

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
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HEARING OFFICER'S REVISED DETERMINATION

IN THE MATTER OF:)	
)	
DOB)	DATE OF HEARING
)	February 26, 2010
Student ID)	Hearing Room 1
Petitioner,)	
)	DATE OF COMPLAINT
V.)	October 5, 2009
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Mathew B. Bogin
77 S. Washington Street
Rockville, Maryland 20850

COUNSEL FOR DCPS: Tanya Chor
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

DCSE
STUDENT HEARING OFFICE
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STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
REVISED
DETERMINATION

February 27, 2010

Representatives:

Petitioner – Matthew Bogan
DCPS – Tanya Chor

Hearing Officer:

Jane Dolkart

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S REVISED DECISION AND ORDER

REVISED HOD – A pre-hearing conference order issued on January 14, 2010, included an order for partial summary judgment, finding that DCPS had denied the student FAPE from October 5, 2007 to October 5, 2009, by failing to evaluate the student in all areas of disability, failing to provide the student with an IEP for the 2008-2009 and part of the 2009-2010 school years, and failing to provide the student with a placement for the 2008-2009 and part of the 2009-2010 school years. On February 5, 2010, the Hearing Officer issued an interim order granting partial summary judgment which incorporated the findings and ruling in the January 14, 2010, pre-hearing conference order and further ordered that DCPS reimburse the parents the sum of _____ for expenses incurred in providing the student special education and related services from October 5, 2007 to October 5, 2009. On March 15, 2010, DCPS counsel informed the Hearing Officer that the DCPS Finance Office refused to honor the Hearing Officer's valid order because it was not included in the final HOD. The DCPS Finance Office refuses to reimburse Petitioner. Therefore, the February 27, 2010, HOD is revised to include the terms of the February 5, 2010, order of reimbursement. The revision is item one in the order. This revision in no way alters the appeals period which runs from February 27, 2010, the date the original HOD was issued. Nor does this revision change the fact that DCPS has now delayed reimbursing the parents for 44 days.

I. INTRODUCTION

This is a _____ year old student who has been diagnosed with developmental delays, neurodevelopmental encephalopathy, macrocephaly, and autism spectrum disorder. The student received services from the _____ In June 2008, the parents contacted the DCPS C.A.R.E. Center so that DCPS could determine the student's eligibility for special education and provide him with a FAPE. On October 5, 2009, a due process complaint was filed alleging that DCPS had not completed evaluations of the student, had not developed an IEP and had never proposed a placement for the student. DCPS filed an untimely response on November 5, 2009. The student has attended private schools and has received home services since the 2008-2009 school year, at the parents' expense. On February 8, 2010, DCPS held an IEP meeting for the student at which it proposed a placement for the student and the number of hours of specialized instruction and related services to be provided. This hearing does not address the appropriateness of the hours of services or the placement offered by DCPS.

A pre-hearing conference was held on November 5, 2009, and a pre-hearing order was issued on November 18, 2009. A second pre-hearing conference was held on January 8, 2010, and a pre-hearing order was issued on January 14, 2010. A third pre-hearing conference was held on February 12, 2010, and a pre-hearing order was issued on February 17, 2010.

The second pre-hearing conference order of January 14, 2010, also including an order for partial summary judgment, finding that DCPS had denied the student FAPE from October 5, 2007 to October 5, 2009, by failing to evaluate the student in all areas of disability, failing to provide the student with an IEP for the 2008-2009 and part of the 2009-2010 school years, and failing to provide the student with a placement for the 2008-2009 and part of the 2009-2010 school years. On February 5, 2010, the Hearing Officer issued an interim order granting partial summary judgment which incorporated the findings and ruling in the January 14, 2010, pre-hearing conference order and further ordered that DCPS reimburse the parents the sum of _____ for expenses incurred in providing the student special education and related services from October 5, 2007 to October 5, 2009.

The sole issue remaining in the case is whether Petitioner's actions after October 5, 2009, delayed the drafting of an IEP and determination of placement.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

The sole issue remaining in this case is whether Petitioner improperly refused to make the student available for evaluations scheduled for October 26, 2009, leading to a delay in the drafting of an IEP and determination of a placement for the student, such that DCPS should not be ordered to reimburse Petitioner for some or all expenses incurred after October 5, 2009.

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated February 18, 2010, containing a list of witnesses with attachments P 1-6. Additionally, all invoices submitted as attachments to Petitioner's December 16, 2010, Motion for Summary Judgment are listed P 7. The disclosure was admitted in its entirety. Petitioner called as a witness the student's father.

DCPS submitted a five day disclosure letter dated February 18, 2010, containing a list of witnesses with attachments DCPS 1-8. Petitioner objected to DCPS 2 and 6 which were not admitted into evidence. The remainder of the disclosure was admitted. DCPS called as a witness the Special Assistant at

V. FINDINGS OF FACT

1. This is a _____ year old student who has been diagnosed with developmental delays, neurodevelopmental encephalopathy, macrocephaly, and autism spectrum disorder.

2. The student received services from the _____ In June 2008, the parents contacted the DCPS C.A.R.E. Center so that DCPS could determine the student's eligibility for special education and provide him with a FAPE.

3. On July 16, 2008, DCPS performed an Early Childhood Screening and determined that the student needed the following evaluations: educational, speech and language, physical therapy, and occupational therapy.

4. Petitioner signed consent to evaluate on November 8, 2008. As of October 15, 2009, Petitioner had received no further contact from DCPS. (Testimony of father, Interim Order Granting Partial Summary Judgment [SJ order])

5. On October 13, 2009, Petitioner was contacted by telephone by _____ a Special Assistant at the successor to C.A.R.E. called _____. During the October 15, 2009, phone call, Petitioner learned for the first time that DCPS had completed the speech and language and physical therapy evaluations. _____ indicated that DCPS wished to complete the remaining evaluations. The father indicated that he would bring the student to _____ on October 26, 2009, so that DCPS could conduct further evaluations. _____ testified that she was aware that a due process complaint had been filed at the time she contacted Petitioner on October 13, 2009. (Testimony of father).

6. On October 13, 2009, _____ Chief Operating Officer, _____ sent a confirming e-mail to the father confirming the student's appointment and indicating that educational, occupational, and psychological evaluations would be administered on October 26, 2009. The e-mail indicated that the parents could contact _____ with any additional questions. (P 1)

7. On October 23, 2009, Petitioner's attorney emailed a letter to _____ indicating that DCPS had failed to comply with the applicable regulations concerning notice and informed consent and that Petitioner could not make an informed decision concerning the evaluations until DCPS complied with the regulatory scheme. (P 2)

8. _____ indicated that the parent had provided consent in November 2008, and had been provided with the required written notice at that time. _____ further asserted that the November 2008, informed consent remained valid.

9. The record does not contain a copy of written notice to the parents at or before the signing of the November 2008, informed consent. _____ testified that the only written documents given to parents obtaining evaluations of their children is the procedural safeguards statement and a copy of the informed consent. (P 3, 4)

10. _____ testified that she intended to obtain a new parent consent form when the student came to be evaluated. (Testimony of _____)

11. The student did not appear on October 26, 2009, for his evaluations. (Testimony of and father)

12. On November 5, 2009, DCPS provided Petitioner with a letter authorizing independent comprehensive psychological and occupational therapy evaluations at DCPS expense. (P 5)

13. On November 25, 2009, DCPS provided Petitioner with a letter authorizing an independent speech and language evaluation at DCPS expense. (P 6)

14. had scheduled all of the student's evaluations to take place on October 26, 2009. Evaluation reports are supposed to be completed ten business days following the evaluation. (Testimony of

15. Petitioner submitted the independent evaluation reports to DCPS in early January. (Petitioner's Provisional Motion for Continuance, dated January 8, 2010)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The IDEA requires that a public agency must conduct a full individual initial evaluation before the initial provision of special education and related services to a child with a disability. 34 CFR § 300.301 (a). There is no dispute that the parents contacted DCPS in June 2008, requesting that their son be evaluated. There is also no dispute that the evaluations had not been completed as of October 13, 2009, when contacted the father to complete the evaluations, 16 months after they had been requested. Before DCPS can conduct an initial evaluation, it must provide notice and obtain informed consent from the parent of the child. Whatever notice and informed consent may have been obtained in June 2008, they would no longer be valid 16 months later because circumstances concerning a child can change significantly in 16 month, especially in the life of a 4 to 5 year old child. Indeed, the Special Assistant at Early Stages stated that a new informed consent was to be obtained on October 26, 2009, when the parents brought the student in for the scheduled evaluations.

Thus, the issue is whether DCPS provided the statutorily required notice predicate to a signing of informed consent and the initiation of the proposed evaluations. Further, even if DCPS did provide the required notice, was the evaluation process sufficiently delayed by Petitioner to mitigate the obligation DCPS would otherwise have to reimburse the parent for the specialized instruction and related services paid for by the parent.

Notice

The IDEA regulations require that DCPS provide written notice to the parents a reasonable time before DCPS proposes to initiate evaluation or educational placement of a child. 34 CFR § 300.503 (a). The notice must include a description of the action proposed, an explanation of why the agency proposes to take the action, and sources the

parent may contact to obtain assistance in understanding the action. 34 CFR § 300.503 (b)(1), (2), (5).

Petitioner argues that DCPS failed to provide the required notice and therefore the parents were unable to provide informed consent. The sole document that can be interpreted as providing notice is the October 13, 2009, confirming e-mail listing the evaluations to be conducted and indicating that the parents could contact Early Stages with any questions. Petitioner asserts that there was insufficient detail concerning exactly which assessment instruments were to be used and who was conducting the evaluations.

Petitioner points to *Holland v. District of Columbia*, 71 F.3d 417 (D.C. Cir. 1995) in support of this proposition. In *Holland* DCPS had scheduled a date on which to perform certain evaluations to determine if the student was eligible for special education. A letter similar to the October 13, 2009, email was sent confirming the date and the evaluations to be conducted. The parents' attorney thereafter sent a letter to DCPS requesting the specific evaluations to be conducted, a description of the "clinical interview" listed as one of the evaluations, and an explanation as to why additional evaluations were necessary. DCPS never responded to the letter and the parents refused to provide consent for the evaluations. The court found that the Holland's were statutorily entitled to an answer to their questions.

The present case can be distinguished from *Holland*. In response to the October 13, 2009, e-mail listing the evaluations that were to be performed, Counsel for Petitioners merely indicated that the e-mail failed to comply with the notice requirement of 34 CFR § 300.503. Counsel did not request that DCPS provide the parents with any additional information or otherwise ask any questions of DCPS. DCPS provided sufficient statutory notice to Petitioner and did not violate the procedural requirements of the IDEA.

Delay

Although DCPS provided Petitioner with sufficient notice to allow Petitioner to provide informed consent and proceed with the October 25, 2009, evaluations, the delay caused by the parents' refusal to do so caused at best *de minimus* delay in the process. The evaluations would have occurred on October 26, 2009. Although indicated that the evaluations were to be completed in one day, this Hearing Officer is doubtful that this would have been the case given the nature of this student's disabilities. Likewise, there is no certainty that the evaluation reports would be completed in 10 business days. This Hearing Officer's experience with the timely completion of evaluation reports suggests that there is a substantial likelihood that the delivery of reports would take longer.

In any case, a mere 10 days after the scheduled evaluation date, DCPS made the decision to provide Petitioner a letter authorizing the identical evaluations to be conducted independently at DCPS expense. Some weeks later, it was determined that a new speech and language evaluation was also necessary and an additional authorization letter was provided. A speech and language evaluation had not been scheduled for the October 25,

2009, evaluation date at Early Stages. Petitioner completed all the evaluations without delay, and within a month of when they were authorized.

Petitioner is entitled to reimbursement for the period from October 5, 2009 to February 8, 2010, when DCPS first proposed a placement for the student. The total expenses for which invoices were submitted covering the included dates is

VII. SUMMARY OF RULING

Petitioner did not unduly delay the drafting of the IEP and placement decision and is entitled to reimbursement for expenses incurred in providing specialized instruction and related services to the student from October 5, 2009, to February 8, 2010, in the sum of

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall reimburse Petitioner, within 10 days of the issuance of this revised HOD, the sum of _____ for specialized instruction and related services provided at parental expense for the period from October 5, 2007 to October 5, 2009, due to DCPS' failure to provide FAPE.
2. DCPS is to reimburse Petitioner, within 30 days of the issuance of this HOD, the sum of _____ for specialized instruction and related services provided at parental expense for the period from October 5, 2009, to February 8, 2010, due to DCPS' failure to provide FAPE.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: March 19, 2010