

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 3, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: December 2, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

PUBLIC CHARTER SCHOOL,

Respondent.

Office of Dispute Resolution,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that in conducting an initial special education eligibility evaluation of Student in 2013, Respondent Public Charter School (PCS) failed to evaluate her child in all areas of suspected disabilities.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's due process complaint, filed on September 19, 2014, named PCS as Respondent. The parties

¹ Personal identification information is provided in Appendix A.

met for a resolution session on October 2, 2014 and did not reach an agreement. On October 6, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on October 20, 2014.

The due process hearing was held before this Impartial Hearing Officer on November 14, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent PCS was represented by DIRECTOR OF SPECIAL EDUCATION and PCS' COUNSEL.

Counsel for the respective parties opening statements. Petitioner testified and called CLINICAL PSYCHOLOGIST as her only witness. PCS called as witnesses, SPECIAL EDUCATION COORDINATOR, PCS SCHOOL PSYCHOLOGIST, DCPS SCHOOL PSYCHOLOGIST and TEACHER. Petitioner's Exhibits P-1 through P-19 were admitted into evidence, including Exhibits P-13 and P-16 through P-18, which were admitted over PCS' objections. PCS' Exhibits R-1 through R-10 were admitted into evidence without objection. At the beginning of the due process hearing and again, at the conclusion of Petitioner's case-in-chief, PCS' Counsel made an oral motion to dismiss the due process complaint at moot. I denied the motion. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

The following issue for determination was certified in the October 6, 2014

Prehearing Order:

Whether PCS denied the student a FAPE by failing to evaluate him in all areas of suspected disabilities following a September 12, 2013 referral meeting.

For relief, Petitioner seeks an order for PCS to fund a clinical psychological evaluation of Student that addresses whether the Student meets criteria for Other Health Impaired due to Attention Deficit-Hyperactivity Disorder or for an Emotional Disability, to fund an updated Woodcock-Johnson Educational Evaluation and to fund a Vineland Assessment to assess Student's adaptive behavior in communication, daily living skills, socialization and motor skills. The Petitioner also reserved the right to seek a compensatory education award, if Student is hereafter determined eligible for special education and related services.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia. Student has never been determined to be a child with a disability in need of special education and related services. Testimony of Mother.

2. Mother enrolled Student at PCS at the beginning of the 2012-2013 school year. During the school year, Mother was concerned over Student's grades and performance at school, his limited attention span, and his lack of focus. When she discussed her concerns with Student's teachers at PCS, the teachers indicated that they had the same concerns and also were concerned over Student's behaviors which caused

him to miss a lot of class time. Testimony of Mother.

3. At a meeting with Special Education Coordinator on April 10, 2013, Mother discussed her concerns. A multidisciplinary team (MDT) meeting was scheduled for May 14, 2013. Testimony of Special Education Coordinator, Exhibits R-2, R-3. At that meeting, Mother expressed her concerns about Student, including her worry about his behavior, that he makes a lot of bad choices and gets mad a lot. His teacher noted that Student had been working in two different small tutoring groups and was asked to leave each one because of his behavior. The MDT team did not decide to conduct eligibility evaluations at that time. The team asked Mother to consult with Student's pediatrician and agreed that Student would go to summer school and be provided some tutoring. The team agreed there would be a follow-up meeting at the beginning of the 2013-2014 school year. Exhibit P-1. Student did not attend summer school, because he was staying with his father at that time. Testimony of Mother.

4. Student failed English-Language Arts and Math for the 2012-2013 school year. Exhibit P-4. For the school year, he had 25 disciplinary incidents, most of which involved defiance, class disruptions, fighting and threat/harassment. Exhibit P-7.

5. As of September 10, 2013, Student had been sent to in-school suspension at last five times in the preceding two weeks for excessive defiance and classroom disruptions. Subsequently, he was disciplined on multiple occasions, including October 10, 2013, October 17, 2013, October 22, 2013, October 23, 2013, October 29, 2013, for disrupting the class, intimidating and harassing other students, aggression and defiance, walking out of class, calling out in class, refusing to do work, and other disruptive behaviors. Exhibit P-6.

6. On September 12, 2013, a special education referral meeting was convened

at PCS. At that meeting, Mother again expressed concerns about Student's behaviors, including his threat to hurt her and his being angry about his parents' separation. Student's teacher reported that his behavior impacted his academic success, that he whispered inappropriate comments to female students, that, when he was moved to a back table in the classroom, he began throwing things and that he struggled with being motivated to complete assignments. At the meeting, PCS School Psychologist expressed concern that Student was displaying behaviors that were "larger than school." Mother told the multidisciplinary team that Student's pediatrician had said he was not a candidate for ADHD because his behavior problems had only started the year before.

Testimony of Special Education Coordinator, Testimony of School Psychologist, Exhibit P-2. (Mother denies telling the MDT team that the pediatrician said that Student was not a candidate for ADHD. Both Special Education Coordinator and PCS School Psychologist testified that Mother said at the meeting that Student's pediatrician had indicated that Student was not a candidate for ADHD and this account of Mother's statement is reflected in Special Education Coordinator's contemporaneous notes. I find the testimony of Special Education Coordinator and School Psychologist to be more credible than Mother's testimony on this issue.) At the September 12, 2014 meeting, School Psychologist discussed conducting a Conners' assessment of Student to look at a possible ADHD condition. The team decided that a Conners' assessment was not needed and recommended that a psychoeducational evaluation be conducted. The team agreed to put Student Support Team (SST) interventions in place while the evaluation was being conducted. Exhibit P-2, Testimony of Special Education Coordinator.

7. PCS School Psychologist conducted a psychoeducational evaluation of Student in October 2013. He administered the Wechsler Intelligence Scale for Children -

Fourth Edition (WISC-IV) and the Wechsler Individual Achievement Test - Third Edition (WIAT-III). PCS School Psychologist also observed Student in the classroom. In his October 21, 2013 report, PCS School Psychologist reported that Student's cognitive ability was in the Borderline range and that his academic skills were inconsistently developed. Although this psychoeducational evaluation did not include a social emotional component, PCS School Psychologist recommended, *inter alia*, a reward system for positive reinforcement of desired behaviors, a behavior contract, teaching new appropriate behaviors, and support for appropriate behaviors. Exhibit P-3.

8. The PCS eligibility team met on October 29, 2013. The team looked at whether Student had a learning disability (LD) and concluded that Student did not have an LD. The team determined that Student was not eligible for special education, because his lack of academic progress was due to lack of exposure to appropriate instruction. Student was referred back to the SST for further interventions. Exhibit P-11. The October 29, 2013 eligibility team did not consider ADHD or an emotional disability as disability categories for Student, because these were not considered areas of suspicion. Testimony of Special Education Coordinator.

9. On November 20, 2013, Mother withdrew Student from PCS and enrolled him in CITY ELEMENTARY SCHOOL, where he is currently a student. Testimony of Mother. On October 3, 2014, a paralegal at the law firm of Petitioner's Counsel wrote the City Elementary School principal by email, to notify DCPS of Mother's concerns about Student's behaviors and academic progress. She wrote that Mother and her representatives suspected that Student had a "disability that impacts him educationally." On October 31, 2014, DCPS School Psychologist wrote the paralegal that the City Elementary School SST team agreed to explore a new comprehensive psychological

evaluation of Student due to an incomplete Conners' Rating Scale. He wrote further that the SST team agreed that development of a 504 plan (Section 504 of the Rehabilitation Act of 1973) should also be explored to provide accommodations for Student while the psychological evaluation was underway. On October 31, 2014, Petitioner's Counsel wrote DCPS School Psychologist, by email, to make him aware of the due process hearing in the instant case, "so that multiple evaluations are not conducted for this student from different sources, thereby invalidating the results." Hearing Officer Exhibit 1. DCPS is ready and willing to conduct a comprehensive psychological evaluation, Vineland Adaptive Behavior Scales, Conners' ADHD Rating Scales if needed, and clinical and social emotional assessments of Student. Testimony of DCPS School Psychologist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

Did PCS deny Student a FAPE by failing to evaluate him in all areas of suspected disabilities following a September 12, 2013 referral meeting?

At the September 12, 2013 initial evaluation referral meeting, the PCS MDT referral team met to review Mother's and teachers' concerns about Student's behaviors

and school performance. After hearing from Mother, Student's teachers and PCS School Psychologist, the team determined that Student should be administered a psychoeducational evaluation. When PCS School Psychologist conducted the evaluation, he did not administer test components to assess for ED or ADHD. Petitioner contends that by not administering these assessments, PCS failed to evaluate Student in all areas of suspected disabilities. PCS responds that when the evaluation referral team met in September 2013, ADHD and ED were not areas of suspected disabilities for Student.

U.S. Department of Education regulations require that, as part of an initial special education evaluation, an LEA must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006).

At the September 12, 2013 PCS referral team meeting, the team considered concerns raised by mother and Student's teachers and input from PCS School Psychologist. The team decided that Student should be assessed with a psychoeducational evaluation, but the meeting minutes do not indicate that the scope of the evaluation was discussed. Petitioner's expert, Clinical Psychologist, opined that it would have been "very reasonable" for the school psychologist to have conducted the Conners' rating scale and *Attention-Deficit/Hyperactivity Disorder Test* (ADHD-T) tests

in assessing Student. However, the referral team's decision not to assess for ADHD in 2013 was based upon Mother's report to the team that Student's pediatrician did not consider him to be an ADHD candidate. Unlike Student's pediatrician, Clinical Psychologist never met the student or formally evaluated him. Based upon these facts, I do not find her opinion persuasive that Student should have been evaluated for ADHD. I conclude that Petitioner has not met her burden of proof to show that, based upon the information available to the PCS referral team on September 12, 2013, ADHD was a suspected disability for Student.

The failure of PCS to assess Student for ED is more problematical. The IDEA regulations define ED to mean a condition exhibiting one or more of the following characteristics, over a long period of time and to a marked degree, that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR § 300.8(c)(4). Student failed English-Language Arts and Math for the 2012-2013 school year. For the school year, he had 25 disciplinary incidents, most of which involved defiance, class disruptions, fighting and threat/harassment. At both the May 2013 and September 2013 special education referral meetings, Student's teachers reported that his behaviors were interfering with his education. It was reported at the

May 2013 meeting that Student's behaviors prevented him from being in tutoring groups. His teachers reported in September that Student whispered inappropriate comments, began throwing things when moved to a table in the back of the classroom and broke things into small pieces to use as projectiles. From the beginning of the 2013-2014 school year, Student was repeatedly disciplined at PCS for serious behavioral issues at school, including disrupting the class, intimidating and harassing other students, aggression and defiance, walking out of class, calling out in class, refusing to do work, and other disruptive and oppositional conduct. At the September 12, 2013 evaluation referral meeting, Mother and Student's teachers' raised concerns about the impact of Student's behaviors on his academic progress. Based upon these facts, I find that Student was displaying some characteristics suggesting the possibility of an emotional disturbance as defined by the IDEA and that it was incumbent upon PCS to assess Student's social and emotional status as an area related to his suspected disability. *See* 34 CFR § 300.304(c)(4).

When PCS School Psychologist conducted his psychoeducational evaluation of Student in October 2013, he used testing instruments, the WISC-IV and the WIAT III, designed to ascertain Student's current levels of cognitive and academic functioning respectively. However, the pschoeducational evaluation did not assess Student's social and emotional status to produce the data needed to determine if Student had an emotional disability, even though School Psychologist recommended various, specific measures to promote and reinforce appropriate behaviors. I find that this was a failure to assess Student in all areas related to his suspected disabilities.

An LEA's failure to appropriately assess a student for suspected disabilities is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.,*

2012 WL 3985686, 16 (D.Haw. Sept. 11,2012). Not all procedural violations are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (Only procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.) I conclude that PCS' omission to formally assess Student's social and emotional status, prior to the MDT team's October 29, 2013 eligibility meeting, significantly impeded the parent's opportunity to participate in the eligibility determination process, resulting in an actionable violation of the IDEA. *See* 34 CFR § 300.513(a).

Request for Relief

In this decision, I have found that PCS violated the IDEA by failing to assess Student for a suspected emotional disability. For relief, Petitioner requests that I order PCS to fund an independent clinical psychological evaluation of Student, including an updated Woodcock-Johnson educational evaluation and a Vineland test.² A hearing officer has broad discretion to fashion relief to serve the IDEA's remedial purposes. *Copeland v. District of Columbia*, 2014 WL 4520213, 6 (D.D.C. Sept. 15, 2014). This extends to ordering relief against a former LEA, when, as in the present case, a student has transferred out of the LEA which violated the IDEA. *See, e.g., L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F.Supp. 2d 69, 76 (D.D.C.2012) (Holding that the IDEA permitted student to bring due process complaint for compensatory education against LEA, with which student was formerly enrolled, after student had moved to new LEA.)

I find, however, that ordering PCS at this time to fund an independent evaluation of Student is not an appropriate remedy for PCS's failure in the fall of 2013 to evaluate

² Petitioner has reserved the right to seek a compensatory education award against PCS if Student is hereafter determined eligible for special education services

Student in all areas of suspected disabilities. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 34 (D.D.C.2012) (Court looks to the appropriate remedy for the violation.) Student transferred from PCS to DCPS in November 2013. Petitioner has recently requested and DCPS has agreed to comprehensively evaluate Student. In conducting its initial evaluation of Student, the IDEA requires that DCPS use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child” and that DCPS ensures that its evaluation is sufficiently comprehensive to identify all of Student’s special education and related services needs. *See* 34 CFR § 300.304(b), (c). As Petitioner’s Counsel wrote DCPS School Psychologist on October 31, 2014, it is important that “multiple evaluations are not conducted for this student from different sources, thereby invalidating the results.” *See Hearing Officer Exhibit 1*. Because DCPS is now required by the IDEA to conduct its initial eligibility evaluation of Student, I find that ordering PCS to fund an independent psychological evaluation of Student at the same time would potentially interfere with the DCPS evaluation and would not serve the IDEA’s remedial purposes.³

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

All relief requested by Petitioner herein is denied, without prejudice to Petitioner’s right, if any, to seek a compensatory education remedy against PCS in a new proceeding, if Student is hereafter determined to be eligible for special education and related services.

³ If the parent disagrees with an evaluation obtained by DCPS, she may have the right to an independent educational evaluation at public expense. *See* 34 CFR § 300.502(b).

Date: December 2, 2014

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. § 1415(i).