DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

RECEIVED
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[Parent], on behalf of,
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: July 5, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: July 1, 2010 Room: 5a

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on July 1, 2010, in hearing room 5a, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is July 11, 2010, pursuant to Standard Operating Procedure (SOP) § 1003. This HOD is issued on July 5, 2010.

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. The hearing was closed to the public.

Present at the due process hearing were:

Chike Ijeabuonwu, Esq., Petitioner's Counsel

Blair Matsumoto, Esq., Respondent's Counsel

[1] Personal identification information is provided in Appendix A.

Petitioner, Student's Mother

Two witnesses testified at the hearing for the Petitioner:

Petitioner (P), Student's Mother

Ogom Ijeabuonwu (O.I.), Petitioner's Advocate

One witness testified for the Respondent, Special Education Coordinator for

The complaint in this matter was filed on May 14, 2010. A response to the complaint was filed on May 24, 2010. The parties agreed in writing that no agreement was possible on June 9, 2010. As a result, the 45 day hearing timeline began June 10, 2010, pursuant to 34 C.F.R. § 300.510(c)(2). A prehearing conference was held on June 10, 2010, and a prehearing order was issued on that date.

The Petitioner is seeking identification of the Student as a child with a disability under the IDEA.

13 documents were disclosed and offered by the Petitioner. (P 1 – P 13) The IHO rejected P 4 as redundant.[2] There were no objections to the remaining offered documents and they were entered into the record as evidence. Petitioner's exhibits are:

P 1	-	June 17, 2010	-	Letter from O.I. to
P 2	-	June 9, 2010	-	Due Process Complaint Disposition and Notes
P 3	-	June 3, 2010	-	Resolution Meeting Confirmation
P 5	-	April 30, 2010	-	Letter from Ijeabuonwu to OSE Resolution Team Unit
P 6	-	April 9, 2010	-	Letter from Ijeabuonwu to OSE Resolution Team Unit
P 7	-	March 29, 2010	-	Comprehensive Evaluation
P 8	-	February 25, 2010	-	Functional Behavior Assessment
P 9	-	January 26, 2010	-	Proposed Settlement
P 10	-	January 26, 2010	-	Resolution Meeting notes and Due Process Complaint Disposition

[2] This document was the Complaint, which was already part of the hearing record.

P 11	-	September 9, 2009	-	Letter from Ijeabuonwu to Principal
P 12	-	June 6, 2009, December 1, 2009, April 15, 2009, September 22, 2009, October 16, 2008	-	Discipline Records
P 13	-	July 8, 2009	-	Attendance Summary

17 documents were disclosed by the Respondent. (R 1 – R 17) R 1, R 2, and R 3 were not offered as they were redundant.[3] The remaining documents were offered into evidence and there were no objections. Respondent's exhibits are:

R 4	-	June 9, 2010	-	Due Process Complaint Disposition
R 5	-	January 26, 2010	-	Proposed Settlement
R 6	-	January 27, 2010	-	Letter from Johnson to Ijeabuonwu
R 7	-	March 18, 2010	-	Letter from Johnson to Ijeabuonwu
R 8	-	April 1, 2010	-	Letter from Johnson to Ijeabuonwu
R 9	-	March 29, 2010	-	Comprehensive Evaluation
R 10	-	February 25, 2010	-	Functional Behavior Assessment
R 11	-	June 10, 2010	-	Email from Matsumoto to Ijeabuonwu
R 12	-	June 10, 2010	-	Letter of Invitation to a Meeting
R 13	-	June 22, 2010	-	Letter of Invitation to a Meeting
R 14	-	January 22, 2010, March 26, 2010	-	Reports to Parents on Student Progress
R 15	-	September 22, 2009, April 15, 2009, October 16, 2008, December 1, 2009	-	Disciplinary Records
R 16	-	July 8, 2009	-	Attendance Summary
R 17	-	May 19, 2010	-	Attendance Summary

II. ISSUE

Whether the Respondent failed to identify the Student as a child with a disability?

III. 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 years of age and attends

[3] These documents included the Compliant, Response, and Prehearing Order, respectively.
[4] Stipulated fact.

2. The Parties signed a settlement agreement on January 26, 2010.[5] The original request for the initial evaluation was made on January 26, 2010, at the resolution meeting on that date.[6] The settlement agreement included the following relevant provisions:[7]

> 3. Parent agrees to cooperate fully with DCPS in the implementation of the terms of this Settlement Agreement. Any delay caused by the student, parent, advocate, counsel, or other representative of the Parent or the student, as it pertains to compliance with the terms of this Settlement Agreement will toll any deadlines herein by one day for each day of delay. DCPS further retains the right to take necessary action, consistent with IDEA, to ensure the continued delivery of free appropriate public education for the student to the extent the delivery of such free appropriate public education may be impeded by delay caused by the student, parent, advocate, counsel, or other representative of Parent or the student.
>
> 4. The parties agree to the following:
>
> a. Parent is authorized to obtain an Independent Comprehensive Psychological evaluation (which includes cognitive, educational , and clinical components as well as a social history) and a Functional behavior assessment, develop a behavior intervention plan at the expense of the District of Columbia to be completed within 45 calendar days of the date of this agreement. . .
>
> b. Within 20 calendar days of receipt of the last independent evaluation, DCPS will convene a meeting to review the evaluations, determine the student's eligibility for special education services, if student is found eligible DCPS will develop a[n] IEP for student and discuss and determine location of services. . . .

3. The functional behavior assessment (FBA) was completed independently and an assessment report written on February 25, 2010.[8] The report was detailed and included several recommendations.[9] One of the recommendations was that the Student be "enrolled in special education."[10]

4. The comprehensive assessment was completed independently and an assessment report written on March 29, 2010.[11] The report was detailed, included a lengthy summary, and

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[5] Stipulated fact, R 5/P 9.
[6] Testimony (T) of A.T. The complaint for the dispute that led to the settlement agreement was not offered or reviewed as part of this proceeding. Thus, it is unknown whether the request for initial evaluation was, in fact, made earlier. For purposes of this review, January 26, 2010, will be the benchmark for timelines as even if there were an earlier date, the outcome remains the same.
[7] R 5/P 9.
[8] P 8/ R 10.
[9] P 8/ R 10.
[10] P 8/ R 10. This recommendation from an independent evaluator does not equate to a determination that the Student is, in fact, eligible for special education and related services under the IDEA.
[11] P 7/ R 9.

included several recommendations.[12] The recommendations included, in part, two additional assessments, and specialized instruction.[13] The report also diagnosed the Student with "Learning Disorder, NOS with Expressive Language Difficulty" and "Mood Disorder, NOS (Dysthimia)."[14]

5. The Respondent stopped compliance with the settlement agreement on April 1, 2010, and conducted no further child find activities until the filing of the present complaint.[15] The parties have failed to meet to review the assessment reports and make an eligibility determination (and write the requisite evaluation report).[16]
6. The assessment reports were provided to the Respondent on April 9, 2010.[17] They have not been reviewed by the Respondent's staff.[18]

IV. 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:

1. 34 C.F.R. § 300.8(a) defines a "child with a disability" as:

> (1) Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.
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> (2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in

[12] P 7/ R 9.
[13] P 7/ R 9.
[14] P 7/ R 9. These diagnoses do not, in and of themselves, qualify the Student for special education and related services under the IDEA.
[15] R 7, R 8, R 12, R 13, T of T of P, and T of O.I.
[16] P 2/ R 4, T of P, T of O.I., and T of (There were several failed attempts to schedule an in-person meeting, and the resolution meeting was not productive because the parties were not prepared to examine the issue of the Student's eligibility.)
[17] P 6.
[18] T of

paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.
(ii) If, consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

The rule continues to define each specific disability category under the IDEA. 34 C.F.R. § 300.8. 34 C.F.R. § 300.309, and local law, provides additional directions as to determinations about specific learning disability.

2. D.C. Mun. Regs. tit. 5, §3004, Identification, provides:

3004.1 Referral to IEP Team

(a) A child with a suspected disability who may need special education and is at least two years, eight months of age and less than twenty-two years of age, shall be referred, in writing, to an IEP team.
(b) A referral, which shall state why it is thought that the child may have a disability may be made by the following:
(1) A child's parent or person in a parental relationship; or
(2) A child (self-referral) who is between the ages of eighteen (18) and twenty-two (22) years of age or an emancipated minor who is eligible to attend the LEA; or
(3) A professional staff employee of the LEA; or
(4) A staff member of a public agency who has direct knowledge of the child.
(c) If the child to be referred attends a D.C. public school or is enrolling in a D.C. public school at the time this referral is made, this referral shall be submitted by his or her parent to the building principal of his or her home school, on a form to be supplied to the parent by the home school at the time of the parent's request.
(d) If the child to be referred does not attend a D.C. public school and the parent does not register the child to attend a D.C. public school at the time the referral is made, this referral shall be submitted by the parent to a site designated by the Superintendent on a form to be supplied to the parent by that site at the time of the parent's request.
(e) Following a referral, an IEP team shall meet to review:
(1) Existing Data;
(2) Information from the parent;
(3) Pre-referral interventions and strategies;
(4) Current classroom-based assessments; and
(5) Observations by teachers and related service providers.

3. D.C. ST § 38-2561.02(a) provides that students will be evaluated "within 120 days from the date that the student was referred for an evaluation or assessment." *See also*: 34 C.F.R. § 300.301. Consent must be obtained before an initial evaluation occurs. 34 C.F.R. § 300.300(a).

4. Determining eligibility requires following these procedures:

(c) Procedures for determining eligibility and educational need.
(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must —
(i) Draw 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; and
(ii) Ensure that information obtained from all of these sources is documented and carefully considered.
(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324.

34 C.F.R. § 300.306(c).

5. D.C. Mun. Regs. tit. 5, §3006, Eligibility Determination, provides:

3006.1 Reports of assessment procedures administered to a child in each area related to the suspected disability shall be available to the IEP team at the time of the eligibility determination meeting.

3006.2 Each assessment report shall include the following:

(a) the date of assessment and the date of the report;
(b) a description of the child's performance in each area assessed, including specific strengths and weaknesses;
(c) information relevant to determinations under § 3005.4(b);
(d) instructional implications for the child's participation in the general curriculum;
(e) if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration); and
(f) the signature and title of the qualified examiner(s) who administered the assessment procedure and who wrote the report.

3006.3 The IEP team shall consider all assessment reports in completing any evaluation of a child suspected of having a disability, or, in the case of reevaluation, any child identified as having a disability under this section. As the result of its consideration, the IEP team will determine whether the child:

(a) is a child with a disability under this Chapter (or, in the case of reevaluation, whether the child continues to be a child with a disability); and
(b) whether the child needs special education and related services (or, in the case of reevaluation, whether the child continues to need special education and related services).

3006.4 The IEP team shall determine that a child has an SLD if:

(a) a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.
(b) Disorder includes such conditions as:
(1) perceptual disabilities;
(2) brain injury;
(3) minimal brain dysfunction;
(4) dyslexia and;
(5) developmental aphasia.
(c) Disorder does not include a learning problem that is primarily the result of:
(1) a visual, hearing or motor disability;

(2) mental retardation;
(3) emotional disturbance; or
(4) environmental, cultural or economic disadvantage.
(d) In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.

3006.5 As the result of any evaluation or reevaluation, whether or not procedures in addition to those already available are conducted, the IEP team will prepare a written evaluation (reevaluation) report, including the following:

(a) information provided by the parent(s);
(b) results of assessment procedures considered and used as a basis for making an eligibility determination;
(c) a statement whether the assessment procedures were valid for the purposes intended and valid for the child;
(d) whether the child is a child with a disability;
(e) whether the child needs special education and related services; and
(f) the signatures of team members participating in the determinations.
(g) if the child was suspected of having SLD, in addition to (a)-(f):
(1) a statement of whether the child has SLD;
(2) the basis for making the determination;
(3) the relevant behaviors noted during the observation of the child;
(4) the relationship of the behaviors to the child's educational performance;
(5) educationally relevant medical findings, if any;
(6) a statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services;
(7) the determination of the IEP team concerning the effects of environmental, economic, or cultural disadvantage; and
(8) the written certification of each IEP team member as to whether the written report reflects the member's conclusions. If the written report does not reflect a member's conclusion, the team member shall submit a separate statement presenting the team member's conclusion. This separate statement will be included as part of the evaluation report.

3006.6 The IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is:

(a) lack of instruction in reading or mathematics; or limited English proficiency; and
(b) the child does not otherwise meet the eligibility criteria.

3006.7 The LEA shall provide the parent with a copy of the evaluation report and each assessment report, at no cost to the parent.

6. The Respondent is required to obtain the Parent's participation in the meeting to determine eligibility, but may not use the Parent's failure to participate as an excuse not to proceed with the identification process if consent has already been provided. *See*: 34 C.F.R. §§ 300.300, 300.327, 300.328, 300.501, and 300.322.

7. The Parent referred the Student for an initial evaluation on or before January 26, 2010. This is concluded because there was a dispute that resulted in a settlement agreement on January 26, 2010. Since there is no contradictory evidence of when the original referral was made, I rely on January 26, 2010, as the referral date. The settlement agreement shows the Parent consented to the initial evaluation of the Student. The settlement agreement permitted the Petitioner to obtain an IEE and required that IEE be completed within 45 days (by March 12, 2010). The IEE was not completed until March 29, 2010. The Respondent unilaterally closed the case on April 1, 2010, because it had not yet received the IEE results, despite the provision of the settlement agreement requiring day for day tolling for any delay caused by the Petitioner or her representatives (in this case, the independent evaluator) and the Respondent's affirmation of its duty to provide the Student free appropriate public education (FAPE) in the event of such delay.[19] 120 days from January 26, 2010, was May 26, 2010. The Respondent did not complete the evaluation by that date (which is a liberal calculation, given that the referral likely happened before January 26, 2010.) To this date, the Respondent has still not completed the initial evaluation, in violation of D.C. ST § 38-2561.02(a) and 34 C.F.R. § 300.301(c)(1)(ii).
8. It cannot be determined whether the Student is a child with a disability under the IDEA at this time because the Respondent has not yet written an initial evaluation report including

[19] The IHO has no authority to enforce the settlement agreement because it was not approved by the SEA or an IHO. Nevertheless, the facts and conclusions regarding the contents of the settlement agreement are relevant to the overall analysis of the issue in this case.

all of the available data on the Student's disability and its affect on her involvement and progress in the general education curriculum.[20]

V. ORDER

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

1. The Petitioner prevails because the Respondent failed to timely complete the initial evaluation of the Student and make an eligibility determination.
2. The Respondent shall convene an IEP team to review all existing assessment reports and other educational data on the Student no later than July 30, 2010. The Petitioner must be provided at least three possible dates for meeting and two possible locations. If she cannot participate on one of the three dates in person the Petitioner must be offered at least two alternative means of participating (e.g. telephone or video conference). If the Petitioner still cannot or will not participate the IEP team will meet without her and must document its efforts to obtain Parent participation, as required by 34 C.F.R. §300.322(d).
3. The IEP team must write an evaluation report, as required by D.C. Mun. Regs. tit. 5, §3006.
    a. If the determination is that the Student is eligible under IDEA, an IEP must be developed and proposed within two weeks of the eligibility meeting.[21] Notice of a proposal for any additional assessments, such as those recommended in the current assessment reports, must be provided to the Petitioner within one business

[20] At the hearing, this IHO advised the parties that he would make an eligibility determination based on the evidence in the record over argument of the Respondent to the contrary. After reviewing the law and the record, however, it is clear that the Respondent's Counsel was correct and it is not possible to make a reasonably certain determination. Thus, the order will direct the parties how to proceed.

[21] This could be done at the same meeting if the team so determines.

day, if it is determined such assessments are necessary (or notice of a refusal if there is a disagreement and the assessments are refused).

b. If the IEP Team determines the Student is not eligible under the IDEA, it must provide notice of a proposal for any additional assessments, including those recommended in the current assessment reports, to the Petitioner within one business day. The additional assessments must be completed, and an IEP team meeting held to review them and make another determination, within 30 calendar days of written informed consent received from the Petitioner.

4. Any failure to comply with the provisions of this Order may be enforced through the State Education Agency complaint process, pursuant to 34 C.F.R. §§ 300.151-153.

IT IS SO ORDERED.

Date: July 5 , 2010

Independent 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).