

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20003

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STUDENT HEARING OFFICE
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STUDENT,¹

HEARING OFFICER DETERMINATION

Petitioners,

Date Issued: February 15, 2011

versus

Wanda I. Resto Torres, Hearing Officer

District of Columbia Public Schools,

Case No:

Hearing Date: February 1, 2011, Room: 2003

Respondent.

INTRODUCTION

On December 13, 2010, the Petitioner filed a Due Process Complaint ("Complaint"), alleging the DCPS failed to timely determine the Student is eligible for special education and related services. I was appointed as the Hearing Officer on December 15, 2010. DCPS' Response to the Complaint was filed on December 16, 2010. The parties held a resolution meeting on January 12, 2011 and did not reach an agreement. On January 21, 2011, a prehearing conference was held in the above matter.² The Petitioner asserted that a comprehensive psychological evaluation could be available prior to the hearing date; in which case she would seek a decision from the Hearing Officer on the Student's eligibility for special education services and related services. The Pre-Hearing Conference Summary and Order was issued on January 25, 2011. On February 1, 2011, a closed hearing was held. Zachary Nahass, Esq. represented the Petitioners and Kendra Berner, Esq. represented the Respondent. The Petitioners presented six documents; they were admitted into evidence and labeled P-1 through 6. Three witnesses testified on behalf of the Petitioners: the Father, the Mother and the Clinical Psychologist.³ The Respondent presented five documents; they were admitted into evidence and

¹ Personal identification information is provided in Appendix A.

² Counsels were not available to participate in the pre-hearing conference on earlier dates.

³ Clinical Psychologist – Qualified as an expert on administration of psychological assessments to for specific learning disorder or emotional disturbance diagnosis.

labeled DCPS 1 through 5. One witness testified: the Special Education Coordinator. No written closing arguments or briefs were submitted.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA," 20 U.S.C. §§1400 et seq.), its implementing regulations, 34 C.F.R § 300 et seq., the District of Columbia Municipal Regulations, Title 5-E, Chapter 30, Education of the Handicapped, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.

BACKGROUND

The Student is a year-old girl in the grade in a DCPS. In May 2009 a Student Support Team ("SST") recommended a referral to a multidisciplinary ("MDT") because there was a suspicion that the Student may have a disability and the Petitioner signed a request to evaluate for special education provided by the SST.⁴ The Respondent in May 2009 invited the Petitioner to a meeting to determine which evaluations were needed, and obtain informed consent. The Student was enrolled in a non-DCPS at a different local education agency for the 2009-2010 academic year. Then in August 2010 the Student was enrolled again in a DCPS and she has not been evaluated nor has there been a meeting to discuss eligibility since returning to DCPS, as a result this Complaint was filed. The Petitioner since the filing of the Complaint received a letter authorizing an independent comprehensive psychological and a speech\language evaluation to be funded by the Respondent.

ISSUES

The issues to be determined are as follows:

- A. Whether DCPS failed to timely ensure that a full evaluation was conducted to determine if the Student is eligible for special education and related services; within a reasonable time of receiving a parental request on April 29, 2009 and May 12, 2009? Is there is a violation of 20 U.S.C. §1412(a)(3) and §1414(a)(1)(A); 34 CFR §300.101 and 300.11, 300.301et. seq; and 5 DCMR 3005.1 and 2 and D.C. Code § 38-2501(a)?

⁴ P 5 April 29, 2009, Student Support Team ("SST") Meeting Notes.

requesting a meeting to obtain informed consent from the Petitioner. The Petitioner did not confirm a meeting in 2009.⁸

5. The school personnel agreed to initiate the evaluation process but the Petitioner did not receive an invitation. The Petitioner's attorney did not inform her that on May 14, 2009, DCPS had requested that she sign an informed consent form prior to evaluating the Student for special education services. The Petitioner did not know what evaluations were requested from DCPS.⁹
6. The SST was used as an intervention strategy to verify if the Student requires extra help and in what areas; prior to making a special education referral. The referral meeting is necessary to discuss the Student's work, and to gather information on what are the child's academic deficiencies, or behavior problems, and other concerns. A team looks at the Student's attendance, report cards and receives input from staff and people who worked with her. The meeting also makes it possible for the team to identify what types of other evaluations are necessary. At that meeting, the Petitioner is provided a pre-printed DCPS form with an explanation of the process for the consent to evaluate and the evaluations needed are identified. The Petitioner must sign a form whereby she provides consent for specific evaluations to be conducted prior to the eligibility for special education goes forward. Even if a parent chooses to bypass the SST, s/he must go through the referral team.¹⁰
7. A January 2, 2011 independent comprehensive psychological evaluation indicates the Student's reading skills are at a 3.2 grade equivalent, although she is repeating the grade. The Student's mathematic ability is limited she is performing at the equivalent of a 2.3 grade level of performance and her overall written language ability is limited to a 2.6 grade equivalent.¹¹
8. According to the expert witness the Student meets the criteria for learning disorder not otherwise specified; because she has academic problems in all areas, math, reading, and

⁸ Testimony of the special education coordinator, and DCPS 1,2,3-Email correspondence May 13,14, and 22. 2009.

⁹ Testimony of the Mother.

¹⁰ Testimony of the special education coordinator.

¹¹ Independent comprehensive psychological January 25, 2011.

written expression. The difficulties impact her educational progress and she should be classified in the school system as a student with a learning disability. The evaluator recommended that special education services be implemented within the general education classroom in the area of reading and written expression. The evaluator concludes the Student's difficulties with math require more intensive support in the form of pullout services. The comprehensive psychological evaluation does not contain current classroom-based work from the Student nor classroom-based observations. It does not include local or state assessments information. It also does not include data from report cards or from work samples of the Student.¹²

9. DCPS received the educational screening of 2008 and the comprehensive psychological evaluation at the end of January 2011 and a week later sent a letter of invitation to the Petitioner and her attorney. Providing three dates for a meeting and there has not been a response to the invitation.¹³

CONCLUSIONS OF LAW

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

Motion to Dismiss

The Respondent argued that the Petitioner claims of "child find" are moot, as the child has been found, and no other claim is ripe until eligibility decision has been made. Furthermore the Respondent argues the remedy that the Petitioner sought, i.e. "independent comprehensive psychological; a speech and language evaluation", is moot because the Petitioner has received authorization for the funding of the evaluations requested and there is no other relief available to the Petitioner.

Where the challenged conduct ceases or is alleviated, and there is no reasonable expectation that the wrong will be repeated," a case is rendered moot because it has "become impossible for the court to grant any effectual relief whatever to [the] prevailing party, and any

¹² Testimony of the Clinical Psychologist

¹³

opinion as to the legality of the challenged action would be advisory." *Green v. Dist. of Columbia*, Civ. No. 05-550, 2006 WL 1193866, at *9 (D.D.C. May 2, 2006) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (internal quotation marks omitted) .

The Hearing Officer considered the Motion to Dismiss but is not persuaded that the claim is moot or that any evidence presented by the Respondent was sufficient to cause the dismissal of the Complaint.

The Petitioner has a right to a determination on the non compliance with the IDEIA obligation to identify, locate and evaluate (child find) the Student. DCPS as the LEA has an affirmative duty to identify, locate and evaluate a potentially disabled child. See: Hawkins ex rel. D.C. v. District of Columbia, 593 F. Supp. 2d 108, 113-14 (D.D.C. 2008).

Furthermore, the allegation that the Student is eligible for special education services is also before the Hearing Officer and a determination on the whether the Student was denied a FAPE is pending, both issues which are ripe for a decision by the Hearing Officer.

The Petitioner alleged the Respondent failed to locate, identify and evaluate the Student for special education needs in a timely manner.

A free appropriate public education must be available to all children between the ages of 3 and 21 who are residing in the District of Columbia, including children with disabilities who have been suspended or expelled from school.¹⁴ The applicable regulations define a FAPE as "special education and related services that are provided at public expense; meet the standards of the [State Education Agency]-; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)." ¹⁵

IDEIA ¹⁶ requires that the Respondent have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and

¹⁴ 34 C.F.R. § 300.101(a) and D.C.M.R. 5§3002.1

¹⁵ 20 U.S.C. 1401(9), and 34 C.F.R. § 300.17

¹⁶ 20 U.S.C. 1412(a)(3), and 34C.F.R. § 300.111

children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

Similarly 5 D.C.M.R. § 3005.1 (2006) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services.

According to D.C. Code § 38-2561.02, initial evaluations and assessments are to be completed within 120 days from the date that the student was *referred* for an evaluation or assessment. D.C. Mun. Regs. Tit. 5 § 3004.1 (b) (1) and (c), states that a referral for evaluations can be made *by* the parent, in writing, to the school principal.

Before proceeding with the evaluation, the LEA is required to provide notice to and obtain consent from the parent of the child.¹⁷ The LEA is relieved of its duty to complete this process within the prescribed timeframe where:

- (1) The parent of a child repeatedly fails or refuses to produce the child for evaluation; or
- (2) A child enrolls in a school of another public agency after the relevant time frame ... has begun, and prior to a determination by the child's previous agency as to whether the child is a child with a disability.¹⁸

The parent testified that she requested from school personnel in April 2009 for evaluations to be conducted. For the evaluation process to begin, the parent must consent to the evaluation by the Respondent. The evidence was the Petitioner requested special education evaluations in the end of April and in Mid-May of 2009. Within two weeks, the Respondent sent invitations to initiate the eligibility process for the Student. The eligibility process was delayed for a number of reasons: the Petitioner did not respond to an invitation through her attorney, and then classes ended for the 2009-2010 academic year and the Student was enrolled in another LEA during 2010-2011. The evidence was that the attorney did not inform

¹⁷ 34 C.F.R. § 300.9 and 300.300 The definition of consent already requires that the parent be fully informed of all the information relevant to the activity for which consent is sought. See: Comment to 34 C.F.R. § 300.9 Federal Register Vol. 71, No 156, August 2006, page 46551

¹⁸ 34 C.F.R. §§300.301.

the Petitioner that DCPS was interested in meeting to discuss evaluations and obtained informed consent.

The burden of proof is the responsibility of the party seeking relief, in this case the parent. Based solely upon the evidence presented at the hearing, the hearing officer must 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 a FAPE.¹⁹ See Schaffer v. Weast, 546 U.S. 49, 51 (2005) (holding that the burden of proving a violation of the IDEA lies on the party seeking relief during the administrative process). The Petitioner failed to meet her burden of persuasion at that hearing. In the present case, the Respondent presented credible evidence that efforts were made to evaluate the Student, and it received no response from the Petitioner or her attorney.

Assuming for discussion propose that the Respondent's obligation to evaluate began on April 29, 2009, DCPS would have to evaluated by August 28, 2009, at that time the Student was enrolled in another LEA for academic year 2009-2010, which is not a party to the present Complaint. The Respondent would not have been responsible for initiating the evaluation process pursuant to 34 C.F.R. §§300.301(c) because the Student was enrolled in another local education agency prior to a determination by the DCPS as to whether the Student was a child with a disability.

Additionally, the IDEIA requires the local educational agency to use a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior.²⁰ The record in the present case lacks information about the Student's current classroom-based work or classroom-based observations. It does not include data from assessments, report cards or from work samples of the Student; all necessary to acquire a clear understanding of the Student's needs.

As indicated above, DCPS did not violate its procedural obligations to timely evaluate the Student. Even though the DCPS should have known the Student required an evaluation for special education services in April 2009. The Petitioner failed to meet with the Respondent to discuss the evaluation process, when invited in May 2009.

¹⁹ 5 D.C.M.R. § 3030.14.

²⁰ 20 U.S.C. 1414(b)(4) and (5)) 34 C.F.R. 300.306. 2(c).

The IDEIA provides at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, “[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child’s right to a free appropriate public education;
- ii. significantly impeded the parent’s opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent’s child; or
- iii. caused a deprivation of educational benefits.”

The Student was not denied a FAPE because of an alleged procedural inadequacy. The Petitioner did not prove that a failure to timely identify and evaluate for special education services denied the Student’s right to a FAPE or deprive him of educational benefit, nor was there credible evidence to demonstrate that the parent was significantly impeded in the decision making process.

ORDER

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

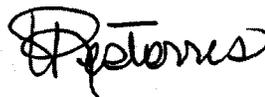
ORDERED, the due process complaint filed December 13, 2010 is Dismissed; **it is further ordered**;

ORDERED, the Petitioner request for relief is Denied.

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 §1415(i)(2)(B).

Dated: February 15, 2011



Wanda I. Resto Torres -Hearing Officer