

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: September 21, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0169

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: September 13-14, 2016

Respondent.

Office of Dispute Resolution, Room 2004
Washington, D.C.

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 GUARDIAN), 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 (“D.C. Regs.”). In her due process complaint, Petitioner alleges that DCPS denied Student a free appropriate public education (FAPE) by finding him ineligible for special education services at an eligibility meeting on May 17, 2016. In addition, Petitioner alleges that DCPS failed to timely grant her May 17, 2016 request for an independent educational evaluation (IEE) psychological reevaluation of Student.

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 July 14, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 15, 2016. The parties met for a resolution session on July 28, 2016 and were unable to reach an agreement. My final decision in this case is due by September 27, 2016. On July 10, 2016, 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 the undersigned Impartial Hearing Officer on September 13-14, 2016 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 SCHOOL PSYCHOLOGIST and by DCPS' COUNSEL.

At the beginning of the due process hearing, Petitioner's Counsel sought leave to withdraw without prejudice Petitioner's claim that DCPS had denied Student a FAPE by not timely granting funding for an IEE psychological evaluation, because DCPS had authorized the IEE after the complaint was filed in this case. DCPS objected to this claim being withdrawn, except with prejudice. I denied Petitioner's request.

The Petitioner testified and called as additional witnesses EDUCATIONAL ADVOCATE 1, CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE 2, and CBI PROVIDER. DCPS called as witnesses CLASSROOM TEACHER, SCHOOL SOCIAL WORKER, SPECIAL EDUCATION COORDINATOR (SEC), and School Psychologist. Petitioner's Exhibits P-1 through P-37 and DCPS' Exhibits R-1 through R-18, were all admitted into evidence without objection. Counsel for the respective parties made

opening statements and closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the July 27, 2016 Revised Prehearing Order:

Whether District of Columbia Public Schools (DCPS) denied Student a FAPE by failing to authorize the parent to obtain an independent (IEE) psychological evaluation as requested on or about May 17, 2016;

Whether District of Columbia Public Schools (DCPS) denied the student a FAPE by not determining him eligible for special education services as a student with either an Other Health Impairment or Emotional Disturbance at the eligibility meeting held on or about May 17, 2016.

For relief, the Petitioner requests that the hearing officer determine that Student is eligible for special education and related services under the disability classifications of Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD) and/or Emotional Disturbance (ED) and order that DCPS immediately convene Student's Individualized Education Program (IEP) team to develop an IEP for Student. Petitioner had also requested that DCPS be ordered to fund the IEE comprehensive psychological reevaluation, which she had requested for Student. However, prior to the hearing date, DCPS issued funding authorization for Guardian to obtain the IEE evaluation. In addition, the Guardian reserved the right to seek compensatory education for delays in determining Student eligible for special education following her request for evaluation made on September 23, 2015.

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 with Guardian who has cared for her since infancy. Testimony of Guardian. Student was determined eligible for special education, as a child with a developmental delay, when he was three years old, and was exited from special education in March 2013. At the time, Guardian agreed with the decision to exit Student from special education. Exhibit P-2.

2. Beginning in August 2013 and continuing through the 2014-2015 school year, Student was repeatedly hospitalized at Psychiatric Hospital for aggression and out-of-control behavior. He was hospitalized August 14-19, 2013, November 21-26, 2014, January 28-February 5, 2015, April 9-17, 2015, April 28-May 5, 2015, and May 13-19, 2015. Exhibits P-21 through P-26. Student's discharge diagnoses on May 19, 2015 were Depressive Disorder NOS, Anxiety Disorder NOS, and ADHD. Exhibit P-21.

3. On May 12, 2015, City School developed a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) for Student to accommodate his ADHD, Depressive Disorder and Anxiety Disorder. The Section 504 accommodations included, that Student would receive scheduled breaks, Student would be allowed to work "away" from class" within the classroom, preferential seating (as close to the teacher as possible and away from as many distractions as possible), breaking classroom assignments into smaller parts for Student, extra time to complete classroom assignments, frequent checks for Student's understanding as class/independent work is being attempted, identify where Student should be in a task or assignment as it relates to its timely completion, frequent checks for understanding after instructions have been given,

provide Student with praise for appropriate behavior and utilize planned ignoring when appropriate, provide clear expectations, provide prompts frequently both verbal and nonverbal, reminders of consequences for inappropriate behavior, and allow Student opportunity to move (physically) to alleviate anxiety and tension if necessary (outside of classroom). Student would also be allowed opportunity to meet with social worker or psychologist as needed. Exhibit P-33.

4. During the 2015-2016 school year, MATH TEACHER set aside one-on-one tutoring time during class to work with Student. Exhibit R-11.

5. At the beginning of the 2015-2016 school year, Guardian made a request to staff at CITY SCHOOL for Student to again be eligible for special education because Student's behaviors were causing him problems at school. These problems had developed after Student had been exited from special education in 2013. Testimony of Guardian. At a multidisciplinary team (MDT) meeting on September 23, 2016, the MDT team determined that there was not sufficient information to proceed with a formal evaluation for special education and related services. The team reported that Student already had the Section 504 Plan and it was recommended that the team reconvene to revise and update the 504 Plan. Exhibit P-9.

6. On September 22, 2015, Student was removed from school and ultimately transported to CITY HOSPITAL due to his behaviors. Exhibit P-2. On October 23, 2015, Student was seen at the Neurology Department at CITY HOSPITAL. His behaviors were reported to be suggestive of rage and psychosis, not due to a primary neurological disorder. Exhibit P-3.

7. At the beginning of the 2015-2016 school year, there were incidents where Student's teachers had to call the school mental health team for assistance. On the third

such occasion, in October 2015, the school had to call for outside support from community mental health workers when Student was in crisis. After October 2015, requests to the mental health team for assistance decreased, but after mid-March 2016, there were at least four more occasions when the school mental health team was called in. Testimony of School Social Worker.

8. In April 2016, School Social Worker completed a Functional Behavioral Assessment (FBA) of Student. She reported that although a capable student, Student exhibited impulsivity and inattentiveness which often disrupted classroom instruction, that he could be extremely oppositional, that he could be off-task and display impulsive behaviors throughout the day, that if there was less structure, Student's behavior was prone to escalate and that Student required consistent interventions to promote academic success in all areas of the school environment. School Social Worker observed that in math class, Student was noticeable distracted, moving his head around in circles and opening and closing his eyes continuously. At least every 4-6 minutes Student stood up for what appeared to be a self initiated movement break. Throughout the observation, Student displayed appropriate behaviors for 60% of the time. He was easily distracted and required frequent self-initiated movement breaks. In an observation at Student's ELA class, School Social Worker observed that throughout the class, Student was inattentive, disruptive and attention seeking. School Social Worker observed Student in the ELA class again the next day when she was called back to provide support for Student. She observed that Student was walking around in the classroom, snatched papers off another student's desk, and threw them back on her desk. Throughout this observation, Student was impulsive, attention seeking and provocative. School Social Worker concluded that the data suggested that Student's

challenging behaviors were multilayered and a manifestation of ADHD, noncompliance, and avoidance. Exhibit R-8.

9. On March 17, 2016, Petitioner, by counsel, filed a prior due process complaint for Student, alleging failure by DCPS to evaluate Student for special education eligibility upon the Guardian's request at the beginning of the 2015-2016 school year (Case No. 2016-0066). In May 2016, Petitioner withdrew the prior complaint, without prejudice, after DCPS agreed to proceed with Student's initial evaluation. Exhibit R-11, Hearing Officer Notice.

10. On May 6, 2015, School Psychologist completed a comprehensive psychological initial evaluation of Student. She reported that Student's cognitive functioning and academic functioning fell in the average range, that Student's teachers reported oppositional behaviors at school as well as some aggressive behaviors, but that they did not believe that his behaviors were negatively impacting his academics as he was on or just below grade level according to standardized assessments. She recommend that Student continue to receive behavioral supports via a Section 504 Plan to address emotional regulation, anger management, coping skills and mood management. Exhibit R-7.

11. At the end of the 2015-2016 school year, Student tested one grade level behind in math on standardized testing. Exhibit R-10. Academically, Student's overall performance was satisfactory for the 2015-2016 school year. He would participate orally in class, but had more of a struggle to put pen to paper. His academic abilities were not outside the norm for students in his class. His behavior in school worsened after March 2016 and the teacher had to repeatedly obtain assistance from School Social Worker for his distracting behaviors. Testimony of Classroom Teacher.

12. On May 17, 2016, the eligibility team at City School met to determine Student's eligibility for special education and related services. Guardian, Petitioner's Attorney and Educational Advocate 1 participated in the meeting. After reviewing the DCPS psychological evaluation and FBA, the school members of the team determined that Student did not meet eligibility criteria for OHI-ADHD because his ADHD impairment did not adversely affect his educational performance. The team similarly concluded that Student was not eligible for special education under the ED criteria because in spite of his behaviors, he continued to meet his academic goals and was able to access the general education curriculum. Exhibit R-6, Testimony of School Social Worker. Guardian and her representatives at the meeting disagreed with the decision not to find Student eligible. Exhibit R-3, Testimony of Guardian.

13. At the May 17, 2016 eligibility meeting, Guardian expressed concern about the accuracy of the background information in the DCPS' psychological evaluation. She requested DCPS to fund an IEE psychological reevaluation. Exhibit R-3. On August 24, 2016, DCPS issued written authorization to the Guardian to obtain an IEE psychological reevaluation. Exhibit R-2. As of the September 13, 2016 due process hearing date, the IEE psychological reevaluation had not been completed.

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

As provided in the D.C. Special Education Student Rights Act of 2014, except where there is a dispute about the appropriateness of the child's IEP or placement, or of

the program or placement proposed by DCPS, the party who filed for the due process hearing, bears the burden of production and the burden of persuasion. There is not an IEP or IEP placement in dispute in this case. Therefore the Petitioner has the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

A.

Did District of Columbia Public Schools (DCPS) deny Student a FAPE by not determining him eligible for special education services as a student with either an Other Health Impairment or Emotional Disturbance at the May 17, 2016 initial eligibility meeting?

The principle issue in this case is whether Student is a child with a disability, eligible for special education and related services. The term “child with a disability” is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as a child . . . having one or more defined disabilities, “and who, by reason thereof, needs special education and related services.” 34 CFR § 300.8(a), (b). It is up to each state to develop criteria to determine whether a child has a disability. See U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006).

Student has a well-documented history of emotional and behavioral concerns. During the 2014-2015 school year, he was repeatedly hospitalized at Psychiatric Hospital for aggression and out-of-control behavior. His May 2015 discharge diagnoses were Depressive Disorder NOS, Anxiety Disorder NOS, and ADHD. On May 12, 2015, City School developed a Section 504 Plan to address Student’s ADHD, Depressive Disorder and Anxiety Disorder. On September 22, 2015, Student was removed from

school and ultimately transported to City Hospital, where the physician reported that his behaviors were suggestive of rage and psychosis. During the 2015-2016 school year, the City School mental health team was frequently summoned to Student's classroom to deal with his emotional and behavioral breakdowns.

The Guardian requested that Student be evaluated for special education eligibility at the beginning of the 2015-2016 school year, but DCPS only agreed to evaluate Student after the parent filed a due process request in March 2016. At a May 17, 2016 initial eligibility team meeting,² the City School team determined that Student had both OHI-ADHD and ED impairments. However, the team determined that inasmuch as Student was allegedly able to access the general education curriculum with his Section 504 Plan supports, he did not meet IDEA eligibility criteria because he did not need special education and related services. Petitioner contends that Student should have been identified as eligible with an OHI-ADHD or ED disability. DCPS stands by the school eligibility team's determination that Student was not eligible. I find that the eligibility team's decision was incorrect.

DCPS argues correctly that even if a child has an IDEA defined disability, he or she does not qualify for special education services if support provided through the regular general education program is sufficient. However, at City School, Student

² Student had been determined eligible as a child with a developmental delay when he was in preschool. He was exited from special education in March 2013. For purposes of the IDEA's evaluation requirements, after a child has been exited from special education, a subsequent evaluation request is considered a request for an initial evaluation, not a reevaluation. *Cf.* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46682 (August 14, 2006) (The evaluation conducted by the new public agency would be to determine if the child is a child with a disability and to determine the educational needs of the child. Therefore, the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency, which would require parental consent.)

needed and received supports beyond what was provided in the general education program. As the Ninth Circuit Court of Appeals recently explained in *L.J. v. Pittsburg Unified Sch. Dist.*, No. 14-16139, 2016 WL 4547360, (9th Cir. Sept. 1, 2016), “General education is what is provided to non-disabled children in the classroom. [Nondisabled students] in the general education setting do not receive specialized services. Special education, on the other hand, is ‘specially designed instruction’ to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(1). ‘*Specially designed instruction*’ is defined under the IDEA regulations: Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child’s disability; and(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3) (emphasis added).” *Id.*

For the 2015-2016 school year, because of his ADHD and ED disabilities, Student needed and was provided a host of services and accommodations, not part of general education instruction, to ensure his access to the general curriculum. There were the Section 504 accommodations, including, *inter alia*, scheduled breaks, being allowed to work “away from class” within the classroom, preferential seating, breaking assignments into smaller parts, extra time to complete assignments, frequent checks for his understanding as work was being attempted, reminding Student where he should be in a task or assignment, providing frequent verbal and nonverbal prompts and allowing Student the opportunity to move physically outside of the classroom to alleviate anxiety and tension. In addition, Math Teacher set aside one-on-one tutoring time during class

to work with Student. Finally, the school mental health team was “on call” to intervene with Student when needed and Student was also allowed to meet with the school social worker or psychologist on his initiative. Clearly most of these accommodations and services were “specially designed” to meet Student’s unique needs resulting from his ADHD and ED disabilities – they were not part of general education available to all students. *See L.J., supra.*

Whether Student was able to make academic progress with his Section 504 Plan has no bearing on his special education eligibility. Providing a Section 504 Plan does not suffice for a Student who is entitled to an IEP. “[T]he requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute.” *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n. 5 (6th Cir.2003) (citing *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 100 n. 2 (2d Cir.1998)). *Cf. N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 29 (D.D.C. 2008) (rejecting argument that because parent’s expert also recommended “educational accommodations” under Section 504, District had no obligation under the IDEA to conduct its own evaluation of child’s needs.)

In sum, at the time of the May 17, 2016 eligibility meeting, it was undisputed that Student had IDEA-defined OHI-ADHD and ED disabilities. To ensure Student’s access to the general curriculum, City School had been providing him specially designed instruction all year long. Therefore, Student met the IDEA definition of a child with a disability – that is, he had one or more IDEA defined disabilities and by reason thereof needed special education and related services. *See* 34 CFR § 300.8. DCPS’ failure to find Student eligible for special education and provide him an IEP was a denial of FAPE.

B.

Did District of Columbia Public Schools (DCPS) deny Student a FAPE by failing to authorize the Guardian to obtain an independent educational evaluation (IEE) psychological reevaluation as requested on or about May 17, 2016?

At the May 17, 2016 eligibility team meeting, Guardian expressed her disagreement with School Psychologist's May 6, 2016 psychological evaluation of Student and requested DCPS to fund an IEE psychological reevaluation. Petitioner's due process complaint was filed on July 14, 2016. Subsequently, on August 24, 2016, DCPS issue funding authorization for the IEE.

The IDEA regulations provide that if a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense. 34 CFR § 300.502(b). In the present case, Guardian waited almost two months after she requested an IEE reevaluation before filing her due process complaint. DCPS waited almost another six weeks before issuing its funding authorization for the IEE. I find that this was unnecessary delay. *See, e.g., Hill v. District of Columbia*, No. 14-CV-1893, 2016 WL 4506972 (D.D.C. Aug. 26, 2016) (Failure to respond to IEE request for 81 days was undue delay.)

The District's failure to timely approve the parent's IEE request was a procedural violation of the IDEA. *See, e.g., Hill, supra*. Whether a violation of the IDEA's evaluation procedures constitutes a denial of FAPE depends upon whether there was a resulting loss of educational opportunity. *See, e.g., Leggett v. District of Columbia*, 793 F.3d 59, (D.C.Cir.2015) (“[A] procedural violation of the IDEA constitutes a denial of a FAPE only if it “results in loss of educational opportunity’ for the student.” *Id. at 67*,

citing *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006)).

In this case, I have determined that Student was denied a FAPE by not being determined eligible for special education at the May 17, 2016 eligibility meeting.

Student should have received an appropriate IEP within 30 days of the meeting date.

See 34 CFR § 300.323(c)(1). (Each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.) There was no evidence that DCPS' failure to timely authorize the requested IEE psychological reevaluation further increased Student's loss of educational opportunity from not having an IEP in place at the beginning of the 2016-2017 school year. Therefore, I find that this procedural violation is not separately actionable.

ORDER

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

ORDERED:

1. Student is a "child with a disability" as defined by the IDEA, 20 USC § 1401(3)(A);
2. Within 21 school days of issuance of this decision, PCS shall convene an IEP team, including the Guardian, to develop an initial IEP for Student, in accordance with this decision, following the procedures set forth in 34 CFR § 300.320, *et seq.* If requested by Petitioner, DCPS may delay convening the IEP meeting for a reasonable period for Student's IEE psychological reevaluation to be completed;
3. This order is without prejudice to Petitioner's right, if any, to seek compensatory education relief for DCPS' delays in conducting Student's initial evaluation and for the failure of DCPS' eligibility team to determine heretofore that Student was eligible for special education and
4. All other relief requested by the Petitioner herein is denied.

Date: September 21, 2016

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team