

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

PETITIONER,)	Date Issued: November 19, 2017
on behalf of STUDENT, ¹)	
)	Hearing Officer: Peter B. Vaden
Petitioner,)	
)	Case No: 2017-0243
v.)	
)	Hearing Date: November 2, 2017
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	Office of Dispute Resolution, Room 2006
)	Washington, D.C.
Respondent.)	
)	

OSSE
Office of Dispute Resolution
November 28, 2017

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not evaluating Student and determining that Student was eligible for special education from 2015 to May 2017.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on September 6, 2017, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned hearing officer was appointed on September 7, 2017. On September 19, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The parties met for a resolution session on September 18, 2017 and were unable to reach an agreement. My final decision in this case is due by November 20, 2017.

The due process hearing was held before the undersigned impartial hearing officer on November 2, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SCHOOL PSYCHOLOGIST and by DCPS' COUNSEL.

The Petitioner testified and called EDUCATIONAL ADVOCATE and INDEPENDENT PSYCHOLOGIST as additional witnesses. DCPS called SCHOOL PSYCHOLOGIST as its only witness. Petitioner's Exhibits P-1 through P-26 and DCPS' Exhibits R-1 through R-27 were all admitted into evidence without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made closing arguments. After Petitioner completed her case in chief, DCPS made a motion for a directed finding that Petitioner has not established a *prima facie* case. I denied the motion. Neither party requested leave to file a post-hearing written closing.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 19, 2017

Prehearing Order:

- a. Whether DCPS failed to comprehensively evaluate Student in all areas of suspected disabilities when requested by the parent (within the past two years);
- b. Whether DCPS denied Student a FAPE by failing to determine Student eligible for special education and related services from 2015 until May 2017.

For relief, the parent requests that the hearing officer order DCPS to fund, at the market rate and not limited to the rate set by the D.C. Office of the State Superintendent of Education (OSSE), Independent Educational Evaluation (IEE) comprehensive psychological, occupational therapy (OT) and speech and language evaluations of Student and any other assessments recommended by the IEE evaluators; and that DCPS convene Student's IEP team to consider the IEE assessments and revise Student's IEP as appropriate.²

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE child, is a resident of the District of Columbia. Student currently attends CITY SCHOOL 3. Testimony of Mother. Student is eligible for special education and related services as a child with an Other Health Impairment based on Student's Attention Deficit-Hyperactivity Disorder. Exhibit R-13.

² Prior to the due process hearing, Petitioner, by counsel, withdrew two other issues identified in the Prehearing Order, namely, failure to ensure that an appropriate IEP, with adequate specialized instruction services and clear and measurable annual goals, was developed for Student on May 16, 2017 and failure to provide IDEA mandated prior written notices to the parent within the past two years.

2. From the 2014-2015 school year through the 2016-2017 school year, Student attended CITY SCHOOL 2. Student has had behavior issues since Student was little, including having tantrums, hitting people and throwing things. Student's behavior got worse after Student began at City School 2. Testimony of Mother.

3. In the fall of 2013, Student was referred to DCPS Early Stages for an evaluation for special education eligibility due to global developmental and behavioral concerns. Student's teacher reported that Student was inattentive, aggressive when faced with things that Student did not want to do and low academically. During the 45 minute evaluation, Student presented as an active child who was not immediately responsive when greeted. Student became agitated when brought into the evaluation room and required heavy adult redirection for the entire testing session. Student refused to answer many questions, cried and had tantrums frequently. Student was unable to finish many of the tasks presented to due to these behaviors. On a number of occasions, Mother had to come into the room to calm Student down. Student would then answer or attempt several questions before becoming agitated again. Student demonstrated various alarming and unsafe behaviors such as kicking, hitting, stomping, yelling, throwing materials, etc. Because of the severity of these interfering behaviors, the assessor reported that results of the evaluation could not be considered a valid estimate of Student's then-current level of functioning. The assessor reported that the test results showed significantly below average age-appropriate skills in all tested skills (adaptive, personal-social, cognitive skills) when compared to children of Student's age. In cognitive testing, Student scored between the Borderline and Low Average ranges on the Wechsler Preschool and Primary Scale of intelligence – Third Edition (WPPSI-III), which raised significant concerns regarding Student's cognitive

abilities, particularly verbal reasoning skills. Student's scores on adaptive, personal-social and cognitive measures were all at, or below, the first percentile except for Attention and Memory (2nd percentile) and Reasoning and Academics (5th percentile). The scores were reported to be largely due to Student's interfering behaviors during testing and were not considered a valid estimate of Student's current level of functioning. The assessor reported that a more accurate picture of Student's current level of functioning was gained through observations, both clinical and in the classroom. The assessor recommended that specially designed instruction was not deemed necessary, as there appeared to be other extraneous factors contributing to Student's off-task and non-compliant behaviors, that could not be ruled out when considering a student eligible for special education services. Exhibit P-1.

4. DCPS Early Stages also conducted an occupational therapy evaluation of Student. Student was reportedly easily distracted and needed verbal redirection in order to remain focused on tests. Student's test results were most likely affected by Student's distraction. Student was reported to demonstrate a mild delay in visual motor skills on fine motor testing. Student was also reported to have difficulty focusing attention for learning. Exhibit P-4.

5. DCPS Early Stages conducted a speech-language evaluation of Student at the end of 2013 on referral from Mother, who expressed concern regarding Student's behavior and short attention span. Although Student demonstrated good attention to tasks at hand during the beginning of the evaluation, Student fatigued quickly and did not respond to several of the testing items presented later in the evaluation. Student was reported to demonstrate language skills below the Average range, however those scores were reported as not so significant that they should have impeded Student's

ability to make progress in the general education curriculum. Exhibit P-3.

6. On January 8, 2014, DCPS Early Stages reported that Student did not present as a student with a disability. The same day, DCPS issued a Prior Written Notice to Mother that Student did not meet criteria of a student with a developmental delay and that Student did not need special education and related services. Exhibit P-7.

7. During the next two school years, Mother repeatedly asked City School 2 staff for Student to be evaluated again. Testimony of Mother. On February 1, 2017, Mother made a formal referral for Student to be evaluated. Exhibit R-3.

8. In April 2017, School Psychologist conducted a comprehensive psychological evaluation of Student. In her May 6, 2017 evaluation report, School Psychologist reported that Student's teachers each school year indicated that Student consistently presented with off-task behaviors, was inattentive, aggressive and defiant. The teachers all also reported that Student's behaviors were negatively impacting academic performance. On the Diagnostic Inventory of Basic Early Literacy (DIBELS) assessments, Student demonstrated minimal growth since kindergarten, which placed Student six book levels below grade level. Student's performance on math benchmark assessments indicated that Student's mathematic skills were more than one year below grade level. Student's teachers all documented that Student presented as having the ability to learn grade level material but Student's behaviors were having a direct impact on the ability to receive instruction and to demonstrate mastery of skills taught. Student's then-current teacher express concerns about Student's inability to make progress, which the teacher directly associated with Student's difficulty with inattention, fidgeting, refusal to comply with adult directives and overly playful behaviors. Student was observed by School Psychologist in the general education

classroom. Student was almost always off-task or non-compliant with adult directives.

Exhibit R-8.

9. During cognitive testing sessions, according to School Psychologist, Student's performance was greatly impacted by these behaviors in a negative manner. Student's scores on cognitive measures fell in the Intellectual Disability ranges. School Psychologist does not know what Student's true cognitive abilities are. School Psychologist wrote that Student's performance on the Wechsler Intelligence Scale for Children, 3rd Edition (WIAT-III) was likely a better and more true representation of Student's academic skills. On the WIAT-III, Student's composite scores were Below Average for Oral Language and Mathematics. Exhibit R-8.

10. To assess social-emotional functioning, Mother and Student's classroom teacher completed the Behavior Assessment Scale for Children, 3rd Edition (BASC-3) rating scales. Responses from both yielded clinically significant scores in all assessed areas with the exception of social skills, leadership and functional communications. Responses from both the teacher and the parent indicated that Student struggled with many of the self-regulation abilities needed in order to be successful in school in social situations. Their responses supported Student's diagnosis of ADHD and also suggested that Student's behaviors should closely be monitored as the level of intensity indicated suggested that without significant behavior interventions, Student's level of aggression and non-compliance could become even more significant having a more detrimental impact academically and socially. Exhibit R-8.

11. School Psychologist recommended that Student met eligibility criteria to receive special education services as a student with an Other Health Impairment (OHI-ADHD). She recommended that behavior interventions should be in place to address

behaviors and aimed at Student's staying in class or returning to class as soon as possible. Exhibit R8.

12. In March 2017, a DCPS Occupational Therapist conducted an Occupational Therapy (OT) assessment of Student. He concluded that Student presented with difficulties in the areas of visual motor integration, visual perception, fine motor precision and grasp on writing tool and that these areas had an impact on Student's ability to consistently produce quality written work. Exhibit R-9.

13. In April 2017, a DCPS social worker conducted a Functional Behavioral Assessment (FBA) of Student. She reported that Student exhibits inattentiveness and impulsive behaviors; that Student often has difficulty remaining seated and in the assigned area; that Student has frequent outbursts (including screaming, yelling out and/or crying) when denied a request; that when demands were placed to complete a non-preferred or challenging activity, Student would refuse, get out of the seat or ask to leave the classroom in order to avoid the assigned task. These behaviors can last from 5 to 15 minutes, two to three times per day. Even with positive reinforcements, Student was not able to consistently exhibit positive results. Exhibit R-10.

14. At an eligibility team meeting on May 2, 2017 at City School 2, Student was determined eligible for special education and related services as a child with and OHI-ADHD disability. At the meeting, it was stated that Student meets with a D.C. Department of Behavioral Health professional weekly, who was working on pro-social actions. Student had demonstrated minimal progress. In a May 16, 2017 Final Eligibility Determination Report, Student was reported to be a child with an OHI-ADHD disability and it was reported that Student's disability impacts Student's participation in the general education curriculum in Mathematics, Emotional Social

and Behavioral Development, Reading, Motor Skills/Physical Development and Written Expression. Mother initialed the draft eligibility determination report to indicate her agreement. Exhibits R-12, R-13.

15. Student's initial Individualized Education Program (IEP) was developed at an IEP meeting on May 16, 2017. For Special Education and Related Services, the initial IEP provided for 8 hours per week of Specialized Instruction, 120 minutes per month of Behavioral Support Services and 120 minutes per month of Occupational Therapy, all services outside general education. Exhibit R-15. (The appropriateness of the May 16, 2017 IEP is not at issue in this proceeding.)

16. Student's final term grades for the 2015-2016 school year were Proficient in Science, Math and Speaking/Listening, Basic in Social Studies and Below Basic in Writing/Language and Reading. Exhibit R-23.

17. Student's final term grades for the 2016-2017 school year were Basic in science and social studies and Below Basic in all other core subjects. Exhibit R-22.

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 DCPS, the District 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. Petitioner holds the burden of persuasion in this case, which must be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- a. Did DCPS fail to comprehensively evaluate Student in all areas of suspected disabilities when requested by the parent (within the past two years)?
- b. Did DCPS deny Student a FAPE by failing to determine Student eligible for special education and related services from 2015 until May 2017?

DCPS Early Stages evaluated Student for special education eligibility in late fall 2013. Although Student's cognitive and adaptive testing scores were indicative of a significant developmental delay, Early Stages determined that Student was not eligible for special education because it could not be ruled out that other, extraneous, factors contributed to Student's off-task and non-compliant behaviors. In the following school years, Mother pressed for Student to be evaluated again. In April 2017, DCPS evaluated Student again and it was determined in May 2017 that Student was eligible for special education and related services as a child with an OHI-ADHD disability.

Student's initial IEP provides for 8 hours per week of Specialized Instruction, outside general education, and Behavioral Support and OT related services. Mother contends that Student was denied a FAPE by DCPS' failure to determine Student eligible in the two years before September 6, 2017 when her due process complaint was filed in this case. (Mother has elected not to seek relief for any failure of DCPS to identify Student as a child with a disability beyond the IDEA two-year statute of limitations period. See 34 CFR § 300.507(a)(2). DCPS denies that it had reason to

suspect that Student was in need of special education and related services prior to receiving an evaluation request from Mother on February 1, 2017.

The IDEA requires local education agencies (LEAs) to have a comprehensive “Child Find” system to ensure that all children who are in need of early intervention or special education services are located, identified, and referred appropriately. *See* 20 U.S.C. § 1412(a)(3). This duty is triggered by a reasonable suspicion that a student has a disability. *Henry v. Friendship Edison P.C.S.*, 880 F. Supp. 2d 5, 7 (D.D.C. 2012). The Child Find mandate requires that LEAs identify disabled children “within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.” *See D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012). The Child Find obligation also applies 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.” *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 224-25 (D. Conn. 2008) *aff’d sub nom. A.P. v. Woodstock Bd. of Educ.*, 370 F. App’x 202 (2d Cir. 2010).

The IDEA regulations at 34 CFR § 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. If the LEA does not suspect that the child has a disability, and denies the request for an initial evaluation, the LEA must provide written notice to the parent explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision. 34 CFR § 300.503(a) and (b). *See Memorandum to State Directors* (OSEP Jan. 21, 2011).

After DCPS Early Stages determined in January 2014 that Student was not eligible for special education, Mother continued in the 2015-2016 and 2016-2017

school years to request that Student be evaluated. If DCPS disagreed that an evaluation was warranted, DCPS was obliged to provide written notice to Mother explaining why it refused to conduct the evaluation and the information that was used as the basis for this decision. *See* 34 CFR § 300.503(a) and (b). In this case, there was no evidence that DCPS provided such written notice to Mother subsequent to the January 2014 written notice that DCPS proposed not to identify Student as a child with a disability.

Moreover, DCPS had cause to reasonably suspect in the 2015-2016 school year that Student had an IDEA disability. Petitioner's expert, Independent Psychologist, opined that based on the evaluations of Student conducted by Early Stages in late 2013, Student should have been identified then as a child with a Developmental Delay. Her opinion is that the Early Stages psychologist erroneously discounted the cognitive and behavioral data from the November 2013 psychological evaluation supporting Student's eligibility. Whether the Early Stages 2014 determination that Student was not eligible was incorrect is not an issue in this case. However, it is significant that the Early Stages evaluators did not conclude that Student did not have a qualifying Developmental Delay, but rather that there appeared to be other extraneous factors contributing to Student's off-task and non-compliant behaviors that could not be ruled out when considering a student eligible for special education services. That is to say that even after DCPS Early Stages determined in January 2014 that Student did not meet the criteria for a student with a developmental delay, the suspicion that Student had a disability was not eliminated. Moreover, in the 2015-2016 and 2016-2017 school years, Student's teachers indicated each year that Student consistently presented with off-task behaviors, was inattentive, aggressive and defiant. The teachers also reported that Student's behaviors were negatively impacting academic performance. I find that even

after the DCPS Early Stages determination in January 2014 that Student was not eligible for special education, at least by the beginning of the 2015-2016 school year, DCPS had cause for a reasonable suspicion that Student was a child with a disability. That required DCPS to conduct a new eligibility evaluation.

The failure to conduct a required IDEA evaluation is a procedural violation of the Act. *See, e.g. 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 that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) 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).

When Student was finally evaluated in spring 2017, Student was determined to have a qualifying OHI-ADHD disability and to need Specialized Instruction, as well as OT and Behavioral Support Services. In addition, as noted above, Student's teachers indicated each year that Student's behaviors were negatively impacting academic performance. I conclude that Petitioner has met her burden of persuasion that it is more likely than not that if Student had been evaluated in the 2015-2016 school year as Petitioner requested, Student would have been found eligible for special education then. DCPS' failure to ensure that Student was timely evaluated impeded Student's right to a FAPE and deprived Student of Educational Benefit. Student was therefore

denied a FAPE.

Remedy

The only relief sought by the parent at the due process hearing was an order for DCPS to fund Independent Educational Evaluations (IEEs) of Student by professionals selected by the parent, to include a comprehensive psychological evaluation, an OT assessment and a speech and language evaluation. DCPS' Counsel represented that DCPS had no objection to funding IEE assessments for Student. Petitioner's expert, Educational Advocate, testified credibly that after contacting the psychologists identified by OSSE as qualified to conduct an IEE psychological evaluation, none of these professionals would conduct a comprehensive psychological evaluation for less than \$3,500.00. DCPS provided no rebuttal to this testimony. Therefore, I will order DCPS to fund an IEE comprehensive psychological evaluation of Student to include an adaptive assessment, at a cost not to exceed \$3,500.00. DCPS shall also provide funding, at the OSSE-approved rates, for the parent to obtain IEE OT and Speech and Language evaluations of Student.³

ORDER

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

ORDERED:

1. Within 10 business days of the date of this decision, DCPS shall provide funding authorization for Petitioner to obtain an IEE comprehensive psychological evaluation, including an adaptive assessment, of Student at a cost not to exceed \$3,500.00. DCPS shall also issue funding

³ Although in the due process complaint Petitioner requested a compensatory education award, at the due process hearing, Petitioner's Counsel elected not to seek a compensatory education remedy at this time and to defer requesting such relief until after the IEE assessments are completed. I will therefore deny, without prejudice Petitioner's original request for compensatory education relief.

authorizations for Parent to obtain IEE OT and Speech and Language assessments of Student. Upon being provided the completed IEE evaluation reports, DCPS shall promptly convene Student's IEP team to review and revise Student's IEP as appropriate;

2. Compensatory education relief for the denial of FAPE found in this decision is denied without prejudice, based upon Petitioner's election to defer seeking such relief until after Student's IEE assessments are completed and
3. All other relief requested by the Petitioner herein is denied.

Date: November 19, 2017

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
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team