

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
October 28, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: October 15, & 17, 2013</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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 for two days on October 15, 2013, and October 17, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006 on the first day of hearing and in Hearing Room 2004 on the second.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age sixteen and resides in the District of Columbia with her parents. During school year (“SY”) 2012-2013 the student was enrolled in a DCPS high school “School A” in ninth grade.

Soon after the student began attending School A at the start of SY 2012-2013 she developed attendance problems. School A referred the student to its student support team (“SST”) and developed an intervention plan to address the student’s poor school attendance. The SST interventions were unsuccessful.

As a result of the student’s poor school attendance a truancy action was initiated in D. C. Superior Court in February 2013. The Court ordered a psychological evaluation that included assessments of the student’s cognitive and academic functioning. The student’s cognitive functioning was determined to be extremely low with a full scale IQ of 68. The evaluator conducted an adaptive assessment and concluded the student met the diagnosis of mild intellectual disability (“ID”). The evaluator also diagnosed the student with posttraumatic stress disorder, generalized anxiety disorder and a mathematics disorder.

On May 1, 2013, DCPS convened an eligibility meeting at which the court ordered psychological evaluation was reviewed. The team did not find the student eligible. The DCPS members of the team concluded that because of the student’s poor school attendance and because the court ordered psychological evaluation did not include in-school observation(s) or testing it would be “next to impossible” to take the student out of general education and thus concluded the student was ineligible for special education.

The student earned all failing grades during SY 2012-2013 and was retained in ninth grade. School A was closed at the end of SY 2012-2013 and the student was transferred to another DCPS high school, “School B” where she started attending a late afternoon/evening high school program.

On August 15, 2013, Petitioner filed the current due process complaint seeking an order directing DCPS to convene an IEP meeting to immediately find the student eligible for special education services, develop a individualized educational program (“IEP”) placing the student outside of the general education setting and providing the student with counseling and behavioral support and compensatory education.

DCPS filed a timely response to the complaint on August 22, 2013. DCPS denied any alleged denial of a free and appropriate public education (“FAPE”) and specifically asserted that the student was properly found ineligible for special education services due to her poor attendance preventing her from accessing the general education curriculum.

DCPS in its response further stated that at the May 1, 2013, eligibility meeting a full DCPS IEP team reviewed the contents of student’s independent psycho-educational evaluation that noted the student’s long history of truancy. DCPS further pointed out that the student herself stated at the eligibility meeting that regardless of what occurred at the eligibility meeting she would not attend School A.

A resolution meeting was held on September 4, 2013, and all matters were not resolved. The parties reached an agreement to proceed directly to hearing. Thus, the 45-day period began on September 5, 2013, and ended (and the Hearing Officer’s Determination (“HOD”) was originally due on October 19, 2013. The original hearing date offered to the parties by the Hearing Officer was October 11, 2013. However, both parties had scheduling difficulties and Respondent filed an unopposed motion to continue the hearing and extend the HOD due date for eight calendar days. The motion was granted and the HOD due date was extended to October 27, 2013.

A pre-hearing conference was held on September 17, 2013, and a pre-hearing conference order was issued October 7, 2013, outlining, inter alia, the issue to be adjudicated.

THE ISSUE ADJUDICATED:²

Whether DCPS denied the student a FAPE by failing to determine the student eligible for special education services on May 1, 2013.³

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 Petitioner asserted facts in the complaint that relate to instances prior to SY 2012-2013 in which a request for evaluation was allegedly made by the parent and/or the student should have been identified pursuant to “child find.” However, Petitioner’s counsel stated during the pre-hearing conference (and the Hearing Officer certified in the pre-hearing conference order) that the sole issue to be adjudicated was a challenge to DCPS’ recent in-eligibility determination. At the hearing Petitioner sought to preserve the other issues mentioned in the complaint but the Hearing Officer warned at the outset of the hearing that preservation of issues was not within the Hearing Officer’s purview. Petitioner chose to proceed to hearing rather than withdraw without prejudice and re-file or request an amendment.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-10 and DCPS Exhibit 1-9) 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 age sixteen and resides in the District of Columbia with her parent. The student began attending school when she was age three and has continued to be enrolled in either a DCPS school or District of Columbia public charter school. The student was first diagnosed with mental health issues in 2011 while she was attending a DCPS middle school.⁵ (Parent's testimony, Petitioner's Exhibit 7-2)
2. The student first began attending School A at the start of SY 2012-2013 in ninth grade. On or near the student's first day attending School A she had a panic attack at school which the school counselor witnessed. (Parent's testimony, Petitioner's Exhibit 6-8)
3. Within a short time after the school year began the student developed attendance problems. The student's family members often had to accompany her to School A because of anxiety the student experienced when required to go to school. On one occasion the student was hospitalized due to her anxiety about attending School A. (Parent's testimony, Witness 3's testimony)
4. School A staff took action to address the student's attendance problems by making telephone calls to the her home. In response to one such call the student answered and when asked why she was not at school she stated she did not want to attend School A and her parent was pursuing a school transfer. (Petitioner's Exhibit 6-6)
5. On September 28, 2012, School A made a referral for the student to its SST citing the student's poor school attendance and emotional concerns including school anxiety. School A ultimately developed an intervention plan to address the student's school attendance issues. At the time the student had been absent twelve days, four of which were excused. (Petitioner's Exhibits 6-2, 6-3, 6-8)

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.

⁵ The parent testified that while the student was attending the DCPS middle school the parent requested of the school staff that the student be evaluated for special education.

6. On October 22, 2012, School A convened a SST meeting with the student's parent and several School A staff members to review the effectiveness of the SST interventions on the student's school attendance. The student's emotional concerns were noted including her clinical diagnosis. The SST interventions were tweaked. (Petitioner's Exhibit 6-7)
7. On December 6, 2012, School A convened a SST follow up meeting. The team noted the student was still not making progress and the interventions were not helping to improve the student's school attendance. (Petitioner's Exhibit 6-9)
8. As a result of the student's poor school attendance a truancy action was initiated in D. C. Superior Court in February 2013. As a result, the Court ordered that a psychological evaluation be conducted. The evaluator assessed the student's cognitive and academic functioning. (Petitioner's Exhibit 7-10)
9. The student's full-scale IQ score was 68 placing her in the extremely low level of cognitive intelligence. The mother's completion of adaptive testing provided the additional basis for the ID. Based upon Woodcock-Johnson III score results, the student's broad reading is at 5.9 grade level, basic reading skills at 5.6 grade level, reading comprehension at 3.4 grade level, and math calculation at 3.6 grade level. (Witness 1's testimony, Petitioner's Exhibit 7-15)
10. The evaluator also diagnosed the student with posttraumatic stress disorder, generalized anxiety disorder, and mathematics disorder. The evaluator did not conduct any in-school observations or talk with any of the student's teachers at School A. The evaluator did not have access to the student's educational records. The evaluator did not specifically recommend that the student be provided special education services. (Witness 1's testimony, Petitioner's Exhibit 7-10, 7-11)
11. On March 27, 2013, the student's parent through her counsel contacted the DCPS Office of Youth Engagement "OYE" in an effort to obtain a safety transfer for the student because she had become afraid to attend School A. However, no school transfer was granted. (Parent's testimony)
12. On April 1, 2013, the student's mother, through her counsel, provided School A with a copy of the independent psycho-educational evaluation prepared for the D.C. Superior Court. (Petitioner's Exhibit 7)
13. On May 1, 2013, DCPS held a meeting at School A to review the independent psycho-educational evaluation and to discuss the student's eligibility for special education. DCPS found the student ineligible and denied the parent's request for special education services. Instead, DCPS concluded that the student had a truancy problem. (Parent's testimony, Petitioner's Exhibit 5-1)

14. The eligibility team included a DCPS school psychologist the parent and the student. There was no special education or general education teacher that participated in the eligibility meeting. (Petitioner's Exhibit 5-1)
15. The DCPS members of the team concluded that because of the student's poor school attendance and without in school observation or testing it would be "next to impossible" to take a student out of general education and that the observations at home that were noted in the psychological evaluation were insufficient to conclude the student was eligible for special education. The team noted there was no diagnosed school anxiety that would prevent her school attendance and thus concluded the student's absenteeism was a truancy issue and it was the parent's responsibility to ensure the student attended school. (Petitioner's Exhibit 5-2)
16. The student earned all failing grades during SY 2012-2013. At the start of SY 2013-2014 with the assistance and direction of her probation officer the student began attending an evening program at School B repeating ninth grade. (Parent's testimony)
17. Although the student receives mental health treatment in the community she is still fearful of attending a large school setting such as School B. The student currently has a therapist and the student has been trying to attend the evening program at School B. She attends approximately three days per week. The student has said she doesn't really like the program at School B because despite being in the evening program there are still too many students at the school for the student to feel comfortable. (Parent'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 a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a 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) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue: Whether DCPS denied the student a FAPE by failing to determine the student eligible for special education services on May 1, 2013.

Conclusion: Petitioner presented sufficient evidence to sustain the burden of proof by a preponderance of evidence that DCPS inappropriately determined the student ineligible at the May 1, 2013, eligibility meeting. DCPS did not fully evaluate the student to determine her eligibility and did not have a fully constituted eligibility team, as DCPS asserted, to legitimately determine the student ineligible.

Pursuant to 34 C.F.R. § 300.306⁷ a school district must ensure that after a student has

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.

⁷ 34 C.F.R. § 300.306 provides:

Determination of eligibility.

(a) General. Upon completion of the administration of assessments and other evaluation measures--

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and... A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math...or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).

been appropriately evaluated for special education and that a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8.

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).⁸

Petitioner challenged DCPS' determination that the student was ineligible as a child with a disability in need of special education and asserted that the student could be and should be found eligible under the classification of emotional disability for school phobia and/or the classification of ID and/or specific learning disability in mathematics.

34 C.F.R. §300.308 states:

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in Sec. 300.8, must be made by the child's parents and a team of qualified professionals, which must include-

- (a) (1) The child's regular teacher; or
- (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
- (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

⁸ 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

The District of Columbia has enacted special education regulations that require IEP teams to "ensure that at least one team member other than the child's regular teacher observes the child's academic performance in the regular classroom setting." D.C. Mun. Regs. Title 5E, Section 3005.10.

Despite the requirement that a teacher be a member of the eligibility team DCPS nevertheless found the student ineligible even though the evidence⁹ clearly indicates that none of the student's teachers and no special education teacher was a member of the eligibility team.

DCPS in its response to the complaint asserted that a full team reviewed the data and concluded the student was ineligible. However, there was not a full team as there were no special or general education teachers who participated as is required. Consequently, the Hearing Officer concludes that DCPS inappropriately found the student ineligible for special education.

Petitioner presented evidence including testimony interpreting evaluative data that clearly demonstrates the student is performing far below grade level in reading, math and written language, and diagnosed the student with disorders. Pursuant to 34 C.F.R. 300.08 for a student to be eligible the student must not only have a listed disability but must also require special education.

Although Petitioner presented expert testimony that supported a conclusion that the student is eligible for special education, DCPS' expert witness countered the testimony of Petitioner's witness and testified that it is imperative that a school observation be included in the evaluation data in order to find a child eligible.

The evidence¹⁰ in this case clearly demonstrates that the evaluator who conducted the independent evaluation, upon which Petitioner's witness' testimony was based, did not conclude the student was in need of special education, did not observe the student in school or review the student school records. Thus, the Hearing Officer found Petitioner's expert's testimony unconvincing.

Although there was evidence the student has a disability based on the independent evaluation and testimony of Petitioner's expert witness, the Hearing Officer concludes there was insufficient school data to concretely confirm that the student was a student with a disability in need of special education. The Hearing Officer concludes that the eligibility team lacked sufficient educational data from which the team could legitimately determine the student's eligibility or ineligibility.

⁹ Finding of Fact ("FOF") # 14

¹⁰ FOF # 10

The May 1, 2013, team found the student ineligible but the team also determined that there was a need for additional data. DCPS' expert witness acknowledged that although she was not the psychologist for this particular meeting had she been a member of the team she would have withheld an ineligibility determination in order for a teacher to be present and for additional data to be obtained before determining the student to be ineligible.

D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

DCPS' determination of ineligibility was both premature because evaluations it concluded were absent were not conducted and because a valid team did not consider and decide upon the student's eligibility or ineligibility. Thus, the Hearing Officer concludes Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS' decision to find the student ineligible was incorrect and denied the student a FAPE.

The Hearing Officer will direct in the Order below that DCPS promptly conduct further evaluation(s) of the student that specifically address the student's in-school educational performance and include data to assess if the student's absenteeism is symptom of a disability.

ORDER:¹¹

1. DCPS shall within ten (10) business days of the issuance of this Order convene a student evaluation plan (“SEP”) meeting to determine the appropriate assessments to include in a comprehensive evaluation of the student to determine her eligibility for special education including assessing whether her non-attendance is a function of a disability.
2. DCPS shall within forty-five (45) calendar days of the issuance of this Order conduct a comprehensive psychological evaluation of the student and convene eligibility team meeting to determine the student’s eligibility and if the student is found eligible draft an IEP for the student and determine an educational placement and an appropriate school location.

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: October 27, 2013

¹¹ 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.