

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
November 12, 2013

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student currently attends a DCPS senior high school. On August 27, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public Schools. On September 4, 2013, DCPS filed its Response to the Complaint.

The parties participated in a Resolution Meeting on September 11, 2013. There was no agreement, but the parties agreed not to prematurely end the resolution period. Therefore, the 45-day timeline began on September 27, 2013 and will end on November 10, 2013, which is the HOD deadline.

On September 27, 2013, the hearing officer conducted a prehearing conference and determined, in an October 2, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner's Claims:*** (1) Alleged failure to timely evaluate and determine Student eligibility for services; and (2) Alleged failure to develop an IEP in a timely manner after the 3/18/2013 eligibility determination. ***DCPS Defenses:*** (i) Petitioner made multiple referrals of Student for special education services and was responsible for all of the delays in the process; Nevertheless, DCPS is willing to consider providing missed services if petitioner can produce a plan; and (2) With respect to development of the IEP, all delays were due to events outside the LEA's control. ***Relief Requested:*** (1) Findings in Petitioner's favor; (2) Funding for Student's compensatory education plan; and (3) Provide Petitioner's counsel with Student's complete cumulative educational records, which DCPS has not been able to locate.

By their respective letters dated October 24, 2013, Petitioner disclosed twenty documents (Petitioner's Exhibits 1-20) and DCPS disclosed ten documents (Respondent's Exhibits 1-10).

The hearing officer convened the due process hearing on October 31, 2013, as scheduled.² All of Petitioner's disclosed documents were admitted into the record without objection.

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

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

Respondent's Exhibits 1 – 3 were excluded on equitable grounds because they were communication log entries for school year ("SY") 2011/12, while Petitioner's Exhibit 20 revealed that DCPS represented in writing to Petitioner's counsel on August 30, 2013 that it was unable to locate communication logs for SY 2011/12.³ Respondent's Exhibits 4 through 9 were admitted without objection, and Respondent's Exhibit 10 was admitted over objection. Petitioner then clarified that the only relief being requested was compensatory education. Thereafter, the hearing officer received opening statements and Petitioner's testimonial evidence. After DCPS rested on the record without presenting any testimonial evidence, the hearing officer received closing statements and concluded 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 fail to timely evaluate and determine Student's eligibility for services?
2. Did DCPS fail to develop an IEP in a timely manner after the 3/18/2013 eligibility determination?

FINDINGS OF FACT⁴

1. Student _____ currently attends a DCPS senior high school where he is repeating ninth grade for the second time.⁵
2. Student began attending school _____. He performed well in school throughout the years and was an honor roll student. However, at the public charter school he attended for 6th grade, Student was retained in sixth grade for failing to complete all assignments. While he was attending this charter school, Student's grades dropped, his behavior became aggressive, and his attitude changed from positive to one of resentment.⁶
3. In September 2011, Student began attending Charter School 2, and Parent requested that Student be tested to determine whether he qualified for special education services.⁷
4. On November 29, 2011, Student's father signed a Consent form granting Charter School 2 permission to conduct an initial evaluation of Student. However, Student never received an evaluation at the school.⁸

³ It should be noted that Petitioner's difficulties obtaining records from DCPS were discussed at the prehearing conference for this case and DCPS counsel agreed to assist Petitioner's counsel in that regard.

⁴ 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.

⁵ See Complaint; testimony of Parent.

⁶ Testimony of Parent; Petitioner's Exhibit 6 at 4.

⁷ Testimony of Parent.

5. On December 1, 2011, Charter School 2 issued a letter acknowledging its receipt of a referral for an initial evaluation of Student. On December 2, 2011, Charter School 2 issued a Prior Written Notice-Evaluation stating that it proposed to conduct an evaluation of Student.⁹
6. DCPS is the local educational agency (“LEA”) for Charter School 2.¹⁰
7. Student exhibited extreme undesirable behaviors at Charter School 2, which included standing up in class and making weird sounds, having outbursts, shaking, and flipping over a desk. Student received so many demerits at Charter School 2 that the school principal told Parent to either withdraw Student from the school or he would be expelled.¹¹
8. Parent enrolled Student at a DCPS middle school in January 2012 and again began asking that Student be evaluated for special education services. However, the school never evaluated Student and gave Parent one excuse after another for why Student could not be tested. All the while, Student was failing his classes and receiving repeated suspensions. More specifically, at the end of SY 2012 Student received four Fs (in English, pre-Algebra, Science, and Spanish), a D in Health and Physical Education, and a C in Art.¹²
9. Student began attending his current DCPS senior high school in August 2012, and on the very first day of the school year, Parent requested that Student be evaluated for special education services. The personnel at the school informed Parent that it was too early to test Student, that they needed to get adjusted for the year and then they would get back to Parent.¹³
10. Parent continued to call the DCPS senior high school and request an evaluation for Student, but the school failed to provide the requested evaluation. During this time period, Student was failing most of his classes.¹⁴
11. Student became involved with the juvenile justice system in the fall of 2012, and the Court ordered a psychoeducational evaluation for Student, which was conducted on October 22, 2012. The evaluation report was issued on November 7, 2012, and Parent gave a copy of the report to the Special Education Coordinator (“SEC”) at the DCPS senior high school. However, the report indicated that the evaluation scores contained therein should be interpreted with caution because Student fell asleep or lost focus and had to be redirected on several occasions during testing.¹⁵
12. On February 12, 2013, DCPS authorized an independent comprehensive psychological evaluation of Student. On March 1, 2013, the clinical psychologist who testified at the

⁸ Petitioner’s Exhibit 3; testimony of Parent; stipulation of DCPS at the due process hearing.

⁹ Petitioners’ Exhibits 4 and 5.

¹⁰ Stipulation of DCPS at the due process hearing.

¹¹ Testimony of Parent.

¹² Testimony of Parent; Petitioner’s Exhibit 10.

¹³ Testimony of Parent.

¹⁴ Testimony of Parent.

¹⁵ Testimony of Parent; Petitioner’s Exhibit 6 at 1.

due process hearing in this case conducted an independent comprehensive psychological evaluation of Student.¹⁶

13. Student previously was diagnosed with ADHD and he previously took Concerta, but he no longer takes medication for ADHD. More recently, in his independent comprehensive psychological evaluation, Student was diagnosed with Disruptive Behavior Disorder, Not Otherwise Specified. Student's recent psychological evaluation also revealed that he presents with clinically significant behaviors in the areas of hyperactivity, aggression, conduct problems, atypicality, attention problems, and adaptability, and he is in the at-risk classification range on somatization, withdrawal, social skills, activities of daily living, functional communication, and social stress.¹⁷
14. Student's overall cognitive skills are in the Low Average range (GIA = 84). Student's oral language skills are in the Low range, his written expression skills are in the Below Average range, his basic reading and mathematics skills are in the Average range, while his math fluency skills are in the Above Average range.¹⁸
15. Student received a long-term suspension based on an incident that occurred on February 19, 2013 involving a fight in the school cafeteria.¹⁹
16. Student's amended IEP, dated June 11, 2013, lists Student's primary disability as Emotional Disturbance and indicates that Student is to receive 26 hours per week of specialized instruction outside general education and 4 hours per month of behavioral support services outside general education. The IEP includes goals for Mathematics, Reading, Written Expression, and Emotional, Social and Behavioral Development. The IEP indicates that Student's previous IEP meeting date was May 7, 2013.²⁰
17. Student's final grades for SY 2012/13 were as follows: Fs in French, Biology, and Army JROTC; a D in English; Cs in Engineering Design, Algebra, and Environmental Science; and a B- in Intro to Financial Services.²¹
18. As compensatory education in this case, Petitioner has requested 120 hours of academic tutoring in reading, math and writing, to be delivered at a rate of three hours per week for 10 months; 40 hours of mentorship through a sports camp, to be delivered at the rate of two hours per week for approximately 5 months; and 75 hours of counseling, to be delivered at the rate of one hour per week for approximately eighteen months. The harm to be remedied by this plan is the alleged harm resulting from DCPS's failure to timely evaluate Student and provide Student with the special education supports he required, which resulted in poor academic and social/emotional functioning evidenced by Student's frequent off-task behavior and suspensions in school, and Student's failing grades in most of his classes for SY 2011/12 and 2012/13. Petitioner asserts that Student missed well over 1,000 hours of specialized instruction over a period of approximately 14 months. The goal of the compensatory education plan is to front load the compensatory education

¹⁶ Petitioner's Exhibits 7 and 15.

¹⁷ Petitioner's Exhibit 7; testimony of clinical psychologist.

¹⁸ Petitioner's Exhibit 7; testimony of clinical psychologist.

¹⁹ Petitioner's Exhibit 13; testimony of Parent.

²⁰ Petitioner's Exhibit 14.

²¹ Petitioner's Exhibit 11.

services to Student to more quickly help get him back to the point where he can be placed in a less restrictive environment.²²

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 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Under IDEA, either a child's parent or a public agency may request an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. §300.301(b). In the District of Columbia, the initial evaluation must be conducted within 120 days from the date the student was referred for the evaluation. *See* 34 C.F.R. § 300.301(c)(1)(ii); D.C. Code § 38-2561.02. Moreover, IDEA requires that the initial evaluation consist of procedures to determine if the child is a child with a disability under § 300.8, and to determine the educational needs of the child. § 300.301(c)(2). With respect to initial IEPs, the LEA must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services, and that as soon as possible after the development of the IEP, special education and related services are made available to the child in accordance with the IEP. 34 C.F.R. § 300.323(c); 5 DCMR § 3007.1. Finally, when a public charter school elects to have DCPS serve as its LEA for purposes of IDEA, then DCPS is the LEA responsible for meeting the requirements applicable to an LEA under IDEA. 5 DCMR § 3019.4.

In the instant case, the evidence reveals that Student's father signed a consent form authorizing an initial evaluation of Student on November 29, 2011, when Student was attending a DCPS charter school, but DCPS failed to conduct an initial evaluation of Student and develop an initial IEP for him until or about May 7, 2013, more than 17 months later, with the result that Student did not receive needed special education services for the majority of two consecutive school years. Based on this evidence, it is clear that DCPS failed to evaluate Student, determine his eligibility, develop an initial IEP for him, and begin providing him with services pursuant to the IEP within the timelines established by IDEA, thereby committing a procedural violation that denied Student a FAPE. *See* 34 C.F.R. § 300.513(a)(2)(ii) (hearing officer may find denial of FAPE where procedural inadequacies impeded the child's right to a FAPE or caused a deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (procedural violations that result in loss of educational opportunity are actionable).

In its Complaint, Petitioner separates its contentions into two separate claims, arguing that DCPS failed to timely evaluate Student and determine his eligibility, and also failed to timely develop Student's IEP after he was determined eligible for special education services. However, the evidence in this case does not establish exactly when Student was determined eligible for special education and related services, and the date of the initial IEP was not clearly proven but was only suggested by circumstantial evidence contained in Student's amended IEP. As a result, the

²² Petitioner's Exhibit 18; testimony of clinical psychologist.

hearing officer concludes that Petitioner has failed to meet its burden of proving its second claim regarding development of the IEP within a timely manner following the eligibility decision.

Nevertheless, the evidence in this case is sufficient to prove that during SY 2011/12 and SY 2012/13, when Student should have been receiving specialized instruction and related services but was not due to DCPS's failure to comply with its obligation to timely conduct an initial evaluation and develop an initial IEP for Student, Student suffered educational harm because his negative behaviors resulted in numerous suspensions, thereby preventing him from fully accessing his education, and he ultimately failed the majority of his classes at the end of both school years even though his basic reading and math skills are in the Average range. Hence, the hearing officer has determined that an award of compensatory education would be appropriate in this case. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program).

The hearing officer has determined that it would be appropriate to charge DCPS with failing to provide Student with needed special education and related services for the periods from approximately April 29, 2012 through the end of SY 2011/12, and from the start of SY 2012/13 through approximately May 7, 2013, which amounts to approximately eleven months.²³ Moreover, after careful consideration of the educational harm suffered by Student during these time periods, as noted above, the hearing officer has further determined that said harm can be remedied by an award of compensatory education services consisting of three hours per week of independent 1-on-1 tutoring in the areas of reading, writing and math, one hour per week of independent individual counseling, and two hours per week of mentoring services by an independent provider of Parent's choice, with the tutoring and counseling services to be provided for the remainder of SY 2013/14 and through Summer 2014, and the mentoring services to be provided during the Summer of 2014 only. *See Reid v. D.C., supra* (the ultimate compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place).

ORDER

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

1. DCPS shall provide Petitioner with funding for compensatory education services consisting of 108 hours of independent 1-on-1 tutoring, 36 hours of independent counseling services, and 16 hours of mentoring services, to be delivered as follows: three hours per week of independent 1-on-1 tutoring in the areas of reading, writing and math for the remainder of SY 2013/14 and through Summer 2014; one hour per week of independent individual counseling for the remainder of SY 2013/14 and through Summer 2014; and two hours per week of mentoring services by an independent provider of Parent's choice, to be provided during the Summer of 2014 only.

²³ The hearing officer arrived at the April 29th approximate start date by allowing DCPS 120 days (or four months) from the November 29, 2011 date on which consent was provided to evaluate and determine eligibility pursuant to 34 C.F.R. § 300.301(c)(1)(ii) and D.C. Code § 38-2561.02, plus an additional 30 days (or one month) thereafter to develop the IEP pursuant to 34 C.F.R. § 300.301(c)(1)(ii) and D.C. Code § 38-2561.02.

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: 11/10/2013

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