DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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STUDENT HEARING OFFICE
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STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION Date: March 21, 2009 Representatives: **Hearing Officer: Wanda I. Resto, Esquire**

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

I. PROCEDURAL BACKGROUND

On February 9, 2009 the Petitioner's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to timely evaluate the Student to determine his possible special education needs.

The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to complete the requested evaluations on the Student or fund the parent's evaluations independently. The Petitioner further request the Respondent convene the individualized education program ("IEP") team to review the findings and recommendations of the assessment, determine his eligibility for special education and its related services, develop an appropriate IEP and provide a placement where the IEP may be implemented. Additionally, the Petitioner requests, if the Student is found to be eligible to receive special education and its related services, the Respondent determine the amount of compensatory education services the Student is owed and develop a compensatory education plan.

A pre-hearing conference was not held due to conflicts in Counsels schedule. The Respondent did not file a written Response to Parent's Administrative Due Process Complaint.

A hearing was held on March 12, 2009. The Petitioner presented a disclosure letter dated March 5, 2009 to which eleven documents were attached, labeled P-1 through 11 and which listed five witnesses. One witnesses testified –the Education Advocate. The Respondent presented a disclosure letter dated March 6, 2009 identifying ten witnesses and to which three documents were attached, labeled DCPS 1 through3. No witness testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent deny the Student access to a free and appropriate public education by failing to timely evaluate the Student to determine possible special education needs?

2. Has the Respondent failed to convene the IEP team to review the findings and recommendations of assessment, determine eligibility for special education and its related services, develop an appropriate IEP and provide a placement where the IEP may be implemented?

3. Has the Student been denied a FAPE and is the Student entitled to a compensatory education award?

III. FINDINGS OF FACT

1. On November 3rd, 2008, the parent, through counsel, sent a request to the Respondent for an initial evaluation of the Student in all areas of suspected disabilities, to determine whether or not

the Student may benefit from special education and its related services needs. The request for evaluations, along with a request for a copy of the Student's educational records, were sent via facsimile to the DCPS Office of Special Education, the DCPS Office of the General Counsel, and to the Student's home school, [redacted]. A Teacher Assistance Team (TAT) form/Consent for Evaluation and a General Authorization letter were attached.[2]

2. The request for evaluations was made due to concerns about the Student's academic progress and constant complaints about the Student's behaviors in school. Additionally, because the Student was suspended to the Academy, a DCPS school for children with behavioral issues. [3]

3. On December 10, 2008, the Respondent provided the parent, through counsel, notice of their intent to evaluate the Student with a psychological, a speech and language, a social history, and an educational evaluation. [4]

4. On December 11, 2008, a psycho-social evaluation report was issued by it indicates the mental health and academic team do not believe the Student is emotionally disturbed. The team determined that the Student has issues that can be addressed through individual counseling and recommended against special education consideration. [5]

5. On January 8, 2009, the IEP team convened on behalf of the Student. At the IEP Team meeting, the Respondent produce a copy of the Student's psycho-social and social history evaluation and agreed to perform a comprehensive psychological, and an educational evaluation. The notes indicate that a psycho-social was completed by on 12/11/08. [6]

6. On January 23, 2009, the Respondent authorized the Petitioner to obtain an independent comprehensive psychological evaluation, (which includes cognitive, educational, and clinical components as well as a social history) and a speech/language evaluation at the expense of the Respondent. The Respondent agreed to reimburse reasonable and documented fees for the evaluations.[7]

7. The Respondent has yet to complete the Student's remaining evaluations or convene an IEP team meeting to determine the Student's eligibility or special education and its related services.

IV. CONCLUSIONS OF LAW

FAPE Determination

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[2] P#3 Request for Initial Evaluation dated 11/8/08.

[3] Testimony of the Education Advocate.

[4] P#5 Notice to Parent of Intent to Evaluate/Reevaluate dated 12/10/08.

[5] RESPONDENT#3 Psycho-social evaluation report from Academy dated 12/11/08,

[6] P#11 MDT notes dated 1/8/08.

[7] RESPONDENT#1Letter to Counsel for the Petitioner from the Deputy Chancellor of Special Education dated 1/23/09.

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall 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.

The Respondent met its legal obligation under the IDEA. Here is why.

Evaluations

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (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 through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.

According to 34 C.F.R. §300.304(c) (4) and (6) Respondent shall ensure that a child is assessed in all areas related to the suspected disability; and in evaluating each child with a disability that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

The IDEA regulations at 34 C.F.R. §Section 300.301(a)(b) provides in pertinent part:

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for initial evaluation. Consistent 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 (emphasis supplied) to determine if the child is a child with a disability.

At the hearing the Respondent argued the DCPS has 120 days from the date consent is received to complete evaluations. The Respondent further contends there has been no harm to the Student.

According to 34 C.F.R §300.301(c)(1)(i) the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; ***or*** if the State establishes a timeframe within which the evaluation must be conducted. The 60 day timeframe established by IDEA in completing initial evaluations, only applies if the State fails to establish a timeframe within which an initial evaluation must be conducted.

In the District of Columbia, the District of Columbia Code, Chapter 25, §38-2501, entitled "Special Education and Assessment", established a 120 day timeframe within which initial evaluations and assessments must be completed for students who may have a disability and may require special education services; applicable to student in public or non-public schools. However, §38-2501 was recently repealed, and not replaced.

District of Columbia Code, Chapter 25B, §38-2561.02, entitled "Placement of Students with Disabilities in *Nonpublic* Schools", includes the same language in §38-2561.02 requiring completion of initial evaluations and assessments within 120 days after the date the student is referred for evaluation or assessment, however, this Chapter only applies to students in non-public schools. The student in this matter is not in a non-public school; therefore, the 120 day time frame is inapplicable.

The Hearing Officer finds that the District of Columbia repealed D.C. Code, §38-2501, and failed to replace the section with another section establishing a timeframe for completing initial evaluations/assessments for students in public schools. Therefore, absent the District of Columbia establishing a timeframe within which the evaluation must be conducted; IDEA §34. C.F.R. §300.301(c)(1)(i) must apply.

The record reflects that on November 3, 2008, the Education Advocate on behalf of the parent requested that the Respondent conduct the evaluations; to eliminate any questions in reference to the Student's emotional state and academic skills; and the MDT agreed to perform a comprehensive psychological and educational evaluation.

According to the IDEA it is clear that either the parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child with a disability. The Hearing Officer finds that parent's November 3, 2008 request for evaluations constitutes a referral of the Student for evaluation, and consent for the evaluation; and the timeline for the Respondent to complete the evaluation began on that date.

Therefore, to comply with the IDEA[8], the Respondent was required to complete the evaluations no later than January 2, 2009, within ***60 days*** after the request for evaluation, the date that the Student was referred and the parent provided consent for the evaluation. On January 23, 2009, the Respondent authorized the Petitioner to obtain an independent comprehensive psychological evaluation, (which includes cognitive, educational, and clinical components as well as a social history) and a speech/language evaluation at the expense of the Respondent. The Respondent has failed to complete the evaluations as required by the IDEA.

Notwithstanding that the DCPS failed to perform a procedural requirement of the IDEA. The IDEA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer

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[8]34 C.F.R.§300.301(c)(1)(i)

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 Petitioner alleges a violation of the statutory right to receive an evaluation consistent with 20 U.S.C. 1414(a). However, the Petitioner did not show that an educational deficiency was caused by any procedural violation DCPS committed. The Petitioner additionally failed to demonstrate that the Student's right to a FAPE was denied or that the parent was significantly impeded from participating in the decision making process.

As indicated above, the Respondent violated its procedural obligations by failing to timely evaluate the Student, even though the Student's parent had consented to an evaluation. However, an IDEA claim based on procedural violations is viable only if those procedural violations affected the student's *substantive* rights. *See, e.g.*, *Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although RESPONDENT admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by any procedural violation the Respondent committed. The IDEA requires that a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. [9] While the Petitioner has established a procedural violation of the IDEA, the Petitioner has not established that that violation caused harm to the Student that the IDEA is intended to address.

Accordingly, the Student has failed to meet the burden of proof and her claims fail on the merits.

V. SUMMARY OF DECISION

The Petitioner established that a procedural violation of the IDEA was committed. The Petitioner has not established that the violation caused an educational harm to the Student or that the Petitioner was significantly impeded from participating in the educational decision making process.

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[9] 34 C.F.R. 300.513(a)(1) and section 615(f)(3)(E)

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint is **Dismissed.**

This order resolves all issues raised in the Petitioner's February 9, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. Final decisions of special education Hearing Officer may be appealed to a state or federal district court of competent jurisdiction. (20 U.S.C. §1415(i)(2) and 34 C.F.R. §300.516)

/s/ *WIRestorres* (electronically signed) **Date: March 21, 2009**