OSSE
Student Hearing Office
February 12, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent, on behalf of Student[1],

Petitioner,

v.

District of Columbia Public Schools,
Respondent.

Hearing Officer: Gary L. Lieber

Case No: 2012-0800

Hearing Date: February 1, 2013

HEARING OFFICER'S DETERMINATION

Appearances: *Elizabeth J. Jester, Esquire for Petitioner* *Justin Douds, Esquire for Respondent*

Introduction and Procedural Background

This case was brought as a due process complaint pursuant to the Individual with Disabilities Act ("IDEA"), as amended 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E-30 of the District of Columbia Municipal Regulations. Petitioner is the mother of Student, now [redacted]. Petitioner alleges that Respondent committed procedural violations of IDEA by failing to evaluate Student when requested to do so by Parent and by failing to identify and timely evaluate Student based upon a possible suspected disability (*e.g.*, "Child Find" obligation). Petitioner seeks an Order requiring that Respondent

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[1] Personal identification information is provided in Appendix A and the Appendix must be removed prior to distribution.

conduct certain specific evaluations to assess and determine eligibility for special education benefits and services.

The Due Process Complaint was filed on November 30, 2012 (Hearing Officer's Exhibit, Exh. A).[2] Respondent District of Columbia Schools ("DCPS") filed a response to the Due Process Complaint on December 10, 2012, in which it denied that a request for an evaluation had been made until October 23, 2012, when "parent met with the school psychologist and formally requested a special education eligibility meeting for student . . . ." *Id.* at H.O. Exh. C, p. 1. Respondent further asserted that it is now in the process of determining eligibility and that it has 120 days under the existing regulations to do so. D.C. Code §38-2561.02(a). On December 17, 2012, the parties conducted a Resolution Meeting which did not result in an agreement that would dispense with the need for the Due Process Hearing (*Id.* at H.O. Exh. D). On January 3, 2013, the undersigned conducted a prehearing conference and on January 7, 2013, a Prehearing Order was issued which, *inter alia*, set the date for the Due Process Hearing as February 1, 2013 (*Id.* at H.O. Exh. F). On January 15, 2013, this Hearing Officer issued an Amended Prehearing Order (*Id.* at H.O. Exh. G). The five-day disclosures were timely filed on January 25, 2013.

The Due Process Hearing was conducted on February 1, 2013. The Hearing was closed to the public and was electronically recorded. Both parties were represented by counsel.

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[2] The Hearing Officer's Exhibits shall be referred to as H.O. Exh. ___; Petitioner's Exhibits as P. Exh. ___; and Respondent's Exhibits as R. Exh. ___.

The Record of Evidence

The Petitioner was the only witness in the hearing. Respondent called no witnesses.

The following exhibits were admitted: Hearing Officer's Exhibits A through G; Petitioner's Exhibits 1 through 3; and Respondent's Exhibits 1 through 7.[3]

Jurisdiction

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. §1415, the statute's implementing regulations at 34 C.F.R. §300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR") at 5-E §3029 and 5-E §3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415 (f)(3)(E) and 34 C.F.R. §300.513.

Statement of the Issues and Relief Requested

As narrowed at the Hearing[4], the following issues were joined at the Hearing:

1. Whether the Parent requested of Respondent that it evaluate Student to determine whether he is disabled?

2. Whether the Respondent violated its "Child Find" obligations by not timely evaluating Student for eligibility for special education benefits and

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[3] Respondent's Exhibit 8 was proferred by Respondent but the undersigned sustained Petitioner's objection to it. It has been placed in the "Rejected Exhibit File."

[4] Two issues originally raised in the complaint and prehearing were abandoned by Petitioner: whether Respondent violated the statute by suspending student after the Parent had requested that Student be evaluated and whether Student was entitled to a compensatory education remedy.

services within a reasonable time after Respondent's agents were on notice of behavior that is likely to indicate a disability?[5]

In its Due Process Complaint and supplemented in counsel's closing argument, Petitioner stated that it was requesting that the following evaluations occur within specific time frames from the date of an Order requiring an evaluation for special education eligibility: complete psychological examination, an occupational therapy evaluation, a speech/language evaluation, a psychiatric evaluation, and a Functional Behavior Assessment ("FBA"). Respondent took the position that in the event that the Complaint was not dismissed, only a psychological evaluation would be necessary and appropriate.

Findings of Fact

1. Student is [redacted] and is currently in 4th grade attending _____ Elementary School (Testimony of Mother).

2. Student lived with Petitioner in the Detroit, Michigan area until February 2011, when they moved to the District of Columbia and enrolled in _____ Elementary School in second grade. Student had not been evaluated for special education benefits and services prior to moving to the District of Columbia. Mother held Student back in first grade in the Detroit school and he, thus, repeated that grade (Testimony of Mother).

[5] Two other issues raised in the complaint were withdrawn at the Due Process Hearing. They are (a) whether Respondent failed to convene a MDI/IEP hearing to develop an IEP, and (b) whether Respondent denied the student a Free and Appropriate Education ("FAPE") by repeatedly suspending him while a request for special education eligibility was pending and should have occurred. It was clear at the Hearing that Petitioner was seeking only an order requiring an evaluation and specific remedial relief in connection with the order mandating an evaluation.

3. In "Teacher comments" in the Spring and Summer of 2011, Teacher at _____ Elementary School stated:

> In his own quiet way, (Student) is one of our greatest classroom citizens. He is very dependable and enjoys his new classroom. As we have discussed although (Student) tries hard, he continues to struggle with his assignments especially with his oral reading and comprehension skills. Let us talk to discussion strategies to help him in these areas.
>
> _____ _____
> Teacher 4-8-11
>
> (Student) continued to be one of our classroom's finest citizens and a dependable student. As we have discussed, (Student)'s reading skills, both orally and comprehension are weak. I suggest that (Student) attends summer school to help develop these areas. In addition, please practice adding and subtracting two to three digits numbers with regrouping. Have a good summer.
>
> _____ _____
> Teacher 6-17-11
> R. Exh. 4-3.

4. In connection with these comments, Student was referred to a Student Support Team (SST) beginning in late March/early April 2011. The SST program at _____ Elementary School provides support for students in need of additional academic help through the use of small study groups during the school day. In the written report of their first meeting, the SST stated "that (Student) is performing below grade in reading and mathematics." The Team stated that it lacked sufficient data "to determine which specific areas should be targeted for intervention." They noted that he had missed two months of school before moving to the Washington, DC area. The Team stated that they would collect more data. Significantly, the Team also noted that

(Student) did not pass the eye screening, that he often complains of not being able to read what is on the blackboard and that parent should be requested to arrange for an eye examination. The Team further noted that further assessment of the Student's needs will most likely be more accurate after an eye examination (R. Exhs. 3-1 & 3-2).

5. Despite being referred to as a Model Citizen and otherwise lauded for his enthusiasm for learning (see also R. Exh. 5-3), Student exhibited regular behavior problems during his entire time at _____ Elementary School. In Teacher comments in 2011 accompanying his third grade report card it was stated, "[b]ehaviorally, the only problem is talking despite warnings and doing things at inappropriate times. He may yell out or start to dance in class, when told to stop, he can become very angry and yell out things. Other than that, he is great role model in terms of his participation and enthusiasm for other students." P. Exh. 2-7. His report cards generally reflect some behavior problems. R. Exh. 5-2.

6. Petitioner stated that Student consistently had trouble focusing and during the 2011-2012 school year had been suspended several times for incidents involving his overreacting with anger to otherwise minor incidents involving other students (Testimony of Mother).

7. Student has continued in SST programs from April 2011 through the time the Due Process Complaint was filed. Petitioner was very appreciative of the efforts of this Team, but on several occasions affirmatively asked that Student be evaluated to determine whether he has a disability and thus be

eligible for special education services and benefits. These requests to the School Psychologist and Student's third grade teacher occurred during the school year in 2011-2012. These requests were done orally and in the context of discussions of the efforts made to assist Student in the SST program. The most specific request was made to Student's teacher in March 2012, after the teacher told Petitioner that Student was daydreaming, that he was having trouble staying still and was talking to himself. During this discussion, Parent asked that he be evaluated for special education and the teacher said she would request it of the school's special education coordinator. Notwithstanding this request, an evaluation did not take place. A renewed oral request was made of his fourth grade teacher in the Fall of 2012, but nothing took place (Testimony of Mother).

8. The Petitioner noted that in fourth grade the student has not been suspended because she believes that the new Principal has introduced a different strategy in dealing with students with behavioral problems. The Petitioner believes that the behavior problems still persist at generally the same level as in the previous school year (Testimony of Mother).

9. Petitioner was advised by the school social worker personnel in April 2012 that Student needed glasses. Petitioner stated she was unable to have student tested and fitted for glasses until October 2012. As a result of getting glasses, Student is now able to see the blackboard and may have developed greater confidence and self-esteem. According to Petitioner, his behavior, including his inability to be still and his need to usually have

something in this hand, has not substantially changed since he got glasses (Testimony of Mother).

10. On October 23, 2012, the School Psychologist met with Parent in connection with the SST program. School Psychologist wrote, "[p]arent would like to have the boys tested for special education" (R. Exh. 6-1). There is no record evidence that Respondent has conducted any testing to date.

11. In a Student Diagnostic Report setting forth the results of tests taken on December 7, 2012, Student's reading score was a grade equivalent of 1.4 (fourth month of first grade) and he scored greater than one percent of students nationally in the fourth grade (P. Exh. 1).

Analysis and Legal Conclusions

The Individuals with Disabilities Education Act ("IDEA") provides that States and Territories, including the District of Columbia, that receive Federal educational financial assistance must establish policies and procedures to ensure that they extend a "Free Appropriate Public Education" to children with disabilities. Free Appropriate Public Education or FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C §1401(28); see also 34 C.F.R. § 300.39 and DCMR Title 5-E § 3001.1. The term "child with a disability" is defined to mean a child with any one of a certain named type of condition or impairment that "by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(i) and (ii). The statue provides that States may issue their own regulations supplementing the Federal scheme. Accordingly, the District of

Columbia has enacted its own provision defining a student with a disability. District of Columbia Code § 38.2561.01(14) and DCMR Title 5-E § 3001. In order to comply with IDEA, each State and Territory receiving Federal educational assistance must act affirmatively to ensure that "all children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated." *Reid v. District of Columbia*, 401 F.3d 516, 518-519, 365 U.S. App. D.C. 234, 236-237 (D.C. Cir. 2005). "Once such children are identified, a 'team' including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an 'individualized education program' or 'IEP' for the child." *Id.* at citing 20 U.S.C. §§1412(a)(4), 1414(d).

The burden of proof in a due process hearing is borne by the party that initiated that action. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); DCMR Title 5-E, Chapter 5-E §3030.14.

The issues in this case are fairly straightforward: whether the Parent made a request for an evaluation to determine eligibility for special education for which the Respondent was required to act upon and, whether the Respondent violated its statutory duty to act affirmatively to identify, locate and evaluate a student suspected of a disability, its so-called "Child Find" obligation. *See Reid v. D.C.*, 401 F.3d at 518-519.

With respect to the first issue, the evidence is substantial that on several occasions the parent requested that Student be evaluated. Parent's testimony was both credible and unrefuted as Respondent called no witnesses. A parent may initiate a request for an initial eligibility for special education benefits and services. 34 C.F.R. §300.31 (b). However, in the District of Columbia, such a request, denominated as a "referral" must be made in writing. DCMR Title 5, §3004(a). Even though the parent made several requests of School personnel to have Student evaluated, none were in writing. And while the Due Process Complaint is to be deemed a request for an evaluation, since Respondent has 120 days to complete an evaluation, it could not be deemed to have violated the statute since the Complaint was filed on November 30, 2012, well within the 120 day timeframe. See D.C. Statute §38-2561.02(a). Accordingly, with respect to the Parent's request that Student be evaluated, Respondent did not commit a violation of IDEA.

As to the second issue, the Child Find requirement of IDEA creates an affirmative duty of a Local Education Agency to identify, locate and evaluate children suspected of disabilities. 20 U.S.C. §1412(a)(3); 34 CFR §300.111(c)(1). The regulations in the District of Columbia mirror the Federal statute:

> The LEA shall ensure that procedures are implemented to identify, locate and evaluate all children with disabilities residing in the District who are in need of special education and related services, including children with disabilities attending private schools, regardless of the nature or severity of their disabilities.
>
> DCMR Title 5 §3002.1(d).

A Child Find violation is not triggered merely because a student is having difficulty or falling behind with his or her academic studies. Similarly, the fact that a student has some behavioral issues does not necessarily activate an LEA's Child Find responsibilities. See generally, *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012) and cases cited therein. Although the question is a close one, I conclude that the Petitioner met her burden of proof that the Child Find requirements were violated. In this respect, the facts are distinguishable from *D.K.* and the other cases cited therein. Here, for a lengthy period of time, Respondent continued the same methods of supplementing Student's academics with his participation in small work groups during both third and fourth grade with no discernible progress. His teachers describe his reading ability with a mixture of both positives and negatives which would have, undoubtedly, been explained to some degree had anyone testified on behalf of the Respondent. *See* P. Exhs. 2-7 & 2-10. For example, in the third grade report card, the teacher stated that Student is an "incredibly enthusiastic learner" but that he "needs significant work across all areas," etc. P. Exh. 2-7. The same trend is demonstrated with respect to behavior. In the same third grade report the Teacher states, "[b]ehaviorally, the only problem is talking despite warnings and doing things at inappropriate times. He may yell out or start to dance in line or in class. When told to stop, he can become very angry and yell out things." *Id.*

The Parent testified that Student frequently talks to himself and is unfocused both at school and at home. She corroborated the report's remark

about his tendency towards anger over minor or small acts which he perceives as directed against him and that he lashes out disproportionately to the conduct directed against him (Testimony of Mother).

Given that the standard for the Child Find duty is not a finding of actual disability, but rather a suspicion or likelihood of disability, I find that the Parent has met her burden of proof. In this respect, I also rely upon the fact that the Parent had regularly been engaged with the school in requesting that Student be evaluated due to his struggles with academics and his behavior and that despite these requests and the fact that he had continued in the SST program, progress was at best marginal. While I was impressed that Student's focus may have improved once he obtained glasses and was able to see the board better, I have concluded that that alone was not enough to mitigate against a finding of a Child Find obligation. In this respect, it is conceivable that the record would tell a different story had Respondent presented witnesses to explain their reports or to explain why an evaluation for eligibility was not appropriate, if not in the third grade then at least by the Fall of 2012, when Student entered the fourth grade.[6] Such testimony could have been quite illuminating. However, there was no such testimony and, accordingly, the evidence proferred by Petitioner stands unrefuted. For these reasons, I find

[6] While not available to Respondent until after the DPC was filed, the report showing reading comprehension at Grade 1.4 months is consistent with facts then available justifying the triggering of Child Find (P. Exh. 1).

that Respondent committed a procedural violation of IDEA[7] by not evaluating Student.[8] See *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

The Hearing Officer further concludes that the Petitioner is the prevailing party.

Remedy

Petitioner seeks a remedy requiring that the Hearing Officer order that certain tests and assessments take place. I shall order that such tests and assessments take place other than a psychiatric examination. Respondent objected on the basis that even in a light most favorable to Petitioner the facts do not warrant a psychiatric medical examination to consider whether Student has ADD/ADHD. I agree that a psychiatric medical examination is not warranted at this stage in the process. See *Letter to Anonymous from OSEP*, 34 IDELR 35 (June 3, 2000).

ORDER

Based upon the Findings of Fact and Conclusions of Law, the entire record herein, including the testimony and exhibits and arguments of counsel, it is hereby

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[7] This is a procedural violation because in the absence of a finding that the Student is disabled under IDEA – a finding that must await an eligibility determination – it cannot be determined whether Student was substantively denied a Free and Appropriate Public Education. *See* 20 U.S.C. §1415(f)(3)(E)(ii). *See also LeSesne v. District of Columbia*, 2005 U.S. Dist. LEXIS 3569, at *29-31 (D.D.C. July 26, 2005), *aff'd*, 447 F.3d 828 (2006).

[8] There is nothing in the record indicating that Respondent has taken steps outside of settlement discussions to evaluate Student. *J.J. v. District of Columbia*, 768 F. Supp. 2d 214, 220 (D.D.C. 2011).

ORDERED

1. That the Parent obtain a comprehensive psychological (clinical, psycho-educational and social history) evaluation; a speech and language evaluation, and an occupational therapy evaluation all at public expense not to exceed the published OSSE cost guidelines. The Parent shall provide a copy of these completed evaluations to DCPS no later than March 1, 2013.

2. Respondent shall conduct a Functional Behavioral Assessment ("FBA") of Student by March 1, 2013.

3. Within fourteen (14) calendar days of the submission of the above-referenced Reports to Respondent and the completion of the FBA, whichever is later, Respondent shall conduct a Multidisciplinary Team Meeting to determine whether Student is eligible for special education benefits and services.

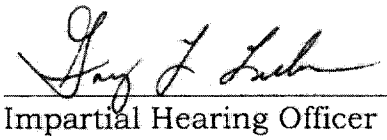
4. Except for conditions set forth in Paragraph 5, these data and deadlines may be adjusted only by mutual agreement of the parties.

5. Any delay in meeting any of the deadlines in this Order because of an act or acts of the Parent and/or her representatives, will extend the deadlines set herein by the number of days attributable to the Parent and/or the Parent's representatives' actions. Respondent shall document any delays caused by the Parent and/or the Parent's representatives.

6. This case shall be, and is, hereby closed.

IT IS HEREBY ORDERED.

Date: 2-11-13



Impartial Hearing Officer

Copies to: All Counsel of Record
District of Columbia Public Schools
Student Hearing Office, OSSE
Chief Hearing Officer, OSSE

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 U.S.C. §1451(i)(2)(B).