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Office of Compliance & Review
State Enforcement & Investigation Division
STUDENT HEARING OFFICE
Van Ness Elementary School
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Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

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STUDENT HEARING OFFICE
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<u>In Re the Matter of:</u>)	
)	CASE NO.
Parent on behalf of Student *)	
)	
Petitioner,)	Complaint Date: 07/14/09
)	Hearing Date: 08/24/09
vs.)	
)	Hearing Site:
The District of Columbia Public Schools)	Van Ness Elementary School
)	1150 5 th Street, S.E., 1 st Floor
<u>Respondent.</u>)	Washington, D.C. 20003

HEARING OFFICER DETERMINATION

Petitioner's Attorney:

Zachary Nahass, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney:

Nia Fripp, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

INTRODUCTION

On 07/14/09, an Administrative Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA when DCPS failed to conduct an independent evaluation at the request of Petitioner.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE DUE PROCESS HEARING

The due process hearing convened and concluded on 08/24/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Zachary Nahass, Esq. ("Petitioner's Attorney") and DCPS was represented by Nia Fripp, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing by telephone.

DCPS declined participation in settlement discussions immediately prior to the commencement of the due process hearing.

Disclosures:

Petitioner's Five-Day Disclosure letter dated 08/17/09 contained Petitioner's Exhibits #1-8. Petitioner's Exhibits #1-8 were admitted into evidence without objection.

DCPS' Disclosure Statement dated 08/17/09 contained DCPS' Exhibits #1-6. DCPS' Exhibits #1-6 were admitted into evidence without objection.

Witnesses:

Witnesses for Petitioner consisted of the Petitioner.

Witnesses for DCPS consisted of _____ the Special Education Coordinator ("SEC") at _____ School.

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Issue Presented in the Complaint:

Issue #1 – Whether DCPS failed to conduct an independent evaluation at the request of Petitioner, thereby denying Student a FAPE?

Relief Requested by Petitioner

- (1) A finding of a denial of a FAPE on Issue #1; and
- (2) DCPS to fund an independent OT evaluation of Student, at market rate; and
- (3) Within 10 days of DCPS' receipt of the independent occupational therapy ("OT") evaluation, DCPS to convene a Multidisciplinary Team ("MDT") meeting to review all current evaluations, and review and revise Student's Individualized Education Program ("IEP") as appropriate.

FINDINGS OF FACT

#1. On 02/27/09, Petitioner participated in a MDT meeting at School. The IEP developed on that date gave Student a disability classification of Specific Learning Disability, and the IEP prescribed 5 hours/week of specialized instruction in the general education setting, 10 hours/week of specialized instruction outside the general education setting, and 60 minutes/week of occupational therapy outside the general education setting; with all services beginning on 02/27/09 and ending on 02/26/10. (*Petitioner's Exhibit #2, IEP dated 02/27/09*).

#2. The 02/27/09 IEP indicated that the reason for OT services was that Student demonstrated weak visual motor skills that impacted handwriting skills at grade level performance and the production of written assignments within requested timeframes. The 02/27/09 IEP contained the following goals:

Annual Goal: Student will improve visual motor and visual perception skills to improve academic performance.

Baseline Goal: Student can copy dictation near point, far point (note taking), overhead and next to proximity.

Short Term Objectives: (1) Student being able to complete written class assignments within time frames designated by the teacher, and (2) Student being able to write multi-paragraphs (at least 4 sentences) with attention to legible details, spacing and mechanics. (*Petitioner's Exhibit #2, IEP dated 02/27/09*).

#3. Petitioner specifically indicated in writing on the front page of the 02/27/09 IEP that Petitioner disagreed with the OT goals. (*Petitioner's Exhibit #2, IEP dated 02/27/09*). On the MDT Meeting Notes dated 02/27/09, Petitioner indicated in writing that Petitioner disagreed with the OT goals because the goals were limited to the academic environment; that outside testing would be requested; and that Petitioner would contact Petitioner's Attorney. (*Petitioner's Exhibit #3, MDT Meeting Notes dated 02/27/09*).

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#4. On 03/16/09, Petitioner, through Petitioner's Attorney, sent a letter to DCPS expressing disagreement with the OT evaluation completed by DCPS and requesting that a letter of funding for an independent OT evaluation pursuant to 34 C.F.R. 300.502 be sent to Petitioner's Attorney. (*Petitioner's Exhibit #7, correspondence from James E. Brown & Associates, PLLC dated 03/16/09*).

#5. On 03/20/09, Petitioner attended a MDT meeting at _____ School at which time two previous occupational evaluations conducted by DCPS, dated 03/10/08 and March 2009, were reviewed. Both DCPS evaluations indicated that Student's gross motor skills were without limitations, and the MDT concluded that on the basis of both reports, Student did not qualify for OT services. At the MDT meeting, Petitioner expressed concerns about the awkwardness of Student's pencil grasp and the legibility of Student's handwriting when Student was writing fast. DCPS countered by saying that if Student had difficulty with pencil grasp, it did not impact Student's ability to write at school and then produced samples of Student's handwriting as proof of DCPS' position that Student no longer needed OT services. Petitioner expressed disagreement with the results of the evaluations and disagreement with the discontinuation of OT services, and indicated to the MDT on 03/20/09 that Petitioner's Attorney had requested an independent OT evaluation. (*DCPS' Exhibit #4, MDT notes dated 03/20/09*).

#6. Subsequent to the 02/27/09 MDT meeting, but prior to the 03/20/09 MDT meeting, the SEC at _____ School sought and received funding approval from DCPS central administration for an independent OT evaluation. (*Testimony of Joyce Brooks Kelley*). At the MDT meeting on 03/20/09, a DCPS member of the MDT provided Petitioner with a consent form authorizing an independent OT evaluation at public expense along with a list of independent evaluators. (*DCPS' Exhibit #4, MDT notes dated 03/20/09; Testimony of Joyce Brooks Kelley*). The consent form was not dated and was not signed by any DCPS official authorized to approve funding. (*DCPS' Exhibit #5, Letter of Authorization from DCPS for an independent OT evaluation*).

#7. On 07/14/09, Petitioner filed a due process complaint alleging that DCPS failed to ensure the provision of an independent OT evaluation at public expense, following Petitioner's request. (*Petitioner's Exhibit #1, Administrative Due Process Complaint Notice filed 07/14/09*).

#8. On 07/21/09, DCPS provided Petitioner's Attorney with a letter authorizing funding for an independent OT evaluation at the expense of DCPS. The authorization letter was signed by the Deputy Chancellor of Special Education and dated 07/21/09. (*Petitioner's Exhibit #8, DCPS letter dated 07/21/09*).

#9. In July 2009, Student was evaluated by an independent OT evaluator at Student's school. (*Testimony of Petitioner*).

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DISCUSSION AND CONCLUSIONS OF LAW

“The burden of proof in an administrative hearing...is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 44 IDELR 150 (2005). “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. 3030.3

Issue #1 – Whether DCPS failed to conduct an independent evaluation at the request of Petitioner, thereby denying Student a FAPE? Petitioner alleges that Student, age 14, receives specialized instruction and related services as a student with a Specific Learning Disability; that DCPS completed an OT evaluation on 03/10/08 that was reviewed at a 02/27/09 MDT meeting; that at the 02/27/09 MDT meeting, Petitioner disagreed with the results of the OT evaluation conducted by DCPS and requested authorization from DCPS to obtain an independent evaluation at public expense; that on 03/16/09, Petitioner reiterated the request for an independent evaluation at public expense; and that DCPS took no action on Petitioner’s request.

Pursuant to 34 C.F.R. 300.502(b)(1), (b)(2), “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense...”

On 02/27/09, the MDT developed an IEP for Student that prescribed 60 minutes/week of OT services outside of the general education setting, with a beginning date of 02/27/09 and an ending date of 02/26/10. (*Finding of Fact #1*). There was no evidence in the record that OT services were not provided in accordance with the IEP from 02/27/09 forwards.

At the MDT meeting on 02/27/09, Petitioner expressed disagreement, both verbally and in writing (*Finding of Fact #3*), with the OT goals contained in the 02/27/09 IEP (*Finding of Fact #2*) because the goals were limited to the academic environment. (*Finding of Fact #3*). Subsequently, on 03/16/09, Petitioner’s Attorney sent a formal letter to DCPS indicating that Petitioner disagreed with the OT evaluation conducted by DCPS, and requesting funding for an independent OT evaluation. (*Finding of Fact #4*). Therefore, pursuant to the statute, Petitioner met its burden of proof in showing (1) that Petitioner disagreed with the results of an OT evaluation conducted by DCPS, and even why Petitioner disagreed; and (2) that Petitioner requested an independent educational evaluation.

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Now, DCPS must show that it either filed a due process complaint to show that the DCPS evaluation was appropriate, or ensured that an independent evaluation was provided at public expense without unnecessary delay.

The evidence in the record is that on 03/20/09, DCPS gave a consent form to Petitioner that authorized funding for an independent OT evaluation along with a list of independent evaluators. However, the consent form was not dated or signed by an official who could authorize funding (*Finding of Fact #6*), and the Hearing Officer concludes that the document was therefore insufficient on its face to *ensure* that Petitioner could secure an independent evaluation at public expense. The SEC at School testified that she was unsure whether or not the unsigned and undated consent form was a valid authorization as it was the first time she had requested such a document from the DCPS central administration. There was no other evidence in the record regarding the legal validity of the unsigned and undated consent form.

After a due process complaint was filed on 07/14/09 (*Finding of Fact #7*), DCPS followed up on the outstanding issue of funding authorization by providing Petitioner's Attorney with a letter signed by an authorizing official and dated 07/21/09, that authorized funding for an independent OT evaluation. (*Finding of Fact #8*). The action that DCPS took on 07/21/09, i.e., issuing Petitioner's Attorney a properly executed authorization letter, resulted in Student being evaluated by an independent OT evaluator in July 2009. (*Finding of Fact #9*).

In this case, DCPS took 4 months to *ensure* that Student received an independent OT evaluation, and the Hearing Officer concludes that this length of time constitutes an unnecessary delay, in violation of IDEIA. In the case of *Pajaro Valley Unified School District v. J.S., et al.*, 47 IDELR 12 (2006), where the school system took 3 months to take action on a request for an independent educational evaluation, the court held that the school system did not explain why it took almost three months from the time Student first requested an independent educational assessment at public expense for the school system to file its due process complaint, much less why that delay was somehow "necessary," and thus the school system failed to file its due process complaint without "unnecessary delay." In *Pajaro*, Student was denied a FAPE because the delay was a procedural violation that impacted the parent's right to significantly participate in the development of an IEP.

Pursuant to 34 C.F.R. 300.34, OT services qualify as related services. Pursuant to 34 C.F.R. 300.39(a)(1), "special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home..." And, pursuant to 34 C.F.R. 300.39(a)(1)(3), "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." Finally, "free appropriate public education or FAPE means special education and related services that are provided at public expense...and include an appropriate preschool, elementary

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school, or secondary school education in the State involved...and are provided in conformity with an IEP.” 34 C.F.R. 300.17.

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).

In this case, Petitioner was challenging the contents and the appropriateness of the IEP that was developed on 02/27/09 with respect to OT services. Petitioner was dissatisfied with the content of the OT evaluations conducted by DCPS that were used as a basis to develop the IEP, initially because the OT services were limited to the academic environment and additionally because the OT evaluations conducted by DCPS recommended discontinuation of OT services. Petitioner had a right under IDEIA to secure an independent OT evaluation after properly disagreeing with an existing public agency evaluation and requesting an independent evaluation, and Petitioner properly did so in accordance with the statute, both verbally and in writing. DCPS’ first effort to provide Petitioner with the means to secure an independent OT evaluation occurred on 03/20/09 when Petitioner was given a consent form by DCPS. Although the consent form was provided without unnecessary delay, the consent form was insufficient on its face due to the lack of an authorizing signature and date. 4 months later, after a due process complaint was filed, DCPS provided Petitioner with a properly executed authorization for an independent OT evaluation, and it was the funding authorization letter dated 07/21/09 that resulted in Student being evaluated by an independent OT evaluator.

For 4 months, Petitioner’s right to participate in the decision making process regarding the development of Student’s IEP with respect to what Petitioner thought were inappropriate OT goals for Student, was significantly impeded because DCPS did not provide Petitioner with a means of securing an independent OT evaluation. The Hearing Officer concludes that 4 months constitutes an unnecessary delay that resulted in the denial of a FAPE for Student.

Petitioner met its burden of proof on Issue #1.

ORDER

WHEREFORE, it is

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ORDERED that

- (1) Within 15 business days of DCPS' receipt of the independent OT evaluation, DCPS shall convene a MDT meeting to review all current evaluations, and review and revise Student's IEP as appropriate; and
- (2) All meetings scheduled pursuant to this Order shall be scheduled through Petitioner's Attorney; and
- (3) Any delay caused by Petitioner or any representative of Petitioner shall result in a day for day extension of time for DCPS to meet any deadline specified in this Order.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/
Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

08/30/09
Date

Issued: August 30, 2009