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Office of the State Superintendent of Education
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OSSE STUDENT HEARING OFFICE 2011 JUN -3 AM 11: 32

**Confidential**

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| STUDENT[1], by and through her Parent<br><br>Petitioners,<br><br>v.<br><br>District of Columbia Public Schools ("DCPS")<br><br>Respondent.<br><br>Case | HEARING OFFICER'S DETERMINATION<br><br>Hearing Date:<br>May 24, 2011<br><br><u>Representatives:</u><br><br>Counsel for Petitioners:<br>Alana Hecht, Esq.<br>Brown and Associates<br>1220 L Street, NW #700<br>Washington, D.C. 20005<br><br>Counsel for DCPS:<br>Assistant Attorney General<br>Cherie M. Cooley, Esq.<br>1200 First Street, NW<br>Washington, DC 20002<br><br><u>Hearing Officer:</u><br><u>Coles B. Ruff, Esq.</u> |

[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 May 24, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## BACKGROUND:

Student or "the student" is age nine in fourth grade and has been determined eligible as a child with a disability under IDEA. The student is enrolled at a District of Columbia elementary school hereinafter referred to as "School A." She enrolled at School A in January 2010. Prior to attending School A the student attended school in North Carolina where the parent had relocated briefly from October 2009 until January 2010.

During the 2008-2009 school year the student attended a District of Columbia public charter school, hereinafter referred to as "School B." Petitioner alleges the student was diagnosed with Dyslexia during the time she attended School B. Petitioner alleges School B began the special education evaluation process by initiating an evaluation. Petitioner alleges, however, School B did not complete the eligibility process prior to the student leaving School B. Petitioner alleges School B never provided the parent the evaluation.

Petitioner alleges when she enrolled the student at School A in January 2010 she made a request to School A's principal and to the student's classroom teacher that the student be evaluated for special education services. Petitioner alleges at the start of the 2010-2011 school year she renewed her request to the school staff that the student be evaluated and the evaluations were not begun until a written request was made for evaluation to the school staff after Petitioner obtained legal counsel. DCPS initiated evaluations in December 2010 and the student was found eligible for special education services in February 2011, with a disability classification of specific learning disability (SLD).

Petitioner alleges DCPS should have timely evaluated the student within 120 days of the parental request for evaluation made in January 2010 and in the alternative the student should have been identified under "Child Find." Petitioner alleges that based on the student's academic difficulties DCPS was put on notice by the end of March 2010 that the student should have been identified and evaluated. Petitioner is seeking assistive technology to assist the student in developing her reading, writing and math skills as compensatory education for the alleged delay in the student being found eligible.

On April 1, 2011, Petitioner filed a due process complaint. On April 16, 2011, DCPS filed a response to the complaint. On April 18, 2011, a resolution meeting was convened. The parties

did not resolve the complaint. This Hearing Officer convened a pre-hearing conference on April 28, 2011[2] and issued a pre-hearing order on May 3, 2011.

DCPS maintains there was no parental request during the 2009-2010 school year or at the start of the 2010-2011 school year. Rather, DCPS maintains the parent stated to the school staff the student had a 504 plan previously and the school staff requested the 504 plan from the parent so it could be implemented. DCPS maintains it provided the student accommodations based on the parent's notice to the school of a 504 plan and when the parent later made a written request for special education evaluations and provided consent the evaluations were conducted and the student was found eligible. DCPS maintains that there was no child find violation, no violation of the 120 day requirement and the student was timely evaluated and found eligible and there was no denial of FAPE and no basis for compensatory education.

**ISSUES:** [3]

The issues adjudicated are:

Whether DCPS failed to provide the student a free appropriate public education ("FAPE') by failing to timely identify, locate, and/or evaluate the student as a child in need of special education "Child Find," and/or by failing to evaluate the student and determine the student's eligibility within 120 days of a parental request?

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-18 and DCPS Exhibits 1-9) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

**FINDINGS OF FACT:** [4]

1. The student is age nine in fourth grade and has been determined eligible as a child with a disability under IDEA. The student is enrolled at a District of Columbia elementary school, School A. She enrolled at School A in January 2010. Prior to attending School A

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[2] Attempts were made by this Hearing Officer to schedule the pre-hearing conference within one week of the resolution meeting. This was the first date mutually available for both counsel.

[3] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order are the issue(s) to be adjudicated.

[4] The evidence that is the source of the finding of fact 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 both parties separately the Hearing Officer may only cite one party's exhibit.

the student attended school in North Carolina where the parent had relocated briefly from October 2009 until January 2010. (Parent's testimony, Petitioner's Exhibit 6)

2. During the 2008-2009 school year the student attended a District of Columbia public charter school, School B. The parent became aware that the student had Dyslexia during the time she attended School B. (Parent's testimony)

3. On January 2009 the student's teacher at School B sent a letter to the parent requesting that student participate in after school tutoring due to the student testing below grade level. (Petitioner's Exhibit 16)

4. In February 2009 the parent sent an email to the student's teacher at School B requesting her assistance in scheduling the student be tested for Dyslexia. The parent stated in the email that if the student has Dyslexia that she would like to receive some information and resources to help the parent work with the student at home. (Petitioner's Exhibit 18)

5. The student did not return to School B at the start of the 2009-2010 school year. Instead the parent enrolled the student in a different District of Columbia Public Charter School, School C, from the beginning of the school year until October 2009 when the student relocated with her parent to North Carolina. The parent enrolled the student at a school in North Carolina, but no evaluations were initiated at the school although the parent attempted to seek assistance for the student while there. The parent returned to the District of Columbia in January 2010 and enrolled the student in the third grade at School A. (Parent's testimony)

6. When the parent enrolled the student at School A the parent did not immediately mention her concerns about the student's alleged Dyslexia to the student's teacher, as she did not want to influence the teacher. After a few weeks the parent and teacher conferred about the student's academic progress.[5] (Parent's testimony)

7. The student scored proficient on the DC-CAS in both Reading and Math during her third grade year (SY 2009-2010) (Petitioner's Exhibit 3)

8. The student's 2009-2010 report card in advisories three and four indicated the student was basic in Reading, Language Arts and Math and her skills in these areas were "developing." The student received an overall "Basic" rating of "2" which means that the student "Approaches the Standard (Basic): Student shows a basic working knowledge of skills/concepts: produces satisfactory work usually applies skills /concepts correctly." The teacher comments indicate the student was making good progress in her work but was affected by the need for additional phonics and spelling practice. The teacher suggested daily practice of spelling and writing and reading and suggested the student

[5] The parent testified that she asked the student's teacher and the principal of School A for the student to be evaluated for special education. Neither the teacher nor the principal returned to School A in the 2010-2011 school year and were not available to testify at the hearing. The Hearing Officer, however, did not credit this portion of the parent's testimony about this request because of an inconsistency in her testimony mentioned in the Conclusions of Law.

attend summer school at the end of the 2009-2010 school year. (Petitioner's Exhibit 2-5, 2-6, 2-7)

9. School A's special education coordinator was on staff at School A during the 2009-2010 school year when the student began attending School A. Neither the student's third grade teacher nor the school principal brought the student to the coordinator's attention during the 2009-2010 school year or mentioned that the student might be in need of special education services. testimony)

10. When the parent had the first meeting with the student's fourth grade teacher after the beginning of the 2010-2011 school year she expressed her concerns to the teacher and the teacher immediately put some measures in place to assist the student. (Parent's testimony)

11. When the parent met with the School A staff early in the 2010-2011 school year the parent requested the student receive academic assistance but did not specifically request the student be evaluated for special education services. The parent stated the student had been previously evaluated and the School A staff requested the parent provide the school any previous evaluations. The school staff took what is the usual course of intervention through the school student support team (SST) and began to provide the student interventions for academic difficulties. testimony, DCPS Exhibit 7)

12. On September 10, 2010, School A staff began to provide the student interventions in reading and written language. The student began to receive interventions from the School A's special education teacher on November 8, 2010. (DPCS Exhibit 7)

13. On November 12, 2010, DCPS sent the parent an invitation for a 504 meeting with the school's 504 coordinator, the student's teacher and the school's special education coordinator. The invitation included a list of the parent's rights granted by Section 504 of the Rehabilitation Act. (Petitioner's Exhibit 15)

14. On November 30, 2010, the parent's legal counsel sent a written request to the School A asking that the student be evaluated for special education. (Petitioner's Exhibit 14)

15. In December 2010, because the 504 process had been initiated the School A special education coordinator requested in an email that the parent clearly state in a return email that she wanted the student to be evaluated for special education.[6] In December 2010 DCPS initiated the special education eligibility process for the student. testimony, Petitioner's Exhibit 12)

16. In January 2011 DCPS conducted an educational evaluation of the student. The student scored in the average range in reading comprehension and reading fluency and in the high

[6] The email was in response to an email the parent sent the coordinator stating that the parent had previously requested the student be evaluated for special education. The coordinator in her response did not specifically refute the parent's statements made in the first email.

average range in reading vocabulary. In written language the student scored in the low average range and high average in overall academic knowledge. (Petitioner's Exhibit 9)

17. In January 2011 DCPS conducted a psychological evaluation of the student. The results demonstrated the student has average cognitive abilities. However, the assessment showed the student had a weakness in processing information making it more difficult for the student to learn new or complex information in the classroom and she has a weakness in executive functioning. The evaluator concluded the student's overall profile indicates a specific learning disability. The evaluator recommended strategies and accommodations to assist the student in the classroom. (Petitioner's Exhibit 7-7, 7-11)

18. On February 17, 2011, the student was found eligible for special education services with a disability classification of specific learning disability. DCPS developed an individualized educational program ("IEP") for the student. The IEP prescribed the student receive 3 hours of specialized instruction in the general education setting. The IEP also prescribes classroom and statewide assessment accommodations. The parent was satisfied with the IEP and the services prescribed therein. (Petitioner's Exhibit 6)

19. On her report card during the 2010-2011 school year, in advisories one through three, in Reading and Language Arts, the student received an overall "Basic" rating of "2" which means that she "Approaches the Standard (Basic): Student shows a basic working knowledge of skills/concepts: produces satisfactory work usually applies skills /concepts correctly." In the area of Math the student received an overall "Proficient" rating of "3" in the first advisory, "2+" in the second advisory and "3" in the third advisory. Proficient means "Student produces work that meets the standard; frequently produces work of high quality; applies skills/concepts correctly." The teacher comments in the first advisory stated that the student was making some progress in Math and Reading. "As previously discuss, the student does experience some difficulty with sound-symbol relationships that affects her spelling and reading. The fourth grade team is working on intervention strategies that will target her weakness and will keep you [the parent] informed. And the reading assessment administered indicated the student was reading far below grade average." (Petitioner's Exhibit 2-1, 2-1, 2-3)

20. The student has consistently received tutoring outside of school over the past few years. The tutoring has been effective. However, the parent does not believe additional tutoring by DCPS would be of value because the student is already receiving tutoring. The parent has conducted research regarding assistive technologies she believes will assist the student in reading, writing and math calculation. The parent has requested that these technologies be provided the student as compensatory education for what the parent believes was a delay in the student being evaluated and found eligible for special education services. (Parent's testimony, testimony, Petitioner's Exhibit 1)

**CONCLUSIONS OF LAW:**

Pursuant to IDEIA §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 free appropriate public education ("FAPE").

Pursuant to IDEIA §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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *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.

34 C.F.R. § 300.17 provides that 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.

**ISSUE :** Whether DCPS failed provide the student a free appropriate public education ("FAPE') by failing to timely identify, locate, and/or evaluate the student as a child in need of special education "Child Find," and/or by failing to evaluate the student and determine the student's eligibility within 120 days of a parental request?

**Conclusion:** The evidence does not support a finding that the student should have been identified under "child find" or that the parent made a request of School A staff that the student be evaluated for eligibility for special education services earlier than the written request by her counsel in November 2010.

Congress passed the IDEA 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." 20 U.S.C.§1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C.§1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public

[7] 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.

education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

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.. 2008). 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).

The parent testified that she attempted to begin the special education evaluation process while the student was attending School B. She alleges, however, School B did not complete the evaluation and eligibility process prior to the student leaving School B she was never provided the evaluation.

The parent also testified that she made a request for evaluation to the student's third grade teacher at School A and also went to the School A principal (both who are no longer at School A) and told the principal that she wanted to "finish the process" that was begun when the student was attending School B. The parent testified the principal said that the time to start the process would be January. The parent twice stated during her testimony the principal informed her that the evaluation process needed to start in January. The parent later attempted to correct her testimony and said she did not mean January but the beginning of the following school year.

In addition, the parent testified that when she first enrolled the student at School A in January 2010, she did not immediately tell the student's teacher that the student had been diagnosed with Dyslexia, but instead wanted the teacher to form an independent impression of the student without that information.

This Hearing Officer finds it incredible that the parent after having been allegedly been ardent about the need for the student to be evaluated at School B and in North Carolina that she did not immediately tell the student's new teacher in January 2010 that the student had been diagnosed with Dyslexia.

The parent also testified that she spoke with the psychologist that conducted the evaluation while the student was at School B during the fall of 2010, when School A staff were requesting that she provide them the evaluation that already been conducted. Yet the parent was not able to give the evaluator's name. None of the individuals the parent allegedly made requests to at School B during the 2008-2009 school year or at School A during the 2009-2010 school year were available to testify at the hearing. The parent's testimony was not corroborated by any witness. Because of the inconsistency in the parent's testimony regarding what the principal at School A told her and the lack of corroboration of her testimony, the Hearing Officer does not find the parent's testimony credible that she requested the student be evaluated for special education during the 2009-2010 school year. The student's report card and DC CAS testing during the 2009-2010 school year do not indicate the student was having any unusual academic concerns that would directly corroborate the parent's testimony either.

The parent also testified that she allegedly, at the start of the 2010-2011 school year, renewed her request to the School A staff that the student be evaluated. However, the parent participated in a number of meetings at which accommodations were discussed and initiated for the student and attended a meeting in November 2010 that specifically indicated the discussion was regarding 504 eligibility. The Hearing Officer finds testimony, supported by the 504 meeting documentation, to be credible that she was under the impression the parent was seeking accommodations for the student for the condition of Dyslexia and she requested that the parent provide the evaluations and or information about the condition so the 504 process could proceed. In any case, the School A staff provided the student interventions to address her concerns starting in September 2010, including assistance from the school's special education teacher. There was no showing that even if the evaluations had been conducted earlier during the 2010-2011 school year the student suffered any harm.

The Hearing Officer concludes that it was not until the parent's attorney requested the student be evaluated in November 2010 that the 120 days began to run for the student to be evaluated. Evaluations were conducted and the student was found eligible on February 17, 2011. This was within the time fame required, thus this Hearing Officer concludes the student was not denied a FAPE.

Although Petitioner's counsel asserts that the alleged recounting of the parent's previous requests to School A during the 2009-2010 school year were not refuted in the responding email by School A's special education coordinator, and the coordinator requested in the email the parent clearly request evaluation despite having received the request from the parent's counsel, the Hearing Officer does not find these factors prove the parent's version of the facts to be true. The Hearing Officer will not make the inference that the coordinator, by not refuting the parent's version of the facts, was admitting their truth.

The Hearing Officer finds the special education coordinator's testimony credible that she had never received a request from the parent that the student be evaluated and never had been informed by anyone at the school during the 2009-2010 school year that the student was having any difficulties that would warrant special education evaluation.

In addition, the student's report cards indicated the student was making academic progress, and the student's DC CAS scores indicated the student was proficient in reading and math during the 2009-2010 school year. Consequently, the Hearing Officer concludes the evidence does not demonstrate that the student should have been located, identified and evaluated under the DCPS "Child Find" obligation and there was no parental request to which DCPS failed to timely respond. Thus, this Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence of a "Child Find" violation or that the student was not evaluated within 120 days of a parental request. Consequently, the Hearing Officer concludes the Petitioner did not sustain the burden of proof by a preponderance of the evidence.

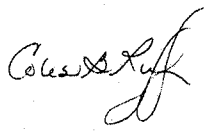
In light of the parent's desire for the student to have the benefit of the assistive technology that she believes would benefit the student's academic progress the parent is free to make such a request to DCPS for an IEP team to consider the request for the assistive technology.

**ORDER:**

The complaint is this matter is hereby dismissed with prejudice.

**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).



**Coles B. Ruff, Esq.**
**Hearing Officer**
**Date: June 2, 2011**