

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 15, 2017
on behalf of STUDENT, ¹)	
)	Hearing Officer: Peter B. Vaden
Petitioner,)	
)	Case No: 2017-0227
v.)	
)	Hearing Dates: October 27, 2017
DISTRICT OF COLUMBIA)	November 1, 2017
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 2006
Respondent.)	Washington, D.C.
)	

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 GUARDIAN), 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 for special education eligibility in the 2015-2016 or 2016-2017 school years.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 21, 2017, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned hearing officer was appointed on August 22, 2017. On September 20, 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 5, 2017 and were unable to reach an agreement. My final decision in this case was originally due by November 4, 2017. The due process hearing was not completed in one day, as scheduled. In order to hold a second hearing day and to allow time to complete this decision, I granted DCPS' unopposed motion to extend the final decision due date for 13 calendar days to November 17, 2017.

The due process hearing was held before the undersigned impartial hearing officer on October 27 and November 1, 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 SPECIAL EDUCATION DIRECTOR and by DCPS' COUNSEL.

The Petitioner testified and called CLINICAL SUPERVISOR, EDUCATIONAL ADVOCATE and PSYCHOLOGIST ADVOCATE as additional witnesses. DCPS called MATH TEACHER and SPECIAL EDUCATION DIRECTOR as witnesses. Petitioner's Exhibits P-1 through P-46 were admitted into evidence, with the exceptions of Exhibits P-4, P-37, P-38, P-39 and P-45 to which I sustained DCPS' objections. Exhibits P-22 and P-23 were admitted over DCPS' objections. After the hearing, I also admitted a Prior Written Notice - Determination of Special Education Eligibility issued by PUBLIC CHARTER SCHOOL (PCS) on November 2, 2017. On November 1, 2017, I sustained DCPS' objection to a DIBELS Leveling Guide (P-47) and to PCS eligibility meeting notes (P-48) proffered by Petitioner. DCPS' Exhibits R-1 through R-6 were admitted into

evidence without objection. Counsel for the respective parties made opening statements and made closing arguments when the hearing was reconvened on November 1, 2017.

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 20, 2017 Prehearing Order:

Whether DCPS failed to evaluate, comprehensively evaluate, and/or timely evaluate Student in School Years 2015-2016 and 2016-2017 to determine whether Student was eligible for special education services as a Student with an other health impairment or an emotional disturbance.

For relief Petitioner requests that the hearing officer award Student compensatory education for DCPS' failure to identify Student as eligible for special education before Student transferred to Public Charter School in the 2017-2018 school year.

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 youth, is a resident of the District of Columbia. In the 2015-2016 and 2016-2017 school years, Student attended CITY SCHOOL, a DCPS public school. For the 2017-2018 school year, Student is enrolled in PCS. Testimony of Guardian. PCS serves as its own Local Education Agency (LEA). Hearing Officer Notice.

2. After enrolling in PCS, Student was evaluated for special education eligibility by PCS and, on or about October 31, 2017, was determined eligible as a student with Multiple Disabilities (MD) which include a Specific Learning Disability (Mathematics); Other Health Impairment (OHI), Attention Deficit-Hyperactive Disorder (ADHD) and Emotional Disturbance. November 2, 2017 PCS Prior Written Notice.

3. Guardian, who is Student's grandmother, became legal guardian in September 2013 when Student was taken from the family home because of alleged domestic abuse and physical abuse by the father. Student's birth mother continues to have regular contact with Student. Testimony of Guardian, Exhibit P-8.

4. Student has a history of emotional/behavioral challenges dating back until at least June 2014 when Student was assessed by COMMUNITY SUPPORT AGENCY. Guardian reported to Community Support Agency that Student had an issue with sleeping at night, had a challenge with focusing and could go from one extreme to another. When Student would get mad, Student reportedly would stomp off, slam doors, destroy property, cut up clothes, or destroy a sibling's property. Student also banged Student's head when upset. Student was also reported to hear imaginary voices. Exhibit P-8. Student has received services from Community Support Agency since at least 2014. However, Guardian refused to provide any of Student's health records to City School staff until the exhibit disclosure date before the due process hearing. Testimony of Guardian.

5. Student started taking medications in 2014 for a Bipolar condition and for ADHD. Student took the medications at home and Guardian never discussed Student's taking the medications with the school. Testimony of Guardian.

6. In May 2014, Guardian asked City School staff for an IEP for Student because Student was not on grade level. An Analysis of Existing Data meeting was held at City School on May 28, 2014. Guardian reported that Student would bang Student's head when showing frustration at home. This behavior was not seen at school. Exhibit R-6. Guardian was told that Student was doing fine academically, that Student was bright and that there were no behavior issues. Testimony of Guardian.

7. In December 2014, a Multidisciplinary Team (MDT) meeting was convened with Guardian to follow up on the educational and behavioral progress of Student and Student's brother. At that time, Student was reported to be progressing as expected in all academic areas. Behaviorally, Student was described as doing well on most days and Student's behavior at school was not a significant concern. Exhibit P-29.

8. In November 2015, Guardian told Community Support Agency staff that she was trying to get an IEP for Student based on Student's challenges with focusing in the classroom and at home. Guardian related that Student had issues with sitting still in class and got distracted easily. Guardian stated it was a fight to get Student to get homework done at home. Exhibit P-8.

9. In February 2016, Student was reported to be reading around two years below grade level. Exhibit P-35. In summer 2017, Student's reading achievement tested in the Low Average range of functioning. Student was not found to have a learning disability in Reading. Exhibit P-28.

10. Student's last term grades for the 2015-2016 school year were Proficient in all subjects except for an Advanced grade in Music. Exhibit P-30. Student's last term grades for the 2016-2017 school year were Proficient in all subjects except for a Basic grade in math and Advanced grades in Writing and Language, Music and Art.

Exhibit P-32.

11. On The Partnership for Assessment of Readiness for College and Careers, (PARCC) assessment in the 2015-2016 school year, Student had not yet met grade level expectations for math. Exhibit P-31. The following school year, Student partially met grade level standards in both math and English Language Arts (ELA). Exhibits P-33, P-34.

12. In the spring of 2017, Special Education Director learned for the first time that Student had a mental health diagnosis. She had a conversation with Guardian about developing a 504 Plan for Student (Section 504 of the Rehabilitation Act of 1973). A 504 Plan meeting was scheduled, but did not go forward. (Guardian and Special Education Director disagree about why the meeting did not occur, each blaming the other.) At the same time, Guardian refused Special Education Director's request for a copy of Student's health records. Testimony of Guardian, Testimony of Special Education Director.

13. On or about June 2, 2017, Student was involved in a verbal altercation incident with another student at City School. School staff could not calm Student down. They were unable to reach Guardian and called Student's aunt. Student's aunt and mother came to the school. At the aunt's instance, Student was conveyed to CITY HOSPITAL by ambulance. Testimony of Special Education Director. Student was admitted for a psychiatric complaint and remained hospitalized until June 9, 2017. Exhibit P-24. Student's diagnosis was "feeling suicidal." Exhibit P-25. Student was hospitalized again from July 12 to July 20, 2017 for physical aggression, suicidal ideation and emotional dysregulation. Exhibit P-26. Student's discharge diagnoses were Anxiety Disorder, NOS; ADHD - Combined Type; Other Specified Anxiety

Disorders and Suicidal Ideation. Exhibit P-25. Student was hospitalized again in September 2017. Student's discharge diagnoses were ADHD by history, Anxiety, Oppositional Behavior, Suicidal Ideation and Unspecified Mood [Affective] Disorder. Exhibit P-27.

14. City School has a "warning flag" system for concerns about students' academic and behavior progress – Yellow flag when not making progress, Red flag when showing a decline. Student had never been "flagged" for academic reasons or for behavior reasons prior to the June 2, 2017 incident. From August 2016 until June 2017, Student had no reported behavior incidents at school. Testimony of Special Education Director.

15. After the June 2, 2017 incident, Student never went back to City School. Special Education Director telephoned Guardian as well as Student's aunt trying to get Student to return to school. The school never heard back from Guardian. Testimony of Special Education Director. On July 19, 2017, Guardian went to City School to withdraw Student.² By that time, Guardian had enrolled Student in PCS for the 2017-2018 school year. Exhibit R-3.

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:

² Guardian testified that a City School administrator had told her to withdraw Student from the school. Special Education Director denied that occurred. The circumstances of Student's withdrawal from City School are not at issue in this case.

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

Did DCPS fail to evaluate, comprehensively evaluate, and/or timely evaluate Student in the 2015-2016 and 2016-2017 school years to determine whether Student was eligible for special education services?

After withdrawing from City School and enrolling in PCS for the 2017-2018 school year, Student was evaluated by PCS for special education eligibility on the recommendation of a City Hospital psychiatrist following Student's second hospitalization in July 2017. Student was determined eligible as a student with Multiple Disabilities (MD) which include a Specific Learning Disability (Mathematics); Other Health Impairment (OHI), Attention Deficit-Hyperactive Disorder (ADHD) and Emotional Disturbance. The issue for this case is whether DCPS denied Student a FAPE by not ensuring that Student was evaluated when Student was still at City School in the 2015-2016 or 2016-2017 school years.

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 burden of persuasion was on Petitioner to establish that DCPS had cause for a reasonable suspicion that Student had a disability prior to the June 2, 2017 behavior incident at City School. Since at least June 2014, Student has been followed by Community Support Agency for behavior issues at home, including difficulty sleeping, challenges with focusing, excessive anger and head-banging when upset. Student was also reported to hear imaginary voices. Mother testified that Student was taking psychiatric medications for these symptoms.

If DCPS had been provided information about Student’s being medicated and requiring mental health services from Community Support Agency, the District should have evaluated Student for a possible IDEA disability. *See D.K., supra*. However, Guardian withheld this information from City School staff and it was not shown that

DCPS was actually informed of the nature of the services provided to Student by Community Support Agency. Nor does the evidence establish that Student's behavior concerns were observed at school. City School had a "warning flag" system for concerns about students' academic and behavior progress – Yellow flag when not making progress, Red flag when showing a decline. Student had never been "flagged" for academic reasons or for behavior reasons prior to the June 2, 2017 incident. From August 2016 until June 2017, Student had no reported behavior incidents at school. Math Teacher testified that he had known Student since the 2015-2016 school year and that he did not have behavior problems with Student or hear reports of Student's exhibiting problem behaviors in other classes.

Petitioner called Psychologist Advocate who is employed by Petitioner's attorneys. This witness concurred with the diagnoses in the September 29, 2017 psychological evaluation that Student meets Diagnostic and Statistical Manual of Mental Disorders (DSM) criteria for ADHD, an SLD in mathematics and mood disorder, but her testimony was not probative that DCPS should have suspected these disabilities prior to Student's psychiatric hospitalizations in summer 2017.

Guardian also called Educational Advocate in support of her contention that DCPS should have suspected that Student had a disability. Educational Advocate opined that Student's report cards for the 2015-2016 and 2016-2017 school years and scores on DCPS' Assessment of Readiness (PARCC) should have given rise to a suspicion that Student had a disability. Special Education Director opined to the contrary that Student's academics were not a concern at City School in either the 2015-2016 or the 2016-2017 school year. Student's final term grades for the 2015-2016 school year were Proficient in all core subjects. For the last term of the 2016-2017

school year Student was Proficient in all subjects except for a Basic in Math and Advanced grades in Writing and Language, Music and Art. Math Teacher testified that Student's math abilities were right around grade level but Student got a lower grade due to rarely turning in work. He expressed surprise that Student was determined in fall 2017 to have a learning disability in math. Educational Advocate also cited Student's scores on reading assessments as a disability indicator. Based on reading measures reported in February 2016, Student was reading about two years behind grade level. However, when tested in summer 2017, Student's Reading achievement score was in the Low Average range and Student was not found to have a learning disability in Reading. For work habits, personal and social skills, Student was reported in the 2015-2016 school year to exhibit desired conduct with frequent or limited prompting. By the 2016-2017 school year, Student was exhibiting desired conduct independently or with limited prompting.

On the PARCC assessment in the 2015-2016 school year, Student had not yet met grade level expectations for math. The following school year, Student partially met grade level standards in both math and English Language Arts (ELA). Special Education Director opined that the PARCC scores merited little weight in isolation, when Student's had been regularly assessed at school with the i-Ready test for reading and math and the ST Math program.

On this record, I found the testimony of Special Education Director and Math Teacher that academics and behavior were not a concern for Student at City School more persuasive than the contrary opinion of Educational Advocate, who first met Student after Student was hospitalized in summer 2017. Certainly this would be a different case if before spring 2017, Guardian had disclosed to City School staff the

extent of Student's mental health challenges and the services Student was receiving outside of school. But on the evidence received at the due process hearing, I conclude that Petitioner has not met her burden of persuasion that prior to June 2017, DCPS should have reasonably suspected that Student had an IDEA disability.

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.

Date: November 15, 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