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STUDENT HEARING OFFICE

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 Parents,	)	
	)	Date Issued: August 26, 2012
Petitioners,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	Case No: 2012-0466
District of Columbia Public Schools	)	
	)	Hearing Date: August 20, 2012
	)	Hearing Room: 2004
Respondent.	)	
	)	

HEARING OFFICER DETERMINATION

Background

Petitioners, the parents of -year old Student, filed a due process complaint notice on June 29, 2012, alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioners specifically alleged that since the beginning of the 2011-2012 school year, Student's behavior and grades were consistently so poor that DCPS was on notice that Student was a child with a suspected disability and DCPS should have conducted an initial evaluation of Student to determine his need for special education services, pursuant to its affirmative Child Find obligations under the IDEA. Petitioners also alleged that DCPS should have evaluated Student within 120 days of their verbal requests to help Student that began in February 2012, as well as within 120 days of April 7, 2012, the date that Petitioners provided the school with a letter from Student's psychiatrist indicating that Student might be need of special education services to address his academic and behavioral problems in school. Petitioners wanted to get the evaluation process started by DCPS providing funding for an independent psychological evaluation that would serve as the basis for data that would be reviewed by DCPS in order to determine whether or not Student was eligible for special education services.

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

DCPS asserted that there were insufficient indicators to suggest that Student might be in need of special education services. DCPS also asserted that it had not violated any statutory timeline by failing to conduct an initial evaluation because 120 days had not elapsed between the time that Petitioners gave the written request for evaluation to school personnel and the time that the due process complaint was filed.

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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 06/29/12. This Hearing Officer was assigned to the case on 07/02/12.

Neither Petitioners nor DCPS waived the resolution meeting. The resolution meeting took place on 07/12/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 07/29/12, the 45-day timeline to issue a final decision began on 07/30/12 and the final decision was due on 09/12/12.

The due process hearing was a closed hearing that took place on 08/20/12. Petitioners were represented by Donovan Anderson, Esq. and DCPS was represented by Victoria Healy, Esq. Petitioners participated in the hearing in person.

Petitioners presented two witnesses: Student's stepmother (Petitioner) and Student's father (Petitioner).

DCPS elected not to present any witnesses.

Petitioners' disclosures dated 08/10/12, containing a witness list and Exhibits P-1 through P-11, were admitted into evidence without objection.

DCPS' disclosures dated 08/13/12, containing a witness list and Exhibits R-1 through R-2, were admitted into evidence without objection.

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

Whether DCPS denied Student a FAPE by failing to locate, identify and evaluate Student in accordance with its affirmative Child Find obligations; specifically, DCPS failed to determine Student's need for special education services since the beginning of the 2011-2012 school year in

light of Student's repeated suspensions and failing grades in all academic courses throughout the school year.

Whether DCPS denied Student a FAPE by failing to evaluate Student and determine Student's eligibility for special education services within 120 days of Petitioners' requests; specifically, (1) on or about 04/07/12, Petitioners provided a letter to the assistant principal from Student's physician requesting that Student be evaluated, and (2) prior to 04/07/12, Petitioners requested an evaluation several times during conversations with the assistant principal.

For relief, Petitioners requested a finding of a denial of a FAPE on the issues presented; DCPS to fund an independent comprehensive psychological evaluation; and DCPS to convene a meeting to review the independent comprehensive psychological evaluation following receipt of it, to determine eligibility, and if Student is eligible for special education services, DCPS to develop an appropriate Individualized Education Program ("IEP"), discuss and determine an appropriate school placement, and DCPS to discuss and determine compensatory education for special education services that Student should have received since the beginning of the 2011-2012 school year.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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 is a resident of the District of Columbia who attended grade at a DCPS school during the 2011-2012 school year.[2]

#2. From the beginning of the 2011-2012 school year, the assistant principal of Student's school knew that Student had Attention Deficit Hyperactivity Disorder ("ADHD").[3]

#3. Student's behavior problems in school began after the first week of the 2011-2012 school year and continued unabated in frequency and intensity throughout the school year, and resulted in some suspensions from school.[4] Eight behavior referrals were made during September 2011 that consisted of sexual harassment of other students, failing to follow teacher directives in the classroom, and pushing and shoving other students. Student fared no better in October 2011 with seven behavior referrals that consisted of disruptive behavior in the classroom, failing to follow teacher directives, missing class, shouting, confrontations with peers, inappropriate physical contact with peers, and provoking fights. Between November 2011 and March 2012, with the exception of February 2012, Student received between 6-8 behavior referrals per month, with citations for inappropriate behavior that included disruptive behavior in

[2] P-1.
[3] Stepmother.
[4] P-10, Stepmother

class, inappropriate touching of peers, provoking fights and inability to complete classwork due to behavior.[5]

#4. Petitioners had constant contact with the school via telephone calls and e-mails due to Student's behavior problems in school, and the majority of the contact was with the assistant principal.[6] On more than one occasion, beginning on or about late February 2012, Petitioners asked the assistant principal what could be done to help Student in school.[7] Petitioners were willing to do whatever was required on their part to help Student adjust more successfully in school.[8]

#5. For the four terms of the 2011-2012 school year, Student received the following grades: an "F" for all four terms in Language Arts, with a final grade of "F"; a "C" followed by three grades of "F" in Mathematics, with a final grade of "F"; an "F" for all four terms in Geography, with a final grade of "F"; an "F" for all four terms in Science, with a final grade of "F"; a grade of "D" for the first term in Health and Physical Education, with a final grade of "D"; a grade of "D" for the second term in Art, with a final grade of "D"; and an "F" for the third term in Music, with a final grade of "F". At the end of the first term, Petitioners spoke with several of Student's teachers about Student's poor academic performance and behavior problems in the classroom that consisted of Student not staying in his seat, Student's inability to grasp the academic work and Student's inability to focus in the classroom. Student failed the 6th grade for the 2011-2012 school year.[9]

#6. Although Student had excessive absences from his classrooms during the 2011-2012 school year, Student did not have a truancy problem from school. Student's 15-20 days of missed school were excused absences due to medical reasons.[10]

#7. Within two days of receiving a letter from Student's psychiatrist on April 7, 2012, Petitioners hand delivered the letter directly to the assistant principal of Student's school.[11] The letter specifically stated that Student had a diagnosis of ADHD and might need an IEP to address Student's problems in school that consisted of lack of motivation, difficulty controlling his impulses, and problems focusing and concentrating. The letter also requested that Student be assessed for special education services.[12]

#8. On June 29, 2012, Petitioners filed a due process complaint alleging that DCPS had failed to comply with its Child Find obligations and that DCPS had failed to complete evaluations.[13]

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[5] P-10.
[6] Stepmother.
[7] Father.
[8] Stepmother.
[9] P-1, Stepmother.
[10] P-1, R-2, Stepmother.
[11] Stepmother.
[12] P-2.
[13] R-1.

#9. Since the beginning of the 2011-2012 school year, DCPS never offered to evaluate Student for special education services until a resolution meeting on July 12, 2012, at which time DCPS offered to evaluate Student, but only if Petitioners accepted the terms of the settlement agreement offered by DCPS. Petitioners were unwilling to accept the terms of the settlement agreement; however, Petitioners were willing to have Student evaluated without accepting the settlement agreement, but DCPS refused.[14]

Discussion/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 (FAPE) 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.

To comply with the overall purpose of the IDEA, all local education agencies (LEA) in the District of Columbia must ensure that all children with disabilities, ages three to twenty-two, who are residents or wards of the District of Columbia, have available to them a FAPE and that the rights of these children and their parents are protected. 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1.

"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 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 identify, locate, and evaluate Student in accordance with its affirmative Child Find obligations; specifically, DCPS failed to determine Student's need for special education services since the beginning of the 2011-2012 school year in light of Student's repeated suspensions and failing grades in all academic courses throughout the school year.

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

[14] R-1, Stepmother.

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). This mandate, known as Child Find, extends to all children suspected of having a disability, not merely to those students who are ultimately determined to be disabled. 34 C.F.R. 300.111(c)(1), *N.G. v. District of Columbia,* 556 F. Supp. 2d 11, (D.D.C. March 31, 2008), 50 IDELR 7. It is an affirmative obligation to identify students who might be disabled and as soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. DCPS must then ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine if the child is a "child with a disability" under the IDEA, and the educational needs of the child. 34 C.F.R. 300.301, 5 D.C.M.R. E-3005.1, *N.G. v. District of Columbia,* 556 F. Supp. 2d 11, (D.D.C. March 31, 2008), 50 IDELR 7.

Recently, an appellate court in another jurisdiction determined that a local educational agency could not be held liable for a Child Find violation unless the student is eligible for special education services. *D.G. v. Flour Bluff Independent School District,* 59 IDELR 2 (5th Cir. June 2012). However, in this jurisdiction, failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE. *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, (2007), 48 IDELR 96; *Hawkins ex rel. D.C. v. District of Columbia*, 529 F. Supp. 2d 108 (D.D.C. March 7, 2008); *N.G. v. District of Columbia,* 556 F. Supp. 2d 11, (D.D.C. March 31, 2008), 50 IDELR 7.

To hold otherwise in this jurisdiction would encourage a bizarre result that would cut against the grain of the Child Find provision which is to identify, locate and evaluate a child who might be in need of special education services; i.e., a student could languish for months and even years while DCPS took its time to evaluate the child, if DCPS evaluated the child at all; and there would be no penalty or consequence to DCPS unless and until a child qualified for special education services under the IDEA. This result would deter parents with counsel from filing complaints to secure services for children who are suspected of having disabilities; a right provided to parents under the IDEA. 34 C.F.R. 300.507(a), 300.512(a)(1), 300.517(a)(1) (parents have a right to file a complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child; the right to be represented by counsel; and the right to recover reasonable attorneys fees if they are the prevailing party in an IDEA action).

Petitioners met their burden of proof on this issue. This Hearing Officer concludes that irrespective of a child's eligibility for special education services, the child can be denied a FAPE with respect to a Child Find violation or the initial evaluation process if there is a procedural violation of the IDEA because a determination that a child has been denied a FAPE can be based on procedural inadequacies that significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, as well as the child's *right* (emphasis added) to a FAPE can be impeded if DCPS delays in the evaluation and determination of eligibility of a child who is suspected of having a disability that affects his educational performance and who might be in need of special education services. See 34 C.F.R. 300.513(a). The broad wording of 34 C.F.R. 300.513(a) protects the child's *right* to a FAPE, that includes DCPS' mandatory compliance with the evaluation and eligibility determination

requirements of the IDEA. If indeed a child is determined eligible for special education services and has been denied a FAPE, then the child's entitlement to compensatory education attaches and the child is entitled to replacement of educational services the child should have received in the first place. *Reid v. District of Columbia, 43 IDELR 32 (2005).*

In the present case, DCPS, as the LEA for Student, was responsible for Child Find for Student during the 2011-2012 school year. See 5 D.C.M.R. E-3001.1, 38 D.C. Code 2561.01(2). During that time, Student was not successfully functioning in school, both behaviorally and academically. By the end of October 2011, there were several strong indicators that put DCPS on notice that Student might be a child with a disability who was in need of special education services. The indicators consisted of the assistant principal knowing that Student had ADHD, a diagnosis that qualifies as a disability under the IDEA if it adversely affects a child's educational performance;[15] Student's poor academic performance and behaviors in the classroom as recognized by Student's teachers; Student's failing of all classes except for Mathematics with a grade of "C;" and an inordinate amount of behavior referrals during the months of September and October 2011.

All of the above facts, known to DCPS at the end of October 2011, were sufficient to trigger DCPS' affirmative Child Find duty to identify, locate, and evaluate Student to determine whether he was in need of special education services. And, despite Petitioners specifically asking the school for help for Student beginning in late February 2012, Student failing all of his classes for the 2nd – 4th terms of the 2011-2012 school year, and Petitioners providing DCPS with a letter from Student's psychiatrist on or about April 9, 2012 that requested evaluation for special education services, DCPS made no efforts to evaluate Student until July 12, 2012 at which time DCPS improperly made evaluation of Student contingent on Petitioners' acceptance of a settlement agreement to resolve the due process complaint filed on June 29, 2012. DCPS had an affirmative duty to evaluate Student, irrespective of the filing of the due process complaint.

In *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (2008), 49 IDELR 213, the Court found that the child had been denied a FAPE when DCPS simply refused to continue the evaluation process for the child, an undisputed resident of the District of Columbia who had been identified as a potential candidate for special education services. *See also District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 86 (2007), 48 IDELR 96. In the present case, DCPS refused to even begin the evaluation process despite being on notice since late October 2011 (under Child Find) that Student was a potential candidate for special education services. DCPS still refused to evaluate Student after the due process complaint was filed, tying evaluation to acceptance of a settlement offer.

The Hearing Officer determines that from the end of October 2011 until the time of the due process hearing on August 20, 2012, DCPS violated its Child Find obligations under the IDEA by not taking steps to evaluate Student to determine his need for special education services. Petitioners had constant contact with the school, Petitioners indicated their willingness to comply with whatever was necessary to help Student, Student had ongoing behavior problems and failing grades, and it was DCPS' affirmative obligation to take steps to have Student evaluated. DCPS failed to do so. Consistent with prior rulings in this jurisdiction, this Hearing

[15] See 34 C.F.R. 300.8(c)(9).

Officer determines that Student was denied a FAPE as a result of DCPS' failure to evaluate Student and determine eligibility by the end of February 2012. See 34 C.F.R. 300.301, 38 D.C. Code 2561.02(a). And, if in fact, after evaluation, Student is determined to be eligible for special education services, the Hearing Officer determines that Student would have been entitled to special education services since the end of March 2012, i.e., one month after the date the eligibility determination should have been made. See 34 C.F.R. 300.323(c)(1).

The second issue to be determined is whether DCPS denied Student a FAPE by failing to evaluate Student and determine Student's eligibility for special education services within 120 days of Petitioners' requests; specifically, (1) on or about 04/07/12, Petitioners provided a letter to the assistant principal from Student's physician requesting that Student be evaluated, and (2) prior to 04/07/12, Petitioners requested an evaluation several times during conversations with the assistant principal.

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).

A child with a suspected disability who may need special education must 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. Following a referral, an IEP team shall meet to review existing data, information from the parent, pre-referral interventions and strategies, current classroom-based assessments and observations by teachers and related services providers. 34 C.F.R. 300.305(a), 5 D.C.M.R. 3004.1(e).

Petitioners met their burden of proof on this issue. All of the testimony of Student's father and stepmother was credible and uncontroverted. The evidence revealed that on or about April 9, 2012, Petitioners provided the assistant principal of Student's school with a written request to evaluate Student. The written request consisted of a letter written by Student's psychiatrist stating that Student had ADHD and specifically requested that Student be evaluated for special education services and an IEP be developed if appropriate in order to help Student navigate the academic and behavioral difficulties he was experiencing in school.

The Hearing Officer determines that on April 9, 2012, Petitioners provided the requisite written referral to the requisite administrative personnel at Student's school to initiate Student's initial evaluation for special education services. Based on this written referral, the evaluation process should have been completed within 120 days, i.e., by August 9, 2012. At the time of the due process hearing on August 20, 2012, the initial evaluation process had not yet been started by DCPS. The Hearing Officer also determines that Student was denied a FAPE by DCPS' failure to timely evaluate Student and determine eligibility within 120 days of the written referral.

Petitioners' verbal requests for help for Student that began in late February 2012, were tantamount to Petitioners asking for an evaluation to be completed.[16] Petitioners requested and were open to receiving whatever services the school could provide in order to improve Student's academic and behavioral standing in school. It was the responsibility of DCPS to suggest an evaluation and move forward with the initial evaluation process. When a parent requests an evaluation, the LEA is obligated to move forward with the requirement of the IDEA to determine whether the student is in fact a child with a disability. *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, (2007), 48 IDELR 96.

An independent educational evaluation ("IEE") is an assessment procedure conducted by a qualified individual who is not an employee of DCPS. 5 D.C.M.R. E-3001.1. At the resolution meeting on July 12, 2012, DCPS offered Petitioner funding for an IEE, i.e., an independent comprehensive psychological evaluation, but the offer was contingent on Petitioners' acceptance of the settlement offer proposed by DCPS. Petitioners were unwilling to accept the settlement offer, but were willing to accept the IEE outside of settlement, but DCPS refused. Throughout the history of this case, Petitioners have tried to get Student evaluated by DCPS for special education services, both inside and outside of the context of the due process hearing procedures, but have been unsuccessful.

The fact that Petitioners rejected DCPS' settlement offer in no way absolves DCPS of its affirmative obligation to evaluate Student. It was improper for DCPS to hinge the evaluation of Student on Petitioners' acceptance of a settlement offer. Petitioners are not required to explain their reasons for rejecting the settlement offer; that is a privileged matter between Petitioners and their attorney. Regardless of the presence or absence of litigation, DCPS is required to evaluate Student when a request is made by the parent or when DCPS has reason to suspect that Student has a disability that requires special education services; both instances of which occurred in this case.

Relief

Petitioners are the prevailing parties in this litigation and Petitioners are entitled to the relief requested. Despite obvious indicators to DCPS beginning at the end of October 2011 that Student might be a child with a disability that negatively affected his academic performance, and despite specific verbal requests from Petitioners to help Student that began in February 2012 and despite a written request to evaluate Student in April 2012, DCPS still has not taken any steps to evaluate Student. Even at the resolution meeting on July 12, 2012, DCPS would not begin the evaluation process of Student without the execution of a settlement agreement, a situation that was untenable to Petitioners for whatever reason. It was not Petitioners who prolonged this litigation, it was DCPS, by refusing to evaluate Student unless Petitioners accepted their settlement offer. Petitioners were willing to accept funding for the independent evaluation outside of the settlement process so that the initial evaluation process could begin, but DCPS refused. DCPS' actions and failure to evaluate Student under these circumstances are contrary to the purpose and provisions of the IDEA and without this litigation, Petitioners would not be able

[16] Stepmother credibly testified that she knew nothing about the evaluation process or what an IEP was until she was informed of such by Student's psychiatrist on 04/07/12.

to achieve their goal of getting Student evaluated to determine if he is eligible for special education services.

To attain a prevailing-party status, a party must attain both a remedy that alters the legal relationship between the parties and fosters IDEA's purposes, and "some judicial imprimatur on a material alteration of the legal relationship". *Gary G. v. El Paso Independent School District,* 632 F.3d 201 (5th Cir. 2011). What Petitioners sought through this litigation was a determination of a denial of a FAPE, funding for an independent psychological evaluation and an Order for a meeting to review the completed evaluation, determine eligibility and develop an IEP if Student is eligible for special education services. Petitioners shall receive all of what was requested. The terms of the settlement offer were not made part of the record, so there is no way to compare whether or not Petitioners fared better in this Hearing Officer Determination than they would have if they had accepted the settlement offer,[17] but this Hearing Officer Determination has resulted in a determination that Student was denied a FAPE and that determination can serve as the basis for an award of compensatory education if Student is ultimately determined to be eligible for special education services.

ORDER

(1) DCPS shall provide to Petitioners a letter of funding for an independent psychological evaluation no later than five (5) business days from the date of this Order; and

(2) No later than five (5) business days following receipt of the independent psychological evaluation, DCPS shall initiate correspondence with Petitioners and Petitioners' Attorney, to convene a meeting within 20 school days of the date of this Order, to review the completed evaluation and determine Student's eligibility for special education services; and if Student is eligible, DCPS shall develop an IEP within 30 calendar days and at the IEP development meeting, DCPS shall discuss and determine an appropriate school placement, and DCPS shall discuss and determine appropriate compensatory education for special education services that should have been in place by the end of March 2012.

IT IS SO ORDERED.

[17] See *Gary G. v. El Paso Independent School District,* 632 F.3d 201 (5th Cir. 2011).

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: August 26, 2012

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioners: (electronically)
Petitioners' Attorney: Donovan Anderson, Esq. (electronically)
DCPS' Attorney: Victoria Healy, Esq. (electronically)
DCPS (electronically)
SHO (electronically)