

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
April 23, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: April 23, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “MOTHER”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (“DCPS”) has denied Student a Free Appropriate Public Education (“FAPE”) by not finding her eligible for special education and related services.

¹ Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 24, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on February 25, 2014. The parties met for a resolution session on March 11, 2014 and agreed to proceed on to the due process hearing. As a result, the resolution period was curtailed and the 45-day period for issuance of this decision started on March 12, 2014. On March 18, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on April 8, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses Student, BEHAVIOR SPECIALIST, SOCIAL WORKER, EDUCATIONAL CONSULTANT and COURT PSYCHOLOGIST. DCPS called as witness SCHOOL PSYCHOLOGIST. Petitioner's Exhibits P-6, P-11 through P-25, P-30 and P-31 were admitted into evidence without objection. Exhibits P-4, P-7, and P-27 were admitted over DCPS' objections. DCPS' objections to Exhibits P-10 and P-28 were sustained. Exhibits P-1 through P-3, P-5, P-8, P-9, P-26 and P-29 were withdrawn. DCPS' Exhibits R-1 through R-12 were admitted into evidence without objection. Counsel for both parties made opening statements and closing arguments. At closing argument, I granted DCPS leave to provide additional testimony in opposition to Petitioner's Child Find claims. DCPS did not elect to offer additional testimony. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- Whether DCPS has denied the student a FAPE by failing in its Child Find obligations, since the middle of the 2012-2013 school year, to identify Student as a child with a potential IDEA disability;
- Whether DCPS denied Student a FAPE by failing in February 2014 to find her eligible for Special Education and Related Services;
- Whether DCPS denied Student a FAPE by failing develop an IEP for her and to offer her an appropriate placement since the beginning of the 2013-2014 school year.

For relief, Petitioner requests the Hearing Officer to determine that Student is eligible for special education and related services as a child with a disability and to order DCPS to convene an IEP team to develop an appropriate IEP and placement for her.²

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student an AGE adolescent, resides with Mother in the District of Columbia. Student is currently enrolled in GRADE at CITY SCHOOL 3. Testimony of Mother.
2. Student began attending school as a kindergartner in the District of Columbia. After her second grade year, Student moved to West Virginia. Student

² In her due process complaint, Petitioner also requested an award of compensatory education to compensate Student for educational harm allegedly resulting from DCPS' failure to provide an IEP or special education and related services since the beginning of the 2013-2014 school year. At the due process hearing, Petitioner did not offer any evidence in support of a compensatory education remedy.

attended school in West Virginia through seventh grade. In February 2013, she moved back to the District with Mother and a brother. Testimony of Mother, Exhibit P-11.

3. At her West Virginia School, Student did well in fifth and sixth grades. She was excited then about going to school and did not have an attendance problem.

Testimony of Mother. Student did not complete seventh grade in West Virginia, because her family had to relocate after being evicted from their home. Exhibit P-11.

4. After moving to the District in February 2013, Student repeated seventh grade at CITY SCHOOL 1. After she started at City School 1, Student's motivation began to diminish. Her school attendance was shaky and she started getting into fights, which had not happened in West Virginia. Student did pass her courses at City School 1 and the only subject she really had problems with was mathematics. Testimony of Mother.

5. At the beginning of the 2013-2014 school year, Student transferred to CITY SCHOOL 2, a DCPS middle school. After her first two weeks there, which were fair, Student's experience at City School 2 was terrible. By October of 2013, Mother was having to take Student to school and it became a struggle to get Student to go through the school door. Testimony of Mother, Testimony of Student, Exhibit P-11. Student stopped attending school. She testified it was because of being bullied. Testimony of Student. According to Mother, Student has no desire to succeed and appears to have a "F---- it" mentality about school. Exhibit P-11. By the end of the second term, her grades were mostly D's and F's. Exhibit R-9.

6. After the March 11, 2014 resolution meeting in this case, Student transferred to City School 3. Testimony of Mother, Exhibit R-1.

7. On December 17, 2013, Student was referred by the Superior Court of the District of Columbia for an emergency forensic screening due to her running away and

noncompliance to medication. Exhibit P-9. On December 16, 2013, Student was evaluated by a Court Child Guidance Clinic Clinical Intern, under the supervision of Court Psychologist. In his January 10, 2014 Confidential Psychological Evaluation report, the examiner reported that test data, history and information from collateral sources suggested that Student was suffering from Post-Traumatic Stress Disorder (PTSD) and, characteristic of individuals with PTSD, she was experiencing distressing memories, thoughts and feelings associated with the traumatic experience (in Student's case) of being raped. The mood and trauma symptoms had manifested in Student's exhibiting a number of acting out and externalizing behaviors such as educational and attention problems, truancy, sexual promiscuity, interpersonal difficulties, and suicidal ideation. On cognitive testing, Student's overall cognitive abilities tested in the Average range. On the Woodcock-Johnson Tests of Achievement (WJ-III), the Math Calculation Skills cluster yielded a standard score of 84 with an age equivalent of eleven years and grade equivalent of five years and five months. Her scores on the index were considered in the Limited to Average range. Student obtained a standard score of 79 on the Calculation subtest with an age equivalent of ten years and two months and a grade equivalent of four years and seven months. She earned a standard score of 99 in Math fluency, an age equivalent of thirteen years and five months and a grade equivalent of eight years. The examiner concluded that Student struggled in math, as shown by her Calculation subtest scores falling two years below her age equivalent and three years or more below her grade equivalent. The examiner diagnosed Student with PTSD and a Specific Learning Disorder with impairment in mathematics. Exhibit P-11.

8. On January 15, 2014, Petitioner's Counsel wrote the principal of City School 2 and the DCPS Instructional Superintendent - Cluster VII to request an

immediate safety transfer of Student from City School 2, because Student was asserted to be being bullied by several City School 2 students and she was scared to attend school. Petitioner's Counsel also requested that Student be evaluated immediately and on an expedited basis for eligibility for special education and related services, based upon the information in the January 10, 2014 Confidential Psychological Evaluation report. Exhibit P-4. On January 28, 2014, Petitioner's Counsel followed up with a letter to the special education coordinator and principal at City School 2, again requesting an immediate review of Student's eligibility for special education and related services. In the January 28, 2014 letter, Petitioner's Counsel wrote that the January 10, 2014 psychological evaluation, which was attached to the letter, found that academically, despite average intelligence, Student was learning at a fifth grade level in mathematics and had significant delays, that Student's educational performance was adversely impacted as a result of her PTSD and that the evaluation indicated that Student had been struggling with depression and anxiety since the beginning of middle school, that she struggled with her ability to concentrate, and that she had daily crying spells and low self-esteem. Exhibit P-6.

9. On February 10, 2014, a Multidisciplinary Team (MDT) meeting was convened at City School 2 for the purpose of reviewing Student's January 10, 2014 psychological evaluation and to determine whether Student was eligible for special education services. Mother, Student and Petitioner's Counsel attended the meeting. In her meeting notes, School Psychologist reported that on review of cognitive and academic test results and Student's DC Comprehensive Assessment System (DC CAS) scores and report card grades, Student did not meet the criteria as a student with a specific learning disability or with an emotional disturbance. Counseling and tutoring

in the area of math were recommended. Exhibit R-2. In its February 10, 2014 Prior Written Notice to Mother, DCPS reported that Student did not meet the criteria for special education services as a student with an SLD. DCPS' Final Eligibility Determination Report stated that Student did not meet the required SLD criterion of demonstrating a discrepancy between achievement and measured ability of two years below her chronological age and/or at least two standard deviations below her cognitive ability. Neither the Prior Written Notice nor the Final Eligibility Determination Reports indicate that the MDT team considered whether Student met IDEA criteria for special education eligibility as a student with an ED. Exhibits R-3 through R-6.

10. Although School Psychologist wrote in her meeting notes, that the MDT team determined that Student did not meet criteria as a student with an emotional disturbance, School Psychologist testified that the MDT team did not, in fact, make an ED eligibility determination on February 10, 2014, because the team did not have enough documentation and School Psychologist believed that Student could not be considered for an ED disability until after a Student Study Team (SST) action plan and other regular education interventions were attempted. Testimony of School Psychologist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A. DID DCPS DENY STUDENT A FAPE BY FAILING IN ITS CHILD-FIND OBLIGATIONS, SINCE THE MIDDLE OF THE 2012-2013 SCHOOL YEAR, TO IDENTIFY HER AS A CHILD WITH A POTENTIAL IDEA DISABILITY?

i. Timeliness of Initial Eligibility Evaluation

Petitioner alleges that DCPS failed to comply with its “Child Find” obligations by not evaluating Student for special education eligibility since the middle of the 2012-2013 school year. The IDEA requires Local Education Agencies (LEA) to have a comprehensive Child Find system to ensure that all children who are in need of early intervention or special education services are located, identified, and referred appropriately. *See* 20 U.S.C. § 1412(a)(3). A school is obligated to evaluate a student once that student is suspected of having a disability. *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013). “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.’” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011), quoting *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008).

The parent’s contention that DCPS should have considered evaluating Student in the middle of the 2012-2013 school year is not supported by the evidence. Student did

not become a resident of the District until February 2013 and, by Mother's account, at her last school in West Virginia, Student did "pretty good." Student passed her courses at City School 1 and only had academic problems in math class. Although Student developed behavior problems after enrolling at City School 1, this was after being uprooted from her home in West Virginia, leaving her West Virginia school mates and being placed in a new school environment where she knew no one. As Petitioner's expert, Educational Consultant conceded, it would not be unusual for a child who has been through these changes to have difficulties at school. I find that Petitioner has not established that in the 2012-2013 school year, Student should have been "suspected" of having a disability so as to implicate DCPS' Child Find obligation.

Student's behavior deteriorated in the current 2013-2014 school year after she transferred to City School 2. By October of 2013, Mother was having to take Student to school and it became a struggle to get Student to go through the school door. In December 2013, Student had become involved with the D.C. court system and was referred for a court-ordered psychological evaluation. On January 15, 2014, Petitioner's Counsel first requested DCPS to evaluate Student for special education eligibility. After School Psychologist completed a review of the court-ordered evaluation and other data, a City School 2 MDT team was convened on February 10, 2014, when it was determined that Student was not eligible for special education as a child with a disability. I find that DCPS' eligibility determination, concluded less than one month after the January 15, 2014 request by Petitioner's counsel for an eligibility evaluation, was not untimely. *See* D.C.Code § 38–2561.02(a) (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.")

ii. Failure to Evaluate for ED

The IDEA regulations require that, as part of an initial special education evaluation, the LEA must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). In her January 15, 2014 letter referring Student for a special education evaluation, Petitioner's Counsel informed the DCPS representatives that Student's recent psychological evaluation indicated that Student had been diagnosed with PTSD and an SLD. Counsel's January 28, 2014 letter added that Student's educational performance was adversely impacted as a result of her PTSD and noted that the January 10, 2014 psychological evaluation report indicated that Student had struggled with depression and anxiety since the beginning of middle school, struggled with her ability to concentrate, had daily crying spells and exhibited low self-esteem. By the end of the 2013-2014 second term, Student had missed 35 days of school and was failing most of her core subjects. Certainly Student should have been assessed for ED as an area of suspected disability.

In her testimony, School Psychologist explained that the February 10, 2014 MDT team did not consider Student's potential eligibility under the ED classification because Student Study Team (SST) or Response to Intervention (RTI) strategies had to be attempted first. School Psychologist misapprehends the requirements of the IDEA. The IDEA's Child Find mandate encompasses all 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 CFR § 300.111(c)(1). An LEA may not delay evaluating a child suspected of having a disability for an SST or RTI strategy to be implemented. In January 2011, the U.S. Department of Education’s Office of Special Education Programs (OSEP) issued a memorandum which emphasized concern about situations where it seemed that school personnel were denying parental requests for evaluation on the basis that the student had not completed the RTI process.

States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provisions of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RTI framework. Unless the district believes that there is no reason to suspect that the child is disabled and in need of special education services, an evaluation must be conducted within the applicable timeline. Should the district refuse to conduct an evaluation because no reason to suspect exists, prior written notice of the refusal must be provided to the parents.

Office of Special Education Programs, Memo to State Directors of Special Education, 56 IDELR 50 (Jan. 21, 2011). *See, also*, Office of Special Education and Rehabilitative Services, *Letter to Ferrara*, 112 LRP 52101 (Feb. 29, 2012) (The implementation of an RTI process is not a reason to fail to respond to a parent’s request for an initial evaluation.) *Cf. N.G. v. District of Columbia, supra* (Where student exhibited at least two of the five characteristics of ED and her academic performance was adversely affected as a result, DCPS should have evaluated her.) I conclude that DCPS defaulted on its Child Find obligation by failing to evaluate Student for an ED disability after receiving the January 2014 evaluation request from Petitioner’s Counsel.

B. DID DCPS DENY STUDENT A FAPE BY FAILING IN FEBRUARY 2014 TO FIND HER ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES?

DID DCPS DENY STUDENT A FAPE BY FAILING DEVELOP AN IEP

FOR HER AND TO OFFER HER AN APPROPRIATE PLACEMENT SINCE THE BEGINNING OF THE 2013-2014 SCHOOL YEAR?

A child is eligible for services under the IDEA if she has been evaluated as having one or more of the disability conditions listed and defined in the IDEA statute and regulations, and “by reason thereof, needs special education and related services.” See 34 CFR § 300.8. Petitioner contends that Student was denied a FAPE by the failure of the City School 2 MDT team to find her eligible for special education as a student with an Emotional Disturbance (ED) and/or a Specific Learning Disability (SLD).

Eligibility as a Student with an Emotional Disturbance

The IDEA criteria for ED are that a student exhibits one or more of the following characteristics over a long period of time, and to a marked degree, that adversely affects the student’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR § 300.8(b)(4)(i). Importantly for the ED classification, a disabled student is not a “child with a disability” if she “only needs a related service and not special education.”

34 C.F.R. § 300.8(a)(2)(i). Therefore, even if Petitioner demonstrates an adverse effect on Student’s educational performance from an ED condition, she must further show that special education is necessary for Student to receive educational benefit. Special education is defined in the IDEA as “specially designed instruction, at no cost to the

parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom. . . .” 20 U.S.C. § 1401(29).

In the January 10, 2014 court-ordered psychological evaluation, the evaluator diagnosed Student with PTSD. Court Psychologist confirmed in his testimony that PTSD often co-occurs with depression and anxiety. Petitioner’s expert, Educational Consultant, noted that Student’s psychological evaluation showed Student experienced depression and anxiety, poor interactions with peers and pervasive unhappiness, which are indicators of an IDEA ED disorder. I find that Petitioner has established that Student exhibited at least three of the five characteristics of the ED condition – inability to build or maintain satisfactory interpersonal relationships, pervasive depression and inappropriate types of behavior – and that Student’s academic performance has been adversely affected as a result. Both Educational Consultant and Social Worker opined that Student needs counseling on a regular basis. However, the evidence does not establish whether Student also requires special education services as a result of her ED disability. In the District, counseling services are encompassed in the DCMR definition of “Related services.” *See* 5-E D.C.M.R. § 3001.1. To establish that Student is a child with an ED disability, the IDEA requires that Petitioner show that Student requires special education in addition to counseling services. Petitioner has not met that burden.

Eligibility as a Student with a Specific Learning Disability

In the January 10, 2014 psychological evaluation report, the court evaluator also diagnosed Student with an SLD in mathematics. A student has a specific learning disability under the IDEA if he or she has “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think,

speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30). An SLD may be found if a child “does not achieve adequately for the child’s age” in basic language or mathematics skills or if the child fails “to meet age or State-approved grade-level standards” in such skills. 34 C.F.R. § 300.309(a). In forming this determination, a school district should “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior.” *Id.* § 300.306(c)(i). SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage. 34 CFR § 300.309(a)(3); 5-E D.C.M.R. § 3001.1 Before an MDT team may confirm a student’s eligibility under SLD, the team must also rule out that the student’s underachievement is a result of a lack of appropriate instruction. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46656 (August 14, 2006).

The court evaluator diagnosed Student with an SLD in mathematics because her math calculation scores fell two years below her age equivalent and three years or more below her grade equivalent. Notwithstanding, School Psychologist testified that the MDT team determined that Student did not qualify as having an SLD in mathematics because she was not attending school regularly. School Psychologist reported that Student’s math teacher at City School 2 stated that Student was able to grasp information easily, but was not learning because she was not present in school. According due deference to the City School 2 MDT team, I find that Petitioner has not established that Student’s weakness in mathematics is attributable to an SLD rather

than to her not being available for appropriate instruction due to her chronic nonattendance. *See T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.); *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 937 (9th Cir.2007) (Fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render more deferential approach appropriate.)

Summary

In summary, I find that Petitioner has shown that DCPS defaulted on its Child Find obligation by failing to evaluate Student for an ED disability. Accordingly, I will order DCPS to reopen its eligibility evaluation of Student and reconvene Student's MDT team to determine if she is a child with a disability. DCPS must ensure that the MDT team considers specifically whether Student has a qualifying ED disability. However, Student has not yet been determined to be a child with a disability as defined by the IDEA and Petitioner did not meet her burden of proof to establish that Student should have been found eligible on the basis of either an ED or an SLD disability. DCPS' Child Find obligation is distinct from its obligation to provide FAPE to a student who has affirmatively been determined to be a child with a disability. *See, e.g., E.T. v. Board of Educ. of Pine Bush Cent. School Dist.*, 2012 WL 5936537, 11 (S.D.N.Y. Nov. 26, 2012). Therefore, Petitioner's further requests for relief must be denied.

ORDER

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

ORDERED:

1. Within 10 school days of entry of this order, DCPS shall reconvene Student's MDT team to determine if Student is a child with a disability under 34 CFR § 300.8. The MDT team must consider, *inter alia*, whether Student has a

qualifying Emotional Disturbance disability. If the MDT team determines that Student is a child with a disability, DCPS shall ensure that an IEP is promptly developed for Student in accordance with 34 CFR §§ 300.320 through 300.324;

2. Petitioner's requests for a determination that Student is eligible for special education and related services as a child with a disability and for an order for DCPS to convene an IEP team to develop an appropriate IEP and placement are denied without prejudice; and

3. All other relief requested by Petitioner here in is denied.

Date: April 23, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).