

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
April 07, 2014

STUDENT, ¹)	
through the Parent,)	
)	
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on January 31, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS had failed to comply with its affirmative Child Find obligation to identify, locate, and evaluate Student to determine his need for special education services since April 2012, based on Student’s continuing problem behaviors in school, Student having repeated the 3rd grade, and Student’s clinical diagnoses. Petitioner also alleged that DCPS had failed to evaluate Student for special education services within 120 days of Petitioner’s written request on October 31, 2013.

DCPS denied that Student was denied a FAPE. DCPS argued that by all objective indicators, Student was not a child suspected of having a disability that impeded his access to the general education curriculum. DCPS argued that Student’s behavior problems in school did not occur in his academic courses; that Student was at or above grade level in all academic areas according to DC school-wide academic achievement testing standards; that Student occupied a leadership position in his classroom and in the school; and that any problem behaviors that Student exhibited did not adversely affect his academic performance. DCPS also argued that it did not receive written notice to evaluate Student on October 31, 2013; and that its statutory 120

¹ Personal identification information is provided in Appendix A.

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days to complete the initial evaluation process did not begin until the Multidisciplinary Team meeting on January 23, 2013 when Petitioner asked for evaluations, because the written request from Petitioner dated December 19, 2013 was incomplete and did not constitute effective notice.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 01/31/14. This Hearing Officer was assigned to the case on 02/04/14. DCPS timely filed a response to the complaint on 02/05/14 and made no challenges to jurisdiction.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on 02/25/14, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on 03/02/14, the 45-day timeline to issue a final decision began on 03/03/14 and the final decision was due by 04/16/14.

A prehearing conference took place on 02/25/14. A Prehearing Order was issued on 02/28/14.

The due process hearing was a closed hearing that took place on 04/02/14. Petitioner was represented by Jocelyn Franklin, Esq. DCPS was represented by Tanya Chor, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner’s Disclosure Statement, filed and served on 03/26/14, consisted of a witness list of three (7) witnesses and documents P-01 through P-27. Petitioner’s documents were admitted into evidence without objection.

DCPS’ Disclosure Statement, dated 03/26/14, consisted of a witness list of nine (9) witnesses and documents R-1 through R-14. DCPS’ documents R-1, R-2, and R-5 through R-14 were admitted into evidence without objection. R-3 and R-4 were not admitted into evidence.

Petitioner presented the following five witnesses in her case in chief: (1) Petitioner; (2) Student; (3) Educational advocate (“advocate”); (4) Mental health consultant; and (5) Special education consultant who qualified as an expert in special education placement and the administration of special education services (“special education placement expert”).

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DCPS presented two witnesses: (1) Student's teacher at School A ("teacher"); and (2) DCPS school psychologist who qualified as an expert in school psychology and eligibility, including the evaluation process ("school psychology expert").

Parties stipulated to the following fact: Student's teacher was Student's teacher this current year and last year.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Issue #1 – Whether DCPS denied Student a FAPE since April 2012 by failing to (1) conduct its affirmative obligation to locate, identify and evaluate Student to determine his need for special education services, based on (A) Student's disruptive behaviors that included suspensions, acting out in classroom, absconding from school and class, threatening staff and peers, (B) repeating the 3rd grade, and (C) Student's diagnoses of ADHD and Bipolar Disorder that was made known to the school since February 2011; and (2) conduct an initial evaluation within 120 days of Petitioner's written request on 10/31/13 and verbal request at a meeting with DCPS on 01/23/14 to evaluate Student and determine his eligibility for special education services.

Petitioner requested the following relief:

- (1) A finding of a denial of a FAPE on the issue presented;
- (2) DCPS to fund an independent comprehensive psychological evaluation, social history and Functional Behavioral Assessment;
- (3) DCPS to convene a Multidisciplinary Team meeting within 10 days of receipt of the last of the assessments to review the assessments, determine eligibility for special education, and if eligible, develop an Individualized Education Program ("IEP") and Behavioral Intervention Plan, and determine school placement; and
- (4) If eligible for special education services, DCPS to provide Student with a dedicated aide for medication management and behavior management; and
- (5) DCPS to determine compensatory education or the Hearing Officer to determine an award of compensatory education, if Student is determined to be eligible for special education services.

Findings of Fact

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

#1. Student is a _____ resident of the District of Columbia. Petitioner is Student's mother.²

#2. In December 2010, Student was clinically diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Post Traumatic Stress Disorder ("PTSD") and Mood

² Petitioner.

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Disorder. Student took medicine on a daily basis to control symptoms associated with these diagnoses.³ Petitioner made Student's school aware of these diagnoses.⁴

#3. Student repeated the 3rd grade during the 2011/12 school year ("SY").⁵ Petitioner received frequent calls from the school about Student's disorderly and disruptive behaviors.⁶ At the end of the 2011/12 SY, Student was at grade level or approaching grade level in all of his classes. Student was promoted to the 4th grade.⁷

#4. During the 2012/13 SY and 2013/14 SY, Student attended the 4th and 5th grades, respectively, at School A. During both years, Student had the same general education teacher.⁸

#5. During the 2012/13 SY and 2013/14 SY, Student did not have any behavior problems in his general education classroom that stood out from the behaviors of his peers. Student had only been removed from the classroom once during the 2012/13 SY when he had not taken his medication, got upset and was taken home.⁹ During the 2013/14 SY, Student had no behavioral incident reports. Student was able to focus in the general education classroom, he was not disruptive in class, he participated a lot in class, got along very well with his classmates, was the leader of the group of students who sat at his table, completed his classwork and helped other students when he had completed his own work.¹⁰ Student had school-wide achievements in leadership and was looked upon as a role model for other students.¹¹ Student had a good relationship with his teacher and was very responsive to her instruction.¹²

#6. Student sometimes had conflict with staff and peers outside of his general education classroom.¹³ Those conflicts generally occurred in Student's elective classes, in the hallways or in the cafeteria.

During the 2012/13 SY and 2013/14 SY, Student did not display any physical aggression or violence towards staff or students.¹⁴

#7. Student's school day extended from 8:45 a.m. – 5:00 p.m. Regular school lasted until 3:45 p.m. and the subsequent aftercare component lasted until 5:00 p.m. Aftercare was optional and afforded Student an opportunity to improve his academics in science and social studies.¹⁵ When Student finally arrived home from school, he was very tired and uncooperative

³ Petitioner, P-20, P-21.

⁴ Petitioner.

⁵ Petitioner.

⁶ P-13, P-17, Petitioner.

⁷ P-13.

⁸ Teacher, Petitioner.

⁹ Teacher.

¹⁰ Teacher, Student.

¹¹ Teacher, Student, school psychology expert.

¹² Teacher.

¹³ Student.

¹⁴ Student.

¹⁵ Teacher.

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with Petitioner about spending an additional 2.5 – 3.0 hours going over schoolwork.¹⁶ Student often had problems completing his homework.¹⁷

#8. Student's ability and inclination to telephone his mother during the school day at will on an almost daily basis and get her involved and worried about his daily dislikes and concerns at school, caused Petitioner to worry excessively.¹⁸ Student's behavior contributed to Petitioner's perception that Student was having a host of very adverse behavior problems in school that weren't substantiated by school staff.¹⁹ Student exhibited behavior problems to gain attention.²⁰

#9. Since October 2013, Student has been receiving community based counseling from a mental health specialist for 2 hours/month. On or about October 2013, Student's community mental health specialist recommended to Petitioner that Student be evaluated for special education services due to Petitioner's chronic concerns about Student's behaviors in school.²¹

#10. On October 31, 2013, Petitioner, through her attorney, addressed a letter to the special education coordinator ("SEC") at School A, requesting that Student be evaluated for special education and related services through a comprehensive psychological evaluation and a Functional Behavioral Assessment.²² There was no substantive evidence in the record that School A actually received the letter.

#11. On December 19, 2013, Petitioner once again through her attorney, addressed a letter to the SEC at School A, requesting the status of the evaluation process.²³ Once again, Petitioner requested that DCPS conduct a comprehensive psychological evaluation and a Functional Behavioral Assessment. This correspondence was received by the SEC at School A, but the correspondence was incomplete. The SEC acknowledged Petitioner's request for evaluation and offered two different dates in January 2014 to meet with Petitioner in order to review existing information and data pertaining to Student's academic progress.²⁴

#12. A meeting took place with a Multidisciplinary Team at School A on January 23, 2014.²⁵ Petitioner and her advocate attended. DCPS did not agree to conduct evaluations to determine whether or not Student was in need of special education services. DCPS' refusal was based on Student's DC CAS scores and Student's report cards.²⁶ Petitioner disagreed with DCPS' decision not to evaluate Student.²⁷

¹⁶ Petitioner, Student.

¹⁷ Petitioner, Student, teacher.

¹⁸ Student, Petitioner.

¹⁹ Petitioner, Student.

²⁰ Student.

²¹ Mental health specialist.

²² P-4-1.

²³ P-5-1.

²⁴ P-6.

²⁵ P-7-1.

²⁶ Petitioner, advocate.

²⁷ Petitioner.

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#13. Student is very, very intelligent, loves learning and performs well academically.²⁸ He participates in a reading intervention and enrichment program at School A that is for high functioning students. He scored higher on testing than many of his classmates. Per standardized informal academic performance testing, Student was at grade level in reading, writing, and mathematics in the 4th grade. He was at grade level in mathematics and writing, and above grade level in reading in the 5th grade.²⁹ Student had no difficulty accessing the general education curriculum.

#14. Student's clinical diagnoses do not adversely affect Student's educational progress.³⁰ The need for behavioral intervention alone does not qualify a child for special education services under the IDEA.³¹

#15. A due process complaint was filed on January 31, 2014. A resolution meeting to resolve the issues in the complaint was held on February 25, 2014. At the resolution meeting, DCPS offered to conduct a comprehensive psychological evaluation and Functional Behavioral Assessment. As of February 28, 2014, Petitioner declined DCPS' offer and instead requested funding for independent evaluations.³²

Conclusions of Law

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

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE since April 2012 by failing to (1) conduct its affirmative obligation to locate, identify and evaluate Student to determine his need for special education services, based on (A) Student's disruptive behaviors that included suspensions, acting out in classroom, absconding from school and class,

²⁸ Teacher, Petitioner, Student.

²⁹ Teacher, school psychology expert, R-5 through R-12, P-15.

³⁰ School psychology expert.

³¹ School psychology expert.

³² R-1-2, R-3-1.

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threatening staff and peers, (B) repeating the 3rd grade, and (C) Student's diagnoses of ADHD and Bipolar Disorder that was made known to the school since February 2011; and (2) conduct an initial evaluation within 120 days of Petitioner's written request on 10/31/13 and verbal request at a meeting with DCPS on 01/23/14 to evaluate Student and determine his eligibility for special education services.

The overall purpose of the IDEA is 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. 34 C.F.R. 300.1. To that end, DCPS must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111, 5 D.C.M.R. E-3002.1(d).

Special education means specially designed instruction, to meet the unique needs of the child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

Child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300(a). Disability includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other Health Impairment. Regardless of the existence of a disability, it is only a qualifying disability under the IDEA if the disability adversely affects a child's educational performance. 34 C.F.R. 300.8.

A child who meets one of the disability classifications under the IDEA who solely is in need of behavioral intervention or a related service and does not require special education services, does not qualify as a child with a disability under the IDEA. 34 C.F.R. 300.8(a)(2)(i).

Petitioner failed to meet her burden of proof by a preponderance of the evidence that DCPS failed in its affirmative Child Find obligation to identify, locate and evaluate Student since April 2012.

Petitioner also failed to meet her burden of proof by a preponderance of the evidence that DCPS failed to conduct an initial evaluation of Student and determine his eligibility for special education services within 120 days of Petitioner's written request on October 31, 2013.

DCPS' Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011).

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Prior to December 19, 2013, there were no objective indicators that Student might be a child with a disability who as a result, required special education services in order to access the curriculum. Despite Student having repeated the 3rd grade, by April 2012, which was at the end of Student's second 3rd grade year, Student was at or approaching grade level in all academic subjects and was promoted to the 4th grade.

Student's overall behaviors in school during the 2012/13 and 2013/14 school years were aligned with those of his peers; Student was not a behavior problem at all in his general education class; Student had performed at or near grade level in all academics in the 4th grade; Student performed at grade level in writing and mathematics and above grade level in reading in the 5th grade; and in the 5th grade, Student occupied a leadership position in the school and the classroom, was a role model for other students, and participated in a reading program for high functioning students. Student loved school and loved learning. He participated in academics to the fullest extent of his abilities.

By Student's own admission, he created behavior problems to gain attention. Student was very, very intelligent. He presented as a child with a very capable intellect. Student testified in a very credible and impressive manner. He was quick to grasp the questions posed to him and provided quick, articulate and responsive answers to the questions.

By the objective standards of School A, Student was not a child with a disability under the IDEA because his clinical diagnoses of ADHD, etc. did not adversely impact his ability to access the curriculum. The evidence in the record supported DCPS' position that there were insufficient objective indicators based on Student's behavior and academic performance to suspect that Student required evaluation to determine his need for special education services.

School A did not have any behavior problems with Student in his academic classroom. Student called Petitioner almost daily to report his school related concerns to her and therein lie the source of Petitioner's concerns about Student's reported behavior problems that were not substantiated by school staff. Student did have problems completing homework, but that could have been due to academic overload or other community based factors that Student alluded to in his testimony. Student had behavior problems in the community that were being addressed through pharmacological intervention and community based support services; however, these behavior problems did not carry over into school environment. Based on the reports of Student, Petitioner, upon the recommendation of the community mental health specialist, requested that Student to be evaluated for special education services.

DCPS must conduct a full and individual initial evaluation upon the request of a parent to determine if the child is a child with a disability. 34 C.F.R. 300.301. This initial evaluation must be conducted by DCPS within 120 days from the date that the student was referred for an evaluation or assessment. 34 C.F.R. 300.301(c), D.C. Code 38-2561.02(a). The referral must be made in writing and submitted by the parent to the building principal of his or her home school if the child attends a D.C. public school. 5 D.C.M.R. E-3004.1(a)-(c). Petitioner's informed consent must be obtained in writing prior to DCPS conducting the initial evaluation. 34 C.F.R. 300.300.

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Petitioner's written request to the special education coordinator at School A on October 31, 2013 did not trigger either Child Find or the statutory 120-day timeline for DCPS to evaluate Student for special education services. Petitioner's written request was not addressed to the principal of Student's school and there was no confirmation in the record that the facsimile number attached to the letter was the correct facsimile number for the principal's office or the school. There was no evidence in the record that Petitioner's October 31, 2013 written request was received by School A.

The December 19, 2013 letter from Petitioner to the special education coordinator at School A triggered both Child Find and the 120-day timeline for DCPS to evaluate Student for special education services. Although this letter also was addressed to the special education coordinator at School A, the school acknowledged receipt of the letter and Petitioner's request for evaluation. The December 19, 2013 written request to evaluate Student was constructively received by the principal of School A on or about December 19, 2013.³³

The December 19, 2013 letter was the first objective indicator to the school that Student was a child with a suspected disability who might be in need of special education to access the curriculum. At that point in time, DCPS was required to comply with the initial evaluation procedures outlined in the IDEA.

Receipt of a referral for an initial evaluation triggers certain procedural safeguards or requirements for DCPS to follow. Among them is the requirement that DCPS provide Petitioner with notice about the identification and evaluation process, the right of Petitioner to receive notice of the school's refusal of a request for pre-placement evaluation, the requirement that DCPS take steps to obtain informed written consent from Petitioner in order to begin the initial evaluation process, and the requirement that DCPS review existing evaluation data that includes input from Petitioner and classroom-based observations. 34 C.F.R. 300.300, 300.305, 300.503.

Following receipt of Petitioner's request for evaluation that was sent to DCPS on December 19, 2013, DCPS convened a meeting on January 23, 2014 to address Petitioner's concerns. At the Multidisciplinary Team meeting on January 23, 2014, DCPS declined to conduct the requested evaluations, based on Student's academic performance and Student's lack of behavior problems that interfered with learning.

A due process complaint was filed on January 31, 2014. A resolution meeting took place on February 25, 2014, at which time DCPS agreed to conduct the requested comprehensive psychological evaluation and Functional Behavioral Assessment. Petitioner declined DCPS' offer to evaluate Student. 68 days of the 120-day statutory timeline had elapsed by the time of the resolution meeting. DCPS could not proceed with the evaluations until Petitioner participated in the initial evaluation process. The Hearing Officer determines that the 120-day statutory timeline was tolled on February 25, 2014 when DCPS offered to conduct the evaluations and Petitioner declined to participate in the evaluation process. As of February 28, 2014, Petitioner still had not accepted DCPS' offer to evaluate Student.

³³ School A's written acknowledgement of receipt of Petitioner's December 19, 2013 letter was undated.

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The 120-day timeline to evaluate Student had not expired by the time Petitioner filed the complaint on January 31, 2014 or by the time DCPS agreed to conduct the evaluations on February 25, 2014. Petitioner's complaint was premature. As of February 25, 2014, when Petitioner brought the initial evaluation process to a halt by not accepting DCPS' offer to evaluate Student, DCPS still had another 52 days to complete the initial evaluation process and determine eligibility.

ORDER

Petitioner failed to meet her burden of proof on the issue presented.

The complaint is **DISMISSED** with prejudice.

All requested relief is denied.

IT IS SO ORDERED.

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).

Date: April 5, 2014

/s/ Virginia A. Dietrich

Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Jocelyn Franklin, Esq. (electronically)

Respondent's Attorney: Tanya Chor, Esq. (electronically)

OSSE-SPED (electronically)

SHO (electronically)