

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

2011 NOV -1 PM 4: 31
STUDENT HEARINGS OFFICE
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Parent ¹ , on behalf of Student,)	
)	
Petitioner,)	
)	Hearing Officer: James McKeever
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS)	Hearing Date: October 24 ,2011
)	
Respondent.		

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a year-old boy with a disability who resides in the District of Columbia and currently attends a middle school in the District of Columbia. The Student is eligible for special education and related services as a student with a disability under the IDEA.

On August 19, 2011 Petitioner filed the within Due Process Complaint ("DPC") against DCPS alleging that DCPS failed to offer the Student a free and appropriate public education (FAPE) during the 2010-2011 school year by failing to timely conduct a Comprehensive Psychological Evaluation of the Student as per the parent's request dated April 18, 2011². Petitioner also

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

² Petitioner filed a DPC for this Student regarding the same issue and sought the same relief on June 6, 2011, under case number 2011-0854. The case was withdrawn on July

alleged a denial of FAPE based on DCPS' failure to reconvene an IEP meeting after the requested evaluation was completed.

On September 7, 2011, DCPS filed its response. DCPS asserted a general denial to the allegations contained in the DPC and advised that the Comprehensive Psychological Evaluation was conducted on July 7, 2011.

A resolution session was held on September 2, 2011. The parties were unable to resolve the complaint and agreed to proceed to a due process hearing.

A Prehearing Conference (PHC) was held on September 26, 2011. Counsel for the Petitioner and counsel for Respondent participated. During the PHC the parties discussed the issues and the requested relief. DCPS' counsel requested that the DPC be dismissed since the Comprehensive Psychological Evaluation was conducted³. Petitioner's counsel advised that he did not receive a copy of the evaluation until after the DPC was filed, however, upon review, it appeared that the evaluation was not complete (for several reasons which are discussed below). As such, Petitioner continued to assert that, for all intents and purposes, the evaluation was not conducted and was therefore still untimely. DCPS' counsel also advised that an IEP meeting was held on September 21, 2011 and that the IEP meeting was not held sooner because the Student had changed schools from the previous school year.

It was agreed that the Due Process Hearing (DPH) would be held on October 24, 2011 and that the five-day disclosures would be filed by October 17, 2011.

The Five-day disclosures were filed as directed on October 17, 2011⁴ and the DPH was held on October 24, 2011. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-30⁵ were admitted into evidence. Respondent's Exhibits 1-9 were also admitted into evidence.

18, 2011. Since the filing of this complaint, Petitioner, through counsel, filed another DPC on September 27, 2011, requesting private placement under case no. 2011-0969.

³ DCPS did not file a written motion to dismiss.

⁴ Respondent's disclosures were filed at 5:58 pm instead of 5:00pm on 10/17/11. Petitioner objected to Respondent's disclosures because they were filed 58 minutes late. The objection was overruled because Respondent's counsel advised that she was in a impartial hearing until 5 pm on October 17, 2011 and could not send the disclosures sooner and because there was no prejudice to the Petitioner.

⁵ A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

The following witnesses testified on behalf of the Petitioner: Parent, Clinical Psychologist, Advocate and School Psychologist (DCPS)⁶.

The following witnesses testified on behalf of the Respondent: DCPS Psychologist.

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513. The HOD deadline is November 2, 2011.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

a. Whether DCPS denied the Student a free and appropriate public education by failing to timely conduct a comprehensive psychological evaluation of the Student, after the parent requested the evaluation on April 18, 2011.

b. Whether DCPS denied the Student a free and appropriate public education by failing to convene an MDT meeting to revise the Student's IEP, as needed, after completing the requested comprehensive psychological evaluation.

Petitioner requests funding for an independent psychological evaluation and an independent occupational therapy evaluation⁷. Petitioner also requested compensatory education in the form of independent tutoring.⁸

⁶ A "Notice to Appear" was issued for the DCPS School Psychologist to testify on Petitioner's direct case.

⁷ An IEE was issued for the OT Evaluation prior to the hearing.

⁸ Petitioner failed to introduced any evidence regarding her request for compensatory education services.

IV. FINDINGS OF FACT

The Student is a -year-old boy who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child classified with Multiple Disabilities (Exhibit P-4-IEP dated 1/20/11). The Student presently attends the grade at a middle school in the District of Columbia. During the 2010-2011 school year, the Student attended the 4th grade at a different DCPS school.

On or about May 29, 2009, the Student underwent an Independent Psychological Evaluation (IPE) (Exhibit P-5). The IPE included various academic and cognitive testing as well as several assessments with respect to the Student's social/emotional functioning. The social/emotional testing included the following: The Behavior Assessment System for Children, Second Edition (BASC-2)-Teacher Rating scale; the BASC-2 Self-Report-Child; the BASC-2 Teacher Rating Scale (Second teacher); Children's Apperception Test (CAT); The Rorschach Inkblot Test; and Kinetic Family Drawing. The IPE also noted that the Student had been evaluated on multiple occasions over the past several years and that he was "most recently evaluated" by a clinical psychologist in March and April of 2009 (Exhibit P-6 page 5). At that time, the Student underwent a full battery of academic and cognitive testing as well as a BASC-2 (Exhibit P-6 page 9).

On or about January 20, 2011, DCPS developed an IEP for the Student. The IEP provided for 30 hours per week of specialized instruction outside the general education setting, 90 minutes per week of behavioral support outside the general education setting and 60 minutes per week of speech and language therapy outside the general education setting (Exhibit P-4 IEP dated January 20, 2011).

On or about February 12, 2011, Petitioner filed a DPC (Case No.) challenging the January 2011 IEP and the Student's placement, *inter alia*. The issues raised in that complaint were the following:

1. Whether the January 2011 IEP and proposed placement were appropriate;
2. Whether the Functional Behavior Assessment (FBA) and the Behavior Intervention Plan (BIP) developed by DCPS were appropriate; and
3. Whether DCPS failed to timely provide an occupational therapy evaluation and a Woodcock Johnson III assessment.

For relief, Petitioner requested that DCPS be directed to fund a private placement. (Exhibit P-3 pages 1-4)

The impartial hearing for this case
2011.

was held on April 13,

On or about April 18, 2011, (3 days after the hearing in the above matter) Petitioner, through counsel, requested that DCPS conduct another comprehensive psychological evaluation of the Student. The request was made, *via* facsimile, to the Principal at the Student's school during 2010-2011 school year (Exhibit P-12). The consent form was dated November 24, 2010⁹. DCPS rejected the consent form because it was dated from 2010 and because it appeared that this date on the consent form had been altered (written over with another date) (Exhibit P-13). DCPS also rejected the form because it did not conform with DCPS' "parental consent form."

On or about April 30, 2011, the HOD under case no 2011-0148 was issued with respect to Petitioner's challenge to the IEP dated January 20, 2011 and the other issues referenced above. In his decision, the Hearing Officer (HO) determined that the January 2011 IEP and the Student's placement were appropriate. The HO also found that the Student had made significant progress with his social/emotional issues since the January 2011 IEP and that the Student had made academic progress under this IEP (Exhibit P-3 page 7 and 8). The HO also noted that the FBA, which was conducted for the Student on January 11, 2011, was appropriate, and that the Behavior Intervention Plan, which was created on January 20, 2011, was also appropriate.

With respect to Petitioner's request for an OT evaluation and a WJ-III assessment, the HO found that the consent form provided by the Petitioner was "stale" because it was dated from 2009. As such, DCPS was not required to conduct the additional evaluations requested by the Petitioner (Exhibit P-3 page 11).

On or about May 16, 2011, Petitioner provided appropriate written consent for the evaluation requested in the case before this HO. At the hearing, Petitioner testified that she did not recall providing consent for the evaluation prior to May 2011 (Petitioner's testimony).

DCPS attempted to conduct the psychological evaluation, on May 17th, May 25th and June 15th, 2011, however, the Student was either absent from school or refused to comply (Exhibit R-5).

The Student was assessed on June 17th and June 29th, 2011 and the report was issued on July 7, 2011. The psychological report indicated that

⁹ Coincidentally, the consent form at issue in this case is the same date as Petitioner's request, made through counsel, for the evaluations at issue in case no.:

BASC -2 was not complete because the parent and the Student's teacher failed to return the BASC-2 questionnaire to the evaluator (testimony of School Psychologist). The report also failed to include any updated information about the Student's background and the Student's medical history since the Student was assessed in 2009 (testimony of Petitioner's Clinical Psychologist). The School Psychologist testified that he could not add any new information under these sections on the report because the parent did not attend the evaluation and because the parent refused to return his telephone calls made to her after the evaluation (testimony of School Psychologist). The report also failed to include a "broad reading" score on the W-J III assessment (Testimony of Petitioner's Clinical Psychologist). The report does indicate, however, that "Reading Fluency," "Letter -Word Identification" and "Spelling" was assessed (Exhibit P-5). The report also failed to include a "classroom observation," however, the School Psychologist testified that by the time the Student was available for the evaluation, school was no longer in session.

On or about September 21, 2011, the MDT convened an IEP meeting to review the psychological report prepared by the School Psychologist. During the meeting, DCPS requested to complete the BASC-2 and amend the psychological report. The parent's advocate requested an Independent Education Evaluation (IEE) for another comprehensive psychological evaluation. The parent was not present at the IEP meeting. (testimony of Parent Advocate).

V. SUMMARY

The Hearing Officer concludes that Petitioner has not met her burden of proving that DCPS denied the Student a FAPE by failing to timely conduct the requested psychological evaluation.

The Hearing Officer also concludes that Petitioner has not met her burden of proving that DCPS denied the Student a FAPE by failing to reconvene an IEP meeting after the evaluation was conducted.

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see Schaffer v. Weast, 546 U.S. 49 (2005).

VI. ANALYSIS AND CONCLUSIONS OF LAW

Reevaluation:

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the

handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

A child is evaluated under section 1414 of the IDEA to determine whether he is a child with a disability and to determine his educational needs. 20 U.S.C. § 1414(a)(1)(B). The educational authorities are directed to "ensure that a reevaluation of each child with a disability is conducted ... if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years[.]" *Id.* at § 1414(a)(2)(A). Before a reevaluation may be conducted, the parent must provide consent for the evaluation. 34 C.F.R. 300.300. The IDEA and the implementing regulations are silent about the time frame within which an agency must conduct the reevaluation requested by a parent. In the District of Columbia, a reevaluation should be conducted within a "reasonable period of time" or "without undue delay." Herbin ex rel. Herbin v. District of Columbia, 362 F. Supp. 2d 254, 259 (D.D.C.2005).

Here, the record shows that Petitioner made the request for the reevaluation, through counsel, on April 18, 2011. However, an appropriate consent form for the reevaluation was not provided to DCPS until May 16, 2011 (Petitioner's testimony). Thereafter, DCPS attempted to conduct the evaluation on May 17th, May 25th and June 15th, 2011, which I find to be a very reasonable amount of time in which to respond to the Petitioner's request. Unfortunately, the Student was either absent from school or refused to comply (Exhibit R-5). Nevertheless, DCPS was able to assess the Student on June 17th and June 29th, 2011 and the evaluation report was issued on July 7, 2011. Although this would appear to end the inquiry as to whether DCPS timely evaluated the Student because an evaluation had actually taken place, it is undisputed that the evaluation did not contain a BASC-2 assessment, a "broad reading score" under the W-J III test of achievement or a classroom observation. Additionally, the information in the "background" and "medical history" sections of the evaluation were not updated by the evaluator. For the following reasons, however, I find that these deficiencies do not rise to the level of a denial of FAPE.

First: the BASC-2 in this case was not completed, in part, because the Petitioner failed to return the parent questionnaire form for this assessment (unrebutted testimony of School Psychologist). Although it was not explained at the hearing as to why the Student's teacher also failed to respond to the

questionnaire, the record shows that at the time the Student was assessed by the School Psychologist, the Student was not in school (School Psychologist). Additionally, the record shows that the Student has been evaluated multiple times, in all domains, during the last few years (Exhibit P-6). Specifically, the record shows that a BASC-2 was completed by a psychologist in April 2009 and then again by a different psychologist in May, 2009. While it is understood that these assessment were conducted more than two years ago, the record shows that in the interim, DCPS conducted an FBA and developed a BIP for the Student in January 2011. Significantly, both the Student's FBA and the BIP were deemed appropriate by the HO in case no. 2011-0148 as of April 2011. (Exhibit P-3). Additionally, it was also determined that the Student's behavior had improved significantly since January 2011 (Exhibit P-5). Further, the stated reason for the evaluation at issue (April 18, 2011), which was made through Petitioner's counsel, was that Petitioner believed that the Student was having "ongoing academic difficulties." (Exhibit P-12 page 1). However, the HOD issued on April 30, 2011 found that the Student had made progress academically and that the IEP dated January 20, 2011 (for the current school year)was appropriate. Accordingly, for the foregoing reasons, I find that the absence of a completed BASC-2 did not invalidate the evaluation at issue.

With respect to the absence of a "broad reading score" under the W-J III test of achievement, I find that this, too, did not invalidate the evaluation conducted by DCPS. As indicated above, the evaluation indicated that "Reading Fluency," "Letter -Word Identification" and "Spelling" skills were assessed by the School Psychologist (Exhibit P-5). Moreover, the Student's current IEP (January 20, 2011) was deemed appropriate and it was determined that the Student was making academic progress under this IEP (Exhibit HOD). As such, I find that the absence of a "broad reading score" on the Woodcock Johnson III was insignificant.

With respect to the absence of a classroom observation, the School Psychologist testified that he could not conduct a classroom observation of the Student because the school year had ended. Although the Student's IEP indicated that the Student was eligible for "Extended Year Services" (ESY), and therefore, according to Petitioner, DCPS should have had an opportunity to conduct the classroom observation during the Student's summer program, Petitioner failed to show when the Student's ESY services were initiated.

Finally, with respect to the outdated information contained in the "background" and "medical history" sections of the evaluation, it is clear that this information could not be updated because Petitioner failed to provide it to the evaluator. Moreover, Petitioner failed to show that the information

contained in these sections had changed in any way since the last evaluation was conducted in May 2009.

Finally, based on the totality of the circumstances in this case, I find that the deficiencies raised with respect to the challenged evaluation were inconsequential because it appears that DCPS is well aware of the Student's needs and that they have been addressed by an appropriate IEP and placement (Exhibit P-3 HOD). I also find that Petitioner, who is represented by counsel, could have addressed these issues by simply responding to DCPS' attempts to contact her.

In conclusion, for the foregoing reasons, I find that Petitioner has not met her burden of demonstrating a denial of FAPE based on DCPS' failure to conduct a timely evaluation.

IEP Meeting:

It is undisputed that an IEP meeting was held on September 2, 2011. The meeting minutes indicate that the IEP was held to review the evaluation at issue. Petitioner failed to offer any evidence to the contrary and failed to address this issue in her post hearing brief. As such, I find that the Petitioner has not met her burden of demonstrating a denial of FAPE with respect to this issue.

Compensatory Education:

As I have not found a denial of FAPE, Petitioner is not entitled to compensatory educational services Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005). Additionally, Petitioner failed to present any evidence with respect to this issue at the impartial hearing.

OT Evaluation:

An IEE for an OT evaluation was issued after the filing of the DPC and prior to the impartial hearing. As such, this was not an issue at the impartial hearing and Petitioner did not present any evidence regarding same.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 1st day of November, 2011, it is hereby

ORDERED that, Petitioner's Due Process Complaint dated August 19, 2011, is dismissed in its entirety, with prejudice.

Dated November 1, 2011

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).