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State Enforcement and Investigation Unit
Office of Review and Compliance

STUDENT HEARING OFFICE
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CONFIDENTIAL

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STUDENT HEARING OFFICE
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In the Matter of:

STUDENT,

Petitioner,

v.

LOCAL EDUCATIONAL
AGENCY,

Respondent.

Case No. (LSD)

**HEARING OFFICER
DECISION**

I. PROCEDURAL BACKGROUND

Petitioner, by and through his parent, filed a due-process complaint on December 23, 2008. Petitioner waived the resolution session. Respondent answered the complaint on January 8, 2009.

On January 13, 2009, I held a prehearing in this matter.

Due to the unavailability of counsel, on January 21, 2009, Respondent requested in writing that the due-process hearing be rescheduled for March 3, 2009. Petitioner consented to the motion, and I granted it.

So, on March 3, 2009, the date proposed by the parties, I held a due-process hearing under the applicable sections of the Individuals with Disabilities Improvement Act of 2004 (*see* 34 C.F.R. §§ 300.1-300.718) and of the District of Columbia municipal regulations (*see* 5 DCMR §§ 2500-3033). At the hearing, both parties were represented by counsel. Petitioner

entered into evidence, without objection, forty-two documents marked P-1 to P-42. Four witnesses, including his mother, testified on Petitioner's behalf.¹ Respondent entered into evidence, without objection, eighteen documents marked R-1 to R-18. One witness testified on its behalf. I entered into evidence one document, marked HO-1, on my own motion.

II. ISSUES RAISED AND RELIEF SOUGHT

In the due-process complaint, Petitioner alleged Respondent denied him a free and appropriate education ("FAPE") by failing to timely evaluate him and convene a multidisciplinary team to determine his eligibility for special-education services. *See* Due-Process Complaint at 4.

For these lapses, Petitioner requests, among other things, that Respondent pay for Petitioner to be comprehensively evaluated, including a functional behavioral assessment and a speech and language assessment, and that Petitioner be awarded compensatory education if he is eligible for special-education services. *See* Due-Process Complaint at 6-7.

III. FINDINGS OF FACT

Based on the witnesses' testimony, the documentary evidence presented by the parties, the arguments made by counsel, and my own observations at the due-process hearing, I find:

1. Petitioner is a sixteen-year old student who attends School A. Petitioner typically receives A's and B's for his coursework; however, his unexcused absences caused him to fail at least three classes. This year, he is repeating the Ninth Grade because his suspensions due to fighting caused him to miss excessive school days. He made the Honor Roll this year. *See* Testimony of Petitioner's Parent; P-16, P-25, P-33, P-35, & P-36 (progress reports).

2. On August 18, 2008, Petitioner's mother signed a consent form to have Respondent evaluate Petitioner. On August 25, 2008, Petitioner's lawyer faxed to Respondent

¹ Witness One was excluded from testifying because Petitioner failed to timely disclose her.

the consent form under cover of a letter specifically requesting a comprehensive evaluation. *See* P-3.

3. On October 8, 2008, Petitioner's mother met with officials from School A to discuss what evaluations would be conducted. She signed another evaluation consent form, one created by Respondent, at that meeting. Testimony of Petitioner's Mother.

4. Between August and December of 2008, Petitioner's lawyer sent several faxed letters to School A's principal regarding scheduling Petitioner's evaluation. *See* P-3 to P-6. There is no indication in the record that Petitioner's lawyer telephoned School A's principal or the special-education coordinator. (In addition, she told me when I questioned her that she had not made any such calls.)

5. On December 23, 2008, Petitioner filed a due-process complaint. *See* Due-Process Complaint at 1.

6. On January 7, 2009, Respondent authorized Petitioner to obtain an independent evaluation at public expense. The evaluation was to be comprehensive and to include a speech and language evaluation. *See* P-13.

7. Unknown to Respondent, officials from School A already had made arrangements to evaluate Petitioner. That evaluation was undertaken on January 8th and 9th of 2009. A report of the comprehensive evaluation was generated on January 22nd and faxed to Petitioner's counsel on January 30th along with an invitation to a multidisciplinary meeting on the proposed dates of February 12th and 17th. *See* P-6 & P-10.

8. On February 10, 2009, Petitioner's counsel rejected the proposed dates of February 12th and 17th due to unavailability. She proposed no alternative dates for the meeting. *See* R-8.

9. That same day, School A re-invited Petitioner to a multidisciplinary meeting and proposed February 26th and 27th. *See* R-9.

10. On February 23, 2009, Petitioner's counsel rejected the proposed multidisciplinary meeting for February 26th or 27th due to unavailability. She proposed no alternative dates.

11. On February 24, 2009, School A sent a letter of invitation to Petitioner's counsel to attend a multidisciplinary team meeting concerning Petitioner. Three timeslots on March 10th and 12th of 2009 were offered to Petitioner for the meeting. *See* R-7.

12. I convened the due-process hearing on March 3, 2009.

IV. CONCLUSIONS OF LAW

Petitioner shoulders the burden of proof in this due-process proceeding, *see* 5 DCMR § 3030.3, and must carry it by a preponderance of the evidence. *See* 20 U.S.C. § 1415 (i)(2)(c).

Respondent is required to evaluate a student at the request of the student's parent. *See* 34 C.F.R. § 300.301. Respondent is not held to a standard of perfection in meeting its obligations under the Individuals with Disabilities in Education Improvement Act. *See Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (petitioner denied relief because, while respondent failed to timely assess petitioner, petitioner could show no harm resulting from that error).²

² *Accord C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3^d Cir. 2005) (“[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.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (holding that procedural flaws do not “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (technical noncompliance with procedural requirements did not result in a “substantive deprivation” of petitioner’s rights); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (“[P]rocedural flaws do not automatically render an IEP legally defective.”).

In the face of a procedural violation, a hearing officer may find Petitioner was denied a FAPE only if the violations impeded Petitioner's right to a FAPE, significantly impeded Petitioner's parent's opportunity to participate in the decision-making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. *See* 20 U.S.C. § 1415 (f)(3)(E)(ii); *see also Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (technical violations must interfere with substantive rights).

Petitioner argued at the hearing that Respondent had sixty days to complete the evaluations. Under District of Columbia regulations, Respondent previously had to conduct that evaluation within 120 days, but that provision of law, which apparently applied only to public school students, was repealed and not replaced. The 120-day evaluation rule, however, still stands for students attending nonpublic school system. In the absence of an evaluation deadline, a rule of reason applies. The past practice has been that 120-days was appropriate for undertaking and completing an evaluation of a public school student and there is no apparent reason why a different amount of time should be allotted for evaluating nonpublic school students. Therefore, it appears that this jurisdiction has provided for a deadline other than sixty days, and it seems reasonable to apply the 120-day deadline to Petitioner's evaluation period. Thus, Respondent should have completed Petitioner's evaluations by December 23, 2008.

Of course, under the sixty-day deadline and the 120-day deadline, Respondent failed to meet its obligation since it did not begin the evaluation until January 7, 2009. So, the failure is a question of degree, not occurrence.

In this case, School A met with Petitioner's parent during the 120-day period to determine what evaluations would be conducted. It is unclear why the evaluation was not undertaken immediately; however, an attempt to start the process was timely made. Petitioner

sent several letters to School A concerning the evaluation. Given the failure of these letters to move the evaluation forward, at some point, it was appropriate for Petitioner's counsel to pick up the telephone to quickly and efficiently resolve whatever issues delayed the completion of the evaluation. Petitioner's counsel instead continued to send letters.

Then—on the very day the evaluations were to be completed—Petitioner filed a due-process complaint. Again, Petitioner's counsel did not call School A in a last-ditch effort to resolve or avoid this technical violation. Obviously, just as a person has a duty to use the last clear chance to avoid an accident created by another's negligence, a student seeking special-education services bears some responsibility in avoiding a denial of a FAPE if possible. A telephone call by counsel was not unreasonable and probably would have done the trick. But, instead of pushing him out of the way, Petitioner's counsel simply let the truck hit her client and, then, filed suit for probably avoidable injuries.

It appears the actual clinical assessments were completed by January 22, 2009—a month after the deadline passed. An evaluation within the meaning of 30 DCMR § 5-3001.1, however, is not complete until a multidisciplinary team meeting is convened to discuss the evaluation results. School A attempted on three separate occasions to schedule such a meeting on six different days. Each invitation was rejected by Petitioner's counsel with no effort made to suggest alternative days.³ I find that Petitioner failed to cooperate and, consequently, the ensuing delay in the completion of the evaluation was due to Petitioner's unavailability.

Petitioner, thus, has sued for thirty-nine days of delay (December 23, 2008, the evaluation deadline, and January 30, 2009, the day the comprehensive evaluation was sent to Petitioner along with a letter of evaluation). Like the student in *Kruvant*, he presented no

³ I note that in each of Petitioner's counsel's rejections of the invitations she states that "we" are not available. It is unclear who that "we" included. But, if it included Petitioner's counsel, her attendance was not essential and the meetings should not have been delayed to accommodate her so long as Petitioner's parent was available.

evidence of how that short delay denied him educational benefit or significantly impeded his right to a FAPE or his parent's ability to participate in the decision-making concerning the provision of a FAPE.

In fact, some of the evidence pointed in the opposite direction. For example, Petitioner's mother testified that he is on the honor role this year. He also has not been suspended as often this school year as last.

Petitioner simply did not meet its burden under the applicable law. Accordingly, Respondent prevails on the two issues presented in the due-process complaint.

V. **ORDER**

It is this 13th day of March 2009—

ORDERED that any pending motions shall be denied as moot, and it is further

ORDERED that this matter is DISMISSED, and it is further

ORDERED that this shall be a FINAL DECISION from which the parties have ninety days from today to file an appeal in a court of competent jurisdiction, and it is further

ORDERED that this matter is closed for all purposes.



Hearing Officer Latif Doman

Copies to: Counsel for the Parties
Student Hearing Office

5. Petitioner's exhibits 1 through 42;
6. Respondent's exhibits 1 through 18; and
7. The hearing-officer decision issued by me on March 13, 2009.

A handwritten signature in black ink, appearing to read "Latif Doman". The signature is written in a cursive style with a large initial "L".

Latif Doman, Hearing Officer