to occur within twenty

calendar days of the date when all three evaluation reports have been completed and submitted to DCPS.

Finally, Petitioner seeks an order allowing for the filing of a future due process complaint with an altered statute of limitations accrual date. Petitioner suggested that any future litigation premised on FAPE denial occasioned by Respondent's failure to evaluate should accrue as of the date of filing of the Complaint in this case. But Petitioner submitted no authority suggesting that this Hearing Officer has the power to alter the statute of limitations in connection to a subsequent litigation. Moreover, it appears to this Hearing Officer that Petitioner still has a fair amount of time to file any due process complaint alleging FAPE denial corresponding to the 2018-2019 school year.

VII. Order

As a result of the foregoing:

1. Respondent shall reimburse Petitioner for evaluations of the Student as follows: a psychological evaluation at a maximum cost of \$2,500.00; a speech and language evaluation at a maximum hourly cost of \$108.33 and a maximum total cost of \$866.64; and an occupational therapy evaluation at maximum hourly cost of \$130.38 and a maximum total cost of \$782.28;
2. Within twenty days after Respondent receives all the reports corresponding to the above evaluations, Respondent must conduct an eligibility meeting for the Student;
3. Petitioner's additional requests for relief are hereby denied.

Dated: October 14, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Nicholas Weiler/DCPS
Josh Wayne/DCPS

VIII. 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: October 14, 2019

Michael Lazan
Impartial Hearing Officer