

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Student Hearing Office
June 09, 2014

STUDENT¹)
through the Parent)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent(s).)

Date Issued: June 9, 2014

John Straus, Hearing Officer

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of the Student, filed a due process complaint notice on March 26, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS failed to evaluate Student in all areas of suspected disability when DCPS failed to timely conduct a Functional Behavioral Assessment (“FBA”) and a social history (a) pursuant to its Child Find obligation to identify, locate and evaluate Student from August 27, 2012 through May 30, 2013, and (b) within 120 days of Petitioner’s April 27, 2012 request that the Student be evaluated for special education services. Petitioner also alleged that DCPS had failed to develop an individualized education program (“IEP”) and determine a location of services since August 27, 2012 even though the Student was attending a private school.

DCPS denied that Student was denied a FAPE. DCPS argued that DCPS did not fail to timely evaluate the student to determine his eligibility for special education and related services. Petitioner did not refer Student for an evaluation for special education services until March 8, 2013. DCPS timely conducted an educational assessment and comprehensive psychological assessment that were reviewed by the Multidisciplinary Team on May 30, 2013. Although Student was determined eligible for special education services by the IEP team on May 30, 2013

¹ Personally identifiable information is provided in Appendix A.

while the Student was attending a private school, DCPS did not develop an IEP or identify a location of services because Petitioner did not request it.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on March 26, 2014. The case was originally assigned to Hearing Officer Massey on March 27, 2014. This Hearing Officer was assigned to the case on May 15, 2014 after Hearing Officer Massey resigned. DCPS timely filed a response to the complaint on April 3, 2014 and made no challenges to jurisdiction.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on May 2, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on April 25, 2014, the 45-day timeline to issue a final decision began on April 26, 2014 and the final decision was due by June 9, 2014.

A prehearing conference took place on May 20, 2014. A Prehearing Order was issued on May 21, 2014.

The due process hearing was a closed hearing that took place on May 29, 2014.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

The Petitioner’s Disclosure Statement, filed and served on May 22, 2014, consisted of a witness list of five (5) witnesses and documents P-01 through P-33. The Petitioner’s documents P-1 through P-5, P-10, P-12, and P-14 through P-22 were admitted into evidence over objection. All other documents presented by the Petitioner were admitted into evidence without objection.

DCPS’ Disclosure Statement, filed and served on May 22, 2014, consisted of a witness list of five (5) witnesses and documents R-1 through R-15. DCPS’ documents were admitted in to evidence without objection.

Petitioner presented the following two (2) witnesses in her case in chief: (1) Petitioner and (2) Expert in Comprehensive Psychological Assessments who qualified as an expert in comprehensive psychological assessments (“psychological assessment expert”).

DCPS presented three witnesses: (1) School Psychologist who qualified as an expert in school psychological assessments (“school psychology expert”); (2) Case Manager, DCPS Private and Religious Schools (PRO) office; and (3) Administrative Assistant, DCPS PRO office.

The issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 –Whether Respondent denied Student a FAPE by failing to evaluate Student in all areas of suspected disability when DCPS failed to timely conduct a Functional Behavioral Assessment and a social history (a) pursuant to its Child Find obligation from 08/27/12 through 05/30/13 to identify, locate and evaluate Student, and (b) within 120 days of Petitioner’s request on 04/27/12 that Student be evaluated for special education services.

Issue #2 –Whether Respondent denied Student a FAPE by failing to develop an individualized education program (“IEP”) and determine a location of services since August 27, 2012 even though Student was attending a private school.

The Petitioner requested the following relief:

- (1) A finding of a denial of a FAPE on the issues presented;
- (2) DCPS to fund a functional behavioral assessment and fund an independent social history assessment;
- (3) Within 10 days of the receipt of the last of the independent assessments, DCPS to convene a meeting to review the assessments, and develop an IEP as appropriate;
- (4) Implement a compensatory services plan to redress the denial of FAPE from August 2012 to present. Specifically, the petitioner requests 144 hours of academic tutoring and 54 hours of counseling; and
- (5) Any other appropriate relief.

At the outset of the hearing, the Respondent expressed a concern that this Hearing Officer did not state that he previously worked for James E. Brown & Associates, a special education law firm in the District of Columbia. The Hearing Officer acknowledged that he last worked for James E. Brown & Associates in October 2009. He further stated that he is familiar with two of the witnesses that were disclosed by the Petitioner who worked for James E. Brown & Associates. The witnesses were disclosed five day prior to the hearing although they were not disclosed at the Pre-hearing conference. The Hearing Officer stated that he will not be prejudiced either by his prior experience with James E. Brown & Associates or his familiarity with the witnesses. He asked whether any party would object to him serving as the Hearing Officer. Both parties stated that they did not object to him serving as the Hearing Officer.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact² are as follows:

1. The Student is a resident of the District of Columbia. The Petitioner is the Student's mother.³
2. The student attended Neighborhood Elementary School from Kindergarten to 5th grade. He was retained in the 5th grade at the end of the 2010-2011 school year and repeated the 5th grade during the 2011-2012 school year. His 5th grade teacher recommended that he be retained because of his lack of focus in school, inappropriate behavior and incomplete homework and classroom assignments. The Student was suspended five times due to his inappropriate behavior and talking back to school authorities. The Student's teachers reported to the Petitioner that the Student's inappropriate behavior in school was affecting his academic performance in 3rd grade.⁴
3. The Student was placed by the Petitioner in a private parochial school ("Private School A") during the 2012-2013 school year and the 2013-2014 school year until March 18, 2014 through the DC opportunity scholarship program.⁵
4. The Petitioner withdrew the student from Private School A after being informed that the Student may be expelled from Private School A on March 18, 2014 due to his involvement in a fight with another student.⁶
5. On April 28, 2011, the Petitioner, through counsel, requested the student be evaluated to determine whether the student is a student with a disability under the IDEA.⁷ This request was initially made while the student was attending Neighborhood Elementary School. A second request was made on July 25, 2011 after the end of the school year.⁸ On April 9, 2012, the Petitioner, through counsel, sent a referral package to the DCPS PRO office.⁹ The DCPS PRO Administrative Assistant testified that the referral package

³ Petitioner

⁴ Petitioner

⁵ Petitioner

⁶ Petitioner

⁷ P-4

⁸ P-5

⁹ P-25 through 29

was incomplete. On March 8, 2013, after receiving the complete package, the PRO office certified receipt of a referral for an evaluation of the Student for special education services.¹⁰

6. On April 11, 2013, the Multidisciplinary (“MDT”) team convened at Neighborhood Middle School. The Petitioner shared that the Student has a diagnosis from a psychiatrist for Attention Deficit with Hyperactivity Disorder (“ADHD”). The Petitioner stated the student acts out, makes jokes and does not take responsibility for his actions in school. The team determined that the Student would receive a psychological assessment to include a Behavior Rating Inventory of Executive Functioning (“BRIEF”), which is a questionnaire completed by parents and teachers, and an educational assessment. The Petitioner noted that there are no speech and language concerns and a social history is not warranted at that time. The school psychology expert stated that she would not evaluate the Student for ADHD because the student already had an ADHD diagnosis. The Petitioner signed consent to have the Student evaluated.¹¹
7. On April 6, 2013, the student received an educational achievement assessment. The assessment yielded average scores in all areas except fluency with academic tasks, ability to apply academic skills and passage comprehension which were in the low average range.¹²
8. The Student received a psychological assessment on April 25, 2013 conducted by the school psychology expert. The report states the student exhibited academic difficulty in Reading, Writing and Math and exhibited inattention, lack of focus and impulsivity. The assessment included a BRIEF; however, there was no parent interview to obtain a social history. The school psychology expert testified that she did not interview the Petitioner because the DCPS PRO was involved. The school psychology expert recommended that the Student meets the criteria for Other Health Impairment under the IDEA and that the student receive a Speech and Language assessment due to a low verbal IQ score.¹³
9. The BRIEF is designed to provide a better understanding of a child’s self-control and problem-solving skills by measuring eight aspects of executive functioning. The executive functions are mental processes that direct a child’s thought, action and emotion, particularly during active problem solving. The BRIEF was developed to provide a window into the everyday behavior associated with specific domains of the executive functions. The BRIEF can serve as a screening tool for possible executive dysfunction. The clinical information gathered from an in-depth profile analysis is best understood,

¹⁰ R-14

¹¹ P-9, Petitioner

¹² P-7

¹³ P-6, School Psychologist

however, within the context of a full assessment that includes (a) a detailed history of the child and family, (b) performance-based testing, and (c) observations of the child's behavior. The Student's scores on the Emotional Control scale and the Inhibit scale are significantly elevated compared to age- and gender-matched peers. In the absence of other marked BRIEF scale elevations, clinical information, or test data, this pattern suggests the possible presence of a primary behavioral or emotional disorder rather than executive dysfunction. Other sources of data regarding the Student's social-emotional functioning should be examined.¹⁴

10. On May 30, 2013, the MDT team reviewed the psychological and educational assessment reports at Neighborhood Middle School. No staff members from Private School A were present. The team determined the student was a student with an Other Health Impairment under the IDEIA but did not qualify for equitable services such as occupational therapy, physical therapy or speech and language therapy. DCPS did not develop an IEP for the student. The Petitioner agreed to provide the assessment reports to the staff at Private School A.¹⁵
11. At the May 30, 2013, meeting, DCPS recommended that the student receive a speech and language assessment based on the recommendations in the psychoeducational assessment. The Petitioner agreed to complete a speech and language assessment. The Petitioner was informed that the speech and language assessment would be completed by the summer team; however, the Student was not available because he was going away for the summer of 2013. The team would reconvene after completion of the speech and language assessment. No further assessments were recommended.¹⁶
12. The student received a speech and language assessment on November 18, 2013. The assessment report includes a Social History done by the speech and language pathologist. The assessment yielded scores in the average to low average range. The evaluator made several recommendations for the classroom and home.¹⁷
13. On March 14, 2014, the MDT team reviewed the speech and language assessment. The team determined the student did not require speech and language services. The Petitioner requested DCPS develop an IEP for the student; however, she was informed that the PRO would not provide an IEP unless he enrolled in a DCPS school. The Petitioner stated she wanted the Student to remain at Private School A because she was not familiar with DCPS schools.¹⁸

¹⁴ P-6

¹⁵ Petitioner, P-8

¹⁶ Petitioner, P-8

¹⁷ P-11

¹⁸ Petitioner, School Psychologist, R-3

14. The student was expelled from Private School A on March 18, 2014. After a two week period, the Petitioner enrolled the student in a nonpublic school (Private School B) through the DC opportunity scholarship program. According to the Petitioner, the student has shown academic and behavioral improvement since his enrollment at Private School B and he is adjusting well to the new school.¹⁹
15. The parent's psychological assessment expert proposed a compensatory education program to compensate the student for the alleged denial of FAPE. The psychological assessment expert believes the Student lost two years of specialized instruction. Her recommendation was based on a theoretical IEP that would have provided 20 hours of specialized instruction per week and one hour of counseling per week. The psychological assessment expert recommended the student be provided 144 hours of tutoring and 54 hours of counseling at Infinite Potential.²⁰

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:

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The issues to be determined are whether DCPS denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability when DCPS failed to timely conduct a FBA and a social history (a) pursuant to its Child Find obligation from 08/27/12 through 05/30/13 to identify, locate and evaluate the Student, and (b) within 120 days of Petitioner's request on 04/27/12 that the Student be evaluated for special education services and whether

¹⁹ Petitioner

²⁰ Psychological assessment expert, P-31

DCPS denied the Student a FAPE by failing to develop an IEP and determine a location of services since August 27, 2012 even though the Student was attending a private school.

DCPS did not deny Student a FAPE by failing to evaluate Student in all areas of suspected disability when DCPS failed to timely conduct a FBA and a Social History

DCPS must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111, D.C. MUN. REGS. tit. 5-E § 3002.1(d).

DCPS must conduct a full and individual initial evaluation upon the request of a parent to determine if the child is a child with a disability. 34 C.F.R. § 300.301. This initial evaluation must be conducted by DCPS within 120 days from the date that the student was referred for an evaluation or assessment. 34 C.F.R. § 300.301(c), D.C. CODE ANN. § 38-2561.02(a). Petitioner's informed consent must be obtained in writing prior to DCPS conducting the initial evaluation. 34 C.F.R. § 300.300.

Receipt of a referral for an initial evaluation triggers certain procedural safeguards or requirements for DCPS to follow. Among them is the requirement that DCPS provide Petitioner with notice about the identification and evaluation process, the requirement that DCPS take steps to obtain informed written consent from Petitioner in order to begin the initial evaluation process, and the requirement that DCPS review existing evaluation data that includes input from Petitioner. 34 C.F.R. § 300.300, .305, .503 and 504.

In this case, the Petitioner initially made a request for an evaluation on April 28, 2011. However, the PRO Office did not certify that the referral was complete until March 8, 2013. The evidence indicates that both the DCPS PRO office and Petitioner's counsel allowed the referral process to continue nearly two years as a result of personnel changes in both offices.

The Petitioner signed consent to evaluate the Student on April 11, 2013. There is nothing in the record that indicates the Petitioner requested a Social History until this instant complaint. If the School Psychologist normally includes a social history in her report, she should have completed a social history regardless whether the DCPS PRO office was involved. However, in this case, the Petitioner did not initially agree to have a social history completed. The Petitioner did have input in the psychological assessment through her responses on the BRIEF. The assessment report recommends a speech and language assessment and strongly suggests that a social history be completed. The speech and language pathologist completed a social history assessment as part of her assessment.

The Petitioner stated that she agrees with the Student's current disability category. There is nothing in the record that indicates the Petitioner ever made a request to members of the MDT team for a FBA or a Social History. If, *arguendo*, the team ordered a FBA, it is not at all clear which behaviors would be measured since the student is doing well at his current school. Therefore, the DCPS did not deny the student a FAPE by not completing a FBA or social history.

DCPS denied Student a FAPE by failing to develop an IEP

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 34 C.F.R. § 300.1. A child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8. Disability categories under the IDEA includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other Health Impairment. *Id.*

A central requirement of the IDEA is that the district in which a student with disabilities resides must offer that student FAPE which entitles each student with a disability to an IEP that is designed to meet his or her specialized educational needs. *District of Columbia v. Wolfire*, 62 IDELR 198 (D.D.C. 2014). The IEP must be formulated in accordance with the terms of the IDEA and "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982). However, no parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. 34 C.F.R. § 300.137(a).

In this case, the Student was enrolled by the Petitioner in private schools since August, 2012. When a student with disabilities is parentally placed in a private school, the LEA responsible for the district in which the student resides "must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher." See *Wolfire*, 62 IDELR 198 (D.D.C. 2014). Therefore, DCPS was obligated to evaluate the student upon the Petitioner's request.

The MDT determined the student is a student with OHI under the IDEA. The LEA has a continuing responsibility to offer a FAPE to a student with disabilities that resides within its district regardless of whether that student is currently enrolled in a private school. Upon receipt of an offer of a FAPE, parents have two options: (1) accept the offer of a FAPE and enroll their student in the delegated school, or (2) keep their child in private school. If the parents choose the latter option, any services provided to the student pursuant to the IDEA are governed by 34 C.F.R. §§ 300.130-300.144. While a district has no obligation to provide FAPE to parentally placed private school students, it does need to make FAPE available. The district must develop

an IEP so the parents can see what the district's offer of FAPE will entail. Because the parents here asked the district to develop an IEP, the district had to document the services it was offering to provide. The district's obligation to actually provide the services listed in the proposed IEP would depend on whether the parents accepted the program. *Id.*

In *Wolfire*, the District of Columbia violated the IDEA when it failed to develop an IEP for a parentally placed private school student who had never attended its schools. Explaining that the district had an obligation to make FAPE available at the parents' request, the U.S. District Court, District of Columbia upheld an administrative decision in the parents' favor. U.S. District Judge Amy Berman Jackson rejected the notion that developing an IEP was tantamount to providing the student FAPE. The judge pointed out that the IDEA requires districts to make FAPE available to all resident students with disabilities -- including those not enrolled in the public school system. As such, the parents' request for an evaluation and IEP required the district to make FAPE available to the student.²¹ "So, as there is no requirement that a child be currently enrolled in a public school to be entitled to a FAPE offer, similarly there is no requirement that the child be currently enrolled in a public school in order to trigger the [district's] obligation to develop an IEP for that child," Judge Jackson wrote. *Id.*

The court explained that IEP development was a necessary component to the district's offer of FAPE, because the parents could not decide whether to accept services from the district without knowing what the student's program would entail. *Id.* In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. 34 C.F.R. 300.513(a)(ii).

In this case, the Petitioner was not able to make an informed decision whether to keep the student in a private school or enroll the student in public school where he would receive an IEP because no IEP was developed for the student. This significantly impeded the Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. Therefore, this hearing officer finds that the student was denied a FAPE.

Special education means specially designed instruction, to meet the unique needs of the child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39. IDEA requires that at the beginning of each school year, each public agency must have an IEP in effect for each child with

²¹ Recognizing that the District of Columbia did not have to provide FAPE to a parentally placed private school student with a mood disorder if his parents chose to continue his unilateral placement, the District Court nonetheless ruled that the district had an obligation to develop an IEP for the student. The court held the district violated the IDEA by failing to make FAPE available.

a disability within its jurisdiction. 34 C.F.R. § 300.323(a). In this case, the MDT team determined the student is a student with an OHI under the IDEA on May 30, 2013. However, DCPS failed to develop an IEP for the student. Had the Petitioner been able to make an informed decision regarding whether to accept DCPS' offer of FAPE, the student might have received specialized instruction for one school year.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The evidence demonstrates the student missed approximately one year of services due to the fact the Student did not have an IEP after the MDT team determined the student was a student with OHI under the IDEIA on May 30, 2013. Petitioner has requested compensatory education in the amount of 144 hours of tutoring and 54 hours of counseling services. The calculation was based on a two year period of harm. However, the Hearing Officer finds that the period of harm was for one year. Thus, the Hearing Officer grants what he considers to be a reasonable amount of compensatory services for the actual services missed that will allow the student to recoup some, if not all, of any lack of services.

ORDER

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

1. Within ten calendar days, DCPS shall convene an IEP meeting, including the student's teachers pursuant to 34 C.F.R. § 300.321, to develop an IEP for the student and discuss and determine the placement and location of services.
2. If the Petitioner agrees to DCPS' offer of FAPE, DCPS shall provide funding for Student to receive the following forms and amounts of compensatory education beginning no later than 11 days after the issuance of this Order: 72 hours of independent tutoring services and 27 hours of independent counseling services. If the Petitioner rejects DCPS' offer of FAPE, the Student is not entitled to compensatory services.

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: June 9, 2014

/s/ John Straus

Hearing Officer