

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

Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
March 11, 2014

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Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**<sup>1</sup>

Student attends a DCPS elementary school. On December 26, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On January 6, 2014, DCPS filed its Response to the Complaint.

The parties did not participate in a Resolution Meeting for this case. The resolution period for this case ended on January 25, 2014. Hence, the 45-day timeline for this case started on January 26, 2014 and will end on March 11, 2014, which is the HOD due date.

On February 12, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

***Petitioner’s Claims:*** (i) Alleged inappropriate determination of ineligibility (in October 2012 based on a June 20, 2012 independent comprehensive psychological by an LEA charter school). (ii) Alleged failure to comprehensively evaluate and/or re-evaluate in all areas of suspected disability in a timely manner and convene an eligibility determination meeting in a timely manner to review said evaluations under the Child Find provision of IDEA.

***Respondent’s Defenses:*** (i) DCPS asserts that as part of an MDT meeting on October 23, 2012, the MDT team appropriately determined that the student was ineligible for special education and related services. (ii) DCPS asserts that a MDT convened to review the student’s independent assessment and determined that no additional assessments were required to determine the student’s eligibility for special education and related services. (iii) DCPS denies any failure to provide the student a free and appropriate public education.

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<sup>1</sup> This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

**Relief Requested:** (i) DCPS be ordered to: publically or privately fund a comprehensive assessment; alternatively, convene a student evaluation plan (SEP) meeting; (ii) DCPS to convene an MDT meeting within 10 days of receiving the last of the independent assessments and make an appropriate eligibility determination; alternatively, DCPS be ordered to determine the student eligible for special education and related services and to convene a MDT meeting within 10 days to determine his disability and create an IEP; (iii) DCPS to devise and implement an appropriate behavioral intervention plan; (iv) reasonable compensatory education for the violations committed here.

By their respective letters dated February 20, 2014, Petitioner disclosed twenty-four documents (Petitioner's Exhibits 1-24), and DCPS disclosed twelve documents (Respondent's Exhibits 1-12).

The hearing officer convened the due process hearing on February 27, 2014, as scheduled.<sup>2</sup> All disclosed documents were admitted without objection. Thereafter, the hearing officer received opening statements from both parties and testimonial evidence from Petitioner. DCPS declined to present any testimonial evidence, so the hearing officer received closing statements from both parties prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **ISSUE(S)**

1. Did DCPS inappropriately determine Student ineligible for special education and related services in October 2012?
2. Did DCPS fail to comprehensively evaluate and/or reevaluate and convene an eligibility determination meeting in a timely manner under the Child Find provisions of IDEA?

### **FINDINGS OF FACT**<sup>3,4</sup>

1. Student presently attends a DCPS elementary school. Student has attended this DCPS school since SY 2012/13. However, for SY 2011/12, Student attended a charter school.<sup>5</sup>

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<sup>2</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

<sup>3</sup> To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>4</sup> When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

<sup>5</sup> See testimony of Parent; Petitioner's Exhibit 11

2. At the end of SY 2011/12, Student was retained in kindergarten.<sup>6</sup>
3. An independent comprehensive psychological evaluation was provided to Student by the LEA charter school he attended during SY 2011/12. The independent evaluation was administered to Student on June 20, 2012.<sup>7</sup> However, the independent evaluation report is not included in the administrative record for this case.
4. On October 8, 2012, a DCPS school psychologist issued a report reviewing Student's independent comprehensive psychological evaluation. In that report, the DCPS reviewer noted that Student's independent evaluation revealed that his Full Scale IQ is in the average range with average verbal abilities and high average nonverbal abilities, although some academic deficits were noted in the areas of reading, math and spoken language. Moreover, although clinical interviews, observations, and projective and objecting testing during the independent evaluation suggested that Student's behavior concerns were partially due to his family's discord, and no standardized behavior rating scales were administered during the independent evaluation, the independent evaluator concluded that Student displayed characteristics of a student with Attention Deficit Hyperactivity Disorder ("ADHD"). However, based on the results of Connors 3 behavior scales administered by the DCPS reviewer, which indicated that Student did not exhibit 6 or more symptoms of ADHD Inattentive or ADHD Hyperactive-Impulsive on parent ratings, the DCPS reviewer concluded that Student would not be eligible for a disability classification of Other Health Impairment ("OHI") for ADHD. The DCPS reviewer recommended, *inter alia*, the development of a 504 Plan for Student to allow for classroom academic accommodations and social-emotional/behavior support, as well as a functional behavior assessment ("FBA") and positive behavior intervention plan ("BIP") to address attention span and self-regulation.<sup>8</sup>
5. On October 23, 2012, DCPS convened an eligibility meeting for Student and determined that Student did not meet the criteria to be identified as a student with a disability under IDEA.<sup>9</sup>
6. Subsequent to the ineligibility determination, DCPS developed a 504 Plan for Student, which required the teacher to spend more time with Student and which resulted in progress for Student because the extra time was sufficient to help Student meet some of his targets.<sup>10</sup>
7. At the end of SY 2012/13, Student's final report card revealed that he was either Secure or Developing in all areas of knowledge measured on the report card.<sup>11</sup>

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<sup>6</sup> See Respondent's Exhibit 8 at 1.

<sup>7</sup> See Respondent's Exhibit 9; testimony of Parent.

<sup>8</sup> Respondent's Exhibit 9.

<sup>9</sup> Respondent's Exhibits 5-8.

<sup>10</sup> Testimony of Parent.

<sup>11</sup> Petitioner's Exhibit 8.

8. Student's July 2013 summer school progress report revealed that he did not meet the standard in reading, math or writing, and he was approaching the standard for behavior. Teacher comments indicated that Student experienced challenges meeting grade level academic standards but consistently gave a good effort.<sup>12</sup> The record contains no indication of whether or not Student received a 504 Plan or other forms of additional support during summer school.
9. During the current school year, SY 2013/14, there is a different administration at Student's DCPS school and Student has not been provided with a 504 Plan or a formal behavior plan. Moreover, Student has a first-time teacher this school year who does not seem to know how to deal with Student. As a result of these factors, Student is not being given additional time and attention by his teacher this year. Instead, he is being sent to his previous teacher's kindergarten class several times per week with his classwork, and he is able to complete his work without assistance in that class.<sup>13</sup>
10. During the current school year, Parent has received approximately five letters from the DCPS school regarding Student's behavior. However, all of the letters concern behavior issues that occur with Student during aftercare, which is less structured than a regular classroom.<sup>14</sup>
11. Parent has also received two calls from the school this year regarding Student's behavior in his classroom. One call concerned Student destroying the library in his classroom, leaving a pile of books on the floor, and the other call concerned Student chewing on dry erase markers.<sup>15</sup>
13. As of December 6, 2013, Student's current teacher felt that Student's strengths were reading comprehension and artistic skills. The teacher reported that she was having difficulty getting Student to work hard and remain on task in class.<sup>17</sup>
14. Petitioner filed the instant Complaint on December 26, 2013, during the Winter Break.
15. In or about January 2014, DCPS invited Parent to attend a Student Support Team ("SST") meeting to determine whether Student requires additional assistance with respect to his behavior, but Parent did not attend the meeting. Instead, Parent instructed DCPS to contact Petitioner's counsel.<sup>18</sup>

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<sup>12</sup> Petitioner's Exhibit 21.

<sup>13</sup> Testimony of Parent.

<sup>14</sup> Testimony of Parent; *see* Petitioner's Exhibit 19.

<sup>15</sup> Testimony of Parent.

<sup>17</sup> Petitioner's Exhibit 9 at 1.

<sup>18</sup> Testimony of Parent.

## **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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3<sup>rd</sup> Cir. 2006). Now, for a consideration of Petitioner's claims.

### **October 2012 Determination of Ineligibility**

IDEA requires that, upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the child's parents determine whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child. 34 C.F.R. § 300.306(a)(1). In turn, IDEA defines a child with a disability to mean a child who has been defined as having one of the specified disabilities and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1). However, if it is determined that a child has a disability specified in 34 C.F.R. § 300.8(a)(1) but only needs a related service and not special education, the child is not a child with a disability pursuant to IDEA. 34 C.F.R. § 300.8(a)(2)(i). Related services are services required to assist a child with a disability to benefit from special education, 34 C.F.R. § 300.34(a); while special education means specially designed instruction to meet the unique needs of a child with a disability, 34 C.F.R. § 300.39(a)(1).

In the instant case, Petitioner contends that DCPS incorrectly determined Student ineligible for special education and related services, and that Student should be found eligible as emotionally disabled ("ED") and/or other health impaired ("OHI"). Petitioner further contends that Student has had significant behavioral issues for the past two years, and even if Student is cognitively bright and only has behavioral issues, then he still requires a disability classification and IEP services. DCPS disagrees, arguing that the determination of ineligibility was appropriate. DCPS notes that the eligibility team determined that Student was not OHI and recommended only a 504 Plan and an FBA and BIP for Student, which is outside of the hearing officer's jurisdiction.

A review of the evidence in this case reveals that after DCPS determined Student ineligible for special education and related services in October 2012 and Student's teacher began providing Student with extra time pursuant to a 504 Plan, Student made progress and was able to meet some of his targets. Indeed, Student's year-end report card for SY 2012/13 revealed that he was either secure or developing in all academic areas measured on the report card. Hence, the evidence reveals that Student did not need special education to access the general education curriculum and make academic progress, with the result that he did not qualify as a child with a disability pursuant to IDEA. *See* 34 C.F.R. § 300.8(a)(2)(i), *supra*; *Cummings v. District of Columbia*, 2006 WL 6905253, \*1 (July 13, 2006 D.D.C.) (citing 5 D.C.M.R. § 3001.1)(when a child has one of the identified disabilities but only needs a related service and not special

education instruction, the child is not a child with a disability under this chapter).<sup>19</sup> Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by incorrectly determining him ineligible for special education and related services.

### **Alleged Failure to Evaluate/Reevaluate and Determine Eligibility Under Child Find**

Pursuant to Child Find, a State must have policies and procedures in place to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located and evaluated. 34 C.F.R. § 300.111; *see also Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (school systems must ensure that all children with disabilities residing in the State who are in need of special education and related services are identified, located, and evaluated.)

In the instant case, Petitioner argues that Student's ongoing behavior problems and suspensions in SY 2013/14 were sufficient to trigger DCPS's Child Find obligation to conduct an evaluation of Student and determine whether he is eligible for special education and related services under IDEA. DCPS disagrees, noting that Student's behavior issues in the current school year have occurred primarily in aftercare, which did not impact his ability to receive educational benefit in school, and therefore, did not trigger DCPS's obligations under Child Find. DCPS further contends that although Student may require an FBA and a BIP, and maybe even a teacher with better classroom management skills, DCPS was not required to conduct an assessment of Student under Child Find.

As noted above, the evidence in this case reveals that Student was able to make academic progress during SY 2012/13 without out specialized instruction when he was provided with a 504 Plan that afforded him extra time and attention from his teacher. The evidence in this case further reveals that DCPS has not provided Student with the 504 Plan or any formal behavior plan during the current school year, SY 2013/14, but when Student is sent to his previous teacher who implemented his 504 Plan during SY 2012/13, he is able to complete his work without assistance. A review of this evidence does not support the conclusion that DCPS should have suspected during the current school year that Student may be a Student with a disability under IDEA. To the contrary, at best the evidence suggests that Student possibly required a 504 Plan again this school year to make academic progress. However, this hearing officer's jurisdiction is limited to matters relating to the identification, evaluation, and educational placement of, or provision of FAPE to, a child with a disability under IDEA, which does not encompass determinations regarding the provision of a 504 Plan that possibly may be required by a student. *See e.g.*, 34 C.F.R. § 300.507(a)(1); § 504 of the Rehabilitation Act, codified at 29 U.S.C. § 701 *et seq.* As a result, the hearing officer concludes that Petitioner has failed to prove in connection with this claim a violation of IDEA that is cognizable in this administrative due process proceeding. *See e.g., Cummings v. District of Columbia, supra* (court dismissed IDEA claims and focused on status of 504 Plan student needed; court also noted that compensatory education was "another IDEA concept that is not available").

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<sup>19</sup> The hearing officer acknowledges that Student was not found to have one of the disabilities specified in IDEA, but this case law demonstrates that even if he had been found to have such a disability, the fact that he did not also require specialized instruction rendered him ineligible for special education and related services pursuant to IDEA.

**ORDER**

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

1. All claims and requests for relief in Petitioner's December 26, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE.**

**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: 3/11/14

/s/ Kimm Massey  
Kimm Massey, Esq.  
Hearing Officer