District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
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STUDENT HEARING OFFICE
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In Re the Matter of :	)	
Parent on behalf of Student,[1]	)	
Petitioner,	)	
v.	)	**Date of Complaint:** February 3, 2010
	)	**Date of Pre-Hearing Conference:** February 16, 2010
District of Columbia Public Schools, ("DCPS")	)	**Date of Hearing:** February 19, 2010
Respondent.	)	**Student Case No.** **Student Identification Number:**
	)	**Attending School:**

HEARING OFFICERS' DECISION

Hearing Officer: Attorney Ramona M. Justice

Attorney for Petitioner: Attorney Olekanma A. Ekekwe
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Attorney for Respondent: Attorney Tanya J. Chor, Assistant Attorney General, D.C. Office of the Attorney General
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Washington, D.C. 20002

1 Personally identifiable information is provided in the "Appendix" which is located on the last page of this Order and must be removed prior to public distribution.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), REAUTHORIZED AS THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEIA), (Public Law 108-446)

DISTRICT OF COLUMBIA PUBLIC SCHOOLS IMPARTIAL DUE PROCESS HEARING

I. BACKGROUND'

The student is years of age, and a grade student attending a District of Columbia Public School, located in the District of Columbia. utilizes the "[1]Schoolwide Applications Model (SAM)" which is a data-based approach to structural school reform. The student is repeating the grade, for the third time, and during the past two (2) school years struggled academically and behaviorally; and his off task behavior impedes his learning. The student is not identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

On February 3, 2010, Petitioner's Attorney, filed a due process complaint, and "Petitioner's Motion for Expedited Hearing", representing that the issues in this complaint relate to discipline of the student, and on December 11, 2009, the student received a three (3) month suspension from school. On February 4, 2010, the Hearing Officer was assigned by the D.C. Public Schools, to preside over this matter. Respondent filed no opposition to Petitioner's motion for an expedited hearing; and on February 9, 2010, the Hearing Officer issued an order granting Petitioner's request for an expedited due process hearing, in accordance with the District of Columbia Public Schools, Standard Operating Procedures, §1008.

Petitioner alleged in the due process complaint that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) identify and evaluate the student as a child requiring special education services; (2) provide parent access to the student's educational records; and (3) complete requested evaluations; in violation of "The Individuals with Disabilities Education Act

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[1] The School-wide Applications Model (SAM) is a data-based approach to structural school reform. It is intended to replace categorical fragmentation of educational resources and supports within schools with fully integrated and coordinated resources focused on improving academic and social outcomes for all students. SAM is a general education support approach which uses a response to intervention logic model to focus and direct all school and [available] community-based resources, to the measurable improvement of academic and social outcomes for all students - regardless of type, level and extent of supports required to progress in the general curriculum. This includes the 1-2% of students who cannot participate in the general assessments. SAM is designed to particularly address the needs of urban core, multicultural, low income school districts. Observation reveals that a "medical model" approach to specialized categorical, targeted populations of students in these districts has led, in many cases, to extensive fragmentation of services and supports that are needed by nearly all students, as well as over-representation by ethnic minorities in various disability categories in special education. Implementation of SAM is an extensive systems-change process that transforms the culture of schools from discreet, specialized functions of resources and personnel, to a fully integrated system of supports and services applicable to all students in accordance with a response to intervention (RTI) logic model dictated by valid and reliable, on-going assessments of pupil academic and social progress. Finally, SAM systems-change processes, delivered through ongoing professional development and technical assistance, are directed to two primary formative sets of variables. The first is structural elements of school organization and service delivery. Elimination of special classes, for example, is an element of structural reform. The second is the quality of instruction. As the culture of schools moves toward a unified resources approach with school teams making instructional decisions on the basis of repeated measures data, measurable improvement in the quality of instruction is an expected outcome.

(IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

On February 16, 2010, a prehearing conference was held; and the Hearing Officer issued a prehearing conference order, confirming the due process hearing for February 19, 2010. A resolution meeting was held on February 17, 2010, however, the parties failed to reach agreement on the issues in the complaint. The due process hearing convened on February 19, 2010, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003, as scheduled.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25.

III. ISSUES

The following issues are before the court:

(1) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to identify and determine the student eligible for special education services?

(2) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide parent access to the student's educational records?

(3) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to complete requested evaluations?

IV. RELIEF REQUESTED

Petitioner seeks the following relief:

1. Hearing Officer order DCPS to allow the student to return to school.
2. Declaratory relief for denial of FAPE, denial of due process and for discrimination based solely on client's disability by DCPS.
3. A determination that DCPS should have found that the student is a child in need of services as a special education student and that failure to find him eligible is a denial of a free appropriate public education (FAPE).
4. A determination that DCPS should fund independent evaluations.
5. A determination that DCPS shall convene an MDT/IEP team meeting within five (5) days of receiving the HOD.
6. A determination that the Hearing Officer award the student three (3) years of compensatory education services, upon a finding of eligibility.
7. A determination that DCPS promptly pay legal fees associated with this claim.

V. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted; and whether there were any objections to the disclosures. Respondent objected to the introduction of Petitioner's Exhibits #3, 4, 9, 15, 16, and 34, on the grounds of relevancy, statute of limitations, and authenticity. After hearing arguments from both parties, Petitioner's exhibits 3, 4, 9, 15, and 16, were admitted into the record, and Petitioner's exhibit 34 excluded, due to the lack of authentication. Receiving no further objections, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE, ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 33; and a witness list dated February 16, 2010.

DISCLOSURES ADMITED INTO THE RECORD AS EVIDENCE, ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 10, and witness lists dated February 16, 2010.

VI. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to identify and determine the student eligible for special education services?

FINDINGS OF FACT

1. The student is years of age, and a grade male student attending a District of Columbia Public School, located in the District of Columbia. utilizes the School-wide Applications Model (SAM), which is a data-based approach to structural school reform. Elimination of special classes is an element of structural reform, at The record reflects that the student would benefit from special classes, with curricular modification, accommodations and/or supplemental services, in the classroom.

2. The student is repeating the grade, for the third time, and during the past two (2) school years continued to struggle academically and behaviorally; and his off task behavior impedes his learning, and that of others. The student is not identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

3. The student's behavior has resulted in numerous in school suspensions, detentions, and out of school suspensions. Of particular note is that the student was suspended from February 17, 2009 through February 20, 2009; and on December 11, 2009, the student was suspended for thirty (30) days, from December 11, 2009 through February 8, 2010 for developing a blow torch with an aerosol can and cigarette lighter, in class. DCPS school officials described the December 11, 2009 incident as a serious offense, posing potential harm to the student and others.

   DCPS acknowledge that during this school year alone, the student has engaged in off task behavior and conduct including physical altercations with a student, along with threats to the student and his siblings; assault of a student with a weapon (punching a student under the eye using a pencil), and a police report filed; possession of marijuana on school property, fireworks and explosives, requiring police response; noncompliance with student dress code; off-task behavior which impedes his learning and that of others; verbal threats to school staff; leaving school without permission; bullying; fighting; and other behavior creating a risk of harm to himself and others; and disregard for school rules and authority.

4. The record reflects that during the end of the 2008/09 and 2009/2010 school years, the parent expressed concern regarding the student's academic and behavioral challenges and requested that DCPS identify the student as emotionally disturbed, eligible for special education services. During the 2008/09 school year, DCPS referred the student for an Educational Evaluation, Comprehensive Psychological Report, and Occupational Therapy Evaluation, and Social Work Report, due to academic difficulties and problematic behavior.

5. On January 24, 2008, DCPS completed an *Educational Evaluation*. The evaluation summarized that the student's academic skills are limited, specifically, his sight reading ability and math calculation skills are limited; and his spelling is very limited. The evaluation also indicated that fluency with which the student performs academic tasks is limited; and his fluency with reading and writing tasks is limited. The evaluation indicated that the student's ability to apply his academic skills is limited; in particular his writing ability is average; his quantitative reasoning is limited to average; and his passage comprehension ability is very limited.

   The evaluator summarized that when compared to others at his age level, the student's academic skills, his ability to apply those skills, and his fluency with academic tasks are all within the low average range; and his performance is average in basic reading skills, low average in broad reading, math calculation skills, math reasoning, and written expression; and low in written language.

   At the time of the evaluation the student was years, months; and the grade level of 3.5. Results of the Woodcock-Johnson III Tests of Achievement reflect that the student was performing at a grade equivalent range of 1.8 to 3.2, in all areas. There is no evidence that the student received academic modifications and support in the classroom, to address the areas of weakness, identified in the evaluation; or implemented the recommendations provided in the evaluation.

6. A *Comprehensive Psychological Evaluation* was completed by DCPS on October 1, 2008; and at the time of the evaluation the student was years, months of age. The evaluation reflects that with regard to the student's attention processing and executive functioning, the following behaviors fell within the clinically significant range: inhibit, shift, and emotional control. Additionally, the evaluation provides that the student's profile seemed to confirm that the student exhibits limited inhibitory system, limited cognitive flexibility along with weakness in concept general skills, and once he becomes emotionally charged, it may be difficult for him to calm down or take on another person's perspective.

   In assessing the student's language processing, his ability to follow a multiple-step direction was found at slightly below expected range; his ability to retrieve linguistic information efficiently, was found at below expected; his performance revealed poor self monitoring; although his performance was slightly improved on the semantic task than on the initial letter task, possibly suggesting a presence of weak visualization skills. The student's problem solving skills were found in the range between below expected and slightly below expected levels. The student received a mental processing index score of 85 which fell within the below expected level of cognitive functioning.

   The evaluation also indicates that the student's reading skills were similar to those of an year old student; reading comprehension was comparable to that of a student below the age of years and months; his ability to apply phonetic decoding skills was similar to a child at the age of 6 years and 4 months.

   According to the teacher rating scale completed as part of the evaluation, the student exhibits symptoms of anxiety, depression, somatization, and withdrawal. According to the parent's endorsement, aggression was found to be clinically significant, and conduct problems to be at risk; and according to the student's teacher endorsement the following behaviors were identified as clinically significant: hyperactivity, aggression, conduct problems, attention problems, learning problems, and withdrawal fell in the at risk range. The student's cognitive profile also reflects that the student could benefit from step by step instruction, because he is an auditory learner.

   At the time of the evaluation, the student was years, months of age; and in the grade; and although certain subtests reflect that he only exhibited a weakness in spelling, his grade equivalent scores ranged between 1:7 and 3:8. There is no evidence that the student received academic modifications and support in the classroom, to address the areas of weakness, identified in the evaluation; or implemented the recommendations in the evaluation.

7. An initial *Occupational Evaluation* was completed on October 15, 2008 and October 17, 2008. The student's visual perceptual quotient of 90 suggested overall average visual perceptual skills when compared to other children of his age. However, in the area of sequencing (visual sequencing) the student's scores suggested significantly below average skills when compared to his peers; that may impact his ability to recall the correct sequence of letters and numbers in order to write words and to complete math problems accurately, and his reading, spelling, and math. Visual motor integration tests suggested overall average visual motor integration skills.

The evaluator recommended consulting with an Occupational Therapist if the student demonstrated increased difficulties with visual perception and motor tasks at school. The evaluator also offered several recommendations, requiring modification of the student's educational program, one on one instruction, and accommodations, however, there is no evidence that the student received academic modifications and support in the classroom, as recommended in the evaluation.

8. DCPS completed a *Social Work Report*, date uncertain, indicating that overall the student presented with academic and behavioral difficulties that school year; was suspended for violating school rules; and is in need of psychological services, if determined eligible for special education services. The evaluation also indicates that the student receives medication for allergies and headaches; and sustained a head injury after riding his bicycle and running into a trashcan. DCPS failed to ensure that the student received academic modifications and support in the classroom, to address his academic difficulties.

   The DCPS counselor testified that in October, 2009, the SST determined that the student requires counseling services to address his behavior difficulties, and issues of grief; and last year the D.C. Department of Mental Health worked with the student at the school, to address problematic behavior, and issues of grief. The DCPS Counselor also testified that the parent decided that the student no longer requires counseling services; and as a result, he receives no counseling services.

9. On October 14, 2008, a MDT convened to review current services and assessments and determine the student's eligibility for special education services. The team reviewed the Speech and Language, Occupational Therapy, and according to the meeting notes, discussed clinical evaluations. The DCPS Psychologist opined that the student has behavioral challenges, and some weaknesses; can compensate for it and requires some strategies and support; however, does not meet the criteria for emotionally disturbed nor other disabilities.

   The MDT meeting notes reflect that the student's general education teacher commented that the student is smart; is kinesthetic; can assemble things; and she wants the best for him and the support available. The teacher opined that the student requires a smaller classroom setting and support; however, members of the team disagreed indicating that the student merely required support, and can learn to cope in the regular education setting. The meeting notes do not reflect any further discussion regarding the teacher's comments. The teacher also commented that some of the student's behaviors had stopped.

   The MDT rendered a preliminary determination that the student was ineligible for special education services, because he failed to satisfy the eligibility criteria for an emotionally disturbed student, as defined by the IDEA, pending review of the Occupational Therapy Evaluation. The Education Advocate and parent disagreed with the MDT's preliminary determination of ineligibility; maintaining that the student required special education services, and an alternate placement.

10. On October 21, 2009, the MDT reconvened, reviewed the Occupational Therapy Evaluation, reiterating its position that the student did not require special educations services. The parent and advocate disagreed, reiterating that the student requires special education services. The student's teacher commented that the student had made small improvements in his behavior, which are improvements. The school Principal explained the available services and current situation of the school, as a restructuring school.

    The MDT referred the student to the Student Support Team (SST); and the D.C. Department of Mental Health for counseling services, to address his problematic behavior and to address issues of grief. The MDT also agreed to discuss strategies to assist the student.

11. DCPS reports that in an effort to address the student's problematic behavior, it initiated and/or attempted to initiate ongoing school-wide interventions; intensive in-home counseling; family reunification/stabilization services; therapeutic support services; including one on one support; anger management; and social skills development. However, DCPS failed to present specific information regarding implementation of the intervention efforts and services; or documentation verifying that these initiatives were implemented, monitored, and evaluated by DCPS, as required as part of the SST process.

12. The IDEA, 34 C.F.R. §300.8 (4)(1)(i) defines emotional disturbance as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

    (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***.
    (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
    (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, ***unless*** it is determined that they have an ***emotional disturbance under paragraph (c)(4)(i) of this section***.

13. The D.C. Public Schools Psychologist misinterpreted and misapplied subparagraph (ii) of IDEA, 34 C.F.R. §300.8 (4)(1)(i) (ii), in determining this student ineligible for special education services, as a student with a disability of emotional disturbance; and as a result, the student was incorrectly determined ineligible for special education services, as a student with an emotional disturbance.

    First, paragraph ***(i)*** of this provision clearly defines emotional disturbance, and according to the evidence presented, including, the evaluations of record, this student satisfies 4 of the 5 eligibility criteria established by IDEA; qualifying him for special education services, under the disability classification of emotionally disturbed.

The student demonstrates an ***inability to learn*** that cannot be explained by intellectual, sensory, or health factors; an ***inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; and a general pervasive mood of unhappiness or depression***.

Second, the DCPS Psychologist concluded in the Comprehensive Psychological Evaluation that despite the presence of behavioral challenges the student presented, his behavioral difficulty appears unrelated to his emotionality, and therefore, clinical impressions of the student at that time suggested a young man with no marked emotional adjustment difficulties; which served as the basis for her recommendation to the MDT and SST, that the student was ineligible for special education services.

The DCPS Psychologist testified that she based her decision and opined that the student is ineligible for special education services because he presents with socially maladjusted behavior, and according to IDEA socially maladjusted students cannot qualify as students with a disability of emotional disturbance. This is clearly a misinterpretation and misapplication of this provision, as applied to the student.

Third, *in addition to* the definition of emotional disturbance, as set forth in paragraph (i) of this provision; subparagraph ***(ii)*** of this provision indicates that emotional disturbance also includes schizophrenia. The statute further explains that the term "emotional disturbance" does not apply to children who are socially maladjusted, ***unless*** it is determined that the student has an emotional disturbance as described under paragraph (c)(4)(i) of this section.

Assuming the student is socially maladjusted as represented by the DCPS Psychologist; according to subparagraph (ii) of IDEA, 34 C.F.R. §300.8 (4)(1)(i) (ii), if this student also satisfies the eligibility criteria for emotionally disturbed, as defined by IDEA under paragraph (c)(4)(i) of this provision, he would qualify and be entitled to receive special education services, as a student with a disability of emotional disturbance.

Subparagraph (ii) does not mean that if a student is socially maladjusted, he cannot meet the definition of "***emotional disturbance***", or qualify for special education services, under the IDEA; as interpreted and applied by the D.C. Public Schools Psychologist.

In this matter, although the student may present as a socially maladjusted student as represented by the DCPS School Psychologist, the evidence of record and witness testimony, including the DCPS School Psychologist, also reflects that the student satisfies 4 of the 5 eligibility criteria identified by the IDEA under paragraph (c)(4)(i) of 34 C.F.R. §300.8, as a student with an emotional disturbance. Therefore, according to the IDEA, although the student may be socially maladjusted, because he also satisfies the eligibility criteria as a student with an emotional disturbance, he is eligible and entitled to receive special education services under the IDEA, as an emotionally disturbed student.

Fourth, the DCPS Psychologist testified that at the time of the evaluation she was aware of reports that the student exhibited aggressive and problematic behavior, however, had not personally experienced such behavior; and was not aware that the student was retained in the grade. In fact, it is evident from the DCPS Psychologist's testimony-

that she is not aware that the student is repeating the grade for the third time. The Comprehensive Psychological Evaluation was completed without the benefit of this information. The DCPS Psychologist is not personally familiar with the student, and failed to utilize the information received from the student's teachers, and parent, and academic and educational history, in evaluating the student. Furthermore, any progress the student made academically over the last three (3) years is minimal; and is likely attributed to the fact that the student is repeating information and the 4th grade, for the third time.

14. The record reflects and evaluations confirm that during the 2008/09 and 2009/2010 the student had academic difficulties and exhibited problematic behavior; and required classroom interventions and supports, development of coping skills and strategies, psychological services; instructional modifications, and academic support. DCPS presented no evidence that the student received instructional modification, academic support; or assistance in developing coping skills and strategies, as recommended in the evaluations.

15. In regard to the student's social/emotional functioning, the evaluations reflect that the student exhibited the following: (1) inability to learn that cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances; and (4) a general pervasive mood of unhappiness or depression; which are consistent with the eligibility criteria under the IDEA, as an emotionally disturbed student.

    Additionally, the data and information in the evaluations is sufficient to warrant an additional evaluation to "rule out" a learning disability, and a Functional Behavioral Assessment; which were not completed. DCPS failed to ensure that the evaluations represented a full and individual initial evaluation of the student; and that the student was evaluated in all areas of suspected disability (i.e. Learning Disability).

16. On February 3, 2009, DCPS convened a Student Support Team (SST) meeting with parent, the Education Advocate, Case Manager, DHS, Team Leader, DHS, Strong Families Program, School Social Worker, Department of Mental Health, Social Worker, School Psychologist, and SAM Coach, General Education Teacher; and the SST Coordinator. The student's teacher reported a decrease in the target areas; and that the student continued to struggle in certain areas, necessitating a modification in the student's instruction, to address his academic difficulties. The teacher also reported that the student was functioning at a 1st to 2nd grade level, and below basic.

    The team concluded that "intervention strategies were partially/not successful; continuation of SST and development of new SST academic and/or behavioral instructional strategies planning and implementation form". However, DCPS failed to develop new SST academic and/or behavioral instructional strategies for the student, as recommended in the SST Ongoing/Final Meeting Report; and there is no evidence that the intervention strategies were revisited or modified since developed on February 3, 2009.

On February 3, 2009, as a follow-up to the meeting, Petitioner's Attorney forwarded a letter to requesting a copy of the meeting notes, and that the notes include representations by the student's teacher that the student was functioning at a 1st to 2nd grade academic level, and is below basic; the teams' determination that based on the student's academic functioning, he should qualify for special education services; parent's position that the student qualifies for special education services, and parent intended to remove the student from and place him in an appropriate setting based on his suspected disability.

17. DCPS failed to administer the SST process, in accordance with the D.C. Public Schools, Second Edition, Student Support Teams Manual, in addressing the student's academic and behavioral difficulties. The record reflects that an initial SST meeting was held on October 30, 2008; and a follow-up meeting held with parent on February 3, 2009. At the February 3, 2009 SST meeting, the SST completed the *SST Academic and/or Behavioral Instructional Strategies Planning and Implementation Form* with implementation to begin on that date.

    The SST plan described the following academic and/or behavioral instructional strategies that would be implemented for a minimum of six (6) weeks; the student would continue to work with the D.C. Mental Health counselor; there would be a reduction in the student's academic work load; the student would be encouraged when he is working hard; the teacher would continue to provide the student options when making decisions; and the teacher would provide the student individual attention, when possible.

    The plan also provides that the strategies were to be implemented in the classroom, and overall school environment; and the student should communicate with staff when academic expectations are becoming difficult. Finally, the plan provides that the SST would determine whether the student is making progress by teacher observations, counseling reports, parent and staff observations.

    A the February 3, 2009 SST meeting, the team also completed the *SST Ongoing/Final Meting Report* reflecting that the team reviewed the mother, teacher, and staff observations; and that the teacher reported a decrease in the target areas, and the student continued to struggle in some areas. The report indicated that the *strategies were partially/not successful*, however, the SST decided to continue the same strategies.

    First, DCPS failed to present evidence that during the six (6) week period following development of the February 3, 2009 SST plan, the academic and behavioral instructional strategies recommended in the SST Plan, were implemented in the classroom and overall school environment as recommended in the SST Report monitored, and evaluated; or that a meeting was held with parent to discuss SST options, including, a determination of-whether to continue the ABIS in the general education classroom;- determination regarding Section 504 eligibility, and development of a 504 Plan if eligible; continuation of the SST and development of new ABIS; or referral of the student to a multidisciplinary development team, to reassess and determine his eligibility for special education; as required by the DCPS SST manual.

Additionally, there is no evidence of parent, teacher, or staff observations, or counseling reports, as provided in the SST plan; and although indicated in the SST Report, there is no evidence that the SST developed new SST academic and/or behavioral instructional strategies for the student, as provided in the SST Ongoing/Final Meeting Report.

Second, although aware that since development of the February 3, 2009 SST plan, the student continues to regress academically and behaviorally; a thirty (30) day suspension was imposed on the student due to a serious offense; parent continued to renew her requests for special education services; and initiated a new request for evaluations, DCPS failed to reconvene the SST with parent to review the academic and behavioral instructional strategies, and discuss SST options; including referring the student back to the MDT to reassess and determine his eligibility for special education services, in response to parent's May 2, 1009 request for special education services.

18. Although there is testimony that the student's general education teacher maintained a daily behavior and academic checklist monitoring the student's academic and behavioral performance; and the SST recommended modification of the student's instruction, there is no evidence to that effect. Additionally, there is no information regarding any accommodations or support services the student may have received in class, to address his academic difficulties.

19. The Assistant Principal testified that the school also initiated an academic and behavioral monitoring sheet early to mid October, 2009; and allegedly there is a lack of consistency in the data, and the information is unavailable because of the lack of cooperation from the parent and student. DCPS failed to present at the hearing, evidence of the academic and behavioral monitoring sheet, utilized to monitor the student's academic and behavioral performance.

20. On November 25, 2008, DCPS developed an "Intervention Behavior Plan ("IBP")" for the student. The plan proposed to target physical/verbal aggression, leaving classroom, and following directions; and indicates that monitoring would be done by the student's general education teacher. Monitoring included maintaining a targeted behavior chart within the classroom with the assistance of a support system; chart to be maintained weekly until next meeting; and the D.C. Department of Mental Health specialist would maintain a record of each counseling session with the student.

    Although the IBP proposed teacher monitoring of the student's behavior; there is no evidence documenting the teacher monitoring; or counseling sessions provided the student, by the D.C. Department of Mental Health, as recommended by the MDT.

    The student continued to exhibit problematic behavior for the remainder of the 2008/09 school year, and during the 2009/2010 school years; and in a letter from Petitioner's Attorney dated February 3, 2009, it is suggested that on that date the SST convened a meeting with parent, and attempted to review and revise the student's IBP. However, there no evidence in the record that since development of the IBP on November 25, 2008, DCPS reviewed and discuss the plan, its effectiveness, modified the plan to address the student's regressive behavior, or discussed other behavioral interventions and strategies.

21. On February 11, 2009, DCPS completed a "DRAFT" Functional Behavioral Assessment (FBA), for the student. Although the student's behavior is regressing, and in a recent incident was characterized as a serious offense, posing risk of harm to self and others; and such behavior has resulted in a thirty (30) day out of school suspension, DCPS failed revisit or finalize the February 11, 2009 FBA; or develop a new FBA to address the student's regressing behavior.

22. DCPS failed to ensure that the local education agency complied with the "Child Find" requirements of D.C. Mun. Regs. Tit. 5, §3002.1(d) (2003) and 34 C.F.R. §300.111 of the IDEA; by appropriately and fully implementing the D.C. Public School procedures designed to identify, locate, and evaluate the student; and determine his eligibility for special education services.

CONCLUSIONS OF LAW

1. DCPS failed to comply with the "Child Find" requirements of D.C. Mun. Regs. Tit. 5, §3002.1(d) (2003) and 34 C.F.R. §300.111 of the IDEA; which requires the LEA must have in effect *policies and procedures to ensure* that all children with disabilities residing in the State, and who are in need of special education and related services, are ***identified, located, and evaluated***.

   The MDT erred in referring the student to the SST; the SST failed to properly administer and complete the SST process; and the SST failed to refer the student to the MDT, upon receipt of parent's February 3, 2009 and May 1, 2009, requests for evaluations and another determination regarding the student's eligibility for special education services.

   Although DCPS has in effect policies and procedures designed to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated; failure to properly administer these policies and procedures, in a timely manner, fails to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated, which violates the Child Find provisions of the IDEA and the DCMR.

2. DCPS also failed to comply with subparagraph (c) of the ***"Child Find"*** provisions which provide that ***"Child find"*** must also include children who are ***suspected*** of being a child with a disability under Section 300.8, ***("Other Health Impairment")***, and in need of special education, even though they are advancing from grade to grade.

3. DCPS failed to comply with the "Child Find" requirements of the IDEA, at 34 C.F.R. §300.311; and IDEA, §§300.301 and 300.304, in conducting a full and individual initial evaluation of the student (i.e. Functional Behavioral Assessment, and a "rule out" for a learning disability).

   Specifically, DCPS failed to comply with 34 C.F.R. §300.304(b) (1) which requires that the public agency use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under §300.8.. DCPS failed to complete a FBA to address the-

student's steadily declining behavior, which continued to have an adverse affect on his learning, and that of others.

Additionally, DCPS failed to comply with subparagraph (2) which provides that the public agency shall not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determination an appropriate educational program for a child; and shall use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

In this matter, the MDT erred by relying upon the DCPS Comprehensive Psychological Evaluation, and the DCPS School Psychologist's interpretation of the evaluation data, and the IDEA's eligibility criteria for an emotionally disturbed student; as the sole criterion for determining whether the student is a child with a disability and for determination an appropriate educational program for the student. The MDT disregarded the fact that the student was retained in the 4th grade three times, continued to regress academically and behaviorally; or carefully consider input for the student's parent and teacher.

Decision

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS denied the student a free appropriate public education (FAPE); by failing to identify, evaluate, and determine the student eligible for special education and related services; in violation of the D.C. Municipal Regulations, and "The Individuals with Disabilities Education Act ("IDEA")", reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA").

ISSUE 2

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide parent access to the student's educational records?

FINDINGS OF FACT

1. On February 3, 2009, Petitioner through her Attorney, forwarded a written request to the student's school requesting a copy of an incident report and any other documentation completed by the school or DCPS representative regarding a November 26, 2008 incident, in which the student was reported as being
   The letter also included a request for a copy of the student's disciplinary record, logs, anecdotal records or any other information maintained in the student's school file or by the school and staff.

2. On February 11, 2009, approximately eight calendar days later, faxed to Petitioner Attorney the student's suspension documents, anecdotal/incident reports, description of multi-layered support for the student, Intervention Behavioral Plan, and Functional Behavioral Assessment. The transmittal indicated that documentation regarding the November 26, 2008 incident was not available at that time.

3. On two (2) occasions in May, 2009, Petitioner's Attorney, through her legal assistant, visited to access the student's educational records. During the second visit the legal assistant obtained some records, however, was advised that the school must retrieve the remaining documents from it archived files.

4. On May 29, 2009, faxed to Petitioner's Attorney the student's discipline and attendance records, for the 2008/09 school year.

5. On June 1, 2009, faxed to Petitioner's Attorney a copy of the student's 2008/09 report card.

6. On January 21, 2010, Petitioner's Attorney requested the student's records, at a meeting with school personnel.

7. On January 27, 2010, Petitioner, through her Attorney, submitted a written request to the student's school requesting a complete copy of any and all school records, including however not limited to, report cards and/or progress reports, standardized testing, attendance records, and disciplinary reports and records.

8. On January 27, 2010, faxed to Petitioner's Attorney a corrected copy of the student's Intervention Behavioral Plan, and the SST attendance sheet for the day the IBP was developed.

9. On January 29, 2010, in response to Petitioner's January 27, 2010 request for records, faxed to Petitioner's Attorney a copy of the student's report cards, progress reports, suspension record for the 2009/10 school year, DC-BAS test results, and attendance record from August 17, 2009 through January 29, 2010.

10. DCPS provided parent copies of requested documents, or access and the right to review and inspect the student's educational records, without unnecessary delay and prior to the hearing, in accordance with the IDEA, 34 C.F.R. §300.501 and §300.613.

CONCLUSIONS OF LAW

1. IDEA, 34 C.F.R. Section 300.501 provides:

"The parents of a child with a disability ***must*** be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to ***inspect and review*** all educational records with respect to—

(1) The identification, evaluation, and educational placement of the child; and
(2) The provision of FAPE to the child."

2. IDEA, 34 C.F.R. Section 300.613 provides in pertinent part:

"(a) Each participating agency ***must*** permit parents to ***inspect and review*** any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency ***must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing*** pursuant to Section 300.507 or Section 300.530 through 300.532, or resolution session pursuant to Section 300.510, ***and in no case more than 45 days after the request has been made***."

Subparagraph (b) of IDEA, ***34 C.F.R. §300.613*** provides that the right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
(3) The right to have a representative of the parent inspect and review the records.

Decision

It is the Hearing Officers' decision that Petitioner failed to satisfy its burden of proof by presenting evidence sufficient for a finding that DCPS denied the student a free appropriate public education (FAPE); by failing provide parent access to the student's educational records, in violation of IDEA, §§300.501 and 300.613.

ISSUE 3

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to complete requested evaluations?

FINDINGS OF FACT

1. On January 24, 2008, DCPS completed an "Educational Evaluation". On October 1, 2008, DCPS completed a "Comprehensive Psychological Report". On October 15, 2008 and October 17, 2008, DCPS completed an initial Occupational Therapy Evaluation. DCPS completed a "Social Work Evaluation", date uncertain. On February 11, 2009, DCPS completed a "Draft" Functional Behavioral Assessment.

2. The student is repeating the grade for the time; since the end of the last school year, and during the 2009/2010 school year, the student continued to regress academically and behaviorally. The student's behavior has resulted in numerous in school suspensions, detentions, and out of school suspensions. For instance, the student was suspended from February 17, 2009 through February 20, 2009; and on December 11, 2009, the student was suspended for thirty (30) days, from December 11, 2009 through February 8, 2010 for developing a blow torch with an aerosol can and cigarette lighter, in class.

   DCPS school officials described the December 11, 2009 incident as a serious offense, posing potential harm to the student and others; and other behaviors as creating a risk of harm to himself and others, actual harm to others, noncompliance and disregard for school rules and authority, off task behavior, verbal threats of school staff, leaving school without permission, bullying, and fighting; etc…

3. During the end of the 2008/09 and 2009/2010 school years, the parent expressed concern regarding the student's academic and behavioral challenges and requested that DCPS identify the student as emotionally disturbed, eligible for special education services.

4. On May 1, 2009, Petitioner through her Attorney, referred the student for evaluation, by forwarding to the student's school a written request for reevaluation of the student. Petitioner requested a complete and comprehensive evaluation of the student to include: academic, psychological, speech and language, occupational evaluation, audio logical, vision, social work, and psychiatric.

5. Although DCPS was aware that interventions had failed; and the student continued to regress academically and behaviorally, posing potential and actual risk of harm to himself and others, it failed to respond to Petitioner's May 1, 2009 request for evaluations and a determination of eligibility for special education services.

   Additionally, although DCPS was aware that interventions had failed; the student continued to regress academically and behaviorally; and engaged in behavior posing potential and actual risk of harm to himself and others, it failed to refer the student to a MDT to reassess and determine his eligibility for special education services; in violation of the Child Find provisions of the IDEA and DCMR.

6. DCPS failed to complete a ***full and individual*** evaluation of the student, in considering his eligibility for special education and related services; and to determine if the student is a 'child with a disability'...; and the educational needs of the student.

7. DCPS failed to conduct a full and complete initial evaluation of the student within 120 days of receiving parent's May 1, 2009 request for complete and comprehensive evaluations.

8. The record reflects that more than a year and a half has elapsed since the student was last evaluated, and determined ineligible, and nearly a year has elapsed since Petitioner's request for complete and comprehensive evaluation of the student, to reassess and determine his eligibility for services.

CONCLUSIONS OF LAW

1. An LEA's duty to identify, locate and complete the evaluation of a student starts "as soon as a student is identified as a potential candidate for special education services." Id. See, e.g., *Hawkins, 539 F.Supp.2d 108; Abramson, 493 F.Supp.2d at 85* (explaining that once a child is identified, the LEA "is then obligated to move forward with the requirement of [IDEA] *35 §1414(a)(1) and determine whether the student is in fact a child with a disability"); which failed to occur in this matter. *See, Integrated Design and Electronics Academy Public Charter School, v. McKinley, 570 F.Supp.2d 28 (2008).*

2. DCPS failed to comply with the D.C. Mun. Regs. Tit. 5, §3002.1(d) (2003) which requires that the local education authority ensure procedures are implemented to identify, locate, ***and evaluate*** children with disabilities residing in the District of Columbia.

3. DCPS failed to comply with the D.C. Mun. Regs. Tit. 5, §3005.1 (2003) which provides that DCPS "shall ensure that a ***full and individual*** evaluation is conducted for each child being considered for special education and related services in order to determine if the child is a 'child with a disability'...; and the educational needs of the child; which DCPS failed to complete.

4. DCPS failed to comply with D.C. Mun. Regs. Tit. 30, §3005.7, by failing to ensure that the student was 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 [and] in evaluating each child with a disability; and that the evaluations conducted were ***sufficiently comprehensive*** to identify all of the child's special education and related services needs.

5. Failure to act on Petitioner's May 1, 2009 request for complete and comprehensive evaluations is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA." See *Harris v. District of Columbia*, Civil Action No. 07-1422 (RCL).

6. DCPS failed to comply with Chapter 25B, §38-2561.02 (a); which provides that DCPS to 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 is referred for an evaluation or assessment. *See, Dorros v. District of Columbia, 510 F.Supp.2d 97 (2007); Integrated Design and Electronics Academy Public Charter School v. McKinley, 570 F.Supp.2d 28 (2008); Jones ex rel. A.J. v. District of Columbia, 109 LRP 52722 (2009).*

Decision

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS denied the student a free appropriate public education (FAPE); by failing ***evaluate*** and determine the student's eligibility for special education services, pursuant to parent's request; in violation of the *"Child Find"* provisions of the D.C. Municipal Regulations, and "The Individuals with Disabilities Education Act ("IDEA")", reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA").

VII. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED,** that within ten (10) school days from the date of this decision, the DCPS Student Support Team (SST) shall refer the student to a Multidisciplinary Development Team (MDT), which shall issue a finding that the student is disabled and eligible for receive special education services, as an emotionally disturbed student, as defined by the IDEA; develop an IEP for the student; discuss and identify an alternate placement for the student, including consideration of a residential placement for the student; and issue a Notice of Placement, placing the student in an alternate program for emotionally disturbed students, pending review of the independent evaluations; and it is further

2. **ORDERED**, that DCPS shall fund the following independent evaluations: Comprehensive Psychological Evaluation (cognitive, educational, clinical components, Social History); Speech and Language, vision screening, Psychiatric Evaluation (including medication assessment); Educational; occupational therapy; and a "rule out" for Attention Deficit Disorder (ADD)/Attention Deficit Hyperactivity Disorder (ADHD), and a Learning Disability; and a Functional Behavioral Assessment; and it is further

3. **ORDERED**, that within ten (10) calendar days of receiving the results of the final independent evaluation, DCPS shall reconvene an MDT/IEP team meeting to: review the independent evaluations, and implement evaluation recommendations; review and revise the student's IEP, based on the findings and recommendations in the evaluations, as necessary; discuss and identify a permanent placement for the student, including consideration of a residential placement; and issue parent a Notice of Placement, for a permanent placement for the student; and it is further

4. **ORDERED**, that DCPS shall send all notices and schedule all meetings through
parent's Attorney, in writing, via facsimile, with copies to the parent in writing by first class mail.

5. **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further

6. **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further

7. **ORDERED,** that DCPS shall schedule all meetings through counsel for the student and parent, Attorney Olekanma A. Ekekwe, in writing, via facsimile at (800) 524-2370; and it is further

8. **ORDERED**, that this decision and order are effective immediately

VIII. APPEAL RIGHTS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date of this decision.

Ramona M. Justice — Date Filed: *2-26-10*

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Tanya Chor, Office of the Attorney General
Attorney Olekanma A. Ekekwe: Fax: 800-524-2370