

District of Columbia
 Office of the State Superintendent of Education
 Office of Review and Compliance
 Student Hearing Office
 810 First Street, NE – Second Floor
 Washington, DC 20002
 Tel: 202-698-3819
 Fax: 202-478-2956

OSSE
 Student Hearing Office
 August 05, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: July 23, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Roberta Gambale, Esq. James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for DCPS: District of Columbia Assistant Attorney General Daniel McCall, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

BACKGROUND AND PROCEDURAL HISTORY:

The student is in middle school and resides in the District of Columbia with his parent. He was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and evaluated by DCPS while in pre-kindergarten in 2004. DCPS reviewed the student’s evaluations but did not find the student eligible for special education services.

The student’s current home school is “School A” a DCPS school, where the student attended during school year (“SY”) 2011-2012. During SY 2011-2012 the student began to display significant behavior concerns that resulted in suspensions and ultimately a long-term suspension and temporary placement at “School B,” another DCPS school where he attended until the end of SY 2011-2012.

In June 2012 the student was hospitalized at the Psychiatric Institute of Washington (“PIW”) for psychiatric concerns and diagnosed with ADHD and Oppositional Defiance Disorder (“ODD”). PIW recommended that the student be provided an individualized educational program (“IEP”).

Following the student’s hospitalization in June 2012, the student’s parent sent a letter to DCPS requesting that DCPS provide the student special education services. However, DCPS did not evaluate the student for special education services. The parent pursued alternative schools for the student for SY 2012-2013 and the student was admitted to “School C,” a District of Columbia charter school for which DCPS is the local educational agency (“LEA”). The parent enrolled the student at School C at the start of SY 2012-2013 but did not make a request to School C that the student be evaluated for special education services.

The student started off well at School C but began to have behavior difficulties and poor academic performance. The student was given both in school and out of school suspensions, but School C took no action to evaluate the student and determine his eligibility based on his behavior and/or academic concerns.

On April 25, 2013, School C informed the parent that the student was being considered for expulsion because of his behavior. The parent appealed the proposed expulsion and an expulsion hearing was held but the parent is uncertain of the outcome. The student was allowed to complete SY 2012-2013 at School C but remained in in-school suspension.

On May 21, 2013, Petitioner filed the current due process complaint alleging DCPS failed to respond to the parental request of June 2012 that the student be evaluated for special education and failed to identify the student as a child with a suspected disability under its “child find” obligations based on the student’s behaviors during SY 2012-2013 at School C.

Petitioner seeks an order directing DCPS to conduct or fund initial evaluations and convene an eligibility meeting and if the student is determined eligible develop an IEP

and determine placement. Petitioner asserts a claim to compensatory education if the student is determined eligible.

DCPS filed a timely response to the complaint on June 3, 2013. DCPS denies any alleged denial of a FAPE and specifically asserts that there was no request or reason prior to the complaint for DCPS to evaluate the student and without a finding of eligibility there is no requirement for DCPS to provide and FAPE and any claim is not yet ripe.

A resolution meeting was convened on June 6, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on June 21, 2013, and ends, and the Hearing Officer's Determination ("HOD") is due, on August 4, 2013. A pre-hearing conference was held on June 20, 2013, and a pre-hearing conference order was issued June 25, 2013, outlining, inter alia, the issue to be adjudicated.

THE ISSUE ADJUDICATED:²

The issue adjudicated is:

Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to identify and find the student eligible under its "child find" responsibilities while the student attended School A and School B during SY 2011-2012 and at School C during SY 2012-2013.³

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-25 and DCPS Exhibit 1-3) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁴

1. The student is in middle school and resides in the District of Columbia with his parent. The student was diagnosed with ADHD and evaluated by DCPS while in

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ Petitioner asserts the student should have been found eligible at earliest within 120 days after the June 7, 2012, letter was sent to School A and School B.

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

- pre-kindergarten in 2004. DCPS reviewed the student's evaluations but did not find the student eligible for special education services. (Parent's testimony, Petitioner's Exhibits 13, 14, 15)
2. The student's current home school is School A, where the student was enrolled from 2009 through the end of SY 2011-2012. During SY 2011-2012 the student began to display significant behavior difficulties that resulted in suspensions and ultimately a long-term suspension and temporary placement at School B, where he attended from February 2012 until the end of SY 2011-2012.⁵ (Parent's testimony, Petitioner's Exhibits 6-1, 6-2, 9-3)
 3. In June 2012 the student was hospitalized at the PIW for psychiatric concerns and diagnosed with ADHD and ODD. PIW recommended that the student be provided an IEP. The student received ongoing treatment with a community based health organization for his emotional and behavioral difficulties. (Petitioner's Exhibits 11-1, 12-1, 12-6, 12-7, 12-8)
 4. On June 7, 2012, the student's parent made a written request of DCPS that the student be evaluated and provided special education services. The parent sent a letter to DCPS by email and by U.S. mail requesting that DCPS take immediate action to develop an IEP for the student in light of the student's behaviors and diagnosis from PIW.⁶ The parent addressed the letter to and had a phone conversation with a DCPS instructional superintendent.⁷ However, DCPS personnel did not directly respond to the parent's written request that the student be considered for special education services and the student was not evaluated. Concurrently, the parent was pursuing alternative schools the student could attend other than School A for SY 2012-2013. (Parent's testimony, Petitioner's Exhibit 1-1)

⁵ The parent testified that the student was due to return to School A in May 2012 but she petitioned for him to remain at School B through the end of the school year.

⁶ The letter specifically requested: "that an IEP meeting be held for [the student] as soon as possible and in no more than 30 days as required by law. This meeting is necessary due to the fact that my child's education is not adequately individualized as evidenced by his classroom behavior, his numerous suspensions and his most recent emotional crisis that required inpatient hospitalization. My child's program needs to be modified to address his current individual needs appropriately and for this reason I am asking the team to reconvene."

⁷ The parent copied other DCPS personnel on the letter and email, specifically, the student's community support worker and the principals of School A and School B. The Hearing Officer credited the parent's testimony that this correspondence was sent and that the letters sent by U.S. mail were not returned to her as undeliverable. DCPS presented no witness or other evidence to refute the parent's testimony that she mailed the letters to DCPS personnel. Thus, the Hearing Officer concluded that the DCPS personnel received the correspondence. The presumption of mailing presumes that a properly addressed letter delivered to the post office or a common carrier was in fact delivered and received by the addressee.

Toomey v. District of Columbia, 315 A.2d 565

5. The student was admitted to School C, a District of Columbia public charter school for which DCPS is the LEA. The student's parent enrolled him at School C at the start of SY 2012-2013. As a result of the student being enrolled at School C the student's parent did not take any further action to have the student evaluated for special education and made no such request of School C staff once the student was enrolled there. (Parent's testimony)
6. The student started off well at School C but by October 2012, the student had begun to have behavior difficulties and his academic performance began to falter. The student was given both in school and out of school suspensions. On December 12, 2012 the student's parent met with the School C Dean of Students ("DOS") and discussed the student's behavior and his past psychiatric hospitalization. The parent requested that the DOS not mention the student's prior hospitalization and emotional difficulties to other School C personnel and the parent did not ask the DOS that the student be evaluated for special education services. School C took no action to evaluate the student and determine the student's eligibility for special education services prior to the current due process complaint being filed. (Parent's testimony, Petitioner's Exhibits 2, 7-1, 7-2, 7-3)
7. The student's behavioral difficulties at School C continued and on April 25, 2013, School C informed the parent that the student was being considered for expulsion. On April 29, 2013, the parent sent School C a letter to appeal the proposed expulsion. The student was able to complete the SY 2012-2013 school year at School C but remained in in-school suspension for the rest of the school year and was ultimately promoted to the next grade although some of his grades were below average. (Parent's testimony, Petitioner's Exhibits 10, 18)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this

part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue: Whether DCPS denied the student a FAPE by failing to identify and find the student eligible under its “child find” responsibilities while the student attended School A and School B during SY 2011-2012 and at School C during SY 2012-2013.

Conclusion: The evidence supports a finding that that the parent made a request of DCPS, including School A or School B staff, that the student be evaluated for eligibility for special education services in June 2012 and that the student should have been evaluated for special education services by at least November 1, 2012. Petitioner sustained the burden or proof by a preponderance of the evidence.

Congress passed the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.§1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C.§1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

A parent may initiate a request for an initial eligibility for special education benefits and services. 34 C.F.R. §300.301 (b). In the District of Columbia, such a request, termed a

⁸ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

"referral," is to be made in writing. DCMR Title 5E, §3004(a).

Child Find is DCPS' affirmative obligation under the IDEA: "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008). DCPS must conduct initial evaluations to determine a child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code § 38-2561.02(a).

"DCPS child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" Long, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

Petitioner presented credible evidence including the parent's testimony⁹ that she made written requests in June 2012 to DCPS for the student to be considered for special education services based upon his behaviors at School A during SY 2011-2012 and his hospitalization in June 2012. The point at which the parent made this request was sufficient notice to DCPS that the student should have been evaluated for special education. Respondent thereafter had 120 days to complete an evaluation and determine the student's eligibility pursuant to D.C. Code §38-2561.02(a).

Based upon the parent's request to DCPS, including to School A or School B staff in June 2012, the student should have been evaluated for special education services and his eligibility or ineligibility determined by at least November 1, 2012. DCPS' failure to do so was a denial of a FAPE to the student. Petitioner sustained the burden of proof by a preponderance of the evidence.

Petitioner also asserted that School C and thus DCPS as the LEA should have identified and evaluated the student under its "child find" obligations based on his behaviors and suspensions during SY 2012-2013 at School C. Although there was testimony and documentary evidence that the student had significant behavioral and academic difficulties during SY 2012-2013 at School C, the Hearing Officer concluded that the student had already been identified to DCPS based upon the parental request made in June 2012. Because the Hearing Officer has concluded that DCPS was under the obligation to evaluate the student based on that parental request its obligation to evaluate the student under "child find" based on his behaviors and academic performance at School C is a moot question.

⁹ FOF # 4 - The parent was forthright, composed and unhesitant in testimony and the Hearing Officer found her to be a credible witness regarding her request in June 2012 to DCPS that the student be evaluated for special education.

ORDER:¹⁰

1. DCPS shall within thirty (30) calendar days of the issuance of this Order provide Petitioner authorization to obtain an independent comprehensive psychological evaluation (to include cognitive, academic and social/emotional components) with DCPS funding at the OSSE/DCPS approved rate.
2. DCPS shall within thirty (30) calendar days of the issuance of this Order convene a multi-disciplinary team (“MDT”) meeting to determine what if any other evaluations of the student are warranted and DCPS shall within thirty (30) calendar days of that MDT meeting conduct the additional evaluations, if any.
3. DCPS shall, within twenty (20) school days of its receipt of the independent comprehensive psychological evaluation, convene an eligibility meeting to discuss and determine the student’s eligibility or non-eligibility for special education.¹¹
4. If the student is found eligible for special education DCPS shall, within ten (10) school days of the eligibility meeting, convene another meeting to develop an individualized educational program (“IEP”) for the student and discuss and determine compensatory education, if warranted.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: August 4, 2013

¹⁰ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

¹¹ The parties by mutual assent may delay the eligibility meeting until all evaluations are completed if any additional evaluations are by the MDT.