District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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Confidential

STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION March 21, 2009 Representatives: Counsel for Petitioners: Fatmata Barrie, Esq. Counsel for DCPS: Daniel McCall, Esq. Hearing Officer: Kimm H. Massey, Esq.

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

On January 30, 2009, counsel for Parent and Student ("Petitioner's counsel") filed a Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) violating IDEIA's Child Find statute by failing to evaluate Student and make a determination as to his eligibility for special education, (2) failing to comply with the 120-day timeline for evaluations, (3) failing to provide Student with an individualized educational program ("IEP"), (4) failing to inform Parent of her due process rights, and (5) failing to provide an appropriate placement.

The Student Hearing Office ("SHO") set February 13, 2009 as the prehearing conference date and provisionally scheduled the due process hearing for March 4, 2009 at 9:00 a.m. However, after consultation with the parties, the hearing officer rescheduled the prehearing conference for February 17, 2009.

On February 11, 2009, DCPS filed District of Columbia Public School's Response, Notice of Insufficiency and Motion to Dismiss Parent's Administrative Due Process Complaint Notice. The Notice of Insufficiency portion of the pleading was a one-sentence paragraph, which merely stated that the Complaint failed to meet the requirements of "IDEA Sec. 615(b)(7)(A)(ii)" but failed to indicate in what respect the Complaint allegedly fell short. The Motion to Dismiss portion of the pleading asserted that DCPS had issued a Letter of Invitation to an MDT meeting on February 10, 2009, the day before the pleading was filed, that the IEP team would "consider the evaluations submitted by the parent to determine" eligibility, and as a result, all claims for relief had become moot and claims for prospective relief would not be ripe until after the eligibility meeting. However, the letter of invitation attached to the pleading stated that the purpose of the proposed meeting was to develop a student evaluation plan for Student.

By disclosure statement dated February 16, 2009, DCPS disclosed five potential witnesses and one document labeled DCPS-1, which was its February 10, 2009 Letter of Invitation.

The hearing officer attempted to convene the prehearing conference on February 17, 2009, as scheduled, but was unable to do so due to the inability to reach counsel for DCPS at the appointed time.

By disclosure statement dated February 25, 2009, Petitioner disclosed nine potential witnesses and nine documents (hereinafter referred to as Petitioner's Exhibits 1 through 9).

The hearing officer convened the due process hearing on March 4, 2009, as scheduled. DCPS's document and Petitioners' Exhibits 1 and 4 through 8 were admitted into the record without objection. However, DCPS objected to the admission of Petitioner's Exhibits 2, 3 and 9 because they were not DCPS documents. The hearing officer overruled the objection, noting the lack of rule requiring Petitioner's Exhibits to be DCPS documents, and admitted Petitioner's remaining documents into the record over DCPS's objection.

Given the lack of a prehearing conference in this case, the hearing officer took a moment to discuss the claims alleged and advised the parties that Petitioner's claims concerning the lack of an IEP and the lack of a placement would be merged with Petitioner's Child Find claim, leaving only three claims to be addressed, because Child Find covers the entire process from identification, location and evaluation, through eligibility determination, and if applicable, development of an IEP and placement. Thereafter, Petitioner voluntarily withdrew its claim of an alleged failure to evaluate within 120 days of Parent's request, stating that the claim had been included in the Complaint by mistake. With respect to Petitioner's claim of a failure to inform Parent of her due process rights, Petitioner alleged that such failure tolled the statute of limitations in this case. The hearing officer ruled that if Petitioner could prove the claim, events dating back to 2006/07 would be taken into account by the hearing officer, but if Petitioner failed to prove the claim, the hearing officer would only consider events that took place within the two-year period preceding the filing of the Complaint.

Thereafter, DCPS asserted its Notice of Insufficiency, which the hearing officer denied based on a review of the face of the Complaint. DCPS also advanced its Motion to Dismiss, which the hearing officer also denied but granted DCPS the option of renewing at a later point in time if appropriate.

Due to the repetitive and exhaustive procedural arguments advanced by counsel for DCPS, the two hours allotted for the hearing proved to be insufficient to allow both parties to present their respective cases. The hearing officer continued the hearing to March 6, 2009 at 9:00 a.m. to receive additional testimonial evidence. During the course of the March 6th hearing, Petitioner withdrew its claim that DCPS failed to inform Parents of her due process rights, on the ground that it was unnecessary to try to toll the statute of limitations in this case because Parent's testimony demonstrated that Student's problems began at the end of the 2006/07 school year, which was within the 2-year statute of limitations.

Upon the conclusion of the March 6th hearing, the parties still had not had time to make closing statements, so at the parties' suggestion, the hearing officer continued the matter to March 11, 2009 to allow Petitioner to submit its written closing on March 9, 2009 and DCPS to submit its responsive written closing on March 11, 2009.

Petitioner submitted its written closing statement on the morning of March 9, 2009. DCPS failed to submit a written closing statement.

III. ISSUE(S)

1. Did DCPS violate Child Find in connection with this Student?

IV. FINDINGS OF FACT

1. Student is presently years old, and he is in the grade at his current DCPS school.[2]

2. Prior to attending his current DCPS shcool, Student attended another DCPS school for two years. Student's problems began at that previous school near the end of his grade year (SY 2006/07). Prior to the end of the fifth grade, Parent thought Student was an honor roll student. However, beginning near the end of Student's fifth grade year, Parent began receiving calls from Student's teacher every other day. The teacher complained that Student would not stay still, would not turn in his homework, would not listen, was disrespectful, called the teachers names, and hit other students. Parent would sometimes have to go to the school to calm Student down.[3]

3. Student's academic and behavior problems only increased in sixth grade. He was disrespectful, he ran the hallways, and he hid in the bathrooms. Student received multiple suspensions during his sixth grade year. However, Parent never received a call from the school asking for a meeting because Student needed help or his grades were falling off.[4]

4. Student continues to have problems at his current placement. He runs the halls. Parent has been told that Student was absent when he was actually hiding in the building and would not go to class because he did not understand and the other children were teasing him.[5]

5. Parent knew that something was wrong with her son and he needed help, so she called a toll-free number for mental health services and obtained an August 25, 2008 appointment for Student. At the appointment, which was with the District of Columbia Department of Mental Health, Student spoke with a licensed clinical social worker and received a Child and Family Individualized Plan of Care. In the Plan of Care, Student was diagnosed with Bipolar Disorder and Bereavement Issues-unresolved grief and loss.[6]

6. A few days after Student's August 25, 2008 appointment, he met with a physician and received three types of medication. Student now goes to see the physician every month.[7]

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[2] *See* Complaint; Testimony of Parent.
[3] Testimony of Parent.
[4] Testimony of Parent; Petitioner's Exhibit 4.
[5] Testimony of Parent.
[6] Testimony of Parent; Petitioner's Exhibit 2.
[7] Testimony of Parent.

7. Student is supposed to receive a new Plan of Care every three months. However, instead of receiving a new Plan of Care on November 25, 2008, he received his second Plan of Care on December 11, 2008. The second Plan does not contain any diagnoses for Student, but it indicates, *inter alia,* that he hears "scary voices calling [his] name" and takes medication.

   Parent faxed a copy of the December 11th Plan to Student's current school on the same day it was issued. Parent did not provide the school with a copy of Student's initial Plan of Care because the licensed clinical social worker had advised parent to wait and see if the medications helped Student, and if they did, the school would not need the Plan. Since the medications did not help Student, however, Parent faxed his December 11th Plan to his school.[8]

8. In October 2008, one of Student's current teachers and his sixth grade teacher from his previous DCPS school completed Teacher Questionnaires Parent received from the Social Security Administration. Both teachers indicated that Student has extensive academic and behavioral problems.[9]

9. Parent went to Student's current school twice – once in October 2008 and once on January 14, 2009, and put a note in each of Student's teacher's boxes. The note explained Student's disability and asked whether Student should be tested. Student's science teacher was the only teacher to respond. This teacher agreed with Student's disability diagnosis, retested him and graded him differently, with the result that he received a D in her class instead of an F.[10]

10. Student's current grades are three Fs and one D (in science). For the previous advisory, Student received four Fs.[11]

11. In light of Student's fighting and mental issues, he will need educational interventions. However, without assessments, it is not possible to say what interventions Student needs or what is driving his behavior. In terms of assessments, at the least, Student will need a comprehensive psychological evaluation that includes psychoeducational and clinical components, as well as a good memory examination, and Student will also need a social history that examines the treatment and/or medications he has or has not received and his family history.[12]

12. The special education coordinator ("SEC") at Student's current school knows nothing about Student or his teachers. The SEC did not learn of the Complaint in this action until he received a call from counsel for DCPS during the week of the due process hearing.[13]

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[8] Testimony of Parent; Petitioner's Exhibit 3.

[9] Petitioner's Exhibits 5 and 6.

[10] Testimony of Parent.

[11] Testimony of Parent.

[12] Testimony of expert psychologist.

[13] Testimony of SEC.

13. On February 10, 2009, approximately 1½ weeks after the Complaint was filed, DCPS issued a Letter of Invitation offering to convene an SEP meeting for Student in February, but Student's advocate wrote back and suggested three dates in March 2009, all of which were after the scheduled due process hearing.[14]

V. CONCLUSIONS OF LAW

At issue in this case is whether DCPS denied Student a FAPE by violating the Child Find provision of IDEIA. As the party seeking relief in this action, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

IDEIA obligates DCPS to ensure that a free appropriate public education (FAPE) is available to all children with disabilities residing within its jurisdiction, even in the absence of a parental request for an initial evaluation of his or her student. *See* 20 U.S.C. §1412(a)(1)(A). Hence, IDEIA requires DCPS to identify, locate and evaluate all children with disabilities residing in the District of Columbia. 34 C.F.R. §300.111. DCPS is further required to ensure that an IEP is developed, reviewed, and revised for each of these children, and to determine appropriate educational placements for such children. *See* 34 C.F.R. §§ 300.112, 300.114, 300.116.

In this case, the evidence proves that Student has presented with academic and behavioral problems in school since the latter part of SY 2006/07. Student's extensive academic and behavioral problems were known by his grade teacher, as reflected in the survey she completed in October 2008, and the survey Student's current teacher completed in October 2008 reveals that she, too, is well aware of Student's extensive academic and behavioral problems. Moreover, Parent provided Student's current school with a copy of his December 2008 Individualized Plan of Care from the District of Columbia Department of Mental Health, which indicates that Student hears voices and takes medication, and Parent also provided Student's current teachers with notes explaining Student's disability.

Based on this evidence, the hearing officer concludes that Student's ongoing academic and behavioral difficulties in school were sufficient to (1) put DCPS on notice during his grade year (SY 2007/08) that Student may be a student with a disability within the meaning of IDEIA, and (2) trigger DCPS's obligation to identify, locate and evaluate Student under the Child Find provision of IDEIA. As the evidence further demonstrates that DCPS failed to take any action at all to address Student's academic and behavioral difficulties until after the Complaint in this action was filed, when DCPS issued a Letter of Invitation to an MDT meeting to develop an SEP for Student, the hearing officer further concludes that Petitioner has met its burden of proving that DCPS violated Child Find in this case.

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[14] Testimony of SEC; DCPS-1; Petitioner's Exhibit 8.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that DCPS violated Child Find with respect to Student.

VII. ORDER

1. Petitioner is hereby awarded a finding that DCPS denied Student a FAPE by failing to comply with the Child Find provision of IDEIA.

2. DCPS shall fund the following independent evaluations for Student: (1) a comprehensive psychological evaluation that includes psychoeducational and clinical components, as well as a good memory examination, and (2) a social history that examines Student's treatment and medication history and his family history.

3. Within 15 calendar days DCPS of receipt of Student's independent evaluation reports, DCPS shall convene an MDT/Eligibility meeting to determine whether additional evaluations are indicated for Student, and whether Student is eligible for special education and related services. In the event Student is determined eligible, DCPS shall also develop an IEP for Student and discuss and determine an appropriate placement for implementation of the IEP.

4. DCPS shall copy Petitioner's counsel on any scheduling correspondence sent to Parent, and DCPS shall also advise Petitioner's counsel by email and/or fax of the date and time of the MDT/Eligibility meeting to be held for Student.

5. In the event DCPS fails to comply with the 15-day deadline specified herein for convening an MDT/Eligibility meeting, the actions of Parent and her representatives, as well as the actions of the individuals acting on behalf of DCPS, will be examined in determining fault. Moreover, Parent and/or her representatives shall contact DCPS's Office of Compliance and make reasonable efforts to obtain an MDT/Eligibility meeting for Student prior to filing a Complaint.

/s/ *Kimm H. Massey, Esq.*
Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 21st day of March, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).