

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)

Date Issued: January 2, 2012

Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of year old Student, filed a due process complaint notice on October 21, 2011 alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that since the beginning of the 2009-2010 school year when Student was in the 3rd grade, Student had been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Student exhibited off task behaviors and distractibility that interfered with him completing class work and performing on grade level. Student’s problem behaviors and poor academic performance continued and resulted in him being retained at the end of the 4th grade. Petitioner asserted that Student’s chronically poor behavior and academic performance was enough to trigger the District of Columbia Public Schools’ (“DCPS”) affirmative Child Find obligation to locate, identify and evaluate Student and determine whether or not he required special education services. Secondly, Petitioner alleged that DCPS did not evaluate Student within 120 days of Petitioner’s written request for evaluation. Thirdly, Petitioner alleged that she was prevented from engaging in timely decision making about her child’s education because she had been requesting a copy of Student’s records since November 2009 and as of mid December 2011, she had not received any records despite three written requests

¹ Personal identification information is provided in Appendix A.

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DCPS asserted that Petitioner had failed to come to the school to review records; that Student's diagnosis of ADHD did not automatically translate into a need for special education services; that there was no basis in fact for Petitioner's request for a speech-language evaluation; and that Petitioner failed to show any harm if the Hearing Officer were to determine that DCPS had violated the IDEA. DCPS denied that Student had been denied a FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 10/21/11. This Hearing Officer was assigned to the case on 10/24/11. A resolution meeting took place on 11/09/11 at which time settlement could not be reached. The parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 11/20/11, the 45-day timeline to issue a final decision began on 11/21/11, and the final decision was due on 01/04/12.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. Prior to the presentation of evidence, parties were given the opportunity to discuss settlement. Petitioner wanted to preserve Student's right to compensatory education for DCPS' alleged failure to evaluate Student since the 2009-2010 school year and Petitioner wanted funding for an independent speech-language evaluation. At that point in time, DCPS had already authorized funding for an independent comprehensive psychological evaluation. DCPS was unwilling to offer a Settlement Agreement.

Petitioner presented three witnesses: Petitioner; Petitioner's educational advocate; and paralegal. DCPS elected not to present any witnesses.

Petitioner's disclosures dated 12/12/11, containing a witness list and Exhibits P-1 through P-13, were admitted into evidence without objection. DCPS' disclosures dated 12/12/11, contained a witness list and Exhibits R-01 through R-05. Exhibits R-01 through R-04 were admitted into evidence without objection. Exhibit R-05 was withdrawn by DCPS.

The parties agreed to the following stipulation of fact:

#1. DCPS provided Petitioner with an authorization for funding for an Independent Educational Evaluation ("IEE") for a comprehensive psychological evaluation at the resolution meeting on 11/09/11.

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The three issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to allow Petitioner access to Student's educational records following her written requests in November 2009, July 2010 and November 2010.

Whether DCPS denied Student a FAPE by failing to identify Student as a child with a disability, pursuant to its Child Find obligations, since the beginning of the 2009-2010 school year; specifically, Student's continued disruptive behavior in school, academic performance that was three grade levels below his peers, and Student's retention at the end of the 2010-2011 school year were all indicators that Student was in need of special education services.

Whether DCPS denied Student a FAPE by failing to evaluate Student within 120 days of Petitioner's written request on November 15, 2010 that Student be evaluated for special education services and an eligibility determination made.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS provide immediate access to Student's records or provide Petitioner with a copy of all of Student's records, and that DCPS fund an independent speech-language evaluation.²

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. Student, age [redacted] is a resident of the District of Columbia and has attended his neighborhood school, [redacted] since Kindergarten.³

#2. Student was first diagnosed with ADHD in August 2009 and since 3rd grade, Petitioner made DCPS aware of Student's diagnosis by informing the principal and teachers not only of the diagnosis, but also that Student was on medication.⁴ In October 2010, Petitioner provided the school with a Health Certificate that indicated that Student had ADHD.⁵

#3. On 11/18/09, Petitioner, through her attorney, made her first request for a copy of Student's educational records to the Principal of [redacted]. The letter request, with facsimile confirmation, requested that the school contact Petitioner in writing of a date and time when Petitioner's representatives could pick up a copy of all of Student's school records and if the school had any questions about the request, to contact Petitioner's attorney.⁶

² Petitioner withdrew her request for an independent comprehensive psychological evaluation. See Stipulation #1.

³ Petitioner.

⁴ Petitioner.

⁵ Petitioner, P-12.

⁶ P-8.

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#4. On 07/29/10, Petitioner, through her advocate, sent a letter, via e-mail correspondence, to the Principal of _____ requesting a copy of Student's educational records. The letter expressly stated that if the school was unable to provide Petitioner with copies of the complete records, the school should advise Petitioner in writing, by facsimile, of times when Petitioner's representatives could pick up copies of the records.⁷ There was no e-mail confirmation in the record, but there also was no evidence that the e-mail request had not been received by the Principal of _____

#5. On 11/15/10, Petitioner provided her third request to the Principal of _____ through her attorney, via confirmed facsimile transmission, requesting that a copy of Student's school records be provided by facsimile. By this same letter, Petitioner requested that DCPS take steps to determine Student's eligibility for special education services and indicated that Petitioner was unable to determine what steps had been taken, if any, since Petitioner had not received a copy of Student's records.⁸ As of 12/12/11, neither Petitioner or Petitioner's representative had received any records from the school, and after 12/12/11, only 4 pages of records were received by Petitioner's representative.⁹

#6. The 11/15/10 letter to the Principal of _____ also contained a request that DCPS begin to evaluate Student by completing a comprehensive psychological evaluation that included an ADHD assessment and then determine Student's eligibility for special education services. Petitioner requested that DCPS contact Petitioner to inform her of whether or not DCPS would conduct the evaluation or whether DCPS would authorize funding for an independent evaluation.¹⁰ DCPS' first response to Petitioner's request for an evaluation was after the complaint was filed; i.e., at the resolution meeting on 11/09/11, DCPS issued a letter authorizing funding for an independent comprehensive psychological assessment including cognitive, educational and clinical components, as well as a social history.¹¹

#7. Regardless of whether or not Student took medication for ADHD, his behavior in school was the same; he couldn't focus, he failed to complete assignments, and Petitioner received many telephone calls from the school regarding Student's off-task behaviors that included fighting, arguing, not completing class work and not paying attention.¹² During the 2009-2010 school year when Student was in the 3rd grade, Student's overall behavior was marked by distractibility that required a lot of supervision and Student made little effort when not under direct supervision. By the end of the 2nd advisory of the 2009-2010 school year, Student was not completing class assignments in the allotted time given. By the end of the 3rd Advisory, Student was still not completing class assignments in the allotted time given, he required direct supervision to complete any class work, and he was easily distracted. By the end of the 4th advisory, Student's behavior and social skills improved; however, he needed to attend summer school to strengthen his comprehension and math skills.¹³ During the 2009-2010 school

⁷ P-7.

⁸ P-6.

⁹ Paralegal.

¹⁰ P-6.

¹¹ Stipulation #1, P-5.

¹² Petitioner.

¹³ R-04.

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year, Student met the basic standard in reading/language arts and science by the end of the school year, but he did not meet the basic standard in mathematics and social studies.

#8. During the 2010-2011 school year when Student was in the 4th grade, Student's teacher documented that Student was performing below grade level, with consistent off-task behavior that included fighting, sleeping, playing, being easily distracted, and struggling to complete assignments.¹⁴ Petitioner received reports from Student's teachers that he was not paying attention, not completing class work or homework, and not staying in his seat.¹⁵

#9. By the end of the 2010-2011 school year, Student did not meet the standard of showing a basic working knowledge of skills and concepts in reading/language arts, mathematics, science, and social studies. Student rarely or required frequent prompting in his ability to follow directions, working well with others, completing and returning homework, and participating in class discussion. Over the course of the entire school year, Student rarely completed class work on time and he rarely used his time wisely in class.¹⁶ Student struggled with academics and behavior throughout the year, displaying behavior that consisted of sleeping often, being off task, and being highly distractible. By the end of the 4th grade advisory, Student was still performing below grade level. As a result, Student was retained in the 4th grade because he had not mastered the necessary skills to advance to the next grade, even though he attended summer school.¹⁷

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 overall purpose of the IDEA is 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. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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

¹⁴ P-10-3.

¹⁵ Petitioner.

¹⁶ P-10-1, P-10-2.

¹⁷ Petitioner, P-10-3, P-11-1.

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process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to allow Petitioner access to Student's educational records following her written requests in November 2009, July 2010 and November 2010.

Pursuant to 34 C.F.R. 300.613(a), DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by DCPS. DCPS must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, or resolution meeting, and in no case more than 45 days after the request has been made. Access to records and other information shall be obtained by making a written request to the public school official having custody or responsibility for the records. 5 D.C.M.R. 2600.4. The right to inspect and review education records includes...the right to request that DCPS provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records and the right to have a representative of the parent inspect and review the records. 34 C.F.R. 300.613(b); 5 D.C.M.R. 2600.1, 2600.2, 2600.6. The parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement, and the provision of free appropriate public education. 5 D.C.M.R. E-3021.1

Petitioner made three written requests to the school, through her legal representatives, for a copy of Student's school records. Two written requests, with confirmation of facsimile transmission, were dated 11/08/09 and 11/15/10. DCPS' receipt of those requests was undisputed in the record. As of 12/12/10, Petitioner had not received any school records and after 12/12/10, Petitioner had received only 4 pages of school records.

DCPS argued that it did not deny Student a FAPE under the IDEA because it was Petitioner's responsibility to come to the school and review the records as a preliminary step to requesting a copy of the records, and Petitioner failed to do so. However, the letters sent to DCPS requested that if DCPS was unable to provide a copy of records via facsimile, DCPS should contact Petitioners with dates and times for review of records. As of 12/12/11, Petitioner had not received any records or correspondence from DCPS regarding the opportunity to review records or retrieve records. IDEA required DCPS to respond to Petitioner's request within 45 days of the first written request on 11/08/09 and DCPS failed to do so. This failure was a violation of the IDEA. The Hearing Officer determines that Student was denied a FAPE because Petitioner was unable to secure the school records that would enable her to effectively and objectively assess her child's progress and educational needs, particularly in view of the fact that Student had been bringing home report cards that indicated that he was off-task and below grade level standard as far back as the end of calendar year 2009. Petitioner met her burden of proof.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to identify Student as a child with a disability, pursuant to its Child Find obligations, since the beginning of the 2009-2010 school year; specifically, Student's continued disruptive behavior in school, academic performance that was three grade levels below his peers, and Student's

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retention at the end of the 2010-2011 school year were all indicators that Student was in need of special education services.

Pursuant to 34 C.F.R. 300.111, DCPS is responsible for identifying, locating and evaluating all children with disabilities residing in the District of Columbia, 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. 34 C.F.R. 300.111(a)(1)(i); 5 D.C.M.R. E-3002.1(d). The duty to find these children, known as Child Find, also includes children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111(c)(1).

There was ample evidence in the record that DCPS should have begun taking steps to evaluate Student for special education services at the end of the 2nd Advisory of the 2009-2010 school year. The school knew Student was on medication for ADHD and Student's report cards beginning with the 2nd Advisory of the 2009-2010 school year indicated that he was having attention problems in class that translated to high distractibility and failure to complete class assignments within the time allotted. By the end of the 2009-2010 school year, there was a recommendation for summer school due to Student's failure to reach a basic standard level of academic performance. And, Student's precarious situation in school did not improve. By the end of the 2010-2011 school year, Student had been retained in the 4th grade despite attending summer school. The evidence was overwhelming that Student could not perform as required to meet the basic standard level of academic performance and that he needed help.

Petitioner met her burden of proof. DCPS' failure to locate, identify and evaluate Student since the end of the 2nd Advisory of the 2009-2010 school year resulted in Student being denied a FAPE because Student's right to a FAPE was impeded.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to evaluate Student within 120 days of Petitioner's written request on November 15, 2010 that Student be evaluated for special education services and an eligibility determination made.

Pursuant to 34 C.F.R. 300.301, DCPS must conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. DCPS must assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment. 38 D.C. Code 2561.02. A child with a suspected disability who may need special education shall be referred, in writing, to an IEP Team. The referral may be made by a child's parent and if the child attends a District of Columbia public school, this referral shall be submitted by the parent to the building principal of the child's home school. 5 D.C.M.R. E-3004.1

The evidence was clear and uncontroverted that on 11/15/10, Petitioner made a written referral to the principal of the Student's home school that Student be evaluated for special education services. By law, the evaluation process should have been completed by March 2011. As of the time of the filing of the complaint, DCPS still had not taken any steps to get Student

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evaluated. On 11/09/11, almost one year later, DCPS finally authorized funding for an independent comprehensive psychological evaluation. DCPS violated the IDEA by failing to evaluate Student within 120 days of the written referral. The impact on Student was devastating. By the end of the 2010-2011 school year, Student had been retained in the 4th grade. DCPS' inaction caused educational harm to Student. Petitioner met her burden of proof that Student had been denied a FAPE.

Relief

Although there was no evidence in the record that Student might need speech-language services, that is not surprising. DCPS failed to timely complete a comprehensive psychological evaluation which would have indicated whether or not additional evaluations were needed. If the comprehensive psychological evaluation had been completed in a timely manner, DCPS would have convened a meeting to discuss the evaluation and determine if Student required additional evaluations. Furthermore, Petitioner was unable to timely obtain copies of Student's records which might have shed some light on what Student's educational needs were. Student is entitled to an independent speech-language evaluation at this time. The analysis of Student's needs and the development of an appropriate educational program for him has been delayed through the fault of DCPS for about two years. Further delay in determining the extent of Student's educational needs would only contribute to more educational harm to Student, especially if it turns out that Student needed speech-language services all along.

ORDER

(1) Within 10 business days of the date of this Order, DCPS shall provide Petitioner, with a copy to Petitioner's Attorney, a letter authorizing funding for an independent speech-language evaluation at market rate; and

(2) On January 16, 2012,¹⁸ DCPS shall make Student's entire school record available to Petitioner's legal representative and provide Petitioner's legal representative with the opportunity to review the records and make copies at no cost. DCPS shall make Student's records available for review beginning at 9:00 a.m.

IT IS SO ORDERED.

¹⁸ At the due process hearing, Petitioner's Attorney chose this date as a date that Petitioner's legal representative would be available to review records at the school.

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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).

Date: January 2, 2012

/s/ Virginia A. Dietrich
Hearing Officer