

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: July 24, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2015-0177

v.

Hearing Date: July 15, 2015

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2004
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) has denied Student a free appropriate public education (“FAPE”) by not ensuring that she has been comprehensively evaluated for special education needs since the 2013-2014 school year.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on May 15, 2015, named DCPS as respondent. The undersigned Impartial Hearing Officer was appointed on May 18, 2015. The parties met for a resolution session on June 8, 2015 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on June 15, 2015. On June 8, 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 Hearing Officer on July 15, 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.

The Petitioner testified and called as witnesses SPECIAL ED CONSULTANT, OT CONSULTANT, and COMMUNITY SUPPORT WORKER. DCPS called OT EVALUATOR as its only witness. Petitioner's Exhibits P-1 through P-38 and DCPS' Exhibits R-1 through R-24 were admitted into evidence without objection. Neither party requested leave to file post-hearing written argument.

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 issue for determination was certified in the June 8, 2015 Prehearing Order:

– Whether since the 2013-2014 school year, DCPS has failed to ensure that Student was comprehensively evaluated, including with an adequate clinical comprehensive psychological evaluation, functional behavioral assessment, a Speech and Language evaluation and an Occupational Therapy evaluation.²

For relief, Petitioner requests that the Hearing Officer order DCPS to conduct or fund complete and appropriate evaluations of Student including the aforesaid assessments, and upon completion to convene Student’s multidisciplinary team (MDT) to review her eligibility classification and develop an appropriate revised Individualized Education Plan (IEP) and Behavior Intervention Plan (BIP) for her. Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

STIPULATIONS

At the beginning of the due process hearing, counsel for Petitioner and counsel for DCPS agreed, on the record, to the following stipulations of fact:

- a. Student was initially evaluated for special education eligibility on April 19, 2013.
- b. In connection with the initial eligibility determination, psychological, educational and speech-language assessments were administered. No additional assessments of Student were requested at that time.
- c. At an eligibility team meeting on May 28, 2013, Student was determined eligible for special education under the disability classification Developmental Delay. There was no dissent from that determination.
- d. Student’s initial IEP was developed at an IEP meeting on May 28, 2013.

² In the prehearing order, this issue also included the alleged failure of DCPS to conduct an “Adaptive Functional Behavior” evaluation. At the due process hearing Petitioner’s Counsel withdrew the Adaptive Functional Behavior evaluation claim.

There was no disagreement with the initial IEP.

e. On March 27, 2014, Student's initial IEP was amended to add Extended School Year (ESY) services.

f. Student's IEP team met for an IEP annual review meeting on May 13, 2014.

g. On February 24, 2015, Student's IEP team met to revise her IEP.

h. On April 6, 2015, Petitioner, through her attorneys, first requested additional assessments of Student. No request for additional assessments was made prior to that date.

i. In spring 2015, DCPS conducted reevaluations of Student, including a comprehensive psychological evaluation (date of Report June 1, 2015) and an Occupational Therapy (OT) evaluation (date of Report June 3, 2015).

j. On June 11, 2015, Student's IEP team met to review and revise her IEP.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where she resides with Mother. Testimony of Mother. For the 2014-2015 school year, Student was in the GRADE at CITY ELEMENTARY SCHOOL. Exhibit P-11.

2. Student is eligible for special education and related services under the primary disability classification Developmental Delay (DD). Exhibit P-11. The initial eligibility determination was made at City Elementary School on May 28, 2013. Exhibit R-3.

3. In March 2013, CLASSROOM TEACHER, referred Student to DCPS' Early

Stages diagnosis center for a special education eligibility evaluation. Classroom Teacher reported that due to Student's disruptive behavior, the teacher had begun a behavior reward chart. Although the chart was helpful, Student continued to lack self regulation at times. Throughout the day, she would refuse to do work, pull away when redirected and hit other students from time to time. When Student was told "no" when she asked to do something, she had become increasingly aggressive, yelling "no" and running around the room. Classroom Teacher also reported that Student had difficulties identifying shapes and colors. Exhibits P-16, P-17.

4. An Ages and Stages Questionnaire (ASQ) for Student was completed on March 7, 2013. Student passed in the areas of communication, gross motor, problem solving and personal-social. Fine Motor was identified as an area of concern in the monitoring zone. Her Fine Motor score did not fall below the cutoff which required further assessment. Testimony of Johnson-Cross, Exhibit P-17.

5. In April 2013, SCHOOL PSYCHOLOGIST conducted a Psychological Evaluation of Student, including cognitive testing and behavioral assessments. Student's Full Scale IQ score of 70 was within the Borderline range of intellectual functioning. Because of Student's reported behavioral concerns, School Psychologist had Mother and Classroom Teacher complete the Behavioral Assessment System for Children (BASC 2) rating scales. The teacher's responses indicated that Student's behavior symptoms composite score was within the Clinically Significant classification range. Mother's responses indicated that Student's scores were within the At Risk classification range. School Psychologist reported that Classroom Teacher's response should be interpreted with caution because the manner in which she interpreted the statements dictated how she answered. School Psychologist recommended specific classroom interventions to address Student's problem behaviors and, if

those interventions were not successful, that an FBA be conducted. Exhibit P-17.

6. Early Stages also conducted an Educational Assessment and a Speech and Language Evaluation of Student as part of the initial evaluation. Exhibits P-18, P-19.

7. Student's initial IEP, developed May 28, 2013, included annual goals for Adaptive/Daily Living Skills and Communication/Speech and Language areas of concern. The IEP provided that Student would receive three hours per week of Specialized Instruction and two hours per month of Speech-Language Pathology services, all in the general education setting. Exhibit P-15.

8. As of April 11, 2014, Student was reported to have mastered all of her Adaptive/Daily Living Skills annual goals and to be progressing on all of her Communications/Speech and Language annual goals. Exhibit R-8.

9. On May 13, 2014, Student's IEP team met for an IEP annual review meeting. Mother and EDUCATIONAL ADVOCATE attended the IEP meeting. At the meeting, Mother stated that Student was coming along, but could benefit from more services. Student's teacher reported that Student had shown improvement, that she could be easily redirected, was making friends in the classroom and that her attention to tasks was better than in August 2013. The IEP team concluded that Student did not have "any behavior problems". Student's IEP was revised to add annual goals for Mathematics and Reading areas of concern. Student's annual goals for Communication/Speech and Language were updated. Annual goals for Adaptive/Daily Living Skills were no longer provided in the IEP. The May 13, 2014 IEP increased Student's Specialized Instruction to two hours per week outside general education and two hours per week in general education. Her Speech-Language services were

continued at 120 minutes per month. Mother agreed with the Specialized Instruction Services provided in the May 13, 2014 IEP. Exhibits P-13, P-3.

10. As of November 18, 2014, Student was reported to be progressing on all of her May 13, 2014 IEP goals. Exhibit R-9.

11. Mother observed that in the beginning of the 2014-2015 school year, Student's behavior was going well, but her learning was not so good. Student was struggling with her homework. Mother would like to get more services to help Student with reading and with writing her words. Mother has not thought of any additional assessments that Student needs at this time. Testimony of Mother.

12. Student's IEP team convened on February 24, 2015 for an annual IEP review. The February 24, 2015 IEP increased Student's Specialized Instruction to 4.5 hours per week outside general education and three hours per week in general education. Her Speech-Language services were continued at 120 minutes per month with the setting changed to outside general education. The IEP stated that Student needed small group support outside of the classroom to have the proper instructional support and in order to learn speech-language skills to be generalized in the general education setting. Exhibit P-11.

13. As of April 22, 2015, Student was reported to be progressing on all of her February 24, 2015 IEP goals. Exhibit R-11.

14. At the end of the 2014-2015 school year, Student's teacher recommended that she repeat Grade because she was not on grade level. Testimony of Mother.

15. On April 6, 2015, Petitioner's Counsel's law firm sent DCPS a written request for additional evaluations for Student. Exhibit P-6. Which specific assessments were requested for Student is not in the hearing record. On April 29, 2015, an MDT

team meeting was convened at City Elementary School, where it was determined that DCPS would conduct a reassessment of Student, including a comprehensive psychological evaluation, an OT evaluation and an FBA. Exhibits P-8, R-12. The school representatives stated that Student would continue to receive speech-language related services, but there was no agreement to conduct a speech-language reevaluation.

Testimony of Community Support Worker.

16. DCPS completed an OT evaluation report and a comprehensive psychological evaluation report for Student on June 3 and June 1, 2015, respectively. Exhibits R-22, R-21. The new assessments were reviewed at an IEP meeting on June 11, 2015. Exhibits P-28, R-19. An “informal” functional behavioral assessment (FBA) was also reviewed at the meeting. At the June 11, 2015 meeting, the IEP team revised Student’s IEP to add 120 minutes per month of OT services, outside general education, and 90 minutes per month of Behavioral Support Services, 30 minutes inside/60 minutes outside general education. Student’s Specialized Instruction services were continued at 4.5 hours per week outside general education and three hours per week inside general education. Exhibit R-19.

17. In the June 3, 2015 OT evaluation report, Student’s fine motor skills were described as a “Strength” and found to be age appropriate. Exhibit R-21.

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, § 3030.14. *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

Since the 2013-2014 school year, has DCPS failed to ensure that Student was comprehensively evaluated, including with an adequate clinical comprehensive psychological evaluation, functional behavioral assessment, a Speech and Language evaluation and an Occupational Therapy evaluation?

Student was initially evaluated for special education eligibility in April 2013 at DCPS' diagnostic center, Early Stages. Early Stages conducted psychological, educational and speech-language assessments of Student. No additional assessments of Student were requested at that time. On May 28, 2013, the City Elementary School eligibility team determined that Student was eligible for special education with her primary disability identified as Developmental Delay (DD). Following a request on behalf of Petitioner in April 2015, DCPS conducted additional assessments of Student including an OT assessment, an informal FBA and an updated comprehensive psychological evaluation. In June 2015, after reviewing these new assessment reports, Student's IEP team determined that Student needed OT and Behavioral Support services as part of her IEP.

In this case, the parent contends that Student was denied a FAPE because DCPS' initial April 2013 evaluation of Student was not comprehensive in that it did not include an OT assessment or an FBA. The parent also contends that, prior to her filing her due process complaint, DCPS failed to appropriately reevaluate Student with OT, FBA and

speech-language assessments. DCPS maintains that its initial evaluation in 2013 was appropriate to identify Student's special education needs. DCPS denies that it was required to reevaluate Student prior receiving the parent's reevaluation request in April 2015.

Initial Eligibility Evaluation

U.S. Department of Education regulations require that, as part of an initial special education evaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must 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, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006).

When DCPS conducted Student's initial evaluation in April 2013, Early Stages conducted a Psychological Evaluation, an Educational Assessment and a Speech and Language Evaluation. Petitioner's experts, Special Ed Consultant and OT Consultant, opined in their respective testimony that DCPS should also have administered an FBA and an OT assessment as part of the Student's initial evaluation.

In the May 20, 2013 initial Psychological Evaluation report, the Early Stages school psychologist reported that Classroom Teacher had expressed concerns over Student's behavior in class. School Psychologist had Mother and Classroom Teacher complete BASC 2 behavior

rating scales for Student. The teacher's responses indicated that Student's behavior symptoms composite score was within the Clinically Significant classification range. Mother's responses indicated that Student's scores were within the At Risk classification range. The school psychologist recommended specific classroom interventions to address Student's problem behaviors and, if those interventions were not successful, that an FBA be conducted.

Special Ed Consultant opined that Student should also have received an FBA as part of her initial evaluation because Classroom Teacher had identified Student's disruptive behaviors in class as a primary area of concern. The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). In *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C.2008), the Court explained that "the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." *Id.* at 68. *See, also, Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (An FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.)

I find unpersuasive Special Ed Consultant's opinion that DCPS was required to conduct an FBA of Student as part of her initial evaluation or prior to the parent's request for a reevaluation in April 2015. The IDEA regulations provide that an evaluation conducted by a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP. *See* 34 CFR § 300.304(b)(1). Here the Early Stages school

psychologist elected to administer BASC behavior rating scales to Mother and Classroom Teacher, and to defer conducting an FBA, to assess Student's behavioral deficits. I find that this decision of the trained Early Stages evaluator is entitled to deference. *Cf. T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.); *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 937 (9th Cir.2007) (Fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render more deferential approach appropriate.)

Moreover, after Student's initial IEP was developed in May 2013, it does not appear that Student's behavior impeded her learning until well into the 2014-2015 school year. When Student's IEP team convened on May 13, 2014 for the annual IEP review, Student's classroom teacher stated that Student had shown improvement, that she could be easily redirected and was making friends in the classroom. The May 24, 2014 IEP team agreed that Student did not have *any* behavior problems. Mother testified at the due process hearing that at the beginning of the 2014-2015 school year, behavior wise, things were going well for Student.

I, likewise, did not find credible the opinion of Petitioner's expert, OT Consultant, that DCPS should have conducted an OT assessment of part of Student's April 2013 initial eligibility evaluation. OT Consultant opined that Student should have been evaluated for OT services because the Ages and Stages Questionnaire (ASQ) administered to Student in March 2013 indicated that fine motor development was an area of concern. However, as DCPS' expert, OT Evaluator, explained, the ASQ only flagged Student's fine motor for monitoring – not for further evaluation. Moreover, in the June 2015 OT evaluation, Student's fine motor skills were described as a "Strength" and found to be age appropriate.

Reevaluation

After Student's initial evaluation was completed in May 2013 and she was determined eligible for special education, any subsequent assessment would constitute a reevaluation. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46440. (Once a child has been fully evaluated, the "initial evaluation," a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a "reevaluation.") Petitioner's claim in this case, that since the 2013-2014 school year, DCPS failed to ensure that Student was comprehensively evaluated, encompasses a claim for failure to reevaluate Student subsequent to the May 28, 2013 initial eligibility determination.

The IDEA provides that a reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Further, a child with a disability must be reevaluated sooner, if the public agency determines that the educational or related services needs of the child warrant a reevaluation or if requested by the child's parent or teacher *See* 34 CFR § 300.303(a); *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46648. In this case, neither DCPS nor the parent sought for Student to be reevaluated until April 2015 when a reevaluation was requested by Mother's attorneys. DCPS timely complied with the parent's 2015 reevaluation request by conducting a comprehensive psychological reevaluation, an OT evaluation and an informal FBA. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). (Reevaluations should be conducted in a reasonable period of time, or without undue delay, as determined in each individual case.)

In her closing argument, Petitioner's Counsel contended that the 2015 reevaluation was not adequate because DCPS refused a request by Petitioner's representative for an updated speech-language assessment. The hearing evidence does not establish that Mother actually requested a speech-language reevaluation. (Parent's April 2015 evaluation request form was not offered into evidence.) However, when a reevaluation of a child with a disability is conducted by the LEA in accordance with 34 CFR §§ 300.304 through 300.311, if the parent disagrees with the reevaluation because a child was not assessed in a particular area, the parent has the right to request an Independent Education Evaluation (IEE) to assess the child in that area. *See* 34 CFR § 300.502(b); *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015). Mother's due process complaint in the present case was filed before the June 2015 reevaluation of Student was completed and there was no evidence that the parent has requested an IEE speech-language reevaluation. Her request that DCPS be ordered to conduct or fund a speech-language reassessment is therefore premature.

ORDER

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

ORDERED:

All relief requested by the Petitioner herein is denied. This order is without prejudice to the parent's remedies under the IDEA if she disagrees with the reevaluation of Student completed in June 2015 or the content of the June 2015 IEP.

Date: July 24, 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 Division of Specialized Education
DCPS Resolution Team