

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

Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹
through the Parent

Petitioner,

v

Respondent.

Date Issued: March 25, 2011

Hearing Officer: James Gerl

Case No:

Hearing Date: March 4, 2011

Room: 2004

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on January 21, 2011. The matter was assigned to this hearing officer on January 25, 2011. A resolution session was convened on February 8, 2011. No settlement was achieved at the resolution meeting and, therefore, the parties agreed that the hearing officer decision is due on or before March 25, 2011. A prehearing conference was convened on February 15, 2011. The due process hearing was convened on March 4, 2011 at the Student

¹ Personal identification information is provided in Appendix A.

Hearing Office. The hearing was closed to the public. The student's parent attended the hearing, but the student did not attend the hearing. Two witnesses testified on behalf of the Petitioner and seven witnesses testified on behalf of the Respondent. Petitioner's exhibits 1-4 were admitted into evidence at the hearing. Respondent's exhibits 1-23 were admitted into evidence at the hearing.

JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq.; Title 34 of the Code of Federal Regulations, Part 300; Title 5-E of the District of Columbia (hereafter sometimes referred to as "District" or "D.C.") Municipal Regulations (hereafter sometimes referred to as "DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered.

To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES PRESENTED

The following two issues were determined at the prehearing conference to be presented by the complaint in this matter and evidence regarding these issues was presented at the due process hearing:

1. Did Respondent fail to evaluate the student upon the request of the parent?
2. Did Respondent violate its child find obligations under the special education laws by failing to evaluate the student?

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, I find the following facts:

1. The student is a -year-old resident of the District of Columbia (R-1; R-5; stipulation by the parties on the record) (References to exhibits shall hereafter be referred to as "P-1," etc. for the petitioner's exhibits, "R-1," etc. for the respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)
2. The student attended 4th grade at one of Respondent's schools for the 2009-2010 school year. (Stipulation by counsel on the record)
3. The student was retained in grade at the end of the 2009-2010 school year. (Stipulation by counsel on the record)
4. The student continues to attend grade in one of Respondent's schools for the 2010-2011 school year. (Stipulation by counsel on the record)
5. Respondent has not evaluated the student to determine whether she is eligible for special education and related services. (Stipulation by counsel on the record)
6. The student's parent has never requested that the student be tested for special education. (T of the student's mother)

7. The student's mother asked Respondent's staff on a number of occasions whether additional help was available for the student. Respondent offered some accommodations to the student, including tutoring, which she took advantage of, and Saturday school, which she only took advantage of for a short period of time because the student told her mother that Saturday school consisted only of watching movies and because the student's father was only available to visit with her on Saturdays. Although a movie is shown one day per month, each Saturday session generally involves about two hours of work on academic subjects as well as breakfast and lunch. (T of R's principal; T of the student's mother; T of R's Math Teacher 2010-2011 school year)
8. Among the red flags that should cause educators and school personnel to suspect that a student might have a disability are poor academic performance and behavioral incidents. (T of R's school psychologist; T of R's math teacher)
9. For the 2009-2010 school year, the student received a final grades of unsatisfactory in math, a D in English, a C in science, a D in

social studies and A's and B's in art, library and physical education. (R-16)

10. As a result of the student's poor academic performance for the 2009-2010 school year the staff at Respondent determined that the student should be retained to repeat the grade for the 2010-2011 school year. (T of R's English teacher)
11. The student's first quarter report card for the 2009-2010 academic year had comments by several teachers indicating problems. Her math teacher noted that her lack of understanding of concepts was causing her to be "disruptive, talkative, playful, and/or inattentive." For the same marking period, the student's science teacher noted that while polite, the student "sometimes finds it hard to pay full attention and listen carefully, especially in class lessons." For the same marking period, the student's social studies teacher noted that the student finds it "hard to pay full attention and listen carefully." (R-9)
12. On the student's second quarter interim progress report for the 2009-2010 school year, she received unsatisfactory marks under

the work habits categories of staying on task and following directions. (R-10)

13. On the student's second quarter report card for the 2009-2010 school year, she received grades of unsatisfactory for the work habit categories of following directions and staying on task. (R-11)

14. On the student's third quarter interim progress report, her teachers noted that she needed improvement in the work habits categories of staying on task and following directions. (R-13)

15. The student's third quarter report card noted grades of needs improvement on the work habits categories of staying on task and following directions. (R-14)

16. The student's scores on the statewide criterion-referenced assessment given on April 19, 2010 were basic, or below proficient, in both reading and mathematics. In mathematics, the student's subtest scores in "number sense and operations," and in "patterns, relations and algebra" were substantially low, scoring in the 32nd percentile and the 17th percentile, respectively. Her subtest scores in the other three mathematics categories were near or above the proficient level. (R-17)

17. The student's report card for the first quarter for her second year in the grade reveals that she received a B in both English and social studies/science and a grade of D in math. On said report card, her teachers noted that she needed improvement in the work habits category of staying on task. (R-19)
18. For the second quarter in the student's second year in the grade, she received a grade of B in both English and social/science and a grade of C in math. (R-20)
19. During the student's time at Respondent's school, she was referred for discipline for behavioral incidents on five occasions. The occasions involving disciplinary referrals are as follows: On December 14, 2009, Respondent issued a phone call to the student's parents for a horseplay incident in which she and another student nearly got into a fight. On April 8, 2010, the student received a two hour in-school suspension for physical aggression by pushing and punching another student. On May 27, 2010, the student received an in-school suspension of an unspecified duration for assault when she asked another student, "does this hurt?" while she stuck a pencil into the other student.

On October 4, 2010, the student received a two hour in-school suspension for fighting when the student started hitting another student on the upper chest and head with her hands. On January 12, 2011, the student received a one hour in-school suspension for inappropriate language when she referred to another student as a

(P-1)

20. The student's actions which resulted in disciplinary referrals by respondent were largely the result of impulsive actions by the student. (T of P's educational advocate)
21. The student's poor academic performance and her impulsive behavioral incidents, coupled with the fact that she was having difficulty concerning staying on task, and paying attention, and focusing during her time in the classroom should have led school staff to reasonably suspect that the student had a disability, possibly attention deficit hyperactivity disorder or a specific learning disability in math, or both. (T of P's educational advocate)
22. Respondent's staff is capable of and willing to conduct a comprehensive psychological examination of the student.

Respondent's staff is capable of analyzing the results of said evaluation. (T of R's school psychologist)

23. At the resolution meeting convened for this due process complaint on February 8, 2011, Respondent offered to conduct certain evaluations of the student. The parent refused to give consent for the evaluations. The resolution meeting did not result in a settlement. (T of R's school psychologist; R-6)

CONCLUSIONS OF LAW

Based upon the evidence in the record, the arguments of counsel, as well as my own legal research, I have made the following Conclusions of Law:

1. A school district must evaluate a student to determine whether she is eligible for special education and related services upon the request of a parent. IDEA §614(a)(1)(B); 34 CFR §300.301(b); See Jones ex rel AL v. District of Columbia 646 F.Supp.2d 62, 53 IDELR 47 (D. D.C. 2009). In the instant case, the parent made no request that the student be evaluated.

2. Under Individuals With Disabilities Education Act, 20 U.S.C. §§1400 *et seq.* (hereafter sometimes referred to as "IDEA"), a state must ensure that children with disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine which children with disabilities are currently receiving need special education services. IDEA § 612(a)(3); Title 5-E, D.C.M.R. § 3002.1(d). To comply with this child find obligation, states must have in effect policies and procedures to ensure that all children with disabilities who are in need of special education and related services are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving special education and related services. Such policies and procedures must include 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 or are highly mobile children. 34 C.F.R. §§ 300.111(a) and (c).
3. In Washington, D.C, municipal regulations have placed the responsibility on local education agencies, such as Respondent, to

ensure that procedures are implemented to identify, locate and evaluate all children with disabilities residing in the district that are in need of special education and related services. The child find obligation provisions of IDEA impose an affirmative duty on the local education agency to identify, locate and evaluate such students. Hawkins v. District of Columbia, 539 F. Supp. 2d 108, 49 IDELR 213 (D.D.C. 2008); Title 5-E, D.C.M.R. § 3002.1(d).

4. The standard for triggering the child find duty is suspicion of disability rather than actual knowledge of a qualifying disability. Regional School District No. 9, Bd. of Educ. v. Mr. and Mrs. M ex rel MM, 53 IDELR 8 (D. Conn. 2009); Torrance United School District v. EM, 51 IDELR 11 (N.D. Calif. 2009). In the instant case, respondent violated its child find duty.

DISCUSSION

Merits

Issue No. 1: Did Respondent fail to evaluate the student at the request of the parent?

Petitioner alleges in the due process complaint that Respondent failed to evaluate the student at the parent's request. The unequivocal testimony of the parent at the due process hearing, however, was to the contrary - that she never requested that the student be evaluated for special education. Accordingly, the evidence in the record does not support the allegation made by Petitioner.

In closing argument, Petitioner's counsel contended that the parent requested a special education evaluation by having a conversation with the principal and with the teachers in which she requested what further help might be available for the student. The language cited by counsel, however, is clearly not sufficient to trigger a duty on the part of Respondent to evaluate the student for special education.

According to the parent's own testimony, Respondent clearly took her request for additional help seriously. The staff at the school offered to provide the student with tutoring, which she took advantage of, and Saturday school, which she did not take advantage of.

The request by the parent, however, cannot fairly be construed to constitute a request for a special education evaluation. Rather, it was

clearly just a request to explore further options to provide the student with additional help which respondent did, in fact, provide. By no stretch of the imagination could the parent's words be construed as a request for a special education evaluation. If it were, every conversation between a parent and school staff concerning how a student is doing would trigger a duty to evaluate the child for special education. Petitioner's argument is rejected.

Petitioner did not prove any facts that would support this allegation. Indeed, the testimony of the parent expressly disproved the allegation. It is difficult to understand why this allegation is in the complaint. Petitioner has not carried her burden with respect to this issue. The Respondent has prevailed with regard to this issue.

Issue No. 2: Did Respondent violate its duty under the child find provisions of IDEA to evaluate the student to determine whether or not she had a suspected disability?

IDEA requires that a school district evaluate a student if there is a reasonable basis to suspect that the student has a disability. The

standard for triggering the child find duty is suspicion of disability rather than actual knowledge of a qualifying disability. See, Regional School District No. 9, Bd. of Educ. v. Mr. and Mrs. M ex rel MM, 53 IDELR 8 (D. Conn. 2009); Torrance United School District v. EM, 51 IDELR 11 (N.D. Calif. 2009). In the instant case, it is clear that the Respondent should have had a reasonable suspicion that the student had a disability.

It is true, as Respondent's counsel stated in closing argument, that not every student who fails a class or is retained for another school year in the same grade should be tested for special education. However, as Respondent's witnesses, including its math teacher and its school psychologist, testified at the due process hearing, there are a number of red flags that should cause a school district to suspect that a student may have a disability. One of the red flags identified by Respondent's witnesses is poor academic performance. Another red flag identified by Respondent's witnesses was the occurrence of behavioral issues.

In the instant case, the student has had both poor academic performance and a number of behavioral issues. Concerning academic performance, the student's grades, particularly her grades in math,

were terrible. As a result of the student's poor academic performance, she was retained for a second year in the grade. Petitioner's educational advocate testified credibly and persuasively that the student showed a troubling lack of progress in math, even the second time through the 4th grade. This testimony is corroborated by the documentary evidence. For example, the student's scores on two of five subtests in mathematics on the statewide assessments were extremely low, whereas the other three subtest scores were at or near the proficient level.

In addition, the student exhibited some behavioral issues. On five occasions during her two years of schooling at Respondent, she was referred for disciplinary action. As Petitioner's educational advocate testified credibly and persuasively, the behavioral incidents for which the student was disciplined were largely impulsive in nature.

In addition, the student's educational advocate testified credibly and persuasively that the student had numerous problems with distractibility and focus. A number of the student's report cards and other educational records maintained by Respondent demonstrate that the student had such problems. Said educational records show

comments such as the following: "lack of ability to stay on task;" "easily distractible;" "needs more time on task;" "disruptive, talkative and inattentive." In addition, a number of her report cards and progress reports noted that the student was either unsatisfactory or needed improvement in the behavioral categories of staying on task and following directions.

It was the credible and persuasive testimony of the Petitioner's educational advocate that the problems with distractibility and focus, coupled with the student's impulsive behavioral issues that caused her to receive discipline, as well as her documented academic struggles, especially in math, caused the advocate to have a suspicion that the student may have a disability, possibly attention deficit hyperactivity disorder or a specific learning disability in mathematics or both.

The testimony of Respondent's witnesses was that they did not suspect that the student had a disability despite the occurrence of these red flags. Such testimony, however, is rejected. The testimony was not credible or persuasive. In particular the testimony of respondent's witnesses was impaired by the fact that they utilized the wrong standard. They concluded that the student did not need special

education. Particularly troubling was the testimony of Respondent's special education teacher that special education students have trouble on all levels. Clearly Respondent was looking for a lot more than a mere suspicion of a disability.

The standard, however, is suspicion of disability not hard proof of a disability. The results of the evaluation of this student could possibly result in a valid conclusion that the student is not eligible for special education. That is not the standard for child find, however. It is clear from the evidence in the record, that Respondent reasonably should have suspected that this student has a disability. In contrast, the testimony of Petitioner's educational advocate in this regard was credible and persuasive.

Accordingly, it is concluded that Respondent reasonably should have suspected that the student had a disability. It is concluded that Respondent violated its child find obligation by failing to evaluate the student for special education.

The Petitioner has met her burden of persuasion on the second issue. The Petitioner has prevailed on this issue.

RELIEF

The educational advocate of Petitioner testified credibly and persuasively at the hearing that the student needs a comprehensive psychological examination. The reason for giving the comprehensive psychological examination is that Respondent should have reasonably suspected that the student had either attention deficit hyperactivity disorder or a specific learning disability in math or both. The testimony was credible and persuasive. The Order herein shall require a comprehensive psychological examination.

Petitioner's educational advocate also provided testimony that the student "probably" should receive a speech language evaluation. The testimony of the educational advocate concerning the speech language evaluation, however, was not persuasive or credible. The educational advocate merely offered a conclusory statement that the student probably needed a speech language evaluation. The testimony was based upon a vague reference to reading comprehension. The advocate did not link this conclusion to any other evidence in the record but merely offered that opinion. The advocate's opinion in this regard was also equivocal and uncertain. The speech language evaluation was not

rooted to the educational advocate's testimony concerning the suspected disabilities of the student with regard to either attention deficit hyperactivity disorder or a specific language disability in mathematics. Moreover, the testimony was speculative as the advocate testified only briefly about the evaluation without stating any rationale linking it to the student's suspected disabilities. Given that the advocate's opinion is not credible or persuasive and is not supported by the other evidence in the record, the request for a speech language evaluation is rejected.

The due process complaint also requests a social history evaluation. However, Petitioner offered no evidence or argument in support of this request and it is, therefore, rejected.

Petitioner has requested that the Respondent be ordered to provide funding for an independent evaluation. In general, the special education law requires that independent evaluations only be provided after a school district has had an opportunity to do its own evaluation and conducts an evaluation that is not appropriate. See, 34 CFR §300.502(b); IDEA §615 (b)(1) and (d)(2).

In the instant case, the hearing officer has found a violation of Respondent's child find obligations. However, Petitioner has provided

no reason why Respondent should not be permitted to conduct the evaluations itself as is contemplated by the statutory citations provided above. The appropriate relief for Respondent's violation of its child find obligations, under all of the facts and circumstances when weighed together, would seem to be to require Respondent to conduct the evaluation that it should have conducted in the first place. Accordingly, it is concluded that Respondent, and not an independent provider, should conduct a comprehensive psychological examination of the student. The Order portion of this decision shall so provide.

During the resolution session conducted pursuant to this due process complaint, Respondent offered to conduct certain evaluations, but the parent refused to consent to said evaluations. Because the issue has arisen and because parent requested an evaluation as relief in this due process complaint, the parent will be required to give appropriate consent to Respondent to conduct the evaluation before the evaluation will be conducted.

ORDER

Based on the foregoing, it is **HEREBY ORDERED**:

1. That Petitioner shall sign any necessary consent forms in order for Respondent to conduct the evaluations as set forth below;
2. Respondent shall conduct a comprehensive psychological examination of the student within 30 days of receipt of said consent from the parent;
3. All other relief requested in the foregoing due process complaint is hereby denied.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Date Issued: March 25, 2011

/s/ James Gerl

James Gerl
Hearing Officer