

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
November 27, 2013

[Parents], on behalf of
[Student],¹

Date Issued: November 27, 2013

Petitioners,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on August 27, 2013. The Petitioners and Respondent are both represented by counsel. The Respondent filed a motion to dismiss on September 5, 2013. A resolution meeting was held on September 9, 2013, and resulted in no agreements. The Petitioners' filed a reply to the Respondent's motion and a cross-motion for summary determination on September 10, 2013. The Respondent filed a reply to the Petitioners' motion on September 11, 2013.

A prehearing conference was held on September 11, 2013, and a prehearing order was issued on September 12, 2013. The order included, among other things, determinations on the motions filed. The Respondent's motion was denied and the Petitioners' motion was granted. The effect of this was to resolve one of the Petitioners' issues by making a determination that the Student

¹ All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

had been denied a free appropriate public education (FAPE) for the 2013-2014 school year because the Respondent failed to propose any individualized education program (IEP) for him.

On October 15, 2013, the parties filed their trial briefs and shared disclosures. On October 21, 2013, the Petitioners filed a motion to continue the hearing due to an injury suffered by their lead counsel. Following discussion with counsels regarding rescheduling, an amended motion to continue was filed on October 22, 2013. The motion was unopposed and an order continuing the hearing from October 22, 2013 to November 19, 2013, with a hearing officer determination (HOD) due date of November 29, 2013, was issued by the Chief Hearing Officer (CHO) on October 22, 2013. The Respondent subsequently shared with the Petitioners a supplemental disclosure on October 28, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

1. Whether the Respondent failed to identify and evaluate the Student during the 2012-2013 school year?

2. Whether the Respondent denied the Student a FAPE because it did not propose or provide an IEP reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of his other educational needs resulting from his disability, during the 2012-2013 school year?

3. Whether the Petitioners are entitled to full reimbursement for the Attending School for the 2013-2014 school year as a result of the denial of FAPE for the 2013-2014 school year?²

The Petitioners are seeking reimbursement for the cost of the Attending School for both the 2012-2013 school year and the 2013-2014 school year.

The Petitioners are entitled to reimbursement for the cost of the Attending School for both the 2012-2013 school year and the 2013-2014 school year.

IV. EVIDENCE

Six witnesses testified at the hearing, four for the Petitioners and two for the Respondent. The Petitioners' witnesses were: the Student's Mother (P); A Speech and Language Pathologist from the Attending School, providing an expert opinion on the Student's educational needs and his benefit from the Attending School program (D.P.); The Curriculum and Technology Specialist from the Attending School, providing an expert opinion on the appropriateness of the Attending School for the Student (J.D.); and an Education Consultant, providing an expert opinion on the appropriateness of the Attending School for the Student (L.S.). The Respondent's witnesses were the Compliance Case Manager for the Respondent's Private and Religious School Office (J.B.), and a School Psychologist whom the Respondent offered as an expert to provide an opinion as to whether the Student could be educated in a less restrictive environment than the Attending School, but who had no such opinion (J.L.).

² This issue is framed differently from Issue 2 because there is a dispute about when the Student should have been found eligible and it is undisputed the Student was found eligible on August 13, 2013, and because it has already been determined the Student was denied a FAPE for the 2013-2014 school year because it is undisputed no IEP for the Student was developed for the Petitioners' to consider.

43 of the Petitioners' 46 disclosures were entered into evidence. The Petitioners' exhibits are listed in Appendix A. Five of the Respondent's six disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. There were no credibility issues and the evidence in the record is uncontroverted. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a nine year old learner with a disability enrolled by the Petitioners at the Attending School.³ The Student suffers from a Mixed Receptive-Expressive Language Disorder and a Reading Disorder.⁴
2. The Student was determined eligible for special education and related services by the Respondent on August 13, 2013, under the definition of Specific Learning Disability (SLD).⁵
3. The Student experienced educational problems as far back as preschool, in the fall of 2008.⁶
At that time the Student was experiencing behavior problems due to sensory issues and the

³ P 34, Testimony (T) of P.

⁴ P 18.

⁵ P 38, R 5.

⁶ T of P, P 2, R 4.

Petitioners had him assessed by an Occupational Therapist, who provided information to the Petitioners and his preschool as to how to work with him.⁷ There is no evidence of any child-find activity on behalf of the Respondent at that time.

4. When the Student entered kindergarten at the Public School in the fall of 2009, the Student's teacher called Petitioners within days of the start of the year to express concern about the Student and his behavior in class.⁸ The Respondent did not initiate child-find activities but rather advised the Petitioners to take the Student to a doctor.⁹ In fact, the Petitioners had already done so, and the Doctor had prescribed medication for Attention Deficit Hyperactivity Disorder, which the Petitioners did not give to the Student until it was clear, after school had started, that medication may be necessary.¹⁰ The Student finished kindergarten with mixed reports about academic development, and social skills were reported as being performed independently.¹¹
5. The Petitioners asked the Respondent about an IEP for the Student prior to the start of first grade.¹² They were told to wait to see how the Student did.¹³ The Student's academic and functional development during first grade, the 2010-2011 school year, was mixed and the Respondent had wanted him to repeat first grade "to be with children closer to his own age and to give him another year to grow."¹⁴ The Petitioners had him proceed to second grade,

⁷ T of P, P 2, R 4.

⁸ T of P.

⁹ T of P.

¹⁰ T of P.

¹¹ R 1.

¹² T of P.

¹³ T of P.

¹⁴ R 1, P 3, T of P. (Student was six years of age at this time, and would be seven when the next school year, 2011-2012, would start).

however, in the hopes he would continue with the same teacher who was going to teach second grade.¹⁵

6. The Student attended second grade during the 2011-2012 school year.¹⁶ The Respondent's staff recommended the Petitioners hire other staff to tutor the Student, and the Petitioners did so, hiring the classroom assistant at \$100 per hour to tutor the Student during the school day.¹⁷ The Student had mixed results again in second grade, and performed lowest (approaching the standard) in math.¹⁸
7. The Petitioners were advised by the Respondent to hire the Student's future third grade teacher over the summer to get the Student ready for third grade, which the Petitioners did.¹⁹ Once third grade began, upon the advice of the third grade teacher, they hired another teacher to help the Student with homework.²⁰ The Student's social skills were noticeably lacking during third grade and he was also involved with physical altercations with other students on the playground during the fall (sometimes he was the victim and sometimes the instigator).²¹ At the end of the first term, the Student was "approaching the standard" in both English Language Arts and Mathematics.²² The Student was experiencing "night terrors," resulting from the stress of school, at least four or five times per week.²³

¹⁵ T of P

¹⁶ T of P, R 1.

¹⁷ T of P.

¹⁸ R 1, P 4.

¹⁹ T of P.

²⁰ T of P, P 5, P 6, P 13.

²¹ T of P, P 8, P 9, P 10, P 13.

²² R 1, P 11.

²³ T of P.

8. Due to the increasing behavior problems, as well as not meeting standards in both Mathematics and English Language Arts, the Petitioners again asked for an IEP in an email to both the Student's teacher and the school Principal on December 4, 2012.²⁴
9. Following this request, the Student's teacher advised the Petitioners, on December 5, 2012, that she would

need to meet with the SST team (composed of teachers, the social worker, and Special Education teachers) to show what we have done for [Student] thus far this year, and provide information about how [Student] is performing with these things in place. I was able to set up a meeting with the team and they will review [Student's] work and progress to get a sense of what might be holding him back or impairing his performance in the classroom. Once the team has met and reviewed the information I have provided, they will be able to decide what other information might be needed and can make suggestions for further steps to help [Student]. . . .

Once the team provides me with suggestions or recommendations, we can all meet to take further necessary steps. My understanding is that the SST team meeting to review [Student's] progress is a necessary step in the process.²⁵

The Respondent did not propose an evaluation and obtain the Petitioners' consent until July 2013, and the initial evaluation of the Student was not completed until August 13, 2013.²⁶

10. Following the request for an IEP in December 2012, and because no proposals or other activity was forthcoming from the Respondent, the Petitioners applied to the Attending School and began a series of assessments of the Student, the first of which had been arranged for as early as November 2012.²⁷ The Student's teacher at the Public School assisted in the Petitioner's application process for the Attending School in December 2012.²⁸
11. The Student was admitted to the Attending School and began attending near the end of January 2013.²⁹ The Student remains enrolled and attending the Attending School at the Petitioners' expense.³⁰

²⁴ P 13.

²⁵ P 13.

²⁶ R 5, P 38.

²⁷ P 16, P 17, P 18, T of P.

²⁸ P 16, T of P.

²⁹ P 17, P 18, T of P, T of J.D.

³⁰ T of P.

12. The cost to the Petitioners for the Attending School for the 2012-2013 school year, including related services, was \$26,655.³¹ No evidence of the cost to the Petitioners for the Attending School for the 2013-2014 school year was provided.
13. The Respondent began evaluating the Student in July, 2013, and an eligibility determination was made by the IEP team, including the Petitioners and Respondent, on August 13, 2013.³² The Student was determined eligible for special education and related services because he met the definition of SLD.³³
14. The Petitioner requested an IEP again on August 13, 2013, when the eligibility determination was made.³⁴ The Respondent has, at all times, refused to offer the Student an IEP because he is no longer enrolled in the Respondent's schools.³⁵
15. The Attending School is a full-time non-public special education school for children with learning disabilities, language disorders, and attention and executive functioning problems.³⁶ The Attending School uses an arts-based, hands-on approach which, for children with processing and academic deficits, often makes the difference between learning and not learning.³⁷ The Attending School has a Certificate of Approval from the Office of State Superintendent of Education (OSSE).³⁸
16. The Student completed the 2012-2013 school year at the Attending School with mixed results of mostly proficient marks, many developing, and some skill areas not introduced.³⁹ His reading was largely proficient and his primary struggle was in mathematics, which

³¹ P 31.

³² R 5, P 38, T of P.

³³ R 5, P 38.

³⁴ P 38.

³⁵ Undisputed Fact (UF), T of J.B.

³⁶ P 34.

³⁷ P 34.

³⁸ UF. (Administrative Notice is taken that under a Certificate of Approval (COA), OSSE sets the rates a Non-Public School may charge.)

³⁹ P 25.

greatly improved.⁴⁰ Functionally, the Student struggled, but benefitted from the highly structured and predictable nature of the program.⁴¹ This helped alleviate his anxiety.⁴² Specific verbal praise and reminders were also techniques used that helped the Student overcome his discomfort.⁴³ The Student continues to improve academically, and particularly functionally in the current school year at the Attending School.⁴⁴ In addition, his “night terrors” have been reduced to once per month.⁴⁵

17. The Respondent, at hearing, proffered an expert witness (J.L.) to provide an opinion on whether the Student can be educated in a less restrictive environment than the Attending School. This proposal generated considerable argument at hearing, since the question for hearing was whether or not the Attending School was providing educational benefit to the Student, not whether it was the placement the Student required. Nevertheless, the Undersigned permitted J.L. to testify as an expert witness. When she was asked her opinion about whether the Student requires the services provided at the Attending School she stated, repeatedly, she had no opinion on that and no opinion as to the Student’s placement in general.⁴⁶

VI. 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:

⁴⁰ P 25.

⁴¹ P 25.

⁴² P 25.

⁴³ P 25.

⁴⁴ T of J.D.

⁴⁵ T of P.

⁴⁶ T of J.L.

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based solely upon the 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.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The analysis to apply in a case such as this is to first determine whether the agency “complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted).
3. All children with disabilities residing with the District of Columbia, including those “attending private schools, regardless of the severity of their disability, and who are in need of special education and related services” must be “identified, located, and evaluated[.]” 34 C.F.R. § 300.111(a)(i), *see also* D.C. Mun. Reg. §§ 5-E3002.1(d) and 5-E3002.3(a).
4. “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. Stat. § 38-2561.02. A written referral may be made by the child’s parent to the school principal. *See* D.C. Mun. Reg. § 5-E3004.1. If a parent

“repeatedly fails or refuses to produce the child for an evaluation; or (2) A child enrolls in a school of another public agency” after the time to evaluate has begun to run, the 120 day timeline does not apply. 34 C.F.R. § 300.301(d).

5. The Respondent failed in its child find duty by not identifying the Student as a possible child with a disability by the time the Student began third grade, and then failed to timely evaluate the Student following the Petitioner’s referral (a written request for an IEP) made December 4, 2012, to the Principal of his school. There is no evidence of any child find procedures utilized regarding the Student, despite the Student’s kindergarten teacher expressing concern about her ability to teach the Student immediately after the start of Kindergarten. When the Petitioners finally made a written request for an IEP in December 2012, an intervening process was described, although there is no evidence it proceeded, and the evaluation process was not initiated until July 2013. The exception to the timelines for completing an initial evaluation of the Student does not apply in this case because the Petitioners never refused to produce the Student for an evaluation, and the Student was never enrolled in a school of another public agency. The time from the Petitioners’ referral, December 4, 2012, to the eligibility determination, August 13, 2013, was 253 days, more than twice as long as the District of Columbia deadline of 120 days.
6. Because the Respondent did not timely identify or evaluate the Student (whom the IEP team ultimately determined was eligible for special education and related services) it failed to timely develop an IEP during the 2012-2013 school year. April 3, 2013, was the deadline for completing the evaluation, from the date of the referral. The Respondent would then have had 30 days to develop an appropriate IEP for the Student, and failed to do so. Thus, the Student was denied a FAPE during, at least, the last several weeks of the 2012-2013 school

year, and probably longer given the failure to identify the Student for an initial evaluation previously.

7. IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Florence County School Dist. Four v. Carter By and Through Carter, 510 U.S. 7, 12 (1993) *citing* School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369 (1985). When considering the appropriateness of parental placement and reimbursement, IDEA's and State FAPE requirements do not apply. Rather, "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required[.]" when considering the equities in fashioning relief for a denial of FAPE. Carter at 16 (1993).
8. The denial of FAPE has been established for the 2013-2014 school year based on the motions made early in the process, which leads to the question of whether the Petitioners are entitled to reimbursement for their placement of the Student at the Attending School for the 2013-2014 school year. Additionally, the Petitioners seek reimbursement for the Student's attendance at the Attending School for the period of the 2012-2013 school year he attended there. The Petitioners have demonstrated conclusively that the Student has benefitted from his education at the Attending School with no evidence to the contrary. The Respondent's arguments that the Student has been taught by teachers who may not be licensed is tenuous, at best, given that a non-public school may be found to be appropriate "even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c). In fact, there is little evidence the Attending School does not meet standards, as

the parties agree it has obtained a COA from the OSSE. Furthermore, the Respondent's argument that the evaluation process is still ongoing because a central auditory processing assessment has not yet been reviewed is meritless. The IEP team, including the Respondent, determined the Student was eligible for special education and related services in August 2013. Any additional or subsequent assessments or reevaluations at this point are irrelevant. Given the Respondent failed to ever produce an IEP is an equitable consideration, as well as the basis for the denial of FAPE here, and warrants reimbursement for the 2013-2014 school year.

9. The 2012-2013 school year is another matter. During that year, the Petitioners removed the Student from the Public School at the end of January 2013, not quite two months from their referral on December 4, 2012, but long after the Respondent likely should have identified the Student. The Respondent had, under the light most favorable to it, until the first week of May 2013 to develop an IEP for the Student. There are at least four equitable factors that come into play to warrant full reimbursement in this case for the 2012-2013 school year. First, because the Student was struggling and the Respondent did not identify him as a possible child with a disability, the Petitioners were encouraged by Respondent's staff to hire other staff as tutors, for which the Petitioners paid as much as \$100 per hour, and have not sought reimbursement. Second, once the referral was made in December 2012 a process was described to the Petitioners involving an "SST team" that would make recommendations or decisions which does not reflect the requirements under law for an initial parental referral or evaluation, and nothing ever happened with the evaluation process until July 2013. It would not be fair to hold the parents to waiting the entire 120 day evaluation period before justifying their action of removing the Student when, nearly two months into the timeline,

during the heart of the school year, no action to evaluate the Student was being taken by the Respondent. Third, as mentioned previously, because no evaluation was underway, and not even begun until July 2013, no IEP was ever developed or offered to the Petitioners during the 2012-2013 school year. In fact, the Respondent specifically refused (and continues to refuse) to develop an IEP for the Student which the Petitioners could consider. Fourth, the Respondent unreasonably added to the time and cost of the litigation of this matter when it offered a witness it proposed as an “expert” who would offer an “expert opinion” about whether the Student could be served in a less restrictive environment than the Attending School (a position generating much argument, including concern by the Undersigned about relevance, since the parental placement need not meet State standards), and then offered no such proffered opinion. (In fact, the witness flatly refused to offer such an opinion when repeatedly asked by Respondent’s counsel.) These factors all weigh into the determination that the Respondent has behaved entirely unreasonably since at least the Petitioner’s request for an IEP in December 2012, and so remove any concerns of unfairness to the Respondent which would warrant any limitation of reimbursement. The Petitioners did what they could to work with the Respondent, and when that work was no longer paying off, they reasonably moved the Student to the Attending School. By virtue of its certificate of approval, which is not in dispute, the District of Columbia has determined the reasonable rates the Attending School may charge. Therefore, the Petitioners are entitled to reimbursement for their cost of the 2012-2013 (\$26,655.34) and 2013-2014 school years for the Student at Attending School, not to exceed the OSSE approved rates.

VII. DECISION

1. The Respondent failed to identify and evaluate the Student during the 2012-2013 school year.
2. The Respondent denied the Student a FAPE when it failed to propose or provide the Student an IEP during the 2012-2013 school year.
3. The Petitioners are entitled to reimbursement for the cost of the Attending School for the Student for the 2013-2014 school year as a result of the denial of FAPE for that year.

VIII. ORDER

The Respondent will reimburse the Petitioners for their cost of the Attending School for the 2012-2013 and 2013-2014 school years. The Respondent will reimburse the Petitioners \$26,655.34 for the 2012-2013 school year within 30 calendar days of this order. Reimbursement will be provided for the educational and related services costs to the Petitioner for the 2013-2014 school year within 30 calendar days of the Respondent's receipt of proof of payment (e.g. receipts or cancelled checks) by the Petitioners. If the Petitioners have not incurred expenses for the entire 2013-2014 school year they may submit proof of payment within 30 calendar days of the payments. The reimbursement for each school year shall not exceed the costs for services approved or set by the OSSE. The Respondent will notify the Petitioners of the individual and address to send the proof of payment within 10 calendar days of this Order.

IT IS SO ORDERED.

Date: November 27, 2013



Jim Mortenson, Esq.
Independent 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 USC §1415(i).