

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

Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

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MAR 11 2011

STUDENT, a minor, by and through
her Parent,¹

Petitioner

v

SHO Case No:

Erin H. Leff, Hearing Officer

DISTRICIT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

HEARING OFFICER DETERMINATION

DECISION

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STATEMENT OF THE CASE

On January 7, 2011 Parent, 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, or placement of or provision of a free, appropriate public education

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; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 4) on January 19, 2011 and a Supplemental Response to Parent's Administrative Due Process Complaint Notice on January 20, 2011 (HO 5). A resolution meeting was held on January 26, 2011. The parties were not able to reach an agreement. HO 6.

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq., and Laura George, Assistant Attorney General, represented DCPS. I held a telephone prehearing conference on February 15, 2011. HO 8. By agreement of the parties, the hearing was scheduled for February 25, 2011. The hearing was held 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(S)

At the Prehearing Conference three issues were identified for hearing:

1. Whether DCPS denied Student a free, appropriate public education by failing to evaluate Student for eligibility under the Individuals with Disabilities Education Act following the student support team ("SST") meeting held on October 8, 2009. At the time of the SST meeting DCPS had sufficient information and data to know Student was potentially eligible for special education.
2. Whether DCPS denied Student a FAPE by finding Student eligible for services as a student with Other Health Impairment rather than a student who is eligible as a student with two disabilities – Other Health Impairment and Emotional Disturbance.
3. Whether DCPS denied Student a FAPE by denying the educational advocate's and/or parent's request at the December 14, 2011 Multidisciplinary Team ("MDT") meeting for a speech language evaluation as recommended by the independent psychological evaluator.³

³ Petitioner waived all other claims at the Prehearing Conference.

Prior to the commencement of the hearing, Respondent's counsel indicated Respondent would stipulate resolutions of issues 2 and 3. It was agreed these stipulations would be entered into the record. Accordingly, at hearing on February 25, 2011, the aforementioned stipulations were entered into the record. *See* Stipulation section, *infra.*, at p. 3. These stipulations left only issue 1 for my determination.

STIPULATIONS

1. DCPS stipulates it has authorized Petitioner to obtain an independent speech and language evaluation as reflected in the IEE [Independent Educational Evaluation] Authorization Letter dated February 17, 2011. R. 6.
2. DCPS stipulates it has agreed to classify the student as a student with emotional disturbance in addition to the prior classification of Other Health Impaired. Student, therefore, will be classified as a student with Other Health Impairment and Emotional Disturbance.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are found in Appendix B⁴.

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

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

B. Testimony

⁴ Respondent objected to the admission of P 5, an independent psychiatric evaluation, because it was not provided to Respondent following the completion of the evaluation on December 21, 2010 and the multidisciplinary team could not use it in its decision making process because it did not have it. I overruled the objection because the evaluation was included in the 5-day disclosures and it could be given the weight it is due in my determination . .

Petitioner testified and presented the following witnesses:

- Joy D. Nagorniak, Psy. D., admitted as an expert in clinical psychology; and
- Lawrencia Cole admitted, over the objection of Respondent, as an expert in the process of developing Individualized Education Programs (“IEPs”).

DCPS presented the following witness:

- Special Education Coordinator.

FINDINGS OF FACT

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

1. Student is a year old second grade student at a DCPS public elementary school. She attended the same school for pre-kindergarten, kindergarten and first grade. She attended summer school between kindergarten and first grade and again between first grade and second grade. Testimony of Petitioner; P 5; P 6; P 8.
2. Student’s grade teacher referred her to the SST on October 8, 2009 for academic and behavioral concerns. P 9; R 1. After a student is referred to the SST, the standard process is for the SST to contact the parent and set up a meeting at which interventions are developed. These interventions are to be tried for six to eight weeks, and then a follow-up meeting is scheduled. Testimony of Horne.
3. Some students referred to the SST may be determined to be potentially eligible for special education and related services and, therefore, are referred to the MDT for evaluation. Some students referred to the SST remain general education students. Testimony of Horne.

4. The standard SST process was not followed in this case. DCPS did not notify Petitioner of the SST meeting, and no follow up meeting occurred. The SST process was not completed. P 9.
5. Student was found eligible for special education as a student with Other Health Impairment on December 14, 2010. This eligibility meeting followed from the implementation of a Settlement Agreement of September 27, 2010 (P 16) resolving a due process complaint filed on September 10, 2010. P 19.
6. Student's academic performance and behavioral issues have remained the same for the 2009-2010 and 2010-2011 school years. Testimony of Petitioner. Student is struggling in reading and writing, performing on the pre-kindergarten to kindergarten level, although she is able to perform on grade level in math. Testimony of Petitioner; Testimony of Nagorniak; P 5; P 6. Student is highly distractible and unable to focus. Testimony of Nagorniak; P 5; P 6. She fights with other students and exhibits behavior that may be dangerous to herself and to other students. She is frequently disruptive in class. Testimony of Petitioner; P 5; P 6. Student has Attention Deficit Hyperactivity Disorder ("ADHD"), and she has an emotional disability. Testimony of Nagorniak; P 5; P 6.

DISCUSSION

Whether DCPS denied Student a FAPE by failing to evaluate Student for eligibility under the Individuals with Disabilities Education Act following the SST meeting held on October 8, 2009. At the time of the SST meeting DCPS had sufficient information and data to know Student was potentially eligible for special education.

Under the Individuals with Disabilities Education Act, as amended, ("IDEA") a local education agency ("LEA") may implement a program of early intervening services for students who are not identified as needing special education and related services but who need additional

academic and behavioral support. 34 C.F.R. § 300.226(a). This program may include “educational and behavioral evaluations, services and support, including scientifically based literacy instruction.” 34 C.F.R. § 300.226(b)(2).

In the instant matter, Student’s first grade teacher referred her to the SST on October 8, 2009. The Student Support Team Request Form completed by the teacher requests assistance with both academic and behavioral support as referenced under IDEA as early intervening services. Once referred to the SST, the team is to meet with the parent, develop strategies to be implemented in an attempt to resolve the student’s difficulties and then meet again after approximately six to eight weeks to determine whether the interventions were successful. Neither Petitioner nor Respondent provided any documentary evidence regarding Student’s SST process other than the Student Support Team Request Form. There is no evidence that Petitioner was contacted regarding the referral to the SST.⁵ There is no evidence of the actual SST meeting having occurred. There is no evidence that interventions were developed or implemented. There is no evidence that a follow-up meeting occurred. Thus the question before me is whether DCPS at the time of the referral to the SST knew or should have known Student was a student who might be eligible for special education programs and services and, therefore, required a special education evaluation.

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

⁵ The Student Support Team Request Form, it should be noted, does not identify Petitioner as Student’s parent. Petitioner, who is Student’s grandparent, has had custody of Student since infancy. However, the form identifies another person in the parent block.

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). The IEP defines the provision of FAPE for each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

Early intervening services, as they occur prior to the determination of IDEA eligibility and the development of an IEP, do not provide FAPE. If I determine Student should have been referred for special education evaluation when referred to the SST or at the end of the SST process, Student had a potential harm which should result in a remedy in this matter if it is assumed she would have been found eligible and received special education services at that point in time.

Not all students who have educational difficulties, however, are suspected of having a qualified disability under IDEA. Early intervening services provide needed interventions for students who may or may not be IDEA eligible. Here, a concerned teacher referred Student to the SST process because she was struggling in school. There is no evidence that any further SST action occurred. Neither DCPS nor the Petitioner requested an IDEA evaluation at that time.⁶ Petitioner asks that I find DCPS knew or should have known at the time of the SST referral that Student had a qualifying disability under IDEA. The argument is without foundation. To assume every student referred to the SST process would be eligible under IDEA contravenes the early intervention process. The referral to the SST process occurred during Student's second month in first grade. Under IDEA Petitioner was able in October of Student's

⁶ Petitioner's subsequent request for evaluation and DCPS' response to that request are the subject of an earlier due process request and are not before me.

first grade year, just as she subsequently did, to initiate a referral for special education evaluation, but she did not. Petitioner's not referring Student for special education evaluation cannot be found extraordinary, nor is it extraordinary that DCPS also did not identify Student as potentially eligible under IDEA. Both Petitioner and Respondent recognized Student was having difficulties at the beginning of first grade. Her teacher asked for additional support from the SST. It was possible that services provided by the SST might have helped Student adjust, but no one had the opportunity to make this determination since the SST process was not completed. As time progressed and Student did not, Petitioner's concerns about Student's academic and behavioral progress clearly increased. These concerns lead to the due process complaint that resulted in the Settlement Agreement leading to Student's being evaluated and found eligible for special education and related services in December 2010. It is unlikely that Petitioner or DCPS would have referred Student for special education evaluation substantially earlier had the SST process been completed.

More recently, when Petitioner learned there had been a referral to the SST in October 2009 she, in her concern for Student, retroactively attributed recently acquired knowledge of Student's current recognized IDEA eligibility to DCPS at the time of the referral to the SST. This is classic boot strapping, and I find there is no basis for this position. While I recognize DCPS did not follow through with the SST process, referral to SST does not establish that DCPS should have recognized Student's need for evaluation under IDEA. Petitioner has provided no evidence regarding when Student should have been identified as a student who might be eligible for special education and related services under IDEA other than identifying the referral to the SST. The referral to the SST is not, in itself, a basis for determining a student should be referred for evaluation under IDEA. I, therefore, find by a preponderance of the evidence, Petitioner has not met the burden of proof. Petitioner has not established that DCPS failed to provide Student a FAPE when it did not evaluate Student for eligibility under the

IDEA following her referral to the SST in October 2009.

CONCLUSIONS OF LAW

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

DCPS' failure to evaluate Student for eligibility under the IDEA following her referral to the SST in October 2009 did not deny Student a FAPE. DCPS did not have sufficient information and data to know Student was potentially eligible for special education at that time.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

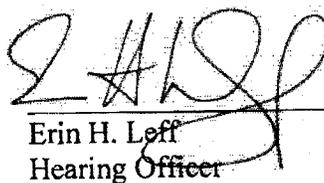
1. The claim that DCPS did not provide Student a FAPE when it failed to evaluate Student for eligibility under the IDEA following her referral to the SST in October 2009 is **DIMISSED**.
2. DCPS, as stipulated on the record, shall provide funding for the independent speech and language evaluation as reflected in the IEE Authorization Letter dated February 17, 2011. R. 6.

1. DCPS, as stipulated on the record, shall classify the student as a student with two disabilities. Student is to be classified as a student with Other Health Impairment and with Emotional Disturbance.

IT IS SO ORDERED:

March 11, 2011

Date


Erin H. Loff
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).