

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
November 14, 2013

Parent,<sup>1</sup> on behalf of,  
Student,\*

Petitioner,

Date Issued: November 13, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,  
Respondent.

---

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is \_\_\_\_\_ currently a 1<sup>st</sup> grade student attending School A. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On October 2, 2013, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to complete comprehensive initial evaluations/assessments and convene a follow-up eligibility meeting in a timely manner with the parent; and failing to convene a manifestation determination review. As relief for this alleged denial of FAPE, Petitioner requested independent comprehensive psychological, speech-language, occupational therapy (OT) and functional behavioral assessments (FBA); any assessments reasonably recommended by the independent assessments; alternatively for DCPS to convene a student evaluation plan meeting; convene a meeting within 10 days of receiving the last independent assessment to review the assessments, determine eligibility for special education and, if eligible, determine any compensatory education that may be due and placement within ten days; for DCPS to convene a manifestation determination review and make an appropriate manifestation determination, or alternatively, for the Hearing Officer to order that the behaviors causing the student's suspensions are manifestations of his suspected disability; for DCPS to implement an appropriate behavioral intervention plan; and compensatory education.

---

<sup>1</sup> Personal identification information is provided in Appendix A.

\*The student is a minor.

On October 9, 2013, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that: DCPS did not receive a request from the parent to evaluate the student in 2011 or at any other time; the parent did not provide a written request for the student to be evaluated; the student was never referred for an evaluation for special education and related services; DCPS does not have knowledge of an alleged disability which would necessitate a manifestation determination review; the student was not suspended for 10 days during the 2012-2013 school year which would trigger a manifestation determination review; and DCPS will treat the due process complaint as a referral for an initial evaluation and proceed with beginning the evaluation process for the student.

On October 9, 2013, Hearing Officer Melanie Chisholm Hearing convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. On October 10, 2013, the Petitioner via electronic mail, clarified the timeline for Issue #1 as discussed during the prehearing conference. The Hearing Officer issued the Prehearing Order on October 17, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On October 10, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. Given the expedited nature of the case, the parties agreed that the 20-school day timeline started to run on October 2, 2013. The parties identified October 29, 2013 as the date for the due process hearing therefore the Hearing Officer Determination (HOD) is due on November 13, 2013.

On October 22, 2013, Petitioner filed Disclosures including twenty-six (26) exhibits and four (4) witnesses.<sup>2</sup> On October 22, 2013, Respondent filed Disclosures including five (5) exhibits and five (5) witnesses.

The due process hearing commenced at approximately 9:32 a.m. on October 29, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 6-9 and 12-24 were admitted without specific objection. Petitioner's Exhibits 1-5 and 10 were not admitted because they were duplicative of the record. The Petitioner withdrew Petitioner's Exhibit 11. Petitioner's Exhibit 25 was admitted, over Respondent's objection, because Petitioner's counsel represented that the witness would testify during the hearing therefore the document was not hearsay. Petitioner's Exhibit 26 was admitted, over Respondent's objection, not for the truth of the matter but to outline Petitioner's specific requests for relief. Respondent's Exhibits 1-5 were admitted without objection.

During the due process hearing, the Petitioner began to call a paralegal from the Petitioner's counsel's law firm as a witness. The Petitioner represented that the witness was being called to testify regarding the student's records and the scheduling of meetings. The

---

<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Respondent objected to the witness, arguing that there were no issues related to records for the Hearing Officer to decide and could provide no testimony regarding factual issues relevant to the time period in question. Given the agreement of the parties regarding the student's records and scheduling of meetings, the Hearing Officer suggested that the parties enter Stipulated Facts relevant to the matter. The parties agreed upon three facts, in addition to the Stipulated Fact presented at the start of the hearing. The Petitioner ultimately decided not to call the witness to testify.

At the close of Petitioner's case, the Respondent made a Motion for a Directed Verdict for Issues #1 and #3. For Issue #1, the Respondent argued that the District of Columbia regulations are clear that a request for an initial evaluation must be in writing and that the record is clear that the parent did not request an initial evaluation in writing in 2011. For Issue #3, the Respondent argued that all of the discipline records are in the record and the number of days that the student was suspended during the 2012-2013 school year does not equal ten. For Issue #1, the Petitioner argued that issues of law and fact remained because the District of Columbia regulations state that the parent's referral was to be on a form supplied to the parent by the school at the time of the request and the parent's verbal request should have prompted the school to provide the parent the form. For Issue #3, the Petitioner argued that the Parent's testimony was that the student was suspended both formally and informally during the 2012-2013 school year. The Hearing Officer denied Respondent's Motion for a Directed Verdict for Issue #1 and reserved ruling on Respondent's Motion for a Directed Verdict for Issue #3.

The hearing concluded at approximately 3:11 p.m. on October 29, 2013, following closing statements by both parties.

#### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

#### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to timely evaluate the student upon the parent's oral request in October 2011?
2. Whether DCPS failed to identify, locate and evaluate the student during the 2012-2013 school year, despite the suspicion that the student had emotional and behavioral disabilities which impacted his education?
3. Whether DCPS failed to conduct a manifestation determination meeting after the student was suspended for 10 days during the 2012-2013 school year, based on the suspicion that the student was a student with disabilities, and if so, whether this failure constitutes a denial of a FAPE?

## **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 not currently identified as a child with a disability. (Parent's Testimony; Principal's Testimony)
2. Inconsistent behavior and difficulty decoding words are typical for a kindergarten student. (Principal's Testimony)
3. School A has a school-wide leveled behavior management system. The low point of the system is "red," the mid-point is "yellow," and the high point is "green." Students are also able to earn additional stars, meaning the student has "above excellent" behavior. (Parent's Testimony)
4. During the 2012-2013 school year, the student would receive stars half of the time and would be on "red" half of the time pursuant to the school-wide behavior management system. (Parent's Testimony)
5. During the 2012-2013 school year, as an intervention, School A would remove the student from his assigned classroom and place him in a "buddy teacher's" classroom. (Principal's Testimony)
6. During the 2012-2013 school year, when the student joined the "buddy teacher's" classroom, the student was a "stellar student" and displayed no behavior problems. (Principal's Testimony)
7. During the 2012-2013 school year, as an intervention, the School A social worker worked with the student. (Principal's Testimony)
8. During the 2012-2013 school year, when the student was with the social worker, the student was able to "calm down." (Principal's Testimony)
9. During the 2012-2013 school year, the parent worked with a "social worker" from the National Center for Children and Families (NCCF). (Parent's Testimony; Principal's Testimony)
10. Employees of NCCF are not employees of DCPS and do not report to DCPS. (Principal's Testimony)
11. For confidentiality purposes, NCCF does not share student information with DCPS. (Principal's Testimony)
12. During the 2012-2013 school year, the principal worked closely with the special education coordinator and was kept abreast of all parental requests for evaluations. (Principal's Testimony)
13. During the 2012-2013 school year, the principal did not receive a parental request for an initial evaluation for the student. (Parent's Testimony; Principal's Testimony)
14. The special education coordinator for School A for the 2012-2013 school year is no longer an employee of School A. (Principal's Testimony)
15. The student was suspended on October 12, 2012 for one day. (Respondent's Exhibit 1)
16. For the first quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the "beginning" level except for one math skill at which the student was "developing." (Petitioner's Exhibit 19)

17. For the first quarter of the 2012-2013 school year, the student needed frequent prompting to demonstrate many appropriate work habits however needed only limited prompting to participate in class discussion and put forth effort into his work. (Petitioner's Exhibit 19)
18. For the first quarter of the 2012-2013 school year, the student primarily needed only limited prompting to demonstrate expected physical development skills. (Petitioner's Exhibit 19)
19. For the first quarter of the 2012-2013 school year, the student independently demonstrated six of the 12 measured social development skills, needed only limited prompting with five of the 12 social development skills and needed frequent prompting to "get along with peers." (Petitioner's Exhibit 19)
20. During the first quarter of the 2012-2013 school year, the student was slowly adjusting to the change in classes, had frequent outbursts, was disrespectful and rarely completed homework assignments. (Petitioner's Exhibit 21)
21. For the first quarter of the 2012-2013 school year, the teacher was confident that the student's academic progress would improve with practice. (Petitioner's Exhibit 21)
22. For the first quarter of the 2012-2013 school year, the student was tardy eight days. (Petitioner's Exhibit 19; Respondent's Exhibit 1)
23. For the second quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the "beginning" level except for one math skill at which the student was "developing." (Petitioner's Exhibit 19)
24. For the second quarter of the 2012-2013 school year, the student needed frequent prompting to demonstrate many appropriate work habits however needed only limited prompting to participate in class discussion and put forth effort into his work. (Petitioner's Exhibit 19)
25. For the second quarter of the 2012-2013 school year, the student primarily needed only limited prompting to demonstrate expected physical development skills. (Petitioner's Exhibit 19)
26. For the second quarter of the 2012-2013 school year, the student independently demonstrated six of the 12 measured social development skills, needed only limited prompting with two of the 12 social development skills and needed frequent prompting for the remaining four social development skills. (Petitioner's Exhibit 19)
27. For the second quarter of the 2012-2013 school year, the teacher commented on the student's gains in reading and did not note any behavioral concerns. (Petitioner's Exhibit 21)
28. During the second quarter of the 2012-2013 school year, the student was tardy to school ten times. (Petitioner's Exhibit 19; Respondent's Exhibit 1)
29. The student was suspended on February 6, 2013 for three days, for obscene, seriously offensive or abusive language or gestures. (Respondent's Exhibit 2)
30. For the third quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the "beginning" level except for two math skills at which the student was "developing." (Petitioner's Exhibit 19)
31. For the third quarter of the 2012-2013 school year, the student's work habits changed from needing frequent prompting in all skills except class discussion and putting forth effort, to needing only limited prompting in all areas except following directions, for which he needed frequent prompting. (Petitioner's Exhibit 19)

32. For the third quarter of the 2012-2013 school year, the student independently demonstrated all measured physical development skills. (Petitioner's Exhibit 19)
33. For the third quarter of the 2012-2013 school year, the student independently demonstrated six of the 12 measured social development skills, needed only limited prompting with five of the 12 social development skills and needed frequent prompting to "display self-discipline." (Petitioner's Exhibit 19)
34. For the third quarter of the 2012-2013 school year, the teacher commented that the student had potential to be a "great" student but his behavior "hampered his progress," and that the student had made gains however was capable of more. (Petitioner's Exhibit 21)
35. During the third quarter of the 2012-2013 school year, the student was tardy to school 13 times. (Petitioner's Exhibit 19; Respondent's Exhibit 1)
36. The student was suspended on May 1, 2013 for three days, for using an article that is not normally considered a weapon to intimidate or threaten another individual. (Petitioner's Exhibit 12; Respondent's Exhibit 2)
37. On May 13, 2013, the student was sent to the office for being disrespectful. (Petitioner's Exhibit 14; Respondent's Exhibit 2)
38. The student was suspended on May 14, 2013 for one day, for threatening teachers. (Petitioner's Exhibit 13; Respondent's Exhibit 2)
39. For the fourth quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the "beginning" level except for two math skills at which the student was "developing." (Petitioner's Exhibit 19)
40. For the fourth quarter of the 2012-2013 school year, the student needed frequent prompting to demonstrate all identified work habits except for following directions which he rarely demonstrated. (Petitioner's Exhibit 19)
41. For the fourth quarter of the 2012-2013 school year, the student independently demonstrated all measured physical development skills. (Petitioner's Exhibit 19)
42. For the fourth quarter of the 2012-2013 school year, the student independently demonstrated six of the 12 measured social development skills, needed only limited prompting with one of the 12 social development skills, needed frequent prompting to demonstrate three of the 12 social development skills and rarely demonstrated two of the 12 social development skills. (Petitioner's Exhibit 19)
43. For the fourth quarter of the 2012-2013 school year, the teacher commented that the student had potential to do much better but his behavior was "a huge issue." The teacher noted the student's propensity to be disrespectful, not follow directions and not listen to authority figures. (Petitioner's Exhibit 21)
44. During the fourth quarter of the 2012-2013 school year, the student was tardy to school nine times. (Petitioner's Exhibit 19; Respondent's Exhibit 1)
45. Prior to the Complaint being filed, the record contains no written referral or request for an evaluation of the student. (Stipulated Fact)
46. DCPS has agreed to conduct a comprehensive psychological assessment, a speech-language assessment, an OT assessment and an FBA of the student. (Stipulated Fact)
47. DCPS scheduled a meeting for October 30, 2013 for the parent to sign the consent to evaluate the student. (Stipulated Fact)
48. As of October 29, 2013, DCPS has not administered the agreed upon assessments. (Stipulated Fact)

## 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:

### Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See 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); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

### Issue #1

Pursuant to 34 CFR §300.111(a)(1), the State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 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. 34 CFR §300.301(b).

The District of Columbia Municipal Regulations state that, "A child with a suspected disability who may need special education and is at least two years, eight months of age and less than twenty-two years of age, shall be referred, in writing, to an IEP team." 5 DCMR §E-3004.1(a). A referral, which shall state why it is thought that the child may have a disability may be made by the following: a child's parent or person in a parental relationship; or a child (self-referral) who is between the ages of eighteen (18) and twenty-two (22) years of age or an emancipated minor who is eligible to attend the LEA; or a professional staff employee of the LEA; or a staff member of a public agency who has direct knowledge of the child. 5 DCMR §E-

3004.1(b). If the child to be referred attends a D.C. public school or is enrolling in a D.C. public school at the time this referral is made, this referral shall be submitted by his or her parent to the building principal of his or her home school, on a form to be supplied to the parent by the home school at the time of the parent's request. 5 DCMR §E-3004.1(c).

The parties have agreed that prior to the Complaint being filed, the record contains no written referral or request for an evaluation of the student. The Parent testified that in late October 2011 or early November 2011 she spoke with the special education coordinator at School A and asked for the student to be "tested" for special education and that she knew to speak with the special education coordinator because the School A principal told her to speak with the special education coordinator. The parent did not ask the principal for an initial evaluation of the student.

The Principal testified that during the 2011-2012 school year, neither the parent nor the student's teacher requested that the student be evaluated for special education and related services. Further, the Principal testified that she never referred the parent to the special education coordinator. The Principal testified that she worked closely with the special education coordinator and was kept abreast of all parental requests for evaluations. The Principal testified that she was never told by the special education coordinator that the parent requested an initial evaluation for the student. The special education coordinator is no longer an employee of School A.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. Even if the DC regulations did not require a parent's request for an initial evaluation to be in writing or to be submitted to the building principal, the evidence is evenly balanced regarding whether the parent made an oral request for the student to be evaluated. The Parent testified that in a conversation with School A's former special education coordinator, she requested an initial evaluation in late October 2011 or early November 2011. The Principal testified that she worked closely with the special education coordinator, was kept abreast of all parental requests for evaluation and that there was no parental request for an initial evaluation of the student.

The Hearing Officer concludes that the Petitioner failed to meet its burden with respect to Issue #1.

## Issue #2

“Child find” is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities. See 34 CFR 300.111. A State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 CFR §300.111(a). Child find also includes children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade. 34 CFR §300.111(c)(1).

The standard for triggering the Child Find duty is suspicion of a disability rather than actual knowledge of a qualifying disability. See *Regional School District Board of Educ. v. Mr. and Ms. M. ex rel. MM*, 15 IDELR 8 (D. Conn. 2009); *Torrance United School District v. E.M.*, 51 IDELR 11 (M.D. Calif. 2009); *District of Columbia Public Schs*, 111 LRP 25929 (SEA DC March 25, 2011). However, the LEA must have a reason to suspect that a student has a disability. See *E.J. by Tom J. and Ruth J. v. San Carlos Elementary Sch. Dist.* 803 F. Supp. 2d 1024 (N.D.Cal. 2011) (allegations that a California district knew about a student’s anxiety disorder for years before it referred her for an evaluation were not enough to show that the district violated its child find obligation because the student’s teachers had no reason to believe she needed special education services); *J.G. v. Douglas County Sch. Dist.* 552 F.3d 786, 803 (9th Cir. 2008) (although the parents requested initial evaluations in May 2003 and attended the district’s child find day in June 2003, the district had no reason to suspect that the students had autism until it was contacted by the twins’ private service provider); *Long v. District of Columbia*, 780 F. Supp. 2d 49 (D.D.C. 2011) (the district’s child find duty was triggered when a private psychologist diagnosed the student with a learning disability). To establish a procedural violation of “child find,” a parent must show school officials overlooked clear signs of disability. *Board of Educ. of Fayette County, Kentucky v. L.M.*, 47 IDELR 122 (6th Cir. 2007).

In the present case, the Petitioner alleged that DCPS failed to identify, locate and evaluate the student during the 2012-2013 school year, despite the suspicion that the student had emotional and behavioral disabilities which impacted his education. The Respondent argued that during the 2012-2013 school year, DCPS did not have a reason to suspect that the student had a disability.

For the first quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the “beginning” level except for one math skill at which the student was “developing.” The student needed frequent prompting to demonstrate many appropriate work habits however needed only limited prompting to participate in class discussion and put forth effort into his work. With physical development skills, the student primarily

needed only limited prompting to demonstrate expected skills. With social development, the student independently demonstrated six of the 12 measured skills, needed only limited prompting with five of the 12 skills and needed frequent prompting to “get along with peers.” The student’s teacher noted that the student was slowly adjusting to the change in classes, had frequent outbursts, was disrespectful and rarely completed homework assignments. However, the teacher was confident that the student’s academic progress would improve with practice. For the first quarter, the student was tardy eight days and was suspended for one day. The record does not include the reason for the student’s suspension in October 2012.

For the second quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the “beginning” level except for one math skill at which the student was “developing.” The student needed frequent prompting to demonstrate many appropriate work habits however needed only limited prompting to participate in class discussion and put forth effort into his work. With physical development skills, the student primarily needed only limited prompting to demonstrate expected skills. With social development, the student independently demonstrated six of the 12 measured skills, needed only limited prompting with two of the 12 skills and needed frequent prompting for the remaining four skills. For the second quarter of the 2012-2013 school year, the teacher commented on the student’s gains in reading and did not note any behavioral concerns. During the quarter, the student was tardy to school ten times and was not suspended.

For the third quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the “beginning” level except for two math skills at which the student was “developing.” The student’s work habits changed from needing frequent prompting in all skills except class discussion and putting forth effort, to needing only limited prompting in all areas except following directions, for which he needed frequent prompting. The student independently demonstrated all measured physical development skills. With social development, the student independently demonstrated six of the 12 measured skills, needed only limited prompting with five of the 12 skills and needed frequent prompting to “display self-discipline.” The teacher commented that the student had potential to be a “great” student but his behavior “hampered his progress.” The teacher noted that the student had made gains however was capable of more. During the third quarter, the student was tardy to school 13 times and was suspended for three days for exposing himself to female students.

For the fourth quarter of the 2012-2013 school year, for the academic concepts which had been introduced, the student was at the “beginning” level except for two math skills at which the student was “developing.” The student’s work habits declined to where the student needed frequent prompting to demonstrate all identified habits except for following directions which he rarely demonstrated. The student continued to independently demonstrate all measured physical development skills. With social development, the student independently demonstrated six of the 12 measured skills however declined in his ability to demonstrate the other social development skills. The student needed only limited prompting with one of the 12 skills, needed frequent prompting to demonstrate three of the 12 skills and rarely demonstrated two of the 12 skills. The teacher commented that the student had potential to do much better but his behavior was “a huge issue.” The teacher noted the student’s propensity to be disrespectful, not follow directions and

not listen to authority figures. During the fourth quarter, the student was tardy to school nine times, was suspended twice in May and sent to the office on another occasion in May.

School A has a school-wide leveled behavior management system. The low point of the system is “red.” If the student is on red, the student is “out.” If the student is on “yellow,” this means to “slow down.” “Green” means “good.” Students are also able to earn additional stars, meaning the student has above excellent behavior. The Parent testified that in any given week, during the 2012-2013 school year, the student would receive stars half of the time and would be on “red” half of the time.

The Petitioner argued that DCPS knew or should have known of the issues with the student’s behavior because the “social worker” referred the student to therapy in September 2012. The Hearing Officer is not persuaded by this argument. The “social worker” to whom the parent spoke is with the NCCF, is not an employee of DCPS and does not report to DCPS. Further, for confidentiality purposes, NCCF does not share student information with DCPS. Additionally, the Parent testified that she did not share with DCPS that the student was receiving counseling from an outside source because she “didn’t want to tell them.” While it was well within the parent’s rights not to inform DCPS that the student was receiving outside counseling, the parent cannot choose to withhold this information from DCPS and then expect DCPS to take some form of action based on the information.

The Principal testified that School A did not suspect that the student had a disability because the student’s behaviors did not manifest in all environments. Specifically, as an intervention, School A would remove the student from his assigned classroom and place him in a “buddy teacher’s” classroom. When the student joined the alternate classroom, the student was a “stellar student” and displayed no behavior problems. The Principal testified that the student’s behaviors were not manifested beyond a specific adult, namely, the student’s teacher. Also, as an intervention, the School A social worker worked with the student. When the student was with the social worker, the student was able to “calm down.” Additionally, the Principal testified that on her daily walks throughout the school environment, she never observed the student demonstrating inappropriate behavior. The Principal testified that she believed that the transition from pre-kindergarten to kindergarten was a challenge for the student and suggested that the parent work with the school social worker on effectively transitioning the student. The student’s grades and behaviors raised no alarm or concern for the Principal and the student’s inconsistent behaviors and difficulty with decoding words are typical for a kindergarten student. The Principal testified that the student is a “bright” student, and with social work in place, the student is a “fabulous young man” and a strong leader.

The Hearing Officer concludes that for the first two quarters of the 2012-2013 school year, the student’s academic progress and behaviors were not such that DCPS should have suspected that the student was a student with a disability and in need of specialized instruction. Although the student was academically at the “beginning” level, it was the beginning of the year and students, especially kindergarten students, need time to transition. The student’s teacher noted, for the first quarter, that the student had frequent outbursts, was disrespectful and rarely completed homework assignments however attributed these behaviors to a slow transition. The student’s teacher did not note behavioral concerns for the second quarter.

For the third quarter, the Hearing Officer also concludes that the student's academic progress and behaviors were not such that DCPS should have suspected that the student was a student with a disability in need of specialized instruction. While the student's teacher noted that the student's behavior "hampered his progress," the student made significant improvements in work habits and social development during the third quarter. The Hearing Officer notes that the student was able to make these social/behavioral gains even after being tardy for 13 days during the quarter and 31 days cumulatively for the year, at that point.

However, during the fourth quarter of the 2012-2013 school year, the Hearing Officer concludes that DCPS should have suspected that the student was a student with a disability and in need of specialized instruction. At that point, the student had not made measureable academic progress, had significantly declining work habits and social skills and received three office referrals within one month in May 2013. While it may be typical for kindergarteners to have some difficulty transitioning to kindergarten, by May 2013, the student should have demonstrated progress. While the Hearing Officer acknowledges that if the student is a student with a disability related to behavior than the student must display behavior across environments, it was proper, by the fourth quarter of the 2012-2013 school year, for an evaluation to be conducted to comprehensively assess the student's behaviors across all environments and to further examine the student's failure to be "secure," or at least "developing," in a majority of the required grade-level academic skills.

When a child is identified as potentially requiring special education services, the LEA has a duty to complete the evaluation process and failure to complete the process constitutes a denial of a FAPE. 20 U.S.C. § 1414(b)(2)(A)(i); *see also N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11 (D. D.C. 2008); *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003) (failure to provide a timely eligibility determination creates a substantive harm and constitutes a denial of a FAPE).

The Hearing Officer concludes that DCPS' Child Find obligation was triggered on May 14, 2013. At that point, the student's behaviors were declining and the student had received his third office referral in one month. While it may not be concerning for a student to be "beginning" toward proficiency during the first semester of school, by the fourth quarter the student remained at the "beginning" level for the vast majority of grade-level academic skills. Therefore, the Hearing Officer concludes that DCPS failed to take affirmative steps to locate, identify and evaluate the student pursuant to its Child Find obligation, and that this failure constitutes a denial of a FAPE for the student.

The Petitioner met its burden with respect to Issue #2.

### Issue #3

The Petitioner alleged that DCPS failed to conduct a manifestation determination meeting after the student was suspended for 10 days during the 2012-2013 school year, while DCPS should have suspected that the student was a student with disabilities. The Respondent argued that the student was not suspended for more than 10 days during the 2012-2013 school year.

The IDEA regulations discipline procedures provide that school personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconducts (as long as those removals do not constitute a change in placement under §300.536). After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required in 34 CFR §300.530(d). 34 CFR §300.530(b).

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 CFR §300.530(e)(1). This process is known as a manifestation determination review. *See* 34 CFR §300.530(e).

For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if – (1) the removal is for more than 10 consecutive school days; or (2) The child has been subjected to a series of removals that constitute a pattern – (i) Because the series of removals total more than 10 school days in a school year; (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR §300.536(a).

In the present matter, the record indicates that during the 2012-2013 school year, the student was suspended on October 12, 2012 for one day; on February 6, 2013 for three days, for obscene, seriously offensive or abusive language or gestures; on May 1, 2013 for three days, for using an article that is not normally considered a weapon to intimidate or threaten another individual; and on May 14, 2013 for one day, for threatening teachers.

The Petitioner argued that the student also received numerous "informal" suspensions during the 2012-2013 school year. The Parent testified that she was called to pick up the student from school "three to four times per month" however the Hearing Officer does not find the Parent's testimony to be credible on this point. While the Parent testified that she was called to pick up the student from school "three to four times per month," at one point her testimony was that she was called to pick up the child "around six times," at another point her testimony was that she was called to pick up the child "like seven times the whole year." The Parent was unable to provide any details regarding the dates of the alleged unofficial suspensions and did not clarify if the calls to pick up the child were on the days of the suspensions documented in the record. The Parent also initially testified that she received phone calls from the principal and

another School A staff member during the 2012-2013 school year to pick up the child from school however later changed her testimony to state that she only received phone calls from the other School A staff member during the 2012-2013 school year to pick up the child from school. The Principal testified that she did not call the parent to pick up the child from school during the 2012-2013 school year however was informed by the parent that on one occasion the student's teacher requested for her to pick up the student from school.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the student was suspended for more than ten days during the 2012-2013 school year. The evidence in the record indicates that the student was suspended for eight days during the 2012-2013 school year. It is also likely that the parent was called by the student's teacher on one occasion to pick up the student from school for one day. The Hearing Officer concludes that, at most, the student was suspended for nine days during the 2012-2013 school year and therefore did not receive a removal for more than ten consecutive days, or a series of removals totaling more than ten days during the 2012-2013 school year. Taken as a whole, the Office Discipline Referral Forms, Notices of Final Disciplinary Action, Attendance Summary and Student Incident Report included in the record do not suggest additional suspensions of the student during the 2012-2013 school year which were not calculated by the Hearing Officer. Accordingly, DCPS was not required to conduct a manifestation determination during the 2012-2013 school year.

The Petitioner failed to meet its burden with regard to Issue #3.

#### Requested Relief

As relief, in the Complaint, the Petitioner requested independent comprehensive psychological, speech-language, FBA and OT assessments; any assessments reasonably recommended by the independent assessments; alternatively for DCPS to convene a student evaluation plan meeting; convene a meeting within 10 days of receiving the last independent assessment to review the assessments, determine eligibility for special education and, if eligible, determine any compensatory education that may be due and placement within ten days; for DCPS to implement an appropriate BIP; and compensatory education. However, in the 5-Day

Disclosures and through the Advocate's testimony, the Petitioner requested comprehensive psychological testing, an FBA and a BIP; 40 hours of independent counseling with a behavior therapist or social worker; and 36 hours of academic tutoring. The Parent, during testimony, requested independent assessments because of her distrust of DCPS.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. The timeframe does not apply if the parent of a child repeatedly fails or refuses to produce the child for the evaluation. 34 CFR §§300.301(c), (d). The District of Columbia has established a 120-day timeline. *See* D.C. Code §38-2561.02. The Hearing Officer concluded that DCPS' Child Find obligation was triggered on May 14, 2013, therefore, an eligibility determination for the student should have been made by September 11, 2013. After the Complaint was filed, DCPS agreed to conduct comprehensive psychological, speech-language, FBA and OT assessments of the student. A meeting was scheduled for October 30, 2013 for the parent to sign the consent to evaluate the student.

Since DCPS has presumably started assessments for the student and since, in the 5-Day Disclosures DCPS did not request independent assessments, it is equitable for DCPS to provide the assessments however within a timeline more expedited than the State established timeline. Additionally, it is equitable for DCPS to immediately issue an authorization letter for independent assessments, should the parent disagree with the DCPS assessments following a review of the assessments.

At this point, the student has not been found eligible as a student with disabilities as defined by 34 CFR §300.8, therefore, the Hearing Officer does not believe that the record contains the evidence necessary to order a BIP, counseling or tutoring. However, should the student be found eligible for special education and related services, the student's IEP Team should discuss the student's needs in relation to the time period he was without services and develop a BIP for the student, if appropriate.

IDEA regulations at 34 CFR §300.304(c)(4) require a student to be “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” A comprehensive psychological evaluation provides assessments related to the student's social and emotional status, general intelligence and academic performance. A functional behavioral assessment is an educational evaluation. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). A comprehensive psychological evaluation and a functional behavioral assessment are needed to address the areas related to the student's

suspected disability. While the Petitioner requested speech-language and OT assessments in the Complaint, the record does not contain evidence which suggests that speech-language and OT assessments relate to the area of the student's suspected disability. Additionally, DCPS did not request these assessments in the 5-Day Disclosures.

### **ORDER**

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

1. Issues #1 and #3 are **dismissed** with prejudice.
2. Within forty-five (45) calendar days of the date of this Order, for DCPS to complete comprehensive psychological and FBA assessments of the student.<sup>3</sup>
3. Within ten (10) school days of the completed assessments, or on a date mutually agreed upon by the parties, DCPS convene a multidisciplinary team (MDT) meeting to review the results of the assessments and complete the initial evaluation process to determine whether the student is eligible for special education and related services.
4. If the student is found to be eligible for special education and related services, within the meeting described in #2, develop an individualized education program (IEP) for the student, and if appropriate, a BIP for the student.
5. If the parent disagrees with the assessments described in #1, following a review of the assessments in the meeting described in #2, DCPS issue an authorization letter for independent assessments at the conclusion of the meeting.
6. During the meeting in described #2 or any subsequent meeting should independent assessments be completed, if the MDT determines that the student is eligible for special education and related services, DCPS specifically address the needs of the student given DCPS' failure to provide services to the student beginning October 11, 2013.<sup>4</sup>
7. All other relief sought by Petitioner herein is **denied**.

---

<sup>3</sup> The record does not contain evidence that OT and speech-language assessments are necessary for the student's suspected disability. However, since DCPS has agreed to conduct OT and speech-language assessments for the student, the Hearing Officer strongly suggests that DCPS complete these assessments by the required date of the comprehensive psychological and FBA assessments in order for the MDT to discuss all assessments conducted for the student.

<sup>4</sup> Approximately 150 days from the date that DCPS' Child Find obligation was triggered.

**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).

Date: November 13, 2013

  
Hearing Officer