



On October 14, 2011, DCPS filed a late Response, which denies the allegations of the Complaint. A Prehearing Conference (“PHC”) was then held on November 3, 2011; and a Prehearing Order was issued on November 9, 2011. Both parties filed timely five-day disclosures; and the Due Process Hearing was held on November 30, 2011. Petitioner elected for the hearing to be closed.

At the Due Process Hearing, Petitioner’s Exhibits P-1 through P-6 were admitted into evidence without objection. DCPS elected not to offer its disclosed Exhibits DCPS-1 through DCPS-3, and thus they were not admitted into evidence. Petitioner testified by telephone on her behalf. DCPS presented no witnesses.<sup>2</sup>

## **II. JURISDICTION**

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer’s Determination (“HOD”) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is December 5, 2011.

## **III. ISSUES AND REQUESTED RELIEF**

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

- (1) Timeliness of Initial Evaluation** — Did DCPS deny the Student a FAPE by not completing the initial evaluation process and determining the Student’s eligibility for special education and related services in a timely manner, *i.e.*, within 120 days from the date the Student was referred for an evaluation or assessment, pursuant to D.C. Code §38-2561.02 (a) and 34 C.F.R. §300.301? Petitioner claims that the 120-day timeline started on or about March 8, 2011 and expired on or about July 6, 2011.

---

<sup>2</sup> Petitioner had compelled the appearance of the Student’s teacher through a Notice to Appear, but elected not to present her testimony at hearing. DCPS then sought to present the teacher as a witness in its case, but that testimony was not accepted because DCPS had not listed the teacher as a proposed witness in its five-day disclosures. *See Appropriate Standard Practices 7. B. 2.*) At the outset of the hearing, DCPS also attempted to designate this compelled witness as its party representative, despite having identified only the SEC and principal in its five-day disclosures. DCPS counsel acknowledged that the teacher had only appeared at the hearing as a result of Petitioner’s compulsory process and that, after she so appeared, had been asked to substitute for the SEC. Party-representative recognition was denied.

(2) **Child Find** — Did DCPS deny the Student a FAPE by failing to identify, locate, and evaluate the Student as a child with a disability in compliance with its affirmative obligations under the child-find requirements of the IDEA? As confirmed at the PHC, Petitioner does not allege any denial of FAPE occurring prior to March 8, 2011.

Petitioner requests that the Hearing Officer make findings in her favor on each issue and order DCPS to: (a) fund independent evaluations (*i.e.*, psycho-educational, clinical psychological including ADHD assessment, speech/language, and social history); and (b) convene meetings to develop a student evaluation plan (“SEP”) and/or to discuss and determine eligibility and develop an individualized education program (“IEP”) for the Student. Petitioner confirmed at the PHC and due process hearing that she does not seek to establish eligibility in this proceeding and does not seek any pre-eligibility compensatory education at this time.

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

#### IV. FINDINGS OF FACT

1. The Student is a .year old child who resides in the District of Columbia and attends his neighborhood DCPS elementary school (the “School”). *Parent Test.*
2. In or about early March 2011, Petitioner took the Student to his pediatrician for a medical examination due to concerns regarding his behavior and functioning. The pediatrician provided Petitioner with rating-scale forms for completion by her and by the Student’s Teacher in order to assess his symptoms and performance. *Parent Test.; P-1.*<sup>3</sup>
3. On or about March 7, 2011, Petitioner completed the Parent Informant form. *See P-1.*

---

<sup>3</sup> The forms the pediatrician used are called “NICHQ Vanderbilt Assessment Scale – Teacher Informant” and “NICHQ Vanderbilt Assessment Scale – Parent Informant,” which are adapted from the Vanderbilt Rating Scales and are approved by the American Academy of Pediatrics and National Initiative for Children’s Healthcare Quality (“NICHQ”). *P-1.*

4. On or about March 8, 2011, Petitioner met with the Teacher and asked her to complete the Teacher Informant form. The Teacher completed the form and returned it to Petitioner. *Parent Test.*; *P-1*.
5. The Teacher's comments on the form completed March 8, 2011, included the following: "[Student] needs many reminders on how to act in all situations. (He has trouble transitioning.) Has difficulty working effectively in a group situation. In the beginning of school, he had behavior problems which lacked empathy and compassion toward his peers. However, he has gotten better." *P-1* (Teacher Informant form, p. 2). The Teacher also noted that the Student "requires frequent one/one attention." *Id.*
6. Shortly thereafter, Petitioner returned the completed Teacher Informant and Parent Informant forms to the Student's pediatrician. *Parent Test.* The pediatrician then diagnosed the Student with several conditions, including Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiance Disorder ("ODD"). *Id.*
7. The Student completed the 2010-11 school year at the School without receiving any further evaluations or assessments.
8. On or about September 14, 2011, Petitioner sent a letter through counsel to the School's principal formally requesting that the Student be evaluated for special education eligibility. *P-2*. The letter states that the "parent is making this request as a result of ongoing academic deficiencies [and] behavioral difficulties which she has witnessed." *Id.* The letter also enclosed a written consent to evaluate the Student signed by Petitioner. <sup>4</sup>
9. Petitioner's September 14, 2011 letter further states as follows: "In deference to the local education agency's ("LEA") efforts to conduct the requested evaluations, the parent will wait for the LEA to complete the evaluations of the student. However, if the evaluations are not completed within a reasonable time, the parents will take appropriate measures to secure independent evaluations at public expense." *Id.* Notwithstanding these statements, one week later, Petitioner filed the instant due process complaint alleging a denial of FAPE and requested independent evaluations.

---

<sup>4</sup> The September 14, 2011 letter is labeled "2<sup>nd</sup> Request and Consent for Evaluation," *P-2*, but the text of the letter makes no reference to the March 8, 2011 in-person meeting between Petitioner and Teacher or any prior request for evaluation.

10. It was stipulated at the prehearing conference that, on or about October 19, 2011, Petitioner signed a further consent to evaluate on a form provided by DCPS. *See Prehearing Order* (Nov. 9, 2011), p. 1. The evaluation process had not been completed as of the date of the due process hearing.

## V. DISCUSSION AND CONCLUSIONS OF LAW

Petitioner claims that DCPS denied the Student a Free Appropriate Public Education (“FAPE”) by: (1) failing to complete the initial evaluation process in a timely manner; and (2) failing to comply with its affirmative child-find obligations. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof.

### Issue 1: **Timeliness of Initial Evaluation**

District of Columbia law requires that DCPS “shall 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.” D.C. Code §38-2561.02 (a) (emphasis added). As this statute has been construed by the courts, DCPS “must conduct a full and individual initial evaluation” within the required time frame of 120 days from the date of referral. *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *see also* 34 C.F.R. §300.301(a); 5-E DCMR §3005.2. This means that DCPS must complete and review the initial evaluation in all areas of suspected disability, determine eligibility, develop an IEP if the Student is found eligible, and determine an appropriate placement, all within 120 days. *See Hawkins v. D.C.*, 539 F. Supp. 2d 108 (D.D.C. 2008); *D.C. v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007); 5-E DCMR §§3002, 3013.

The statute does not define what it means to be “referred” for evaluation or assessment. However, OSSE regulations specify that a child with a suspected disability who may need special education “shall be *referred, in writing*, to an IEP team.” 5-E DCMR §3004.1 (a) (emphasis added). The OSSE regulations provide that a “referral ... shall state why it is thought that the child may have a disability,” and that it may be made by a parent, a professional staff employee of the LEA, or a staff member of a public agency who has direct knowledge of the child.” *Id.*, §3004.1 (b). The regulations further provide that in the case of a child attending a D.C. public school, “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." *Id.*, §3004.1 (c).

Petitioner testified that on or about March 8, 2011, she requested the Student's Teacher to complete an NICHQ Vanderbilt Assessment Scale form supplied by the Student's pediatrician to assist in his medical examination of the Student; that the Teacher completed the form and returned it to Petitioner; that Petitioner then provided the completed Teacher and Parent forms to the pediatrician; and that the pediatrician then diagnosed the Student with ADHD and certain other conditions. *See Parent Test.; P-1*. However, Petitioner did not testify that she was requesting the Teacher to refer or evaluate the Student for special education services at that time. Nor did she follow up to provide the School with the results of the pediatrician's subsequent diagnoses.<sup>5</sup> Moreover, it is undisputed that Petitioner made no request or referral in writing prior to September 14, 2011.

Under these circumstances, the Hearing Officer concludes that Petitioner has not proved by a preponderance of the evidence that the Student was "referred" for an initial evaluation for special education eligibility within the meaning of D.C. Code §38-2561.02 (a) as of March 8, 2011. Merely soliciting completion of a teacher rating form for use by the Student's pediatrician in medically diagnosing certain conditions did not constitute a request or referral for evaluation of special education services eligibility. Accordingly, the Hearing Officer concludes that the statutory 120-day timeline did not begin to run until September 14, 2011, and will not expire until January 12, 2012. Thus, Petitioner's claim under Issue 1 is premature.

Even assuming *arguendo* that Petitioner had shown by a preponderance of the evidence that a valid request or referral was made on March 8, 2011, Petitioner has failed to demonstrate any substantive denial of FAPE. An LEA's failure to conclude the initial evaluation process within 120 days is generally viewed as a procedural violation, and such procedural violation is only actionable if it affects the Student's substantive rights. *See Lesesne v. District of Columbia*,

---

<sup>5</sup> Petitioner testified that she was completing these documents at the pediatrician's request in order "to have him tested for ADHD or something like that," *Parent Test*, leaving the record at best unclear as to Petitioner's intentions with regard to special education as of March 8, 2011. Petitioner then elected not to present the Teacher's testimony to confirm and/or clarify the 03/08/2011 conversation, despite having compelled the Teacher's appearance as a witness with direct knowledge of the relevant facts. The Hearing Officer may properly draw an inference that Petitioner would have presented such testimony had it been favorable to her cause. *See generally C. McCormick, McCormick's Handbook of the Law of Evidence § 272, at 656-57 (2d ed. Cleary 1972).*

447 F.3d 828 (D.C. Cir. 2006); *Kruvant v. District of Columbia*, 99 Fed. Appx. 232 (failure to show harm resulting from error under 120-day requirement). Thus, “[i]n 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 FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” 34 C.F.R. §300.513 (a) (2). Petitioner has not presented evidence to satisfy any of these requirements or to show that any educational harm otherwise resulted from DCPS’ failure to assess the Student for IDEA eligibility within 120 days of March 8, 2011.

**Issue 2: Child Find**

The “child find” provisions of the IDEA require each State to have policies and procedures in effect to ensure that “[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §§300.111(a). These provisions impose an affirmative duty on States to identify, locate, and evaluate such children. *Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008). In the District of Columbia, OSSE regulations require LEAs to ensure that such procedures are implemented for all children residing in the District. *See* 5-E DCMR §3002.1(d).

Petitioner claims that DCPS has failed to comply with its affirmative child-find obligations because “despite the student’s teacher indicating significant areas of concern under the NICHQ Vanderbilt Assessment Scale, DCPS has not undertaken any steps to locate, identify [and evaluate] the student as a student with a disability.” *Complaint*, p. 3. However, as discussed above, this assessment scale was completed at the parent’s request for the purpose of a medical examination by the Student’s pediatrician. The parent does not appear to have provided the results of the pediatrician’s examination to the School or to have made a specific request to evaluate the Student’s eligibility for special education services until September 2011. An initial evaluation of the Student for special education eligibility is currently pending.

The Hearing Officer concludes that the evidence presented by Petitioner is insufficient to show that DCPS should have identified and located the Student as a child with a suspected disability prior to September 2011. As soon as the Student was identified as a potential

candidate for special education services by means of the parent's written request, DCPS had a duty to "locate" him and complete the initial evaluation process. Although the record does not reflect any further DCPS actions beyond obtaining consent to evaluate, since the statutory 120-day timeline has not yet expired, the Hearing Officer cannot conclude that DCPS has failed to meet that duty at this time.

\* \* \* \*

As noted above, DCPS should now ensure that the initial evaluation/eligibility process for the Student is completed by no later than **January 12, 2012**.<sup>6</sup> If DCPS does not do so, then Petitioner may file another due process complaint. And if Petitioner disagrees with an evaluation conducted or obtained by DCPS, Petitioner may assert her right under the IDEA to an independent educational evaluation at public expense at that time. *See* 34 C.F.R. §300.502.

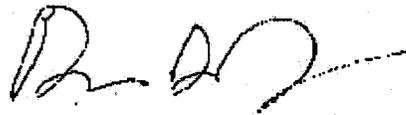
#### VI. ORDER

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

1. Petitioner's requests for relief in her Due Process Complaint filed September 21, 2011 are hereby **DENIED**; and
2. The Complaint is **DISMISSED, With Prejudice**.

***IT IS SO ORDERED.***

Dated: December 5, 2011

  
\_\_\_\_\_  
Impartial Hearing Officer

<sup>6</sup> DCPS argued in closing that the 120-day timeline should not begin to run until Petitioner executed a written consent to evaluate on a form provided by DCPS on or about October 19, 2011, which would extend the timeline into February 2012. This argument is rejected as contrary to the requirements of the IDEA, D.C. Code §38-2561.02 (a), and 5-E DCMR §3004.1.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 U.S.C. §1415(i)(2).