

**DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT
OFFICE OF COMPLIANCE AND REVIEW**

STUDENT, a minor, by and through
her Parent¹

Petitioner,

v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICIT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSF
STUDENT HEARING OFFICE
2011 JAN 19 PM 2:45

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On November 12, 2010 Parent ("Petitioner"), on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"). HO 1.² requesting a hearing to review the identification, evaluation, placement of or provision of FAPE to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). This Hearing Officer was appointed to hear the matter by notice dated November 12, 2010. Respondent filed a Response to Petitioner's Administrative Due Process Complaint Notice (HO 2) dated November 19, 2010 on December

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Respondent's exhibits will be referred to as "R" followed by the exhibit number. Petitioner did not file exhibits in this matter.

10, 2010³. A resolution meeting was held on December 7, 2010. The parties were not able to reach an agreement. *See*, HO 10.

At all times relevant to these proceedings Petitioner was represented by Zachary Nahass, Esq., and Kendra Berner, Assistant Attorney General, represented DCPS. I held two telephone prehearing conferences. The first was on December 13, 2010 (HO 10), and the second was on January 4, 2011 (HO 15). Petitioner did not participate in either conference. Petitioner filed two prehearing motions. A Motion for Default Judgment was filed on December 10, 2010. (HO 5) I issued a Memorandum Opinion and Order on December 15, 2010 (HO 9) denying the Motion for Default Judgment. My Order further required Respondent to file an amended response to address the components required under SOP §303B.1. This amended response was filed on December 16, 2010. (HO 8). Petitioner's Motion for Adjudication on the Pleadings was filed on December 17, 2010 (HO 11). I issued a Memorandum Opinion and Order denying the Motion on December 23, 2010. (HO 12.) By agreement of the parties, the due process hearing was scheduled for January 7, 2010, and I held the hearing as scheduled.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE

The issue is:

1. Whether DCPS failed to complete a requested evaluation to determine eligibility for special education and related services in a timely matter.

³ Respondent filed a response to the Complaint on December 10, 2010 with an email explaining Counsel for DCPS believed the response had been filed on November 19, 2010 but review of her documentation revealed it had not been filed. This December 10, 2010 filing followed Petitioner's filing a Motion for Default Judgment.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Respondent are found in Appendix B.

Exhibits admitted on behalf of Hearing Officer are found in Appendix C.

B. Testimony

Petitioner testified and offered no other witnesses.

DCPS presented no witnesses.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is an eight year old resident of the District of Columbia. Student currently attends
HO 1. She also attended
School for the 2009-2010 school year. Testimony of Petitioner.
2. Student began showing some educational difficulties in the first grade (2008 – 2009 school year). Petitioner thought these difficulties might improve in second grade after student had some time to adjust to school. However, these difficulties continued in the second grade and continue this school year (2010 -2011 school year) as well. Testimony of Petitioner.
3. Student's teacher began calling Petitioner at the beginning of the 2009 - 2010 school year expressing concerns about student. Testimony of Petitioner..
4. Student also began to exhibit behavior problems at school and at home during the 2009-2010 school year. Testimony of Petitioner..

5. In March 2010 Petitioner had a conference with Student's teacher. At that conference Petitioner asked the teacher to whom Petitioner should speak to obtain a special education evaluation of Student. Petitioner also asked Student's teacher how to contact the school psychologist to obtain assistance with the student's behavior. Testimony of Petitioner.
6. The teacher introduced Petitioner to a female special education administrator. Petitioner requested an evaluation. She and the administrator completed forms requesting the evaluation, and Petitioner signed the forms. Testimony of Petitioner.
7. Petitioner did not receive any follow-up contact to schedule a meeting after this initial contact with the special education administrator. She made numerous contacts with two different special education administrators, the woman she had spoken to initially and her male supervisor, regarding the need to schedule a meeting. Eventually she told someone in the main office that she would contact the chancellor's office. She then received a phone call from the male special education administrator. Testimony of Petitioner.
8. Student received SST support from March through the end of school year during the 2009-2010 school year.
9. Student received a Woodcock-Johnson educational evaluation on May 3, 2010. R.5.
10. A meeting was held in May. Petitioner did not understand the purpose of the meeting. The special education evaluation was not discussed. The participants in the meeting showed Petitioner the results of academic tests Student had taken. Student did not do well on the tests. Testimony of Petitioner.
11. Following this meeting, Petitioner spoke to the male special education administrator. He explained there was a new process for special education evaluation and that new forms

had to be completed. He stated there was a possibility Student would be evaluated over the summer. This did not occur. Testimony of Petitioner.

12. The male special education administrator referred Student to a summer program for assistance in reading and math. Student attended. No special education evaluation occurred. Testimony of Petitioner.
13. Student enrolled in Amidon for the 2010 - 2011 school year. No one contacted Petitioner regarding the special education evaluation. Petitioner called the school and spoke to the male special education administrator. She was given an appointment in October. However, when she appeared for the appointment, the appointment was cancelled. Two additional appointments were scheduled, and each was cancelled. Testimony of Petitioner.
14. At a parent teacher conference in October, Petitioner was informed that Student is below grade level in reading and math and has poor writing skills. Petitioner was also told Student does not complete homework nor in-class assignments. Testimony of Petitioner.
15. Student has been seeing the school psychologist for weekly sessions since March 2010. Testimony of Petitioner.
16. No assessments were completed prior to the filing of the Complaint on November 12, 2010. Testimony of Petitioner.
17. Petitioner's Complaint requests, among other remedies, an independent comprehensive psychological evaluation. HO 1.
18. Following the filing of the Complaint a referral meeting was held on November 16, 2010 at which Petitioner signed a consent for evaluation. R 5. A psychological to assess

Student's "cognitive abilities and academic skills" was provided on December 2 and December 3, 2010 and a report issued on December 27, 2010. R. Supp.

19. Petitioner withdrew her request for an independent speech and language evaluation at the hearing.
20. Respondent stipulated at the hearing that it had not provided Student with a timely evaluation.
21. An MDT meeting to determine eligibility is scheduled for January 18, 2011. R.3.

DISCUSSION

As DCPS stipulated, at the due process hearing on January 7, 2011, that it had not completed an evaluation of Student within the 120 day timeline required by D.C. Code §38-2561.02, the only issue left for this Hearing Office to address is the appropriate remedy. Relief under the Individuals with Disabilities Education Act, as amended ("IDEA"), 20 U.S.C. § 1400 *et seq.*, is based on equitable considerations. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C.C. 2005) *citing Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) and *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d (1985).

In the instant matter, Petitioner requested an independent, comprehensive psychological evaluation in her Complaint and restated her request for an independent, comprehensive psychological evaluation at the hearing. Petitioner also restated her request, at hearing, for the DCPS IEP team ("the MDT") to meet to

- review the independent psychological evaluation within 10 days of DCPS' receipt of the evaluation,

- discuss and determine Student's eligibility, and
- develop an individualized education program ("IEP") and determine placement, if warranted.

At the hearing Petitioner also asked that the MDT determine appropriate compensatory education if student is found eligible for special education and related service.

The IDEA requires that all students identified as potentially disabled be provided an individualized, initial evaluation. 34 C.F.R. § 300.301. In conducting the evaluation, the public agency, here, Respondent DCPS, must administer assessments and other evaluation measures needed to determine whether the student is a child with a disability as defined under 34 C.F.R. § 300.8. 34 C.F.R. § 300.305(c). The assessment data is also to be used, should the student be found eligible for special education and related services, in developing the student's individualized education program ("IEP"). 34 C.F.R. § 300.324(a)(iii).

Here, Respondent, despite conceding it did not provide an evaluation for student within the required time period, argues there is no appropriate remedy at this time because the team has not determined whether Student is eligible for special education and related services. The Hearing Officer rejects this argument. Following this argument to its ultimate conclusion, Respondent would have this Hearing Officer find that as long as no evaluation has occurred there is no remedy for a failure to evaluate a student within required timelines. In the extreme, a student could be "on-hold" waiting for an evaluation with no remedy, under this posited scenario, for years. This position is clearly outside the intent of the IDEA. The IDEA procedural safeguards are intended to provide parents with remedies if and when educational agencies fail to comply with the mandates of the IDEA as to identification, evaluation, placement or provision of FAPE to a child with a disability. 34 C.F.R. § 300.507(a) (emphasis added).

Here, Petitioner has requested a simple remedy – the provision of an independent comprehensive psychological evaluation, IEP team review of the results and development of an IEP and provision of a placement, if warranted, and the determination of appropriate compensatory education. DCPS argues that it is premature for the Hearing Officer to make determinations as to denial of FAPE and compensatory education as the student has not yet been determined eligible for special education. The Hearing Officer agrees with this assertion. The student has not been determined eligible for special education and related services, and, therefore, the basis for awarding compensatory services has not been established. Furthermore, Petitioner has not asked the Hearing Officer to make a determination as to compensatory services.

DCPS also argues that while it has conceded it did not complete Student's evaluation within 120 days as required, the eligibility determination process is now taking place. Moreover, DCPS states, it has provided Student with services directed at addressing the concerns identified by Petitioner. While the Hearing Officer agrees that Respondent, after many months of inaction or perhaps limited action, has finally begun to respond to Petitioner's request for evaluation of Student, the Hearing Officer is concerned that Respondent wants to use these extremely delayed and limited actions to preclude Petitioner from pursuing her claim. The illogic of this position is obvious. Were Respondent to prevail in this view any dilatory response could be cured without legal consequence by simply initiating action if and when a due process complaint is filed.

The Hearing Officer recognizes that DCPS, in fact, has provided some services to Student. For example, the student was referred to and participated in the SST process from March through the end of the 2009-2010 school year. Student received a Woodcock-Johnson

educational evaluation in June 2010. Student was referred to and participated in a summer program to address her academic difficulties in the summer of 2010. Student has been seeing the school psychologist on a weekly basis since March 2010. As of the date of the hearing an evaluation process had been initiated. A psychological was completed after the request for due process was filed and, Respondent asserted, an educational evaluation was being completed during the time period the hearing was occurring. An MDT meeting had been scheduled for January 18, 2010 to reach a determination as to whether Student is eligible for special education and related services. Respondent asked the Hearing Officer determine these actions met Respondent's obligation under IDEA. However, The Hearing Officer finds these efforts to address student's needs provide evidence that DCPS was making some efforts to benefit Student, but none of these efforts meet the requirement to evaluate Student and determine her eligibility for special education and related services within 120 days of Petitioner's request for evaluation made in March 2010. The extended delay in responding to Petitioner's request for evaluation cannot be cured by simply doing it now, months after the evaluation should have been completed.

DCPS asks that the Hearing Officer consider the equities in reaching a determination as to relief, suggesting that the efforts, identified above, made by DCPS should be considered as balancing against the requested relief, and the Hearing Officer agrees. In assessing the equities the Hearing Officer has reviewed the documentary evidence as well as the credible, uncontested testimony of Petitioner. In reaching her determination, the Hearing Officer has considered the length of delay and limited responsiveness of Respondent to the request for evaluation as well as the efforts to provide some support to Student identified herein. Against this the Hearing

Officer considered Petitioner's request for an independent comprehensive psychological evaluation.

Respondent demonstrated extreme delay in responsiveness to Petitioner's request for evaluation and further showed little effort to resolve the matter even after the Complaint was filed. Petitioner made repeated efforts to have Student evaluated in the spring of 2010. Student's teacher identified numerous school based issues both academic and behavioral. Yet no evaluation took place. At the end of the 2009-2010 school year Petitioner was told Student might be evaluated over the summer. She was not. In the 2010-2011 school year three scheduled referral meetings were cancelled. Finally on November 16, 2010 a referral meeting was held. Petitioner agreed to a psychological evaluation and a social work observation. The minutes of the referral meeting recognize Student's behavioral issues.

Petitioner has not requested extraordinary relief despite the approximate eight month delay between the request for evaluation and the meeting to create the evaluation plan held on November 16, 2010. Petitioner has merely requested that Student receive an independent comprehensive psychological evaluation, a request Petitioner has maintained since the filing of the Complaint, and then a meeting to determine eligibility, placement and compensatory education, if warranted. To support this request Petitioner has identified long-standing, on-going issues regarding both Student's academic performance and Student's behavior. In support of her claim that Student's potential special education needs include more than the academic or cognitive, Petitioner testified that Student's teachers have identified ongoing academic and behavioral concerns, and Student has been seeing the school psychologist on a weekly basis since March 2010. All of Petitioner's testimony points to the need for a comprehensive psychological evaluation. Yet, the psychological evaluation provided by DCPS is not a

comprehensive psychological. Rather the DCPS psychological states on its face that it addresses Student's cognitive abilities and academic skills. R. Supp., p. 1. At hearing Petitioner did not object to the DCPS' psychological being introduced into evidence and indicated Petitioner was not questioning the content of the DCPS psychological. Rather, Petitioner stated, Petitioner was restating her request for a comprehensive psychological that addressed more than the cognitive abilities and academic skills addressed by the DCPS psychological. The Hearing Officer then ruled that as the content of the psychological was not at issue,⁴ that the question to be determined regarding the requested relief was whether Petitioner's request for an independent comprehensive psychological should be granted.

An evaluation to determine eligibility for special education and related services under IDEA is intended to address all areas of suspected disability. 34 C.F.R. § 300.304. The assessments then allow the team, should it determine a student eligible, to develop an IEP that address all areas of educationally related need. *Id.* In this instance, the need to assess student's social/emotional/behavioral needs is clear. The student has a documented history of behavior problems in school including, throwing things, breaking things, yelling, screaming and cursing. Parent had received repeated calls regarding these behaviors. Student has been seeing the school psychologist since March 2010. Student also has a documented history of academic difficulties. In reaching this conclusion the Hearing Officer is not suggesting the psychological evaluation provided by DCPS does or does not address the specified academic and cognitive areas adequately. The content of the DCPS psychological was not at issue. The issue raised by

⁴ The Hearing Officer notes that the DCPS psychological was performed after the filing of the Complaint, and Petitioner's request for an independent comprehensive psychological was not addressed as this was an after the fact assessment limited to cognitive and academic areas. Moreover, the psychological was provided to Petitioner as a supplemental exhibit after the 5 day disclosure date had passed.

Petitioner is the lack of comprehensiveness of the DCPS psychological.⁵ The Hearing Officer finds Petitioner's request for a comprehensive, independent psychological evaluation is quite reasonable in the circumstances discussed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as follows:

The provision of an independent comprehensive psychological evaluation is an equitable remedy in the circumstances.

ORDER

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

1. DCPS fund as independent comprehensive psychological evaluation of student at the current rate. This psychological must address all areas of concern for Student, including academic, cognitive and behavioral/social-emotional. To facilitate this process and inform the independent comprehensive psychological, DCPS is to obtain consent from Petitioner to provide a copy of the DCPS psychological evaluation dated 12/27/10, as well as other relevant evaluation, academic and educational records, to the psychologist performing the independent comprehensive psychological evaluation.
2. DCPS is to convene an IEP team meeting, including Petitioner, within 10 days of receipt of the independent psychological evaluation to review the evaluation as well as other available records to determine Student's eligibility for special education and

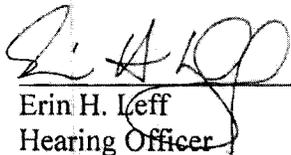
⁵ Therefore, as its content were not in questions and as the face of the document clearly indicated the DCPS psychological evaluation had a focus limited to academic and cognitive areas, the Hearing Officer determined Petitioner's request for a comprehensive, independent psychological must be evaluated as of the date of her filing.

related services. If Student is found eligible an IEP is to be developed and a placement determination made at the meeting.

3. If Student is found eligible for special education and related services the MDT, including Petitioner, are also to determine compensatory education services to cover the period from March 2010 through the date of the meeting described in ¶2., above. If this cannot be accomplished at the meeting described in ¶2., above, a second meeting is to be held within 10 days of the first meeting at which the IEP and placement were developed and established to determine compensatory education services.

IT IS SO ORDERED:

January 19, 2011
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).