

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, N.E., 3rd Floor
Washington, DC 20002

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Office of Dispute Resolution
March 24, 2022

PETITIONER,)	
on behalf of STUDENT,)	Date Issued: March 24, 2022
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2022-0023
)	
DISTRICT OF COLUMBIA)	Hearing Date: March 21, 2022
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution,
Respondent.)	Video Conference Hearing
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner alleges that respondent District of Columbia Public Schools (DCPS) disciplined STUDENT for code of conduct violations in the 2021-2022 school year, without affording Student the safeguards of the IDEA’s provisions for disciplining students with disabilities. Petitioner also alleges that DCPS failed to timely evaluate Student for special education eligibility as required by the IDEA and the District of Columbia law.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s request for an expedited due process hearing, filed on February 11, 2022, named DCPS

as respondent. The undersigned hearing officer was appointed on February 14, 2022. The parties met for a resolution session meeting on March 11, 2022 and no agreement was reached. On March 20, 2022, I convened a prehearing telephone conference with counsel to confirm the expedited hearing date and to discuss the issues to be determined and other matters. The final decision in this case is due within 10 school days of the hearing date, by April 4, 2022.

The expedited due process hearing was held before the undersigned impartial hearing officer on March 21, 2022. With consent of the parent, the hearing was convened by video conference using the Microsoft Teams platform. The hearing officer hosted the virtual hearing, which was closed to the public, and made an audio-video recording. Over DCPS' objection, I granted Mother permission to participate by telephone. Mother was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother testified and called CASE MANAGER as her only additional witness. DCPS called as witnesses ASSISTANT PRINCIPAL 1 and LEA Representative. Mother was recalled to give rebuttal testimony. Petitioner's Exhibits P-1, P-2, P-6, P-7, P-9 through P-11, P-14 (page 2 only), and P-16 were admitted into evidence, including Exhibits P-2, P-11, and P-14, page 2 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-3 through P-5, P-12, P-13, P-14 (page 1), P-15 and P-17 through P-20. Exhibit P-8 was withdrawn. DCPS' Exhibits R-1 through R-6, R-8, R-9, R-11 through R-13 and R-15 were admitted into

evidence, including Exhibits R-6, R-11, R-12 and R-13 admitted over Petitioner's objections. I sustained Petitioner's objection to Exhibit R-14. Exhibits R-7 and R-10 were withdrawn.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The issues to be resolved in this case, and relief requested, as set forth in my March 10, 2022 Prehearing Order, are:

- a. Whether in the 2021-2022 school year, DCPS has denied Student a FAPE by failing to evaluate Student for a suspected IDEA disability;
- b. Whether in the 2021-2022 school year, DCPS has denied Student a FAPE by suspending him/her for more than 10 school days without affording Student the IDEA protections for children suspected of having an IDEA disability.

For relief, Petitioner requested that DCPS be ordered to conduct a comprehensive special education eligibility evaluation of Student, determine Student eligible for special education and ensure that an appropriate IEP is developed. Petitioner also sought an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the March 21, 2022 expedited due process hearing, as well as the argument of counsel, this hearing officer's findings of fact are as follows:

1. Student is an AGE resident of the District of Columbia, where Student resides with Mother. Testimony of Mother.
2. Student has never been evaluated for special education eligibility or determined to be a “child with a disability” within the meaning of 20 U.S.C. § 1401(3). Hearing Officer Notice.
3. Student is in GRADE at CITY SCHOOL 2, a DCPS public school, where Student first enrolled at the start of the 2021-2022 school year. Exhibit P-6, Testimony of Mother.
4. Previously, Student attended CITY SCHOOL 1. Student started receiving therapeutic support with the D.C. Department of Behavioral Health in November 2019 when attending City School 1. Based on a clinician report, Student was diagnosed with Oppositional Defiant Disorder. Exhibit R-4.
5. During the first two advisory periods of the 2021-2022 school year at City School 2, Student received F’s in Math. On I-Ready computer-based adaptive assessments, at the beginning and middle of the 2021-2022 school year, Student received scores equivalent to second grade, many years behind Student’s actual grade. In math class, Student is often off task, which is a distraction for Student and his/her classmates. When Student does not know a skill, he/she becomes non compliant and disrespectful in an attempt to be removed from class. If that doesn’t work, he/she will walk out. Student’s attendance plays a huge role in his/her performance in math. Exhibit R-4.

6. On The Reading Inventory, Student earned a Beginning of 2021-2022 Year Lexile score of 346. Student’s Middle of Year Lexile level of 490 indicated Student was progressing and meeting the expected growth with current interventions. Both scores were years below Student’s current grade level. During the 2nd Advisory Student earned a grades of C- in English Language Arts and Extended Literacy. Exhibit R-4.

7. As of March 2022, since attending City School, Student received a total of 29 discipline infractions during the current school year. Exhibit R-4. The number of days that Student was suspended, prior to February 11, 2022 when Petitioner’s due process complaint was filed, is disputed by the parties. I find, by the predominance of the evidence, that Student was suspended for code of conduct violations as follows:

<u>Incident Date</u>	<u>Days of Suspension</u>
Sept. 16, 2021	1 Day
Nov. 19, 2021	1 Day
December 16, 2021	3 Days
January 18, 2022	1 Day
February 9, 2022	2 Days (on site)

Exhibit R-8, Testimony of Assistant Principal 1, Testimony of Special Education

Coordinator. Mother testified that Student’s out of school suspensions were longer than reflected in DCPS’ Student Incident Report (Exhibit R-4). However Mother’s testimony was rebutted by Assistant Principal 1 and Special Education Coordinator. I find that Mother did not meet her burden of persuasion that Student was suspended for more than 8 school days total prior to February 11, 2022.

8. Case Manager is a case manager with the D.C. Department of Human

Services Parent and Adolescent Support Services (PASS) program. Case Manager received Student's case on October 13, 2021. Student was referred to the PASS program due to concerns about Student's extreme truancy and disobedience. Testimony of Case Manager. On November 8, 2021, Case Manager sent an email request to City School 2's principal, with a copy to Special Education Coordinator, requesting that Student be evaluated for special education eligibility and services. The request was signed by Mother. The request asserted that Student had recently been diagnosed with Oppositional Defiant Disorder (ODD) that directly impacted his/her performance and needs; that though the school and teachers had attempted to address some areas of concern, Student continued to have difficulties as many of the interventions had been unsuccessful; and that Student was making limited progress and as a result was experiencing increased frustration. Exhibit P-1. Case Manager followed up on the November 8, 2021 evaluation request in discussions with ASSISTANT PRINCIPAL 2. Prior to the Petitioner's filing her due process complaint, DCPS did not move forward with the requested eligibility evaluation. Testimony of Case Manager.

9. At the Resolution Session Meeting for this case, held on March 11, 2022, DCPS agreed to conduct an initial eligibility evaluation of Student. Testimony of Case Manager. On March 14, 2022, Special Education Coordinator sent a DCPS consent to evaluate form, for Mother to sign, by email to Petitioner's attorney. As of the hearing date, Mother had not yet returned the executed consent to evaluate Student. Testimony of Special Education Coordinator.

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

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency (LEA), the LEA shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. In this case, Petitioner has the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

- A. In the 2021-2022 school year, has DCPS denied Student a FAPE by suspending him/her for more than 10 school days without affording him/her the IDEA protections for children suspected of having an IDEA disability.

Petitioner alleges that City School 2 unlawfully suspended Student for more than 10 school days since the start of the 2021-2022 school year, without conducting a

Manifestation Determination Review (MDR). DCPS denies that Student has been suspended for more than 10 days. The IDEA and the D.C. Regs. prohibit the disciplining of a student with a disability for misbehavior that is a manifestation of the disability. Prior to suspending a student with a disability for more than 10 school days, the school must conduct a “manifestation determination” during which the student’s parents and educators consider the relevant information in the student’s file, as well as information provided by teacher observations and the parents, to determine whether the conduct at issue “was caused by, or had a direct and substantial relationship to, the child’s disability” or “was the direct result of the local educational agency’s failure to implement the IEP.” 20 U.S.C. § 1415(k)(1)(E).¹ *See, also*, 5B DCMR § 2510.12. For a child, such as Student, who has not yet been determined eligible, a school division will be deemed to have knowledge that a child is a child with a disability if, before the

¹ Section 1415(k)(1)(E) provides in full:

Except as provided in subparagraph (B), 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, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

Id.

conduct violation occurred, the child's parent expressed concern in writing to the agency that the child was in need of special education and related services. 34 C.F.R. § 300.534.

On November 8, 2021, Mother requested in writing that City School 2 evaluate Student for special education eligibility. Therefore, for purposes of this claim, I assume that Student is deemed to be a child with a disability pursuant to 34 C.F.R. § 300.534. However, the hearing evidence did not establish that as of the date Mother filed her due process request, Student had been suspended for more than 10 school days in this academic year. I find that Petitioner has not met her burden of persuasion that DCPS denied Student a FAPE by suspending him/her for more than 10 school days in the current school year.

- B. In the 2021-2022 school year, has DCPS denied Student a FAPE by failing to evaluate Student for a suspected IDEA disability?

Petitioner alleges in her due process complaint that since the beginning of the 2021-2022 school year, DCPS had cause to suspect that Student was a child with a disability and should have initiated an initial eligibility evaluation. Petitioner claims, in the alternative, that DCPS should have initiated the eligibility evaluation process upon Mother's written request on November 8, 2021. DCPS did not move forward with evaluating Student until the March 11, 2022 Resolution Session Meeting in this case.

As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017),

A school district must “evaluate a student who may have a disability and who may require special education services.” D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any “child suspected of having a disability who may need special education.” 5–E D.C. Mun. Regs. § 3004.1(a) (emphases added); see 34 C.F.R. § 300.111(c)(1) (extending duty to “[c]hildren 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”). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process “as soon as a student is identified as a potential candidate for special education services.”

Davis, supra, 244 F. Supp. 3d at 49, *citing N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (emphasis in original). “School districts may not ignore disabled students’ needs, nor may they await parental demands before providing special instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

In Student’s case, DCPS’s evaluation and eligibility expert, Special Education Coordinator, testified that after students returned to in-person classes for the 2021-2022 school year, following the COVID-19 school closings, there was a period of adjustment for all students. She opined that for that reason and because Student was new to City School 2, it was not appropriate to refer Student for an eligibility evaluation early in the 2021-2022 school year. Instead, under DCPS’ Multi-Tiered System of Supports (MTSS) model, student was appropriately referred first to City School 2’s mental health team. LEA Representative, similarly, testified that under the MTSS model, for a child who has experienced trauma, DCPS uses “restorative” practices to address the child needs before escalating to the special education team. These

witnesses' testimony was not rebutted by Petitioner. On these facts, I conclude that Petitioner did not establish the DCPS violated its child-find obligations by not evaluating Student before receiving Mother's November 8, 2021 written request.

Both of the DCPS witnesses agreed that if a parent requests an eligibility evaluation, then the child should be referred directly to the special education team. Under the law of the District, "an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment." D.C. Code § 38-2561.02(a). The LEA shall make reasonable efforts to obtain parental consent within thirty (30) days from the date the student is referred for an assessment or evaluation. 5E DCMR § 3005.2(a). I find that following receipt of Mother's November 8, 2021 evaluation request, DCPS was required under D.C. law to secure Mother's written consent and complete Student's evaluation no later than February 6, 2022 (90 days after November 8, 2021). DCPS did not request Mother to execute its evaluation consent form until after the March 11, 2022 resolution session meeting. At the time of the due process hearing, DCPS had not started its evaluation of Student. I find that this was a violation of DCPS' child-find obligations under the IDEA and District law.

An LEA's failure to comply with child-find may constitute a procedural violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *See, also, G.G. ex rel. Gersten v. District of Columbia.*, *supra*, 924 F. Supp. 2d at 280 (School

district's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE 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.

34 CFR § 300.513(a)(2)

Petitioner alleges that DCPS' failure to timely complete an initial eligibility evaluation has denied Student a FAPE and she seeks compensatory education as equitable relief. When a hearing officer finds a denial of FAPE, an appropriate remedy can include compensatory education. *See, e.g., B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016). However, pending completion of a comprehensive initial evaluation and eligibility determination, which DCPS has agreed to do, it cannot be determined whether Student is a student with a disability entitled to a FAPE. Therefore, I will deny, without prejudice, Petitioner's request for compensatory education for Student.

ORDER

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

ORDERED:

All relief requested by the Petitioner herein is denied, without prejudice to the parent's right to have Student evaluated for special education eligibility and, if Student is determined eligible, to seek compensatory education from DCPS for

the District's not completing its initial special education eligibility evaluation of Student by February 2022.

Date: March 24, 2022

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).

cc: Counsel of Record
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