

*District of Columbia*  
*Office of the State Superintendent of Education*

OSSE  
Student Hearing Office  
September 23, 2013

Office of Review and Compliance  
Student Hearing Office  
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**Confidential**

Parent on Behalf of Student <sup>1</sup> ,  Petitioner,  v.  District of Columbia Public Schools (“DCPS”)  Respondent.  Case #	HEARING OFFICER’S DETERMINATION  Hearing Date: September 11, 2013  <u>Representatives:</u>  Counsel for Petitioner:    Counsel for Respondent:    <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **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 April 18, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age seventeen and resides in the District of Columbia with parent. During school year (“SY”) 2012-2013 attended a DCPS high school (“School A”). On or about February 14, 2013, the student’s parent provided DCPS a written request that the student be evaluated for special education.

A DCPS psychologist thereafter met with parent and discussed the request and the parent agreed to go forward with school-based interventions. Those interventions were begun but the student stopped coming to the study group and tutoring sessions. The parent asserts that she followed up with DCPS about the student’s participation in the interventions but she never rescinded her request that the student be evaluated for special education and expected that the evaluation and eligibility process would be completed.

Petitioner filed the current complaint asserting DCPS failed to evaluate and determine the student’s eligibility or ineligibility within the required time frame and/or failed to evaluate the student pursuant to “child find.” Petitioner seeks an order directing DCPS to fund independent evaluation(s) and convene and eligibility meeting and determine the student’s eligibility or ineligibility and if the student is determined eligible develop an IEP and fund compensatory education.

DCPS filed a timely response to the complaint on July 19, 2013. DCPS denied any alleged denial of a FAPE and specifically asserted that the parent agreed to interventions subsequent to the her request and therefore evaluations were not begun and there was no independent basis for DCPS to suspect a disability under “child find.”

A resolution meeting was held on July 24, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead they expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. The 45-day period began on August 9, 2013, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on September 22, 2013.

A pre-hearing conference (“PHC”) in this matter was held on August 8, 2013.<sup>2</sup> On August 14, 2013, the Hearing Officer issued a pre-hearing conference order outlining the issue to be adjudicated at hearing.

**THE ISSUE ADJUDICATED:**

Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to evaluate the student for special education pursuant to a parental request on or about February 14, 2013, and/or pursuant “child find” based on the student’s ongoing academic struggles. Petitioner asserts the student should have been identified under “child find” by February 2013.

**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 13 and Respondent’s Exhibits 1 through 4) that were admitted into the record and are listed in Appendix A.

**FINDINGS OF FACT:**<sup>3</sup>

1. The student is age seventeen and resides with parent in the District of Columbia. The student has been attending School A since ninth grade and is currently a high school senior for SY 2013-2014. (Parent’s testimony)
2. School A is an application school with approximately 329 students. Students are provided general education and vocational training. The school is academically rigorous and students are required to work independently and if any student’s academic performance is not up to par that student may not be allowed to return to School A the following school year. (Witness 1’s testimony)
3. Since attending school A the student had to go to summer school to pass from 10<sup>th</sup> to 11<sup>th</sup> grade. The student has been having problems with comprehension and the student’s progress reports have indicated the student struggles academically. The student stated to the parent that schoolwork is overwhelming at times. The student does not have behavioral difficulties at school and has had not attendance issues. The parent has spoken with the student’s teachers about grades and test scores and academic struggles and at least one teacher indicated that might be having processing issues. (Parent’s testimony)

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<sup>2</sup> The pre-hearing conference (“PHC”) was convened on the first date that both counsel were available following reassignment of the case.

<sup>3</sup> The evidence that is the source of the Finding of Fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit 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.

4. On February 11, 2013, School A held meetings with parents to discuss students who were not doing well in classes and who might not be invited to return to School A the following year. The student was included in that list and the student's parent attended one of these meetings. (Parent's testimony)
5. On February 14, 2013, the student's parent mailed a letter to the School A principal requesting that the student be evaluated for special education services because the student was having problems with the same academic classes, English and History, for a number of years. The principal responded to the parent with correspondence indicating the issues would be addressed. (Parent's testimony)
6. The parent later talked with the School A psychologist and expressed her concerns about the student and mentioned she had already sent a letter to the principal. (Parent's testimony)
7. The parent recalls that the psychologist stated that she did not recommend that the student be evaluated because was doing well in at least one of more difficult courses. The parent, however, did not rescind her request that the student be evaluated and wanted the student evaluated before senior year. The school psychologist provided the parent strategies to assist the student but the parent did not ever state that she did not want the student evaluated. No evaluations of the student were ever conducted by DCPS prior to the due process complaint being filed. (Parent's testimony, Petitioner's Exhibits 5, 6)
8. After the meeting with the school psychologist the student began attending after-school interventions with science teacher that had been arranged by the school psychologist. The student's progress reports, however, indicated that by March 2013 was failing English and History. (Parent's testimony, Petitioner's Exhibit 7)
9. In June 2013 School A held a meeting to discuss whether the student would be allowed to return to School A. If the student could pass the summer school courses could continue at School A for SY 2013-2014. The student failed four classes but was able to make up two in summer school and pass to twelfth grade and has returned to School A for SY 2013-2014. (Parent's testimony, Petitioner's Exhibits 9, 10)
10. School A's school psychologist confirmed that in her conversation with the student's parent the parent asked that the student be evaluated for special education, but also asked that the student participate in after-school interventions. Typically a student will go through the student support team ("SST") process first before being evaluated for special education. However, a formal SST process was not begun for this student. The principle intervention that was implemented for the student following the psychologist's conversation with the parent was for science teacher to assist him with study skills, organization and the opportunity to complete homework. The parent has now provided DCPS a consent form to evaluate the student and the evaluation has begun but will not be completed until the student obtain eye glasses so that the assessments can be completed. (Witness 1's testimony)

## 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”).

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)

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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>4</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE:** Whether DCPS denied the student a FAPE by failing to evaluate the student for special education pursuant to a parental request on or about February 14, 2013, and/or pursuant “child find” based on the student’s ongoing academic struggles. Petitioner asserts the student should have been identified under “child find” by February 2013.

**Conclusion:** The evidence supports a finding that that the parent made a written request of DCPS that the student be evaluated for eligibility for special education services on February 14,

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<sup>4</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

2013, and that the student should have been evaluated for special education services by at least June 14, 2013. DCPS did not begin the evaluation process prior to this due process complaint being filed. Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE. The Hearing Officer does not conclude, however, that DCPS was required to evaluate the student pursuant to "child find" prior to the parental request.

Congress passed the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. §1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C. §1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

A parent may initiate a request for an initial eligibility for special education benefits and services. 34 C.F.R. §300.301 (b). In the District of Columbia, such a request, termed a "referral," is to be made in writing. DCMR Title 5E, §3004(a).

Child Find is DCPS' affirmative obligation under the IDEA: "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008). DCPS must conduct initial evaluations to determine a child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code § 38-2561.02(a).

"DCPS child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" *Long*, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

Petitioner presented credible evidence including the parent's testimony<sup>5</sup> that she made written requests in February 2013 to DCPS for the student to be evaluated for special education services based upon academic difficulties. The point at which the parent made this request was sufficient notice to DCPS that the student should have been evaluated for special education. Respondent thereafter had 120 days to complete an evaluation and determine the student's eligibility pursuant to D.C. Code §38-2561.02(a). DCPS failed to do so and this failure was a denial of a FAPE to the student.

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<sup>5</sup> FOF # 4 - The parent was forthright, composed and unhesitant in testimony and the Hearing Officer found her to be a credible witness regarding her request in February 2013 to DCPS that the student be evaluated for special education.

Although there is evidence the parent met with the School A psychologist and agreed to interventions and help from science teacher on study skills, organization and completing homework, the parent credibly testified that she never rescinded her written request that the student be evaluated and expected the evaluation would have completed. Although DCPS has not begun the evaluation process and apparently cannot proceed until the student has glasses, the evaluation process should have started long before the complaint in this case was filed. DCPS' failure to do so was a denial of a FAPE to the student. Petitioner sustained the burden or proof by a preponderance of the evidence.

Petitioner also asserted DCPS should have identified and evaluated the student under its "child find" obligations. Although there was testimony and documentary evidence that the student had significant academic difficulties during SY 2012-2013 at School A, the Hearing Officer concludes that the student was identified to DCPS based upon the parental request made in February 2012. The evidence Petitioner presented regarding the student's academic performance prior to the parental request did not rise to the level to have put DCPS on notice that the student might have been a child with a disability in need of evaluation. The Hearing Officer has concluded that DCPS was under the obligation to evaluate the student based on the parental request; its obligation to evaluate the student under "child find" was insufficiently proved.

**ORDER:<sup>6</sup>**

1. DCPS shall within thirty (30) calendar days of the issuance of this Order, complete a comprehensive psychological evaluation (to include cognitive, academic and social/emotional components).
2. DCPS shall within thirty (30) calendar days of the issuance of this Order convene a multi-disciplinary team ("MDT") meeting to determine what if any other evaluations of the student are warranted and DCPS shall within thirty (30) calendar days of that MDT meeting conduct the additional evaluations, if any.
3. DCPS shall, within twenty (20) school days of completion of the comprehensive psychological evaluation, convene an eligibility meeting to discuss and determine the student's eligibility or non-eligibility for special education.<sup>7</sup>
4. If the student is found eligible for special education DCPS shall, within ten (10) school days of the eligibility meeting, convene another meeting to develop an individualized educational program ("IEP") for the student and discuss and determine compensatory education, if warranted.

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<sup>6</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

<sup>7</sup> The parties by mutual assent may delay the eligibility meeting until all evaluations are completed if the MDT orders any additional evaluations.

**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 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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: September 22, 2013**