

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 25, 2014

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| PETITIONER ¹ |) | |
| On behalf of STUDENT |) | |
| |) | |
| Petitioner, |) | Date Issued: August 24, 2014 |
| |) | |
| v. |) | Hearing Officer: Christal E. Edwards, Esq. |
| |) | |
| District of Columbia Public Schools (DCPS) |) | |
| |) | |
| Respondent. |) | |
| |) | |

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed May 22, 2014 and Amended DPC filed on June 10, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner (MOTHER), the Student's Parent ("Petitioner"), against Respondent, District of Columbia Public Schools ("Respondent"). Petitioner claims that Respondent denied the student a Free Appropriate Public Education ("FAPE") because Respondent failed to timely evaluate student upon parent's request on October 25, 2013; failed to meet its Child Find obligations in regards to identifying student as a child with a disability; failed to have an appropriate IEP at the beginning of the school year 2013/2014; and DCPS failed to provide an appropriate placement for the Student during the school year 2013/2014.

¹ Personal identification information is provided in Appendix A.

On June 5, 2014 and June 16, 2014, Respondent filed its Notice of Insufficiency and Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE.

During the Prehearing Conference, on or about July 7, 2014, the parties agreed that five-day disclosures would be filed by July 16, 2014 and that the Due Process Hearing ("DPH") would be held on July 23, 2014.

A Resolution Meeting was held on June 17, 2014, which was within the 15 calendar days of the filing of the DPC; however, an agreement was not reached but the Parent and Respondent agreed to continue to attempt to resolve the complaint prior to the end of the 30-day resolution period and the 45-day timeline to file the Hearing Officer Determination ("HOD") will not began until such resolution period has expired. The statutory 30-day resolution period ended on July 3, 2014. The 45-day timeline for this Hearing Officer Determination ("HOD") started to run on July 5, 2014 and the original due date for the HOD was August 5, 2014. However, on or about June 3, 2014, Petitioner and Respondent agreed to allow Petitioner to amend their DPC and on June 10, 2014, Petitioner filed a Consent Motion to Amend their DPC, thereby changing the 45 day timeline due date from August 5, 2014 to August 24, 2014.

Petitioner's Disclosure Statement, dated July 16, 2014, consisted of a witness list of three (3) witnesses and documents P-1 through P-12. Respondent submitted written objections to Petitioner's disclosure at P-3, P-8, P-9, P-10, and P-12. The Petitioner's Exhibits: P-1 through P-2 and P-4 through P-7 and P- 11 through P-12 were all admitted. The Petitioner presented the following witnesses in her case in chief:

- (a) Petitioner; and
- (b) Petitioner's Child Psychologist;

Respondent's Disclosure Statement dated July 16, 2014 consisted of a witness list of three (3) witnesses and documents R-1 through R-2. Petitioner did not submit any written objections to Respondent's Disclosures; therefore, all of Respondent's Disclosures were admitted into evidence. The Respondent presented the following witnesses:

- (a) Respondent's Compliance Case Manager/Resolution Specialist; and
- (b) Respondent's Special Education Coordinator for Attending School.

Neither party requested or filed any post hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case, as identified in the Prehearing, are:

Issue #1 Whether Respondent denied Student a FAPE by failing to timely evaluate student upon parent's request on October 25, 2013.

Issue# 2 Whether Respondent denied Student a FAPE by not meeting its Child Find obligations in regards to identifying student as a child with a disability.

Issue# 3 Whether Respondent denied Student a FAPE by failing to have an appropriate IEP at the beginning of the school year 2013/2014.

Issue# 4 Whether Respondent denied Student a FAPE by failing to provide an appropriate placement.

RELIEF REQUESTED

Petitioner requests the following relief:

- (1) A finding that DCPS denied the student a FAPE;

- (2) An Order that Respondent fund a complete suite of Independent IEE assessments;
- (3) An Order for Compensatory Education; and
- (4) An Order for other relief this Hearing Officer deems appropriate.

FINDINGS OF FACTS

After considering all of the evidence, as well as argument of counsel, this Hearing Officer's findings of facts are as follows:

- 1) Student is a male, resides with Mother in the District of Columbia. (Testimony of Mother and (P-5).
- 2) At the beginning of the academic school year 2013/2014, Student was attending School A. However, on or about October 25, 2013, the principal for School A drafted a Notice of Immediate Involuntary Transfer of Student. (P-6) This transfer is dated October 25, 2013 and stamped as distributed October 27 or October 29, 2013 – as it is hard to clearly read the actual date. (P-6).
- 3) Student was transferred to Attending School, where he is in the 10th grade. (P-4, P-5, and P-6)
- 4) Petitioner states that on or about October 25, 2013, she hand-delivered a letter to the principal at School A requesting that her child be evaluated for special education. Petitioner further states that she wanted her child evaluated for special education services because Student had been in the Psychiatric Institute of Washington (“PIW”) twice for services. (Testimony of Petitioner)
- 5) Through Petitioner's counsel, a letter dated November 20, 2013 Petitioner requested School B to evaluate and test her child for special education services and requested an acknowledgement receipt of such letter. (Testimony of Petitioner) However,

Petitioner did not submit proof that such letter had been received by any intended recipients – the principal or the special education coordinator. (Testimony of Petitioner, P-2)

6) On or about June 17, 2014, a Resolution Meeting was held (R -1). In attendance was the Respondent's Special Education Coordinator ("SEC"), the Petitioner, and the Petitioner's attorney. (R - 1) During the meeting the Petitioner stated she only wanted her attorney to speak for her. (R - 1) Petitioner's counsel stated that the request to evaluate Student was submitted in October 2013 to the principal at School A and proof of that submission would be turned over in the 5-day disclosure and that no one spoke with the School B's team about the evaluations. (R - 1) Then Respondent's SEC stated that DCPS would be more than willing to do a Comprehensive Psychological evaluation and a Functional Behavior Assessment ("FBA"). Lastly, Petitioner's counsel then stated that Petitioner/parent would not sign the consent form without the following information:

- 1) A list of all evaluations to be performed, i.e. the Woodcock Johnson III, etc;
 - 2) The names of all evaluators and which evaluations they will be conducting;
 - 3) The educational background of all evaluators, including the degree(s) they received and the year(s) in which they received them;
 - 4) All boards and/or agencies in which the individual is currently licensed or certified, the date in which those licenses or certifications were granted or issued, and the license or certification number for each agency and/or board.
- (R-1)

CONCLUSIONS OF LAW

Purpose of the IDEA

The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

The IDEA requires that all students be provided with a free appropriate public education ("FAPE"). FAPE means:

special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Procedural Violations of IDEA

1. Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

(I) impeded the child's right to a free appropriate public education;

- (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C. §1414(f)(3)(E). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (B.C. Cir. 2006).

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

BURDEN OF PROOF

In a Special Education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S.49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *See also*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

Analysis

(1) Whether Respondent denied Student a FAPE by failing to timely evaluate student upon parent's request on October 25, 2013.

Petitioner claims that Respondent DCPS has denied Student a FAPE by failing to timely evaluate the Student after the parent requested by letter on or about October 25, 2013. I find that Petitioner has not met her burden of proof on this issue.

Pursuant to C.F.R. §300.301 regarding initial evaluations:

- (a) *General.* Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.
- (b) *Request for initial evaluation.* Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.
- (c) *Procedures for initial evaluation.* The initial evaluation— (1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or(ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and (2) Must consist of procedures—(i) To determine if the child is a child with a disability under § 300.8; and(ii) To determine the educational needs of the child.
- (d) *Exception.* The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if— (1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or(2) A child enrolls in a school of another public agency after the relevant timeframe in paragraph (c)(1) of this section has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability under § 300.8.(e) The exception in paragraph (d)(2) of this section applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

Before Respondent may provide special education services to a Student, Respondent must conduct a full and individual initial evaluation. See 34 C.F.R. 300.301(a). However, before such evaluation process may begin, an informed parental consent must be obtained. 34 C.F.R. §300.300(a)(1)(i). In the case at bar, no such consent from the parent has been obtained. Specifically, during the resolution meeting, the Petitioner and Petitioner’s counsel clearly stated that consent would not be provided unless the following information is received:

- 1) A list of all evaluations to be performed, i.e. the Woodcock Johnson III, etc;
 - 2) The names of all evaluators and which evaluations they will be conducting;
 - 3) The educational background of all evaluators, including the degree(s) they received and the year(s) in which they received them;
 - 4) All boards and/or agencies in which the individual is currently licensed or certified, the date in which those licenses or certifications were granted or issued, and the license or certification number for each agency and/or board.
- (R-1)

Respondent's SEC stated that she was not privy to any of that information and could only state that the evaluators met the Office of the State of the Superintendent of Education's ("OSSE") regulations to be employed as the evaluators. (R – 1). Further, Respondent's SEC stated that she would forward the consent form once Petitioner obtained that information from OSSE and Petitioner's counsel then stated that the parent would not sign the form that day. No other evidence as to whether or not the Petitioner received or sought such information and no evidence as to whether or not the parent ever signed the consent form was presented.

Furthermore, 34 C.F.R. 300.9 outlines when a consent is required under IDEA and that fact that it must be "fully informed" to be valid. 34 C.F.R. specifically states:

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c) (1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.
- (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).
- (3) If the parent revokes consent in writing for his child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's educational records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

None of the information Petitioner demanded before she would sign the consent form are justified or requirement under IDEA. Therefore, such refusal to sign the consent form was not reasonable or justified.

Furthermore, Petitioner stated that she made her October 25, 2013 request to School A to have the Student evaluated by a letter dated that same day the principal of School A drafted a Notice of Immediate Involuntary Transfer of Student. (P-1 and P-6). Further, Petitioner testified that she sent a letter, through her counsel, dated November 20, 2013 to School B (P – 2).

However, no proof of receipt of such letter was confirmed and Petitioner did not submit any proof of communications between parent and School B regarding such request. Petitioner further stated that Student had been admitted to PIW on two occasions and the student had a court-ordered psycho educational evaluation report. However, Respondent's LEA and Compliance Case Manager/Resolution Specialist both testified credibly that they were unaware of the Student being admitted to PIW or the court-ordered psycho educational evaluation report. I conclude therefore that DCPS did not deny Student a FAPE by failing to timely evaluate after the parent made such request.

(2) Whether Respondent denied Student a FAPE by not meeting its Child Find obligations in regards to identifying student as a child with a disability.

The Child find regulation is the screening process used to identify those children who are potentially in need of special education and related services. Specifically, C.F.R. §300.111 states:

(a)General.

(1) The State must have in effect policies and procedures to ensure that—

- (i)** All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
- (ii)** A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

Therefore, IDEA requires Respondent to evaluate a child it suspects of having a disability and needing special education and related services pursuant to 34 CFR 300.111(c)(1). Furthermore, Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). The District must “ensure that ‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’ ” *Scott v. District of*

Columbia, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (citing *id.*); 20 U.S.C. § 1412(a)(3).

Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia* 2013 WL 620379, 5-6 (D.D.C. Feb. 20, 2013).

In this case, Respondent did not suspect or have reason to suspect the Student of having a disability or in need of special education services. Respondent was not aware of the Student being admitted to PIW nor did Respondent have the court-ordered psychoeducational report. (Testimony of Petitioner's LEA and Compliance Case Manager. Further, Petitioner's Compliance Case Manager stated that if such information had been received prior to the resolution meeting, the information would have been reviewed and a Multidisciplinary team ("MDT") would have been convened. (Testimony of Respondent's Compliance Case manager)

Petitioner further states that no IEP team was convened to determine eligibility of Student for special education services. However, Respondent convened a resolution meeting on June 17, 2014 to address the issues of this complaint and obtain parental consent to begin this process and as stated above, no consent was obtained to begin this process. I conclude therefore that DCPS did not deny Student a FAPE by failing to meet its Child Find obligations in regards to identifying student as a child with a disability.

(3) Whether Respondent denied Student a FAPE by failing to have an appropriate IEP at the beginning of the school year 2013/2014.

Petitioner claims that Respondent DCPS has denied Student a FAPE by failing to have an appropriate IEP in place at the beginning of the school year 2013/2014. I find that Petitioner has not met her burden of proof on this issue.

The IDEA requires that to provide a FAPE, “[t]he IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). However, before an IEP is developed, the child must be found to be a student with a disability and therefore eligible for special education services. As previously stated, C.F.R. §300.301(a) requires

Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

And as previously stated, before such evaluation process may begin, an informed parental consent must be obtained. 34 C.F.R. §300.300(a)(1)(i). To date, Petitioner has not provided such consent to begin the process as required under IDEA. Therefore, I conclude that DCPS did not deny Student a FAPE by failing to have an appropriate IEP at the beginning of the school year 2013/2014.

(4) Whether Respondent denied Student a FAPE by failing to provide an appropriate placement.

Petitioner’s last issue claims that Respondent DCPS has denied Student a FAPE by failing to provide an appropriate placement. I find that Petitioner has not met her burden of proof on this issue.

Under the IDEA, DCPS is obligated to match each child with a disability with a school capable of fulfilling the child’s IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991). In order for Respondent to fulfill this obligation, the child must be found to be a child with a disability and in need of special education services. As shown above, Petitioner has impeded the process by not providing the required parental consent to perform the initial

evaluations, review such evaluations, and draft an IEP that may address such placement recommendations. I conclude therefore, that DCPS did not deny Student a FAPE by failing to provide an appropriate placement for the Student.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

- (1) All requested relief by Petitioner in this matter is DENIED.

IT IS SO ORDERED.

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 U.S.C. §1415(i).

08/24 /14
Dated

/s/Christal E. Edwards
Christal E. Edwards, Esq.
Hearing Officer