

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Parent on behalf of Student)	Case No. 2020-0093
)	
Petitioner,)	Hearing Dates: July 23, 2020
)	Conducted by Video Conference
v.)	
)	Date Issued: August 10, 2020
District of Columbia Public Schools,)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On April 23, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing, to locate, evaluate, and identify Student as a child with a disability, and failing to provide Petitioner access to Student’s education records. On May 1, 2020, DCPS filed *District of Columbia Public School’s Response to Parent’s Due Process Complaint* (“*Response*”), denying each of the claims in the *Complaint*.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on April 23, 2020 alleging that DCPS denied Student a FAPE by (1) failing to locate, evaluate, and identify Student as a child with a disability, and (2) failing to provide Petitioner access to Student's education records that were requested on March 20, 2020. On May 1, 2020, DCPS filed its *Response* to the *Complaint*, asserting, *inter alia*, that (1) Petitioner never requested that Student be evaluated to determine eligibility for services, (2) Petitioner never requested a meeting concerning childfind, (3) DCPS denies that Student requires evaluation for a suspected disability, (4) on March 31, 2020, DCPS provided by email the records requested by Petitioner on March 20, 2020, (5) Petitioner's counsel then requested discipline records; DCPS advised that COVID – 19 restrictions precluded access to these records, and (6) Petitioner's counsel made repeated requests for the same records, which requests were denied due to the pandemic restrictions. At the prehearing conference, Respondent's counsel stated that on May 11, 2020 DCPS issued Petitioner an authorization letter for independent evaluations for psychological, occupational therapy, and speech and language deficits, as well as a functional behavior assessment.

The parties participated in a resolution meeting on May 1, 2020, that did not result in a settlement. The resolution period ended on May 23, 2020. On May 29, 2020, *Petitioner filed Petitioner's Motion to Compel Education Records and/or Motion to Assume Facts as True and Admit Them into Evidence*. (“*Petitioner's Motion*”).

A prehearing conference was conducted by video conference on June 3, 2020. The Prehearing Order was issued on June 4, 2020.

On June 4, 2020, DCPS filed District of Columbia Public Schools' Opposition to Petitioner's Motion to Compel Access to Records (“*DCPS Opposition*”). On June 9, 2020, Petitioner filed *Petitioner's Reply to DCPS' Opposition to Petitioner's Motion to Compel Education Records and/or Motion to Assume Facts as True and Admit Them into Evidence* (“*Petitioner's Reply*”). On June 23, 2020, I issued an Order denying *Petitioner's Motion*.

The due process hearing was conducted on July 23, 2020 by video conference and was closed to the public. Petitioner's *Disclosure Statement*, filed July 16, 2020, included a witness list of five individuals and Exhibits P1-P41. On July 21, Respondent filed objections to the expert designations of Witnesses A, Witness B, and Witness C, but offered no reasons for the objections. DCPS also objected to P1-12, and P20-P41 on the grounds of relevance, authentication, hearsay, and the best evidence rule. I sustained the objection to P10-P12, independent evaluations performed after the filing of the *Complaint*, but overruled the objection to all other exhibits. Thus, Petitioner's Exhibits P1-P9, and P13-P41 were admitted into evidence.

Respondent's *Disclosure Statement*, filed July 16, 2020, contained a witness list of six witnesses and documents R-1 through R-13. On July 17, 2020, Petitioner filed *Petitioner's Memorandum Regarding a Hearing Officer Ordering the IEP Team to Determine Appropriate Compensatory Education*. On July 21, 2020, Petitioner filed

objections to expert testimony from [REDACTED] on the grounds that Respondent made no proffer of the witness' expertise. Petitioner also objected to Exhibits R1-R7 based on relevancy, hearsay, authentication and/or unfair surprise. During Respondent's direct presentation, Respondent's counsel offered Exhibits R4-5, R7, and R11-13 into evidence. I overruled Petitioner's objection to R4, R5, and R7 and admitted Exhibits R4-5, R7, and R11-13 into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Witness C. Petitioner offered Witness A as an expert in clinical psychology, Witness B was offered as an expert in speech and language pathology, and Witness C was offered as an expert in occupational therapy. I allowed opinion testimony from each of these witnesses. Respondent presented testimony from Witness D. I overruled Petitioner's objection to Witness D offering expert testimony in special education. At the conclusion of the testimony, the parties' counsel agreed to submit written closing arguments on or before July 31, 2020. On July 31, 2020, Respondent filed *District of Columbia Public Schools' Closing Argument* along with a copy of the Hearing Officer Determination ("HOD") in Case No. 2018-0303. On August 1, 2020, Petitioner filed *Petitioner's Closing Argument*.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows:

1. Whether DCPS failed to locate, evaluate, and identify Student as a child with a disability.
2. Whether DCPS failed to provide Petitioner access to Student's education records that were requested on March 20, 2020.

FINDINGS OF FACT

1. Student is X years old and was in grade K at School A during the 2019-2020 school year.²
2. For the 2017-18 school year, Student's final grades were C+ in English I (with 5 unexcused absences), D+ in World History & Geography I: Middle Ages (with 9 unexcused absences), B in Algebra I (with 6 unexcused absences), C- in French (with 7 unexcused absences), C- in Biology (with 4 unexcused absences), C+ in Academic Support HS (with no unexcused absences), D in Global Perspectives (with no unexcused absences), D+ in Art (with no unexcused absences), F in Sculpture (with no unexcused absences), C in Health Education (with 6 unexcused absences), and B+ in Test Taking Strategy (with 5 unexcused absences).³
3. For the 2018-19 school year, Student's final grades were F in Geometry (with

² Petitioner's Exhibit ("P:") 1 at page 6 and Exhibit 15 at page 138. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P1:6, P15:138.

³ P13:125-26.

11 unexcused absences), F in English II (with 64 unexcused absences), F in Test Taking Strategy (with 46 unexcused absences), F in French II (with 65 unexcused absences), F in World History (with 43 unexcused absences), F in Geometry (with 11 unexcused absences through the first two terms), F in Chemistry (with 12 unexcused absences through the first two terms), A- in Fitness & Lifetime Sports I (with 5 unexcused absences), and C in Fitness and Lifetime Sports II (with 6 unexcused absences).⁴ Student's Scholastic Reading Inventory ("SRI") score on August 24, 2018 placed [REDACTED] five grades below his/her current grade level.⁵

4. For the first two terms of the 2019-20 school year, Student's grades were F in World History (with 46 unexcused absences), F in JROTC (with 49 unexcused absences), F in French II (with 48 unexcused absences), F in Environmental Science (with 43 unexcused absences), F in U.S. History & Geography (with 48 unexcused absences), F in Algebra II and Trigonometry (with 49 unexcused absences), F in English III (with 42 unexcused absences), and F in Music (with 39 unexcused absences).⁶ Student's final grades were all F's with 99 days absent.⁷

5. The Partnership for Assessment of Readiness for College and Careers, or PARCC, is the District of Columbia's annual assessment of mathematics and English language arts/literacy (ELA), based on the Common Core State Standards (CCSS). In the 2016-17, 2017-18, and 2018-19 school years, Student scored 1 ("Did not yet meet expectations") in ELA and Math and Algebra 1. In the 2017-18 school year, Student scored 1 in Algebra I. In the 2018-19 school year, s/he scored 2 ("Partially met expectations") in Geometry.⁸

6. For the 2018-19 and 2019-20 school years, Student had a total of 228 unexcused absences.⁹

7. On March 20, 2020, Petitioner's counsel requested a copy of Student's "entire" records.¹⁰

8. On March 26, 2020, DCPS provided Petitioner's counsel copies of attendance history from 2011 to the present, report cards from the 2018-19 through to the present, and the 3rd term Progress Report for the current school year.¹¹

9. On April 9, 2020, Petitioner's counsel specifically requested the Student Journal, Parent Contact Logs in SEDS, all Student Support Plans, and all discipline records.¹²

10. On April 10, 2020, DCPS sent Petitioner's counsel the Student Journal, and a

⁴ P14: 132-33.

⁵ P15:141.

⁶ *Id.* at 139-40.

⁷ P17:147.

⁸ P178: 147-48.

⁹ R5:10.

¹⁰ P20:173.

¹¹ P23:182; P24:187; P25:191-92; P26:198; P27:209.

¹² P31:226.

screenshot of the SEDS Parent Contact Log.¹³

11. On April 10, 2020, and April 13, 2020, Witness D informed Petitioner's counsel that the only disciplinary records were located on the premises at School A, but were inaccessible due to COVID-19 restrictions.¹⁴

12. Student was involved in one behavioral incident, but had no history of verbal aggression, and the staff at School A did not believe that his/her behavior was an issue.¹⁵

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹⁶

Here, the appropriateness of an IEP or placement is not at issue. Thus, Petitioner bears the burden of persuasion on both issues.¹⁷

Whether DCPS failed to locate, evaluate, and identify Student as a child with a disability ("child find").

The regulations require that:

The State must have in effect policies and procedures to ensure that—All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are

¹³ P32:232.

¹⁴ P34:247; P35:254-56; Testimony of Witness D.

¹⁵ Testimony of Witness D.

¹⁶ D.C. Code Sect. 38-2571.03(6)(A)(i).

¹⁷ *Schaffer v. Weast*, 546 U.S. 49 (2005).

identified, located, and evaluated...Child find also must include—Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade...¹⁸

This is referred to as the local education agency’s “child find” obligation. Petitioner cites Student’s poor grades and standardized test scores as evidence of an apparent disability that should have prompted DCPS to initiate evaluations to determine eligibility for special education services. Witness A testified that Student’s grades were declining, his/her SRI score indicated performance well below grade level, and his/her PARCC scores showed minimal progress in math and English language arts. DCPS argued that Student’s poor academic performance was directly attributable to his/her failure to attend school regularly; when s/he attended school regularly during the 2017-18 school year, Student had passing grades.

Petitioner relies on *Joaquin v. Friendship Public Charter School*¹⁹ to refute DCPS’ argument that Student’s unexcused absences were the primary reason for his/her poor academic performance. *Joaquin* is distinguishable on two counts. First, the issue in *Joaquin* was not childfind but the adequacy and implementation of an IEP for a child that already had been found eligible for services. Second, Petitioner’s counsel quoted language from the decision suggesting that a student’s truancy was not a defense to an LEA’s failure to provide services. In fact, the issue was DCPS’ failure to provide the transition services prescribed in the student’s IEP. Thus, truancy was not a viable defense because “the IDEA does not recognize a defense that the proper implementation of an IEP provision would have yielded no incremental benefit.” Petitioner’s reliance on *Daniels v. District of Columbia*,²⁰ *Middleton v. District of Columbia*,²¹ and *Wade v. District of Columbia*,²² is equally misplaced, as those cases also involved implementation of IEPs of students already found to be disabled. In *Middleton*, the primary issue was an alleged inappropriate placement, not child find. The court found that the student’s attendance problems were animated by the inappropriate placement.²³ In *Wade*, DCPS was found to have failed to provide an appropriate placement when it placed the student at a school that could not provide the full-time specialized services prescribed in the IEP. DCPS argued that the student’s grades improved with improved attendance. The court countered that while DCPS’ “argument makes common sense, it does not recognize that DCPS failed to place J.W. at a school that could implement the hours of special education and class sizes required by [his/her] IEPs.”²⁴

Petitioner’s counsel cited several cases from other jurisdictions for the proposition that “attendance issues trigger a school’s childfind obligation.” This is an erroneous characterization of the rulings. *Keystone Central School District v. E.E. ex rel. H.E.*²⁵ did not involve child find; the petitioner alleged a failure to implement the IEP, and the primary issue was the amount of compensatory education. Truancy was not an issue in the case. *Springfield*

¹⁸ 34 C.F.R. §300.311(a)(1)(i) and (c)(1).

¹⁹ Civ. Action No. 14-1119 (D.D.C. 2015).

²⁰ Civ. Action No. 14-665 (D.D.C. 2015).

²¹ 312 F.Supp.3d 113 (D.D.C. 2018).

²² 322 F.Supp.3d 123 (D.D.C. 2018).

²³ 312 F.Supp.3d at 145.

²⁴ 322 F.Supp.3d at 135.

²⁵ 438 F.Supp.2d 519 (M.D. 2006).

School Committee v. Doe,²⁶ did not involve child find. There, the student had already been found eligible for services, and his IEP placed him in a “partial inclusion social/emotional/behavioral support program.”²⁷ The court upheld the Hearing Officer’s ruling that the implementation of the student’s IEP required the school district to address his absenteeism.²⁸ Similarly, the student in *Independent School District No. 284 v. A.C. ex rel. C.C.* was eligible for services for “emotional and behavioral disorders.”²⁹ The issue was whether the school district should have been required to reimburse the parent for the student’s placement in a residential facility chosen, in part, to address the student’s truancy. The court concluded that the student’s emotional impairments were so significant that residential placement was necessary. “The only question here is whether she should go home at night or remain in a special institution twenty-four hours a day. Because the preponderance of the evidence show that she will not receive educational benefit in the less restrictive setting, the statute’s preference is overcome here.”³⁰ In *Falmouth School Department*,³¹ one of the allegations was the timely failure to identify the student as a child with a disability. The school district found the student eligible as a “multi-handicapped student.” Although the student exhibited separation anxiety from his mother, the findings of fact do not reflect that absenteeism was a factor in the eligibility determination. Student’s truancy began after the eligibility determination and became a serious problem a year after the determination.³² The state agency found that the eligibility determination was untimely, because the school was two school days late in convening an eligibility meeting; state law required the meeting within 45 school days of the referral.

Thus, Petitioner has cited no authority for the proposition that truancy alone warrants the initiation of child find procedures. Truancy is addressed in the District of Columbia Office of the State Superintendent of Education (“OSSE”) *Attendance and Truancy Resources*.³³ District law imposes on parents the obligation to ensure regular school attendance.³⁴ A student who has had ten or more unexcused absences within a single school year is considered to have chronic truancy.³⁵ After the fifth unexcused absence, schools must refer the student to a school-based student support team (“SST”).³⁶ After the tenth unexcused absence, the SST is required to present the school administrator with a plan for immediate intervention.³⁷ No provision in the OSSE policy statement, District law, or IDEA caselaw suggests that chronic truancy is presumptive indication of a disability. However, once a child is found to be disabled, truancy must be addressed by an IEP team, particularly in cases involving social/emotional issues.

²⁶ 623 F.Supp.2d 150 (D.Mass. 2009).

²⁷ *Id.* at 154.

²⁸ *Id.* at 159.

²⁹ 258 F.3d 769, 771 (8th Cir. 2001).

³⁰ *Id.* at 779.

³¹ 102 LRP 4414 (Maine Ed. Agency 1999)

³² Finding of Fact 49.

³³

https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Attendance%20and%20Truancy%20Resources%20%28Parent%20Notice%29_Iuly%2012%2C%202019.pdf

³⁴ D.C. Code §38-202(a).

³⁵ 5-A 21 D.C.M.R. §2199.

³⁶ 5-A 21 D.C.M.R. §2103.2(c)(3).

³⁷ 5-A 21 D.C.M.R. §2103.2(c)(4).

Petitioner elected not to testify at the hearing. Thus, there is no evidence that she harbored concerns that Student had a disability prior to March 2020. There is no allegation or record of any persistent disciplinary or behavioral issues. During the 2017-18 school year, Student earned C's in his/her core subjects. While these grades were not impressive, they indicate an ability to read, write, calculate and earn passing grades. During the 2018-19 and 2019-20 school years, Student failed every course, but by District standards, s/he was chronically truant, with a total of 228 unexcused absences during the 2018-19 and 2019-20 school years. No evidence was offered for the reason for the excessive absences.

The only evidence that DCPS should have suspected a disability was his/her PARCC and August 2018 SRI scores that showed no growth and performance well below grade level. Witness A testified that DCPS had enough information from this testing to discern that Student's growth was "stagnant" and that further evaluations should have been undertaken. However, the child find regulations provide that eligibility is not appropriate if the child has not received "appropriate" instruction in reading and math.³⁸ School A officials did not suspect Student to have a disability because of his/her passing grades in the 2017-18 school year; truancy was more of a "red flag" than his/her PARCC and SRI scores. DCPS was not unjustified in attributing Student's poor academic performance his/her 228 unexcused absences. In light of Student's grades of C+ in English and B in Algebra during the 2017-18 school year, the standardized test scores do not provide compelling, independent evidence of an apparent disability.

For all of these reasons, I conclude that Petitioner has failed to meet her burden of persuasion that DCPS was remiss in failing to locate, evaluate, and identify Student as a child with a disability on or before April 23, 2020.

I am aware that Student has now been evaluated by Witness A, Witness B, and Witness C. Each of these expert witnesses conducted evaluations after the inception of this proceeding. However, the issue presented is whether, at the time the *Complaint* was filed, DCPS had failed to identify Student as a child with a disability. Therefore, I excluded the evaluations from evidence and did not permit reference to the evaluations by the witnesses. These evaluations will undoubtedly lead to an eligibility meeting at the earliest possible date. Nothing in this decision should have any effect on those deliberations.

Whether DCPS failed to provide Petitioner access to Student's education records that were requested on March 20, 2020.

The regulations require the local education agency to allow parents to have access to their student's records:

- (a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—
 - (1) The identification, evaluation, and educational placement of the child; and

³⁸ 34 C.F.R. §300.306(b)(1) and (2).

(2) The provision of FAPE to the child.³⁹

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.⁴⁰

In *Petitioner's Closing Argument*, Petitioner's counsel referred only to Student Support Plans as records that DCPS had failed to provide. In OSSE's *Attendance and Truancy Resources*, schools must refer the student to a school-based student support team after the fifth unexcused absence. These teams then develop plans to address the truancy. Witness D testified that Student's support plans were in his/her teacher's office, which had been inaccessible since prior to Petitioner's initial records request due to COVID-19 restrictions.

The courts treat violations of this provision as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it "(1) impeded the child's right to a [FAPE], (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents' child; or (iii) caused the deprivation of educational benefits."⁴¹

Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid. On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE.⁴²

³⁹ 34 C.F.R. §300.501.

⁴⁰ 34 C.F.R. §300.613.

⁴¹ 20 U.S.C. §1415(f)(3)(E)(ii).

⁴² *N.B. and C.B. v. Hellgate Elementary School District*, 541 F.3d 1202, 1208 (9th Cir. 2008), citing *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 890 (9th Cir. 2001).

DCPS provided Petitioner all records to which it had access, and these records were all of the records relevant to a determination of whether DCPS unjustly failed to identify Student as a child with a disability. The student support plans were developed to address Student's truancy, and were not relevant the issue of his/her academic performance or behavior. Thus, the failure to provide the student support plans did not impede the child's right to a FAPE, did not impede Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE to Student, and did not cause any deprivation of educational benefits. I conclude that DCPS' failure to provide Petitioner copies of all student support plans did not constitute a denial of FAPE.

RELIEF

For relief, Petitioner requested;

1. Declaratory relief of a finding of a denial of FAPE for failure of childfind and failure to provide access to education records;
2. Injunctive relief including ordering DCPS to provide immediate access to Student's education records, for DCPS to fund independent comprehensive psychological, speech and language; and occupational therapy evaluations, a functional behavior assessment, and any other evaluation recommended in these evaluations; order DCPS to convene an IEP team meeting within 10 days of the final evaluation to review the evaluations and the FBA to determine eligibility, and if found eligible, to develop an appropriate IEP and BIP; and attorney's fees
3. Compensatory Education: At the IEP Meeting, the parties are to discuss compensatory education. In the alternative, DCPS shall be ordered to fund independent education evaluations at market rate to determine appropriate compensatory education. Petitioner may bring a due process complaint to enforce recommendations in the evaluation.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and pre and post-hearing submissions by the parties' counsel, it is hereby

ORDERED, that the *Complaint* is **DISMISSED**.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks

Terry Michael Banks
Hearing Officer

Date: August 10, 2020

Copies to: Attorney A, Esquire
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