

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
April 14, 2014

<p>ADULT STUDENT¹,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Impartial Hearing Officer:</p> <p>Charles M. Carron</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed February 11, 2014, by Petitioner, who is an adult student, against Respondent, District of Columbia Public Schools (“DCPS”).

On February 12, 2014, the undersigned was appointed as the Impartial Hearing Officer.

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

On February 24, 2014, three days after the February 21, 2014 deadline, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied Petitioner a free appropriate public education (“FAPE”).

A Resolution Meeting was held on February 21, 2014 but it failed to resolve the DPC. The statutory 30-day resolution period ended on March 13, 2014.

The 45-day timeline for this Hearing Officer Determination (“HOD”) started to run on March 14, 2014 and will conclude on April 27, 2014.

The undersigned held a Prehearing Conference (“PHC”) by telephone on February 28, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 3, 2014 and that the Due Process Hearing (“DPH”) would be held on April 10, 2014. Later on February 28, 2014, the undersigned issued a Prehearing Conference Summary and Order (the “PHO”).

No pre-hearing motions were filed by either party and the DPH was held on April 10, 2014 from 9:48 a.m. until 11:18 a.m. at the Student Hearing Office, 810 First Street, NE, Room 2006, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following documentary exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-2 through P-8

Respondent’s Exhibit: R-1

Hearing Officer’s Exhibits: HO-1 through HO-7

Petitioner’s proposed exhibit P-1 was excluded based upon Respondent’s objection that it was not relevant to the issues in this matter.

The following witnesses testified on behalf of Petitioner at the DPH: Petitioner and Educational Advocate.

At the conclusion of Petitioner’s case, Respondent made an oral motion for judgment, which the undersigned denied for reasons explained on the record.

No witnesses testified on behalf of Respondent at the DPH.

The parties gave oral closing arguments and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the DPC are as follows:

Petitioner is female, Current Age, and is not currently attending school. Prior to School Year ("SY") 2011-2012 she attended Public School A. During SY 2011-2012 she attended Public School B, in Last Grade Attended. Petitioner has not yet been determined to be eligible or ineligible for special education under the IDEA.

Petitioner claims that Respondent has denied her a FAPE by failing to identify her as a child with a suspected disability, failing to evaluate her, failing to determine her eligible for special education, and failing to provide her with specialized instruction and related services that she required due to her disability.

IV. ISSUES

As confirmed at the PHC and in opening statements at the DPH, the following issues were presented for determination at the DPH:

(a) From February 11, 2012 to date, has Respondent denied Petitioner a FAPE by failing to identify her as a child with a suspected disability?

(b) From February 11, 2012 to date, has Respondent denied Petitioner a FAPE by failing to evaluate her in all areas of suspected disability?

(c) From February 11, 2012 to date, has Respondent denied Petitioner a FAPE by failing to determine her eligibility for special education?

(d) From February 11, 2012 to date, has Respondent denied Petitioner a FAPE by failing to provide her with appropriate specialized instruction and related services?

V. RELIEF REQUESTED

Petitioner requests the following relief:²

- (a) findings in favor of Petitioner on all issues;
- (b) an Order that Respondent fund four Independent Educational Evaluations (“IEEs”)—psychological, educational, vocational and speech and language;

² In the DPC, Petitioner also requested an Order that Petitioner’s Multidisciplinary Team (“MDT”) determine appropriate compensatory education; however, the undersigned struck this request because a Hearing Officer cannot remand such a remedy to an MDT or any other body that includes representatives of Respondent. In the DPC, Petitioner also requested an Order that Respondent provide Petitioner an appropriate level of specialized instruction and related services and place Petitioner in an appropriate setting. Paragraph 9 of the PHO instructed Petitioner to email Respondent’s counsel and the undersigned, no later than March 7, 2014, a statement of the specialized instruction, related services and setting that Petitioner was seeking. The PHO stated that if Petitioner did not meet this deadline, these requests for relief would be waived. Petitioner did not email the required statement; accordingly, these requests for relief are waived.

(c) an Order that within ten school days of the HOD, Respondent convene a Multidisciplinary Team (“MDT”) meeting to review all of Petitioner’s evaluations, develop an appropriate IEP, and discuss and determine an appropriate placement;

(d) 350 hours of independent tutoring, 100 hours of vocational transition services, and 200 hours of counseling, to be provided over a two-year period, as compensatory education³; and

(e) an Order that all meetings be scheduled through Petitioner’s counsel.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. Petitioner is a female, Current Age. R-1-1⁴, testimony of Petitioner.
2. Petitioner currently is homeless, residing in the District of Columbia.

Testimony of Petitioner.

Referrals of Petitioner for Evaluation and Responses Thereto

3. In January or February of 2012, Petitioner and her mother spoke with the Principal of Public School B and asked for her to be “tested” for special education.

Testimony of Petitioner.

³ Petitioner introduced no documentary evidence or testimony supporting this request for compensatory education.

⁴ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

4. In the latter part of the fall term of SY 2012-2013, Educational Advocate attempted to assist Petitioner, who was not attending school, return to Public School B, which she had attended the previous school year. Testimony of Educational Advocate.

5. Petitioner and Educational Advocate were informed that due to Petitioner's age, she would have to attend the night program at Public School A, or return at a later date to enroll in Public School B's winter term if space were available. *Id.*

6. Educational Advocate stated to the Special Education Coordinator at Public School B that she wanted to refer Petitioner for a special education evaluation. *Id.*

7. Respondent did not seek Petitioner's consent for evaluation or take any other action in response to this referral. *Id.*

8. Sometime after the SY 2012-2013 winter break, Educational Advocate attempted to register Petitioner at Public School A but the Principal stated there was a waiting list. *Id.*

9. Educational Advocate stated to the Principal of Public School A that Petitioner needed to be evaluated, in response to which the Principal referred Educational Advocate to the Special Education Coordinator of Public School A. *Id.*

10. On March 20, 2013⁵, Educational Advocate wrote to Public School A, stating, *inter alia*, as follows:

We are currently working with [Petitioner] to get her registered for school and referred for special education services. [Public School B] is the neighborhood school for [Petitioner]. [Petitioner] attempted to enroll at [Public School A] night school program but was told she had missed the

⁵ The document bears the date March 20, 2012. However, Educational Advocate testified that this was a typographical error, which is confirmed by the reference to Petitioner's age at the time of the letter.

deadline for registration. [Public School B] day program informed us they do not register students over 18.

In the past, DCPS has taken the position that only students that are registered in DCPS can make a legal referral for special education services. However, in [Petitioner's] case, she is being constructively barred from making a referral due to DCPS registration policies.

Could⁶ you please advise our organization on the proper procedures for making a special education referral for students in [Petitioner's] position.

On behalf of [Petitioner] we are sending you this written request for special education services.

P-4-1.

11. Respondent did not seek Petitioner's consent for evaluation or take any other action in response to this referral. Testimony of Educational Advocate.

12. On or about October 30, 2013, Educational Advocate and Petitioner went to the Office of Youth Engagement and met with the Student Placement Specialist to attempt to enroll Petitioner in Public School C and refer her for special education.

Id., P-4-1.

13. On November 21, 2013, Educational Advocate sent an email to the Student Placement Specialist stating, *inter alia*, as follows:

I met with you on October 30, 2013 concerning [Petitioner]. I explained that she was in need of a school placement and a referral for special education services. We agreed that she could be placed at [Public School A]. On November 7, 2013 I accompanied [Petitioner] to [Public School A] to register. [Public School A] stated that the deadline for registration was over and only those students [with] special exceptions would be allowed to register. As of 11/7/2013, [Public School A] had not received any information on [Petitioner]. Cou[ld] you please contact [Public School A] regarding [Petitioner] [and] I will once again take her to register tonight.

⁶ On cross-examination, Respondent's counsel noted the use of the word "could." In context, the undersigned does not find that the use of "could" renders the referral for special education evaluation conditional, particularly given the next paragraph that specifically requests special education services.

P-6-1.

14. Later on November 21, 2013, Student Placement Specialist responded via email, thereby confirming that he had received the referral for special education. P-7-1.

15. On December 2, 2013, Educational Advocate wrote to Student Placement Specialist stating, *inter alia*, as follows:

On October 30, 2013, I met with you concerning [Petitioner's] need for a school placement and referral for special education services. On 10/30/2013 we agreed that you would have her placed at [Public School A], and that you would forward our special education concerns to the appropriate staff in the special education department.

On November 7, I attempted to assist [Petitioner] in enrolling at [Public School A]. [Public School A] refused her enrollment. I emailed you concerning my failed attempt to get [Petitioner] enroll[ed] in [Public School A]. On November 23, 2013 you followed up with me on my email and we spoke via phone concerning [Petitioner's] placement at [Public School A]. You informed me that [Petitioner] could not enroll for the fall 2013 session and that she would have to enroll for the Winter 2014 session.

Since the start of the 2012-2013 school year [Petitioner] has been attempting to make a referral for special education services. [Public School B] (her previous neighborhood school) refused to accept her referral. Could you please forward this referral for special education services on behalf of [Petitioner] to the appropriate staff in DCPS.

P-5-1.

16. Respondent did not seek Petitioner's consent for evaluation or take any other action in response to this referral. Testimony of Educational Advocate.

17. Based upon the entire record, and in particular the lack of any testimony rebutting the testimony of Petitioner and Educational Advocate, the undersigned finds that Petitioner and her representative made numerous requests for her to be evaluated for

special education eligibility, beginning in January or February of 2012 and including a request on November 21, 2013 that Respondent acknowledged receiving.⁷

18. Based upon the entire record, and in particular the lack of any testimony or documentary evidence rebutting the testimony of Petitioner or Educational Advocate or Educational Advocate's correspondence with Respondent⁸, the undersigned finds that Respondent failed to respond to Petitioner's requests for evaluation.

Petitioner's Academic Performance

19. Petitioner failed Environmental Science, Extended Literacy 9, Geometry Part B, Chemistry I and Principles of U.S. Government. P-3-1.

20. Petitioner may have failed courses in SY 2011-2012 due to her attempt to attend both day and night classes to avoid having to attend summer school. *Id.*

21. Petitioner lacks 2.5 credits to graduate high school. P-3-1 and -2; testimony of Educational Advocate.

22. Petitioner believes that her teachers inflated her other grades and allowed her extra credit to be compassionate because of her personal (non-school) difficulties.

Testimony of Petitioner.

⁷ If Petitioner or her mother had made only one request for evaluation, in January or February of 2012, IDEA's two-year statute of limitations would render the date of the request significant. However, Educational Advocate made numerous requests for evaluation, all of which were within the statute of limitations.

⁸ On cross examination, Respondent's counsel asked Educational Advocate whether she had a confirmation receipt of the facsimile transmission of her letter of March 20, 2013, to which Educational Advocate responded that she did not. The undersigned found Educational Advocate to be entirely credible and does not infer from the absence of a confirmation that the letter was fabricated.

Petitioner's Personal Difficulties and Behavior

23. Petitioner experienced a heinous traumatic event at age seven that preoccupies her constantly to this day, and has prevented her from focusing on her school work and completing that work. *Id.*

24. Petitioner has engaged in bullying and fights at school. *Id.*

25. Petitioner has an unstable non-school environment, including homelessness and a bad relationship with her grandmother. *Id.*

26. If Petitioner's non-school issues were resolved, she might be able to focus in school. *Id.*

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VIII. CREDIBILITY

The undersigned found both of the witnesses to be credible, to the extent of their firsthand knowledge.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended “(A) 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 and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected...” 20 U.S.C. §1400(d)(1). *Accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education (“FAPE”). FAPE means:

special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

“Child Find”

3. IDEA’s “Child Find” provisions impose an affirmative obligation on the states that receive federal funding (including the District of Columbia, which is a state for these

purposes) to ensure that “all children with disabilities residing in the State, including ... children with disabilities attending private schools ... and who are in need of special education and related services, are identified, located, and evaluated ...” 20 U.S.C. §1412(a)(3)(a). *See also*, 34 C.F.R. §300.111(a)(1)(i) and DCMR §5-E3002.3(a).

4. Although Petitioner and Educational Advocate testified that Petitioner engaged in bullying and fighting, there is no evidence in the record of any suspensions. She was advancing from grade to grade and passed most of her courses. Accordingly, Petitioner has not met her burden of proof that her academic performance or conduct put Respondent on notice that she had a disability affecting her education such that she should have been evaluated. In these circumstances, Respondent’s Child Find obligations were not triggered prior to the initial request for evaluation in January or February of 2012.⁹ *C.f.*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008), and *Clay T. v. Walton County Sch. District*, 952 F. Supp. 817 (M.D. Ga. 1997).

Response to Request for Evaluation

5. Separate and apart from its affirmative Child Find obligations, when a Local Educational Agency (“LEA”) such as Respondent receives a request to evaluate a child for special education eligibility, the LEA must conduct an initial evaluation. 34 C.F.R. §300.301(b).

6. The evaluation must be conducted within 60 days of receiving consent for evaluation unless the State establishes a different timeframe within which the evaluation

⁹ In any event, due to IDEA’s two-year statute of limitations (*see*, 20 U.S.C. §1415(f)(3)(C)), any Child Find violation prior to February 11, 2012 would be time-barred.

must be conducted. 34 C.F.R. §300.301(c)(1). The District of Columbia, which is a State for purposes of IDEA (20 U.S.C. §1401(31)), has established its own timeframe. Under DC ST §38-2561.02(a), “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.” The 120 days runs from referral, not consent.

7. In the instant case, the first referral was made no later than the end of February 2012 (Finding of Fact 17) and the 120 days therefore expired on or before the end of June 2012.

8. Parental consent is required for evaluation. 20 U.S.C. §1414(a)(1)(D). *See* also, 34 C.F.R. §300.300(a)(1)(i).

9. An LEA must make reasonable efforts to obtain the informed consent from the parents (or adult student) for an initial evaluation. 34 C.F.R. §300.300(a)(1)(iii). Because Respondent failed to obtain consent (Findings of Fact 7, 11 and 16), Respondent cannot assert lack of consent as a defense to its obligation to evaluate Petitioner.

Child with a Disability

10. The IDEA defines a child with a disability as a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. §1401(3)(A).

11. “Child with a disability” is further defined in 34 C.F.R. § 300.8(a) as a child evaluated

as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

12. “Emotional disturbance” is defined in 34 C.F.R. § 300.8(c)(4)(i) as

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 behaviors 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.

Accord, DCMR §5-E3001.1.

13. Given Petitioner’s mental preoccupation with her early childhood trauma that interferes with her academic performance (Finding of Fact 23) and her aggressive behavior (Finding of Fact 24), she may qualify for special education as a child with emotional disturbance. That cannot be determined without evaluating her.

IEP

14. The “primary vehicle” for implementing the goals of the IDEA is the individualized education program (“IEP”) which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

15. The requirement of an IEP applies once “a determination is made that a child has a disability and needs special education and related services” 34 C.F.R. §300.306(c)(2). *See also*, DCMR §5-E3007.1 (“The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.”)

16. Respondent did not develop an IEP for Petitioner because Respondent never determined her eligibility. If Petitioner has, in fact, needed specialized instruction and related services due to an IDEA-covered disability, Respondent’s failure to evaluate her, determine her eligibility, and develop an IEP for her has denied her a FAPE by depriving her of such instruction and services since the spring of 2012.¹⁰

Enrollment

17. As noted by the U.S. District Court for the District of Columbia in *District of Columbia v. West*, 54 IDELR 117, 110 LRP 19316 (D.D.C. 2010), quoting *James ex rel. James v. Upper Arlington City School Dist.*, 228 F.3d 764,768 (6th Cir. 2000):

Under the IDEA, “the obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from

¹⁰ The contents of such an IEP are speculative given the lack of any evidence in the record of the nature of Petitioner’s disability, the impact of that disability on her academic and social-emotional progress, and her needs.

enrollment.” ... The District’s offer to convene an MDT meeting for A.C. was always predicated upon her re-enrollment, a condition that was not required by the IDEA. As such, A.C. was neither required to re-enroll before requesting an MDT nor required to re-request an MDT after her re-enrollment.

18. In *District of Columbia v. Vinyard* (D.D.C. Civ. No. 12-1604 (CKK), September 22, 2013), the U.S. District Court for the District of Columbia held that “the receipt of services pursuant to an IEP is predicated on a child enrolling in a public school, but an offer of an IEP is not.” *Id.*

19. Thus, the fact that Petitioner has not been enrolled in school does not excuse Respondent’s obligation to deal with her, and if she is found eligible, to offer her an IEP.

Summary

20. Petitioner has not met her burden of proof that Respondent was on notice, prior to requests for evaluation by Petitioner, her mother or Educational Advocate, that Petitioner should have been identified as a child with a suspected disability.

21. From as early as January 2012 and certainly no later than November 21, 2013, to date Respondent has denied Petitioner a FAPE by failing to evaluate her in all areas of suspected disability based upon numerous requests for evaluation.

22. From as early as January 2012 and certainly no later than November 21, 2013, to date Respondent has denied Petitioner a FAPE by failing to determine her eligibility for special education.

23. Petitioner introduced no evidence of her disability or the relationship of that disability to her education (*i.e.*, her need for specialized instruction and related services); accordingly, she has not met her burden of proof that Respondent denied her a FAPE by failing to provide her with such instruction and services.

X. ORDER

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

1. No later than April 21, 2014, Respondent shall issue to Petitioner one or more Individualized Educational Evaluation (“IEE”) letters authorizing her to obtain psychological, educational, and vocational IEEs. In a cover letter or in the IEE letter(s), Respondent shall identify the DCPS contact to whom copies of the IEE reports should be sent, including name, title, mailing address, email address, telephone number, and facsimile number.

2. Petitioner shall make reasonable efforts to have the IEEs completed by May 30, 2014. Petitioner shall cause copies of the IEE reports to be sent directly to the DCPS contact identified by Respondent when issuing the IEE letters pursuant to Paragraph 1 above.

3. If any of the IEE reports recommends a speech and language assessment, within five business days of receiving that report, Respondent shall issue to Petitioner an IEE letter authorizing Petitioner to obtain a speech and language assessment. Petitioner may waive a speech and language assessment to expedite the eligibility determination described in Paragraph 4 below.

4. Within 14 calendar days of receiving the last of the IEE reports, Respondent shall convene a meeting of a Multidisciplinary Team (“MDT”) or Individualized Education Program (“IEP”) Team, with all necessary members, including Petitioner, to (a) review the results of the evaluations, (b) review any other information regarding Petitioner’s academic performance, behavior, and suspected disabilities including any

disability asserted by Petitioner, and (c) determine whether Petitioner is eligible for special education.

5. If the Team determines that Petitioner is eligible for special education, then the Team shall proceed at that time to develop an IEP for Petitioner, including determination of placement and location of services; provided, that the Team may reconvene at a later date as long as all of these tasks are completed no later than 28 calendar days after Respondent's receipt of the last of the IEE reports.

6. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

7. Any delay caused by Petitioner or Petitioner's representatives (e.g., absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

8. Petitioner's other requests for relief are DENIED.

Dated this 11th day of April, 2014.



Charles Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).