

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

Student Hearing Office
1150 Fifth Street, S.E.
Washington, DC 20003

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STUDENT HEARING OFFICE
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Parent, on behalf of the STUDENT,¹)	
)	
Petitioner,)	Case Number:
)	
v.)	Hearing Date: January 20, 2011
)	Hearing Room 2006
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Officer: Frances Raskin
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; the federal regulations at 34 C.F.R. §§ 300.1 *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

II. BACKGROUND

Petitioner is the mother of a -year-old student with a disability who attends a District of Columbia elementary school. On December 6, 2010, Petitioner filed a Due Process Compliant against the District of Columbia Public Schools ("DCPS") pursuant to IDEA. In the due process complaint, Petitioner waived her right to a resolution session meeting and requested that the case proceed directly to a due process hearing.

This Hearing Officer was appointed to preside over this matter on December 7, 2010. On December 14, 2011, DCPS issued a letter waiving the resolution meeting.² Accordingly, the parties agreed that the forty-five-day, due-process-hearing timeline started to run on December 15, 2010.

¹ Personal identification information is provided in Attachment A.
² DCPS filed a copy of this letter with the Student Hearing Office on December 16, 2010.

DCPS filed its Response to Parent's Administrative Due Process Complaint ("Response") on December 22, 2010, thirteen days after the filing deadline. On December 29, 2010, this Hearing Officer held a prehearing conference in which Zachary Nahass, counsel for Petitioner, and Tanya Chor, counsel for Respondent DCPS, participated. On January 11, 2011, this Hearing Officer issued a Prehearing Conference Summary and Order.

The due process hearing commenced on January 20, 2011. This Hearing Officer admitted into evidence both parties' exhibits at the inception of the hearing. Petitioner presented the testimony of six witnesses. DCPS presented the testimony of one witness. The due process hearing concluded after the parties presented oral closing arguments.

III. ISSUES PRESENTED

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") when it failed to comply with its "child find" obligations, i.e., timely identify the Student as a student with a suspected disability, evaluate him in all areas of suspected disability, and determine his eligibility for special education; and

B. Whether DCPS denied the Student a FAPE when it developed an IEP for the Student on October 20, 2010, that failed to provide sufficient hours of specialized instruction, sufficient behavioral supports, and a small, structured, therapeutic setting.

V. FINDINGS OF FACT

1. Petitioner is the mother of a nine-year-old, special-education student ("Student") who attends a DCPS elementary school.³ In October 2010, the Student, an IEP team found the Student eligible for special education and related services as a student with an emotional disturbance.⁴

2. During the spring of 2009, the Student had regular emotional outbursts in the classroom.⁵ These outbursts were triggered when the Student got into an argument with another student, which sent him into a rage.⁶ Other times, when the Student's desires were not met, he would disrupt the classroom.⁷ When the Student's teachers and other school staff were unable to control the Student, they telephoned Petitioner to seek her assistance in calming him down.⁸ During some of these incidents, Petitioner was able to calm down the Student by talking to him

³ Testimony of Petitioner; Joint Exhibit 1 at 2 (September 27, 2010, Report of Confidential Psychological Evaluation).

⁴ Petitioner Exhibit 6 at 2 (Notes from October 20, 2010, meeting of the Student's individualized educational program ("IEP") team).

⁵ Testimony of Petitioner; see also Joint Exhibit 1 at 5 (September 27, 2010, Report of Confidential Psychological Evaluation) (stating that the school principal reported that the Student began exhibiting behavioral problems during the 2008-2009 school year).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

over the telephone.⁹ On other occasions, she had to remove the Student from school because he would not calm down.¹⁰

3. In February 2010, the Student was removed from his family and placed in foster care by the District of Columbia Child and Family Services Agency.¹¹ After the Student was removed from his home, his behavior at school deteriorated.¹² He exhibited a short attention span, wandered out of his classroom, and stayed in his seat for only a brief period of time.¹³ He also had behavioral outbursts in school, in which he yelled, cried, banged things, was destructive, and became physically aggressive with adults.¹⁴ These outbursts lasted as long as five hours, occurred almost daily, and required five to ten staff members to control him.¹⁵ The Student was suspended several times during the 2009-2010 school year.¹⁶

4. On April 27, 2010, the Student was hospitalized at the Children's National Medical Center for depression after he exhibited signs of depression and suicidal ideations.¹⁷ He had made suicidal statements at school and reported to the school nurse that he liked to hurt himself.¹⁸ The Student remained in the hospital for about two weeks.¹⁹ Upon his discharge from the hospital, the Student was diagnosed with attention deficit hyperactivity disorder ("ADHD") and depression.²⁰

5. On August 27, 2010, DCPS convened a student evaluation plan ("SEP") meeting.²¹ During the meeting the school social worker reported that the Student had difficulty with anger management, is defiant and oppositional, and has no fear of consequences.²² The classroom teacher reported that when he is challenged in class, the Student breaks down and acts out in the class.²³ The school principal stated that the Student's behavioral issues impact his

⁹ *Id.*

¹⁰ *Id.*

¹¹ Petitioner Exhibit 7 at 2 (May 6, 2010, First Home Care Diagnostic Assessment Report).

¹² Petitioner Exhibit 11 at 1 (April 15, 2010, DCPS Student Support Team Initial Meeting Report).

¹³ *Id.* at 1-2.

¹⁴ Petitioner Exhibit 7 at 6.

¹⁵ *Id.*; Testimony of Educational Advocate; Petitioner Exhibit 4 at 3 (October 12, 2010, re-entry meeting notes).

¹⁶ Joint Exhibit 1 at 14. He also was suspended for five days during the first four weeks of the 2010-2011 school year. *Id.*

¹⁷ Petitioner Exhibit 8 at 2 (May 5, 2010, Clinical Discharge Summary); Joint Exhibit 1 at 2.

¹⁸ Petitioner Exhibit 7 at 2. The Student also told the Social Worker that he wanted to die, to kill himself, or for someone to kill him. *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 4; Petitioner Exhibit 8 at 4. While hospitalized, the Student disclosed that he hurt small animals, including hitting cats with a stick and squeezing or stepping on rats. Petitioner Exhibit 8 at 2; Petitioner Exhibit 7 at 2.

²¹ Petitioner Exhibits 1, 2 (August 27, 2010, SEP meeting notes).

²² Petitioner Exhibit 1 at 3; Petitioner Exhibit 2 at 1.

²³ Petitioner Exhibit 2 at 2.

ability to complete academic tasks.²⁴ The SEP team agreed to complete psychological and educational testing of the Student.²⁵ Petitioner provided written consent for DCPS to evaluate the Student.²⁶

6. DCPS completed the Student's psychological evaluation on September 27, 2010.²⁷ DCPS completed the Student's educational evaluation on September 30, 2010.²⁸ The Student has below average cognitive ability, verbal and nonverbal reasoning.²⁹ His nonverbal intelligence is within the average range.³⁰ The Student's behavior interfered with his educational evaluation to such a degree that the results of this evaluation are not reliable.³¹

7. On October 12, 2010, DCPS convened an informal meeting to discuss the Student's return to school from a recent psychiatric hospitalization.³² The Student was having difficulty adjusting to school, and the team discussed strategies to ease his adjustment.³³ The DCPS dean of students suggested that the Student's school schedule be reduced to a half-day, but the student's social worker informed the participants in the meeting that this would violate the law since the Student has a disability.³⁴ When asked whether DCPS could provide the Student with a dedicated aide, the school principal rejected the suggestion, stating that the procedures for a dedicated aide are tedious.³⁵ She added that she could not authorize a dedicated aide for the Student because DCPS was in the midst of a hiring freeze and the aide was not in the school's budget.³⁶

8. On October 20, 2010, DCPS convened a meeting of the Student's IEP team.³⁷ The purpose of the meeting was to review the Student's psychological and educational evaluations and determine his eligibility for special education.³⁸ The IEP team found the Student eligible for special education as a student with emotional disturbance.³⁹ The IEP team then proceeded to discuss an IEP for the Student.

²⁴ Petitioner Exhibit 1 at 4.

²⁵ *Id.*

²⁶ Petitioner Exhibit 3 at 3 (August 27, 2010, Consent for Initial Evaluation/Reevaluation).

²⁷ Joint Exhibit 1.

²⁸ Joint Exhibit 2.

²⁹ Joint Exhibit 1 at 13.

³⁰ *Id.*

³¹ Joint Exhibit 2 at 2.

³² Petitioner Exhibit 4 at 1 (Advocate's meeting notes).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ Petitioner Exhibit 5 (Advocate's IEP meeting notes), Petitioner Exhibit 6 (IEP team meeting notes).

³⁸ *Id.* at 1.

³⁹ Petitioner Exhibit 5 at 3; Exhibit 6 at 1.

9. The Student's treating psychiatrist participated in the October 20, 2010, meeting.⁴⁰ He informed the IEP team that, based on his observations of the Student in the psychiatric hospital as well as in the academic classes in which the Student participated while in the hospital, it was his opinion that the Student requires full-time specialized instruction outside the general education setting in a small, structured environment.⁴¹ The Student's advocate also recommended that the Student be placed in a therapeutic setting with full-time special education services.⁴² The Student's teacher responded that the Student was very behind academically.⁴³

10. The DCPS Special Education Coordinator rejected these recommendations.⁴⁴ She explained that the team could not provide the Student a 27.5 hour IEP because the DCPS School could not provide him that level of services.⁴⁵ When the advocate objected to providing the Student fewer hours of specialized instruction, the SEC suggested that Petitioner could file a due process complaint. That day, the IEP team developed an IEP for the Student that provides him with five hours per week of specialized instruction and 60 minutes per week of behavioral support services.⁴⁶ This IEP does not provide the Student a dedicated aide.⁴⁷

11. The Non-Public School can provide the Student a therapeutic structured environment.⁴⁸ The Student would be in a class of four other students of similar ages and with similar emotional difficulties.⁴⁹ The Non-Public School is an appropriate setting for the Student.⁵⁰ Based on the Student's extreme emotional disturbance, the Non-Public School is his least restrictive environment.

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer finds that the testimony of all the witnesses at the hearing was credible.

VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.⁵¹ FAPE is defined as:

⁴⁰ Petitioner Exhibit 5 at 4, DCPS Exhibit 6 at 1.

⁴¹ Testimony of Psychiatrist, Petitioner Exhibit 5 at 5.

⁴² *Id.*

⁴³ Petitioner Exhibit 5 at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Joint Exhibit 6 at 6.

⁴⁷ *Id.*

⁴⁸ Testimony of Non-Public School Director.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 20 U.S.C. §§ 1400(d) (1)(A), 1412 (a) (1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Shaffer v. Weast*, 546 U.S. 49, 51 (2005).

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...”⁵²

In deciding whether DCPS provided Petitioner a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEA; and (b) whether Petitioner’s IEP is reasonably calculated to enable Petitioner to receive educational benefit.⁵³

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.⁵⁴ In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.⁵⁵

The burden of proof is properly placed upon the party seeking relief.⁵⁶ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.⁵⁷

VIII. DISCUSSION

A. Petitioner Proved that DCPS Denied the Student a FAPE by Failing to Timely Identify Him as a Student with a Suspected Disability.

DCPS must ensure that “all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated.”⁵⁸ This is known as the “child find” duty.⁵⁹

As soon as a student is identified as a potential candidate for special education services, DCPS has a duty to begin the evaluation process.⁶⁰ DCPS must conduct an initial evaluation

⁵² 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

⁵³ *Rowley*, 458 U.S. at 206-207.

⁵⁴ 34 C.F.R. § 300.513 (a)(2).

⁵⁵ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

⁵⁶ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

⁵⁷ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

⁵⁸ *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008).

⁵⁹ *Id.* (mandate known as “child find” is an affirmative obligation of every public school system to identify students who might be disabled and evaluate those students to determine whether they are indeed eligible for special education).

⁶⁰ *Id.*

within 120 days from the date the student was referred to an IEP team for an evaluation.⁶¹ Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.⁶²

As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child.⁶³ Additionally, the IEP team must review current classroom-based assessments and observations; and observations by teachers and related service providers.⁶⁴ On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child.⁶⁵

In interpreting evaluation data to determine eligibility and educational need, DCPS must draw upon information from a variety of sources, including parent input and teacher recommendations.⁶⁶ DCPS must ensure that information obtained from all of these sources is documented and carefully considered.⁶⁷ Only then can a group of qualified professionals and the parent of the child determine whether the child is a child with a disability.⁶⁸

Here, the testimony overwhelmingly established that the Student's began having severe tantrums and disrupting the classroom as early as spring 2009. By April 2010, the Student was hospitalized for depression and suicidal ideations. He was so uncontrollable that it required ten to fifteen school staff members to contain him.

Thus, by April 2010 at the latest, DCPS should have suspected that the Student was a student with a suspected disability, i.e. emotional disturbance.⁶⁹ Thus, DCPS should have completed the Student's evaluations by August 27, 2010. DCPS failed to comply with this timeline and it wasn't until two months later that it developed an IEP for the Student. During this time, the Student continued to experience extreme emotional difficulties and was again hospitalized. Thus, Petitioner proved that DCPS denied the Student a FAPE.

⁶¹ D.C. Code § 38-2561.02. *See also* 34 C.F.R. § 300.301 (c) (stating that initial evaluation must be conducted within sixty days of receiving parental consent unless the state establishes some other timeframe).

⁶² *N.G.*, 556 F. Supp. 2d at 16 (citing *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 114 (D.D.C. 2008)).

⁶³ 34 C.F.R. § 300.305.

⁶⁴ *Id.* at § 300.306 (a); D.C. Mun. Regs. Tit. 5-E § 3005.4.

⁶⁵ 34 C.F.R. § 300.305.

⁶⁶ *Id.* at § 300.306 (c).

⁶⁷ *Id.*

⁶⁸ *Id.* at § 300.306 (a).

⁶⁹ *See* 34 C.F.R. § 300.8(c) (4)(i) (defining emotional disturbance as a condition one or more of characteristics, including inappropriate types of behavior or feelings under normal circumstances and or a general pervasive mood of unhappiness or depression, over a long period of time and to a marked degree that adversely affects a child's educational performance).

B. Petitioner Proved that DCPS Denied the Student A FAPE when It Failed to Develop an Appropriate IEP on October 20, 2010.

FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁷⁰ The IEP is the centerpiece of special education delivery system.⁷¹

The term “educational placement” refers to the general educational program prescribed by the IEP, such as the classes, individualized attention, and additional services a child will receive, rather than the “bricks and mortar” of the specific school.⁷²

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services.⁷³ The program must be implemented in the least restrictive environment (“LRE”).⁷⁴ For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.”⁷⁵

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.⁷⁶

Here, the IEP team developed a minimal IEP for the Student. Its rationale for providing only five hours of specialized instruction was that that the elementary school could not implement a 27.5-hour IEP. DCPS failed to heed the suggestions of the Student's teacher and treating psychiatrist, instead developing an IEP that was based on what the school could provide rather than on the Student's individualized needs. Thus, Petitioner proved DCPS denied the Student a FAPE by failing to develop an IEP that was “reasonably calculated to enable the child to receive educational benefits.”

Petitioner also established that the Petitioner requires a full-time, therapeutic environment with small classes and very low student-teacher ratio. This is what the Student's psychiatrist informed the IEP team that the Student requires. This also is the environment that the Non-Public school offers. Thus, this Hearing Officer finds that the Non-Public School is an appropriate setting for the Student and is his LRE.

⁷⁰ *Rowley*, 458 U.S. at 188-89 (citation omitted).

⁷¹ *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted).

⁷² *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

⁷³ 34 C.F.R. § 300.320.

⁷⁴ 20 U.S.C. § 1412 (a) (5); 34 C.F.R. §§ 300.114 (a) (2), 300.116 (a) (2).

⁷⁵ *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

⁷⁶ *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202).

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, it is this 28th day of January 2011 hereby:

ORDERED that DCPS shall bear all expenses of the Petitioner's attendance at the Non-Public School, and provide transportation, for the remainder of 2010-2011 school year;

IT IS FURTHER ORDERED that, within thirty days of the Student's enrollment at the Non-Public School, DCPS shall convene a meeting of the Student's IEP team to review and revise his IEP in accordance with this Hearing Officer Determination; and

IT IS FURTHER ORDERED that DCPS shall receive a one-day extension of time for holding this meeting for every day of delay caused by Petitioner, her educational advocate or her counsel.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

Distributed to:

Zachary Nahass, counsel for Petitioner
Tanya Chor, counsel for Respondent
Student Hearing Office
DCPS