

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

STUDENT,¹ by and through his Parent,

Petitioners,

v.

Case No. 2009-1368
Bruce Ryan, Impartial Hearing Officer

Decided: December 9, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The Due Process Complaint in this matter was filed October 6, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint alleges that Respondent District of Columbia Public Schools ("DCPS") denied the Student a free appropriate public education ("FAPE") by failing timely to conduct and review evaluations in all areas of suspected disability. Specifically, Petitioners allege that on or about May 7, 2009, they requested in writing that DCPS evaluate the Student to determine his eligibility for specialized instruction and related services, and that DCPS had not acted on that request by the date the complaint was filed approximately five months later.

On or about October 15, 2009, DCPS filed a Response, in which "DCPS concedes that as of the date of the complaint, evaluations have not been conducted for the student." The Response states, however, that DCPS issued a letter the same date authorizing an independent comprehensive psychological evaluation and an ADHD assessment of the Student, at DCPS expense ("IEE letter"), and that DCPS will convene an MDT meeting following completion of the independent evaluation. The Response contained no explanation as to why DCPS had failed

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

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OFFICE OF THE STATE ENFORCEMENT AND INVESTIGATION DIVISION

or refused to take the requested action for the preceding five months, notwithstanding the pleading requirements of 34 C.F.R. §300.508(e).²

On October 19, 2009, Petitioners filed a Motion for Adjudication on the Pleadings. The motion argues that there are no material facts in dispute and that Petitioners are entitled to HOD findings and relief in their favor that DCPS (a) violated the IDEA and (b) denied FAPE to the Student. On October 20, DCPS filed a response to the motion, requesting that the Hearing Officer deny Petitioners' request for an adjudication on the pleadings. In its response, "DCPS concedes that the evaluations were not done within the timeline," but asserts that "Petitioner must prove harm occurred and that the delay in the evaluations is more than just a procedural error."³ DCPS further argues that the "denial of FAPE claim is not yet ripe and the matter should be dismissed because this Hearing Officer cannot make a determination on whether FAPE has been denied until the evaluation is completed and the team can...make an eligibility determination."⁴

A Prehearing Conference ("PHC") was held on November 6, 2009, to discuss the issues and requested relief, as well as the motion for adjudication on the pleadings. The statutory 30-day resolution period ended and the 45-day timeline under IDEA began on November 5, 2009, and the Due Process Hearing was scheduled for December 9, 2009. As a result of the PHC, the Hearing Officer determined that no material facts were in dispute that necessitated an evidentiary hearing, and that the legal issues could be decided on the basis of the pleadings and motion. Neither party objected to this procedure. The Hearing Officer finds that it is authorized and appropriate under the IDEA and the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). See, e.g., SOP §§ 401, 700.4.

² See, e.g., *Massey v. District of Columbia*, 400 F. Supp. 2d 66, 72-73 (D.D.C. 2005) ("the IDEA does not allow DCPS to respond generally to the substance of the complaint in whatever form it deems desirable. On the contrary, Congress' delineation of the four requirements [specified in 20 U.S.C. 1415(c)(2)(B)] makes clear that general responses are not acceptable."); see also *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13 (D.D.C. 2008) (IDEIA adopted "explicit requirements...how an LEA must respond to a complaint...[and] now requires that an LEA file a response to a complaint containing specific information" as set forth in 20 U.S.C. 1415(c)(2)(B)). "Because this is the kind of information that is peculiarly within the knowledge and control of DCPS and because the parent bears the burden of proof, it is no small matter when a response fails to convey the obligatory information." *Jalloh, supra*.

³ DCPS' Response to Petitioner's Motion for Adjudication on the Pleadings, filed Oct. 20, 2009, pp. 1-2.

⁴ *Id.*, p. 2.

This written ruling constitutes the Hearing Officer's decision and determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Sections 800.1 (6) and 1003 of the *SOP*.

II. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioners, along with the pleadings filed by both parties and the motion for adjudication on the pleadings, has resulted in the following issues being presented for determination:

- a. Whether DCPS violated the IDEA and implementing D.C. law by failing to complete an initial evaluation of the Student in all areas of suspected disability within the required timeline of 120 days; and*
- b. Whether DCPS has denied the Student a FAPE by failing to conduct and review evaluations in all areas of suspected disability, as noted above.*

The relief sought by Petitioners includes: (1) declaratory findings on the issues stated above; and (2) ordering DCPS, within 10 days of receiving the last independent evaluation, to convene an MDT meeting to review all current evaluations, determine eligibility, and if warranted develop an appropriate IEP and discuss and determine an appropriate placement. Petitioners had also sought an order requiring DCPS to fund an independent comprehensive psychological evaluation and an independent ADHD assessment, but this request is now moot since DCPS has authorized such evaluations in the 10/15/09 IEE letter.

III. FINDINGS OF FACT⁵

1. The Student is a [REDACTED]-year old resident of the District of Columbia who has been enrolled in his neighborhood DCPS elementary school since February 2009.

2. Following his enrollment, the parent believed that the Student was experiencing problems with his behavior and academic progress.

3. On or about May 7, 2009, Petitioners sent a formal written request to DCPS, requesting that DCPS evaluate the Student to determine his eligibility for specialized instruction and related services.

⁵ The undisputed facts set forth in this section of the HOD are based on the pleadings, Petitioners' motion for adjudication on the pleadings, and DCPS' response thereto.

4. Between May 7 and October 6, 2009, the date on which the complaint was filed, DCPS did not initiate or complete any evaluations of the Student. DCPS also did not issue any written notice explaining its reasons for failing to evaluate the Student.

5. DCPS has not provided any reason for failing to evaluate the Student for the five-month period between the date of the parent's request and the filing of the complaint.

6. The parent believes that the Student's behavioral and academic difficulties have continued since May 7, 2009.

7. On or about October 15, 2009, after the filing of the complaint, DCPS issued an IEE letter authorizing Petitioners to obtain an independent comprehensive psychological evaluation and an independent ADHD assessment of the Student, at DCPS expense.

8. As of the date of November 6, 2009 Prehearing Conference, the evaluations of the Student had not been completed, DCPS had not convened an MDT meeting to review the evaluations, and DCPS had not made a determination of the Student's eligibility under the IDEA.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary Adjudication Standards

1. Based on the pleadings, the undisputed facts, and the argument and evidence contained in their motion, Petitioners request that the Hearing Officer grant summary adjudication on their claims and order the relief requested in the complaint.

2. Under ordinary civil procedure rules, summary judgment is appropriate when the motion papers, affidavits, and other submitted evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whether a fact is "material" is determined in light of the applicable substantive law invoked by the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In light of the applicable substantive law, a "genuine issue of material fact" is a fact that is determinative of a claim or defense, and therefore, affects the outcome of the case. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248. The moving party bears the initial burden of demonstrating that no genuine issues of material fact are in dispute. Upon such a showing, the burden then shifts to the non-moving party to demonstrate that genuine issues of material fact are in dispute. The court is precluded from

weighing evidence or finding disputed facts and must draw all inferences and resolve all doubts in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

3. Similar standards should apply in IDEA cases, where “the hearing is not governed by formal rules of procedure or evidence.” *SOP, Section 700.4*. The Hearing Officer must “attempt to ensure that all parties have an adequate opportunity to present their cases” and that “the hearing will proceed in an orderly fashion.” *Id.* Pre-hearing motions for summary adjudication are deemed authorized, where appropriate, under the *SOP*. Moreover, Section 401(C) (5) requires that “[r]esponses contesting facts shall so state and supply supporting affidavits, declarations or documents as appropriate.” *SOP, Section 401 (C) (5)*. *See also* 71 Fed. Reg. 46,706-07 (Aug. 14, 2006).

4. The Hearing Officer concludes that this case meets the standards for summary adjudication under the *SOP*. Both parties agreed at the PHC that the material facts are not in dispute, that an evidentiary hearing in this matter is unnecessary, and that the issues can be decided based on the pleadings and motion papers in the record. Thus, the matter will be adjudicated by the Hearing Officer on the basis of the written record.

B. Issues – Failure to Evaluate/Alleged Denial of FAPE

5. The burden of proof in an IDEA special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). In this case, Petitioners allege that DCPS failed to conduct and review evaluations to determine the Student’s eligibility for special education in a timely manner, and that such failure constitutes a denial of FAPE to the Student. For the reasons discussed below, the Hearing Officer concludes that Petitioners (a) have met their burden of proving a failure to evaluate in violation of IDEA and implementing D.C. law, but (b) have not yet proven that a denial of FAPE has occurred.

6. Pursuant to its “child find” mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). Under child find, DCPS “must conduct a full and individual initial evaluation” of any child who is “suspected” of being a child with a disability in accordance with IDEA requirements. 34 C.F.R. §§ 300.301(a), 300.111(c). The parent of a child may initiate a request

for an initial evaluation to determine eligibility. *Id.* § 300.301(b). In carrying out such initial evaluation, DCPS must (*inter alia*) ensure that the child “is assessed in all areas related to the suspected disability,” and 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 [is] classified.” 34 C.F.R. §300.304 (c) (4), (6).

7. District of Columbia law further requires that DCPS “shall assess or evaluate a student, who may have a disability and who may require special education services, ***within 120 days from the date that the student was referred*** for an evaluation or assessment.” D.C. Code §38-2561.02 (a) (emphasis added). Thus, DCPS “must conduct a full and individual initial evaluation” within the required time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); DCMR §5-3005.2. This means that DCPS must complete and review the initial evaluation in all areas of suspected disability, determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within 120 days. *See Hawkins v. D.C.*, 539 F. Supp. 2d 108 (D.D.C. 2008); *D.C. v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); DCMR §§ 5-3002, 5-3013.

8. In this case, it is undisputed that the Student was referred for an initial evaluation or assessment on or about May 7, 2009. On that date, the parent sent a formal written request to DCPS, requesting that DCPS evaluate the Student to determine his eligibility for specialized instruction and related services. Accordingly, the mandatory 120-day timeline specified in D.C. Code §38-2561.02 (a) expired on or about September 5, 2009. By the time Petitioners filed the complaint in this case, approximately 150 days had elapsed since the date of referral.

9. Between May 7 and October 6, 2009, the date on which the complaint was filed, it is undisputed that DCPS did not take steps to initiate or complete any evaluations of the Student. DCPS also did not issue any written notice explaining its reasons for failing to evaluate the Student. Moreover, DCPS did not authorize Petitioners to obtain independent evaluations at DCPS expense until October 15, 2009, 10 days after Petitioners’ complaint was filed and approximately 160 days after the Student was referred for evaluation.⁶ Accordingly, the

⁶ Ironically, the DCPS letter signed by Mr. Richard Nyankori, Deputy Chancellor of Special Education, states that “[t]o ensure that the student’s needs are met in a timely manner,” DCPS requests that the independent evaluations be

Hearing Officer concludes that DCPS has violated its obligations under IDEA and D.C. Code § 38-2561.02 (a).

10. As noted above, “DCPS concedes that the evaluations were not done within the timeline,” but argues that “Petitioner must prove harm occurred and that the delay in the evaluations is more than just a procedural error.”⁷ However, courts have held that a delay in completing required evaluations is not a “mere procedural inadequacy”; rather, “such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA.” *Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008). As in *Harris*, the “intransigence of DCPS as exhibited in its failure to respond quickly to [parent’s] simple request has certainly compromised the effectiveness of the IDEA as applied to [the Student].” 561 F. Supp. 2d at 69.⁸

11. Moreover, the Hearing Officer concludes that 34 C.F.R. §300.513(a) (2) is not necessarily applicable here, as IDEA specifically authorizes hearing officers “to make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in 300.507(a)(1).” 71 *Fed. Reg.* 46,707 (Aug. 14, 2006). These “other matters” include any matters “relating to the identification, *evaluation* or educational placement of a child with a disability....” 34 C.F.R. 300.507 (emphasis added); *see also id.* §300.503(a). Thus, it is within the authority of the Hearing Officer to determine that DCPS has violated the initial evaluation requirements of the IDEA and D.C. Code § 38-2561.02 (a), without specific proof of harm and/or a denial of FAPE.

12. Under the present circumstances, however, the Hearing Officer declines to find a denial of FAPE. First, DCPS correctly points out that if the Student is ultimately determined not to be eligible, then “there can be no denial of FAPE since [he] is not entitled to a FAPE without a disability classification.”⁹ *See* 34 C.F.R. §§ 300.17, 300.101. Second, Petitioners have not presented any evidence of educational harm to the Student, and a dispute exists on that issue that

completed by the parent within 45 days “in order to expedite services to your client.” Attachment 1 to DCPS’ Response, filed Oct. 15, 2009.

⁷ DCPS’ Response to Petitioner’s Motion for Adjudication on the Pleadings, filed Oct. 20, 2009, pp. 1-2.

⁸ *See also IDEA Public Charter School, supra* (failure to perform child-find duty and comply with DC’s 120-day timeline constitutes substantive denial of FAPE); *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008)(same); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007) (noting that DCPS is obligated to “offer FAPE by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement”).

⁹ DCPS’ Response to Petitioner’s Motion for Adjudication on the Pleadings, filed Oct. 20, 2009, p. 2.

would appear to preclude determination of FAPE denial on the basis of a motion for summary adjudication.

C. Appropriate Relief

13. The IDEA authorizes district courts and hearing officers to order “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In this case, the Hearing Officer has exercised his discretion to order appropriate equitable relief to remedy the above violation.

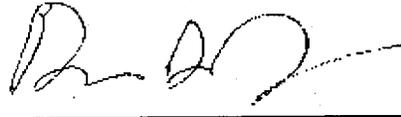
V. ORDER

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

1. Within **10 school days** of receiving the results of an independent comprehensive psychological evaluation and an ADHD assessment of the Student at DCPS expense (as authorized by DCPS by letter dated October 15, 2009), DCPS shall convene a meeting of the Student’s MDT/IEP Team for the following purposes:
 - a) to review all current evaluations;
 - b) to determine the Student’s eligibility for specialized instruction and related services under the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations; and
 - c) if the Student is determined to be eligible, to (i) develop an appropriate individualized education program (“IEP”) to meet the unique needs of the Student, (ii) discuss and determine an appropriate placement for the Student, and (iii) discuss and determine whether additional services, if any, are appropriate to compensate for any harm caused by the delay in determining the Student’s eligibility and initiating services during the 2009-2010 school year (*i.e.*, since September 5, 2009).
2. If the Student is determined to be eligible for special education and related services, DCPS shall issue a Prior Notice of Placement for the Student in compliance with 20 U.S.C. § 1415, within **five (5) school days** of the MDT/IEP Team meeting (in the case of a public school placement) and within **30 calendar days** (in the case of a private school placement).

3. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioners, Zachary Nahass, Esq., via facsimile (202-742-2098), or via email (znahass@jeblaw.biz).
4. Any delay in meeting the deadlines in this Order caused by Petitioners or Petitioners' representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: December 9, 2009



Impartial Hearing Officer

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. §1415(i)(2).