

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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Parent, through Student,¹)	
Petitioner,)	Room: 111
)	Hearing: August 30, 2018
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2018-0142
DCPS,)	Issue Date: September 4, 2018
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by Petitioner, who is the parent of the student (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 June 4, 2018. A response was filed by Respondent on June 14, 2018. The resolution period ended on July 4, 2018.

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 Education Improvement Act (“IDEIA” or “IDEA”), 20 U.S.C. Sect. 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 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.

III. Procedural History

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

On July 9, 2018, 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 was issued on July 17, 2018, summarizing the rules to be applied in this hearing and identifying the issue in the case. There was one hearing date: August 30, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-14, except for P-9-4. There were no objections. Exhibits 1-14 except for P-9-4 were admitted. Respondent moved into evidence Exhibits 1-13. There were no objections. Exhibits 1-13 were admitted. Petitioner presented as a witness: Witness A, an advocate. Respondent presented as witnesses: Witness B, a compensatory education analyst, and Witness C, the manager of the DCPS resolution team. At the close of the hearing on August 30, 2018, both sides presented closing arguments. Respondent supplemented its closing argument with a list of citations, which were provided to this Hearing Officer on August 31, 2018.

IV. Issue

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

Did DCPS improperly refuse to grant Petitioner's request for an Independent Educational Evaluation ("IEE") for the Student? If so, did DCPS violate 34 CFR Sect. 300.502?

As relief, Petitioner is seeking a comprehensive, independent, psychological evaluation by Provider 9.

V. Findings of Fact

1. The Student is an X-year-old who has recently been determined to be eligible for IDEA special education services as a student with Other Health Impairment. During the 2017-2018 school year, the Student had academic difficulty, as reflected by “F” final grades in science and math. (P-1-1; P-4; R-10)

2. A comprehensive psychological evaluation of the Student was conducted on or about April 13, 2018. The evaluator tested the Student through the Wechsler Intelligence Scale for Children, Fifth Edition; the Woodcock-Johnson Tests of Achievement, Fourth Edition; the Behavior Rating Inventory of Executive Function, Second Edition (parent and teacher reporting); and the Behavior Assessment for Children, Third Edition (self-report). (P-1-2)

3. The evaluation of April 13, 2018, was sent to Petitioner. On May 11, 2018, Petitioner sent an email to Respondent. In this email, Petitioner expressed disagreement with the evaluation and requested an IEE for a psychological evaluation. Petitioner indicated that she wanted Provider 9 to conduct the evaluation. (P-2-1)

4. On May 21, 2018, in response to Petitioner’s email, Respondent authorized an IEE for a comprehensive psychological evaluation at the rate of \$1,618.11 per evaluation. (P-3-1)

5. On August 3, 2018, Respondent authorized a new IEE, in response to Petitioner’s email, for a comprehensive psychological evaluation at the rate of \$2,500.00 per evaluation. (P-5-1)

6. Respondent publishes a “Parent Guide to Independent Services” (“the Guide”) every year. The most recent edition of the Guide, the 2018-2019 edition, provides guidelines for IEE reimbursement for a comprehensive psychological

evaluation. The Guide lists sixteen providers as “local service providers” for comprehensive psychological evaluations. The Guide indicates that these providers are “a place to start your search” and that parents may select a provider who is not listed, if the provider is qualified to conduct the assessment and will accept the prescribed rate, which is \$2,500.00 per comprehensive psychological evaluation (including cognitive, achievement, social-emotional, possible depression/anxiety, and educational components). (P-7)

7. Witness A called all sixteen of the above-referenced providers listed in the Guide. One provider (Provider 8 in the Guide) was willing to conduct the evaluation at Respondent’s rate without any reservation or condition. Two providers (Provider 7 and Provider 10 in the Guide) indicated that they had performed some evaluations at Respondent’s rate, but that this was not their usual rate. The other thirteen providers either did not return calls or would not provide the service. Several of the providers expressed surprise that they were listed in a guide published by Respondent. (P-7-53-55; Testimony of Witness A)

8. None of the providers said that their customary rate was \$2,500.00 per evaluation. (Testimony of Witness A)

9. A qualified provider in the District of Columbia who is known to Petitioner has conducted comprehensive psychological evaluations at the previously authorized DCPS rates of approximately \$1,360.32 and \$1,618.11 per evaluation. This provider would likely accept the \$2,500.00 rate to conduct a comprehensive psychological evaluation of the Student. However, Witness A did not contact this

provider to determine if the provider would be available to conduct the evaluation of the Student. (Testimony of Witness A)

10. Witness A did call other providers who were not listed in the Guide. However, these other providers would not accept the \$2,500.00 rate. (Testimony of Witness A; P-9)

11. In the past year, Respondent has paid for approximately fifty psychological evaluations at a rate that is less than \$2,500.00 per evaluation. Provider 9 in the Guide has accepted a rate below \$2,500.00 from DCPS in connection to psychological evaluations at least fourteen times in the past two school years. However, Provider 9 no longer accepts the DCPS rate, even with the increase to \$2,500.00, in part because Respondent requires a lot of paperwork and is slow to pay the evaluators. (Testimony of Witness B; Testimony of Witness C; P-9-2)

12. Provider 7 in the Guide accepted the rate of \$1360.32 several times during 2017. Provider 16 in the Guide accepted the rate of \$1360.32 at least once in or about 2017. Provider 12 in the Guide accepted the rate of \$1,360.32 in or about 2016. (R-6)

13. In the spring of 2017, prior to DCPS increasing its rate of reimbursement to \$2,500.00, a DCPS intern called approximately twenty-three psychologists to determine their rates for comprehensive psychological evaluations. The intern called some providers who were in the Guide, some providers that s/he found on the internet, and some providers who had expressed interest in being in the Guide. Ten of these psychologists said they would accept the rate of \$1,618.11 per evaluation. Six said they would accept the rate of \$2,500.00 or below. Seven said that their rates were over \$2,500.00 per evaluation. The average rate for all of the providers called was

approximately \$2,381.00. DCPS also contacted neighboring school districts to determine the rates that they paid to psychologists for comprehensive psychological evaluations. None of the neighboring districts paid the evaluators as much as \$2,500.00. (Testimony of Witness C)

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 proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

The sole claims in this case relate to the duty of school districts to pay for IEEs. For this issue, the burden of proof lies with the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS improperly refuse to grant Petitioner's request for an IEE? If so, did DCPS violate 34 CFR Sect. 300.502?

Federal regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by

the school district. 34 C.F.R. Sect. 300.502(a), (b). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate, or that the evaluation obtained by the parent does not meet the school district criteria. 34 C.F.R. Sect. 300.502(b)(2)(i)-(ii). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense. 34 C.F.R. Sect. 300.502(b)(3); DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 (D. Vt. Sept. 4, 2007).

34 CFR 300.502(e)(2) states that a public agency may not impose conditions or timelines related to obtaining an IEE at public expense, except that the criteria for the IEE, such as the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, provided that the parental right to an IEE is unimpaired. 34 CFR 300.502(e)(1). Petitioner therefore contended that the regulatory language in 34 CFR 300.502(e)(2) established that no caps can be set on IEEs by a Local Educational Agency ("LEA").

However, in its comments on these regulations, the United States Department of Education (the "Department") specifically authorized school districts to set caps on certain evaluations sought for IEEs. 71 Fed. Reg. 46689 (2006). The Department remarked that school districts "should not be required to bear the cost of unreasonably expensive IEEs" and that it "is appropriate for a public agency to establish reasonable cost containment criteria" applicable to personnel used by the agency, as well as to personnel used by parents, so long as the school district provided "a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator

whose fees fall outside the agency's cost containment criteria." The Department also stressed that an LEA cannot impose requirements for the private evaluator that could deny the parents' right to the IEE. Letter to Petska, 35 IDELR 191 (OSEP 2001).

Respondent pointed to a number of cases where a school district established a cap on evaluations, including Seth B. v. Orleans Parish School Bd., 810 F. 3d 961, 961-85 (5th Cir. 2016), where a circuit court authorized a \$3,000 cap and the parents failed to show that there were "unique circumstances." In another case, a federal court found that the evaluator's fee exceeded the district's cost parameters, and the parents, upon request, offered no unique circumstances to justify the cost. The LEA based its maximum fee schedule on research as to customary rates in the area, as determined by a team of special education evaluators. Shafi v. Lewisville Indep. Sch. Dist., No. 4:15-CV-599, 2016 WL 7242768, at *10 (E.D. Tex. Dec. 15, 2016).

In a third case, a federal court found that a school district was not obliged to waive a fee cap so long as there was a choice of evaluators in the area who could complete evaluations for lower rates. The court was influenced by the fact that the parent did not contact certain service providers due to an apparent desire to obtain the IEE from a preferred provider. M.V. v. Shenendehowa Cent. Sch. Dist., No. 1:11-CV-00701 GTS, 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013).

Petitioner did not present cases to the contrary, and did not present a psychologist to support her claim that the \$2,500.00 cap on a comprehensive psychological evaluation is unreasonable. Nor did Petitioner show that the evaluation required for the Student is unique or unusual or exceptional in any way, or that the school district imposed restrictions on the IEE evaluators that it did not impose on its own evaluators.

Petitioner's main argument is that she did not have a choice of providers. Certainly, Respondent could have, and should have, provided the parent with a more helpful list. Still, three of the providers on the list in the Guide indicated some willingness to do the evaluation. According to Witness A, Provider 7 "has done some evaluations for students with an IEE authorization, depending on her situation and her time." Yet Witness A never followed up with Provider 7 to see if an evaluation with this provider could be arranged. Furthermore, Provider 10 "will fit DCPS evaluations in, depending on the circumstances and when she has time." Yet, again, Witness A never followed up with Provider 10 to see if an evaluation with this provider could be arranged. Petitioner agreed that Provider 8 was willing to do the work, but argued that this provider was not competent. However, Petitioner did not support this contention with persuasive expert testimony explaining exactly why this provider was not competent.

Moreover, Petitioner knew that she was not limited to the providers on the list in the Guide. Letter To Parker, 41 IDELR 155 (OSEP, 2004). There is evidence that other qualified providers were available and that the identity of these providers was known to Petitioner. Witness A knew, for instance, that Provider X would likely be willing to conduct this evaluation at the \$2,500.00 rate, but did not contact her to see if she would do the work. There is nothing in the record to suggest that Provider X is incompetent, and Petitioner did not suggest that Provider X is unable to conduct the evaluation.

It is important to note that the establishment of a \$2,500.00 cap for IEEs for comprehensive psychological evaluations was the product of deliberation by Respondent. Prior to setting the rate, DCPS staff researched the usual and customary rates set by local providers and determined that the average rate was lower than the \$2,500.00 cap. DCPS

also researched the rates of reimbursement paid by neighboring school districts before arriving at the \$2,500.00 figure. According to the unrebutted and credible testimony of Witness C, none of the neighboring school districts imposed a cap that would allow evaluators to receive as much as \$2,500.00 per comprehensive psychological evaluation.

Petitioner did not meet her burden of persuasion to show that the \$2,500.00 limit was unreasonably imposed in regard to her request for a comprehensive psychological evaluation of the Student. Petitioner's claim, therefore, must be denied.

VII. Order

As a result of the foregoing, the Due Process Complaint is dismissed with prejudice.

Dated: September 4, 2018

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

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: September 4, 2018

Michael Lazan
Impartial Hearing Officer