

**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
March 28, 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 13, 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 obligation to identify, locate, and evaluate Student to determine his need for special education, since the beginning of the 2012/13 school year, based on Student’s problem behaviors in school. Petitioner also alleged that DCPS had failed to take any steps to evaluate Student for special education services following a written request by Petitioner in September 2013.

DCPS argued there were insufficient indicators for DCPS to suspect that Student might be in need of special education services; that the reason for Student’s poor grades was Student’s poor judgment in not going to class; and that DCPS had no knowledge of a written referral for an evaluation for special education services until the middle of January 2014.

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.

¹ Personal identification information is provided in Appendix A.

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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 01/13/14. This Hearing Officer was assigned to the case on 01/14/14. DCPS timely filed a response to the complaint on 01/16/14 and made no challenges to jurisdiction.

Petitioner waived the resolution meeting, but DCPS did not. A resolution meeting took place on 02/11/14, at which time parties did not agree to end the 30-day resolution period. The 30-day resolution period ended on 02/12/14, the 45-day timeline to issue a final decision began on 02/13/14 and the final decision was due by 03/29/14.

A prehearing conference took place on 01/28/14. A Prehearing Order was issued on 01/31/14. An Amended Prehearing Order was issued on 02/04/14 that addressed Respondent’s Objections and Exceptions to the Prehearing Order that was filed by DCPS on 02/04/14.

On 03/03/14, Petitioner filed Petitioner’s Objections to the Respondent’s Disclosures. On 03/04/14, DCPS filed DCPS’ Objections to Petitioner’s Disclosure February 27, 2014. Both party’s objections were addressed at the due process hearing.

The due process hearing was a closed hearing that took place on 03/06/14. Petitioner was represented by Domiento C.R. Hill, 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 until Petitioner’s case in chief was concluded. Petitioner was then excused due to health reasons.

Petitioner’s Disclosure Statement, dated 02/27/13,² consisted of a witness list of three (3) witnesses and documents P-1 through P-25. P-1, P-2, P-3, P-5, P-6, P-12, P-13, P-14, P-15, P-16, P-18, P-24 and P-25 were admitted into evidence over the objection of DCPS; the objections having been noted in DCPS’ Objections to Petitioner’s Disclosure February 27, 2014. P-4 was withdrawn by Petitioner. The remainder of Petitioner’s disclosures were admitted into evidence without objection.³

DCPS’ Disclosure Statement, dated 02/27/14, consisted of a witness list of six (6) witnesses and documents R-1 through R-6. DCPS presented the testimony of one witness from its disclosure witness list; a witness that Petitioner had not objected to in her written objections. DCPS only offered document R-3 into evidence after it was identified and authenticated during the testimony of DCPS’ witness. R-3 was admitted into evidence over the objection of Petitioner. The remainder of DCPS’ disclosures were not admitted into evidence.

² 02/27/13 was a typographical error; the disclosures should have been dated as 02/27/14. Petitioner’s disclosures referenced the correct case number.

³ Per the Amended Prehearing Order issued on 02/04/14, failure to note objections to the opposing party’s disclosures would result in the disclosures being admitted without objection.

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Petitioner presented the following two witnesses in her case in chief: (1) Petitioner; and (2) Student's aunt ("Aunt").

DCPS presented one witness: (1) Special education coordinator ("SEC") at School B from 08/01/13 – 01/30/14.

The two issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether DCPS/School B denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate Student to determine Student's need for special education since the beginning of the 2012/13 school year, as evidenced by Student's numerous suspensions, off-task behaviors and failing grades.

Issue #2 – Whether DCPS/School B denied Student a FAPE by failing to conduct an initial evaluation to determine Student's eligibility for special education services within 120 days of Petitioner's written request on 09/11/13.

The relief requested by Petitioner is as follows:⁴

- (1) A finding of a denial of a FAPE;
- (2) DCPS to fund independent assessments consisting of: a comprehensive psychological assessment, Functional Behavioral Assessment, and any other assessments recommended by those assessments; and
- (3) Within five (5) school days of receipt of the last of the assessments, DCPS to convene Student's Multidisciplinary Team ("MDT") at Student's current school to determine Student's eligibility for special education and related services, and if eligible, DCPS to develop an appropriate Individualized Education Program ("IEP").

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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:

#2. While Student attended 9th grade at School A during the 2011/12 school year, he received passing grades despite behavior problems.⁶ Student's grades ranged from "A-" to "D",

⁴ Per the Amended Prehearing Order issued on 02/04/14, Petitioner was permitted to reserve her claim for compensatory education.

⁵ Petitioner.

⁶ Petitioner, Aunt, P-19-1, P-24-1.

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with an even amount of “B” and “C” grades. Petitioner transferred Student to School B for the 2012/13 school year due to the negative impact of Student’s high incidence of behavioral incidents at School A.⁷

#3. During the next 2012/13 school year while Student was in the 10th grade at School B, Student received a lot of in school detentions and multiple suspensions.⁸ Student’s problem behaviors consisted of being disruptive in class, arguing with teachers, and not completing his class work.⁹ Petitioner and Student’s aunt were repeatedly contacted by School B about Student’s behaviors.¹⁰ By the end of the 2012/13 school year, Student had failed 2 classes, but had passed all other classes with grades of “C-” and “C”, except for one grade of “B-” in Algebra Concepts.¹¹

#4. While still at School B during the first half of the subsequent 2013/14 school year, Student was suspended three times.¹² Petitioner and Student’s aunt received many telephone calls from the school about Student’s problem behaviors.¹³ Student’s grades at the end of the first semester of the 2013/14 school year consisted of an “F” in all subjects except for a “C” in History.¹⁴ Student’s failing grades were not due to excessive absences.¹⁵

#5. With respect to educational matters, Student’s aunt frequently operated in loco parentis for Petitioner who was substantially visually impaired and occasionally in the hospital. In her role as surrogate parent for educational purposes, Student’s aunt participated in educational meetings, communicated with the school, made requests and answered emails, all on behalf of Petitioner. Both Petitioner and the school were very comfortable and accepting of Student’s aunt as the educational co-decision maker for Student.¹⁶

#6. On 09/11/13, on behalf of Petitioner, Student’s aunt sent an email to the Principal and to the Dean of Students of School B requesting that Student be evaluated for IEP services.¹⁷ Petitioner and Student requested the evaluation because of Student’s problem behaviors in school that had persisted over time.¹⁸ In the latter part of September 2013, Student’s aunt was informed by the Dean of Students of School B that Petitioner’s request for evaluation would be sent to the special education coordinator (“SEC”) at School B, implying that the SEC was the appropriate person to handle the request.¹⁹

⁷ Petitioner, Aunt.

⁸ Petitioner, Aunt, P-7-2.

⁹ P-12, Petitioner, Aunt.

¹⁰ Petitioner, Aunt, P-7-2.

¹¹ P-19-1, P-23-2.

¹² Aunt, P-8, P-9, P-10.

¹³ Petitioner, Aunt.

¹⁴ P-21-1.

¹⁵ P-22-1.

¹⁶ Petitioner, Aunt, SEC.

¹⁷ Aunt, P-7.

¹⁸ Petitioner, Aunt.

¹⁹ Aunt.

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#7. In the latter part of September 2013, Student's aunt participated in a telephone conference with the SEC at School B about Student's chronic behavior problems.²⁰ At that time, the SEC was aware of Petitioner's desire to have Student evaluated for special education services although the SEC wasn't personally aware of a specific written referral or written request for Student to be evaluated.²¹ In September 2013, the SEC elected to delay the formal evaluation process until behavioral interventions were implemented and deemed unsuccessful by the school.²² Although Student's aunt agreed with trying the behavioral intervention plan of Student seeing a social worker for behavioral support services, at no time did Student's aunt or Petitioner retract the request for Student to be evaluated for special education services.²³ By the time that the due process complaint had been filed on 01/09/14, DCPS had not taken any steps to evaluate Student for special education services.²⁴

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:

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.

"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 first issue to be determined is whether DCPS/School B denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate Student to determine Student's need for special education since the beginning of the 2012/13 school year, as evidenced by Student's numerous suspensions, off-task behaviors and failing grades.

²⁰ Aunt, SEC, R-3.

²¹ SEC, R-3.

²² Aunt, SEC, R-3.

²³ Aunt, R-3.

²⁴ Petitioner, Aunt, SEC.

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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).

Child with a disability means a child who is evaluated as having one of the qualifying disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8. 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.

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 during the 2012/13 school year.

During the preceding 2011/12 school year at School A, Student had behavior problems in school, but still he managed to complete the school year with all passing grades. Petitioner transferred Student to School B for the 2012/13 school year due to Student's numerous behavioral incidents at School A that affected his viability as a student there.

During the 2012/13 school year, Student's same behavior problems persisted. As a result, School B contacted Petitioner and Student's aunt frequently. Some of Student's behaviors resulted in suspensions from school. Despite behavior problems of being disruptive in class, arguing with teachers, not completing assignments, and receiving in-school detentions, suspensions and some out of school suspensions, Student still was able to achieve passing grades of "C-" or better in all but two classes, which he failed. The Hearing Officer determines that there were insufficient indicators during the 2012/13 school year for School B to suspect that Student might be a child with a disability who as a result of the disability, was in need of special education services in order to access the curriculum. Student's grades were respectable.

The 2013/14 school year was a different matter. Petitioner met 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 during the 2013/14 school year.

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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On 09/11/13, Petitioner, through Student's aunt, sent a written request to the principal of School B, asking that Student be evaluated for IEP services due to his persistent behavioral problems in school. The testimony of Student's aunt was credible and uncontroverted on those points. The request was made because Petitioner and Student's aunt were tired of being called by School B about Student's problem behaviors that had persisted over time. Petitioner's concerns were not only expressed in the 09/11/13 written request for evaluation, they were expressed by Student's aunt to the SEC at School B in a telephone conversation that occurred in the latter part of September 2013. The Hearing Officer determines that DCPS' affirmative Child Find duty to identify, locate and evaluate Student was triggered by Petitioner's 09/11/13 written request to evaluate for IEP services that was properly sent to the Principal of School B.

The SEC was not credible that she had no idea that Petitioner had requested evaluation for special education services because her notes taken that day reflected that special education was discussed and that consent to evaluate had not been obtained from Petitioner. The Hearing Officer believed that Student's aunt did agree that behavioral support services were to be put into place, but that neither Student's aunt nor Petitioner agreed to a delay or a suspension in the evaluation process.

Student was denied a FAPE in that Student's right to a FAPE was impeded by DCPS' failure to evaluate him. Student had been identified as a child who might be in need of special education services as early as 09/11/13. Student was denied a FAPE in that Petitioner's opportunity to participate in the decision-making process with respect to the provision of a FAPE to Student was significantly impeded. Six months after Student had been identified pursuant to Child Find, not one step towards evaluating Student had been taken by DCPS. Petitioner still didn't know whether or not her child was a child with a disability who required special education services to access the curriculum. By the end of the first semester of the 2013/14 school year, Student had failed all of his courses except one. He had been suspended from school three times.

The second issue to be determined is whether DCPS/School B denied Student a FAPE by failing to conduct an initial evaluation to determine Student's eligibility for special education services within 120 days of Petitioner's written request on 09/11/13.

In furtherance of its Child Find obligations under 34 C.F.R. 300.111, 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. D.C. Code 5 E-3004.1(a), E-3004.1(b).

Petitioner met her burden of proof by a preponderance of the evidence that DCPS failed to evaluate Student within 120 days of Petitioner's written request that Student be evaluated for special education services.

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The testimony of Student's aunt was credible and uncontroverted: that she made a written request to the principal of School B on 09/11/13 on behalf of Petitioner who was visually impaired; and that subsequently she was informed by the Dean of Students that her request for evaluation would be forwarded to the SEC. The testimony of Student's aunt was substantiated by the notes of the SEC, taken in September 2013, that Petitioner was seeking special education services for Student.

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.

120 days after receiving the written request for evaluation, DCPS had taken no steps to evaluate Student. At that point in time, Student had failed all but one class and had been suspended three times due to his behavior. Six months after the written request for evaluation, DCPS still had not taken any steps to evaluate Student.

In *Scottsdale Unified School District*, 38 IDELR 204 (2003), the school district's failure to comply with the process and timeframes for identifying the student as a child with a suspected disability and making a timely decision concerning whether or not to evaluate the child, seriously infringed the parent's opportunity to participate in the process, because it inordinately delayed it, and resulted in a denial of FAPE.

The Hearing Officer determines that DCPS' failure to comply with its statutory obligation to evaluate Student within 120 days of the initial referral was a procedural violation of the IDEA. The impact of DCPS' failure was that Student's right to a FAPE was impeded and Petitioner's opportunity to participate in the decision-making process was significantly impeded. Student had a statutory right to be evaluated and an eligibility determination made within 120 days of 09/11/13. 34 C.F.R. 300.301, 300.306. Six months later, the evaluation process still had not even begun. Student was denied a FAPE.

DCPS is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 34 C.F.R. 300.304(b)(1). Additionally, DCPS must assess the child in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4). Petitioner is entitled to the relief requested; i.e., an independent comprehensive psychological assessment that includes a clinical component and a Functional Behavioral Assessment, to be completed by an independent provider. DCPS' lag in conducting the appropriate assessments will stop here.

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ORDER

(1) DCPS shall provide funding to Petitioner for the completion of an independent comprehensive psychological assessment that includes an assessment of Student's emotional/social/behavioral development and needs, and funding for an independent Functional Behavioral Assessment, no later than five (5) business days following the date of this Order; and

(2) Within 20 school days of receipt of the last of the independent comprehensive psychological assessment and the independent Functional Behavioral Assessment, DCPS shall convene a multidisciplinary team meeting to review the assessments, determine eligibility, and if Student is determined eligible for special education services, DCPS shall convene an IEP development meeting within 30 calendar days of the eligibility determination to develop an appropriate IEP and determine an appropriate school placement.

(3) All other 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: March 28, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Domiento C.R. Hill, Esq. (electronically)

DCPS' Attorney: Tanya Chor, Esq. (electronically)

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