

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

PARENT on behalf of
STUDENT,

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On August 14, 2013 parent, Petitioner herein, on behalf of the student (“Student”) filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,¹ requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Petitioner’s Administrative Due Process Complaint Notice (HO 5) on August 23, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held August 29, 2013. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 6. The 45 day timeline began to run on September 14, 2013,

¹ Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

the day after the 30 day resolution period ended. On September 10, 2013, DCPS filed a Motion to Dismiss (“Motion”) (HO 7), and Petitioner timely filed a response to the Motion on September 13, 2013. I issued an Order, on September 21, 2013, denying the Motion as to Issue 1 and granting it as to Issue 2, leaving only Issue 1 to be heard. Following the Prehearing Conference held on September 19, 2013, I issued a Prehearing Conference Order on September 22, 2013. HO 10. My Hearing Officer Determination is due on October 28, 2013.

The hearing was held as scheduled in Room 2004 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

ISSUE

The issue is:

Whether DCPS failed to comply with IDEA Child Find requirements from September 15, 2011 through the filing of the Complaint. This includes the failure to timely evaluate and/or identify the student as eligible for special education services and/or develop an individualized education program (“IEP”) for the student and make services available in a timely manner. If the student had been identified and found eligible timely, services would have been available from approximately January 30, 2012 through the filing of the complaint.

RELIEF REQUESTED

Petitioner is seeking compensatory education as relief.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

- P-1 Email Correspondence to SEC from Roberta Gambale dated August 1, 2013;
- P-2 Request for evaluation dated May 30, 2013;
- P-3 Email Correspondence chain to Advocate from SEC dated August 5, 2013;
- P-4 Student Health Authorization Form dated December 9, 2009;
- P-5 4th grade Report Card SY 2012;
- P-6 District of Columbia Universal Health Certificate dated August 23, 2010;
- P-7 Rehabilitation Hospital Inpatient Discharge summary dated June 6, 2011;
- P-8 Letter from Rehabilitation Hospital dated June 3, 2011;
- P-9 Letter from Rehabilitation Hospital dated May 27, 2011;
- P-10 Student Progress Report dated September 26, 2013 and
- P-11 Curriculum Vitae for Advocate

Respondent introduced no exhibits.

Exhibits admitted by the Hearing Officer are:²

- HO 1 Administrative Due Process Complaint Notice filed August 14, 2013
- HO 2 Notice of Hearing Officer Appointment of August 15, 2013
- HO 3 Prehearing Conference Scheduling Letter and Order re Timelines of August 18, 2013
- HO 4 Prehearing Notice of August 21, 2013
- HO 5 District of Columbia Public Schools' Response to the Administrative Due Process Complaint Notice of August 23, 2013
- HO 6 Resolution Period Disposition Form of August 29, 2013
- HO 7 District of Columbia Public School System's Motion to Dismiss of September 10, 2013
- HO 8 Petitioner's Response to Respondent's Motion to Dismiss dated September 12, 2013 and filed with hearing officer on September 13, 2013
- HO 9 Memorandum Opinion and Order of September 21, 2013
- HO 10 Prehearing Conference Order of September 22, 2013
- HO 11 Miscellaneous emails
 - Chain of 8/18 – 8/19/13 re scheduling
 - 8/19/13 re resolution meeting
 - Chain 9/10/13 re motion to dismiss
 - Chain of 9/19/13 re counsels' phone numbers for conference
 - Chain of 9/22/13 re compensatory education plan
 - Chain of 10/16/13 re Disclosures
 - Chain of 10/17/13 re Disclosures
- HO 12 List of Proposed Hearing Officer Exhibits filed October 11, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

² Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

- Student's grandmother ("Grandmother").

DCPS presented the following witnesses:

- SEC
- Student's 3d grade, general education, language arts³ teacher ("Teacher")

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:⁴

1. Student is 10 years old. He currently attends a Charter School.⁵ Prior to the 2013 – 2014 school year he attended DCPS Attending School at all times relevant to the instant complaint. He currently is in the 5th grade. Testimony of Petitioner.
2. Student was diagnosed as having attention deficit hyperactivity disorder ("ADHD") when in first grade. School personnel suggested Student see a psychiatrist due to his behavior in school. Petitioner complied with the school's recommendation and took Student to a psychiatrist who diagnosed Student's ADHD. Attending School was aware of the ADHD diagnosis. Staff at the school gave Student medication for ADHD during the school day. Student continued to see the psychiatrist and take medication for approximately two years. Petitioner stopped the medication after this time period on her own initiative. P 4; P 6; Testimony of Petitioner.
3. Student was hit by a car on or about May 27, 2011.⁶ He was 7 years old and in the third grade. Student incurred multiple fractures and a brain injury. He was hospitalized at Medical Center. As a result of the accident Student experienced deficits in mobility, self-care skills,

³ This teacher also taught Student mathematics for part of the year.

⁴ In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. Some exhibits were introduced by both Petitioner and Respondent. The citations to exhibits reference only one party's exhibits in those instances where both parties have introduced the same exhibit.

⁵ The Charter School is not a named respondent in the instant matter.

⁶ Student was not on the medication for ADHD at this time.

cognition and language/communication. He was admitted to Rehabilitation Hospital on June 2, 2011. At the time of his discharge on June 16, 2011, Student continued to demonstrate impaired cognition and impaired communication. P 7; P 8; P 9; Testimony of Petitioner.

4. Staff from Attending School were aware of Student's accident. They visited him at Rehabilitation Hospital and attended a meeting at Rehabilitation Hospital held sometime in August 2011.⁷ At that meeting Rehabilitation Hospital staff indicated Student might have future difficulties with headaches as well as speech and memory issues⁸ resulting from the accident. P 8; Testimony of Petitioner; Testimony of Grandmother

5. When Student returned to Attending School at the beginning of the 2011-2012 school year Petitioner provided a person in the counselor's office Student's discharge documents from Rehabilitation Hospital and a form requesting a special education evaluation. This individual did not provide Petitioner a receipt for the documents or any other papers in return for the documents. Petitioner does not know the name of the person who was in the counselor's office or her position in the school. She was not one of the three school counselors who attended the May 2013 meeting. The counselors at this May meeting were the only counselors at Attending School during the 2011-2012 school year. No evaluation occurred in the 2011-2012 or 2012-2013 school years. Testimony of Petitioner; Testimony of SEC.

6. Student was not on grade level at the beginning of the 2011 -2012 school year. He was not, however, significantly behind. Student also demonstrated some minor, but not unusual, behavioral issues during the 2011-2012 school year. Testimony of Teacher.

⁷ The evidence was clear that this meeting occurred. It was not clear, however, as to the date. I refer to the meeting as having occurred in August 2011 throughout the instant HOD. It is possible, however, that the meeting occurred in June or July 2011. If that is the case my determinations as to the meeting and the effect of the meeting are not changed by a possible change in date of its occurrence.

⁸ Petitioner reports Attending School contacted her about Student having headaches approximately two times during the 2011 -2012 school year. She received no calls about headaches in the 2012 -2013 school year. Student would awaken in the middle of the night in significant pain due to headaches during the 2011-2012 school year.

7. During the 2012 -2013 school year Student demonstrated difficulties in school. Teachers reported difficulties with academics as well as behavior. He acted inappropriately, getting into some squabbles with other students. He also struggled with finding the correct details to answer questions, did not complete in-class assignments or turn in all of his homework. He also struggled with writing assignments. Student did not have patience and would not return to a task if he decided it was complete. Petitioner frequently reminded Student's teachers of his brain injury and asked about evaluation. She was told none was needed. Petitioner was notified of Student's proposed retention in the 4th grade at a meeting in May 2013. Petitioner indicated her opposition to the retention, stating Student should have been evaluated for eligibility for special education and related services. P 5; Testimony of Petitioner.

8. The school viewed Student as having made progress in the 2012 -2013 school year albeit slower progress than his peers. At the end of the year, however, his TRC reading level was Q rather than S, as would have been expected. He was not proficient in any subject on his report card. He scored below basic in all areas other than art in which he achieved a basic rating. P 5; Testimony of SEC

9. Attending school does not routinely evaluate students for special education and related services under IDEA following accidents even when a student incurs a brain injury. Testimony of SEC.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

Whether DCPS failed to comply with IDEA Child Find requirements from September 15, 2011 through the filing of the Complaint. This includes the failure to timely evaluate and/or identify the student as eligible for special education services and/or develop an IEP for the student and make services available in a timely manner. If the student had been identified and found eligible timely, services would have been available from approximately January 30, 2012 through the filing of the complaint.

A district's obligation under IDEA Child Find requirements is well settled. A public education agency such as Respondent herein must have "policies and procedures to ensure that all children with disabilities residing in the State, . . . regardless of the severity of their disability, . . . who are in need of special education and related services, are identified, located and evaluated." 34 C.F.R. § 300.111(a). Child Find is an affirmative obligation which requires "every public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible." N.G. v. District of Columbia 50 IDELR 7; 108 LRP 19551; 556 F. Supp. 2d 11 (March 31, 2008). Clearly, "the Child Find obligation extends to all children suspected of having a disability, not merely to those students who are ultimately determined to be disabled." *Id.* Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE. *Id.*, citing *Hawkins ex rel. D.C. v. District of Columbia*, 2008 WL 632588, (D.D.C. March 7, 2008); and *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).

In the instant matter it is uncontested that DCPS knew Student had been hit by a car in May 2011 and had received significant injury requiring admittance both to Medical Center and then to Rehabilitation Hospital. DCPS also knew one of Student's injuries was a brain injury. Staff⁹ from Student's school participated in a meeting at Rehabilitation Hospital with Student's treating professionals at Rehabilitation Hospital. In the meeting Student's potential speech/

⁹ It is not clear which specific staff attended this meeting, and it is not necessary to establish precisely which staff were in attendance to establish the school had knowledge of Student's injuries and the potential impact of these injuries.

language, memory and headache issues were discussed. Upon Student's return to school in August 2011, Petitioner provided someone in the counselor's office at Attending School with documentation of Student's injuries including a discharge summary stating Student had cognitive and communication/language impairments.¹⁰ Throughout the 2011 -2012 and 2012 -2013 school years Petitioner reminded Student's teachers of his brain injury and questioned whether an IDEA evaluation should be performed. No evaluation was performed. Yet, at the end of the 2012-2013 school year Student's report card reflected poor performance, and his teachers comments indicated he was having difficulties that included not being able to answer questions with detail or write clearly about what he had read. He also was not turning in homework assignments as required. Any or all of these issues may have been related to the potential memory and speech/language problems identified during the meeting at Rehabilitation Hospital in August 2011 at which at least one Attending School representative was present. Yet no IDEA evaluation was initiated. Instead, Student's teachers recommended he be retained in the fourth grade.

In an effort to justify and explain this response to the struggles of a Student with a diagnosed brain injury, DCPS staff testified at hearing that Attending School does not evaluate all students who have had accidents for special education eligibility even when brain injury is involved. The basis for this practice is based on the possibility that the effects of the injury may be short term. This school practice is in direct conflict with IDEA. The intent of IDEA Child Find requirements is to assure that all students who have disabilities, regardless of the severity of the disability, who by reason of the disability need special education and related services are

¹⁰ Petitioner also testified that she provided the same person with a completed form requesting Student be evaluated for eligibility under IDEA. Petitioner provided copies of the discharge information as evidence. No copy of the form requesting IDEA evaluation was provided. Therefore, I must rely solely on Petitioner's testimony as to this form. Without a copy of the form, the evidence regarding the form is not as definitive as the other evidence presented regarding Student's injuries and the potential impact of the brain injury. However, the specifics of whether Attending School received the written request, the specific content of this form and to whom Petitioner may or may not have handed the written form is not necessary for me to reach my determination here. Petitioner has established Attending School was aware of Student's accident and injury with or without the form.

provided services. 34 C.F.R. § 300.111. The IDEA therefore requires that all potentially eligible students be identified and evaluated. The intent of Attending School's practice, in contrast, appears to be to limit the number of students who are evaluated for special education eligibility because, in the case of accidents at least, the disability may be short lived. IDEA recognizes no such limitation on the affirmative obligation under Child Find to evaluate all children who might be eligible for IDEA services. *Id.* I note, moreover, that IDEA addresses the possibility of a short term, educationally related disability by requiring regular review of a student's need for special education and related services and by allowing a student to be declassified in the event his/her disability is resolved or no longer has educational impact.

For the forgoing reasons I find, by a preponderance of the evidence, that DCPS failed to comply with IDEA Child Find requirements by failing to evaluate Student for IDEA eligibility¹¹ from September 15, 2011 through the filing of the Complaint.

The Remedy

In most circumstances a finding that DCPS has failed to comply with IDEA requirements results in the award of a remedy. Such an award, however, requires that the student have been found to be an eligible student under IDEA. Such a finding has not been made here, but the lack of an eligibility determination is not attributable, in the instant matter, to Petitioner. Petitioner repeatedly asked that her child be evaluated. The lack of eligibility determination is, in actuality, a direct result of DCPS' failure to evaluate a child who has been identified as having a brain injury and, therefore, was potentially eligible for services for over two years.¹² A child with a disability is defined to include a child with traumatic brain injury or a child with specific learning disability. IDEA defines traumatic brain injury to be an "acquired injury caused by an external

¹¹ I do not make determinations as to Student's actual eligibility or the possible related failure to develop an IEP and provide Student timely services because such evidence did not exist at the time of the filing of the Complaint.

¹² A DCPS funded neuropsychological assessment is currently in process.

physical force resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance." 34 C.F.R. § 300.308(b)(12). The definition specifically includes impairments in language and memory, two of the areas of concern noted by the team at Rehabilitation Hospital. *Id.* Specific learning disability is defined, in part, as meaning a disorder of one or more of the basic psychological processes involved in understanding or using language, written or spoken associated with, among other dysfunctions, brain injury. 34 C.F.R. § 300.308(b)(10). Despite DCPS having knowledge that Student had a brain injury that might have affected his language and/or his memory, DCPS ignored this identification (the first step of the Child Find process) suggesting Student might have a disability requiring special education and related services and chose not to evaluate Student and reach a determination as to his eligibility for IDEA services. Clearly it is possible that Student may have been found eligible for IDEA services under either of the disability definitions identified here. The failure to conduct an evaluation to determine whether Student was, in fact, eligible violated Child Find and thereby precluded the provision of a remedy in the instant matter. Remedy is precluded even if Student would have been found eligible for services had an evaluation under Child Find been provided as required.

I therefore find that I must dismiss the claim for remedy as Student is not at this time an eligible student under IDEA. I dismiss the claim for remedy, however, without prejudice because, as discussed above, the lack of determination of Student's eligibility or lack of eligibility under IDEA is entirely attributable to DCPS' recalcitrance in evaluating Student despite the clear indications of the possibility of his eligibility for services and resultant clear Child Find requirement that he be evaluated.

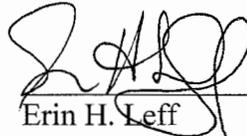
CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS failed to comply with IDEA Child Find requirements by failing to evaluate Student for IDEA eligibility from September 15, 2011 through the filing of the Complaint.
2. The request for relief is dismissed without prejudice.

IT IS SO ORDERED:

October 20, 2013
Date



Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).