

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

OSSE
Student Hearing Office
April 28, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a girl who is not eligible for services.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 19, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on February 11, 2014.

A response was filed by the District denying these contentions on February 2, 2014. This response was timely filed. A resolution meeting was held in this case on February 27, 2014. The resolution period ended on March 12, 2014.

On March 18, 2014, this Hearing Officer held a prehearing conference. Roberta Gambale, Esq., counsel for Petitioner, appeared. Justin Douds, Esq., counsel for Respondent,

appeared. A prehearing conference order issued on March 21, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issue in the case.

On April 7, 2014, Respondent moved for the Student to appear at the hearing as a witness. On April 9, 2014, Petitioner opposed this application.

A hearing date proceeded on April 21, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-22; Respondent entered into evidence exhibits 1-16.

Petitioner presented as witnesses: Petitioner; Witness A, a paralegal; Witness B, an advocate.

Respondent presented: the Student; and Witness C, a school psychologist.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUE

As identified in the Prehearing Conference Summary and Order, the issue to be determined is as follows:

Did Respondent deny the Student a FAPE when it failed to conduct an evaluation of the Student after the parent’s letter requesting an evaluation dated September 16, 2013?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is _____ at School A. (Testimony of Petitioner)
2. She has been diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Depression. (Testimony of Petitioner)
3. The Student does not feel she needs assistance from special education. (Testimony of Student; Testimony of Witness C)
5. The Student is insightful, articulate, and a good self-advocate in the classroom. (Testimony of Student; Testimony of Witness C)
6. For the most part, the Student goes to her classes, does her work, and is a typical teen. She is social and popular. (Testimony of Witness C)
7. She scored in the proficient range on the DC-CAS in Math _____ She scores in the Basic range in reading _____
- : 8. At the Student's previous school, School B, behaviors were a concern of the Petitioner. (Testimony of Petitioner)
9. An Educational Evaluation Report dated November 16, 2011 indicated that the Student was a B and C student who was reading below grade level. The report indicates that the Student has emotional challenges that disrupt the flow of learning, but have not disrupted academics to the extent that special education services are warranted. (R-1-3)
10. The Student's then LEA found that the Student was ineligible for services on March 3, 2012. (R-3-1)

11. An HOD was issued on October 5, 2012, dismissing Petitioner's challenge to that decision. (R-4)

12. For the 2012-2013 school year, Petitioner felt that the Student was doing poorly. She spoke to the Student's teachers and was told that the Student was not following directions, was walking in and out of class and spending too much time using her cellphone. (Testimony of Petitioner)

13. The Student failed algebra for the school year. She received a D in Honors English, a C in Extended Literacy, a B in Introduction to Business. She received an A in World History. (Testimony of Petitioner; P-8-1)

14. Petitioner faxed a request for evaluations to three numbers at Respondent's offices. One letter was faxed to the Office of General Counsel; another was faxed to the Office of Special Education; a third was faxed to the Student's school, School A. (Testimony of Witness A; P-1-1-3)

15. Faxed together with this request for evaluation was a request for records. (P-1-4-6)

16. This letter requested a Functional Behavior Assessment and a comprehensive psychological evaluation. (P-1-1-3)

17. Petitioner received three fax confirmations for the letters. (Testimony of Witness A; P-1-1-7-9)

18. On October 9, 2013, Petitioner received a confirmation of receipt of the records request. (Testimony of Witness A; P-3-1)

19. Thereafter, on November 8, 2013, Petitioner sent a second letter to School A following up on the request for evaluation. (Testimony of Witness A; P-2-1-2)

20. For the current school year, the Student has skipped classes. Her grades have been inconsistent. In English, she maintains a B grade. In Chemistry, she is easily distracted and maintains a D grade. She has conflicts with her Band teacher and she failed health.

(Testimony of Petitioner)

21. She has been suspended for 5 days for calling the Dean of Students a bitch, and 3 days for talking on her cellphone. (Testimony of Petitioner)

22. The report card for first and second terms indicates all Bs and Cs in academic classes, with an D+ in chemistry for the second term. For the third term, in academic classes, the Student received all C grades with a B in World History. (P-10-2; R-12-2)

23. A progress report dated February 21, 2014 indicated that the Student needs to study more in Geometry, has excessive absences in World History, does not participate in Chemistry, and has poor behavior in Spanish. She had a possibility of failing health. (P-6-1)

24. On February 28, 2014, Respondent's staff indicated that the Student did not need to be evaluated. (Testimony of Petitioner)

25. On the February 18, 2014, Petitioner was notified that the Student had failed physical education. (P-4-1)

26. A SEP meeting was held on March 13, 2014. An English teacher indicated that the Student is more determined this year and does not lash out as much. The chemistry teacher complained about the Student's behavior. Respondent agreed to do a comprehensive psychological evaluation and an FBA. (Testimony of Petitioner; P-17)

27. The assessments have begun. Respondent has begun interviewing teachers and has observed her in two classes. (Testimony of Witness C)

28. The team is scheduled to reconvene in connection to the Student on June 4, 2014.

(R-9-2)

29. The Student is happier at School A this year. (Testimony of Petitioner)

30. As of February 14, 2014, her class rank was 73 out of 171. She has accumulated 7.5 credits. (P-10-1)

31. I found all the witnesses credible in this proceeding.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

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 CFR Sect. 300.513(a).

The DC Code indicates that initial evaluations must be conducted within 120 days. D.C. Code § 38-2561.02(a); Smith v. Dist. of Columbia, 2010 WL 4861757 (D. D.C. Nov. 30, 2010). Petitioner testified that she requested an evaluation of the Student on September 16, 2013 and provides a document to this effect with three fax confirmations. No evaluation has been completed as of this date, which is more than seven months later. The record indicates that no evaluation began until the Due Process Complaint was filed here. Respondent will be ordered to authorize an independent FBA and an independent comprehensive psychological assessment to insure that the process will move forward.

However, a failure to timely evaluate is a procedural violation of IDEA. Only where when the parents are able to show that harm resulted from the failure to evaluate, FAPE denial can result. As stated by the D.C. Circuit: “(a)n IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006)(emphasis in original); see also Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004) (though DCPS admitted that it failed to satisfy its responsibility to assess the student within 120 days, of her parents' request, parents did not show harm).

Accordingly, to this IHO, the record must establish that a Student was eligible for services for there to be a denial of FAPE and a corresponding compensatory education award. Under the theory of compensatory education, courts and hearing officers may award “educational services. . . to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The ultimate

award must be reasonably calculated to provide the educational benefits that likely would have accrued from *special education services* the school district should have supplied in the first place. Id., 401 F. 3d at 524. (emphasis added)

I will therefore assess whether, on this record, I can determine that the Student is eligible for special education services under the act.

1. Emotional Disturbance.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

The record does not establish that the Student has an inability to learn or an inability to maintain satisfactory relationships in school. The Student has passed most of her classes and gets along with adults and peers at her school. She is socially popular and she is in the top half of her class in terms of ranking. She has received an appropriate amount of credits. While the Student has engaged in some inappropriate behavior, it has not been shown that this behavior has been occurring over a long period of time, to a marked degree, or that such behavior adversely affects her educational performance. While subsequent assessments could possibly show that the Student is eligible pursuant to this classification, I cannot find that the Student was eligible as a student with an emotional disturbance on this record.

2. Specific Learning Disability.

As defined in the DCMR, a Specific Learning Disability (SLD) is:

a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage should have been deemed eligible for services as a Student with a specific learning disability.

5-E DCMR Sect. 3001.1, 3006.4; see also 20 USC Sect. 1401(30).

Under regulations pursuant to IDEA, a specific learning disability may be found if a child "does not achieve adequately for the child's age" in basic language or mathematics skills or if the child fails "to meet age or State-approved grade-level standards" in such skills. 34 CFR Sect. 300.309(a). In forming a determination, a school district should "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 CFR Sect. 300.306(c)(i).

Additionally, the child should "not make sufficient progress" to meet such standards "when using a process based on the child's response to scientific, research-based intervention" or the child "exhibits a pattern of strengths and weaknesses" in relevant areas. 34 CFR Sect. 300.309 (a)(2).

Also, the team should determine that such findings are not primarily the result of other factors such as a visual or hearing disability, emotional disturbance, or environmental or cultural factors. 34 CFR Sect. 300.309 (a)(3).

Also, to ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider 1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and 2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. 34 CFR Sect. 300.309(b).

In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, as well as a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5-E DCMR Sect. 3006.5 (g) (2), (6).

There is little in the record to suggest that this Student has a specific learning disability. While there is a document in the record indicating that the Student's reading was below grade level, the entirety of the record reveals otherwise. The Student has passed all her classes that involve reading, and there is no complaint from the parent or counsel that the Student's reading is inadequate. This contention is not mentioned in the prehearing order in this case. Again, the Student ranks in the top half of her class and has achieved a reasonable amount of credits to the point in her high school career. On this record, I cannot conclude that the Student is eligible for services as a Student with a specific learning disability.

3. Other Health Impairment.

"Other health impairment" is an appropriate classification if a Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. This classification requires identification of chronic or acute

health problems such as: Asthma;, Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1

Again, the record indicates that this is a Student who has been doing adequately in school and indeed ranks in the top half of her class. While there is a reference in the record to indicate that the Student has ADHD, there is nothing in the record to indicate that the Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. The Student's main behavior issue is the fact that she uses a cell phone in class, which has not been connected up to ADHD in the record. I cannot conclude that the Student should be deemed eligible for services as Other Health Impaired.

In sum, though Petitioner is correct that Respondent failed to comply with applicable law and regulation by not evaluating this Student, I do not find that this failure resulted in FAPE denial. The record does not establish that this Student is eligible for services. However, I will order that the Petitioner receive an independent FBA and a comprehensive psychological assessment, as requested. After such assessments are completed, the IEP team shall meet to determine whether the Student is eligible for services.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, I hereby find:

1. Respondent violated the D.C. Code and applicable laws and regulations by failing to evaluate the Student within 120 days of the request to evaluate;
2. Petitioner shall receive an authorization for an independent FBA and comprehensive psychological assessment within 10 days of this HOD;

3. Within 10 days of the completion of the FBA and the psychological assessment, the IEP team shall meet to review such assessments;

4. Petitioner's request for compensatory education is denied.

Dated: April 26, 2014

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 26, 2014

Michael Lazan
Impartial Hearing Officer