

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

OSSE
Office of Dispute Resolution
October 29, 2015

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: October 29, 2015
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0294
)	
DISTRICT OF COLUMBIA)	Hearing Date: October 23, 2015
PUBLIC SCHOOLS,)	Office of Dispute Resolution, Room 2006
)	Washington, D.C.
Respondent.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleges that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to conduct initial evaluations to determine special education eligibility.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on September 1, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 2, 2015. The parties

¹ Personal identification information is provided in Appendix A.

convened for a resolution session on September 14, 2015, which did not result in an agreement. The 45-day period for issuance of this Hearing Officer Determination began on October 2, 2015. On September 23, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on October 23, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called no other witnesses. DCPS called CITY MIDDLE SCHOOL LEA REP as its only witness. Petitioner's Exhibits P-1 through P-6 and P-8 through P-20 were admitted into evidence, including Exhibits P-1 through P-6 and P-8 through P-11 which were admitted over DCPS' objections. DCPS' objection to Exhibit P-7 was sustained. DCPS' Exhibits R-1 through R-6 were admitted into evidence without objection. Counsel for the Petitioner made an opening statement. Counsel for both parties made closing arguments.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 23, 2015

Prehearing Order:

- Whether DCPS has failed and refused to provide a free appropriate public education (FAPE) to Student by failing to evaluate him in all areas of suspected disability, determine his eligibility for special education services, and if eligible, develop an Individualized Education Plan (IEP) and offer an appropriate placement, despite receiving repeated requests for evaluation from Petitioner and
- Whether DCPS has failed and refused to provide FAPE to Student by failing to convene a meeting to review and consider the psychological evaluation report from the D.C. Department of Behavioral Health (DBH) on Student, despite receiving numerous requests from Petitioner that the report be reviewed as part of an eligibility determination.

For relief, Petitioner requested that the Hearing Officer order DCPS to fund

Independent Educational Evaluation (IEE) assessments in the following areas:

- Comprehensive psychological evaluation to include academic testing, cognitive testing, and social/emotional testing;
- Comprehensive speech/language evaluation;
- Comprehensive occupational therapy evaluation;
- Comprehensive auditory processing evaluation; and
- Comprehensive evaluation of attention issues.

Petitioner further requested that DCPS be ordered, upon receipt of the evaluations, to convene a multidisciplinary team (MDT) meeting to review the IEE assessments and the DBH report and determine Student's eligibility for special education services, and if determined eligible, develop an appropriate IEP for Student and offer him placement in a program to implement the IEP. Petitioner also stated in her complaint that she would seek a compensatory education award for the denials of FAPE alleged in the due process complaint. However, no evidence on compensatory education was offered at the due process hearing.

An additional issue was identified in the Prehearing Order, whether DCPS had

failed and refused, since September 1, 2013, to provide FAPE to Student by failing to comply with its Child Find obligations under IDEA. At the beginning of the due process hearing on October 24, 2015, Petitioner's Counsel withdrew this issue without prejudice. Counsel stipulated that Petitioner's claim in this proceeding is limited temporally to whether DCPS has failed to evaluate Student after April 14, 2015. DCPS' Counsel did not object to withdrawal of the Child Find issue.

FINDINGS OF FACT

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

1. Student is a resident of the District of Columbia. Student has never been determined eligible for special education and related services. Testimony of Mother.
2. Student currently is placed in a temporary shelter with foster parents in the District. Mother retains educational decision making rights for Student. Testimony of Mother.
3. In May 2013, the District of Columbia Child and Family Services Agency became involved with Mother, Student and his siblings due to alleged educational neglect and substance abuse interfering with parenting. In the summer of 2014, Student was referred to the D.C. Department of Behavioral Health (DBH) by the Superior Court of the District of Columbia for a psycho-educational evaluation of Student to determine his cognitive and academic functioning. A DBH psychologist interviewed and evaluated Student on August 24, 2014. On the cognitive functioning test, Student obtained a Full Scale IQ score of 83, in the Low Average range. On the Woodcock Johnson Tests of Achievement (WJ-III), many of Student's academic skills tested in the Average range. He exhibited relative strengths in decoding and spelling words and a relative weakness

in certain aspects of academic fluency. His math skills and writing fluency were areas of concern. Behaviorally, Student appeared to exhibit mild anxiety. Home-based stressors and Mother's medical and financial problems were reported to have had a negative impact on Student's school attendance. The DBH evaluator recommended that reassessment of Student's cognitive and academic skills be conducted in June 2014 [*sic*] to monitor Student's progress. (The Hearing Officer assumes that this was a typographical error and the DBH evaluator intended to recommend a reevaluation in June 2015, at the end of the next school year.) The evaluator diagnosed Student with Adjustment Disorder with anxiety. Exhibit P-1.

4. On October 15, 2014, Petitioner's Attorney wrote the principal at CITY ELEMENTARY SCHOOL 1 to request that Student be comprehensively evaluated to determine his eligibility for special education services. She attached to this request the August 24, 2014 DBH evaluation of Student, which counsel requested be reviewed by Student's MDT team as part of his eligibility determination. Exhibit P-3. The City Elementary School 1 principal responded by email to the letter from Petitioner's Counsel and requested more information, to which Petitioner's Counsel replied. Exhibit P-4.²

5. Student was enrolled by Mother in Alexandria, Virginia public schools from November 2014 to March 2015. Testimony of Mother.

6. On November 24, 2014, Petitioner's Counsel forwarded by email her request for Student to be evaluated to another DCPS employee. In the email, counsel represented that to her knowledge, nothing had happened and inquired as to how she

² Mother testified that she had requested that Student be evaluated at the start of the 2013-2014 school year. Mother showed confusion over dates and I did not find credible her testimony as to when she first requested that Student be evaluated.

should proceed. Exhibit P-5. At this time, Student was not enrolled in DCPS schools, but was attending a public school in Alexandria, Virginia. Testimony of Mother.

7. In mid-March 2015, Student began attending CITY ELEMENTARY SCHOOL 2, a DCPS public school. Testimony of Mother. On April 14, 2015, Petitioner's Counsel wrote the principal of City Elementary School 2 to request that Student be comprehensively evaluated to determine his eligibility for special education services. Counsel attached to this request the August 24, 2014 DBH evaluation of Student which counsel requested be reviewed by Student's MDT team as part of his eligibility determination. Exhibit P-6.

8. By email of April 29, 2015, Petitioner's Counsel copied to CITY ELEMENTARY SCHOOL 2 LEA her request for Student to be evaluated. Exhibit P-8. On May 28, 2015, Petitioner's Counsel again emailed City Elementary School 2 LEA to state she had not received any response to her request that Student be evaluated and to ask when the evaluations would be conducted. Exhibit P-9. On June 5, 2015, Counsel copied to CITY ELEMENTARY SCHOOL 2 SCHOOL PSYCHOLOGIST by email her request for Student to be evaluated. Exhibit P-10. On July 24, 2015, Petitioner's Counsel sent a follow up email addressed to City Elementary School 2 LEA and School Psychologist, stating it was her understanding that no testing of Student had been completed and asserting that it was critical that the testing be completed as soon as possible so that Student's eligibility could be determined before the start of the 2015-2016 school year. Exhibit P-11.

9. Student enrolled in City Middle School at the beginning of the 2015-2016 school year. Testimony of LEA Rep.

10. Petitioner's due process complaint in the present case was filed on

September 1, 2015. DCPS convened a resolution meeting on September 14, 2015 at City Middle School. Exhibit P-19. The participants at the resolution meeting agreed to complete a comprehensive psychological evaluation and an Occupational Therapy (OT) assessment of Student. On September 15, 2015, Mother executed a parental consent form for the assessments. As of the date of the October 23, 2015 due process hearing, both the comprehensive psychological and OT assessments were under way. LEA Rep expected that both assessments would be completed by the beginning of the week of October 27, 2015 and that a meeting would be scheduled by November 10, 2015 for an eligibility team to review the results of the assessments. Testimony of LEA Rep.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

– Did DCPS fail, following a request from the parent on April 29, 2015, to evaluate Student in all areas of suspected disability, determine his eligibility for special education services, and if eligible, develop an IEP and offer an appropriate placement?

– Did DCPS fail to convene a meeting to review and consider the August 14, 2014 DBH Psychoeducational Evaluation report on Student, despite receiving numerous requests from the parent that the report be reviewed as part of Student's special education eligibility determination?

On April 29, 2015, Petitioner's Counsel sent City Elementary School 2 a written request, on behalf of Mother, that Student be evaluated for special education eligibility. She attached to this request of copy of the August 24, 2014 DBH psychological evaluation of Student, which recommended, *inter alia*, that Student's cognitive and academic skills be reevaluated in June 2015. It is undisputed that DCPS did not initiate Student's eligibility evaluations until after Mother's due process complaint was filed on September 1, 2015.

Under the IDEA's "Child Find" mandate, "[a]s soon as a child is identified as a potential candidate for services, [the LEA] has the duty to locate that child and complete the evaluation process. . . ." *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008). "DCPS must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.' D.C. Code § 38–2561.02(a)." *Long v. District of Columbia* 780 F.Supp.2d 49, 56 (D.D.C.2011).

Petitioner's counsel initially requested that Student be evaluated in October 2014. Thereafter, from November 2014 until mid-March 2015, Student was enrolled in Alexandria, Virginia public schools and DCPS was not Student's local education agency (LEA). Petitioner's Counsel renewed the evaluation request on April 29, 2015, after Student returned to reside in the District. Following the April 29, 2015 request, under the District's 120-day initial evaluation requirement, DCPS was required to complete its evaluations and determine whether Student was eligible for special education services by the week of August 24, 2015. As of the October 23, 2015 due process hearing date, the initial evaluations were under way, but Student's eligibility determination decision was only projected for the first week in November.

The courts in this jurisdiction have held that the failure to complete an initial IDEA eligibility evaluation within the 120–day period required by D.C. Code § 38–2561.02(a) constitutes a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). In *Gersten*, the parents of a child diagnosed with Asperger Syndrome referred the child for an initial DCPS eligibility evaluation on June 13, 2011, triggering the 120-day evaluation period. On October 11, 2011, when the 120-day period lapsed, DCPS had not yet evaluated the child or determined his eligibility for services. On October 27, 2011, the parents requested a due process hearing, alleging that DCPS had denied the child a FAPE. The special education hearing officer held that the parents were premature in filing their due process complaint, because after the end of the evaluation period, DCPS would have had an additional 30 days to develop the initial IEP. *See* 34 CFR § 300.323(c)(1) (Public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.) The Hearing Officer thus concluded that DCPS had until November 11, 2011 (30 days after the 120-day evaluation period) to develop an IEP for the child.

The U.S. District Court rejected the hearing officer’s conclusion as “illogical,” reasoning that no IEP was going to be completed, or even begun, until an evaluation was completed and an eligibility determination made. “[B]ecause an evaluation and eligibility determination is a prerequisite to preparing an IEP, the District’s failure to timely evaluate G.G. or determine his eligibility by the October 11 deadline ensured that he would not receive a timely IEP, thus, denying him a FAPE.” *Gersten, supra* at 230.

In the present case, if DCPS had timely evaluated Student and determined him eligible for special education services, he would have been provided his initial IEP near

the beginning of the 2015-2016 school year. Due to DCPS' inaction on Mother's evaluation requests, Student's eligibility determination will now be made, at best, in November 2015. If Student is found eligible, development of his first IEP will be have delayed by some three months. I find that by delaying Student's initial eligibility evaluation and by failing to review the DBH evaluation of Student, DCPS has violated the IDEA's child-find requirement and District law. As a result, Student has potentially been denied the free appropriate public education due to a child with a disability.

Remedy

For her remedy in this case, Petitioner requests that I order DCPS to complete its initial evaluation of Student and convene a meeting to determine his eligibility for special education and related services within a defined time frame. Even though it is undisputed that the initial evaluations are underway, as of the due process hearing date, the assessments were not completed and it was not known whether additional data might be needed to determine Student's special education eligibility. *See Hawkins ex rel. D.C. v. D.C.*, 539 F. Supp. 2d 108, 115-16 (D.D.C. 2008) (DCPS did not argue before the hearing officer that an IEP team or its equivalent had reviewed the evaluations, much less that a team had made a determination that no additional data was needed. Thus, these evaluations standing alone do not fulfill DCPS' obligations under the IDEA.) In light of DCPS' prior lack of responsiveness to the parent's evaluation requests and its delay in starting the eligibility determination process, I find that it is appropriate to order that within thirty days, DCPS must complete initial evaluations of Student, obtain any other needed data and hold a multi-disciplinary team meeting to determine Student's eligibility for special education services. *See Hawkins, supra* at 116.

Petitioner also requests that I order a battery of IEE assessments to move the eligibility determination process forward. However, no competent evidence was offered that at this stage, Student requires other assessments in addition to the psychological and OT assessments being conducted by DCPS. I find that the evidence does not support the need for additional IEE assessments.

Finally, Petitioner requested, in her due process complaint, that Student be awarded compensatory education.³ Because it is not yet determined that Student is a child with a disability as defined by the IDEA, *see* 34 CFR § 300.8 (definition of “child with a disability”), it is premature to decide whether he has been harmed by DCPS’ delay in completing the initial evaluation process. *See, e.g., S.S. v. Howard Rd. Acad.*, 562 F. Supp. 2d 126, 130 (D.D.C. 2008) (Compensatory education as equitable relief to remedy past harm.) Therefore I will deny, without prejudice, Petitioner’s request for a compensatory education award.

ORDER

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

ORDERED:

1. DCPS shall ensure that Student’s initial eligibility determination for special education and related services, including completion of all needed eligibility evaluations, is completed within 30 calendar days of the entry of this decision;
2. Petitioner’s request for a compensatory education award for DCPS’ failure to timely complete Student’s initial eligibility determination is denied without prejudice;
3. Petitioner’s request that DCPS be ordered to fund IEE evaluations of Student is denied and

³ Petitioner offered no evidence in support of compensatory education relief at the due process hearing.

4. All other relief requested by the Petitioner herein is denied.

Date: October 29, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team