

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 - First Street, N.E.; Washington, D.C. 20002
(202) 698-3819 www.osse.dc.gov

Confidential

Parent on behalf of Student¹)	Case No. 2022-0233
)	
Petitioners)	Hearing Dates: February 7-8, 2024
)	
v.)	Conducted by Video Conference
)	Date Issued: February 20, 2024
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X-year-old student (“Student”) attending School A. On November 28, 2023, Petitioner filed a Due Process Complaint alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to comply with its child find obligation to Student. On December 8, 2023, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint*, denying that it had denied Student a FAPE in any way.

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

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

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on November 28, 2023, alleging that DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner's request on or about January 11, 2022. Petitioner also alleged that DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner's second request on or about April 6, 2023.

On December 8, 2023, DCPS filed its *Response*, denying that it had denied Student a FAPE in any way. Specifically, DCPS alleged that after an Analysis of Existing Data ("AED") meeting on March 1, 2022, the multidisciplinary team ("MDT") agreed to evaluate Student in the area of communication, but it declined to evaluate her/him for academic concerns; his/her chronic absenteeism was an exclusionary factor. On July 5, 2022, DCPS issued a Prior Written Notice ("PWN") informing Petitioner that Student was not identified as a student with a disability following a review of the evaluation. DCPS denied having received a written request for initial evaluations of Student on or about April 6, 2023. DCPS asserted that on November 7, 2023, it received a referral from Petitioner with a request to evaluate Student in all areas of concern. An AED meeting was convened on December 8, 2023. The MDT agreed that DCPS would conduct psychological and speech and language evaluations.

The parties participated in a resolution meeting on December 12, 2023 that did not result in a settlement. The parties participated in a prehearing conference on December 20, 2023. The *Prehearing Order* was issued later that day.

The due process hearing was conducted on February 7-8, 2024 by video conference. The hearing was open to the public at Petitioners' request. Petitioner filed Five-Day Disclosures on January 31, 2024 containing a witness list of four witnesses and documents P-1 through P-43. DCPS filed objections to Petitioner's Disclosure on February 5, 2024. DCPS objected to expert testimony from Witness A and Witness B because they "would be unable to testify to any of the procedural allegations raised in the *Complaint*." Rulings on these objections were deferred until the witnesses' testimony was offered. DCPS also objected to Petitioners' Exhibits P1-P4, P7-P8, P11-P12, P24-P31, P34-P39, and P43. Petitioner's Exhibits P1-P2, P4-P6, P9-P11, P13-P27, P32-P33, P35, and P39-P43 were admitted into evidence.

Respondent's Disclosures, were also filed on January 31, 2024, containing a witness list of two witnesses and documents R1-R29. Petitioner filed objections to Respondent's disclosures on February 5, 2024. Petitioner objected to Respondent's proposed Exhibit R3, Resolution Meeting Notes. The objection to this document was sustained. Respondents' Exhibits R1-R2, and R4-R29 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner. Witness A was admitted as an expert in clinical psychology, and Witness B was admitted as an expert in special education. Respondent presented as witnesses in chronological order: Witness C and Witness D. Witness C was admitted as an expert in school social work, and Witness D was admitted as an expert in special education. At the conclusion of testimony, the parties' counsel provided oral closing arguments. The Hearing Officer authorized counsel to submit lists of authorities on which they relied on or before February 12, 2024. On February 12, 2024, Respondent filed *DCPS Citation Submission*; Petitioner filed *Petitioner's Citations*.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner's request on or about January 11, 2022. Specifically, Petitioner alleges that DCPS failed to complete initial evaluations until June 22, 2022, and conducted only a speech and language evaluation despite parent and teacher concerns about numeracy, learning new information, writing letters, and retaining information.
2. Whether DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner's request on or about April 6, 2023. Specifically, Petitioner alleges that DCPS ignored Petitioner's request.

FINDINGS OF FACT

1. Student is X years old and is currently enrolled in grade E at School A.²
2. On January 11, 2022, when Student was in grade M at School B, Petitioner requested initial evaluations of Student to determine his/her eligibility for special education services due to stuttering.³ On February 8, 2022, DCPS invited Petitioner to an Analysis of Existing Data ("AED") meeting on February 16, 2022.⁴
3. On March 1, 2022, DCPS convened an Analysis of Existing Data ("AED") meeting.⁵ Student had been absent 29 of 75 days, and tardy 30 days. At the meeting, Petitioner reported that Student did not recognize all numbers and Student's ability to express her/himself. Teacher A, Student's teacher, confirmed Student's weakness recognizing numbers 1-20. She also had concerns about Student's following directions and gaining information. Teacher A reported dysfluencies in casual conversation with peers, frustration with peer help, and temper tantrums in the classroom. During a fifteen-minute fluency screening during the meeting, s/he displayed dysfluency on one occasion.⁶
4. Student transferred to School A in April 2022 solely for family reasons unrelated to School B.⁷

² Petitioner's Exhibit ("P:") 23 at page 1 (155). The exhibit number and exhibit page numbers are followed by the digital page number in the disclosure in parentheses, i.e., P23:1(155).

³ P18:1 (138). The cite references the first sentence of the March 1, 2022 AED form. Petitioner also signed a Standard Initial Referral Form indicating that the referral date was February 2, 2022. That form indicated that Petitioner was concerned with Student's stuttering. Respondent's Exhibit ("R:") 19 at page 53. The exhibit number is followed by the digital page, i.e., R19:53.

⁴ R20:54.

⁵ *Id.*

⁶ P18 at 1-3 (138-140).

⁷ Petitioner's testimony.

5. Petitioner provided consent for a speech and language evaluation on May 11, 2022.⁸ On May 23, 2022, DCPS issued a Prior Written Notice (“PWN”) indicating its intention to conduct a speech and language evaluation of Student.⁹

6. On June 7, 2022, Examiner A of DCPS completed an Initial Speech & Language Evaluation of Student. Student was referred for the evaluation by Petitioner, who was concerned about Student’s stuttering.¹⁰ Student’s teacher at School A, Teacher B, reported that she had no concerns, because Student was meeting academic expectations, although Student had been often absent in his/her three months at School A. Teacher B had noticed stuttering on but one occasion. Student talked in incomplete sentences and had difficulty maintaining conversations, but s/he followed directions and had no difficulty understanding age-appropriate vocabulary words.

[Student] is able to retell a story and is recognizing numbers and letters. [Teacher B] reports no concerns with understanding [Student] and that [his/her] peers do not have difficulty understanding what [s/he] is saying... [S/he] is able to understand comprehension questions about a story that is read to [her/him] but requires excessive wait time in order to respond. [Student’s] strengths include: active learner, identifies 23 uppercase and 20 lowercase letters, produces the sounds of 20 letters. Areas of growth include: appropriate interactions with peers...¹¹

Examiner A administered the [Grade M] Language Scale (“PLS-5”) to measure Student’s articulation. Student’s raw score of 20 was in the normal range. His/her overall speech intelligibility in structured and unstructured conversation was “Good” to an unfamiliar listener in known and unknown contexts. “Average articulation and phonological development skills suggest that [Student] should not experience difficulty being understood when communicating thoughts and ideas or participating in oral language activities (e.g. oral narratives, discourse, story retells) within the general education environment.”¹² Examiner A administered The Stuttering Severity Instrument (SSI-4) to assess Student’s fluency. Examiner A observed no dysfluencies during the assessment, leading to the conclusion that Student’s “Average fluency skills will support [Student’s] ability to engage freely in classroom discussions and actively participate in conversations with peers.”¹³ Student’s Receptive Vocabulary and Expressive Vocabulary skills, Auditory Comprehension, Expressive Communication, and Pragmatic Language skills were also within the expected range.¹⁴

7. DCPS conducted a Final Eligibility Determination Report on June 22, 2022. The multidisciplinary team (“MDT”) determined that “[Student] does not have a disability that affects [her/his] educational performance.” The form indicated Petitioner’s agreement with the determination.¹⁵ On July 5, 2022, DCPS issued a PWN reporting its determination of Student’s non-eligibility.¹⁶

⁸ P5:1 (34)

⁹ P20:1 (145).

¹⁰ P5:1 (34)

¹¹ *Id.* at 2 (35).

¹² *Id.* at 3 (36).

¹³ *Id.* at 4 (37).

¹⁴ *Id.* at 4-6 (37-39).

¹⁵ P9:1 (66).

¹⁶ P21:1 (148).

8. On April 6, 2023, Petitioner sent an email to Witness D, School B's Special Education Coordinator, requesting DCPS to evaluate Student "for an IEP."¹⁷

9. At the end of grade H at School A, Student received the following grades and teacher comments for the 2022-23 school year: Proficient in Mathematics (demonstrated strength in identifying numbers between 11-19 and understanding the concept of subtraction; developing problem solving skills and can apply basic math strategies to solve simple word problems), Science (demonstrated good observation skills and could describe and discuss the characteristics of living things and non-living things; developing an understanding of basic scientific concepts; demonstrated strength in the use of counting and numbers to identify patterns), Social Studies (showed an interest in learning about different cultures and traditions; actively participated in discussions and demonstrated an understanding of basic community roles and responsibilities; demonstrated strength in arguments with reasons), Art, Health & Physical Education, and World Languages, and Basic in English Language Arts ("ELA") (demonstrated strength in recognizing that spoken words are represented in print by specific sequences of letters). The report card indicated that based on a mid-year ("MOY") Reading assessment on January 26, 2023, Student's DIBELS placed him/her Below Grade Level. Based on an i-Ready Mathematics assessment on January 17, 2023, Student's score of 344 was Below Grade Level Range. Student had a Section 504 plan during the school year.¹⁸ During the 2022-23 school year, Student was absent 20 days (8 unexcused) and tardy 33 days.¹⁹ In the area of Social Emotional Learning, Student showed significant growth in "Building and maintaining healthy relationships across differences by listening, communicating, and collaborating. For example: [Student] listens actively to adults and peers."²⁰

10. Student's 2022-23 year-end ("EOY") mCLASS Reading assessment Composite score of 411 was nine points below the grade level expected range beginning at 420.²¹ His/her EOY i-Ready Math assessment score of 348 was at the Emerging Grade H level, placing him/her one grade level behind.²² His/her Reading EOY i-Ready Overall Placement score of 343 was also in the Emerging Grade H level.²³

11. On July 19, 2023, Petitioner reiterated her request for initial evaluations of Student.²⁴

12. Student's September 13, 2023 i-Ready Reading Assessment overall score of 378 was one grade below grade level.²⁵ His/her September 29, 2023 i-Ready Math Assessment overall score of 345 was two grades below grade level.²⁶

13. On November 9, 2023, when Student was in grade E at School A, DCPS

¹⁷ P26:1 (171).

¹⁸ R18:50-52. Section 504: 29 U.S.C.A. § 794.

¹⁹ R17:48.

²⁰ P13:1 (84).

²¹ R12:31.

²² R9:25.

²³ R11:29.

²⁴ P27:1 (173).

²⁵ P15:1 (94).

²⁶ P16:1 (112).

acknowledged receiving a November 7, 2023 referral for evaluations.²⁷

14. On Student's report card for the first term of the 2023-24 school year, dated December 1, 2023, s/he earned the following grades and teacher comments: Proficient in Health and Physical Education, Music, and Spanish, and Basic in ELA, Mathematics, and Art. Her/his September 7, 2023 BOY Reading assessment score and her/his September 19, 2023 BOY Math assessment were Below Grade Level.²⁸

15. On or about December 13, 2023, DCPS conducted an AED meeting. Petitioner "would like for [Student] to be able to self soothe and communicate [his/her] emotions without getting frustrated or overwhelmed. [Student] displays great impulsivity, physical aggression toward peers and authority figures, does not follow directions and is hyperactive." A Behavior Screening indicated that Student had no Behavior Infractions during the school year.²⁹ Student's September 19, 2023 beginning of the year ("BOY") i-Ready Math assessment score of 345 placed her/him one grade below grade level. Her/his September 13, 2023 i-Ready Reading score of 378 was also one grade below grade level.³⁰ In the area of Communication, Teacher C, Student's ELA Teacher, reported that Student's attention can impact her/his performance and engagement, but s/he had made great progress since the beginning of the year with letter-sound identification and blending of short words. The team concluded that "[Student] may be having difficulties communicating in the classroom due to [her/his] speech fluency, comprehension of directions, and/or vocabulary skills."³¹

In the area of Emotional, Social and Behavioral development, it was noted that Student had no behavioral infractions during the 2023-24 school year, one during 2022-23, and none during 2021-22. On a Strength and Difficulties Questionnaire ("SDQ") rating form completed by Teacher D, Student's Homeroom/ELA teacher, Student was predicted to be a Medium Risk for Any Disorders, a Low Risk for Behavioral Disorders, and a Medium Risk for Hyperactivity or Concentration Disorders. On the Behavior Rating Inventory of Executive Function ("BRIEF"), Teacher D's responses included "Rarely" for sympathetic towards others' feelings, "Never" for ignoring distractions by classmates, "Often" for bullying other students, instigating peers with teasing or put-downs, "Almost Always" for physically aggressive towards peers, and "Often" for having trouble staying focused, failing to complete assignments on time, and becoming easily distracted. The team concluded that Student "struggles with self-regulation as it relates to mild to moderate off-task, oppositional behaviors, along with occasional verbal/physical aggression (in the school setting). However, [Student's] behaviors have not reached to the severity warranting a disciplinary action, such as in-school and/or out-of-school suspension. It must be noted [Student's] self-regulation challenges are to be expected due to [his/her] ADHD diagnosis. Additionally, [her/his] acting out behaviors seem to be more prevalent or more intense in the home setting."³² The MDT determined that Student required the following evaluations: psychological, speech and

²⁷ R2:2.

²⁸ P14:1-4 (89-92).

²⁹ R4:8.

³⁰ *Id.* at 9-10.

³¹ *Id.* at 11.

³² *Id.* at 11-15.

language, and occupational therapy.³³ Petitioner provided written consent for the evaluations at the AED meeting.³⁴

16. As for Student's classroom behavior, Teacher D reported that Student occasionally elopes from the classroom because s/he wants to accompany a particular classmate to the bathroom or nurse. One of the two students was reassigned to another classroom to prevent the eloping behavior. Teacher D reported that Student complies when redirected in the classroom. She conceded that Student's need for redirection adversely affects his/her progress, but it does not impede the learning of classmates. Teacher D reported that Student was making progress with her and a reading interventionist in a small group; Student had made progress having learned all letter sounds, progress in blend sounds to decode c-v-c words, and is able to read simple sentences. The MDT determined that there was enough information to suspect that Student has an IDEA disability, but not enough to determine her/his eligibility for services, thereby warranting evaluations.³⁵

17. Witness A, Petitioner's expert in clinical psychology, declined to opine as to what the 2021-22 MDT should have done, but testified that for a student with Student's profile, it may be best to conduct a comprehensive psychological evaluation. Witness A also testified that in the event Student missed considerable instruction due to absences, s/he would need to attend regularly before a determination as to disability could be made. As for the December 2023 MDT, based on Teacher D's responses to the SDQ, Witness A opined that Student should have received a comprehensive psychological evaluation.³⁶

18. Witness B, Petitioner's educational advocate, opined that DCPS should have honored Petitioner's request for evaluations in January 2022 based on the Health Services Plan in Petitioner's proposed Exhibit P8 and the Basic grades on Student's report card. Witness B also opined that DCPS should have ordered evaluations upon Petitioner's request in January 2022 because of Teacher A's comments at the AED Meeting in March 2022 that she was concerned about Student's ability to gain information. Finally, Witness B opined that Student required an FBA based on comments by Student's teachers at the December 2023 AED meeting.³⁷

19. Petitioner testified that she provided DCPS with a health assessment upon Student's enrollment at School A in April 2022.³⁸ Petitioner testified that during the spring of 2022, she received numerous telephone calls from Teacher E at School B that Student was walking out of class or not remaining in his/her seat. When Student was enrolled at School A, Witness D, School A's Special Education Coordinator, informed Petitioner that School A did not currently have the capability to perform evaluations for Student. During the 2022-23 school year, Petitioner testified that she continued to get telephone calls reporting that Student could not stay focused and was

³³ *Id.* at 16.

³⁴ R5:17.

³⁵ P11:2-3 (79-80).

³⁶ Testimony of Witness A.

³⁷ Testimony of Witness B.

³⁸ The referenced document, Petitioner's proposed Exhibit 8 was not admitted into evidence, because it was not authenticated; it was prepared by a social worker whose credentials were unknown and who was not listed as a potential witness. Moreover, the Plan of Care was dated June 20, 2023, 17 months after the original referral and 14 months after Student's enrollment at School A. P8:1 (50). The Plan includes an Initial Psychiatric Evaluation dated July 6, 2022, five months after the referral, two months after Student's transfer to School A, and more than two weeks after the initial eligibility meeting on June 22, 2022. P8:13 (62)..

performing below grade level. Petitioner testified that on April 6, 2023, she made another written request for evaluations. When DCPS ignored her request, she sent another email reiterating her request on July 19, 2023. Petitioner testified that Student had been suspended on a number of occasions, but Petitioner had no documentation to corroborate the disciplinary actions.³⁹

20. Witness C is a school social worker at School A. Witness C conducted the BRIEF referenced in paragraph 15 above. She testified that a comprehensive FBA II would not be warranted in Student's case, because s/he had no behavioral infractions, had exhibited no unsafe behaviors, no classroom disruptions, and his/her elopements were not persistent. Student's teachers reported that Student was manageable and easily redirected. Witness C conceded that a less comprehensive FBA I would be "helpful."⁴⁰

21. Witness D, School A's Special Education Coordinator, conceded that she informed Petitioner that School A did not have a school psychologist and would have to coordinate with DCPS' central office to arrange for a psychological evaluation for Student. School A had no concerns over Student's behavior; s/he had no infractions at School A, and his/her teacher was not seeing elopement, off-task behavior, or conflicts with peers. Witness D opined that evaluations were not warranted during the 2022-23 school year for academic deficiencies, because Student was making academic gains. DCPS has completed the three evaluations it agreed to conduct at the December 2023 AED meeting.⁴¹

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:

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.⁴²

The issues in this case do not involve an alleged failure of DCPS to provide an appropriate IEP or placement. Thus, under District of Columbia law, Petitioners bear the burden as to all issues.⁴³

³⁹ Petitioner's testimony.

⁴⁰ Witness C's testimony.

⁴¹ Witness D's testimony.

⁴² D.C. Code Sect. 38-2571.03(6)(A)(i).

⁴³ *Schaffer v. Weast*, 546 U.S. 49 (2005).

Whether DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner’s request on or about January 11, 2022. Specifically, Petitioner alleges that DCPS failed to complete initial evaluations until June 22, 2022, and conducted only a speech and language evaluation despite parent and teacher concerns about numeracy, learning new information, writing letters, and retaining information.

IDEA requires local education agencies to identify and evaluate all students suspected of having disabilities to determine their eligibility for special education services:

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 disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.⁴⁴

The regulations define a child with a disability as follows:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.⁴⁵

In compliance with IDEA, District of Columbia law requires local education agencies such as DCPS to locate and identify children suspected of having a disability:

Each LEA and public agency shall publish and implement child find policies and procedures to ensure that:

(a) All children with disabilities between the ages of three (3) and twenty-two (22) years old enrolled in the LEA, including children with disabilities who are homeless, children who are in the custody of the District of Columbia CFSA or committed to DYRS, children who are suspected of being a child with a disability even though they are making progress grade to grade, and highly mobile children, who are in need of special education and related services, are identified, located, and evaluated...⁴⁶

⁴⁴ 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a)(1)(i).

⁴⁵ 34 C.F.R. §300.8(a)(1).

⁴⁶ 5-A DCMR § 3003.1(a).

The District's regulations require an LEA to consider any oral or written referral from a parent, an employee of an LEA, or an employee of a public agency who has knowledge of the child, as a request for an initial evaluation of the child.⁴⁷ The LEA must issue a PWN informing the parent of its decision to evaluate or not evaluate the child.⁴⁸ If the LEA decides to evaluate the child, it must (1) initiate efforts to secure parental consent for the evaluation within ten days of the referral, (2) make and document its reasonable efforts, to obtain parental consent within thirty days from the date on which the child is referred, and (3) evaluate and make an eligibility determination within sixty days from the date that the student's parent or guardian provides consent for the evaluation.⁴⁹

Here, DCPS' March 1, 2022 AED form confirmed that Petitioner requested evaluations on January 11, 2022. Under local regulations, DCPS was required to initiate efforts to secure parental consent for the evaluations within ten days of the referral and evaluate and make an eligibility determination within sixty days of receiving consent, or issue a PWN informing Petitioner of its decision not to evaluate Student. DCPS provided no documentation or testimony that it complied with any of these requirements. Therefore, I conclude that DCPS failed timely to complete initial evaluations of Student.

DCPS' failures to meet the deadlines for initiating initial evaluations are procedural violations. However, a Hearing Officer's determination of whether a child was denied a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.⁵⁰ In other words, an IDEA claim is viable only if those procedural violations affected the child's substantive rights.⁵¹

Petitioner's request for evaluations was based on Student's stuttering. Petitioner offered no testimony or documentation that she had any academic concerns or concerns as to a potential disability other than Student's stuttering when she requested DCPS to evaluate Student. Petitioner offered no contemporaneous educational records or medical records suggesting the possibility of a disability. Examiner A completed a speech and language evaluation on June 7, 2022 in which she observed no dysfluencies, leading to the conclusion that Student's "Average fluency skills will support [Student's] ability to engage freely in classroom discussions and actively participate in conversations with peers." Student's Receptive Vocabulary and Expressive Vocabulary skills, Auditory Comprehension, Expressive Communication, and Pragmatic Language skills were also within the expected range. Thus, the only potential disability raised by Petitioner in her referral was refuted by a comprehensive speech and language evaluation five months later.

Witness A, Petitioner's expert in clinical psychology, declined to opine as to what the March and June 2022 MDTs *should have done*, and conceded that in the event Student missed considerable instruction due to absences, s/he would need to attend regularly before a

⁴⁷ 5-A DCMR § 3004.1 and § 3004.5.

⁴⁸ 5-A DCMR § 3005.2.

⁴⁹ 5-A DCMR § 3005.4.

⁵⁰ 34 C.F.R. 300.513(a).

⁵¹ *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015); *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

determination as to disability could be made. As of the date of the March 1, 2022 AED meeting, Student had been absent 29 of 75 days enrolled (38.7% of instructional days), and tardy 30 days. Under District law, ten unexcused absences in a school year is considered truancy, warranting referral to the local child welfare agency.⁵²

Witness B, Petitioner's educational advocate, opined that DCPS should have honored Petitioner's request for evaluations in January 2022 based on the Health Services Plan in Petitioner's proposed Exhibit P8, and the Basic grades on Student's report card. Petitioner's proposed Exhibit P8 was not admitted into evidence, because it was not authenticated. It was prepared by an individual whose credentials were unknown, and who was not listed as a potential witness. Petitioner testified that she provided School A the Plan upon Student enrollment in April 2022. However, the Plan of Care was dated June 20, 2023, 17 months *after* the original referral and 14 months *after* Student left School B. The Plan included an Initial Psychiatric Evaluation dated July 6, 2022, completed five months *after* the referral, two months *after* Student left School B, and more than two weeks *after* the initial eligibility meeting on June 22, 2022. Therefore, School B could not have had access to the Plan or the Initial Psychiatric Evaluation at any time prior to its AED meeting on March 1, 2022, and School A could not have had access to them at the final determination of eligibility on June 22, 2022. As for report cards available at that time, Petitioner did not offer a report card into evidence for the 2021-22 school year. Witness B also opined that DCPS should have ordered evaluations upon Petitioner's request in January 2022 because of Teacher A's comments at the AED Meeting in March 2022 that she was concerned about Student's ability to gain information. However, the MDT in June 2022 had access to Examiner A's evaluation in which she interviewed Teacher B, Student's teacher for her/his first three months at School A. Teacher B, reported that she had no academic concerns, because Student was meeting academic expectations, although Student had been often absent.

Petitioner testified that during the *spring* of 2022, she received numerous telephone calls from Teacher E at School B that Student was walking out of class or not remaining in his/her seat. The spring of 2022 is more than two months after the referral and well after the March 1, 2022 AED meeting. This suggests that Petitioner's actual concerns, both when she made the referral and at the AED meeting, were consistent with the referral form she signed, and were limited to Student's stuttering.

While the June 2022 evaluation was untimely, it justified DCPS' subsequent determination at the June 22, 2022 eligibility meeting that Student was not eligible for special education services. For these reasons, I conclude that DCPS' procedural violation did not ultimately cause a deprivation of educational benefit to Student. Therefore, Petitioner has failed to meet her burden of proving that DCPS' failure timely to evaluate Student after the January 11, 2022 referral constituted a denial of FAPE.

⁵² D.C. Code § 38-202(b) and (c).

Whether DCPS denied Student a FAPE by failing timely to conduct comprehensive initial evaluations of Student upon Petitioner’s request on or about April 6, 2023. Specifically, Petitioner alleges that DCPS ignored Petitioner’s request.

Petitioner reiterated her request for evaluations for Student in emails on April 6, 2023 and July 19, 2023. On both occasions, DCPS violated its obligation to initiate efforts to secure Petitioner’s consent to evaluate and to complete evaluations within sixty days, or to issue a PWN notifying Petitioner of its decision not to evaluate Student. Again, a determination must be made as to whether these procedural violations resulted in a deprivation of educational benefit.

Student’s final 2022-23 report card revealed grades of Proficient in Mathematics, Science, Social Studies, Art, Health & Physical Education, and World Languages. As documented in paragraph 9 above, Student’s teachers in Mathematics, Science, Social Studies, and ELA commended his/her academic progress and classroom participation. Although Student’s 2022-23 BOY and MOY assessments in Math and ELA indicated that s/he was performing below grade level, Student was absent 20 days and tardy 33 days during the school year. While Student did not meet the threshold of 10 *unexcused* absences to be deemed truant,⁵³ s/he missed more than 11% of the 180 days of instruction. In the area of Social Emotional Learning, Student showed significant growth in “Building and maintaining healthy relationships across differences by listening, communicating, and collaborating. For example: [Student] listens actively to adults and peers.” Witness C, School A’s social worker, testified that Student had no behavioral infractions, had exhibited no unsafe behaviors, no classroom disruptions, and his/her elopements were not persistent. Student’s teachers reported that Student was manageable and easily redirected. Witness B, Petitioner’s educational advocate, opined that Student required an FBA based on comments by Student’s teachers at the December 2023 AED meeting. However, Student’s struggles with self-regulation were characterized as mild to moderate, and had never reached the level warranting even one disciplinary action. The December 2023 MDT also noted that Student’s self-regulation challenges seemed to be more prevalent and/or intense at home, rather than in the classroom.

For these reasons, I conclude that Petitioner has not shown that DCPS’ procedural violations, failing timely to comply with initial evaluation procedures after referrals in April and July 2023, ultimately caused a deprivation of educational benefit to Student. Therefore, Petitioner has failed to meet her burden of proving that DCPS’ failure timely to evaluate Student after these referrals constituted denials of FAPE. After yet another referral on November 9, 2023, DCPS honored Petitioner’s request that it conduct psychological, occupational therapy, and speech and language evaluations at the December 13, 2023 AED meeting, at which DCPS also secured Petitioner’s consent to evaluate.

RELIEF

For relief, Petitioner requests (1) an order requiring DCPS to conduct a comprehensive psychological evaluation (including cognitive, academic, social/emotional, and executive functioning), a comprehensive speech and language (“S/L”) evaluation, a comprehensive occupational therapy (“OT”) evaluation, and a functional behavior assessment (“FBA”), (2)

⁵³ D.C. Code § 38-202(c)(1)(A).

compensatory education services or funding for determination of any additional information necessary to determination of the appropriate compensatory education and funding of the compensatory education services warranted by the developed new information, and (3) attorney's fees.


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 the parties' post-hearing submissions, it is hereby

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

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
Hearing Officer

Date: February 20, 2024

Copies to: Attorney A, Esquire
Attorney B, Esquire
OSSE Office of Dispute Resolution