DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: August 18, 2011

Hearing Officer: Jim Mortenson

Case No:

2011 AUG 18 PM 3:11
STUDENT HEARING OFFICE
OSSE

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on June 8, 2011. The Petitioner is represented by Nicholas Ostrem, Esq., and the Respondent is represented by Victoria Healy, Esq.

A resolution meeting was held June 20, 2011, and did not result in any agreements and the 30 day resolution period continued to run. A prehearing conference was held on June 21, 2011, and a prehearing order issued on that date. A response to the complaint was filed, untimely, on June 21, 2011.

The hearing was convened and held on August 16, 2011, in room 2004 at 810 First Street NE, Washington, D.C. The due date for the hearing officer determination (HOD) is August 22, 2011. This HOD is issued on August 18, 2011.

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, AND DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent failed to timely review existing evaluation data as part of an initial evaluation of the Student requested on October 4, 2010, and not reviewed until April 27, 2011?

(2) Whether the Respondent failed to correctly determine the Student's eligibility for special education and related services when it determined on April 27, 2011, that the Student was not a child with a disability under the Individuals with Disabilities Education Improvement Act (IDEA)?

The substantive requested relief at the time of hearing included:

(1) A determination that the Student is eligible for special education and related services under the definition of other health impairment (OHI).

(2) An individualized education program (IEP) team meeting to develop an IEP for the Student.

(3) Compensatory education or an evaluation to determined necessary compensatory education.

Based on the findings of fact and conclusions herein, this IHO has determined that the Respondent failed to timely complete an initial evaluation of the Student. The Respondent correctly determined the Student was not eligible for special education and related services and so the failure to timely complete the evaluation process caused the Student no harm.

IV. EVIDENCE

Four witnesses testified at the hearing, two for the Petitioner and two for the Respondent.

The witnesses for the Petitioner were:

1) The Petitioner (P)

2) Educational Advocate (Providing expert testimony on eligibility under definition of other health impairment.)

The witnesses for the Respondent were:

1) Special Education Coordinator,

2) Carols Phillip, School Psychologist (C.P.)

19 documents were disclosed by the Petitioner and 18 were admitted into evidence.[2] The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	June 1, 2001	IEP
P 2	May 5, 2010	Section 504 Plan
P 3	December 3, 2010	Section 504 Eligibility Form
P 4	December 3, 2010	Section 504 Plan
P 5	April 27, 2011	Advocate's Notes
P 7	February 25, 2008	Psychiatric Assessment
P 8	November 2, 2010	Psychological Evaluation
P 9	[Undated]	[Functional Behavioral Assessment]
P 10	May 13, 2010	Letter from Cason to Petitioner
	March 19, 2008	Letter from Craft to Petitioner
P 11	July 21, 2009	Report Card
P 12	October 12, 2010	Consent for Initial Evaluation/Reevaluation
P 13	December 12, 2010	Student Discipline Report
P 14	April 27, 2011	Transcript
	December 3, 2010	Report to Parents on Student Progress
P 15	October 4, 2010	Request for Re-evaluations for [Student]
P 16	August 20, 2010	Letter from Proctor to Special Education Coordinator
P 17	August 30, 2010	Letter from Proctor to Special Education Coordinator
P 18	May 26, 2011	Email chain ending from Holt to Davis, et al.
P 19	[Undated]	Resume for Ida Jean Holman

[2] P 6 was not admitted.

Five documents were disclosed by the Respondent and four were admitted into evidence.[3]

The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	June 20, 2011	Report to Parents on Student Progress
R 2	October 12, 2010	Consent for Initial Evaluation/Reevaluation
R 3	November 2, 2010	Psychological Evaluation
R 5	April 27, 2011	MDT Meeting Notes

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a year old learner enrolled at The Student was in the grade during the 2010-2011 school year.[5]
2. The Student was determined eligible for special education and related services at some point in the past, and was subsequently exited prior to attending The Student was eligible as a result of behaviors due to attention deficit hyperactivity disorder (ADHD) that impacted his educational performance.[7] When the Student was at a charter school prior to his attendance at it was determined that he no longer required an IEP because he was performing school work at grade level, even though he continued to have behavioral problems.[8]

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[3] R 4 was not admitted.
[4] Testimony (T) of P, R 1, R 2, P 3, P 4.
[5] P 3, P 4, P 11, R 5 (R 1, the report card for 2010-2011, indicates the Student is in 9th grade. This appears to be an error. P 14, the transcript, also includes this apparent error, but lists the 2009-2010 school year as 10th grade for the Student.)
[6] P 1, T of P. (The evidence is not clear on when the Student was first eligible or when he was exited from special education. P 1 is an IEP revised in seventh grade, and not the initial IEP. The Petitioner testified the Student was evaluated in 7th grade and seemed to indicate that P 1 was his first IEP. She was not entirely clear on her or her son's due process rights regarding the IEP and testified credibly to that effect.)
[7] T of P, P 1.
[8] T of P.

3. The Student was moved to a plan of accommodations under Section 504 of the Rehabilitation Act of 1973, called a "Section 504 Plan," while he was at the charter school.[9] The plan was designed specifically to accommodate the Student's disability as a result of his ADHD.[10] The 504 plan was continued and revised while the Student was at for the 2010-2011 school year.[11] Accommodations included: preferential seating determined by the teacher to minimize distractions and off-task behaviors, five minutes to settle down after arriving in class, bi-weekly counseling with the guidance counselor, tutoring in chemistry at least once weekly, use of a behavior assessment chart, a subsequent behavior intervention plan (BIP).[12]
4. The Student did not go to his counseling sessions.[13]
5. The Student's ADHD impacts his educational performance by causing him to sometimes disregard rules, be impulsive, be unfocused, and occasionally be disruptive.[14] His grades are largely good being mostly As and Bs for the 2010-2011 school year, with many positive reports from teachers on his work and participation.[15] The Student failed Health class and Chemistry this last school year due to not liking the teachers, not doing the work, and not attending class regularly.[16] The Student responded well to positive reinforcements, like the opportunity to play football which required good grades.[17]
6. On October 4, 2010, the Petitioner, through Counsel, requested that the Student be evaluated for special education and related services.[18] Consent to evaluate the Student was signed by

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[9] P 2, T of P.
[10] P 2.
[11] P 3, P 4, T of P, T of T of T of
[12] P 4.
[13] T of P.
[14] T of P, R 3/P 8, P 3, P 9.
[15] R 1, P 14.
[16] R 1, R 5, T of
[17] T of R 1.
[18] P 15.

the Petitioner on October 12, 2010.[19] The evaluation consisted of an FBA conducted between October and November 2010 and a Psychological assessment conducted in October 2010.[20] A meeting to review the assessments and make an eligibility determination was scheduled for December 16, 2010.[21] The Advocate could not attend the meeting because the road in front of the school was blocked by police cars and so it was rescheduled for January 27, 2011.[22] The meeting did not occur on January 27, 2011 because of a snow day (school was closed).[23] The Respondent then attempted to reschedule the meeting for February 4 or February 8, 2011, but the meeting was not held until April 27, 2011.[24]

7. The Petitioner often participated by phone for meetings (three of them) and the Advocate attended four meetings in person.[25]

8. At the April 27, 2011 meeting the Student's eligibility for special education and related services was discussed and no agreement was reached.[26] School staff opined that the Student did not qualify because despite the Student's ADHD, and some behavior problems, he was making good academic progress and doing well in most classes but for the two he didn't like. The Petitioner and Advocate opined that that Student was eligible because there were numerous behavior incidents indicating he was not making good choices, he had been expelled from his prior school, the 504 plan was not being implemented, and that having an IEP would better protect him.[27]

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[19] R 2/P 12.
[20] P 9, R 3/P 8.
[21] T of T of
[22] T of T of
[23] T of T of
[24] T of T of P 5, R 5.
[25] T of P, T of
[26] T of T of T of P, P 5, R 5.
[27] T of P, T of P 5, R 5.

9. The Student was given in-school suspension once in October 2010 and once in November 2010 for being disruptive and disrespectful.[28] The Student was out-of-school twice in November 2010, once for

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. tit. 5 § 3030.14. 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 meet their burden. D.C. Mun. Regs. tit. 5 § 3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. Federal regulations at 34 C.F.R. § 300.301(b) provide:

> Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

District of Columbia law, at D.C. Mun. Regs. tit. 5 §3005.2 provides;

> The IEP team shall conduct an initial evaluation of a child within a reasonable time of receiving a written referral and parental consent to proceed and within timelines consistent with Federal law and D.C. Code § 38-2501(a).

DC ST § 38-2501 was repealed, but DC ST § 38-2561.02(a) requires:

[28] P 13.
[29] P 13.

> DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment.

The evaluation process is completed pursuant to D.C. Mun. Regs. tit. 5 §3006.3:

> The IEP team shall consider all assessment reports in completing any evaluation of a child suspected of having a disability, or, in the case of reevaluation, any child identified as having a disability under this section. As the result of its consideration, the IEP team will determine whether the child:
>
> (a) is a child with a disability under this Chapter (or, in the case of reevaluation, whether the child continues to be a child with a disability); and
>
> (b) whether the child needs special education and related services (or, in the case of reevaluation, whether the child continues to need special education and related services).

Thus, the Respondent has a maximum of 120 days following the referral of the Student to complete the evaluation process, including the IEP team meeting where the determination is made.

3. The Petitioner, through Counsel, made a request (referral) for an initial evaluation of her child on October 4, 2010. 120 days from that date was February 1, 2011. The Respondent scheduled a meeting in December at which the Petitioner's Advocate did not show due to the road in front of the school being blocked. It is unclear why the meeting did not proceed as the Advocate could have participated via telephone just as the Petitioner typically did. Nevertheless, the meeting was rescheduled for another day within the deadline, on January 27, 2011. This meeting also failed to occur due to circumstances beyond anyone's control. What was within Respondent's control was to convene the meeting no later than February 1, 2011, and this did not happen. Whether or not the Advocate or even the Petitioner was available to be there in person does not excuse the Respondent from delaying the meeting beyond the deadline as no such exceptions exist under the law. Thus, the Respondent failed to timely review the evaluation data when it did not convene the team meeting until April 27, 2011.

4. It is not disputed that the Student is a child with a disability. What is disputed is whether the child, as a result of that disability, requires special education services. *See* 34 C.F.R. § 300.8(a), and D.C. Mun. Regs. tit. 5 §3006.3. The Petitioner has not shown by a preponderance of the evidence that the Student requires special education, only that he has a disability. His disability impacts his education by causing him to sometimes be impulsive and disruptive, but not to such a degree he is unable to access the curriculum. Indeed, the Student performs very well academically most of the time. He is accommodated with a 504 plan that may need to be changed or strengthened from time to time, but in the two classes he failed last year, health and chemistry, it was due to his own admitted dislike for either the teacher or the work required and he would often not go to class. While his determination to not attend may be a manifestation of his disability (specifically his executive functioning deficits – although this is merely a proposition, not a determination), his 504 plan included counseling services to help him deal with these issues. He did not attend his counseling, either, and this may need to be addressed under the 504 process. Both the Petitioner and her Advocate expressed concern that the Student needed an IEP because the 504 plan did not protect the Student or was not implemented, Despite the Advocate's expertise on the subject, that expertise did not come out in her testimony as her primary reason for supporting the Petitioner's position was that the Student had behavior issues and, importantly, those issues would be better addressed by an IEP than a 504 plan because, in her opinion, no one could be held accountable for implementing the 504 plan. A failure to implement a 504 plan is not justification for special education services. The Respondent's position is well supported by the evidence showing that the Student could and can be accommodated without special education services. The Petitioner has not shown this determination to be in error.

VII. DECISON

The Petitioner prevails on Issue 1 because the Respondent failed to complete the Student's initial evaluation within 120 days of the October 4, 2011 referral by the Petitioner.

The Respondent prevails on Issue 2 because it correctly determined the Student is not eligible for special education and related services under the IDEA.

VIII. ORDER

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

Because the Student is not eligible for special education and related services under the IDEA, the Respondent's failure to timely evaluate the Student is harmless error. The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: August 18, 2011

Independent Hearing Officer

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 USC §1415(i).