

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
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STUDENT HEARING OFFICE
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Confidential

STUDENT, through the legal guardian¹)
)
Petitioner,)
) Complaint Filed: June 26, 2009
v.)
)
THE DISTRICT OF COLUMBIA) Hearing Date: None held
PUBLIC SCHOOLS)
)
Respondent.)
)

ORDER

Counsel for the Petitioner: Roberta Gambale, Attorney at Law
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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. BACKGROUND

Petitioner is the parent of a [REDACTED]-old student ("Student") who attends a District of Columbia Public Schools ("DCPS") elementary school. Both Petitioner and the Student reside in the District of Columbia.

On June 26, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") alleging that, in May 2008, the Student had an epileptic seizure at school. Petitioner alleges that the Student continued to experience seizures that the Student was diagnosed with seizure disorder by a neurologist at Howard University Hospital. Petitioner alleges that the neurologist sent DCPS a letter advising of the Student's seizure disorder and cognitive difficulties and delays. Petitioner alleges that the Student is unable to participate in physical education due to his tendency to fall down, is unable to tie his shoes, has difficulty grasping a pencil, and cannot write legibly. Petitioner alleges that the Student has difficulty understanding oral directions and has significant problems with memory and retention.

Petitioner alleges that, on or about January 2009, DCPS conducted a psychological evaluation of the Student that was not comprehensive and contained inconsistent information. Petitioner alleges that DCPS conducted no further evaluations of the Student. Petitioner alleges that, on or about March 30, 2009, DCPS convened a meeting of the multidisciplinary team ("MDT"), but failed to include the Student's classroom teacher in the meeting, and determined that the Student was not eligible for special education and related services. Petitioner further alleges that the classroom teacher had expressed to Petitioner that she believed the Student required special education and related services. Petitioner alleges that the Student failed to make appropriate educational progress as a result of his cognitive delays.

Petitioner alleges that, on or about February 25, 2009, DCPS conducted a Woodcock-Johnson III evaluation of the Student's cognitive abilities and found that the Student was performing below a kindergarten level in oral language, oral expression, listening comprehension, writing fluency, and oral comprehension. Petitioner alleges that the evaluation revealed that the Student is performing at a kindergarten level in total achievement, broad math, broad reading, spelling, and academic fluency.

Petitioner alleges that DCPS failed to (1) identify the Student as eligible for special education and related services with a traumatic brain injury and/or other health

impairment; (2) convene an appropriate MDT team meeting in that the Student's teacher did not participate; (3) develop an individualized educational program ("IEP") for the Student; and (4) comprehensively evaluate the Student. Petitioner requested relief in the form of an order requiring DCPS to (1) identify the Student as eligible for special education and related services; (2) fund independent neuropsychological, speech and language, social history, occupational therapy, and physical therapy evaluations; (3) develop an IEP for the Student; and (4) convene an MDT meeting to review the Student's evaluations, revise the Student's IEP, discuss compensatory education, and discuss and determine an educational placement for the Student.

On July 20, 2009, counsel for DCPS filed a Response to Petitioner's Due Process Complaint ("Response"). The Response was due on July 6, 2009, and thus was filed fourteen days late.² DCPS asserted that the MDT team did not believe the Student met the criteria for learning disability, Petitioner did not suggest traumatic brain injury or other health impairment as suspected disabilities, and that the MDT did not believe these disability classifications were appropriate for the Student. DCPS further asserted that Petitioner did not previously request that DCPS fund an independent evaluation of the Student but that it had issued a letter authorizing independent evaluations at DCPS expense. Finally, DCPS asserted that the Student's teacher participated in the January 2009 MDT meeting for the Student.

This Hearing Officer was assigned to this case on August 11, 2009. No prehearing conference was held.³

² If the LEA has not sent a prior written notice under § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes--

- (i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;
- (ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;
- (iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
- (iv) A description of the other factors that are relevant to the agency's proposed or refused action.

34 C.F.R. § 300.508(e).

³ Due to her late assignment to this case, the Hearing Officer was unable to convene a prehearing conference. On August 14, 2009, three days after she was assigned to this case, the Hearing Officer provided her availability for the prehearing conference and ordered both counsel to confer and provide the times on which they were both available for the prehearing conference. At 1:30 p.m. on August 17, 2009, counsel for Petitioner emailed the Hearing Officer to state that the only time that both counsel would be available was that same day between 3:00 p.m. and 3:30 p.m. The Hearing Officer was not available at such late notice.

The due process hearing convened at 1:30 p.m. on August 31, 2009. The due process hearing began a half hour late because both counsel and the Hearing Officer were in another due process hearing that did not conclude on time.⁴ Counsel for Petitioner did not object to starting the due process hearing in this case at 1:30 p.m.

At the outset of the due process hearing in this case, counsel for Petitioner represented that Petitioner did not wish to proceed on the claim that DCPS failed to comprehensively evaluate the Student because this issue was resolved when DCPS issued a letter authorizing Petitioner to obtain independent evaluations at DCPS. This Hearing Officer queried whether Petitioner would rather obtain the evaluations and pursue the remaining claims when the evaluations were completed, but Petitioner opted to proceed to hearing.⁵

This Hearing Officer admitted both parties' five-day disclosures into evidence without objection from the parties.

Counsel for Petitioner then represented that she would be unable to reach Petitioner's expert witness, the neurologist who diagnosed the Student with seizure disorder and cognitive difficulties and delays, because he was available only between 1:00 and 1:30 p.m. This was the first time counsel for Petitioner advised this Hearing Officer that her witness would be unavailable after 1:30 p.m.⁶ This Hearing Officer recessed the due process hearing for ten minutes to allow counsel for Petitioner to attempt to reach the neurologist. Petitioner was unable to reach the neurologist and stated that she would proceed with Petitioner as her sole witness and added that statements by the neurologist were admitted as Petitioner Exhibits 18-20. This Hearing Officer advised counsel for Petitioner that it would be difficult to meet the burden of proof on a child-find claim solely on the testimony of Petitioner and the exhibits in evidence. Counsel for Petitioner asserted that she wished to proceed with the due process hearing.

At the conclusion of Petitioner's testimony, counsel for DCPS orally moved for a directed verdict. This Hearing Officer stated that she would reserve ruling on the motion,

⁴ The prior due process hearing was extended by half an hour to allow a witness to finish testifying. At 1:00 p.m., the time the due process hearing in this case was slated to begin, this Hearing Officer asked counsel for Petitioner if she objected to starting the due process hearing in this case thirty minutes late. Counsel for Petitioner did not object but stated she needed to advise Petitioner, and this Hearing Officer provided counsel an opportunity to do so.

⁵ The Hearing Officer also made this inquiry by email before the due process hearing with the same result.

⁶ It would have been unrealistic to expect that an expert witness who was critical to Petitioner's case would conclude his testimony, including cross-examination, in half an hour. Moreover, review and admission of five-day disclosures and opening statements usually consumes at least the first fifteen minutes of a due process hearing. Thus, it would have been extremely unlikely that the neurologist would have been able to conclude his testimony by 1:30 p.m.

and suggested that counsel for Petitioner could seek a continuance in order to procure the testimony of the neurologist. Counsel for Petitioner requested a continuance and the Hearing Officer adjourned the hearing.

On September 9, 2009, counsel for Petitioner filed a motion for continuance of the due process hearing to September 24, 2009. The Chief Hearing Officer granted the motion on September 10, 2009. The Hearing Officer then scheduled the continued due process hearing for 9:00 a.m. on September 24, 2009. Because counsel for Petitioner was unable to procure the testimony of the neurologist in the interim, the due process hearing was not reconvened.

On September 2, 2009, counsel for DCPS filed a Motion to Dismiss. The Motion to Dismiss reiterated counsel's request for a directed verdict and made various other legal arguments. For the reasons explained below, other than the requested directed verdict, the arguments in the DCPS Motion to Dismiss are unavailing.⁷

III. RECORD

Due Process Complaint Notice, filed June 26, 2009;
DCPS Response to Petitioner's Due Process Complaint, filed July 20, 2009;
Petitioner Five-Day Disclosure Statement, listing seven witnesses and including twenty-seven documents,⁸ filed on August 21, 2009;
DCPS Five-Day Disclosure Statement, listing seven witnesses and including five proposed exhibits, filed August 26, 2009;
DCPS Motion to Dismiss, filed September 2, 2009;
Petitioner Letter Motion for Continuance, filed September 9, 2009; and
Continuance Order, issued September 10, 2009.

IV. ISSUES PRESENTED

As framed by counsel for Petitioner, the second issue in the Complaint, i.e., whether DCPS failed to include the Student's teacher in the discussion of the Student's eligibility for special education services, is purely procedural.⁹ This issue is

⁷ Especially inapposite is Respondent's argument that the Hearing Officer lacks subject-matter jurisdiction because the case is moot. Counsel for Respondent appears to argue that the case is moot because, even if the Hearing Officer finds the Student eligible for special education and related services, Petitioner has already obtained the only relief the Hearing Officer could grant (evaluations). As explained below, Respondent mischaracterizes the gravamen of the Complaint.

⁸ The disclosure listed twenty-eight documents, but indicated that the last document was an occupational therapy/physical therapy evaluation that was "to be provided." This evaluation was not presented at the due process hearing or entered into evidence.

⁹ In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE,

encompassed in Petitioner's claim that DCPS failed to find the Student eligible for special education and related services because it goes to the heart of whether the Hearing Officer should uphold the MDT's determination.

Issue number three in the Complaint, i.e., whether DCPS failed to develop an IEP for the Student, also is encompassed in this claim because the Student must be found eligible for special education services before an IEP is required. In other words, if the Hearing Officer finds that DCPS should have found the Student eligible, DCPS must develop an IEP for the Student.

As discussed below, issue number four in the Complaint, whether DCPS failed to evaluate the Student, is moot. DCPS granted the relief Petitioner requested in authorizing independent evaluations.

In her opening statement, counsel for Petitioner framed the main issue in the case as whether DCPS complied with its "child find" obligations. The term "child find" refers to the requirement in IDEIA that requires a state to demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated."¹⁰

Here, it is undisputed that DCPS evaluated the Student, reviewed the evaluations, and determined whether the Student was eligible for special education and related services.¹¹ The issue in this case is not "child find" but whether the Hearing Officer

significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. 20 U.S.C. § 1415 (f)(3)(E)(ii). In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").⁹

¹⁰ 20 U.S.C. § 1412(2)(C). *See also* 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. §§ 300.128(a)(1) and note 1, 300.220 and note, 300.300 note 3.

¹¹ As soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate him and complete the evaluation process. *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007). Once a child has been referred to an IEP team for an eligibility determination, the IEP team must conduct an initial evaluation, which shall consist of procedures to (a) determine whether a child is a child with a disability within 120 days of receiving parental consent for the evaluation; and (b) to determine the educational needs of such child. 20 U.S.C. § 1414(a)(1)(C)(i); D.C. Code § 38-2561.02. As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child. 34 C.F.R. § 300.305. On the basis of that review, and input from the child's parents, the IEP team must identify

should uphold the MDT's determination that the Student is not eligible for special education and related services. Thus, this Hearing Officer interprets Petitioner's sole surviving claim as essentially:

Whether DCPS failed to find the Student eligible for special education, develop an IEP, and determine an appropriate educational placement for the Student.

V. FINDINGS OF FACT

1. Petitioner is the parent of a [REDACTED] old, [REDACTED] student who attends a DCPS elementary school.¹² Both Petitioner and the Student reside in the District of Columbia.¹³

2. In 2007, the Student suffered a seizure while he was on the school playground.¹⁴ The Student had not had any subsequent seizures but that he regularly sees a neurologist for follow up.¹⁵

3. At a parent-teacher conference in 2008, the Student's teacher informed Petitioner that the Student should be evaluated for special education and related services.¹⁶ The teacher informed Petitioner that the Student's mind wanders during instruction, he cannot hold a pencil, and cannot write legibly.¹⁷ The Student also is unable to identify letters and words and writes backwards.¹⁸ He cannot follow simple, single-step directions.¹⁹ The Student did not exhibit any of these problems before his seizure in 2007.²⁰

4. On December 20, 2008, DCPS ordered the Student to receive educational and psychological evaluations.²¹ DCPS conducted an educational evaluation of the Student on February 25, 2009.²² DCPS completed the psychological evaluation on February 17, 2009.²³

what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child. *Id.*

¹² Testimony of Petitioner; Petitioner Exhibits 16, 17, 21, 22

¹³ Petitioner Exhibit 23.

¹⁴ Testimony of Petitioner; Petitioner Exhibit 17.

¹⁵ Petitioner Exhibit 17.

¹⁶ Testimony of Petitioner.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ DCPS Exhibit 1.

²² Petitioner Exhibit 16; DCPS Exhibit 1.

²³ *Id.* DCPS conducted this evaluation on January 27, 2009, January 30, 2009, and February 10, 2009. *See* Petitioner Exhibit 17.

5. Compared to other students his age, the Student's academic achievement is in the average range in basic reading, broad written language, math calculation skills, and mathematics reasoning.²⁴ His oral expression is limited to average and he will probably find age-level tasks requiring listening skills and oral vocabulary development difficult.²⁵ The Student's overall reading ability is limited and reading tasks above the age six years, five months, level will be quite difficult for him.²⁶ The Student's listening comprehension, which includes listening ability and verbal comprehension, is limited and tasks above the age [REDACTED] level will be quite difficult for him.²⁷ The Student's written expression ability is limited to average, and writing fluency tasks above the age [REDACTED] level will be quite difficult for him.²⁸

6. The Student's academic skills are limited to average.²⁹ Specifically, his sight reading ability and spelling are average.³⁰ His math calculation skill is limited to average.³¹ The Student's ability to apply his academic skills is limited.³² In particular, his quantitative reasoning and writing ability are limited to average.³³ His passage comprehension ability is limited.³⁴ The fluency with which the Student performs academic tasks is limited to average.³⁵ The Student's knowledge of phoneme-grapheme relationships is limited.³⁶ Specifically, his ability to pronounce nonwords and ability to spell nonwords is limited.³⁷

7. The psychological evaluation included the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV).³⁸ This assessment revealed that the Student's full scale IQ is 93, which exceeds the IQs of about 32 percent of children his age.³⁹ Thus, his general cognitive ability is within the average range.⁴⁰

8. The Student's verbal reasoning abilities are in the average range.⁴¹ His performance on verbal comprehension subtests revealed a diverse set of verbal abilities as

²⁴ *Id.*
²⁵ *Id.*
²⁶ *Id.*
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
³² *Id.*
³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
³⁶ *Id.*
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.*

he performed much better on some verbal skills than others.⁴² He achieved his best score on the similarities subtest and demonstrated skills in the average range.⁴³ On the word-reasoning subtest, the Student achieved his weakest performance and demonstrated skills in the borderline range.⁴⁴

9. The Student's nonverbal reasoning abilities as measured by the perceptual reasoning index are in the low average range and above those of only 18 percent of his peers.⁴⁵ The Student's nonverbal abilities also vary.⁴⁶ The Student's performance in abstract categorical reasoning is in the average range.⁴⁷ The Student's weakest performance was in the analysis and synthesis of abstract visual information.⁴⁸ He performed slightly better on verbal than on nonverbal reasoning tasks, but there is not significantly meaningful difference between his ability to reason with or without the use of words.⁴⁹

10. The Student's ability to sustain attention, concentrate, and exert mental control are in the average range.⁵⁰ In this area, he performed better than about 55 percent of students of the same age range.⁵¹

11. The Student's ability in processing simple or routine visual material without making errors is in the average range when compared to his peers.⁵² He performed better than 66 percent of his peers on processing speed tasks.⁵³ The Student performs well in processing visual material quickly as compared to his nonverbal reasoning ability.⁵⁴

12. The Student's weakest performance is in verbal reasoning, which is a measure of his comprehension of social situations and social judgment, as well as his knowledge of conventional standards of social behavior.⁵⁵ His performance in this area is below most of his peers.⁵⁶

13. The Student's performance on block design, which assesses nonverbal fluid reasoning and the ability to mentally organize visual information, was below that of

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

most children his age.⁵⁷ This test assesses his ability to analyze whole-part relationships when information is presented spatially.⁵⁸ Performance on this task may be influenced by visual-spatial perception and visual perception-fine motor coordination, as well as planning ability.⁵⁹ The Student's visual motor perceptual processing, i.e., integration or coordination of visual perceptual and motor abilities, is in the average range.⁶⁰

14. Based on the findings of the DCPS psychological evaluation, the Student does not appear to meet the criteria of a learning disabled student.⁶¹ He may need encouragement to take an active approach to reading for learning.⁶² Computer programs that focus on vocabulary development, word attack, and phonics would be helpful in strengthening the Student's reading skills.⁶³ Programs that emphasize verbal reasoning and comprehension also would be helpful.⁶⁴

15. The Student has a seizure disorder.⁶⁵ He has partial, complex seizures with vacant staring spells, forgetfulness, and loss of memory for events as well as a lack of environmental contact lasting for several seconds.⁶⁶ The Student's neurologist prescribed anti-seizure medication.⁶⁷

16. On March 30, 2009, DCPS convened an eligibility meeting for the Student.⁶⁸ The Student's teacher was unable to attend the eligibility meeting because she could not find a teacher to cover her class during the meeting.⁶⁹ The Student's teacher was upset that she could not attend because she wanted to inform the MDT that the Student required help because of his learning difficulties.⁷⁰

17. The Student's DCPS report card for the 2008-2009 school year shows that his achievement in all subject areas, except language development, was "basic," which indicates that the Student shows a basic working knowledge of skills and concepts, produces satisfactory work, and usually applies skills and concepts correctly.⁷¹ The Student's achievement in language development was slightly higher.⁷²

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Testimony of Petitioner; Petitioner Exhibit 19.

⁶⁶ Petitioner Exhibit 19.

⁶⁷ *Id.*

⁶⁸ Petitioner Exhibit 21.

⁶⁹ Testimony of Petitioner.

⁷⁰ *Id.*

⁷¹ Petitioner Exhibit 24.

⁷² *Id.*

18. On July 16, 2009, DCPS issued a letter authorizing Petitioner to obtain independent comprehensive psychological, speech-language, occupational therapy, and physical therapy evaluations of the Student at DCPS expense.⁷³ On August 14, 2009, DCPS issued a letter authorizing Petitioner to obtain an independent neuropsychological evaluation of the Student at DCPS expense.⁷⁴

VI. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. DCPS presented no testimony at the due process hearing. Petitioner was the sole witness at the due process hearing. Petitioner's testimony was uncontroverted, and thus this Hearing Officer finds her testimony credible.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.⁷⁵ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁷⁶

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children.⁷⁷ FAPE "consists of educational instruction specially 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."⁷⁸

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."⁷⁹ In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b) whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.⁸⁰

⁷³ Petitioner Exhibit 9; DCPS Exhibit 4.

⁷⁴ Petitioner Exhibit 12; DCPS Exhibit 5.

⁷⁵ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁷⁶ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

⁷⁷ 20 U.S.C. § 1412(1).

⁷⁸ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

⁷⁹ 34 C.F.R. § 300.101.

⁸⁰ *Rowley* at 206-207.

VIII. DISCUSSION

A. Petitioner Failed to Prove that DCPS Failed to Timely and Comprehensively Evaluate the Student and Already Obtained the Relief She Was Seeking.

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation.⁸¹ Re-evaluations should be conducted in a "reasonable period of time," or "without undue delay," as determined in each individual case.⁸² The parent of a child with a disability has the right to obtain an independent educational evaluation ("IEE") at public expense if the parent disagrees with the evaluation obtained by the public agency.⁸³

Here, in 2008, the Student's teacher recommended that DCPS evaluate the Student to ascertain whether he requires more assistance in the classroom.⁸⁴ Petitioner failed to establish the exact date of the teacher's recommendation, whether that recommendation was shared with anyone other than Petitioner, and whether Petitioner ever requested that DCPS evaluate the Student. Petitioner did establish that DCPS conducted psychological and educational evaluations in January and February 2009.⁸⁵ Moreover, on July 16, 2009, and August 14, 2009, DCPS issued IEE letters authorizing Petitioner to obtain independent evaluations at DCPS expense.

Thus, Petitioner failed to establish that DCPS did not timely evaluate the Student. However, in authorizing the independent evaluations, DCPS provided Petitioner all the relief she requested for this claim in the July 16, 2009, and August 14, 2009, IEE letters. Thus, this claim is moot.

B. Petitioner Failed to Prove that the Student Has a Disability that Adversely Impacts His Educational Progress.

Before a State or local educational agency may commence the initial provision of special education services, it must first determine whether a student is a child with a disability.⁸⁶ A child with a disability is a child with mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education

⁸¹ 34 C.F.R. § 300.303 (a)(2).

⁸² *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

⁸³ 34 C.F.R. § 300.502 (b)(1).

⁸⁴ Testimony of Petitioner.

⁸⁵ Petitioner Exhibits 16 and 17.

⁸⁶ See, e.g., 34 C.F.R. § 300.8.

and related services.⁸⁷ If a child has one of the disabilities identified above, but only needs a related service and not special education, the child is not a child with a disability.⁸⁸

Here, Petitioner presented testimony and documentary evidence that proved the Student has a seizure disorder. However, Petitioner presented no testimony or documentary evidence that proved that this disorder adversely impacts the Student's educational performance such that the Student requires specialized instruction. Petitioner was provided ample opportunity to obtain the testimony of the neurologist, who could have established that the Student's seizure disorder adversely affected his educational performance, yet failed to do so.

Thus, this Hearing Officer will grant Respondent's motion for directed verdict.⁸⁹

ORDER

Upon consideration of Petitioner's request for a due process hearing, the DCPS response thereto, the exhibits and the testimony admitted at the hearing, and the DCPS motion for directed verdict, it is this 4th day of October 2009 hereby:

ORDERED that the DCPS Motion for Directed Verdict is **GRANTED**;

IT IS FURTHER ORDERED that the DCPS Motion to Dismiss is **DENIED AS MOOT**;

IT IS FURTHER ORDERED that the Complaint is **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that this Order is effective immediately.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. Fed. R. Civ. P. 52 (c). If a plaintiff fails to prosecute, a defendant may move to dismiss the action or any claim against it. Fed. R. Civ. P. 55 (b). Unless the dismissal order states otherwise, this dismissal operates as an adjudication on the merits. *Id.* A motion to dismiss (under Fed. R. Civ. P. 41) on the ground that plaintiff's evidence is legally insufficient should be treated as a motion for judgment on partial findings pursuant to Rule 52(c). Fed. R. Civ. P. 41, notes of Advisory Committee.

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 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. § 415(i)(2).

Distributed to:

Roberta Gambale, Attorney at Law
Kendra Berner, Attorney at Law
Hearing Office