

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 29, 2014, 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 2007.

BACKGROUND AND PROCEDURAL HISTORY:

The student is attending his DCPS neighborhood school (“School A”). In 2010 the student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). The student attended School A in first grade during school year (“SY”) 2011-2012. He had significant absences during first grade and struggled in reading and math. The student was promoted to second grade.

The student’s parent removed him from School A and placed him in a public charter school (“School B”) for second grade. DCPS is the local education agency (“LEA”) for special education purposes for School B. While the student attended School B in second grade (during SY 2012-2013) he also had significant absences during that school year. The student’s School B teacher stated in the student’s end of year report card that he was not ready to make the transition to the third grade. Because the student’s mother wanted him promoted to third grade he was promoted with the recommendation that he attend summer school and participate in a summer reading program. The student did not attend summer school.

The student’s parent placed him back at School A for third grade at the start of SY 2013-2014 and soon thereafter requested School A evaluate the student for special education. DCPS conducted evaluations and on February 18, 2014, convened an eligibility meeting. The team concluded the student did not meet the criteria as a child with a disability after considering him for both specific learning disability (“SLD”) and other health impairment (“OHI”) for his ADHD.

On February 25, 2014, Petitioner filed the due process complaint asserting DCPS inappropriately found the student ineligible at the February 18, 2014, meeting. Petitioner also alleged DCPS failed to timely identify and evaluate and determine the student’s eligibility while he was attending School B pursuant to “Child Find” (due to his behavior and poor academic performance) and/or parental request in October 2012 and should have determined eligibility by the end of SY 2012-2013. Petitioner sought as relief an order finding the student eligible under either or both classifications considered and directing DCPS to develop an individualized educational program (“IEP”) and provide an appropriate placement and provide compensatory education.

DCPS filed a timely response to the complaint on March 4, 2014. DCPS denied any alleged violation(s). DCPS asserted there was no request for evaluation and no record of referral at School B by the parent nor was there a basis to evaluate the student prior to

SY 2013-2014; the student was appropriately evaluated and appropriately determined ineligible. One of the factors that supported the determination is that the student had excessive absences the previous school years as well as during the current school year.

A resolution meeting was held April 8, 2014. Nothing was resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on March 27, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on May 11, 2014. The Hearing Officer convened a pre-hearing conference on April 10, 2014, and issued a pre-conference order on April 10, 2014, outlining, inter alia, the issue to be adjudicated.

ISSUES: ²

The issues adjudicated are:

1. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to timely evaluate and determine his eligibility by the end of SY 2012-2013 based on "Child Find" due to his behavior and poor academic performance and/or a parental request made in October 2012.
2. Whether DCPS denied the student a FAPE by failing to determine the student eligible for special education services at the February 18, 2014, meeting.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 26 and Respondent's Exhibits 1 through 8) that were all admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

FINDINGS OF FACT: ³

1. The student is attending School A. In 2010 the student was diagnosed with ADHD and has been prescribed and currently takes medication for that condition. (Petitioner's Exhibit 18-2)
2. The student attended School A in first grade during SY 2011-2012. He had significant absences during first grade. The student's parent notified School A of the student's ADHD diagnosis. The student's first grade report card noted his struggling in reading

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ The evidence that is the source of the Finding of Fact ("FOF") 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.

and math and in most skill areas he was not meeting standards in any advisory except the fourth. School A provided the student tutoring and a laptop computer to assist in addressing his academic deficits. The student was promoted to second grade but the student's teacher noted in his end of the year report card that the student would benefit from summer school and noted the student would need tutoring in second grade. (Parent's testimony, Petitioner's Exhibit Petitioner's Exhibits 18-4, 20-1, 20-2, 20-3)

3. The student's parent removed the student from School A and placed him in School B for second grade. DCPS is the LEA for School B. While the student attended School B in second grade he was absent a total of 38 school days and by the end of the school year was rated as needing improvement in most academic areas including language arts and math. His study habits were also rated as needing improvement. At the end of second grade the student's teacher noted that he had difficulties completing classroom and homework assignments and consistently tested below basic in reading and math. The subject of the student being evaluated never came up while he was attending School B. (Parent's testimony, Petitioner's Exhibit 18-4, 19-1)
4. The student's School B teacher stated the following in his end of year report card: "Based on an overall assessment of his [the student's] skills, he is not ready to make the transition to the third grade. However, in a discussion with his mother she indicated that she wanted him promoted to third grade, based on this discussion, it is my recommendation that he attend summer school and participate in a summer reading program..." (Parent's testimony, Petitioner's Exhibit 19-2)
5. The student did not attend summer school. The parent placed the student back at School A for third grade at the start of SY 2013-2014 because she believed the student received more assistance when he attended School A. Because the student's parent knew the student was not ready for third grade she requested that School A evaluate him for special education. DCPS started the student evaluation team ("SST") and provided the student classroom interventions and began the evaluation process to determine his need for special education. (Parent's testimony, Petitioner's Exhibit 18-5, 10-3)
6. The SST agreed the student would be provided reading intervention and a reading specialist began working with the student. (Witness 1's testimony, Witness 4 testimony)
7. During SY 2013-2014 the parent attended parent/teacher conferences and the student's classroom teacher informed the parent that the student was behind in every academic area and has been displaying disruptive behaviors in the classroom, disturbing other students' work and displaying work avoidance. The parent got at least one email from the student's teacher regarding the student's behaviors in the classroom and the teacher sometimes called the student's father about the student's behavior. The student's absences during the current school year have primarily been due to doctor appointments or illness. His absences in prior school years were often due to the student's father not getting him to school when he visited with his father on the weekends or when the parent did not have funds for his transportation to school. (Parent's testimony)

8. The student’s stepfather assists him with his homework and observes the student has significant difficulty staying focused and difficulty retaining what he has learned. The student is not operating at the academic level of the class work and homework he is being provided. The student’s inability to do the work also contributes to his resistance and distractibility in doing the work. (Stepfather’s testimony)
9. The student’s first advisory report card in third grade indicated he struggled in reading and math and he received “below basic” rating. For the first two advisories the student was below basic in all areas except music and art. The report card indicates that of the 132 days of the school year at that point the student had been attended 117 and had missed school 15 days and had been late 17 days. (Petitioner’s Exhibit 7-6, Respondent’s Exhibit 2-2)
10. On November 21, 2013, DCPS conducted a functional behavior assessment (“FBA”) conducted by the School A social worker. The FBA notes that the student’s teacher reported the student’s difficulty in maintaining focus and his impulsivity but these difficulties did not cause a serious disruption in his academic progress. The student exhibits mild tantrums where he emotionally shuts down in an effort to avoid academic instruction. The social worker concluded that the student’s overall school attendance/tardiness should be improved to rule out missing instruction as contributing to his poor academic performance. (Petitioner’s Exhibit 9-1, 9-2, 9-3)
11. In December 2013, DCPS conducted a social history and a comprehensive psychological evaluation of the student. (Petitioner’s Exhibit 18, Respondent’s Exhibit 3)
12. The psychological evaluation included a Woodcock Johnson (“WJ-III”) administered when the student was age nine, 0 months (9-0) and in third grade (3.3). The student was operating below grade in all areas tested - mostly at first grade level except math where was operating at beginning second grade. The student had the following scores:

Cluster/Test	Standard Score	Grade Equiv.
Broad Reading	69	1.8
Letter -Word Identification	76	1.9
Reading Fluency	76	1.8
Passage Comprehension	74	1.6
Broad Math	74	2.0
Calculation Skills	78	2.1
Math Fluency	67	1.3
Calculation	85	2.6
Applied Problems	75	1.9
Broad Written Language	66	1.8
Written Expression	76	1.8
Writing Fluency	75	1.4
Spelling	68	1.5
Writing Samples	81	1.9

(Petitioner’s Exhibit’s Exhibit 7-7)

13. The DCPS psychologist assessed the student's cognitive abilities to be at the low average range with a full scale IQ of 72. His verbal comprehension and working memory yielded the following scores: 83 and 88 respectively. His perceptual reasoning score and processing speed score (65 and 75 respectively) impacted his lower full scale IQ of 72. (Petitioner's Exhibit 7-5)
14. The student's BASC-2⁴ rating scales reflected "at risk concerns" to "clinically significant" in various areas. The teacher responses indicated the student presented within the clinically significant range for dealing with problems and externalizing problems. These included the student showing elevated signs of hyperactivity, poor self-control and aggression. The teacher noted the student had trouble staying seated and bothering other children when they are working. (Petitioner's Exhibit 7-8, 7-9)
15. The teachers responses to the evaluator stated that the student almost always had the following behaviors in the classroom: short attention span, easily distracted, unorganized, trouble staying seated, bothering other children, is overly active, disrupts other children's activities, acts without thinking and interrupting others when they are speaking, cannot wait his turn. (Respondent's Exhibit 3-8, 3-9)
16. The DCPS psychologist interviewed the student's classroom teacher and his parent and conducted a classroom observation. The classroom teacher stated that the student tried his best but at times got distracted and would not always complete his class work or turn in his homework. The student's rate of reading and vocabulary was weak compared to typical grade peers. His most significant areas of need were in organization and planning, keeping track of work that is due and in meeting deadlines. The student was below basic in terms of following verbal instructions, his ability to pay attention and focus and in his peer interactions. The teacher was also concerned about the student's late arrivals to school. (Petitioner's Exhibit 7-3)
17. The DCPS psychologist stated in the evaluation that the student's "achievement history and cognitive profile reinforce the determination that he demonstrates areas of cognitive processing that are not as well developed as others and that attendance may have played a role in the student not mastering grade level skills." The psychologist went on to state: "A constellation of processing including processing speed, long term retrieval, planning and organization, self regulation, self monitoring and aspects of working memory and attention can, to varying degrees, impact on [the student's] general academic functioning. "At this time [the student] does not demonstrate deficits in his academic skills as assessed the areas of reading, math and written expression.⁵ As such, he does not appear to meet the IDEA criteria for special education eligibility as a student with a specific learning disability or other health impairment." (Petitioner's Exhibit 7-11)

⁴ Behavior Assessment System for Children, Second Addition (BASC-2) administered by the DCPS psychologist as a part of the December 2013 evaluation.

⁵ It was unclear whether this statement was intentional or a mistaken description of the student's academic skills.

18. On February 18, 2014, DCPS convened an eligibility meeting and reviewed the student's evaluation and other data. The student's parents, a teacher and a DCPS reading specialist working with the student, were among the participants in the meeting. The student's primary teacher was on leave at the time and was not a participant in the meeting. The team concluded the student did not meet the criteria as a child with a disability after considering him for both the SLD and OHI classification for his ADHD. (Parent's testimony, Stepfather's testimony, Respondent's Exhibits 5-2, 6, 7)
19. Because the student's academic deficits may have resulted in a lack of instruction due to his attendance issues in first, second and now in third grade the psychologist and thus the DCPS team members concluded the student did not meet the criteria for SLD. The psychologist also did not recommend the student's eligibility under OHI. The DCPS psychologist testified that it was hard to say whether the student's absences played a part in his academic deficits or whether the deficits were the result of his distractedness due to his ADHD. Had the student's attendance concerns not been factor more than likely the student would have been found eligible. Although the student's mother and teacher both noted the student's attention issues, because the student had not had any suspensions or behavioral referrals to the school office and the classroom and the teacher was able to redirect the student, the psychologist and the DCPS members of the team concluded that the school should try interventions including counseling and classroom and testing accommodations under a 504 plan before finding the student eligible for special education. (Witness 4's testimony, Respondent's Exhibits 5-2, 6, 7)
20. The student's parents educational advocate were accompanied them in the eligibility meeting. The advocate believed the student classroom teacher (rather than the substitute teacher who attended) was a critical member of the team that was missing and was the person who is in regular contact with the parent reporting the student's classroom behavior. The reading specialist who had been working with the student also participated in the meeting and the data she shared indicated the student had minimal benefit from the his work with the specialist. This caused the parents and their advocate to even more strongly believe that an eligibility finding was appropriate rather than the interventions School A proposed. (Witness 2's testimony, Stepfather'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.⁶ *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 1: Whether DCPS denied the student a FAPE by failing to timely evaluate and determine his eligibility by the end of SY 2012-2013 based on “Child Find” due to his behavior and poor academic performance and/or a parental request made in October 2012.

Conclusion: There was insufficient evidence presented by Petitioner that there was a basis, prior to the parent’s request for evaluation as the start of SY 2013-2014, that DCPS was or should have been on notice to evaluate the student under its “Child Find” obligations. In addition, there was no evidence the parent made a request for the student to be evaluated prior to SY 2013-2014. Therefore, Petitioner failed to sustain the burden of proof by a preponderance of the evidence on this issue.

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 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").

⁶ 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.

Although there is evidence the student was behind academically in first and in second there was insufficient evidence presented of any factors other than this that would have put DCPS, School A or School B on notice that the student should have been identified and evaluated for special education prior to the specific request by the parent at the start of the student third grade year in SY 2013-2014. The parent did not testify to any request prior to SY 2013-2014 and although there is indication the schools were aware of the student's ADHD diagnosis there was no indication that the student behaviors at school were impacting him in first and second grade such that the school should have identified and evaluated the student pursuant to "Child Find."

ISSUE 2: Whether DCPS denied the student a FAPE by failing to determine the student eligible for special education services at the February 18, 2014, meeting.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that the student should be found eligible as child with a disability with a disability classification of OHI for his ADHD condition and that DCPS' finding of ineligibility on February 18, 2014, was inappropriate.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).

Petitioner asserted that the student could and should be found eligible under SLD or OHI classification for ADHD. The evidence including DCPS expert's testimony interpreting evaluative data clearly demonstrates the student has average cognitive abilities.⁷ It was reasonable given the student's significant absences in first, second and his 15 days of absence in the current school year that the discrepancy between the student's cognitive abilities and his academic performance may be due to his lack of instruction from absences. Thus, the Hearing Officer concludes that the DCPS finding that the student is not a child with a disability under SLD was not inappropriate.

However, DCPS' conclusion that the student was not eligible at all, under OHI, despite his academic deficits and despite the fact that his ADHD is impacting him the classroom (purportedly because it is being addressed by the classroom teacher) is a far more tenuous conclusion that the Hearing Officer finds is insufficiently supported by the record. The Hearing Officer notes that the DCPS psychologist testified that had it not been for the student's history of absences he would probably have been found eligible.⁸

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in **limited alertness with respect**

⁷ FOF # 13

⁸ FOF #19

to the educational environment, that— (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or **attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) **Adversely affects a child’s educational performance.****⁹

The evidence clearly demonstrates the student’s ADHD is adversely impacting him in the classroom. The teacher comments in the psychological evaluation and the observations both by the DCPS psychologist and social worker clearly point to the student’s distractibility and lack of attention in the classroom.¹⁰ DCPS’ assertion that because the student can be redirected and because he has not been suspended or referred him to the school office for his behaviors means his ADHD is not adversely affecting his educational performance is contradicted by his teachers comments noted in the evaluation and the teachers calls to the parent regarding the student’s behavior.¹¹

The student was at the time of the December 2013 evaluation nearly two years behind his grade level in reading and a year behind in math. Albeit the student could have been retained in second grade rather than promoted to third grade the student is evidently in danger of falling further and further behind academically. Although DCPS cautiously proposed 504 interventions before finding the student eligible there was evidence that the interventions attempted by the reading specialist have had minimal impact on the student’s performance.¹²

The teacher feedback in the psychological evaluation and the phone calls to the student’s parents from classroom teacher regarding the student’s behavior and the student distractibility even in doing his homework all point to the fact that student’s behaviors related to his ADHD have been and are adversely impacting his academic performance. The one person that had made these behavioral comments in the evaluation and in calls to the parent was not a member of the team that determined the student ineligible.

Although DCPS presented the evaluator who was member of that team who gave a cogent rationale for why the student was found ineligible the evidence presented regarding the student’s classroom behaviors are sufficient basis to tip the balance toward the preponderance of the evidence that the student should not have been found ineligible at the February 18, 2014, meeting.

Based upon the evidence in the record that the student behaviors related to his ADHD condition are adversely impacting him in the classroom the Hearing Officer concludes the student is eligible a child with a disability under the classification of OHI for his ADHD.

Although Petitioner stated in the complaint that compensatory education would be sought as a component of relief Petitioner presented no evidence on compensatory education and the Hearing Officer determines that an award of compensatory education has not been substantiated.

⁹ Emphasis added by Hearing Officer

¹⁰ FOF #s 14, 15, 16

¹¹ FOF #7

¹² FOF #20

ORDER:¹³

1. The student is hereby determined eligible as a child with a disability with a classification of OHI for his ADHD.
2. DCPS shall within ten (10) school days of the issuance of this Order convene a individualized education plan meeting and develop an appropriate IEP for student with appropriate services and goals including specialized instruction to address his academic deficits in reading, math and written expression and related services to address his behavioral concerns in the amount(s) that the IEP team deems appropriate to enable him to adequately access the general educational curriculum.
3. All other requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: May 11, 2014

¹³ 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.