

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2015-0239
v.)	
)	Date Issued: September 29, 2015
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on July 16, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 20, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on July 30, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on August 16, 2015, and 45-day period concludes on September 29, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on August 3, 2015 and August 6, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by September 3, 2015 and that the DPH would be held on

¹ Personal identification information is provided in Appendix A.

September 10, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on August 7, 2015.

The DPH was held on September 10, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006. Petitioner elected for the hearing to be closed. Petitioner was represented by Emily Maloney, Esq. and DCPS was represented by William Jaffe, Esq.

Petitioner’s and Respondent’s disclosures were timely filed, except for Respondent’s exhibit 1. At the DPH, Petitioner’s exhibits P-1 through P-17 were admitted without objection. Respondent’s exhibits R-2 through R-14 were admitted without objection. Respondent’s exhibits R-1 was not admitted into evidence, as it was not timely disclosed.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Independent Psychologist²
- (c) Educational Advocate

Respondent called the following witness at the DPH:

- (a) School Psychologist³

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under the IDEA by failing to identify Student as eligible for special education and related services in its March 4, 2015 eligibility meeting.
- (b) Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under the IDEA by failing to identify Student as eligible for special education and related services in its June 19, 2015 eligibility meeting.
- (c) Whether DCPS failed to comply with its obligations to comprehensively evaluate Student when it failed to conduct a functional behavioral assessment (“FBA”) despite a recommendation for a behavioral intervention plan (“BIP”) in the January 21, 2015 initial psychological evaluation report.

² Qualified as an expert in clinical psychology (without objection) and school psychology (over Respondent’s objection).

³ Qualified as an expert in clinical and school psychology over Petitioner’s objection. Petitioner’s objection to the clinical psychology designation was substantive. Petitioner’s objection to the school psychology designation was based on the fact that, while the name of the witness was timely disclosed, her CV was not provided until the day after the disclosure deadline.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE;
- (b) an Order that Student is eligible for special education and related services under the classification of specific learning disability, other health impairment and emotional disturbance;
- (c) an Order that DCPS shall fund an independent FBA to be conducted at the start of the 2015-2016 school year;
- (d) a recognition that Petitioner reserves the right to seek reasonable compensatory education should Student be found eligible for special education and related services.

FINDINGS OF FACT

1. Student is ■ years old and resides with his mother (“Parent”/“Petitioner”) in Washington, D.C. Student has not been determined eligible for special education and related services.⁴
2. During the 2012-2013 school year, Student was a 3rd grader at District Elementary School. During the 2013-2014 school year, Student was a 4th grader at a private school. Student returned to District Elementary School for 5th grade student during the 2014-2015 school year, one week prior to the end of the first term.⁵
3. Student has nephrotic syndrome (diagnosed at age one), which causes swelling and sometimes results in Student being hospitalized. Student also has H-pylori (diagnosed at age 7 or 8), which causes constipation, stomach pains and burning urination. Additionally, Student was diagnosed with attention deficit hyperactivity disorder (“ADHD”) during the summer of 2014.⁶
4. Student had approximately 26 absences during the 2014-2015 school year, 20 of which were excused. Several of his excused absences were related to his medical condition.⁷
5. Student was in third grade at District Elementary School during the 2012-2013 school year. Parent informed the school of Student’s health concerns and wrote a letter asking the school to evaluate him because he was behind academically. Subsequently, Parent followed up with a second letter requesting that the school evaluate Student. District Element School wanted to collect additional data before evaluating Student.
6. Parent applied for and Student was awarded a scholarship to a private school for the 2013-2014 school year, and Parent removed Student from District Elementary School and placed him in the private school for fourth grade. The private school did not offer special education services to Student, and Student continued to struggle there. Parent removed Student

⁴ Testimony of Parent.

⁵ Testimony of Parent; P-1-16.

⁶ Testimony of Parent; P-1-16.

⁷ P-16.

from the private school and returned him to District Elementary School for the 2014-2015 school year, so that he could be evaluated for special education eligibility.⁸

7. When Student returned to District Elementary School in the 2014-2015 school year, Parent again requested that the school evaluate Student in October 2014. Parent had made the school aware of Student's ADHD and other diagnoses; however, the school wanted to monitor Student and gather additional data prior to evaluating him. Parent initially consented to defer testing, but after consulting with her legal counsel, she recanted on the same day, and requested that the school immediately evaluate Student.⁹

8. Student's grades improved throughout the 2014-2015 school year. In the first quarter, he earned "below basic" in most of his classes. However, by the fourth term, he had improved to "basic" or "proficient" in most classes.¹⁰

9. Student was sometimes pulled out of class for additional assistance in mathematics during the 2014-2015 school year. Student did no homework and no school work in mathematics. If he had done some of his work, he would have done better in that subject.¹¹

10. Student is nearsighted and has been prescribed prescription eyeglasses since at least November 2013. Student does not generally wear his glasses throughout the school day.¹²

11. Student's father has been an inconsistent presence in his life in recent years, which causes Student great distress, "sadness, anxiety and low self-esteem."¹³

12. When Student is upset, he sometimes has temper tantrums that can involve yelling and crying while either sitting, standing or lying down, and which likely impact his ability to concentrate, at least to some extent.¹⁴

January 21, 2015 Psychological Evaluation

13. School Psychologist conducted a confidential psychological evaluation, summarized in an evaluation report dated January 21, 2015.

14. Student did not wear his eyeglasses during the evaluation. School Psychologist asked him to wear his glasses, but he told her that he did not have them with him.

15. One of the assessments the evaluator conducted was the Reynolds Intellectual Assessment Scales ("RIAS"), which measures verbal and nonverbal cognitive ability. Generally,

⁸ Testimony of Parent.

⁹ Testimony of Parent.

¹⁰ P-10-1.

¹¹ Testimony of Parent.

¹² Testimony of Parent.

¹³ Testimony of Parent; P-1-3; P-4-2; P-6-3.

¹⁴ Testimony of Parent.

a student's verbal and nonverbal scores are approximately the same; however, Student initially scored approximately 18 points higher on his verbal than his nonverbal.¹⁵

16. The day after Student was assessed with the RIAS, he agreed to wear his corrective lens and sit for a different test of nonverbal cognitive ability, the TONI-4. With his glasses on, Student scored in the average range for nonverbal cognitive ability, significantly higher than he had the previous day without his glasses on.¹⁶

17. School Psychologist recommended that the low nonverbal cognitive ability scores Student received on the first day of testing be interpreted with caution, due to the fact that Student refused to wear his eyeglasses for that portion of the evaluation.¹⁷

18. Based on the academic records that were available to her, School Psychologist found Student to generally be at or slightly below grade levels in most academic areas, though some of his scores were flagged for rushing through the test, and though he had not been wearing his eyeglasses consistently.¹⁸

19. Based on her evaluation, School Psychologist concluded that Student did not meet the criteria for an Emotional Disturbance or Other Health Impairment.¹⁹

20. Among other things, School Psychologist recommended a 504 Rehabilitation Plan to provide accommodation Plan for his ADHD-related behaviors, and she also recommended that Student receive a behavioral intervention plan ("BIP") to help regulate his off-task behaviors.²⁰ She also recommended specific strategies to help Student maintain attention and to persist in the timely completion of assignments.²¹

March 4, 2015 Eligibility Determination

21. On March 4, 2015, Student multidisciplinary team ("MDT") met and considered Student's eligibility under the categories of Other Health Impairment ("OHI") and Emotional Disturbance ("ED"). Student was not found eligible.²²

22. Parent and Educational Advocate disagreed with the DCPS team members on the eligibility determination, and requested an independent evaluation, as well as a functional behavioral analysis.²³

¹⁵ Testimony of School Psychologist; R-6-6.

¹⁶ Testimony of School Psychologist; R-6-9 and R-6-20.

¹⁷ Testimony of School Psychologist; R-6-14.

¹⁸ P-1-16.

¹⁹ P-1-15 and P-1-16.

²⁰ P-1-17.

²¹ P-1-18.

²² R-8.

²³ Testimony of Parent; testimony of Educational Advocate.

23. During this eligibility meeting, District Elementary School offered to provide Student counseling services and a 504 plan; however, Parent and Educational Advocate were not in agreement with these services because they believed Student required a greater level of services.²⁴

24. DCPS authorized the IEE, but did not conduct an FBA.²⁵

June 1, 2015 Psychological Evaluation

25. Independent Psychologist's office conducted an independent comprehensive psychological evaluation ("IEE"), summarized in an evaluation report dated June 1, 2015.²⁶

26. Student did not wear his glasses during the IEE.²⁷

27. Student had several meltdowns during the testing, including whining, crying, complaining, shutting down, draping his body across chairs and covering his face with his jacket. The examiner called Parent several times throughout the testing in an effort to have her calm Student down by phone, but only when Parent physically came into to the testing room and sat with Student was he able to complete the testing.²⁸

28. Independent Psychologist found that Student's cognitive abilities fell generally in the average, low and very low range, and that his academic achievement levels fell at the low average range for broad reading and broad math, and the low range for broad written language.²⁹

29. According to Independent Psychologist, Student's diagnoses include ADHD, Oppositional Defiant Disorder, and Specific Learning Disorder with impairments in reading, written expression and mathematics.³⁰

30. Among other things, Independent Psychologist recommended that Student receive special education services under the category OHI, also finding that Student should be eligible under the category Specific Learning Disability. Independent Psychologist also recommended that Student receive an FBA to help decrease Student's non-compliant behaviors.³¹

31. The IEE only considered Student's first and second term grades from the 2014-2015 school year, though third term grades were available by the time the report was prepared.³²

²⁴ Testimony of Parent; testimony of Educational Advocate.

²⁵ Testimony of Educational Advocate.

²⁶ P-6.

²⁷ Testimony of Independent Psychologist.

²⁸ P-6-4.

²⁹ P-6-4 through P-6-8.

³⁰ P-6-11.

³¹ P-6-11 and P-6-12.

³² Testimony of Independent Psychologist; P-6-2.

June 19, 2015 Eligibility Determination

32. The DCPS members of Student's team (particularly School Psychologist and Student's special education teacher) had concerns about the validity of the IEE because Parent had been present in the room with Student during part of the evaluation, Student was not in control of his behavior throughout the evaluation, and Student had not worn his eyeglasses during the evaluation. The team discussed that these were serious concerns; however, Parent and Educational Advocate disagreed with the DCPS team members regarding the ultimate eligibility determination (finding Student not to be eligible).³³

CONCLUSIONS OF LAW

"Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

(a) Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under the IDEA by failing to identify Student as eligible for special education and related services in its March 4, 2015 eligibility meeting.

An LEA is responsible for identifying, locating and evaluating all children with disabilities who reside in the District of Columbia. 34 C.F.R. §§300.111, 300.131. At a parent's request, a public agency must conduct a full and individual initial evaluation to determine if the child is a child with a disability. 34 C.F.R. 300.301. DCPS must conduct this initial evaluation within 120 days from the date that the Student was referred for an evaluation or assessment. 34 C.F.R. 300.301(c), D.C. Code 38-2561.02(a). The Hearing Officer finds that Parent made a request as of October 2014,³⁴ and that DCPS timely conducted Student's evaluations. However,

³³ Testimony of Educational Advocate.

³⁴ While Parent also made requests for evaluation during the 2012-2013 school year, the Hearing Officer does not find sufficient evidence to make a finding about whether or not Parent could have been construed to have consented to deferring the evaluations until after the team gathered additional data, and/or while Student was at the private school, and if so whether Parent renewed her request to DCPS at any time during the two year statute of limitations period. Therefore, the Hearing Officer finds that for purposes relevant to this decision, Parent made the request for an evaluation in October 2014.

Petitioner asserts that the team's March 4, 2015 determination that Student is not eligible was a denial of FAPE.

As of the March 4, 2015 meeting, the team had the psychoeducation evaluation School Psychologist conducted, his grades from the first two terms of school, his attendance records, teacher feedback, and limited other information, such as Student's DIBELS scores and the fact that Student was not regularly wearing his prescribed eyeglasses. School psychologist testified credibly about the impact Student's avoidance of his eyeglasses had on his nonverbal cognitive scores. Additionally, the Hearing Officer finds School Psychologist's analysis of Student's academic records and cognitive scores to be credible and consistent with her finding that Student did not meet the criteria for an Emotional Disturbance or Other Health Impairment. Petitioner argues that Student's health challenges were causing him absences from school. This is correct; however, Student's report card reflects some limited academic progress even from the first term to the second term of the 2014-2015 school year, even though he did not arrive at District Elementary School until the end of the first term, even with the distress he has experienced from his father's frequent unavailability, and even with his absences and resistance to wearing his eyeglasses. Based on the evidence available as of March 4, 2015, the team's determination that Student was not eligible for special education and related services was not unreasonable or a denial of FAPE. Petitioner did not meet her burden of proof on this issue.

(b) Whether DCPS denied Student a FAPE by failing to comply with its child find obligations under the IDEA by failing to identify Student as eligible for special education and related services in its June 19, 2015 eligibility meeting.

As of the June 2015 eligibility meeting, the team had all the data the March 2015 team had, as well as the IEE. School Psychologist raised a number of protocol challenges to the IEE, including the fact that parent was present in the room with Student during the evaluation and that Student's behavior during the evaluation was not sufficiently controlled to allow him to concentrate well during the evaluation. These are significant concerns that go to the reliability of the data gleaned in the evaluation. The Hearing Officer credited School Psychologist's testimony and evaluation report over the testimony and evaluation report of Independent Psychologist, in large part because School Psychologist provided appropriate caveats about the extent to which the results she reported are reliable, for example due to Student's avoidance of wearing his glasses for most of her evaluation. Independent Psychologist was more reticent to acknowledge in her testimony and report that Student's performance could have been impacted by the fact that he did not wear his prescribed glasses throughout the IEE. In her testimony, she also indicated that Student's behavior during the IEE and Parent's presence with him in the room during the testing were not significant factors. Additionally, the IEE report did not consider Student's third term grades, though they were available at the time the report was issued. Under these circumstances, the Hearing Officer does not find the limited weight the team placed on the IEE to have been improper, or the June 19, 2015 decision the team reached that Student was not eligible for special education or related services to have been a denial of FAPE. Petitioner did not meet the burden of proof on this issue.

- (c) **Whether DCPS failed to comply with its obligations to comprehensively evaluate Student when it failed to conduct a functional behavioral assessment (“FBA”) despite a recommendation for a behavioral intervention plan (“BIP”) in the January 21, 2015 initial psychological evaluation report.**

As discussed above, the LEA has an obligation to provide a full individual initial evaluation. Based on School Psychologist’s recommendation in her January 2015 evaluation report that Student receive a BIP, a full individual evaluation for Student should have included an FBA. Independent Psychologist likewise recommended that Student receive BIP. However, a finding of a denial of FAPE must be based on substantive grounds. As Student has not yet been determined eligible, the relevant inquiry turns on whether an FBA would have changed either of the two challenged eligibility determinations. Here, even if Student had been given an FBA, it would not have changed the March or June 2015 eligibility determinations, because the record does not sufficiently demonstrate that Student was not making academic progress, particularly given that Student was not wearing his glasses or doing his homework consistently throughout the school year. For these reasons, Petitioner did not meet the burden of proof on this issue.

ORDER

As no denial of FAPE was found on the issues alleged, Petitioner’s requested relief must be **DENIED**. The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: September 29, 2015

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner’s Attorney: Emily Maloney, Esq. (electronically)

DCPS’ Attorney: William Jaffe, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).