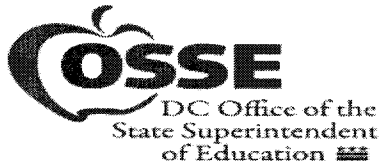

Office of Review & Compliance

Student Hearing Office
Van Ness Elementary School
1150 5th Street, S.E., 1st Floor
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STUDENT HEARING OFFICE
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Confidential

The Student Through their	)	**IMPARTIAL DUE PROCESS HEARING**
Parents,*	)	
Case No.:	)	
Petitioner,	)	**DECISION AND ORDER**
vs.	)	Due Process Compl. filed: Feb.10, 2009
	)	**Due Process Hr'g Date: Mar. 13, 2009**
The District of Columbia Public Schools,	)	Held at: Van Ness Elementary School
Home School: School	)	1150 5th Street, S.E., 1st Floor
Attending: School	)	Washington, D.C. 20003
Respondent.	)	

Counsel for the Parent/Student: **Douglas Tyrka, Esq.**
Tyrka & Associates, LLC
Attorneys at Law
1726 Connecticut Ave., N.W., Suite 400
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District of Columbia Public Schools: **Candace Sandifer, Esq.**
Assistant Attorney General
Office of the General Counsel, OSSE
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

Independent Hearing Officer: **Frederick E. Woods**

*** Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.**

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033; and Section 327 of the D.C. Appropriations Act.

B. DUE PROCESS RIGHTS

Before the hearing, the parents had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed on 03/06/09 that list seven (7)-witnesses and attached twelve exhibits sequentially labeled and tabbed Parent-01 through Parent-12. Two witnesses were called to testify: (1) the student's mother; and (2) the admission director.

Respondent: Admitted, without objection, a disclosure letter filed on 03/06/09 that list nine (9)-witnesses and attached six exhibits sequentially labeled DCPS-01 through DCPS-06. Two witnesses were called to testify: the student's Science/Math teacher; and (2) the student's World Geography teacher.

D. STATEMENT OF THE CASE

The student, born age -years 2-months, is a grade general education student attending School located at (R. at Parent-01; DCPS-01.)

The parents alleged three things: (1) that DCPS failed to identify and evaluate their child for a suspected disability due to his poor academic performance and behavior problems in school; (2) that DCPS failed to evaluate their child after they through their attorney requested an evaluation on November 20, 2008; and (3) due to their child's poor academic performance and social emotion problems, can not met their child's needs. (R. at Parent-01, 09.)

Consequently, on 02/10/09 parents' counsel filed the student's 02/10/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing three things:

(1) Failing to identify and evaluate the child for a suspected disability due to his poor academic performance and behavior problems in school;

(2) Failing to evaluate the child after his parents through their attorney requested an evaluation on November 20, 2008; and

(3) Failing to provide the student an appropriate placement after his IDEA rights attached once the parents requested an evaluation due to his poor academic performance and social emotion problems in school. (R. at Parent-01, 09.)

DCPS' 02/24/09 Response to the DPC said three things: (1) DCPS had not failed to timely identify or evaluate the student; (2) DCPS did not receive the parents' November 20, 2008 request for an evaluation; and (3) DCPS did not fail to provide the student with an appropriate placement, Academy, after he was suspended on Feb. 11, 2009. (R. at DCPS' 02/24/09 Response to DPC.)

The OSSE Student Hearing Office ("SHO") scheduled the due process hearing for 9:00 a.m. on Friday, March 13, 2009 that convened as scheduled at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parents selected to have a closed due process hearing that convened 33-days after the DPC was filed.

Assistant Attorney General Candace Sandifer appeared in-person for DCPS. Attorney Douglas Tyrka appeared in-person representing the student who was not present; and the students' parents who were both present in-person.

II. Issue

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE when it allegedly did three things: (1) failed to identify and evaluate the student for a suspected disability due to his behavior problems in school that impacted his academic performance; (2) failed to evaluate the student after his parents through their attorney requested an evaluation on November 20, 2008; and (3) failed to provide the student an education program due to his poor academic performance and social emotion problems at (R. at Parent-01, 09.)

Brief Answer

Yes. DCPS failed to identify and evaluate the student despite the overwhelming evidence that the student has severe social emotional problems that impact his academic performance; and DCPS failed to evaluate him when over four months ago his parents requested an evaluation. And although he has not been found eligible for special education services, his teachers testified that their behavior modification interventions did not work consequently the student interferes with his own learning as well as the learning of the other students in the classroom.

III. FINDINGS OF FACT

1. The student, born age ·years 2-months, is a grade general education student attending School located at
(R. at Parent-01; DCPS-01.)

2. On August 12, 2008 the student was enrolled as a grader by his parents at (R. at DCPS-01.)

3. Before that, during the 2007-08 school year the student was a grader at School He aged out and was promoted to the grade. (R. at Parent 07, the student's mother's testimony.)

4. According to the student's last Fifth Grade Report Card, it noted in the fourth advisor, the key ("R") for rarely the lowest key possible, for these Personal & Social Skills:

   i. Follows classroom rules R
   ii. Follows playground rules/school rules R
   iii. Respect the rights/property of others R
   iv. Listens while others speak R
   v. Practices self-control R

   (R. at Parent-07.)

5. The Teacher Comments on that Report Card consistently say, for each advisory, that the student is smart but his behavior interferes with his academic performance. (R. at Parent-07.)

6. For historical purposes, those same comments ring true on all of the student's Report Cards admitted into evidence—from the first grade through the fifth grade. (R. at Parent-03, 04, 05, 06, 07.)

7. And although the Teacher Comments were not included with the student's Jan. 15, 2009 Report Card, for the second advisory he received two "Fs"; two "Ds"; and one "B"—the B is in beginning Band. The other grades are in the 6th grade core academic subject—Math, Science, World Geography, and Language Arts. (R. at DCPS-02.)

8. Those grades, however, resulted from the impact the student's social and emotional problems have on his academic performance.

9. That is because according to the student's grade World Geography teacher, "the student is both smart and defiant. Academically he has all of the potential in the world but he is defiant to authority [teachers and staff]. All classroom behavior interventions did not work. The student stands out as a behavior problem." (R. at student's World Geography teacher's testimony.)

10. Further, according to the student's grade Math and Science teacher, "when given standardized test the student is proficient. But his behavior in the classroom is not good. He does not remain in his seat; he hits other student's in the classroom; and the behavior interventions that were tried in the classroom did not work. The student failed Math and Science for both the first and second advisory this 2008-09 school year due to his behavior problems. (R. at DCPS-02; the student's 6th grade Science/Math teacher's testimony.)

11. On November 10, 2008 the parents, through their attorney sent a letter to the special education coordinator requesting that the student be evaluated to determine his eligibility for special education services. (R. at Parent-09.)

12. DCPS did not offer any credible evidence that the special education coordinator did not receive the 11/10/08 letter.

13. And to date, the student has not been evaluated nor have any steps been taken towards having the student evaluated.

14. On Jan. 28, 2009 the student was suspended from school for 25-days, from 01/29/09 through 03/08/09. The suspension notice is silent as to where the student was to attend school during the suspension. (R. at Parent-08; DCPS-03, 04.)

15. However, according to the student's Feb. 14, 2009 Student Referral Form, the student was to attend Academy during his 25-day suspension. (R. at DCPS-06.)

16. The student never attended Academy because DCPS did not provide him with bus transportation to-and-from school. And his parents could not take him and pick him up from school. (R. at mother's testimony.)

17. Instead, on or about Feb. 16, 2009, his parents unilaterally placed him at School, a private special education school who accepted him based on his suspected disability of Emotionally Disturbed ("ED"). (R. at mother's testimony; admission director.)

18. According to the admission director, the student was admitted as an ED student, without having an IEP. That was because based on his report cards, teacher comments, and conversations with his parents the student's suspected disability is ED. Presently receiving special educational services as an ED student, he is doing well academically and behaviorally at His daily take-home behavior management report has been consistently "blue stars'—meaning good behavior without incident. (R. at admission director.)

19. DCPS did not provide any evidence that contradicted that testimony. Nor did DCPS provide any evidence that the student is not suspected of being ED or that could not provide him educational benefit as an ED student. And DCPS did not offer any school whatsoever to the parents that could meet their child's needs.

20. And the student was entitled to the protections of the IDEA because (1) DCPS knew the student had a suspected disability; (2) the parents wrote to the school on 11/10/08 about that suspected disability and requested an evaluation; and (3) for over two years the student's teacher's expressed concerns, in writing, about how the student's behavior was negatively impacting his academic performance. (R. at Parent-03, 04, 05, 06, 07, 08, 09; DCPS-02, 03, 04, 06.)

21. Based on those facts the hearing officer found three things: (1) that DCPS defaulted on its IDEA obligations by failing, for more than two years, to identify and evaluate the student to determine his eligibility for special education services under its child find obligation; and if eligible for services, providing him an appropriate IEP and placement to implement his IEP for the 2008-09 school year. (2) That failure, an inexplicable two year delay in evaluating the student, resulted in a procedural violation of the IDEA that denied the student a FAPE. And (3) the parents' proposed program placement of their child at as an ED student is granted because the school can provide and currently is providing him educational benefit.

22. So that student is hereby interimly placed and funded at School effective from the date the student enrolled there on or about Monday, February 16, 2009 through the remainder of the 2008-09 school year.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I

DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

DCPS did not meet its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).

2. Pursuant to Initial Evaluations at 34 C.F.R. § 300.301 (a): "Each public agency shall conduct a full and individual initial evaluation in accordance with § 300.305 and § 300.306 before the initial provisions of special education and related services [are provided] to a child with a disability under this part [Part B of the IDEA]."

3. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(4): "Each public agency must ensure that … (4) "the child is assessed in all areas related to the suspected disability, including, if appropriate … [their] social and emotional status."

4. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(6): "Each public agency must ensure that … (6) "in evaluating each child with a disability under §§ 300.304 - 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

5. Pursuant to 20 U.S.C. § 1414 (c)(1), "initial evaluation shall consist of procedures to determine whether a child is a child with a disability …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 such timeframe." The District of Columbia's established evaluation timeline codified at D.C. Code Ann. § 38-2051(a) was [within 120-days of receipt of the referral].

6. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."

7. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

8. Pursuant to the IDEIA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (a) Requirement that Program be in Effect—

> At the beginning of each school year, each local educational agency ... shall have in effect for each child with a disability in the agency's jurisdiction an IEP.

9. To ensure that each eligible student receives a FAPE, the IDEIA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. See 20 U.S.C. § 1414 (d)(3).

10. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, "[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results."

11. "School districts may not ignore disabled students' needs nor may they await parental demands before providing special instruction. Rather, IDEA requires that school districts must identify, locate, and evaluate all children with [suspected] disabilities who are in need of special education and related services." Reid v. District of Columbia, 401 F.3d 516, 519 (D.C. Cir. 2005); See also 20 U.S.C. § 1414 (a)(3)(A).

12. DCPS did not comply with these cited IDEA regulations because when the parent requested special education services on 11/10/08, DCPS never responded to that request. (R. at Parent-09.)

13. And no reason was given as to why DCPS did not respond to the parents' letter. But refusing to respond does not comport with the IDEA and D.C. law.

14. Further, according to 34 C.F.R. § 300.311 (a)(1)(i), Child Find, "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 ... wards of the State."

15. Pursuant to 34 C.F.R. § 300.40, State, "State means each of the 50 States, the District of Columbia and the Commonwealth of Puerto Rico, and each of the outlying areas."

16. According to case law, "in order to establish that the school violated the identification requirements of the IDEA, a [Petitioner] must show that the

school officials overlooked clear signs of a disability and were negligent in ordering testing, or that that there was no rationale justification for deciding not to evaluate." Clay T. v. Walton County School District, 952 F. Supp. 817, 823 (M.D. Ga. 1997).

17. The record evidence supports a finding that for over two year DCPS overlooked clear signs of a disability and was negligent in ordering testing because the confluence of the student's poor academic performance, behavior problems, suspension from school, and classroom tried by failed behavior interventions are clear signs that the child may have a disability and should have been evaluated in all areas of his suspected disability—ED.

18. Specifically, those signs include the Teacher Comments on the student's Report Card that consistently say, for each advisory, that the student is smart but his behavior interferes with his academic performance. (R. at Parent-07.)

19. For historical purposes, those same comments ring true on all of the student's Report Cards admitted into evidence—from first grade through the fifth grade. (R. at Parent-03, 04, 05, 06, 07.)

20. And although the Teacher Comments were not included with the student's Jan. 15, 2009 Report Card, for the second advisory he received two "Fs"; two "Ds"; and one "B"—the B is in beginning Band. The other grades are in the 6th grade core academic subject—Math, Science, World Geography, and Language Arts. (R. at DCPS-02.)

21. These grades, said two of his core course teachers, resulted from the impact that the student's social and emotional problems have on his academic performance—almost a text book definition of an ED student. (R. at the student's World Geography and Science/Math teachers' testimony.)

22. Those findings show that the student had a suspected disability, for over two years, yet received no effective interventions tailored to meet his unique needs; that DCPS knew that its interventions were not working; and DCPS did nothing to remediate that situation. So DCPS defaulted on its IDEA obligation to develop an appropriate IEP for the student.

23. And as to the parents' claim that is an inappropriate education setting for their son, there is also sufficient evidence to support that claim.

24. If he had been evaluated and found eligible for special education services, he too, would have an educational placement to implement his IEP. According to 34 C.F.R. § 300.116 (a)(1), Placements, "[i]n determining the educational placement of a child with a disability, each public agency shall ensure the placement decision is made by a group of persons, including the parent, and

other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."

25. And his IEP would have been developed by a team of professionals, including the child's parents, "as well as a representative of the local educational agency with knowledge about the school's resources and curriculum." Branham v. District of Columbia, 427 F.3d 7, 8 (D.C. Cir. 2005). An appropriate IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).

26. But the IEP can not be implemented without first identifying a placement because the provision of the IEP services, which must be based upon the child's IEP pursuant to 34 C.F.R. § 300.116(b)(2), with consideration given to the quality of services that the child needs. 34 C.F.R. § 300.116(b)(2)(d).

27. The IDEA was enacted to "ensure that children with disabilities have access to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400 (d)(1)(A). A free appropriate public education, or FAPE, is delivered through the implementation of an Individualized Education Program, or "IEP." See Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (*describing* the IEP as the "modus operandi" of special education).

28. DCPS did not comply with those cited IDEA obligations. Here is why.

29. There was no evidence presented at the due process hearing that DCPS has provided the student with an IEP and placement that can address his unique needs. In fact the evidence presented points to the inescapable conclusion that DCPS cannot meet the student's needs.

30. Consequently, the student is an individual with a suspected disability within the meaning of the IDEA entitled to a free appropriate public education consistent with his unique needs. Albeit not yet eligible for special education services due to DCPS' nonfeasance, the student presents as ED student who for over two years was not provided an appropriate IEP or an appropriate placement to implement his IEP while attending a D.C. public school. (R. at Parent-02; DCPS-01.)

31. Those findings results in the student being denied a FAPE.

32. That conclusion is further supported by the fact that an appropriate IEP, at a minimum, "must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Board of Educ. v. Rowley, 458 U.S. 176, 204 (1982).

33. An important factor in determining educational benefit is the "achievement of passing marks and advancement from grade to grade." Rowley, 458 U.S. at 207.

34. In this case, the confluence of unremediated severe behavior issues, failing grades, and suspension from school leads to the inescapable conclusion that DCPS defaulted on its IDEA obligations. (R. at Parent-03, 04, 05, 06; DCPS-03.)

35. Therefore next, according the United States Supreme Court, "[w]hen a public school system has defaulted on its obligation under the Act [the IDEA], a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefit.'" Florence County School District Four v. Carter, 510 U.S. 7, 11 (1993); See also Massey v. District of Columbia, 400 F. Supp. 2d 66 (D.D.C. 2005).

36. The parents' requested relief, placement, related services, and Transportation, all at public expense, for their son to attend School is granted. DCPS did not contest that can provide the student educational benefit. And the student has been accepted and is currently enrolled in School. (R. at School's admission director's testimony.)

37. School provides a therapeutic special education program for students with an IDEA disability code of ED. It is a small school with social workers on staff to provide the student's IEP called for counseling and has a behavior award system to monitor the student's behavior daily. Each student works in their own cubicle instead of in the traditional classroom structure of a series of desk configured in an open space. And the student has been accepted for admission to the school. (R. at admission director's testimony.)

38. Pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the Responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a Free Appropriate Public Education (FAPE)."

39. The parents, who filed the DPC, had and met their burden of proof in this case because the parents:

a. Proved that DCPS failed to identify and evaluate their son to determine his eligibility for special education services and if eligible, develop an appropriate IEP and placement for the 2008-09 school year.

So in consideration of the hearing record, the hearing officer finds that DCPS did not evaluate the student; did not develop an IEP for the student for the 2008-09 school year; and DCPS denied the student a FAPE; and provides the parent's requested relief through this:

ORDER

DCPS shall .....

1. Fund at public expense and issue, effective Monday, February 16, 2009, for the remainder of the 2008-09 school year, the student's prior Written Notice of Interim Placement, related services of counseling, and transportation to attend School located at phone number

2. The student may remain enrolled at if the school permits, while awaiting DCPS' Prior Written Notice of Interim Placement, funding, and bus transportation or bus tokens based on the conditions established in this Order.

3. Continue the student's placement at unless and until DCPS provides him another appropriate placement to implement his IEP once the student is evaluated, and an IEP is developed by DCPS and his new MDT team at

4. Fund at public expense these IEEs, one of them specifically requested by the parents, to be performed by the parents' selected independent evaluator on or before May 30, 2009:

   a. Social History;
   b. Vision and Hearing Screening; and
   c. Comprehensive Psychological Assessment.

5. After the IEEs are completed the parties' shall mutually agree to a date a time to convene the student's BLMDT/IEP Meeting at to review the assessment results, to determine if the student is eligible for special education services, and if eligible develop his IEP, and decide placement if it's determined that a change in placement is necessary.

6. Schedule all meetings at a mutually agreeable time through the parent and parent's counsel. And provide counsel a copy of the meeting notice by facsimile at (202) 265-4264.

7. Day-for-Day Caveat: Any scheduling, evaluation or meeting delay due to acts of the parent, student, student-advocate, student's attorney or because of an unscheduled school closing for any reason shall extend DCPS' performance timelines established in this Order by one day for each day of delay.

8. This Order resolved all issues raised in the student's 02/10/09 Due Process Complaint that is dismissed; and the hearing officer made no additional findings.

This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).

/s/ *Frederick E. Woods*	**March 23, 2009**
Frederick E. Woods	**Date**
Hearing Officer	