

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
2011 MAY -9 AM 10:15

Confidential

<p>STUDENT¹, by and through her Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: April 26, 2011</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq. Brown and Associates 1220 L Street, NW #700 Washington, D.C. 20005</p> <p>Counsel for DCPS: Assistant Attorney General Tanya Chor, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ 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 April 26, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009.

BACKGROUND:

Student or "the student" is age twelve in fifth grade and has not been determined eligible as a child with a disability under IDEA. The student is enrolled at a District of Columbia elementary school hereinafter referred to as "School A." She enrolled at School A soon after the start of the 2010-2011 school year. Prior to attending School A the student attended a District of Columbia public charter school, hereinafter referred to as "School B."

Petitioner alleges the student is repeating the fifth grade for the third time and was previously evaluated and found ineligible while she was attending School B during the 2009-2010 school year. Petitioner alleges the student was having academic and behavior difficulties soon after she began attending School A, which was communicated to the parent by school staff. Petitioner alleges that by October 31, 2010, DCPS was on notice that the student should have been identified and evaluated.

Petitioner also alleges that in early fall 2010 the parent approached the School A staff about the student being evaluated. Petitioner alleges the student should have been identified based on this parental request and evaluations should have been initiated by October 31, 2011, and the eligibility determination should have been made within 120 days thereafter.

On March 8, 2011, Petitioner filed a due process complaint alleging, inter alia, DCPS had failed to timely identify and evaluate the student. On March 22, 2011, a resolution meeting was convened. The parties did not resolve the complaint. On March 31, 2011, DCPS filed a response to the complaint. This Hearing Officer convened a pre-hearing conference on April 6, 2011² and issued a pre-hearing order on April 11, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

Petitioner is seeking (1) DCPS funding of independent evaluations: comprehensive psychological and social history, (2) an order directing DCPS to convene an eligibility meeting within ten (10) days of its receipt of the independent evaluations to determine the student's eligibility and if the student is found eligible that an IEP team develop an IEP.

DCPS maintains that the student's current academic performance did not and should not have triggered a suspicion by DCPS staff that the student might be a child with a disability who

² Attempts were made by this Hearing Officer to schedule the pre-hearing conference soon after the resolution session information was made available. This was the first date mutually available for both counsel.

should have been evaluated. DCPS asserts that it has not been provided any of the student's previous evaluation data or a request for evaluation and the student has not been denied a FAPE.

ISSUES: ³

The issues adjudicated are:

Whether DCPS failed to provide the student a free appropriate public education ("FAPE") by failing to timely identify, locate, and/or evaluate the student as a child in need of special education "child find," and/or by failing to evaluate the student and determine the student's eligibility within 120 days of a parental request?

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-4 and DCPS Exhibit 1-3) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁴

1. The student is enrolled in _____ grade at a District of Columbia elementary school, School A. She enrolled at School A soon after the start of the 2010-2011 school year. Prior to attending School A the student attended a District of Columbia public charter school, School B, where she was also in the fifth grade. The student is repeating the fifth grade for the third time. (Parent's testimony)
2. During the 2009-2010 school year at School B the student had failing grades and was sent home on a couple of occasions due to her disrespectful and disruptive behaviors. Although it was recommended the student attend summer school during summer 2010 because of family difficulties the student did not attend. During that school year the parent worked with the student on her homework but the student often got frustrated because the work was difficult. Since the student has attended School A the parent has received the student's report cards. (Parent's testimony)

³ The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the r pre-hearing order are the issue(s) to be adjudicated.

⁴ 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 both parties separately the Hearing Officer may only cite one party's exhibit.

3. In June 2008 when the student was in the fourth grade a psycho-educational evaluation was conducted which consisted of the Woodcock Johnson Third Edition (WJ III) Cognitive Abilities and Tests of Achievement. The student's general intellectual abilities were measured as average. However, academically she preformed almost two years below her age expectancy. The examiner concluded the student's academic achievement when compared with her intellectual abilities was significantly lower than predicted in the areas of broad reading, math calculation skills and oral language. The evaluator recommended the student be determined eligible for special education services with a learning disability. (Petitioner's Exhibit 3-6)
4. In August 2008 a speech and language evaluation was conducted of the student. The evaluator determined the student demonstrated below average receptive and expressive language skills and recommended the student be provided language therapy services. (Petitioner's Exhibit 4)
5. When the student first arrived at School A in the first advisory the student's performance in some areas was below grade-level. The student's fifth grade report card for the first through third advisories demonstrates the student's skill levels in all areas are developing or secure. Secure means the student is on grade level. Developing means that the student is coming close to grade level. The teacher comments on the report card indicate the student was performing well in the first advisory but needed extra work in math. The second advisory comments indicate the student was not as focused or ambitious as in the first advisory. The third advisory comments indicate the student's academic performance improved. (testimony, DCPS Exhibit 1)
6. In November 2010, the student's classroom teacher attempted to meet with the parent to discuss the student's behavior with some of her peers. The student was being overly talkative and sometimes argumentative with other students. The teacher found it difficult to reach the parent. The teacher was not able to reach and meet with the parent until mid February 2011. Once the teacher informed the parent of the student's behaviors in the classroom the behaviors ceased. The teacher never met the parent prior to mid February 2011, and the parent did not ask the teacher about the student being evaluated for special education services. (testimony)
7. The student's teacher has found the student to be bright, generally respectful, and operating above grade level in reading and a bit behind grade level in math. The student has still not mastered all the basic math skills she should for fifth grade. The teacher has shared this information with the parent. The student's teacher does not believe the student's academic performance or behaviors warrant the student being evaluated for eligibility for special education services. The student is on tract to be promoted to sixth grade (testimony)
8. School A's special education coordinator has had no request or communication from the parent that the student be evaluated for special education services. The coordinator first became aware of the student once the due process complaint was filed. After the complaint was filed the coordinator checked with the student's teacher and was informed

that the student was not demonstrating any behavior or academic difficulties. The coordinator has not received any information from anyone at School A that would indicate to her that the student was or is in need of special education evaluations. testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁵ *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.

34 C.F.R. § 300.17 provides that 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.

ISSUE : Whether DCPS failed provide the student a free appropriate public education ("FAPE") by failing to timely identify, locate, and/or evaluate the student as a child in need of special education "child find," and/or by failing to evaluate the student and determine the student's eligibility within 120 days of a parental request?

Conclusion: The evidence does not support a finding that the student should have been identified under "child find" or that the parent made a request of School A staff that the student be evaluated for eligibility for special education services.

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

⁵ 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.

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).

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).

In this case the parent testified that she made a request to the student's teacher and the special education coordinator that the student be evaluated for special education services. This Hearing Officer did not find the parent's testimony credible. The parent was unsure of the exact dates that the teacher allegedly informed her that the student was having academic difficulty and could not state the date she met with and made a request to the special education coordinator. In addition, the student's report cards indicate the student was making academic progress, which is contrary to the information the parent alleged the teacher provided her.

The teacher on the other had a strong grasp of the student's level of performance and was convincing in her testimony that the student is not displaying behavioral or academic concerns that would warrant the student being evaluated for special education services. Rather, the student's behavior was corrected immediately once the parent finally met with the teacher in February 2011. In addition, the student's academic performance demonstrates she is at or near fifth grade level in all areas and on track to be promoted to the sixth grade.

The Hearing Officer also found the special education coordinator's testimony credible that she had never received a request from the parent that the student be evaluated and never had been informed by anyone at the school that the student was having any difficulties that would warrant evaluations. Consequently, this Hearing Officer concludes the evidence does not demonstrate that the student should have been located, identified and evaluated under the DCPS "child find" obligation and there was no parental request to which DCPS failed to timely respond. Thus, this Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence.

In light of the student's previous evaluations which recommend the student receive special education and related services, if the parent wants the student evaluated she should immediately make an appointment, if she has not already done so, with the School special education coordinator so that an determination can be made by the school what assessments if any will be conducted and the parent can sign any necessary consent forms for the student to be evaluated.

ORDER:

The complaint in this matter is hereby dismissed with prejudice.

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).



Coles B. Ruff, Esq.
Hearing Officer
Date: May 6, 2011