

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
March 25, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2016-0041
v.)	
)	Date Issued: March 25, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“DCMR”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on February 23, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On March 3, 2016, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on March 1, 2016. The parties did not reach an agreement during the RSM. The DPC contains a discipline-related allegation; therefore, the case had to be heard on an expedited timeline. Accordingly, the DPH had to occur by March 22, 2016 (20 school days after the DPC was filed) and the deadline for the Hearing Officer’s Determination (“HOD”) in this matter is April 8, 2016 (10 school days after the DPH convened on March 18, 2016).

The undersigned Impartial Hearing Officer (“Hearing Officer”) held a Pre-hearing Conference (“PHC”) on March 3, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be

¹ Personal identification information is provided in Appendix A.

filed by March 11, 2016 and that the DPH would be held on March 18, 2016. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on March 7, 2016.

The DPH was held on March 18, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. and DCPS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-6 and P-9 were admitted without objection. Petitioner did not offer P-7 or P-8 into evidence. Respondent’s exhibits R-1 and R-3 were admitted without objection. Respondent did not offer into evidence R-2 or R-4.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Psychologist (Parent)²

Respondent called the following witness at the DPH:

- (a) Psychologist (DCPS)³

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO and subsequently narrowed by Petitioner, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to comply with the child find obligations pursuant to 34 C.F.R. §300.111, including by failing to evaluate Student following Parent’s several requests from February 23, 2014 through the present time, in light of Student’s socio-emotional and learning disabilities, ADHD, anxiety, school phobia, depression, and other areas of concern described in the DPC.
- (b) Whether DCPS denied Student a FAPE by failing to determine Student eligible, develop an IEP and provide a special education placement from February 23, 2014 through the present time.
- (c) Whether DCPS denied Student a FAPE by failing to comply with 34 C.F.R. §§ 300.530-536, in that it effectively suspended Student from summer school during the summer of 2015 (though summer school attendance was necessary in order for Student to be promoted to the next grade) without convening the required meeting.

² Qualified as an expert in clinical psychology, without objection.

³ Offered but not qualified as an expert in psychology and evaluation, as no *curriculum vitae* for the witness was included in the five-day disclosures.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) an Order that DCPS fund an independent comprehensive psychological evaluation and an independent functional behavioral assessment at community market rate, and not limited to the amount described in the DCMR;
- (b) an Order that DCPS convene an MDT meeting to review all evaluations and develop an IEP, to include placement/location of services.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides with her mother (“Petitioner”/”Parent”) in Washington, D.C., and has at times resided with another relative in a different jurisdiction (“Other Relative”).⁴
2. Student has previously been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), Mood Disorder and Anxiety Disorder. Student perceives herself as being overweight, which makes her feel extremely self-conscious. Student has not been determined eligible for special education and related services.⁵
3. Student was enrolled at District School from the 2013-2014 school year until approximately November 2015.⁶
4. Parent and Student moved into the District of Columbia from another jurisdiction where Student had significant behavioral challenges in school. Upon enrolling Student in District School, Parent informed the principal of Student’s previous behavioral challenges.⁷
5. From at least August 2014 to the present, Parent made numerous requests to the special education coordinator, vice principal and principal of District School that Student be evaluated for eligibility for special education services. District School did not evaluate Student, and indicated to Parent that she would not qualify due to her intellect.⁸
6. Student had two psychiatric hospitalizations while attending District School, and District School was aware of the hospitalizations.⁹
7. Due to Student’s continued school difficulty, District School encouraged Parent to take Student to live with Other Relative. Parent sent Student to live with Other Relative toward the end of the 2014-2015 school year. Student did not attend school while living in the different jurisdiction with Other Relative.¹⁰

⁴ Testimony of Parent.

⁵ Testimony of Parent; testimony of Psychologist (Parent); P-6.

⁶ Testimony of Parent.

⁷ *Id.*

⁸ *Id.*

⁹ Testimony of Parent; P-6-2.

¹⁰ Testimony of Parent.

8. Student had been in danger of failing her grade during the 2014-2015 school year, and District School told Parent that Student would need to attend summer school in order to be promoted. Parent brought Student back from Other Relative's home, in part so that Student could attend summer school. However, District School told Parent it did not have the staffing to support Student's behavioral challenges and Student would not be permitted to attend summer school. Ultimately, Student was promoted to the next grade, even though she did not attend summer school.¹¹

9. As of November 2015, Student has been homeschooled at Parent's expense. Student is thriving with homeschool. She is happy, eating well, maintaining her personal hygiene. However, Parent does not want Student to be homeschooled as a permanent arrangement. She wants Student to be around others her age and to return to school. Funding homeschool for Student also poses a financial strain for Parent, who has to work two jobs to pay the homeschool expenses in addition to her other obligations.¹²

10. In February 2016, Parent contracted with Psychologist (Parent) to administer a comprehensive psychological evaluation to Student. As of that time, DCPS had not yet provided Parent an authorization for an independent educational evaluation ("IEE"). Psychologist (Parent) nevertheless agreed to evaluate Student, and explained to Parent that once an IEE was issued, Psychologist (Parent) would be willing to bill through the IEE to collect the bulk of her fee; however, Parent would be contractually obligated to pay any remaining balance.¹³ Psychologist (Parent) conducted assessments with Student on February 9, 2016 and prepared an evaluation report dated March 7, 2016.¹⁴

11. On March 1, 2016, DCPS provided an IEE to Parent to obtain a comprehensive psychological evaluation for Student.¹⁵ The IEE authorized a maximum fee of \$1,360.32. However, Psychologist (Parent)'s actual fee for conducting the comprehensive psychological evaluation for Student was \$2,000. The \$2,000 fee is fair market rate for the time and effort Psychologist (Parent) expended in conducting the evaluation.¹⁶ In the past, Psychologist (Parent) has attempted to obtain the difference between an IEE rate and her market rate through the variance procedure provided for through the DCMR and it took years for her to receive the full payment.¹⁷

12. Prior to preparing the evaluation report, Psychologist (Parent) attempted to obtain input about Student from District School; however, District School did not provide the requested feedback.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ Testimony of Psychologist (Parent).

¹⁴ P-6-1.

¹⁵ R-3-1.

¹⁶ Testimony of Psychologist (Parent).

¹⁷ *Id.*

¹⁸ *Id.*

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 DCMR E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer’s determination of whether a child received 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 student’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. 34 C.F.R. § 300.513(a).

- (a) **Whether DCPS denied Student a FAPE by failing to comply with the child find obligations pursuant to 34 C.F.R. §300.111, including by failing to evaluate Student following Parent’s several requests from February 23, 2014 through the present time, in light of Student’s socio-emotional and learning disabilities, ADHD, anxiety, school phobia, depression, and other areas of concern described in the DPC.**

An LEA is responsible for identifying, locating and evaluating all children with disabilities who reside in the District of Columbia. 34 C.F.R. §§300.111, 300.131. At a parent’s request, a public agency must conduct a full and individual initial evaluation to determine if the child is a child with a disability. 34 C.F.R. §300.301. DCPS must conduct this initial evaluation within 120 days from the date that the student was referred for an evaluation or assessment. 34 C.F.R. §300.301(c), D.C. Code 38-2561.02(a). In addition to any areas of concern providing an independent basis for DCPS to suspect Student may potentially have a disability (such as her in-school behavioral challenges, ADHD diagnosis, psychiatric hospitalizations, and poor attendance) Parent also made numerous requests for evaluations over at least the past two years. Even counting from the February 23, 2014, 120 days had passed by approximately May 26, 2014, and then passed again many times over and DCPS had not evaluated Student. Respondent’s failure to evaluate Student impeded Student’s right to a FAPE, significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and potentially caused Student a deprivation of educational benefit. Petitioner met the burden of proving that DCPS denied Student a FAPE by failing to comply with the child find obligations pursuant to 34 C.F.R. §300.111, including by failing to evaluate following Parent’s several requests.

(b) Whether DCPS denied Student a FAPE by failing to determine Student eligible, develop an IEP and provide a special education placement from February 23, 2014 through the present time.

When conducting an initial evaluation, an LEA must include “procedures to determine if the child is a child with a disability” and “to determine the educational needs of the child.” 34 CFR § 300.301(c)(2). As indicated above, DCPS did not evaluate Student after Parent requested evaluation, and likewise it did not make a formal determination regarding whether Student is eligible. Despite her best efforts, Psychologist (Parent) was not able to obtain the input she requested from District School prior to preparing her evaluation report. Without input from District School, the Hearing Officer does not have sufficient information in this instance to make a determination regarding whether Student is in fact eligible, as Student’s educational performance across her recent educational settings (home and District School) would be a relevant consideration. However, Respondent’s failure to make a determination regarding whether Student is eligible impeded Student’s right to a FAPE, significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and potentially caused Student a deprivation of educational benefit. Petitioner met the burden of proving that DCPS denied Student a FAPE in failing to make a determination by approximately May 26, 2014 regarding whether or not Student is eligible.¹⁹

(c) Whether DCPS denied Student a FAPE by failing to comply with 34 C.F.R. §§ 300.530-536, in that it effectively suspended Student from summer school during the summer of 2015 (though summer school attendance was necessary in order for Student to be promoted to the next grade) without convening the required meeting.

Pursuant to 34 CFR § 300.534(a),

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

DCPS is required to convene a student’s IEP team for a MDR/IEP team meeting “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.”²⁰ The statute dictates that a “change of placement” has occurred when the child has been subjected to a series of removals that constitute a pattern, (i)

¹⁹ The fact that Student began homeschooling in November 2015 did not toll the timeline, because Parent never declined an offer of FAPE, denied consent to, or refused to make Student available for services from DCPS. Rather she at all relevant times continued to seek evaluation, an eligibility determination and placement. *Letter to Harris*, 20 IDELR 1225 (OSEP 1993).

²⁰34 CFR § 300.530(e).

because the series of removals totals more than 10 school days in a school year; (ii) because the student's behavior is substantially similar to his behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.²¹

In this case, Student had not yet been determined eligible for special education and related services during the summer of 2015. DCPS had knowledge, at least by way of Parent's several requests for evaluation, that Student may be a child with a disability. However, Petitioner does not allege that Student violated any particular code of conduct during the summer of 2015. Rather, Petitioner alleges that District School prevented Student from attending summer school in anticipation of what her behavior may be like during that summer. Petitioner testified that Student has been suspended, but there was not evidence regarding when Student was suspended and for how long. Student ultimately was promoted to the next grade for the 2015-2016 school year, though she did not attend summer school in summer 2015. The Hearing Officer does not find sufficient evidence to conclude that DCPS denied Student a FAPE by failing to comply with 34 C.F.R. §§ 300.530-536, in effectively suspending Student from summer school during the summer of 2015.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall fund the actual cost (not to exceed \$2,000) of the independent comprehensive psychological evaluation Parent obtained for Student from Psychologist (Parent), reflected in a report dated March 7, 2016;²²
- B. DCPS shall fund an independent functional behavioral assessment for Student;
- C. DCPS shall convene an MDT meeting within 10 school days of this decision to review evaluation data obtained to date, to make an eligibility determination, and to develop an IEP if Student is determined eligible.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: March 25, 2016

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

²¹ 34 CFR § 300.536(a).

²² P-6. Citing DCMR tit. 5-E, § 3000 et seq., Respondent noted that there is a regulatory variance scheme that could have been used to obtain the balance due of Psychologist (Parent)'s fee. However, given that DCPS had not evaluated Student despite Parent's several requests over a long period of time, given the risk Parent and Psychologist (Parent) took to jumpstart the evaluation process after DCPS' lengthy delay, and given the reasonableness of Psychologist (Parent)'s total fee, the equities favor awarding the full fee through this action.

2016-0041
Hearing Officer Determination

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
DCPS' Attorney (electronically)
Chief Hearing Officer Virginia Dietrich, Esq. (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).