

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 FEB - 1 AM 10:41

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year-old male, who attends a DCPS high school.

On November 18, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to complete initial evaluations/assessments and convene a follow-up eligibility meeting in a timely manner, and inappropriately found Student ineligible for special education and failed to develop an individualized education program. As relief for these alleged denials of FAPE, Petitioner requested findings in its favor; that the hearing officer develop an appropriate IEP or order DCPS to do so; and that DCPS be ordered to fund Student's attendance at and provide Student with the necessary transportation to one of several private schools listed or some other appropriate therapeutic day or residential school, convene an MDT meeting within 10 days to develop an IEP, determine any compensation education that may be due, and determine placement with placement to be made within 10 days, award reasonable compensatory education, and provide any other relief warranted.

On December 1, 2011, DCPS filed its Response to the Complaint, which asserted, *inter alia*, that Student has missed 88 days this school year and missed more than 120 days last school year; Student is failing academically due to his failure to attend school; DCPS has no record of receipt of a written request for an initial evaluation of Student, and even if one had been submitted, Student's truancy would have prevented the school from completing evaluations; an IEE letter was issued on June 30, 2011, the IEE was completed on September 12, 2011, and at Student's

October 25, 2011 eligibility meeting the team determined Student's issues were due to his social maladjustment and not due to a disability; and DCPS has not denied Student a FAPE.

On December 15, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on December 18, 2011.

The parties concluded the Resolution Meeting process by participating in a resolution session on December 2, 2011. No agreement was reached, but the parties agreed to shorten the resolution period. However, during the prehearing conference, the parties determined to retract their agreement to shorten the 30-day resolution period to alleviate difficulties finding a mutually agreeable date on which to reschedule the due process hearing. Hence, the original 45-day timeline from December 19, 2011 to February 2, 2011 continued to apply.

On December 15, 2011, the parties filed their Joint Notice to Rescind Agreement to Cut Short 30-day Resolution Period. On December 18, 2011, the hearing officer issued an Order Resetting the Timeline to the Original 75-Day Timeline.

By their respective disclosure letters dated January 11, 2012, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 - 14) and DCPS disclosed nine documents (Respondent's Exhibits 1 - 9).

The hearing officer convened the due process hearing on January 19, 2012.¹ Both parties' disclosed documents were admitted into the record without objection. Thereafter, the hearing officer received opening statements, testimonial evidence from each party, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to complete initial evaluations in a timely manner, because initial evaluations were requested in February 2011, but an IEE was not issued until June 30, 2011, the evaluation was completed on September 12, 2011, and the eligibility meeting took place on October 25, 2011? (The viability of this claim depends upon a finding that the ineligibility determination at issue in claim #2, *infra*, was incorrect.)
2. Did DCPS inappropriately determine on October 25, 2011 that Student is ineligible for special education and inappropriately fail to develop an IEP, despite Petitioner's

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

assertion that Student is eligible for Emotional Disturbance and Learning Disability and requires a full-time therapeutic residential facility?

FINDINGS OF FACT²

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

1. Student is a _____ year-old male, who is registered to attend _____ grade at a DCPS senior high school. This is Student's second year in _____ grade.³
2. Student has significant truancy problems. He was absent for at least 102 days of school during school year (SY) 2010/11. Between August 30 and October 11, which consisted of 31 school days, Student missed 22.5 days of school. On or about October 31, 2011, DCPS prepared a truancy referral form to refer Student to the District of Columbia Superior Court for truancy. Per the form, Student was truant from school for 25 days between September 9 and October 24, 2011, and he accumulated 318 absences at his previous DCPS senior high school. However, the document was never sent to the Superior Court based on the attendance counselor's belief that Student had transferred to another DCPS high school.⁴
3. DCPS has not implemented any major initiatives designed to combat Student's truancy. Hence, although the record includes a Student Attendance Support Plan, which was signed and dated on October 31, 2011 by the Principal and Attendance Counselor at Student's current DCPS high school, the Plan does not indicate what barriers to school attendance exist for Student, any actions to be taken by Student, Parent or school personnel, or any referrals to be made to in-school or community-based resources. Similarly, a Home Visit Intervention Form included in the record was signed by the Attendance Counselor at Student's current school but sections for the date and timing of any home visit(s), the strengths of Student and/or his family, and any observations were left blank.⁵
4. On February 17, 2011, Petitioner, through her attorney, requested in writing that DCPS conduct a comprehensive initial evaluation of Student.⁶
5. On June 17, 2011, Petitioner filed a Complaint alleging that DCPS failed to complete an initial evaluation of Student and timely convene a follow-up eligibility meeting. To resolve that Complaint, on June 30, 2011, DCPS issued an independent educational

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ See Respondent's Exhibit 4 at 1; Respondent's Exhibit 8.

⁴ See Respondent's Exhibit 2 at 3; Respondent's Exhibits 5 and 7; testimony of attendance counselor.

⁵ Petitioner's Exhibit 13; Respondent's Exhibit 6.

⁶ Petitioner's Exhibit 2.

evaluation ("IEE") letter authorizing Student to obtain an independent bilingual comprehensive psychological evaluation for Student. Ultimately, however, the independent evaluator determined that Student speaks, reads and writes in English better than Spanish, and he did not require the services of the Spanish language interpreter.⁷

6. Student's IQ is 65, which is in the Very Low range. Student's Broad Reading and Broad Written Language skills are in the Low range, with grade equivalencies ("GE") of 4.6 and 4.7, respectively, while his Broad Math skills are in the Low Average range (GE = 6.7). These GEs represent performance at age equivalencies of 10-0, 10-1, and 12-1 years of age, respectively.⁸
7. Student's academic problems started in the 5th grade. He would not always bring his work home. He would tell his parents he had done the work, but when his report card came it was clear Student had not done the work. More recently, Student has indicated that he does not want to go to school because his skills are low and he's afraid the other students will make fun of him.⁹
8. Since Student's truancy issues did not become a major issue until SY 2010/11 when he began attending high school, one would have expected his academic achievement scores to be at the 8th to 9th grade level, instead of at the 4th to 6th grade level. On the other hand, Student has a history significant for truancy and he may not have been able to access previously learned but unused information during his independent evaluation. Moreover, some children do not perform well on standardized tests but are able to do just fine on in-class assessments.¹⁰
9. Additional data is required to determine whether Student is LD and to rule out other potential issues that could have caused Student's lack of academic achievement on the independent evaluation. Student's performance in a classroom needs to be observed to determine whether he can master the material being presented. School attendance by Student is the only way to determine exactly what it is, if anything, that Student needs.¹¹
10. During SY 2009/10, when Student was in the 9th grade at middle school, Student received the following grades: B+ in Health Education; B in Health and Physical Education, and Marching Band 1A; C in Algebra 1B and Marching Band 1B; C- in Algebra 1A and Extended Literacy 9; D in English 1; and F in World History and Environmental Science.¹²
11. Extended literacy classes are designed for students who need a little additional support in the area of language arts.¹³

⁷ Petitioner's Exhibits 4, 6, and 7; Petitioner's Exhibit 8 at 6.

⁸ Petitioner's Exhibit 8.

⁹ Testimony of Mother.

¹⁰ Testimony of licensed clinical psychologist; testimony of DCPS school psychologist.

¹¹ Testimony of DCPS school psychologist.

¹² Respondent's Exhibit 8.

¹³ Testimony of DCPS school psychologist.

12. Student received the following grades in 10th grade for SY 2010/11: D in Art and Design Foundations and U.S. History/Geo Part A; and F in all other classes taken, including Physical Education II: Indiv & Dual Sports.¹⁴
13. Student's September 12, 2011 comprehensive psychological evaluation report contains the following diagnoses for Student: Axis I -- Mood Disorder Not Otherwise specified, Cannabis Abuse; Alcohol Abuse; and Learning Disorder Not Otherwise Specified; Axis IV -- multiple arrests, affiliation with a gang, history of school truancy and absenteeism, academic problems, and interpersonal difficulties with parents. However, a close examination of the evaluation report reveals that the evaluator's assessment of Student's social-emotional and behavioral functioning are primarily based on scales/questionnaires completed by Student's mother, as all of Student's ratings of himself were in the Average range of functioning, Student's teachers from his previous school were not available to complete rating scales, and the teachers at Student's current school lacked sufficient interaction with him, due to his chronic truancy, to be able to rate him.¹⁵
14. Student's mother wants Student to go to a full-time residential school so that he can focus more on school and stay at the school, because there is a lot of pressure on the mother at home because she cannot make Student go to school. Student is also beginning to have a negative influence on his younger brother.¹⁶
15. Student's mother initially testified on direct examination that Student has never been arrested and was only incarcerated in a shelter because of his truancy issues, but he ran away from the shelter and was later incarcerated again after turning himself in. Then, in response to questions on cross-examination, the mother stated that Student had been arrested one other time that she knows about, but stated that she did not know what the arrest was for. As a result of the mother's inconsistent testimony, her credibility is questionable.
16. Student has been experiencing interpersonal problems with his parents, with whom he lives, since he began attending middle school. He is very disrespectful to his mother and his father, does not follow their instructions, and uses foul language.¹⁷
17. Student has a pattern of coming home at approximately 3 or 4 a.m. and sleeping most of the day, then he eats a very light dinner before leaving the house for the entire night. More recently, Student has begun staying away from home for days without coming back.¹⁸
18. Student began having legal problems during his first year in high school. As a result, Student has been arrested and taken into custody several times. Student does not comply with the court's requirements for him. His probation officer sends him to court for failure

¹⁴ Respondent's Exhibit 8.

¹⁵ Petitioner's Exhibit 8.

¹⁶ Testimony of Parent.

¹⁷ Petitioner's Exhibit 8 at 2.

¹⁸ Petitioner's Exhibit 8 at 2; Petitioner's Exhibit 9 at 2; Respondent's Exhibit 2 at 2.

to check in with her. He has refused to participate in counseling sessions ordered by the court. Moreover, the court has placed Student in a residential setting at least twice, but Student ran away from the residential homes. Student was also placed in shelters on several occasions, but he ran away from one shelter at least once and from another shelter at least three times.¹⁹

19. Student has used drugs and alcohol in the past. There is insufficient evidence to determine with certainty whether Student currently uses drugs and alcohol; however, Student has passed his weekly court-mandated urine tests since April 2011, but he ingests large amounts of cranberry juice prior to each urine test.²⁰
20. Student has a history of gang involvement. Student's friend was killed when Student was 13 years old. Student did not witness the murder, but around the time of the killing Student decided that school was no longer for him. However, Student's history of gang involvement and drug and alcohol abuse predated his friend's death, and it is possible that his deceased friend was a gang member who was killed by a rival gang. Student has admitted to robbing people constantly between the ages of 13 and 15 to get money to buy what he wanted. Although Student indicates that he is no longer as active with his gang, he still spends time with individuals from the gang.²¹
21. Student has problems at home with following his parents' rules and expectations. He also has significant behavior problems in the community, which are reflected in his antisocial, oppositional, and disrespectful behavior, his drug use, and his affiliation with gang members. These problems are primarily antisocial and delinquent in nature, and they are engaged in willfully by Student. Hence, they are indicative of Student's social maladjustment. While Student clearly is socially maladjusted, there is insufficient data to determine whether he is also ED because he needs to be observed in school. Social adjustment and ED are not mutually exclusive.²²
22. An FBA is an essential tool needed to help determine why Student will not come to school. However, it will be impossible to prepare an FBA unless Student comes to school.²³
23. On September 23, 2011, Petitioner, through her attorneys, submitted Student's September 12, 2011 independent comprehensive psychological evaluation report to DCPS.²⁴
24. On October 25, 2011, DCPS convened an eligibility meeting for Student. The multi-disciplinary team ("MDT") determined, based upon a review of Student's independent comprehensive psychological evaluation report, that Student is not eligible for special education services because his problems are reflective of social maladjustment and not

¹⁹ Petitioner's Exhibit 8.

²⁰ Petitioner's Exhibit 8 at 3-4.

²¹ Petitioner's Exhibit 8 at 11.

²² Testimony of DCPS school psychologist.

²³ Testimony of DCPS school psychologist.

²⁴ Petitioner's Exhibit 5.

emotional disturbance or a learning disability. Parent and her educational advocate disagreed with the team's determination.²⁵

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. Alleged Inappropriate Eligibility Determination

IDEA defines a "child with a disability" as a child who has been evaluated in accordance with 34 C.F.R. §§ 300.304 – 300.311 as having, *inter alia*, a serious emotional disturbance or a specific learning disability, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1).

For these purposes, a serious emotional disturbance ("ED") means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problem. The term ED does not apply to children who are socially maladjusted, unless it is determined that they also have ED under the definition set forth herein. 34 C.F.R. § 300.8(c)(4)(i)-(ii).

Specific learning disability ("SLD") means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. Specific learning disability does not include learning problems that are primarily the result, *inter alia*, of emotional disturbance, or of environmental, cultural, or economic disadvantage. *See* 34 C.F.R. § 300.8(c)(10)(i)-(ii).

To determine a Student's eligibility for special education and related services, after necessary assessments and other evaluation measures have been completed, a group of qualified professionals and the child's parent determine whether the child is a child with a disability, as defined in § 300.8. *See* 34 C.F.R. § 300.306(a)(1). A child must not be determined to be a child with a disability if the determinant factor is lack of appropriate instruction in reading or math, or limited English proficiency, and if the child does not otherwise meet the eligibility criteria under § 300.8(a). § 300.306(b)(1)-(2). In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, the public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, and ensure that

²⁵ Respondent's Exhibit 2; Petitioner's Exhibit 9.

information obtained from all of these sources is documented and carefully considered. 34 C.F.R. § 300.306(c)(1)(i)-(ii).

A child may be determined to have SLD if, *inter alia*, the child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with appropriate learning experiences and instruction: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD, using appropriate assessments. See § 300.309(a)(1)-(2). As part of the process of determining that a child is SLD, the public agency must ensure that the child is observed in either the child's learning environment or in an environment appropriate for a child of that age. 34 C.F.R. § 300.310.

In the instant case, Petitioner has asserted that DCPS inappropriately determined that Student is not eligible for special education and related services because Student's September 2011 independent comprehensive psychological assessment supports a finding that Student is eligible as ED and LD, because the report states that Student has learning disabilities in math, reading and writing, and the report further states that Student has a severe emotional disturbance which contributes to his excessive truancy and requires that he be placed in a full-time therapeutic residential facility.

DCPS disagrees, asserting that Student's chronically excessive truancy is not the only factor in this case, because Student's substance abuse and gang activity are also relevant. DCPS points out that all of these factors were discussed in Student's independent evaluation, in the review of that evaluation by DCPS's school psychologist and by the team during Student's eligibility meeting. DCPS maintains that Student is socially maladjusted and does not meet the criteria for LD or ED, with the result that he is not a child with a disability.

With respect to ED, the evidence in this case reveals that Student has a history of cannabis and alcohol abuse, multiple arrests, lack of compliance with court requirements, affiliation with a gang, school truancy and excessive absenteeism, and interpersonal difficulties with his parents. The evidence further reveals that one of Student's friends was killed when Student was 13 years old, which was a traumatic event in Student's life; however, Student's history of gang involvement, drug and alcohol abuse, and interpersonal problems with his parents predated his friend's death. All of this evidence, when considered together, has persuaded the hearing officer that Student's negative behaviors are primarily delinquent in nature and are, therefore, the result of social maladjustment. See *e.g.*, *W.G. and M.G. v. N.Y. City Dept. of Ed.*, (despite single depressive episode, Student's behaviors including truancy, defiance and refusing to learn were indicative of social maladjustment).

Social maladjustment and ED are not mutually exclusive. However, more information is needed to determine whether Student also has ED. Specifically, Student needs to be observed in the school setting to rule in or rule out ED. Moreover, as IDEA requires the public agency to ensure a child has been observed in school or some other appropriate environment prior to determining

him or her eligible as SLD, Student also needs to be observed in the school setting to rule in or rule out SLD. Under these circumstances, the hearing officer concludes that there is insufficient evidence in the record to determine whether or not DCPS's ineligibility determination for Student was incorrect. Hence, Petitioner has failed to meet its burden of proof on this claim.

To ensure that sufficient data is collected to definitively determine whether or not Student is a student with a disability who is entitled to receive special education and related services, the hearing officer will order DCPS to conduct at least two observations of Student and reconvene Student's eligibility meeting to consider the observation data along with Student's evaluative data, parental input, and other relevant data in determining Student's eligibility. *See Letter to Armstrong*, 28 IDELR 303 (OSEP June 11, 1997) (due process system must give hearing officers authority to order any relief necessary to ensure student receives a FAPE).

The evidence in this case reveals that Student's chronic truancy has prevented DCPS from conducting or arranging an observation of Student, and that an FBA is an essential tool needed to help determine why Student will not come to school. As a result, the hearing officer will also order DCPS to conduct an FBA for Student and implement truancy interventions, such as an attendance contract, an attendance support plan, home visits, a truancy referral to the D.C. Superior Court or other appropriate interventions, designed to help Student overcome his truancy problem so that DCPS can conduct the necessary observations of Student.²⁶

2. Alleged Failure to Timely Complete Initial Evaluation

Under IDEA and District of Columbia law, DCPS must complete initial evaluations within 120 days of receipt of a referral. *See* 34 C.F.R. § 300.301(c)(1) (initial evaluation must be completed within 60 days of receiving parental consent, unless the State establishes a timeframe for the evaluation); D.C. Code § 38-2561.02 (DCPS must evaluate a student who may have a disability within 120 days from date of referral). Either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301(b). For these purposes, the public agency's initial evaluation must consist of procedures to determine if the child is a child with a disability under § 300.8, and to determine the educational needs of the child. 34 C.F.R. § 300.301(c)(2).

In the instant case, Petitioner has acknowledged that the viability of this claim depends upon a finding that DCPS's ineligibility determination for Student was incorrect. As the hearing officer determined above that Petitioner failed to meet its burden of proof on its claim concerning DCPS's ineligibility determination, this claim is not presently a viable one. Hence, the hearing officer will dismiss the claim without prejudice to Petitioner's right to re-file the claim if it is ultimately determined that Student is indeed eligible for special education and related services.

²⁶ The hearing officer acknowledges that one or more observations are required for successful completion of an FBA.

ORDER

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

1. Within 10 school days of the issuance of this Order, DCPS shall begin implementing truancy interventions, such as an attendance contract, an attendance support plan, home visits, a truancy referral to the D.C. Superior Court and/or other appropriate interventions, designed to help Student overcome his truancy problem.
2. Within 30 calendar days of the issuance of this Order, DCPS shall conduct at least two observations of Student in the school environment and develop an FBA that addresses the reasons for Student's truancy.
3. Within 45 calendar days of the issuance of this Order, DCPS shall reconvene Student's eligibility meeting and consider the observation data that has been collected for Student pursuant to Paragraph 2, above, as well as Student's evaluative data, parental input, and other relevant data, to determine whether or not Student is eligible for special education and related services as a child with ED and/or SLD.
4. Petitioner's claim that DCPS incorrectly determined Student ineligible for special education and related services and inappropriately failed to develop an IEP is **Denied and Dismissed** for failure of proof.
5. Petitioner's claim that DCPS failed to timely conduct an initial evaluation of Student is **Dismissed Without Prejudice**.

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).

Date: 2/1/2012

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer