

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 24, 2013

, on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year old male, who currently attends a DCPS high school. On March 14, 2013, Petitioner filed a Complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to timely determine Student’s eligibility for special education and related services. As relief for this alleged denial of FAPE, Petitioner requested a finding of a denial of FAPE, funding for independent comprehensive psychological, functional behavior assessment, vocational assessment and assistive technology assistive evaluations, and an MDT meeting to determine Student’s eligibility, and if eligible, develop an appropriate IEP and discuss and determine placement, and compensatory education.

On March 25, 2013, DCPS filed its Response to the Complaint. Therein, DCPS asserted that Student was properly exited from special education services in March 2010, that Student is excelling academically at his current school, that DCPS is unaware of any issues Student is having that is preventing him from accessing his education, and that DCPS has not received any oral or written request to evaluate Student.

The parties concluded the Resolution Meeting process by participating in a resolution session on April 11, 2013. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline began on April 14, 2013 and will end on May 28, 2013, which is the HOD deadline.

On April 24, 2013, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on April 29, 2013.

On May 1, 2013, Petitioner filed a Motion for Summary Judgment. On May 6, 2013, DCPS filed an Opposition to the motion. On May 9, 2013, Petitioner filed a Reply to DCPS's Opposition.

By letter dated May 2, 2013, DCPS disclosed eleven documents (Respondent's Exhibits 1-11). By letter dated May 3, 2013, Petitioner disclosed twenty documents (Petitioner's Exhibits 1-20).

The hearing officer convened the due process hearing on May 10, 2013.¹ The hearing officer took Petitioner's summary judgment motion under consideration, and after taking into consideration the pleadings and the parties' oral arguments, the hearing officer denied the motion. Thereafter, all documents disclosed by the parties were admitted into the record without objection. The hearing officer then received opening statements, testimonial evidence, 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 timely determine Student's eligibility for special education and related services pursuant to Parent's 9/8/12 written request?

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 _____ years old, and he currently attends eleventh grade at a DCPS senior high school that he has attended since the beginning of ninth grade.³

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

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 Complaint at 2; testimony of Parent; testimony of advocate.

2. Student's current DCPS school is an application school, which means that students have to apply and meet certain requirements to be accepted into the school. The school utilizes an A and B schedule, which means that the students do not go to the same classes each day. This introduces a higher level of rigor than a typical comprehensive high school, and the students are expected to demonstrate a higher level of independence.⁴
3. In ninth grade at the current school, Student took 10 courses, including Honors Environmental Science and Honors Algebra 1, and Student received three As and seven Bs as final grades.⁵
4. In tenth grade at the current school, Student took 11 courses, including Honors Geometry, and Student received four As, six Bs, and one C as final grades.⁶
5. In the current school year for eleventh grade, Student is taking nine courses, including Honors Digital Electronics and Algebra II, and Advanced Placement ("AP") U.S. History and English Language & Composition. Student's most recent report card indicates that he is performing poorly, with primarily Ds and Fs, in both of his Advanced Placement classes, but he is otherwise performing primarily at the A to B grade level.⁷
6. Student has been an A and B student since he began attending the current school, and he has no problems understanding the work or completing work in class. However, his grades are dropping because he is not doing his homework anymore. Student feels there is no longer a need to do homework because it is the end of the school year, and he does not really want to do anymore homework. Hence, the only problem he is having is with doing assignments and projects at home.⁸
7. Student manages to get good grades in most of his classes despite any problems he has with organization. Student was offered tutoring in chemistry this year, but the tutoring schedule conflicted with his band schedule or his schedule to help in robotics, so Student did not attend tutoring. Student's chemistry teacher also gave Student a binder for his chemistry work and offered to help Student with his organization, but Student did not go in to receive the help.⁹
8. Overall, when Student does his work, the staff at the current school does not notice any organizational issues. For example, when Student has to write extensively, the teachers do not notice any organizational issues with his writing.¹⁰

⁴ Testimony of school psychologist.

⁵ Respondent's Exhibit 4.

⁶ Respondent's Exhibit 4.

⁷ Respondent's Exhibit 1.

⁸ Testimony of Student.

⁹ Testimony of Student.

¹⁰ Testimony of school psychologist.

9. In his chemistry class, Student performs above average for quizzes and tests, but his assignments are only at the average level because he does not complete homework assignments. In class, there are no academic concerns with Student, as he performs very well, masters chemistry concepts without the need for intervention, completes assignments, and is often assigned to serve as team leader/teacher assistant. However, Student's grade in chemistry has been negatively impacted by his failure to turn in homework and complete out-of-class projects, such as the science fair. Student was offered an opportunity to make up all assignments for third quarter over Spring Break, but he came back to school after the break and did not submit any of the work. Student has also been asked to participate in the chemistry teacher's tutoring workshops on Wednesdays and Thursdays, but he has chosen not to participate.¹¹
10. Student has participated in many extracurricular activities this school year, and he has always participated in many extracurricular activities. Earlier in the school year, when Student was participating in basketball, he was sometimes given study hall during basketball and on other days he had no energy to do anything else once he got home so he would do his homework. However, now that Student only has band after school, which is not a physical activity, Student has energy to go to the recreation center and hang out after school, which he chooses to do instead of doing his homework.¹²
11. Student is not currently receiving special education services. Student previously received special education services as a student with emotional disturbance ("ED"), but he was exited from those services by the multi-disciplinary team ("MDT") on February 1, 2010 when he was in middle school. The team's general feeling was that Student no longer required special education supports because he was an honor roll student with the special education supports in place and he performed well above average on standardized tests. However, the team agreed to refer Student to the general education counselor and the mental health specialist at the middle school to work on organizational skills and any other issues he may have had socially as a growing adolescent.¹³
12. By email dated September 6, 2012, Parent advised the staff at Student's current school that Student needs help with organizing and prioritizing his assignments (executive functioning).¹⁴
13. By email dated September 8, 2012, Parent advised the staff at Student's current school, *inter alia*, that she needed to have Student evaluated for special education service for impaired executive functioning. Parent sent this email to the special

¹¹ Testimony of secondary science teacher.

¹² Testimony of Student.

¹³ Testimony of advocate; *see* Petitioner's Exhibits 5-6; Respondent's Exhibits 6-7 and 9-10.

¹⁴ Petitioner's Exhibit 9.

education coordinator (“SEC”), the school psychologist and the interim principal at Student’s current school.¹⁵

14. On or about September 25, 2012, the MDT met regarding Student and some of his siblings who attend the same school. The SEC and school psychologist were there, Parent and student’s advocate attended the meeting, and Student’s AP teachers also came in for a portion of the meeting. Parent indicated that she was concerned about Student’s executive functioning and the fact that he wasn’t doing well in AP classes. The team looked at Student’s grades, a breakdown of his quizzes, exams, papers, participation and homework, and his previous academic history and determined that Student did not need special education services; he just needed to do his homework. Hence, the team determined not to do a formal assessment for Student. Parent agreed with this decision when it was made in September. However, around mid-third advisory in late February/early March, Student’s grades dropped and Parent sent another email saying that Student was not achieving.¹⁶
15. After the team meeting in September 2012, DCPS did not issue a Prior Written Notice advising Parent that it would not conduct a formal comprehensive psychological assessment for Student, and DCPS did not generate an Analysis of Existing Data or Eligibility Determination form.
16. In or about January 2013, the school psychologist at Student’s current school offered Parent the option of removing Student from his AP classes, but Parent declined to do so.¹⁷

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:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner’s claim.

1. Alleged Failure to Determine Eligibility Pursuant to Parent’s Written Request

Under IDEA, either a child’s parent or a public agency may request an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. §300.301(b). In the District of Columbia, the initial evaluation must be conducted within 120 days from the date the student was referred for the evaluation. *See* 34 C.F.R. § 300.301(c)(1)(ii); D.C. Code § 3802561.02.

¹⁵ Petitioner’s Exhibit 10; testimony of Parent.

¹⁶ Testimony of school psychologist; *see* Petitioner’s Exhibits 8 at 2, 11.

¹⁷ Testimony of Parent.

Moreover, IDEA requires that the initial evaluation 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. § 300.301(c)(2).

In conducting the initial evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under § 300.8. § 300.304(b)(1). The public agency must not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability. § 300.304(b)(2).

As part of the initial evaluation, the IEP team and other qualified professionals must review existing evaluation data on the child, including information provided by the parents, current classroom-based, local, or State assessments, and classroom-based observations, and observations by teachers and related service providers. § 300.305(a)(1). Parental consent is not required before reviewing existing data as part of an evaluation. 34 C.F.R. § 300.3000(d)(1). On the basis of that data review, and input from the child's parents, the team must determine what additional data, if any, are needed to determine, *inter alia*, whether the child is a child with a disability, as defined in § 300.8, the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, and whether the child needs special education and related services. § 300.305(a)(2).

Upon completion of the initial evaluation, the team must determine whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child, and the public agency must provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. § 300.306(a).

In the instant case, Petitioner argues that DCPS had 120 days after Parent's request for an initial evaluation to either evaluate Student or issue a Prior Written Notice ("PWN") indicating that it would not do so, but DCPS failed to do either. Hence, Petitioner requests a comprehensive psychological evaluation of Student, which it has been requesting all along, and a meeting to determine Student's eligibility.

DCPS's position is that there was no denial of FAPE when DCPS declined to conduct a comprehensive psychological evaluation at Parent's request, because DCPS conducted a meeting to discuss Student's progress, at which Student was evaluated via a review of existing data, there has been no negative impact on Student, and Student was offered interventions but he has failed to utilize the interventions.

A review of the evidence in this case reveals that after receipt of Parent's September 8, 2012 request for an initial evaluation of Student, DCPS convened a meeting on September 25, 2012 that included Parent, Student's advocate, the SEC, the school psychologist, and Student's teachers from his AP classes. Parent stated her concerns about Student's executive functioning and poor grades in his AP classes, and the team looked at Student's grades, a breakdown of his quizzes, exams, papers, participation and homework, and his previous academic history before determining that Student did not need special education services; he just needed to do his

homework. Based on this evidence, the hearing officer concludes that DCPS conducted an initial evaluation of Student pursuant to Parent's September 8, 2013 request by convening a meeting of the IEP team and conducting a review of existing data on Student, including Parent's input, before determining that no additional data was required, that Student does not qualify as a child with a disability under 34 C.F.R. § 300.8, and that Student is not in need of special education and related services.

Although DCPS complied with its obligation to conduct an initial evaluation of Student, DCPS thereafter failed to comply with the procedural requirements of § 300.306(a) by providing Parent with documentation concerning the evaluation process and the determination of eligibility. Nevertheless, the evidence in this case demonstrates that Student continued to perform well in school, except in classes where he chose not to do homework, Student continued to have an opportunity to participate in afterschool workshops but declined to do so, and Parent was not deprived of an opportunity to participate in the decision-making process regarding Student. As a result, the hearing officer concludes that DCPS's procedural violations in this case did not rise to the level of a denial of FAPE. *See* 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only where procedural inadequacies impeded child's right to FAPE, significantly impeded parent's opportunity to participate in decision-making, or caused a deprivation of educational benefit); *Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) (citations omitted) (IDEA claim is viable only if procedural violations affected student's substantive rights). Hence, Petitioner has failed to meet its burden of proof on this claim.

ORDER

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

1. Petitioner's Motion for Summary Judgment is denied.
2. All claims and requests for relief in Petitioner's March 14, 2013 Complaint are **DENIED**.

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: 5/23/2013

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer