

DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
 1150 5th Street, SE
 Washington, D.C. 20003
CONFIDENTIAL

<p>[Parent], on behalf of [Student],</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case #2009-1341</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>December 4, 2009</p> <p><u>Representatives:</u></p> <p>Domiento Hill, Petitioner</p> <p>Daniel McCall, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:30 a.m. on November 20, 2009. The hearing concluded on November 20 and the record closed on November 25, 2009, following receipt of written closing statements. The due date for the Hearing Officer's Determination (HOD) is December 5, 2009, in accordance with Standard Operating Procedure (SOP) § 1003.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Domiento Hill, Esq.

Respondent's Counsel, Daniel McCall, Esq.

Petitioner, Student's Grandmother

Three witnesses testified at the hearing: the Student's Grandmother, Petitioner (P); [REDACTED] and Compliance Assistant, [REDACTED] (W.).

The complaint in this matter was filed on September 30, 2009. A motion to dismiss the complaint was filed as part of the response to the complaint on October 14, 2009. A prehearing conference was held on October 15, 2009, and a prehearing order was issued on that date. The motion to dismiss was denied in the prehearing order. A supplemental motion to dismiss was filed on October 19, 2009. This motion was denied in a second prehearing order on October 27, 2009.

28 documents were disclosed and filed by the Petitioner on November 13, 2009.

There were no objections raised to the admission of any of the disclosed documents and they were all admitted as exhibits into the record. (P 1 – P 28). Petitioner's exhibits are as follows:

- P 1 - Student Hearing Office, Due Process Hearing Notice
- P 2 - Due Process Complaint Notice, September 30, 2009
- P 3 - District of Columbia Public School's Supplemental Response, and Motion to Dismiss Petitioner's Due Process Complaint Notice, October 13, 2009
- P 4 - Prehearing Order, October 15, 2009
- P 5 - District of Columbia Public School's Supplemental Response, and Motion to Dismiss Petitioner's Due Process Complaint Notice, October 13, 2009
- P 6 - District of Columbia Public School's Supplemental Motion to Dismiss Petitioner's Due Process Complaint Notice, October 19, 2009 (with attached exhibits 2 and 3)
- P 7 - Petitioner's Opposition to the Respondent's Supplemental Motion to Dismiss the Petitioner's Administrative Due Process Complaint Notice and Memorandum, October 21, 2009 (with attached exhibits 1 through 13)
- P 8 - Order on Respondent's Supplemental Motion to Dismiss, October 27, 2009
- P 9 - Email chain ending from Hill to Shapiro, sent Tuesday, October 27, 2009

- P 10 - Email chain ending from Hill to Shapiro, sent Wednesday, October 28, 2009
- P 11 - Letter from Hill to Hall, August 5, 2009
- P 12 - Letter from Hill to Rogers and Hall, August 13, 2009 (with attachments)
- P 13 - Letter from Scroggins to Hill, August 19, 2009 (with attachment)
- P 14 - Letter from Hill to Scroggins, August 23, 2009
- P 15 - Individualized Education Program (IEP), September 9, 2009 (with meeting notes)
- P 16 - Analysis of Existing Data and Prior Written Notice – Evaluation, October 8, 2009
- P 17 - Letter from Hill to Scroggins, October 12, 2009 (with attachments)
- P 18 - Due Process Complaint Disposition, October 15, 2009
- P 19 - IEP, September 9, 2009 (with meeting notes)
- P 20 - Resolution Meeting Confirmation, October 8, 2009
- P 21 - Resolution Meeting Confirmation, October 6, 2009
- P 22 - Letter from Hill to Scroggins, October 12, 2009 (with attachments)
- P 23 - Letter from Hill to Scroggins, October 13, 2009; Letter from Scroggins to Hill, October 13, 2009
- P 24 - Letter from Hill to Shapiro, October 16, 2009 (with attachments)
- P 25 - Occupational Therapy Evaluation Report, April 17, 2007
- P 26 - Speech and Language Evaluation Report, January 27, 2006
- P 27 - Confidential Psychological Report, January 31, 2006; February 2, 2006
- P 28 - IEP, April 18, 2007 (with meeting notes)

Five documents were disclosed and filed by the Respondent on November 16, 2009.

There were no objections raised to the admission of any of the disclosed documents and they are all admitted into the record. (R 1 - R 5). Respondent's exhibits are:

- R 1 - Hearing Officer's Determination (HOD), July 31, 2009
- R 2 - Authorization for Temporary Guardianship of Minor, May 5, 2009
- R 3 - Email from Wynn to McCall, sent Friday, October 16, 2009 (with attachments)
- R 4 - Prince George's County Real Property Data Search, November 6, 2009
- R 5 - Letter of Invitation to a Meeting, August 19, 2009; Letter from Scroggins to Hill, August 19, 2009

II. ISSUE

Whether the Respondent denied the Student a free appropriate public education (FAPE) by failing to complete a re-evaluation of the Student requested by the Petitioner on August 13, 2009?

III. FINDINGS OF FACT

1. The Student is a [REDACTED] year old learner who resides with his grandmother in the District of Columbia.¹ The Student attends a non-public school and was enrolled in July 2009 in the seventh grade at [REDACTED] Educational Center.² The Student has been determined eligible for special education and related services by the Respondent as a result of a specific learning disability (LD).³ He is eligible to receive a free appropriate public education from the Respondent.⁴

¹ T of P. (This hearing involved a critical question of whether the Student was a resident of the District and whether his grandmother was, in fact, his guardian. A credibility issue arose when it became clear, through the testimony of P, that the Student's biological parents had falsely indicated on a form that they lived in the Petitioner's home within the District and P signed off on the form (see P 6, ex. 3, R 2). The IHO is satisfied with the candor and credibility of P as demonstrated at the hearing, and believes her testimony is truthful with regard to the circumstances of the Student's residency and her role in his life and education. Because she is acting in place of the biological parent she is a "parent" under 34 C.F.R. § 300.30(a)(4).)

² T of P, P 15/ P 19, P 16.

³ P 15/ P 19.

⁴ P 15/ P 19, T of L.S. (Following the filing of the complaint in this matter the Respondent's Student Residency Office was contacted by the Respondent's Counsel to look into whether the Student was a resident of the District. R 3, T of R.W. An investigation was conducted but no notice was provided to the Petitioner and she was not given an opportunity to contest the Respondent's internal determination that the Student was not eligible to attend its schools tuition free. T of P, T of R.W., R 3. Thus, this finding settles the matter of the Student's residency unless and until the Respondent follows proper procedures and provides the Petitioner with adequate due process leading to a contested case if it finds new information to refute the Petitioner's position that she, as the Student's grandparent, is acting in place of the biological parent.)

2. On August 13, 2009, the Petitioner requested, through her attorney, a comprehensive reevaluation of the Student including: a comprehensive psychological reevaluation; a speech and language reevaluation; and an occupational therapy reevaluation.⁵ The Petitioner wanted a reevaluation because she was concerned about the Student's reading, writing, comprehension, and counting.⁶ The letter requesting the reevaluation included a self-described consent form which did not, itself, include the specific assessments requested, and was signed by the Petitioner on July 15, 2009.⁷
3. The Respondent replied to the request on August 19, 2009, offering to convene an IEP team meeting on one of three proposed dates in September.⁸ The Respondent advised the Petitioner's attorney in the letter that once the IEP team determined what assessments would be conducted, it would seek the consent of the Petitioner, specifically stating that it did not believe the July 15, 2009, consent form was a valid trigger of the timelines in which to complete the assessments.⁹ The Petitioner, through counsel, selected the September 9, 2009, date to meet and an IEP team meeting was held on that date.¹⁰

⁵ P 12, T of L.S.

⁶ T of P.

⁷ P 12.

⁸ P 13.

⁹ P 13.

¹⁰ T of P, T of L.S., P 14.

4. The IEP team revised the Student's IEP on September 9, 2009, and the Petitioner agreed to the revisions.¹¹ The IEP team disagreed about whether to immediately conduct the assessments requested by the Petitioner in August, whether a classroom observation should occur first, and whether the timelines to complete the reevaluation had already begun.¹²
5. A review of existing records and a classroom observation were conducted between the September 9, 2009, IEP team meeting and October 8, 2009.¹³ The review resulted in a summary of the Student's known performance in the areas of math (functioning at fourth grade level), reading (functioning at fifth grade level), writing (very poor skills), speech and language (no concerns), emotional, social and behavioral development (appears to have executive functioning problems/attention deficit hyperactivity disorder (ADHD)), and motor skills/physical development (visual motor, visual perceptual, and sensory issues, among others).¹⁴
6. A notice for the Petitioner was created on October 8, 2009, that stated "an initial or re-evaluation and additional assessments are needed."¹⁵ This was proposed because the team did not have enough information to make decisions about the

¹¹ P 15 P 19.

¹² P 15, T of P, T of L.S. (The Petitioner asserted the timelines for the reevaluation began when the Respondent received her "consent" form, and the Respondent believed the timelines would not begin until it had been determined by the team, following classroom observations, what assessments would be conducted and the Petitioner provided informed consent for those assessments.)

¹³ P 16.

¹⁴ P 16.

¹⁵ P 16.

educational needs of the Student.¹⁶ The notice did not include specifics as to what assessments were proposed.¹⁷

7. No reevaluation has been conducted.¹⁸

IV. CONCLUSIONS OF LAW

1. Federal regulations at 34 C.F.R. § 300.17 define a free appropriate public education (FAPE) as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

The Supreme Court, in Rowley has guided us stating:

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982).

¹⁶ P 16.

¹⁷ P 16.

¹⁸ T of P.

2. A reevaluation of a Student with a disability:

shall be conducted at least once every three years, or more frequently if conditions warrant reevaluation; if the child's parent or teacher requests a reevaluation; or before determining a child is no longer a child with a disability.

D.C. Mun. Regs. tit. 5, § 3005.7 (2007), 34 C.F.R. § 300.303(b).

3. Evaluations must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” 34 C.F.R. § 300.304(c)(6). Furthermore, evaluations must include “Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. § 300.304(c)(7). *See also*, D.C. Mun. Regs. tit. 5, § 3005.9 (2007).

4. Federal regulations, at 34 C.F.R. § 300.305(a)(2), require:

On the basis of the review [of existing evaluation data], and input from the child’s parent’s, identify what additional data, if any, are needed to determine-

- (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
- (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
- (ii) The present levels of academic achievement and related developmental needs of the child;
- (iii)(A) Whether the child needs special education and related services; or
- (B) in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

5. Reevaluations should be conducted in a “reasonable period of time,” or “without undue delay,” as determined in each individual case. *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995), Herbin v. District of Columbia 362 F.Supp.2d 254, 259 (D.D.C.,2005).

6. In this case, the Petitioner requested a reevaluation including a comprehensive psychological reevaluation, a speech and language reevaluation, and an occupational therapy reevaluation. Nearly four weeks later the IEP team convened to discuss the reevaluation of the Student. It was not unreasonable for the Respondent to convene the team to discuss the reevaluation of the Student, in fact that is what is required under 34 C.F.R. § 300.305 so that it can be determined what specific data needs to be collected. While a parent may disagree with the determinations about whether additional data must be collected or what data should be collected, a parent may not circumvent the team process with a preemptory “consent” for unilaterally selected assessments, as was attempted in this case. It was not reasonable, however, for the Respondent to wait for the IEP team meeting to determine that a review of records would take place. Parental consent is not required for this activity and it should have begun shortly after the request for a reevaluation, and certainly before the IEP team meeting in September where the team could have discussed what, if any, additional data needed to be collected. *See*, 34 C.F.R. § 300.300(d)(1) (Parental consent is not required before reviewing existing data).

7. The delay in this case is attributable to several different factors, including the parties dispute about the "consent" form sent in August, the Respondent's failure to act prior to the September 9, 2009, IEP team meeting, and most importantly, the Respondent's failure to provide appropriate prior written notice in order to obtain the informed consent of the Petitioner. 34 C.F.R. § 300.503 requires prior written notice, including a description of the actions proposed. In this case, the District stated in a written notice that it wanted to conduct an initial or reevaluation. This notice lacked the necessary information to fully inform the Petitioner of all the information relevant to the reevaluation, particularly what assessment tools would be used to collect what data about the Student so that educational decisions could be made. *See*, 34 C.F.R. § 300.9. Thus, most of the delay is primarily attributable to the Respondent's actions and failures.

8. While the evidence shows the Student is not progressing in the general curriculum with his peers (he is two to three grades behind in reading and math respectively, and has very poor writing skills), this cannot be attributed to the delay in the reevaluation which is a more recent problem. The delay in the reevaluation does impede the Student's access to a free appropriate public education (FAPE) because the Student is behind academically, requires special education and related services, and the IEP team is struggling to make appropriate decisions for lack of current data. The reevaluation of the Student must be completed as quickly as possible to ensure the Student's access to a FAPE.

V. DECISION

The Student was denied a free appropriate public education when the Respondent failed to timely complete a reevaluation to determine his special education and related service needs within a reasonable time following the Petitioner's request on August 13, 2009, nearly seven weeks prior to the Due Process Complaint initiating this matter, and nearly 14 weeks prior to the due process hearing.

VI. ORDER

1. The Respondent must arrange and pay for a comprehensive independent educational evaluation of the Student consisting of (as requested in the complaint): 1) a comprehensive psychological assessment; 2) a psychiatric assessment; 3) an occupational therapy assessment; and 4) a neuropsychological assessment.
2. The assessments must be completed, and assessment reports written, by January 29, 2010. The IEP team must meet within seven days of the final assessment report to review the assessment data and revise the IEP accordingly. The Respondent must provide the Petitioner with at least three alternative times to meet (not all consecutive) and inform her of the date the IEP team will meet if she fails to select one of the proposed times. Her attorney must be copied on any correspondence or other notices sent or delivered to the Petitioner, unless directed otherwise by the Petitioner.
3. Any delay in the completion of the assessment reports that is due to either the Petitioner failing to make the Student available for assessments or the failure of

the independent provider(s) to complete the assessments and generate the report(s) will not be held against the Respondent and the timelines herein will be extended day for day.

4. If the Petitioner believes this order has not been complied with she is directed to enforce this order, including by filing a complaint with the Office of the State Superintendent of Education pursuant to 34 C.F.R. §§ 300.151-300.153. It is recommended that any failure to comply with this order be remedied following a review of the Student's then current educational performance.

IT IS SO ORDERED.

Dated this 4th day of December, 2009.



Jim Mortenson, Esq.
Independent Hearing Officer