

On March 26, 2012, DCPS filed a late Response to the Complaint, which denied the allegations. DCPS further responded, *inter alia*, that “the parent failed to provide the required information necessary to complete the referral.” P8-3.

On April 10, 2012, a Prehearing Conference was held to discuss and clarify the issues; and a Prehearing Order was issued the same date. *See P12*.

On April 13, 2012, the parties filed their required five-day disclosures. On that same date, DCPS also filed a Motion to Dismiss, arguing that Petitioner failed to allege a claim upon which relief could be granted because she had refused to provide written consent for the initial evaluation of the Student, and thereby had waived any right to eligibility. Petitioner opposed the motion.

On April 19, 2012, the Hearing Officer issued an Order denying the motion, finding that the Complaint asserted a cognizable claim for relief within his jurisdiction or authority to resolve under the IDEA. The reasons for this ruling were stated in more detail on the record at the outset of the due process hearing.

The Due Process Hearing was held on April 23, 2012, in Hearing Room 2004. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P1 through P14.

Respondent’s Exhibits: DCPS 1 through DCPS 7.

In addition, the following Witnesses testified on behalf of each party:

Petitioner’s Witnesses: (1) Parent (Direct and Rebuttal); (2) Educational Advocate (“EA”); and (3) Private School Director.

Respondent’s Witnesses: Ms. Tuesday Brown, LEA Representative.

Following the testimony, the parties presented oral closing statements.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513,

and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* (“SOP”). The statutory deadline for issuance of the HOD is *May 22, 2012*.

III. ISSUES AND REQUESTED RELIEF

Pursuant to the *Prehearing Order*, the following single issue was presented for determination at the due process hearing:

120-Day Violation — Did DCPS deny the Student a FAPE³ by failing to evaluate the Student and determine eligibility within 120 days of the date he was referred for an evaluation or assessment by the parent’s August 2011 request, pursuant to D.C. Code § 38-2561.02?

Alternatively, by failing to do so, did DCPS thereby commit a procedural violation that: (i) impeded the Student’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 Student; and/or (iii) caused a deprivation of educational benefit, pursuant to 34 C.F.R. § 300.513 (a) (2)?

As relief, Petitioner requests that the Hearing Officer order DCPS to fund an independent comprehensive psychological evaluation of the Student. This is the only relief requested. At the PHC, Petitioner’s counsel withdrew all other items of requested relief set forth in the Complaint – *i.e.*, ordering an independent occupational therapy (“OT”) evaluation, convening an MDT meeting, and compensatory education. *See Prehearing Order* (April 10, 2012), ¶ 6; *P12-2*.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005).

³ Under the IDEA, FAPE means “special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...” 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

IV. FINDINGS OF FACT

Based upon the evidence presented at the Due Process Hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is an -year old student who is a resident of the District of Columbia. In November 2008, he was determined not to be eligible for special education and related services under the IDEA. *See P4 (11/20/2008 MDT meeting notes); Parent Test.*
2. The Student currently attends Private School, which is a non-public, special education school located in the District of Columbia. He began attending Private School around the beginning of the 2011-12 school year. *See Parent Test.; Private School Dir. Test.* Previously, the Student attended a different non-public school ("Former Private School") during the 2010-11 school year. *Id.*
3. Petitioner is the Student's mother. On or about August 11, 2011, she contacted DCPS through its "Early Stages Center"⁴ to request that the Student again be evaluated for special education eligibility due to concern that his behavior was affecting him academically and socially. *See Parent Test.; P5-10; DCPS 1.*
4. By the beginning of September, 2011, Petitioner had completed multi-page forms supplied to her by DCPS to document her request/referral and to provide other supporting information. *See P5; DCPS 1; Parent Test.* At that time, DCPS staff at Early Stages (specifically including Ms. Tuesday Brown, the LEA Representative) informed Petitioner that the information was sufficient for DCPS to start the evaluation process for the Student, as Petitioner credibly testified. *Parent Test.*
5. In connection with the referral, Petitioner informed DCPS that she had enrolled Student at Private School for the 2011-12 school year. *Parent Test.* As of 9/1/2011, additional information concerning the Student's educational history had been requested from Private School. *See DCPS 2, p. 000015.* Private School submitted certain information by mail shortly thereafter, on or about September 8, 2011. *See P6; Private School Dir. Test.*

⁴ The Early Stages Center, whose primary mission is to help identify developmental delays in children ages 3 through 5, is also the site designated to receive referrals of children suspected of having disabilities who attend private schools in the District of Columbia. DCPS' Private-Religious Office ("PRO") at this location is responsible for locating, identifying, and evaluating all parentally placed private school children in D.C. *See DCPS 3; LEA Test.*

6. Despite the referral, DCPS took no action to evaluate the Student between September 2011 and the filing of the due process complaint in March 2012. DCPS also did not follow up with Petitioner to obtain any additional information during this time period. *See Parent Test.; LEA Test.*
7. On March 21, 2012, DCPS convened a resolution meeting to review the allegations in the Complaint. *DCPS 4.* The DCPS Compliance Case Manager (“CCM”) informed Petitioner’s advocate at this meeting that the documentation submitted to the PRO was incomplete because it was missing information from Private School and that “once it is completed, PRO can begin the evaluation process.” *Id., p. DCPS-000048.* Petitioner’s advocate clarified that Petitioner was seeking independent educational evaluations (“IEE’s”) and would accept that remedy if it was proposed in a written settlement agreement (“SA”). The CCM stated that DCPS did not propose an SA, but that “DCPS is currently willing to provide the parent with an IEE authorization letter for the requested evaluations.” *Id., p. DCPS-000049; see also EA Test.* However, the meeting ended without any resolution.
8. On March 26, 2012, DCPS emailed Petitioner’s advocate stating that “DCPS is rescinding it’s [sic] previous offer to authorize independent evaluations.” *P10-1.* The email did not state a reason for this change in position.
9. On April 10, 2012, DCPS emailed to Petitioner’s counsel a Letter of Invitation (“LOI”) dated April 9, 2012, for an April 12, 2012 meeting to discuss the Student’s eligibility for special education services. *P13-3; P-14; DCPS 6.*⁵
10. On April 12, 2012, DCPS convened the meeting without Petitioner’s participation “to discuss eligibility for special education services” and “to discuss appropriate evaluation data to determine whether the student is eligible for special education services.” *DCPS 7, p. 1* (eligibility meeting notes). DCPS determined that the “team was unable to proceed with appropriate evaluation for the student due to the parent not being available to consent to evaluating the student.” *Id.* DCPS then issued a Prior Written Notice (“PWN”), which stated that it was “unable to move forward due to Parent not attending

⁵ In response to the Hearing Officer’s inquiry at the April 12, 2012, prehearing conference, DCPS’ counsel had indicated that DCPS was in the process of evaluating the Student and was not willing to authorize an independent evaluation at this time. *P12-1 – P12-2.*

meeting to sign consent to evaluate form.” *DCPS 7*, p. 2. The PWN further stated that: “Eligibility determination not made; No Assessments were ordered.” *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof under the specified Issue and grants the requested relief.

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

The statute does not define what it means to be “referred” for evaluation or assessment. However, OSSE regulations specify that a child with a suspected disability who may need special education “shall be ***referred, in writing***, to an IEP team.” 5-E DCMR §3004.1 (a) (emphasis added). OSSE regulations provide that a “referral ... shall state why it is thought that the child may have a disability,” and that it may be made ***by a parent***, a professional staff employee of the LEA, or a staff member of a public agency who has direct knowledge of the child. *Id.*, §3004.1 (b). In the case of a child who does not attend a D.C. public school, OSSE regulations further provide as follows:

“If the child to be referred does not attend a D.C. public school and the parent does not register the child to attend a D.C. public school at the time the referral is made, this referral shall be submitted by the parent to a site designated by the Superintendent ***on a form to be supplied to the parent by that site at the time of the parent’s request***.” *Id.*, §3004.1 (d) (emphasis added).

In this case, Petitioner has proved by a preponderance of the evidence that the Student was “referred” for an initial evaluation for special education eligibility within the meaning of

D.C. Code §38-2561.02 (a) by at least September 1, 2011, and possibly as early as August 11, 2011. Petitioner requested that the Student be evaluated for special education eligibility in mid-August 2011 and submitted forms to the PRO shortly thereafter. It is undisputed that the Student does not attend a D.C. public school and was not registered to attend such school at the time of the referral, and that Early Stages Center is the site designated by OSSE to receive referrals for such students. Thus, pursuant to 5-E DCMR §3004.1(d), whatever form was needed to complete and/or process the referral should have been supplied to Petitioner by DCPS/Early Stages at the time of Petitioner's request.

Instead, DCPS waited more than *seven months* to schedule an eligibility meeting on *two days notice* to Petitioner – over a month after a due process complaint was filed, and on the eve of five-day disclosures in the case. Then, at that meeting, DCPS decided that it was unable to proceed with the Student's evaluation “due to the parent not being available to consent to evaluating the student.” *DCPS 7* (4/12/2012 eligibility meeting notes & Prior Written Notice). *See also id.* at p. 3 (PWN: “Unable to move forward due to Parent not attending meeting *to sign consent to evaluate form*....Eligibility determination not made; *No Assessments were ordered.*”) (emphasis added). Moreover, the evidence shows that DCPS took such action despite not having previously informed Petitioner that it needed an additional written consent form beyond the other signed referral documents obtained by the PRO, either on 9/1/2012 or any other prior occasion. DCPS cannot so easily evade its initial evaluation responsibilities.⁶

The Hearing Officer concludes that the statutory 120-day timeline began to run no later than September 1, 2011, and expired on or about January 1, 2012. By failing to take any steps to evaluate the Student and determine eligibility by January 1, 2012, DCPS violated the above requirements of D.C. Code §38-2561.02 (a) and the IDEA.⁷

⁶ DCPS argued in its motion to dismiss and at hearing that Petitioner waived any right to eligibility by refusing to provide consent for the initial evaluation in April 2012, citing Parent counsel's 4/11/2012 email stating that Petitioner “will not consent to DCPS evaluating her child now, more than 200 days after she first submitted her request.” *P14; DCPS 5*. The email correctly points out, however, that “any meeting to determine what evaluations might be necessary for this student should have been held in September 2011, not April 2012.” *Id.* By that time, DCPS was already several months beyond the statutory 120-day timeframe from referral, and the parties were proceeding to a hearing on Petitioner's request for an independent evaluation. Parent counsel's statements must be read in this context, as a response to DCPS' post-filing procedural maneuvers during the pendency of litigation. The Hearing Officer declines to find any waiver in such circumstances.

⁷ DCPS' LEA Representative conceded in her testimony that the applicable time period is the same whether an evaluation would lead to an individualized education program (“IEP”) or to an individualized services plan (“ISP”) designed to ensure equitable participation of parentally-placed private school children. *See LEA Test.* (response to HO question).

An LEA's failure to conclude the initial evaluation process within 120 days is generally viewed as a procedural violation, however, and such procedural violation is only actionable if it affects the Student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006); *Kruvant v. District of Columbia*, 99 Fed. Appx. 232 (failure to show harm resulting from error under 120-day requirement). "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 FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 34 C.F.R. §300.513 (a) (2).

In this case, the Hearing Officer concludes that Petitioner has presented sufficient evidence to show that DCPS' procedural violation has significantly impeded her opportunity to participate in the decision-making process regarding the provision of FAPE to the Student. Regardless of the benefits being received by the Student at Private School, Petitioner testified that her ultimate goal is to obtain an IEP and placement for the Student that will accommodate his needs within the DCPS school system. *Parent Test.* DCPS' failure to assess the Student for IDEA eligibility within 120 days of Petitioner's request has effectively frustrated that objective by preventing her from participating in the evaluation and eligibility process for her child in a timely fashion.

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Since DCPS has ordered no assessments and has decided not to proceed with the evaluation of the Student (*see DCPS 7*), the Hearing Officer further concludes that the relief Petitioner requests – *i.e.*, to fund an independent comprehensive psychological evaluation of the Student – would be appropriate and equitable in this case.

VI. ORDER

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

1. Petitioner shall be, and hereby is, immediately authorized to obtain an **independent comprehensive psychological evaluation (including clinical, cognitive, and educational components)**, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). Petitioner is directed to obtain this independent evaluation within no more than **60 calendar days** of this Order. Upon completion of the independent evaluation, Petitioner shall promptly cause a copy of the evaluation report to be sent to DCPS.
2. Within **20 calendar days** of receiving the completed report of independent evaluation specified in Paragraph 1 above, DCPS shall convene a meeting of the Student's MDT/IEP Team to review the report and any other evaluative data, and to determine the Student's eligibility for special education and related services. DCPS shall issue a Prior Written Notice regarding its eligibility determination within **10 calendar days** thereafter.
3. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.
4. With the grant of the foregoing relief, this case shall be **CLOSED**.

IT IS SO ORDERED.

Dated: May 18, 2012



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).