

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
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HEARING OFFICER'S DETERMINATION

)	Date of Hearing
)	June 25, 2009
DOB)	
)	Date Complaint Filed
Petitioner,)	May 26, 2009
)	
v.)	Attending School
)	
District of Columbia)	
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Zachary Nahass
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1220 L Street, N.W.
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COUNSEL FOR DCPS: Tanya Chor
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STUDENT HEARING OFFICE

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

July 5, 2009

Representatives:

Petitioner – Zachary Nahass
DCPS – Tanya Chor

Hearing Officer:

Jane Dolkart

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student who has just completed the grade at . The student is not presently eligible for special education. This due process complaint was filed alleging that DCPS has failed to evaluate the student for special education pursuant to the child find provisions of the IDEA, and has failed to evaluate the student pursuant to a request from his parent. The complaint initially alleged that the student had been the victim of on-going bullying which necessitated a new placement for the student for summer school. The parent has found a summer school placement for the student at another DCPS school. Therefore, the issue of bullying and an inappropriate placement have been dropped from the case.

A pre-hearing conference in this matter was held on June 16, 2009, and a pre-hearing order was issued on June 23, 2009. Petitioner has requested that the pre-hearing order be amended to reflect the fact that the student is in another placement only for the 2009 summer, and not for the 2009-2010sy. The amended is so made.

On June 5, 2009, DCPS filed a Motion to Dismiss and a Notice of Insufficiency. On June 9, 2009, Petitioner filed an opposition to the motion and the notice. On June 9, 2009, an Order was issued denying both the motion to dismiss and the notice of insufficiency.

DCPS filed a written closing statement on June 24, 2009.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to commence the child find process in the face of failing grades and behavioral problems?
2. Failing to commence evaluation of the student for eligibility for special education at the request of the parent on January 7, 2009?

IV. DOCUMENTS AND WITNESSES

The IDEA and its implementing regulations require that DC must have in effect policies and procedures 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 CFR § 300.111(a)(1). Before the initial provision of special education to a child the agency must conduct full and individual initial evaluations. Either a parent of the child or the public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 CFR § 300.301(a).

DCPS' unawareness of a Student's possible disability and need for special education services will not relieve it of its obligation, if it should have suspected the Student might have such a disability. *Reid v. District of Columbia*, 310 F. Supp. 2d 137 (D.D.C. 2004); D.C. MUN. REGS. tit. 5, § 3004.1(a) (2003) (child with a suspected disability to be referred to the IEP team by school staff). Federal law requires that students suspected of having disabilities be evaluated, 'even though they are advancing from grade to grade.' 34 C.F.R. § 300.111(e). The IDEA's sweeping child find requirement applies to all children residing in the District of Columbia regardless of:

- (a) The severity of the disability;
- (b) Whether the child is on the custody or under the jurisdiction of a public or private agency or institution;
- (c) Whether the child has never attended or will never attend public school; and
- (d) Whether the District of Columbia serves infants and toddlers under Part C or preschool children under Part B of IDEA.

DCMR 3002.1 (d).

Petitioner has not met her burden of proof that DCPS should have suspected the student might have a disability prior to the parent's written request for evaluation in late May 2009. However, once the parent initiated a request for an initial evaluation, DCPS had an obligation to evaluate the student in all areas of disability. DCMR 3005.9 (9). DCPS immediately set about obtaining the parent's signature to conduct an evaluation, and had the signed consent to evaluate completed on June 5, 2009.

Pursuant to the IDEA and its implementing regulations, a school district must determine whether a child is a child with a disability "within 60 days of receiving parental consent for the evaluation, or, if the state establishes another timeframe, within such timeframe. 20 USC 1414 (a)(1)(C)(i)(1); 34 CFR 300.301 (c). The DC Code at 38-2561.02 requires that DCPS shall assess or evaluate a student within 120 days from the date that the student was referred for an evaluation or assessment. *Id.*

The language presently contained in DC Code 38-2561.02 used to be found in Chapter 25 –Special education and Assessment. This chapter was repealed some time prior to November 2007. The language is now found in chapter 25B-Placement of Students With Disabilities in Non-Public Schools. Petitioner argues that the 120 day timeline applies only to students in non-public schools, and that the IDEA's 60 day deadline now applies to students in public schools. The title of chapter 25B is most unfortunate. However, to is

clear from reading the language in chapter 25B that it applies to the process of child find and placement for all DC students, regardless of whether they are in public or private school. Any other interpretation would produce the absurd and unfair result of treating children in public schools differently from children in private schools in the determination of whether they are eligible for special education. At least two DC Federal District Court cases have interpreted the language of 38-2561.02 to apply the 120 day timeline to students attending public schools. *T.P. v. Friendship Edison Charter School*, 577 F.Supp.2d 68, 74 (DDC 2008), *AH v. District of Columbia*, 579 F. Supp. 2d 22, 28 (DDC 2008).

Petitioner signed the consent to evaluate on June 5, 2009. DCPS has 120 days within which to complete evaluations of the student in all areas of suspected disability. It is presently July 5, 2009. Obviously, DCPS has approximately three more months within which to complete evaluations. Indeed, even if the 60 day timeline applied, DCPS would still have 30 days within which to complete the evaluations. This Hearing Officer strongly urges DCPS to complete the evaluations before the start of the 2009-2010 school year so that the student can start receiving special education services as soon as possible, should he qualify for such services. There is no basis at this point in time to order DCPS to fund independent evaluations.

Petitioner has failed to meet her burden of proof that DCPS has violated the child find provisions of the IDEA.

VII. SUMMARY OF RULING

DCPS has not denied the student FAPE.

VIII. ORDER

It is hereby **ORDERED** that this case be dismissed with prejudice.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: July 5, 2009