

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

Office of Dispute Resolution
810 First Street, N.E.
Washington, DC 20002

OSSE
Office of Dispute Resolution
September 22, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 6, 2014 in regard to the Student. On August 18, 2014, Respondent filed a response. A resolution meeting was held in this case on September 17, 2014. This is an expedited matter due to a claim relating to school suspensions.

On August 21, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on August 27, 2014 summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date followed on September 5, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-18. Respondent entered into evidence exhibits 1-7. Petitioner presented as witnesses: Petitioner. Respondent presented: Witness A.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 USC Sect. 1400 et seq., its implementing regulations, 34 CFR Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUES

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS fail to respond to parental requests for evaluations during the two years prior to the filing of the Due Process Complaint?
2. Did DCPS fail to respond to an outside therapist’s request for an evaluation on November 11, 2013?
3. Did DCPS fail to locate, identify and evaluate the Student pursuant to “Child Find” for the two years prior to the filing of the Due Process Complaint?
4. Did DCPS improperly suspend the Student without providing him a manifestation determination after he was suspended for more than ten days during the 2013-2014 school year?
5. Did DCPS fail to provide the parent with Prior Written Notice of the refusal to evaluate the Student during the 2013-2014 school year?

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 currently ineligible for services. (Exh. P-9)

3. The Student has made threats and will punch himself when he is angry. (P-3-4)

4. The Student has met the criteria for ADHD, Mood Disorder NOS, and Conduct Disorder, Childhood Onset. (P-3-9, P-4-1)

5. The Student has also been diagnosed with ADHD Combined Type, and Bipolar Disorder mixed type with psychotic features. (R-1-3)

6. His academic career started poorly,

7. Student attended School A. During his time at School A, he had behavioral issues

8. During this time, there was an incident where the Student apparently tried to commit suicide at the school. (Testimony of Petitioner)

10. During the 2011-2012 school year, in third grade, the Student went to School B.

The Petitioner sought evaluations at this time. (Testimony of Petitioner)

11. During the 2012-2013 school year, in fourth grade, the Student went to School C.
(Testimony of Petitioner)

12. During this year, the Petitioner went to Principal A and told her of the Student's issues. The Petitioner indicated that the Student's class size was too big. (Testimony of Petitioner)

13. During this year, the parent also went to Witness A, a school counselor, and told her that her son needed to be evaluated. (Testimony of Petitioner)

14. The Student had some issues at this time. Witness A worked on the Student's attendance issues with the Petitioner. (Testimony of Witness A)

15. During 4th grade, the Student received grades in all academic subjects, which indicates that the Student did not meet academic standards. He did not work well with others, did not use his time wisely, did not complete and return his homework, and did not participate in class discussion. He rarely followed playground rules or classroom rules, he did not respect the rights of others, he did not listen when others spoke, and did not practice self-control. (P-5-1-3)

16. During the first term of fourth grade, his behavioral problems were affecting his academics. During the second term, he regressed in reading and did not apply himself in the classroom. During his third term and fourth term, he improved somewhat. (P-5-4)

17. For fifth grade, the Student again went to School C. (Testimony of Petitioner)

18. A behavior checklist was written for the Student by Teacher A. This list was based on Teacher A's observations of the Student. The checklist indicates that the Student communicated with peers in a way that was disrespectful,

created excessive noise in the classroom, hall, and cafeteria, refused to comply with staff in regard to instruction or rules, and demonstrated behaviors that disrupted or interfered with classroom teaching and learning. He engaged in loud outbursts, fell out of the chair three times followed by loud laughter, and refused redirection. (P-6-1)

19. The next day, Teacher A filled out another checklist based on his observations of the Student. The Student had similar issues including creating excessive noise in the classroom, hall, and cafeteria, refusing to comply with staff instruction or rules, and demonstrating behaviors that disrupt or interfere with classroom teaching and learning. He engaged in name calling, yelling and refused redirection. (P-7-1)

20. In September, 2013, the Petitioner asked Principal A to evaluate the Student. (Testimony of Petitioner)

21. In October, 2013, the Petitioner asked Witness A for an evaluation. (Testimony of Petitioner)

22. In response, Witness A said to Petitioner that the Student could not have an IEP because his problems were behavioral. Witness A suggested a Section 504 plan, and the Petitioner agreed, so Witness A set up a Section 504 eligibility meeting, (Testimony of Petitioner; Testimony of Witness A)

23. A Section 504 meeting was held December 2013. (P-9)

24. The Student was deemed to be eligible for Section 504 services because he has a impairment. This impairment affects his communicating, his learning,

25. At the Section 504 meeting were the Petitioner, Witness A, two of the Student's teachers, and Dr. A, a psychiatric resident who had been treating the Student. (P-9-1)

26. The Student's Section 504 plan requires visual cues and prompts, and allowing the student to self-soothe. It also provided for assignments that took no more than 10 minutes to complete and breaks between tasks. (P-9-1)

27. Dr. A's suggestions were incorporated into the Section 504 plan. (Testimony of Witness A)

28. The Section 504 plan did not improve his behavior. (Testimony of Petitioner)

29. After the Section 504 plan was developed, the Student assaulted another student and was not allowed back into school without a document from the Psychiatric Institute of Washington. (Testimony of Petitioner)

30. During the 2013-2014 school year, the Student was suspended numerous times because he would not stay in his seat, was disrespectful to staff, and was aggressive. (Testimony of Petitioner)

31. The Student was suspended on April 11, 22, and 23, 2014; May 5-12, 2014; and June 3, 4, and 5, 2014. (P-15-1; P-16-3)

32. At some point during the 2013-2014 school year, outside mental health worker Mr. A asked school staff for the Student to be evaluated. (Testimony of Petitioner)

33. At some point during the 2013-2014 school year, the Petitioner asked Ms. A, his main teacher, for an evaluation. (Testimony of Petitioner)

34. During the 2013-2014 school year, the Student's behavior was stopping him from progressing academically. (Testimony of Petitioner)

35. The Student's behavior worsened significantly in fifth grade. (Testimony of Witness A)

36. The Student's fourth term report card in 5th grade indicated 1 grades in all academic subjects except reading, where he received a 2. He rarely followed directions, did not complete class work on time, did not work well with others, did not use time wisely, did not return completed homework, made no effort, did not follow classroom rules, did not follow playground rules, did not respect the rights of others, did not listen to others, and did not practice self-control. (P-10-1)

37. I found the Petitioner credible in this matter. I found Witness A partly credible, but I did not believe the suggestion that the Petitioner came up to her asking for a Section 504 evaluation. There is nothing in the record to suggest that Petitioner would know what a Section 504 evaluation was at the time she was seeking an evaluation.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v.

Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”

Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

1. Requests for Evaluations.

The Petitioner contends that she requested evaluations numerous times without any response from the Respondent. Of particular note, the Petitioner contends that she requested an evaluation from Principal A in September, 2013. The Petitioner also contends that the Student’s counselor requested an evaluation without any response from the Respondent.

Federal regulations at 34 C.F.R. § 300.301(b) provide that, “(c)onsistent 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 DC Code Sect. 38-2561.02(a) implements this provision. The Code reads, in part, as follows: “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 District of Columbia Municipal regulations expand on these requirements. The regulations require that requests for evaluation be in writing. As the regulations state:

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 Sect. 3004.1(c).

I credit the parent for her testimony that she did indeed ask for an evaluation from school staff, including the Student’s teacher, Witness A, and the school principal. However, the parent

did not submit these requests for evaluations on a form provided by the school. None of her requests for an evaluation were in writing according to the testimony.

I have carefully considered this issue -- which was not raised by the Respondent as a defense. To this IHO, an unrepresented parent could not know that they have to request an evaluation in writing using a form from the school. Upon an oral parent request for evaluation, I find that it is the Respondent's responsibility to inform the parent of the need to put this request in writing on a form and then to provide this form to the parent. There is nothing in the record to suggest that Respondent did so. Accordingly, I find the Respondent violated the IDEA and the DCMR by failing to evaluate the Student upon a parent request.¹

2. Child Find.

Petitioner premises her "child find" claim on the Student's negative behavioral history and its connection to his academics in the past two years.

The "child find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. Sect. 1412(a) (3) (A); 34 C.F.R. Sect. 300.111(a). Child find must include any children "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c) (1).

Federal case law indicates that these provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the "child find" obligation "extends to all children suspected of

¹ The testimony and evidence are insufficient in regard to the claim that the counselor requested an evaluation. Petitioner only relies on her own vague statement, which does not identify a date or the person that the request was directed to.

having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

The IDEA does not dictate that every child with behavioral problems in school must be suspected of having an emotional or other disability. To the contrary, the IDEA expressly cautions that the "emotional disturbance" disability category does not apply to children who are socially maladjusted unless they meet the specific criteria for emotional disturbance. 34 CFR Sect. 300.8 (c)(4)(ii); see also N C. v. Bedford Central School Dist., 51 IDELR 149 (2d Cir. 2008) (distinguishing qualifying emotional disturbance from mere "bad conduct"). For Petitioner to have a "serious emotional disturbance" as defined under the IDEA, his condition would need to exhibit one or more of the specific characteristics set forth in Sect. 300.8 (c)(4). The characteristics include: "(A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; [and] (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c)(4)(i). Petitioner also must show that these characteristics occurred over a long period of time to a marked degree, which affected his educational performance. 34 CFR Sect. 300.8 (c)(4)(i)(A)(E).

During the past two school years, the Student has given strong indications that he is engaging in inappropriate types of behavior or feelings under normal circumstances. He also showed an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. In fourth grade, he rarely followed directions, did not work well with others, did not use his time wisely, did not complete and return his homework, or participate in class discussion.

He rarely followed playground rules or classroom rules, he did not respect the rights of others, he did not listen when others speak, and did not practice self-control.

Then in the fifth grade, according to the Respondent's witness, his behavior got much worse. He was subjected to more than ten suspensions, communicated with peers in a way that was disrespectful, created excessive noise in the classroom, hall, and cafeteria, refused to comply with staff instruction or rules, and demonstrated behaviors that disrupted or interfered with classroom teaching and learning. For instance, on the first day that Teacher A wrote a behavior checklist for him on September 18, 2013, he engaged in loud outbursts, fell out of the chair three times followed by loud laughter, and refused redirection. On the second day when Teacher A wrote a behavior checklist for him on September 19, 2013, he engaged in name calling, yelling across the room, called a student a derogatory term, and refused redirection.

It is fair to deduce these behaviors had an impact on the Student's academic performance. If a student is not following directions, not doing his homework, not participating in discussions, and not communicating with others, classwork should be affected. It is noted that the Student's grades were poor for the fourth and fifth grades, with mostly 1 and 2 grades in academic subjects. I agree with Petitioner that Respondent violated the "child find" provisions of the IDEA by failing to evaluate the Student after he presented with an emotional disturbance in school for an extended period of time.

3. Suspensions.

Petitioner contends that the Student was suspended in excess of ten days without benefitting from the protections of the IDEA, in particular, without benefitting from a manifestation determination.

Students who are not eligible services may be subject to the protections of the IDEA under certain circumstances. 34 CFR Sect. 300.534(a). To gain this protection in connection to violations of codes of conduct, the public agency must have had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

This knowledge can be acquired in three ways. The parent can express concern in writing to a supervisor or administrative personnel of the agency. The parent can request an evaluation of the child. Also, a teacher, or other personnel of the LEA, can express specific concerns about the pattern of behavior demonstrated by the child directly to the director of special education of the agency or other supervisory personnel of the agency. 34 CFR Sect. 300.534(b)

Here, as indicated earlier in this decision, the parent did request an evaluation of the Student. As a result, even though the Student was not eligible for services at the time of the discipline, I find that the Student's behavior is subject to the disciplinary provisions of the IDEA.

The pertinent disciplinary provisions here relate to suspensions. When a child with a disability has been removed from his educational placement for ten school days in a school year for disciplinary reasons, the LEA must convene a team, including the parent and relevant members of the IEP team, within 10 school days to review all relevant information in the child's file, including the IEP, any teacher observations, and any relevant information provided by the parent, to determine whether the conduct in question was caused by, or had a direct relationship to, the child's disability, or whether the conduct in question was the direct result of the LEA's failure to implement the IEP. See 34 CFR Sect. 300.530(e); 5 DCMR Sect. E2510. When a child is removed from his educational placement for more than ten school days, the Respondent "must continue to provide the specialized instruction and related services that are specified on the

student's IEP." 5 DCMR Sect. 5-E2510.6; 34 CFR Sect. 300.530(d). A student's behavior intervention plan, if he has one, must be reviewed and modified, if necessary, to address the behavior that led to the disciplinary removal that resulted in a change of educational placement if the student's behavior was determined to be a manifestation of his disability. 34 CFR Sect 300.530(f)(1)(ii).

Respondent argues that the Student was not suspended more than 10 days during the 2013-2014 school year, but documentation in the record shows that he was. The Student's attendance record (Exh. 15) does show that the Student was suspended only on April 11, 22, 23, and June 3, 4, and 5, 2014. However, enclosures attached to a letter from Principal A indicate that the Student was also suspended May 5 through 12, 2014. (P-16-3) This comes to a total of 11 days of suspension. Respondent did not put on any testimony or present any evidence to rebut Exhibit 16, which clearly states that the Student was suspended for 5 days in May. I agree with Petitioner that the Student was suspended for more than ten days without a manifestation determination and the concomitant disciplinary protections of the IDEA, in violation of the federal and local laws and regulations.

4. Prior Written Notice.

Petitioner contends that DCPS failed to provide her with Prior Written Notice of the refusal to evaluate the Student during the 2013-2014 school year. Petitioner points to no law or regulation in support of this argument, did not testify about this issue, and there is no documentation in the record to support this claim. As a result, I find that Petitioner has not met her burden on this issue.

As a remedy, Petitioner asserts that appropriate relief in this matter is to order a comprehensive independent psychological evaluation, an independent Functional Behavior

Assessment, and an MDT meeting within 10 business days to develop an IEP and determine appropriate placement for the Student.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

The Petitioner’s requests are reasonable. As I have found, the Student requires an evaluation by DCPS. This evaluation should consist of, at minimum, a thorough psychological assessment and a Functional Behavior Assessment to try to determine what is causing the Student’s behaviors. In view of DCPS’s failure to address the Student’s behavioral issues over an extended period of time, I agree that it is appropriate to order that the Petitioner receive independent assessments here so that these issues can be addressed expeditiously.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent shall immediately evaluate the Student to determine if he is eligible for special education services;

2. Respondent shall fund an independent psychological assessment of the Student, to be completed by a provider of the Petitioner's choice. Such provider shall charge reasonable and customary rates for this service;

3. Respondent shall fund an independent Functional Behavior Assessment of the Student, be completed by a provider of the Petitioner's choice. Such provider shall charge reasonable and customary rates for this service;

4. Within 10 days of the completion of the independent psychological assessment and the independent Functional Behavior Assessment, an MDT team shall meet to determine the Student's eligibility and, if appropriate, develop an IEP for the Student.

Dated: September 19, 2014

Michael Lazan
Impartial 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).

Date: September 19, 2014

Michael Lazan
Impartial Hearing Officer