

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on May 4, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age _____ and in grade _____.² The student resides with [REDACTED] parents in the District of Columbia. On February 1, 2017, the student’s mother, “Petitioner” filed her due process complaint against District of Columbia Public Schools (“DCPS” or “Respondent”) on February 1, 2017, alleging a Child Find violation. Prior to the complaint being filed DCPS had obtained consent from Petitioner to evaluate the student. On March 30, 2017, DCPS determined the student eligible as a child with a disability classification, pursuant to IDEA, of Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”)

RELIEF SOUGHT:

Petitioner seeks as relief that the Hearing Officer find DCPS has denied the student a free appropriate public education (“FAPE”), and that the Hearing Officer direct DCPS to fund compensatory education for the period from when Petitioner alleges the student should have been identified as a student in need of special education pursuant to Child Find.

LEA Response to the Complaint:

DCPS, the local educational agency (“LEA”), filed a timely response to the complaint on February 10, 2017. DCPS asserts that the student has not been denied a FAPE and denies the Petitioner’s Child Find allegation. DCPS asserts it had no reason to suspect the student was a child with a disability who may need special education and related services during school year 2015-2016, and it has not overlooked clear signs of disability. DCPS obtained Petitioner’s consent to complete an initial evaluation of the student on November 23, 2016, and proposed to complete a psychological evaluation and a functional behavior assessment (“FBA”). In its response, DCPS asserted the evaluations were completed and would be reviewed by the student’s multi-disciplinary team (“MDT”) to determine the student’s eligibility for special education and related services.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on February 14, 2017, and the parties did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The

² The student’s current age and grade are indicated in Appendix B.

45-day period began on March 4, 2017, and originally ended [and the Hearing Officer's Determination ("HOD") was originally due] on April 17, 2017.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on March 10, 2017, and issued a pre-hearing order ("PHO") on March 14, 2017, outlining, inter alia, the issue to be adjudicated.

The parties appeared for hearing on April 6, 2017, after the student had been determined eligible, but prior to ■ individualized educational program ("IEP") being developed. The parties mutually agreed to file a motion for continuance of the hearing and extension of the HOD due date, to await completion of the student's IEP. Their motion was granted, which extended the HOD date to May 14, 2017.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to timely evaluate and determine the student's eligibility or ineligibility under its Child Find obligations as early as January 28, 2015, when Petitioner gave DCPS the student's medical documentation.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 26 and Respondent's Exhibits 1 through 21) that were admitted into the record and are listed in Appendix A.⁴ Witnesses' identifying information is listed in Appendix B.⁵

SUMMARY OF DECISION:

Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE and that based on the student's failing grades and serious behavioral difficulties DCPS should have initiated a determination of the student's eligibility or ineligibility for special education services pursuant to Child Find by the end of school year ("SY") 2015-2016. As relief for the denial of FAPE, the Hearing Officer granted Petitioner compensatory education in the amount of 100 hours of tutoring and 25 hours of behavior support.

³ The Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this is the issue to be adjudicated.

⁴ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁵ Petitioner presented four witnesses: Petitioner, two educational advocates employed by Petitioner's law firm, one of whom was designated as an expert witness, and an independent school psychologist. Respondent presented one witness: the former special education coordinator from School A.

FINDINGS OF FACT:⁶

1. The student resides with [REDACTED] parents in the District of Columbia. (Petitioner's testimony)
2. The student currently attends School A, a DCPS [REDACTED] school. The student began attending School A at the start of SY 2015-2016. Prior to attending School A, the student attended School B, a DCPS [REDACTED] school. (Petitioner's testimony)
3. Prior to attending DCPS schools, the student attended school in Prince Georges County, Maryland in SY 2010-2011. During that time, the student was seen at Children's National Medical Center ("CNMC") due to Petitioner's concerns about the student's behavior. CNMC conducted testing of the student and diagnosed [REDACTED] with ADHD. (Petitioner's Exhibit 7)
4. When the student began attending School B, Petitioner provided School B with the medical documentation from CNMC. School B developed a 504 plan for the student on January 28, 2015. The plan provided the student extra time for assignments and testing as well as the ability to take breaks. (Petitioner's testimony, Petitioner's Exhibit 4)
5. School B was implementing the 504 plan by giving the student bathroom breaks and extra time on schoolwork. The student had behavior difficulties at School B, including walking out of class, cursing and fighting with students. This resulted in staff frequently telephoning Petitioner to come up to the school, or talk to the student over the phone to encourage modifications of [REDACTED] behavior. Petitioner went to School B on occasion and observed the student. On those occasions, Petitioner observed that the student would not complete [REDACTED] classwork. (Petitioner's testimony)
6. During SY 2014-2015, the student's last year at School B, [REDACTED] was approaching grade level standards in most of the subject areas and proficiency in some subjects. The student could complete and return homework independently and participate in classroom discussions. (Respondent's Exhibit 2-1)
7. During SY 2015-2016 at School A, the student continued to display behavioral difficulties. The School A staff, on a several occasions, telephoned the student's parent and requested that she talk with the student by phone to help settle [REDACTED] behavior. On some occasions the student was sent home due to [REDACTED] behavior. The student's parent was on occasion asked to come to the school to shadow [REDACTED] and observe [REDACTED] in class. The student's mother observed the student in the classroom on a few occasions and observed

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

that the student was unfocused and did not complete ■■■ classwork. (Petitioner's testimony)

8. On March 21, 2016, School A conducted a review and update of the student's 504 plan. Petitioner participated in the meeting. The updated 504 plan allowed for re-reading of directions to the student before ■■■ started assignments, and repeated directions and extra time and/or extensions to complete assignments. The student was also to be provided frequent reminders as needed and sit by ■■■ away from other students and distractions, and was to be provided individual bathroom and water breaks to give ■■■ opportunities to refocus. ■■■ was also to be provided counseling surrounding appropriate behaviors, reactions, and interpersonal relations as well as time management and organizational skills. (Petitioner's Exhibit 5-1, 5-2)
9. During the March 21, 2016, 504 plan meeting the team discussed actions to get the student's grades up. Petitioner expressed that she would like for the student to be in a smaller setting, as ■■■ had been in the same setting with the same supports, and continued to experience behavior and academic difficulties. (Parent's testimony)
10. At the end of ■■■ first year at School A, the student failed two of ■■■ classes: computer literacy and music. The student was able to obtain a final passing grade of "C" in math and language arts, but had a significant number of absences in these two classes: 31 and 24 absences respectively. The student received a "D" in three of ■■■ other classes that year. (Respondent's Exhibit 3-1, 3-2)
11. The student would arrive at school on time because Petitioner brought the student to school. However, despite being dropped off to school on time, ■■■ would often not make it to some of classes, and the School A staff shared with Petitioner that the student would often hang out in the halls and miss class. (Parent's testimony)
12. The student returned to School A for SY 2016-2017. The student incurred repeated behavioral infractions in the first few weeks of school, and ■■■ parents were called to the school to engage in meetings about the student's behaviors. (Petitioner's testimony, Respondent's Exhibit 17-2)
13. On September 26, 2016, Petitioner, through counsel, requested that DCPS evaluate the student to determine ■■■ eligibility for special education and related services. (Petitioner's Exhibit 22-2)
14. On November 23, 2016, DCPS obtained written consent to conduct the requested evaluations of the student. (Respondent's Exhibit 4)
15. On January 19, 2017, School A developed a behavior intervention plan ("BIP") for the student to ■■■ address ■■■ inattention, off-task and disruptive behaviors. (Petitioner's Exhibit 9)

16. On February 1, 2017, the School A social worker conducted a FBA to update the student's BIP. (Respondent's Exhibit 8)
17. A DCPS psychologist initiated a psychological evaluation of the student on January 3, 2017. The psychologist had difficulty contacting the student's parents to complete the evaluation. The evaluation was completed on February 7, 2017, and the evaluation report is dated February 27, 2017. (Witness 2's testimony, Respondent's Exhibit 9-1)
18. The DCPS psychological evaluation assessed the student's cognitive, academic, and social emotional functioning. The student's cognitive functioning was average. The student's overall math ability was in the average range. The student's overall reading ability was below average. The evaluator concluded the student's reading skills are under-developed and should be addressed in a small class setting, with a remedial reading intervention program and tutoring services. The student's social emotional functioning assessments demonstrated that ■ exhibits poor concentration, distractibility, difficulty finishing tasks, restlessness, impulsive behaviors, difficulty being quiet, poor anger control and aggressive behaviors. The evaluator concluded the student's poor social skills and peer relations was a large element of ■ ADHD. The evaluator concluded the student could not access ■ grade level general education curriculum, without a variety of academic and behavioral supports. (Respondent's Exhibit 9-8, 9-9, 9-10, 9-11, 9-14, 9-16, 9-18)
19. The student's most recent in-school assessments of ■ reading and math indicate that ■ is operating one grade level below in math and reading. (Respondent's Exhibits 12, 13)
20. The student's second advisory report card for SY 2016-2017 indicated ■ was failing three of ■ classes: history, math and academic enrichment. ■ had low passing grades in English and science and average grades in computer science and ■ school support class. ■ earned an "A" in physical education. (Petitioner's Exhibit 13-1)
21. On March 30, 2017, DCPS convened an eligibility meeting and reviewed the student's psychological evaluation. The team determined the student was eligible for special education services with the disability classification of OHI, due to ADHD. (Respondent's Exhibits 15, 16)
22. On April 26, 2017, School A developed the student's IEP that prescribes the following services: 5 hours per week each of specialized instruction in reading and written expression inside of the general education setting, 5 hours per week of specialized instruction in math outside general education, and 120 minutes per month of behavior support services outside the general education setting. At the IEP meeting, there was discussion about the student being provided compensatory education services, but there was no agreement between the parties as to the amount of services that would be provided. (Witness 1's testimony, Respondent's Exhibit 19-1, 19-8)
23. At the April 26, 2017, IEP meeting DCPS offered Petitioner the following independent services as compensatory education: 45 hours of tutoring at \$65.00 per hour and 20 hours

of behavioral support services at \$104.64 per hour. These services were offered as an addition to the services the student receives pursuant to ■■■ IEP. However, the parties were not in agreement with respect to the timeline from which compensatory education should be measured. (Witness 1's testimony, Respondent's Exhibit 21)

24. Petitioner's educational advocate prepared a compensatory education proposal to compensate the student for the alleged denials of FAPE. The proposal summarizes the documentation, pertaining to the student, that the advocate reviewed and considered in making her recommendation. She presumed in her proposal that the student missed services from on or about January 28, 2015, and based her calculations on the amount of services that are in the student's IEP. She approximated that in that time period the student would have received approximately 600 hours of services. As compensation for the alleged missed services, the advocate recommended the following services: 240 hours of specialized tutoring, 60 hours of counseling and 60 hours of mentoring. (Witness 3's testimony, Petitioner's Exhibit 25)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii). In this case, as noted in the PHO and at the hearing, Petitioner had the burden of production and persuasion on the issue adjudicated.

ISSUE: Whether DCPS denied the student a FAPE by failing to timely evaluate and determine the student's eligibility or ineligibility under its Child Find obligations as early as January 28, 2015, when Petitioner gave DCPS the student's medical documentation.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that by the end of SY 2015-2016, DCPS was on notice based on the student's failing grades and behavior issues that the student was a child with a suspected disability and that the student should have been evaluated for special education eligibility pursuant to its Child Find obligations. However, Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS was on notice by January 28, 2015, that the student should have been considered for eligibility pursuant to Child Find.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.11 require every state to effectuate policies and procedures to ensure that all children with disabilities residing in the state, including wards of the state, who are in need of special education and related services are "identified, located and evaluated." This Circuit in *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State...regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated." See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005)

In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court, citing the above cases held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral." The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of Columbia*, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process."

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

Petitioner asserts that School B should have been on notice when she provided the school the student's medical documentation in SY 2014-2015 that ■ was a child in need of special education, or at latest when School B developed the student's 504 plan in March 2015. However, the evidence demonstrates otherwise.

The evidence demonstrates that although Petitioner provided School B the medical documentation of the student's diagnoses of ADHD and ADD, it was reasonable for DCPS to develop a 504 plan for the student to accommodate ■ disability and provide ■ with supports. The student's report card from SY 2014-2015 demonstrates that ■ made academic progress and that ■ disability did not have a negative impact on ■ ability to access the curriculum. The student was approaching grade standards in the areas measured.

Despite Petitioner's testimony of the student's behavioral difficulties during ■■■ time at School B, the evidence does not support that the student behaviors significantly impacted ■■■ educational performance, as reflected on ■■■ report card from SY 2014-2015. The report card indicated that ■■■ was operating independently in completing assignments and returning homework. The Hearing Officer found that the documentary evidence of the student's academic performance during SY 2014-2015 was overwhelmingly convincing regarding the student's progress. This evidence outweighed any testimonial evidence presented to the contrary.

The evidence demonstrates that the student behavior difficulties continued when ■■■ arrived at School A and that School A took reasonable action by updating the student's 504 plan to provide greater supports, including counseling services. At that point, the evidence does not support that DCPS was on notice that the student should have been evaluated for special education eligibility. However, the evidence demonstrates that by the end of the SY 2015-2016, despite the increase in supports in the student's 504 plan, the student failed two classes and had below average grades in others. This, in the Hearing Officer opinion, should have put DCPS on notice that it should have evaluated the student's eligibility for special education and related services.

Even though there was a 504 plan in place for the student, and ■■■ was receiving accommodations and counseling services pursuant to the plan, there was a need for specialized instruction for the student to address the academic concerns that were being negatively impacted by ■■■ disability. ■■■ poor grades are clear indication that ■■■ was in need of more than the accommodations and services ■■■ was being provided pursuant to ■■■ 504 plan. The student's behavior, poor academic performance, and the parent's concern raised at the March 21, 2016, 504 meeting that the student was in need of a different educational setting, combined to form the basis for DCPS to have acted pursuant to Child Find, without the parent ever having to formally request evaluations to determine the student's eligibility.

DCPS asserted that many of the student's standardized testing scores were low only in the areas of fluency and in the other areas ■■■ tested in the low average and average range. DCPS maintained that fluency issues can be addressed by giving the student extra time on assignments as the student's 504 provided. Thus, DCPS asserted there was no indication that the student was in need of specialized instruction and therefore, it was not unreasonable for DCPS to have not suspected the student to be a child with a disability in need of specialized instruction and identified pursuant to Child Find.

However, at the point the student failed two classes and earned significantly poor grades at the end of SY 2015-2016, the student's disability clearly had begun to negatively impact ■■■ academic performance, as noted in ■■■ end of year report card for SY 2015-2016. DCPS had an affirmative duty at that point to find, locate and identify, through the mechanism of evaluation, this student as a child with a disability on its own initiative, pursuant to Child Find.

Petitioner presented a witness designated as expert who gave his opinion that the student should have been evaluated for special education when the 504 plan was developed, given the severity of the student's behaviors. The witness testified that the severity of the student's behaviors would indicate an IEP would have been more appropriate than a 504 Plan. This witness also

testified that in his experience, it is unusual for counseling services to be included in a 504 plan and that counseling services are more often found in an IEP.

The Hearing Officer was not convinced by Petitioner's expert witness' testimony that the student's behavior concerns warranted an IEP instead of a 504 plan, when the 504 plan was developed. This expert witness noted he had never met the student, or spoken with any of [REDACTED] teachers, the psychologist or social worker; nor had he observed the student in an educational setting. The expert witness also noted that a child that only needs a related service, such as counseling, and not specialized instruction, is not a child with disability under IDEA. The student receiving counseling in the updated 504 plan, did not, in and of itself, mean that as of the date of that the 504 plan was updated, the student should have had an IEP. Even though the updated 504 plan included counseling services that the witness thought were unusual for a 504 plan and usually provided as a related service in an IEP, the expert correctly acknowledged that a student, who is simply in need of a related service and not specialized instruction, is not deemed a child with a disability pursuant to IDEA.

As stated, the Hearing Officer concludes that under the facts of this case, DCPS was put on notice by the student's failing grades and behavior by at the end of SY 2015-2016, that the student should have been evaluated pursuant to Child Find.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) (The Hearing Officer has concluded that the student was not provided special education services for a total of three (3) school days, that [REDACTED] was removed from school without the benefit of a MDR, no FBA, and no BIP. [Where does this come from...it's not in the Facts?]

Under the theory of compensatory education, "courts and hearing officers may award educational services, to be provided prospectively, to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

In this instance, Petitioner did not present evidence from which the Hearing Officer could reasonably craft a compensatory education award. The proposal overstated the period in which services would, or should have been provided to the student, and overstated the services that would compensate him.

Presuming DCPS timely evaluated the student and determined [REDACTED] eligibility for special education, the student would have had an IEP in place and been provided services by

approximately November 2017. Based upon the services that are in the student's current IEP, the student would, or should have been provided approximately 6 months of services: 360 hours of specialized instruction and 12 hours of behavior support services.

The Hearing Officer concludes that DCPS should provide Petitioner the tutoring services and behavior support services that it previously offered and authorized Petitioner to receive: 45 hours of tutoring and 20 hours of behavior support services. In addition, because of the amount of instruction the student missed, the recommendation contained student's psychological evaluation that ■ would benefit from tutoring as well as Petitioner's advocate's testimony as to the student's need for specialized instruction, the Hearing Officer concludes that DCPS shall provide the student an additional 55 hours of independent tutoring for a total of 100 hours of tutoring and 20 hours of behavioral support services.

ORDER:

1. DCPS shall, within Fifteen (15) school days of the issuance of this Order, authorize for this student One Hundred (100) hours of independent tutoring and Twenty (20) hours of behavioral support services at the OSSE prescribed rates.
2. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 14, 2017

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