DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

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

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: July 9, 2011

Hearing Officer: Jim Mortenson

Case No:

2011 JUL 11 AM 9:15
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on May 16, 2011. The Petitioner is represented by Roberta Gambale, Esq., and the Respondent is represented by Tanya Chor, Esq.

A response was filed on June 3, 2011. A prehearing conference was held on June 3, 2011, and a prehearing order issued on that date. The resolution meeting was held on June 6, 2011, and no agreements were reached.

The hearing was convened and held on July 8, 2011, in room 2004 at 810 First Street NE, Washington, D.C. The due date for the hearing officer determination (HOD) is July 30, 2011. This HOD is issued on July 9, 2011.

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, AND DETERMINATION

The issue to be determined by the IHO is:

> Whether the Respondent failed to timely respond or conduct an initial evaluation of the Student requested by the Petitioner on or about January 13, 2011?

The substantive requested relief at the time of hearing included:

> An independently provided comprehensive psychological assessment, a vision and hearing screening, and a speech and language assessment.

Based on the findings of fact and conclusions herein, this IHO has determined that the Respondent did not fail to respond to or conduct an initial evaluation of the Student. No request for an initial evaluation was sent on January 13, 2011, and the request made on May 9, 2011, was not sent to the Student's home school pursuant to DCMR § 3004.1.

IV. EVIDENCE

Four witnesses testified at the hearing, two for the Petitioner and two for the Respondent.

The witnesses for the Petitioner were:

1) The Petitioner (P)
2) Lauren Manago, Paralegal, (L.M.)

The witnesses for the Respondent were:

1) Special Education Coordinator,

2) Registrar,

Eight documents were disclosed by the Petitioner and all were admitted into evidence. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	January 13, 2011	Letter from Manago to Ransome (Request for Initial Evaluation)
P 2	January 13, 2011	Letter from Gambale to Ransome (Request for Access to Student's Records)
P 3	January 13. 2011	Letter from Gambale to Ransome (Request for transfer assistance)
P 4	January 13, 2011	[Four fax confirmations for January 13, 2011 and four fax cover sheets without confirmations]
P 5	January 10, 2011	Parental/Guardian Consent to Evaluate
P 6	January 10, 2011	General Authorization For Information
P 7	May 9, 2011	Request for Evaluation (with fax cover and confirmation)
P 8	June 29, 2011	[Email chain ending from Gambale to Johnson]

Three documents were disclosed by the Respondent and all were admitted into evidence. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	June 7, 2011	Resolution Session Meeting Notes
R 2	June 7, 2011	[Email from Gambale to Chor with four January 13, 2011 fax confirmations]
R 3	June 29, 2011	[Email from Johnson to Gambale]

V. 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. In the beginning of January, 2011, the Student was attending The Student had been involved in an altercation at school prior to the winter break and the Petitioner, Student's Mother, requested a "safety transfer" after school began in January.[3] The Student's transfer was complicated and was effectuated by the end of January.[4]
2. The Student had been having academic difficulties prior to the Petitioner's attempt to change her school and so she sought, through her lawyer's office, to obtain an initial evaluation of the Student.[5] A letter was written by a paralegal in the lawyer's office, dated January 13, 2011, requesting a comprehensive psychological assessment, a functional behavioral assessment, and a speech and language assessment, among other things.[6]
3. The request for an initial evaluation was never sent to the Respondent.[7] Three different letters had been drafted on behalf of the Petitioner including the request for an evaluation (one page), a request for access to the Student's records (two pages), and a letter seeking assistance with the transfer of the Student (one page).[8] The paralegal only attempted to fax the three letters to the Respondent and did not mail or have them hand-delivered.[9] On January 13, 2011, two faxes were sent to the Student's school,
   Both faxes contained four pages, including the cover sheet, and both faxes included only the request for access to education records and the signed authorization.[11]

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[2] Testimony (T) of P.
[3] T of P.
[4] T of P.
[5] T of P, P 1.
[6] P 1, T of L.M.
[7] T of D.J., T of M.H., P 4.
[8] P 1, P 2, P 3.
[9] T of L.M.
[10] P 4, T of L.M., T of D.J.
[11] T of L.M., T of D.J., P 1, P 2, P 4, P 6, P 7 (Close examination of the documents, including the fax confirmations, in conjunction with the testimony of L.M. and D.J. show that it is more probable that D.J. is correct that the same documents were faxed to the school twice as she testified. Had L.M. sent two batches of different documents as she testified (the request for evaluation and the request for records) the number of pages in the fax confirmations would have been different because the request for evaluation was only one page and the corresponding consent for was one

4. The paralegal sent to the letter from the attorney requesting assistance with the transfer of the Student on January 13, 2011, not the request for evaluation or consent form.[12]
5. The paralegal sent to the District Office of Special Education the letter from the attorney requesting assistance with the transfer of the Student on January 13, 2011, not the request for evaluation or consent form.[13]
6. No follow up to the purported request for initial evaluation was made until another letter was sent to . on May 9, 2011.[14] However, the Student was not attending and her home school is
7. The Respondent has offered to conduct an initial evaluation of the Student and has requested the Petitioner to enroll the Student in school.[16] The Student stopped attending school and was dropped from the roles in March.[17]

VI. 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:

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page, and with the fax cover would have totaled three pages. This is not shown in the confirmations which, sent three hours apart, both show four pages were sent – the same number as the two page request for records, one page authorization, and fax cover, as testified to by D.J.)

[12] T of M.H., P 3, P 4. (The letter, P 3, indicates it is copied to Winston and the fax cover indicates it accompanies "Attorney Letter to Johnson John Hayden Middle School" and consists of a total of two pages including the fax cover. L.M. testified she did not send these but rather sent the request for evaluation with the consent form, a different set of documents and a total of four pages with the fax cover. This testimony is not believable given the documentary evidence and the testimony of M.H.)

[13] P 3, P 4. (Likewise as in finding #4, the letter indicates it is copied to DCPS Office of Special Education and the fax cover indicates it accompanies "Attorney Letter to Johnson John Hayden Middle School" and consists of a total of two pages including the fax cover. L.M. testified she did not send these but rather sent the request for evaluation with the consent form, a different set of documents and a total of four pages with the fax cover. Again, even without testimony from someone at OSE, L.M.'s testimony is suspect at best.)

[14] T of L.M., P 6.

[15] T of P, T of L.M., P 1 (indicating Student's address).

[16] P 8, R 3.

[17] T of M.H.

1. Federal regulations at 34 C.F.R. § 300.301(b) provides:

> Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

2. District of Columbia law, at DC ST § 38-2561.02(a) implements this provision, in part, as follows:

> 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.

Furthermore:

> 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.C. Mun. Regs. tit. 5, § 3004.1(c).

3. Prior to the filing of the due process complaint initiating this case, the Petitioner never made a request or referral for a special education evaluation. Due to probable error and a lack of follow-up, the Petitioner's lawyer failed to ensure the intended request for an evaluation was made in January. When the Petitioner's lawyer finally did act four months later, in May, she failed to follow the law and send the request for an evaluation to the Student's home school. It is unclear why neither the Petitioner nor her lawyer did not follow up the attempted request in January when they were not contacted within a reasonable time following the attempted request on January 13, 2011. In fact, rather than inquire about the status of the request, the Petitioner's involvement took a drastic turn the opposite direction and she failed to even ensure the Student was in school. Once the complaint was filed with the District Administration, the Respondent was on notice of the request for an evaluation and has since

offered to evaluate the Student.[18] The Respondent has also advised the Petitioner to enroll the Student so that the process can begin. The Petitioner will have to complete the enrollment process. The Respondent has 120 days from the date of referral, May 16, 2011 (the date the due process complaint was filed with the Respondent notifying them that the Petitioner wanted the Student evaluated), which is September 13, 2011, to complete the initial evaluation.[19] If the Petitioner fails to cooperate in timely completing the enrollment process, this may affect any subsequent determination about timeliness of the initial evaluation of the Student.

VII. DECISON

The Respondent prevails because the Petitioner never made a proper request to evaluate the Student and the Respondent was not on notice of the request to evaluate until the filing of the due process complaint.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the complaint in this matter is dismissed with prejudice. The Respondent is cautioned to comply

[18] It is noted for the benefit of the general public and the State advisory panel that prudent public policy would dictate that a referral or request for an initial evaluation arriving at an incorrect school building be promptly forwarded to the proper administrative office for the local education agency and not ignored. This is not the law in the District of Columbia at this time. *See*, D.C. Mun. Regs. tit. 5, § 3004.1.

[19] The Respondent argued at hearing that referral and consent are synonymous. It is unclear what the basis for this argument is given the plain language of the law at 34 C.F.R. § 300.300 and D.C. Mun. Regs. tit. 5 § 3026 concerning consent, the use of the word "request" as opposed to "consent" under 34 C.F.R. § 300.301, and the use of the terms "referred" and "referral" under D.C. law at DC ST § 38-2561.02(a) and D.C. Mun. Regs. tit. 5, § 3004.1. Furthermore, since individuals other than a parent may refer or request a child be evaluated, and only a person meeting the definition of a "parent" under the IDEA can provide consent, the argument that the words are synonymous is without merit. The distinction is important to note due to the timelines set by D.C. law for the completion of initial evaluations. The deadline is based on the date of the referral, not the date of consent. Based on the Respondent's arguments, it must also be noted that if efforts to obtain consent are made and it is not provided, the local education agency may, but is not required to, utilize due process procedures. *See*, 34 C.F.R. § 300.300(a)(3).

with due process requirements pursuant to 34 C.F.R. § 300.503 as it partakes to effectuate the initial evaluation of the Student. The Petitioner is cautioned to comply with enrollment procedures as directed by the Respondent and to ensure the Student returns to school.

IT IS SO ORDERED.

Date: July 9, 2011

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).