

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
June 12, 2014

Confidential

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| <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: May 29, 2014</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 May 29, 2014, 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 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ at a DCPS elementary school (“School A”). The student is not currently eligible for special education. During school year (“SY”) 2012-2013 and SY 2013-2014 the student allegedly had low academic performance and behavioral problems resulting in suspensions. School A convened a meeting with the student’s parents in October 2013 and in November 2013 to address the student’s behaviors and offered to provide the student in-school counseling. The student’s parents declined.

In December 2013 School A initiated a student support team (“SST”) to address the student’s behavioral and academic concerns. Another SST meeting was held in February 2014, at which the student’s continued behavioral difficulties were noted. However, DCPS took no action to obtain consent to evaluate the student for special education eligibility prior to the parent filing a due process complaint on March 28, 2014, alleging DCPS had failed to identify the student under its “Child Find” obligations. Petitioner asserts in the complaint that DCPS should have been put on notice to evaluate the student as of mid October 2013 based on the student’s behaviors and poor academic performance.

Petitioner seeks as relief an order directing DCPS to provide the following independent evaluations: bilingual comprehensive psychological, social history, functional behavioral assessment (“FBA”), speech and language evaluation and any other assessments reasonably recommended by these evaluations and that DCPS convene an eligibility meeting and if the student is eligible develop an individualized educational program (“IEP”), determine any compensatory education that may be due and determine placement.

DCPS filed a response to the complaint on April 1, 2014. DCPS denied any alleged denial of a free and appropriate public education (“FAPE”) and specifically asserted DCPS had been in communication with the student’s parents regarding strategies and interventions through the SST process and the parents did not disagree with that process. The meetings in October and November 2013 were regarding incidents of suicidal ideations by the student as well as inappropriate language use to peers. A mobile crisis intervention agency (Children & Adolescent Mobile Psychiatric Service) “CHAMPS” was called a number of times to provide the student crisis intervention but there has been no request nor any information leading to a special education referral or need for referral.

A resolution meeting was held April 22, 2013. The parties did not resolve the complaint. The parent, nonetheless, provided DCPS written consent to conduct evaluations and the parties tentatively set a meeting date of June 10, 2014, for the evaluations to be reviewed and eligibility to be determined. The evaluations had not been completed by the time of the hearing.

Following the resolution meeting the parties expressed no mutual desire to proceed directly to hearing. The 45-day period began April 28, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) June 11, 2014. A pre-hearing conference was held May 1, 2013. A pre-hearing order was issued outlining, inter alia, the issue to be adjudicated.

ISSUE: ²

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to identify, locate, evaluate or convene a meeting with the parent to determine the student's eligibility for special education as required by the "Child Find" provisions of IDEA.

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 13 and Respondent's Exhibits 1 through 22)³ that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁴

1. School A is the only school the student has ever attended. During SY 2012-2013 when the student was in third grade he had behavior problems and did not listen to teachers. The teachers would call the student's mother twice per month with complaints about the

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 summarized the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated although they have been stated here differently than in the pre-hearing order.

³ The following DCPS documents were admitted into the record: (R 1, R 2, R 5, R 6, R 8, R 13, R 17, R 20, R 22). The remainder of Respondent's 22 documents disclosed were not admitted.

⁴ The evidence that is the source of the Finding of Fact ("FOF") 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.

student's behaviors. The student had an out of school suspension toward the end of SY 2012-2013 for problems he had with his teachers. (Father's testimony)

2. After the start of SY 2013-2014 the student continued to have behavior problems and School A staff continued to telephone the student's mother about his behavior. In October 2013 School A called the student's parents in for a meeting regarding the student's behaviors. The school staff told the parent's that the student had problems and offered him in-school counseling. The student's parents declined the offer of counseling intervention, as they did not consider the student's problems severe enough for such intervention and because of the cultural stigma the parent believed was associated with the student receiving such services. (Father's testimony)
3. The School A staff then encouraged the parents to seek outside services to address the student's emotional and behavioral concerns. However, the student's parents were not in the economic position to do so. The school staff asked the parents to address the student's behaviors by instructing him to behave. At these meetings no School A staff offered to conduct evaluations to determine if the student had a disability that qualified him for special education or sought the parents' written consent to conduct evaluations. (Father's testimony)
4. In November 2013 the School A convened a second meeting with the student's parent regarding his behaviors due to the student's suspension from school. The School A staff reiterated to the student's parents that they needed to speak to the student and instruct him regarding his behaviors. The student's parents thereafter considered moving the student to another school but did not. At that meeting no School A staff offered to conduct testing or requested written consent from the parents. (Father's testimony)
5. On November 15, 2013, February, 4, 2014, March 26, 2014, the School A psychologist had the student sign a safety agreement in which the student promised he would not do harm to himself and would talk to adult who would help him feel safe or call emergency contact numbers list on the form. (Petitioner's Exhibits 2, 3, 4)
6. The School A special education coordinator first participated in a meeting regarding the student on December 4, 2013. The student's parents attended the meeting along with other School A staff to address the student's behaviors of making racial comments. The student's parent stated that the student was stressed with school pressures that were causing his behaviors. The student was suspended for two days and the student's parent's suggested that they might move the student to another school. (Witness 1's testimony, Respondent's Exhibit 8).
7. On December 19, 2013, a student support team meeting was held at which the student's low academics (kindergarten level in math and 1st to 2nd grade level in reading and no progress in either subject), his tendency towards violent, disruptive behavior and poor focus was noted. The document also noted that the for the past few months strategies had been attempted with little to no improvement in the problem areas noted. (Petitioner's Exhibit 5)

8. The student has had some behavior difficulty at least once per month during the current school year and was last suspended in January or February 2014. The student tells his parents that the school staff is not patient with him. He feels frustrated and utters a bad word and is disciplined by being removed from class. (Father’s testimony)
9. The student gets frustrated and angry when he does not understand or cannot do the class work. He asks for help and believes that the teachers are not patient with him and do not provide him sufficient assistance. When he gets angry he has told the teachers that he is going to kill himself. In those instances the school staff have had the student sign a safety agreement and have asked the student’s parent to come to the school to help ensure his safety and that he does not harm himself. (Mother’s testimony)
10. The student’s mother communicated with the social worker in the School A after school program following a meeting she had with the student’s teachers toward the end of December 2013 and the mother agreed to allow the afterschool counselor to work with the student and filled out the necessary documents. The counselor began working with the student in mid January or February 2014 and works with the student two days per week. (Mother’s testimony, Petitioner's Exhibit 12)
11. School A convened another SST meeting on February 12, 2014. The meeting included the school psychologist, the special education teacher and bilingual counselor, the classroom teacher, and the school social worker. The forms indicate that the SST interventions were just beginning. (Petitioner’s Exhibit 11)
12. According to the student’s report card for SY 2013-2014 the student had the following grades:

| Subject | Term 1 Grade | Term 2 Grade | Term 3 Grade |
|-----------------------------|--------------|--------------|--------------|
| Reading | 1 | 2 | 2 |
| Written Language | 2 | 2 | 2 |
| Speaking & Listening | 1 | 1 | 1 |
| Math | 1 | 1 | 1 |
| Social Studies | 1 | 2 | |
| Science | 2 | 2 | 2 |
| Music | 2 | 3 | 3 |
| Art | 3 | 3 | 3 |
| Health & Physical Education | 3 | 4 | 4 |
| World Languages | 2 | 2 | 2 |

1= “Is performing significantly below grade level BELOW BASIC Student does not show basic working knowledge of skill/concepts, seldom produces work of satisfactory quality.” Emphasis added.

According to the same report card, the student demonstrated the following work habits, personal and social skills:

| Area | Term 1 Comment | Term 2 Comment |
|---------------------------------------|-------------------|-------------------|
| Follows directions | FP | R |
| Completes class work on time | FP | R |
| Works well with others | FP | R |
| Uses time wisely | FP | FP |
| Completes and returns homework | I | LP |
| Participates in class discussion | LP | FP |
| Makes an effort | R | FP |
| Follows classroom rules | FP | R |
| Follows playground rules/school rules | LP | FP |
| Respect the rights/property of others | FP | R |
| Listens while others speak. | FP | FP |
| Practices self-control | R | R |

FP = With frequent prompts; I = Independently; LP = With limited prompting; and R = Rarely. (Petitioner’s Exhibit 6)

13. The student was suspended from school on November 12, November 18, December 5, December 6, December 16, 17, and March 7, 2014. (Petitioner’s Exhibit 7)
14. On March 26, 2014, the student was dismissed from the School A afterschool program because of his behaviors. (Petitioner’s Exhibit 8)

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 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.⁵ *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, locate, evaluate or convene a meeting with the parent to determine the student's eligibility for special education as required by the "Child Find" provisions of IDEA.

Conclusion: The Hearing Officer concludes that as of December 19, 2014, DCPS was on notice based upon the student's repeated behavioral difficulties, suspensions, incidents of suicidal ideations and poor academic performance that the student was perhaps a child with disability in need of special education and DCPS should have sought parental consent and initiated evaluations of the student by that date.

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 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").

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).

Because an evaluation and eligibility determination is a prerequisite to preparing an IEP, ordinarily DCPS' failure to evaluate the student and determine his eligibility strictly within the deadline would be considered a denial of a FAPE. See G.G. ex rel. *Gersten v. District of*

⁵ 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.

Columbia, 924 F.Supp.2d 273, 280 (D.D.C. Feb. 20, 2013) and cases cited therein; *Latynski-Rossiter v. District of Columbia*, 928 F.Supp.2d 57, 60 (D.D.C.2013) (An IDEA violation occurs at the moment that the District fails to provide an appropriate placement for the child.)

Petitioner asserts DCPS was put on notice that the student is perhaps a child with a disability due to his behavioral difficulties and the repeated telephone calls to his parent about his behaviors by the time of the school's meetings with the parents in October 2013 and November 2013. The Hearing Officer did not conclude that this was the case. At the point of these meetings DCPS offered to provide the student counseling as a strategy to address the student's emotional and behavioral concerns. The parents rejected the offer for this type of intervention.⁶ However, DCPS had already been attempting other forms of intervention.⁷ The Hearing Officer concludes that DCPS' efforts to attempt interventions prior to considering or initiating evaluation for special education was reasonable. Thus, the Hearing Officer does not conclude that by the dates of the October and November 2013 meetings a "Child Find" violation had been triggered.

Nonetheless, the evidence demonstrates that as of the December 19, 2014, SST meeting that strategies had been attempted to address both the student's academic difficulties and behavior concerns for months and that the strategies were unsuccessful.⁸ The evidence demonstrates that in February 2014 School A apparently was beginning the SST process anew despite the data that was already available as of the December 19, 2014, meeting that interventions that had been attempted were unsuccessful.⁹ School A's special education coordinator first attended a meeting for this student on December 4, 2014, yet School A made no attempt to obtain consent to conduct evaluations to determine the student's eligibility until the complaint was filed and a resolution meeting held.¹⁰

The Hearing Officer concludes that it was sufficiently apparent to DCPS as of December 19, 2013, that the strategies that were attempted were not working and the student's behavior and academic difficulties were continuing unabated. The weight of the evidence supports a conclusion that the student had emotional and behavior difficulties as well as academic struggles that warranted evaluation to determine whether he had a disability and was in need of special education as of December 19, 2013. Petitioner met the burden of proof by a preponderance of the evidence that DCPS was on notice by that date pursuant to its "Child Find" obligations to seek parental consent and initiate evaluations to determine the student's eligibility or ineligibility.

Had DCPS initiated the evaluation and eligibility process by December 19, 2014, an eligibility determination should have been made within 120 days thereafter. Albeit that date would have been after the complaint was filed, as of the date of the due process hearing the evaluations had still not been completed. Nonetheless, based upon the facts of this case and evidence of the student's repeated behavioral difficulties, suspensions, incidents of suicidal ideations¹¹

⁶ FOF #2

⁷ FOF #7

⁸ FOF #7, 12

⁹ FOF # 11

¹⁰ FOF #s 4, 6

¹¹ FOF #s 5, 9

and poor academic performance the Hearing Officer concludes that DCPS' failure to initiate evaluations as of December 19, 2013, was a violation that resulted in substantive harm to the student.

Although Petitioner has requested as relief independent evaluations, representations were made that DCPS has at least initiated evaluations and the parties had tentatively agreed to a June 10, 2014, eligibility meeting date. Thus, the Hearing Officer will not grant the requested relief of independent evaluation, rather will direct that DCPS complete the evaluation and eligibility process within a time certain.

ORDER:¹²

DCPS shall, within thirty (30) calendar days of the issuance of this order, conduct the following evaluations of the student: bilingual comprehensive psychological, social history, FBA and speech and language, and convene an eligibility meeting to determine the student's eligibility based on a team's review of the evaluations and if the student is determined eligible develop an IEP, determine any services the student may be due for the un-timeliness of his eligibility determination and determine an appropriate school placement.

All other requested relief is denied.

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: June 11, 2014

¹² 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.