

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
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OSSE
Student Hearing Office
December 16, 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>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: November 25, 2013</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.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on November 25, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ with her parent and attends a DCPS elementary school (“School A”). The student was in third grade at School A during school year (“SY”) 2012-2013 and displayed academic and behavioral difficulties. As a result, on March 4, 2013, Petitioner, through counsel, provided DCPS a written request for the student to be evaluated for special education services.

DCPS convened a meeting to discuss the parent concerns and the need for evaluations. The student’s parent participated in the meeting as did the School A psychologist.

Under the impression DCPS took no further action to evaluate the student following the April 17, 2013, meeting, Petitioner filed an initial complaint on July 26, 2013, and alleged that evaluations were not begun or completed and should have been completed within 120 days of the March 4, 2013, request. Petitioner withdrew the complaint when DCPS represented it had conducted evaluation(s) and the student was determined ineligible.

On October 1, 2013, Petitioner filed the current complaint asserting: (1) DCPS failed to timely provide the parent the student’s educational records (informal assessment(s) in reading and math; (2) failed to evaluate in all areas of suspected disability: social/emotional elements for Attention Deficit Hyperactivity Disorder (“ADHD”) and/or Oppositional Defiance Disorder (“ODD”); and (3) failed to notify the parent that evaluation(s) were completed and failed to conduct an eligibility meeting with the parent present.

Petitioner seeks as relief: an order directing DCPS to fund an independent psychological evaluation and convene and eligibility meeting with the parent present to determine the student’s eligibility or ineligibility and if the student is determined eligible develop an individualized educational program (“IEP”) and fund compensatory education.

DCPS filed a response to the complaint on October 28, 2013. DCPS denied any alleged denial of a FAPE. DCPS counsel stated that the student was evaluated in all areas that could be assessed and the parent was not responsive to the evaluator’s requests for interviews. The timeline for the student to be evaluated and eligibility determined was expiring and DCPS therefore proceeded with the process absent the parent.

A resolution meeting was held October 15, 2013. The parties did not resolve the issues and expressed no desire to proceed directly to hearing. The 45-day period began on November 1, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) on December 15, 2013.

A pre-hearing conference was held on October 28, 2013, and a pre-hearing conference order was issued November 8, 2013, outlining, inter alia, the issues to be adjudicated.

ISSUES: ²

The issues adjudicated are:

- (1) Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to evaluate in all areas of suspected disability: social/emotional elements for ADHD and/or ODD as a part of the DCPS psychological evaluation.
- (2) Whether DCPS denied the student a FAPE by failing to notify the parent that evaluation(s) were completed and failing to conduct an eligibility meeting with the parent present.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 31 and Respondent's Exhibits 1 through 12) that were admitted into the record and are listed in Appendix A

FINDINGS OF FACT: ³

1. The student is _____ in the District of Columbia with her parent and attends School A. The student was in third grade at School A during school SY 2012-2013. (Parent's testimony)
2. The student is has attended School A since kindergarten and the parent began to have concerns about the student around first grade. She seemed not to be on grade level in math and wasn't getting simple addition and subtraction and could do the work but did not seem to retain information. (Parent's testimony)

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) in the pre-hearing conference order at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner withdrew at the start of the hearing the issue related to student records.

³ 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 more than one party separately the Hearing Officer may only cite one party's exhibit.

3. During SY 2013-2014 the student continued to display academic and behavioral difficulties. As a result, on March 4, 2013, Petitioner through counsel provided DCPS a written request for the student to be evaluated for special education services. (Petitioner's Exhibit 7)
4. On April 17, 2013, DCPS convened a meeting to discuss the parent's concerns and the need for evaluations. The student's parent participated in the meeting as did the School A psychologist. (Petitioner's Exhibits 8, 10)
5. During the April 17, 2013, meeting the parent expressed concerns about the student's classroom behaviors and that the student might have ADHD or other psychological disorders. The DCPS members at the meeting expressed to the parent that they did not need to assess for ADHD as they had not seen that behavior in the classroom. The parent was told the student would likely not be found eligible because she was not operating two grades levels below her current grade. However, there was no written communication to the parent of a final decision not to evaluate. (Parent's testimony)
6. In response to the parent's concerns about the student's behaviors expressed during the April 17, 2013, meeting the School A psychologist described to the parent symptoms associated with ADHD and based on the parent's responses the psychologist concluded there was no need to assess the student for ADHD. In addition, because the student was not operating academically two or more grade levels below her assigned grade, the DCPS members at the meeting concluded there was no need for further evaluation of the student. The student was operating approximately one grade level below and her absenteeism and tardiness seemed a logical reason for her being behind academically. (Witness 2's testimony)
7. Because DCPS' decision that the student did not warrant evaluation(s) for special education was not timely entered into the DCPS special education database, in June 2013, prior to the end of SY 2012-2013, the School A psychologist proceeded with a formal evaluation of the student including assessments and a classroom observation. The psychologist attempted to reach the parent by telephone to gain information about the student but was unable to do so. Consequently, the evaluation report did not include any information from the parent other than what the parent shared at the April 2013 meeting. Because the parent did not indicate that the student displayed symptoms of ADHD at the April 2013 meeting the evaluator did not conduct any assessment of the student for ADHD. The psychologist eventually talked with the parent by telephone after she had completed the evaluation report. (Witness 2's testimony)
8. The School A psychologist's evaluation included the following assessments: Reynolds Intellectual Assessment Scales (RIAS), Woodcock-Johnson III (WJ-III), Staff Interview, Parent interview student interview, student observations, record Review – DCPS cum Record (2009-2013) MDT meeting Notes (4/2013). The evaluation indicated the student had average intellectual abilities and academic abilities that in the low average range for reading, math and written expression. (Witness 2's testimony, Petitioner's Exhibit 24-1, 24-4, 24-5, 24-6)

9. As a part of the evaluation the School A psychologist conducted a classroom observation of the student. The psychologist reported that during the observation the student was initially engaged in the assignment and then began to talk and play with classmates and had to be redirected a couple of times. She became agitated and talked back to the teacher under her breath as she was being corrected. She then pouted a few minutes and did not make further attempts to continue her work. (Petitioner's Exhibit 24-3)
10. The student's parent, under the impression DCPS took no further action to evaluate the student following the April 17, 2013, meeting, filed a due process complaint on July 26, 2013, and alleged that evaluation(s) were not begun or completed and should have been completed within 120 days of the March 4, 2013, request. Petitioner withdrew the complaint when DCPS represented it had conducted evaluation(s) and the student was determined ineligible. On October 1, 2013, Petitioner filed the current complaint challenging the evaluation DCPS conducted and the alleged ineligibility determination. (Petitioner's Exhibits 15)
11. On May 29, 2013, DCPS generated a report that seemed to indicate that an eligibility meeting had been held in which the student's parent and the School A psychologist participated and the student was found ineligible. However, neither of them participated in an eligibility meeting and no eligibility meeting was ever held. (Parent's testimony, Witness 2's testimony, Petitioner's Exhibit 21)
12. In the current year (SY 2013-2014) the student is not doing well academically or behaviorally. She was suspended for two days for making a verbal threat. Her desk has been moved in the classroom a couple times to see if it will make a difference in her behavior. The student's parent has been to School A a couple of times and seen the student's tests scores. The student he is struggling in reading and math and her current teacher has indicated to the parent that the student has behavior problems and is inattentive and is not completing work. (Parent's testimony)

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.⁴ *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 1: Whether DCPS denied the student a FAPE by failing to evaluate in all areas of suspected disability: social/emotional elements for ADHD and/or ODD as a part of the DCPS psychological evaluation.

Conclusion: Petitioner sustained the burden or proof by preponderance that the student was not assessed in all areas of suspected disability and thus the student was denied a FAPE.

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an “LEA *shall ensure* that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, *hearing, social and emotional status...and motor abilities.*” (emphasis added).

The evidence⁵ supports a finding that DCPS failed to fully evaluate the student in all areas of suspected disability. The parent expressed concerns of the student’s inattention and whether the student might have ADHD. On the other hand DCPS concluded based on the parent’s responses to questions at the April 17, 2013, meeting that the student should not be assessed for ADHD and in fact concluded there was not need to evaluate the student at all.

However, due to an oversight in timely communicating that decision to the parent and recording it in the database DCPS moved forward with evaluations of the student but did so without the parent’s input. DCPS was on notice the request for evaluation had been made by the parent through counsel, but DCPS made insufficient attempts to reach the parent even through counsel for her to provide formal input and data for the evaluation that was conducted.

⁴ 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.

⁵ Finding of Fact (“FOF”) #s 5, 7

The evidence⁶ indicates the student displayed and is displaying inattention and behavioral difficulties and the failure to formally assess the student for an expressed concern was a failure to fully evaluate. The failure to include the parent's input and failure to officially assess for the parent's expressed concern that the student might have ADHD was a failure to ensure that the student was assessed in all areas of suspected disability and was a denial of FAPE.

Petitioner presented credible evidence⁷ that she made a written request on March 4, 2013 to DCPS for the student to be evaluated for special education services. Respondent thereafter had 120 days to complete an evaluation and determine the student's eligibility pursuant to D.C. Code §38-2561.02(a). DCPS failed to do so and this failure was a denial of a FAPE to the student.

Although there is evidence the parent met with the School A psychologist conducted an evaluation, the evaluation was conducted apparently to simply meet a deadline and the evaluation was completed without the benefit of full input from the parent and did not address the parent's concerns about ADHD and did not assess for that condition.

The failure to do so was a denial of a FAPE to the student and as a result the Hearing Officer directs in the order below that DCPS fund an independent comprehensive psychological evaluation.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to notify the parent that evaluation(s) were completed and failing to conduct an eligibility meeting with the parent present.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to convene an eligibility meeting with the parent present and failed to provide the parent a copy of the evaluation prior to the parent filing an due process complaint. DCPS failure to do so was a denial of a FAPE to the student and impeded the parent right to participate in the process.

The parent made a written request of DCPS that the student be evaluated for eligibility for special education services on March 4, 2013, and that the student should have been evaluated for special education services and an eligibility determination made by June 4, 2013.

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

⁶ FOF #s 5, 9, 12

⁷ FOF # 3

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).

34 C.F.R. § 300.306 provides:

- (a) Upon completion of the administration of assessments and other evaluation measures-
 - (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and
 - (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

The parent made a written request of DCPS that the student be evaluated for eligibility for special education services on March 4, 2013, and that the student should have been evaluated for special education services and an eligibility determination made by June 4, 2013.

The evidence⁸ supports a finding that DCPS failed to convene an eligibility meeting at which the parent was present and the student's evaluation data was reviewed and her eligibility or ineligibility for special education determined. This was a denial of FAPE to the student and significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of a FAPE.

Consequently, the Hearing Officer directs in the Order below that DCPS convene an eligibility meeting to review the independent evaluation and other relevant data and determine the student's eligibility or ineligibility for special education services.

ORDER:⁹

1. DCPS shall promptly and in no case later than thirty (30) calendar days of the issuance of this Order, fund an independent comprehensive psychological evaluation (to include cognitive, academic and social/emotional components) at the DCPS/OSSE approved rate.
2. DCPS shall within fifteen (15) calendar days of its receipt of the independent psychological evaluation report convene an eligibility meeting to review that evaluation and other relevant data and discuss and determine the student's eligibility or non-eligibility for special education.¹⁰

⁸ FOF # 11

⁹ 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.

¹⁰ The parties by mutual assent may delay the eligibility meeting.

3. If the student is found eligible for special education DCPS shall, within ten (10) school days of the eligibility meeting 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: December 15, 2013