

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

██████████, on behalf of
██████████

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

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Student is a ██████████ girl, who attends a DCPS elementary school. On October 16, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS violated Student's right to a free appropriate public education ("FAPE") by failing to (1) evaluate Student under Child Find as a child suspected of having a disability; and (2) evaluate Student in all suspected areas of disability upon Parent's request. As relief for these alleged denials of FAPE, Petitioner requested funding for independent evaluations, to include comprehensive psychological (including clinical), speech/language, adaptive, occupational therapy, vision and hearing (not screening) evaluations.

On November 2, 2012, DCPS filed its Response, which asserted (1) that DCPS sent Parent an invitation to meet on or about April 26, 2012, but the meeting did not convene because it was not confirmed; (2) that upon receipt of the Complaint, DCPS sent parent a letter of invitation to a meeting to determine evaluations but did not receive a response; (3) there has not been educable harm as a result of the alleged violation; and (4) that Student has not been denied a FAPE.

The parties concluded the Resolution Meeting process by participating in a resolution session on November 13, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline initially was set to begin on November 16, 2012 and end on December 30, 2012. However, on December 3, 2012, Petitioner filed a revised Motion for a Continuance noting the unavailability of Parent to participate in the due process hearing scheduled for December 12, 2012, which the chief hearing officer granted on December

5, 2012, with the result that the 75-day timeline for this case was extended to January 25, 2013, which is now the HOD deadline.

On November 19, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer determined to combine Petitioner's two claims concerning evaluations into one claim. The hearing officer issued a Prehearing Order on November 21, 2012.

By their respective letters dated January 4, 2013, DCPS disclosed two documents (Respondent's Exhibits 1-2), and Petitioner disclosed seven documents (Petitioner's Exhibits 1-7).

The hearing officer convened the due process hearing on January 11, 2013.¹ Petitioner's disclosed documents were admitted into the record without objection. DCPS's disclosed documents were admitted into the record over Petitioner's objection to relevance on the ground that the documents were blank, because Petitioner failed to raise the objection prior to the hearing. The hearing officer also accepted Petitioner's hearing brief.

Thereafter, the hearing officer received Petitioner's opening statement and DCPS was allowed to reserve its opening statement to the start of its case on the condition that it was restricted to the matters raised in the Response and PHC Order. Petitioner presented its testimonial evidence, DCPS waived an opening altogether and presented its testimonial evidence, and the hearing officer allowed the parties until close of business on Tuesday, January 15, 2013 to submit simultaneous written closing statements.² The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to evaluate Student (a) pursuant to Child Find from November 1, 2010 forward, and (b) despite numerous requests from Parent?

FINDINGS OF FACT³

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² Both parties timely submitted their written closing briefs.

³ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is [REDACTED] and she currently attends second grade at a DCPS elementary school.⁴
2. Student has attended her current DCPS school for the past 3 years. Student began attending the school in first grade; she was promoted to second grade for SY 2011/12, but Parent had Student retained and returned to first grade after Student struggled for a few weeks in second grade and the second grade teacher confirmed that Student should be retained; and now, Student is in 2nd grade.⁵
3. During Student's first year in first grade, Parent was concerned that student was not reading as well as she should have been and could not complete her homework without Parent's help. Student's teacher confirmed that Student was struggling in reading and spelling, and the teacher reduced Student's spelling words from 20 to 5 or 6 because Student was failing substantially all of her spelling tests, but even with the reduced number of words and constant repetition with Parent Student still could not spell her spelling words.⁶
4. During Student's second year in first grade, Parent did substantially all of Student's homework so that she could pass. Parent explained this to DCPS during SY 2011/12. Parent also explained that Student did not seem to be progressing and could not perform many of the skills required for her grade level, and overall, Parent was concerned about Student's academics.⁷
5. During SY 2011/12, Parent discussed Student's reading issues with the assistant principal, and the assistant principal advised Parent to read to Student every night, go to the library to select high quality literature, and look into storytelling times and activities at the library. The assistant principal did not recommend that Parent seek an evaluation for special education, nor did Parent ask the assistant principal for an evaluation of Student.⁸
6. During Student's second year in first grade, SY 2011/12, Parent asked the special education coordinator ("SEC") for a meeting. Although Parent expressed her concerns in the fall, DCPS did not convene an MDT meeting for Student until February 2012.⁹

⁴ See Complaint; testimony of Parent.

⁵ Testimony of Parent.

⁶ Testimony of Parent.

⁷ Testimony of Parent; testimony of previous SEC.

⁸ Testimony of assistant principal.

⁹ Testimony of Parent; testimony of previous SEC.

7. At Student's February 2012 MDT meeting, Parent informed the team members that Student was writing backwards, and Student's teacher brought work samples to the meeting showing that Student could not write in sentences and all the work Student had completed was written backwards. Parent asked whether DCPS tested for dyslexia, and DCPS advised Parent that to call her pediatrician or insurance company because DCPS did not test for dyslexia. DCPS indicated that it would collect data regarding Student and the use of interventions in class prior to reconvening the meeting in 4 weeks. However, when Parent returned to the school for the second meeting in or about April 2012, only the SEC was available and no other DCPS team members were available, so the meeting could not go forward. The SEC said she would reschedule the meeting, but the meeting was never rescheduled.¹⁰
8. Parent called her pediatrician but was advised the office did not test for dyslexia. Parent called her insurance company, which gave her some referrals but no testing options. Ultimately, Parent's case worker linked her up with an educational advocate.¹¹
9. Student's vision and hearing were tested in February 2011 and were found within normal limits. However, it is unclear whether the testing consisted of screenings or more in-depth evaluations.¹²
10. At the end of SY 2011/12, the SEC told Parent that someone would get in touch with her regarding a meeting for Student, but she never received any communications at all. Then, at the start of SY 2012/13, the former SEC (who previously served as SEC in SY 2011/12) said she was no longer serving as the SEC but would address the issue with the current assistant principal. Again, however, Parent never received any communications.¹³
11. Student only recently stopped writing everything backwards.¹⁴
12. Recent informal testing of Student reveals that her academic skills are at a kindergarten to first grade level. During the informal testing, Student did not the sounds of consonants and blends, she could not rote count beyond 20, she could not do single digit addition without manipulatives and couldn't consistently do the addition problems correctly even with the manipulatives, and did not know how to tell time or the days of the week, months and similar items. Student also asked for repetition of the instructions repeatedly during testing, which suggests that she may have issues with her hearing.¹⁵

¹⁰ Testimony of Parent; *see* testimony of previous SEC; Petitioner's Exhibit 3.

¹¹ Testimony of Parent.

¹² Petitioner's Exhibit 3; testimony of previous SEC.

¹³ Testimony of Parent; testimony of previous SEC.

¹⁴ Testimony of Parent.

¹⁵ Testimony of educational advocate.

13. By second grade, a student should no longer be writing words backwards. The fact that Student is reading on a kindergarten level and cannot produce letter sounds was sufficient to put her teachers on notice that she may be a child with a disability.¹⁶

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:

1. Alleged Failure to Evaluate

Under IDEA's Child Find provision, each State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111.

IDEA also provides that, consistent with the requirements of 34 C.F.R. § 300.300 (regarding parental consent), either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301(b). The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or within the timeline established by the State if the State establishes a timeline, and must consist of procedures to determine if the child is a child with a disability under 34 C.F.R. § 300.8 and to determine the educational needs of the child. 34 C.F.R. § 300.301(c). Pursuant to District of Columbia law, DCPS shall evaluate a student who may have a disability and who may require special education services within 120 days from the date the student was referred for an evaluation. D.C. Code § 38.2561.02

IDEA further provides that a public agency conducting the evaluation of a disabled child must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). The public agency must also ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to conduct an initial evaluation of Student (1) pursuant to Child Find, and (2) within 120 days upon Parent's request for an evaluation at Student's February 2012 MDT meeting.

DCPS disagrees that it had a duty to conduct an initial evaluation of Student, arguing that Parent failed to make a written referral request for an evaluation of Student; Parent failed to provide written consent for an evaluation, which DCPS maintains is a prerequisite before an evaluation may take place; and Student was reading on a beginning first grade level at the time of the

¹⁶ *See* testimony of educational advocate.

February 2012 meeting, which contradicts Parent's assertions about Student's level of functioning.

A review of the evidence in this case reveals that, at the latest, by the beginning of SY 2011/12 when Parent made the decision to remove Student from second grade and return Student to the first grade for the second consecutive school year, with agreement of Student's then teacher, DCPS had sufficient knowledge to suspect that Student may be a child with a disability, which triggered DCPS's obligation to evaluate Student under IDEA's Child Find provision. As a result, the hearing officer concludes that DCPS's failure to conduct an initial evaluation of Student during SY 2011/12 to determine whether, and to what extent, Student may require special education and related services to access the general education curriculum constituted a violation of IDEA that rose to the level of a denial of FAPE. *See* 34 C.F.R. 300.513(a)(2) (hearing officer may find denial of FAPE where procedural inadequacies impeded child's right to FAPE or caused deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (procedural violations that result in loss of educational opportunity are actionable).

The evidence further reveals that Parent repeatedly expressed her concerns about Student's academic struggles to the staff at Student's DCPS school, and at Student's February 2011 MDT Parent specifically requested dyslexia testing for Student. Instead of agreeing to conduct an initial evaluation of Student, which may or may not have indicated a need for dyslexia testing, and providing Parent with a consent form, DCPS advised Parent that it did not test for dyslexia and advised Parent to consult with her pediatrician and insurance company. This act on DCPS's part constituted a failure to respond to Parent's request for an evaluation of Student, because despite DCPS's argument to the contrary, Parent's request for dyslexia testing was sufficient to inform DCPS of Parent's desire for an initial evaluation of Student for special education purposes and sufficient to trigger DCPS's obligation to seek informed consent for the initial evaluation. *See* 34 C.F.R. § 300.300(a)(1)(iii) (public agency must make reasonable efforts to obtain informed consent from parent for an initial evaluation). As a result, the hearing officer concludes that DCPS further denied Student a FAPE by failing, in response to Parent's February 2011 request for testing, to conduct an initial evaluation of Student to determine whether, and to what extent, Student may require special education and related services to access the general education curriculum. *See* 34 C.F.R. 300.513(a)(2), *supra*, *Lesesne v. D.C.*, *supra*.

As relief for DCPS's denials of FAPE in this matter, the hearing officer will award Petitioner funding for independent evaluations, to include a comprehensive psychological evaluation, and in light of Student's reading and spelling difficulties, a speech/language evaluation. The hearing officer is not convinced that a clinical component to the psychological evaluation is indicated, or that adaptive, occupational therapy, vision and hearing evaluations are necessary at this juncture. However, the hearing officer will order DCPS to conduct any of those additional evaluations that are indicated by the results of the independent testing that is being awarded herein.

ORDER

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

1. DCPS shall provide Petitioner with funding for independent comprehensive psychological and speech/language evaluations.
2. Within 10 school days of receipt of the independent evaluation reports, DCPS shall convene an IEP meeting for Student to (1) review the evaluation data, (2) provide funding for clinical, adaptive, occupational therapy, vision and/or hearing evaluations if recommended by the independent evaluator(s), (3) determine Student's eligibility for special education and/or related services, and (4) if appropriate, develop an IEP for Student and assign an appropriate school for implementation of the IEP.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination 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 Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 1/25/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer