DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

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STUDENT HEARING OFFICE
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Confidential

STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER'S DETERMINATION** Date: April 26, 2009 **Hearing Officer: Wanda I. Resto, Esquire**

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

I. PROCEDURAL BACKGROUND

On March 13, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to identify, locate and evaluate the Student within the statutory required time. The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to fund an independent clinical-psychological-educational evaluation, and any other assessments recommended. Additionally, the Petitioner requests the Respondent to within 10 school days of the receipt of the final evaluation convene a multidisciplinary team ("MDT") with the appropriate personnel to review the evaluations; determine eligibility for special education and if eligible develop an Individualized Education Plan ("IEP"), discuss placement If warranted and for the MDT to determine a compensatory education plan for the Student.

On March 23, 2009, the Respondent filed its Response to Parent's Administrative Due Process Complaint, Notice of Insufficiency, and Motion to Dismiss was filed. *The Respondent asserts that on* January 27, 2009, the Special Education Coordinator sent an invitation letter to the parent for an IEP meeting and did not receive a response. The Respondent held on March 13, 2009, a Student Evaluation Plan ("SEP") meeting, prepared a plan and consent to evaluate was obtained from the parent.

After various attempts s a pre-hearing conference call was held with Counsel for both parties on April 14, 2009.[2] During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Petitioner asserts that on November 18, 2008, the parent was told that the Student would be evaluated and it has not happened. The Petitioner claims that the violation has harmed the parent by significantly impeding the Petitioner's participation in the decision-making process. The Respondent asserts that the Petitioner cause 45 days delay in the evaluation process. The Respondent further asserts that it has provided an education that is specifically designed to meet the child's unique needs, with support services that will permit him to benefit from the educational instruction. The Petitioner offered three witnesses; the Respondent offered one witness and both Counsels provided a synopsis of their witnesses' testimony.

Preliminary Matters

The Respondent alleges that that the Complaint fails to provide sufficient notice of facts to be able to respond, resolve or defend the issues raised. It's the Respondent's position that the Complaint fails to state a claim for which relief may be granted. Further argues the Respondent that the Complaint does not alleges specific procedural safeguards violation that it only alleges that this Student has not been offered a FAPE. The Respondent asserts that the Petitioner failed to explain what happened between November 18, 2008 when allegedly the Petitioner was told that the Student would be evaluated and March 13, 2009 when a SEP was prepared.

The Respondent further alleges that the claim of child find violations is moot because the Respondent has already commenced the evaluation process and the meeting for eligibility meeting cannot happen until all the evaluations are ready. Consequently argues the Respondent that the claim should be dismissed.

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[2] The Complaint was assigned to the current Hearing Officer on April 6, 2009.

The Petitioner correctly asserts the IDEIA places an affirmative obligation on states and local school districts—not parents-to identify, locate and evaluate all children, including migrants and the homeless, residing within the jurisdiction who have disabilities and are in need of special education or related services The Petitioner further asserts that in conformity with Reid vs. District of Columbia, 310 F. Supp 2d 137 (D.D.C. 2004); the duty to identify and evaluate the student "is triggered when the school has reason to suspect a child has a disability, and has a reason to suspect that special education services and related services may be needed to address the disabilities.

The Respondent's claim of insufficiency is not accurate 20 U.S.C. '1415(b) (7)(A)(ii) does not require a due process complaint to reach the level of specificity and detail of a complaint in a court of law. The purpose of the sufficiency requirement is to ensure that the other party will have an awareness and understanding of the issues forming the basis for the complaint. Due process complaints should be construed in light of Schaeffer v. Weast, 126St.Ct.528, 532 (2005) and Escambia County Board of Education v. Benton, 406 F. Supp. 2d 1248, 1259-1260 (2005) The standard set in Schaeffer and Escambia for reviewing the sufficiency of a due process request is a minimal pleading standard and is lower than the standard for reviewing complaints in court.

The Complaint filed by the Parent in this matter, contains all the relevant information along with a description of the failure to identify, locate and evaluate the Student within the statutory required 120 days; and it contains proposed resolutions by the Parent. Making the Complaint sufficient, and in conformity with the IDEA. See 20 U.S.C. 1415(b)(7) and its regulations at 34 C.F.R. 300. § 508(b).

A hearing was held on April 17, 2009. The Petitioner presented a disclosure letter dated April 10, 2009 to which thirty documents were attached, labeled P-1 through 30 and which listed five witnesses. Three witnesses testified –the Mother, and two Education Advocates. The Respondent presented a disclosure letter dated April 9, 2009 identifying three witnesses and to which four documents were attached, labeled DCPS 1 through 4. Two witnesses testified – the Special Education Coordinator and the School Principal. All the documents were admitted into evidence.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Has the Respondent failed to timely evaluate the Student to determine possible special education needs?

2. Did the Respondent fail to convene an IEP team to review the findings and recommendations of assessments, determine eligibility for special education and its related services, develop an appropriate IEP and provide a placement where the IEP may be implemented?

3. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. The Student and the parent are residents of the District of Columbia.

2. The Student this school year has been suspended three times for approximately four days each time for fighting and aggression towards teacher, and being disruptive in class. The mother has received many calls from the teacher and the Principal about the Student's behavior. The Student walks out of class, is aggressive and not doing his work. In September of 2008 he was suspended approximately three days, and then he was suspended again twice in October. [3]P10 -11 student incident report September 18, 2008

3. On November 18, 2008 the school Principal and the Counselor had a meeting with the parent to discuss the Student's behavior and how to get him on the right track. They talked about getting the Student evaluated for "emotional reasons because of his behavior and to figure out what to do with him", the Mother did not receive any documents to sign. In December 2008 the Student's pediatrician diagnosed the Student with Attention Deficit Hyperactivity Disorder ("ADHD"), and recently the Student began taking 13 mg of Concerta. In January 2009 the Principal said that the Student could not be in a large classroom and he would be put in a smaller class, and that has not happened. The Mother believes the Student has been harmed because she does not know how to help him.[4]

4. A student support team meeting ("SST") meeting happened prior to the MDT meeting. The SST was composed of a counselor, the parents, the Principal, a teacher and the mother and it discussed possible strategies to try and maintain the Student in the regular education setting, the student was referred to the social worker on November 18, 2008 and the mother indicated she would also get outside counseling for the Student. The Principal and the mother met again in December and talked about the student's behavior and the possibility of public charter schools as an option. The Student was moved to another class in January of 2009, but the Student refused to stay in that new classroom. The Student's teacher has told the Principal that the Student could do better work if he focused and that his behavior is not impacting his academics. [5]

5. The educational advocate observed the Student is in a class with 28 other students, she saw that the Student could not follow the task, was quick to respond; however, twice as many times he was wrong. The Student had a short attention span, and could not stay on task more than 5 minutes.[6] P12 educational advocates notes-accepted due weight will be given. During the observation the Student's teacher reported that the student has good and bad days and that mornings are better than afternoon.

6. On January 26, 2009, the Petitioner requested the Student's educational records and included an authorization to evaluate signed by the parent on December 29, 2008. [7]

7. On January 27, 2009, the Special Education Coordinator ("SEC") -offered three dates for a meeting, the parent was not available for two of them. The letter indicates that the SEC received on

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[3] Testimony of the Mother and P10 -11 Student incident report September 11 and 18, 2008.

[4] Testimony of the Mother.

[5] Testimony of the school Principal.

[6] Testimony of the Female Education Advocate.

[7] P15, 20-23 Petitioners' letter dated January 26, 2009 request for records, representation and consent to evaluate form.

January 26th a letter with the parent's consent to evaluate signed on December 29, 2008 and noting that nearly a month had passed before the request was received by the school. In that letter, the Respondent offered February 3rd, 6th and the 10th as meeting dates, Parent's Counsel offered February 20, 2009. The morning of the meeting, the Education Advocate ("EA") cancelled the meeting. [8]

8. On February 20, 2009 the EA sent a letter inviting the Petitioner to a meeting. Counsel for the Petitioner chose March 13, 2009 as the meeting date.

9. On March 4, 2009, the Principal sent a letter reminding the Petitioner of the March 13, 2009 meeting and indicating that meeting dates to complete the intake process have been proposed previously without success, and that evaluations cannot begin until a DCPS consent form is signed.[9]

10. On March 13, 2009, a Student Evaluation Plan ("SEP") was prepared and written consent for the Respondent to evaluate was obtained from the parent. From February 20 through March 13, 2008 the mother was available for a meeting but did not accept the dates offered by the Respondent.[10] The evaluation process has begun, the education evaluation was completed on March 17, 2009 and the cognitive evaluation is complete, the report is to be written within a week. The meeting to discuss the evaluations and determine eligibility has not taken place.[11]

11. An EA participated in the March 13, 2009 SEP meeting. The Student's functioning in the classroom was discussed. The MDT meeting had not convened sooner because an EA had an emergency. The EA requested a comprehensive psychological and a social history. The MDT agreed to evaluate within a reasonable time starting from the month of March. The EA disagreed because the starting date for timelines for the evaluation should have been from November 2008 when the Principal and the parent had a conversation.[12]

12. The Student needs more one to one attention and completes less schoolwork than most boys in his grade. He is easily distracted and the teacher is concerned about the way the Student interacts with his peers; she believes it seriously impairs the Student's classroom performance. The Student demonstrates very serious and disruptive uncooperative, withdrawn, aggressive, and other inappropriate (not aggressive) behaviors. The teacher rated the Student's levels of oral expression, listening comprehension, basic reading skill, reading comprehension, mathematic calculation, mathematics reasoning, basic reading skill and written expression as average and within the fourth grade level. The Student's overall academic skills and the ability to apply academic skills are in the average to advance level, when compared to others at his grade level, the Student's standard score are high average in math calculation skills and brief writing. The standard scores are average in broad reading, brief reading, broad mathematics, brief mathematics, broad written language, and written expression. No significant strengths and weaknesses were found among the scores in the achievement areas.[13]

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[8] DCPS2-DCPS' Letter of invitation January 27, 2009

[9] DCPS3 - March 4, 2009 letter from the Principal.

[10] P-19 - March 13, 2009 consent to evaluate, and testimony of the Mother.

[11] Testimony of the special education coordinator, DCPS1- Educational Evaluation dated March 17, 2009, and DCPS 2 Petitioners' February 20, 2009 Letter of cancellation of meeting.

[12] Testimony of the Male Education Advocate.

[13] DCPS1- Educational Evaluation dated March 17, 2009.

IV. CONCLUSIONS OF LAW

Burden of Proof:

Pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; in this case the parent. 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)."

FAPE Determination

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

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

The Petitioner/Student, who filed the hearing request, did not meet the burden of proof in this case because the Student:

1. did not prove that the Respondent failed to identify, locate and evaluate the Student in violation of the IDEIA;
2. failed to prove that a procedural violation cause the Student an educational harm.

Time Frame for Initial Evaluations

The IDEIA at 20 U.S.C. 1412(a)(3), and its regulations at § 300.111, require that the Respondent have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. While pursuant to the D.C. Code § 38-2501, initial evaluations are to be completed "within 120 days from the date that the student was referred for an evaluation."

The School District is required to locate, identify, and evaluate all children, with disabilities, including children with disabilities attending private schools in the school district, and homeless children. The process of locating, identifying, and evaluating children with disabilities is known as child find.

Eligibility determination

1. <u>Meeting to determine eligibility for special education services</u>

The Respondent presented credible evidence that efforts were made to convene an MDT/IEP meeting. The eligibility process and the MDT/IEP meeting were delayed for a number of reasons that were not in the control of the Respondent. The SST was put in place to discuss strategies prior to special

education interventions. Additionally, the evidence is that more than a month passed before the Petitioner's Counsel sent the consent to evaluate to the LEA. There also is evidence that steps were taken by the Respondent to convene meetings and the Petitioner because of the EA absence decided not to attend. From February 20 through March 13, 2008 the mother was available but did not accept dates for a meeting, and meeting to obtain consent to evaluate was delayed 35 days by again a choice of the Petitioner.

2. Evaluation of the Student

D.C. Mun. Regs. tit. 5, §3005.5 (2006) requires that "qualified evaluators [administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. tit. 5, §3005.5 (2006). All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. tit. 5, § 3005.9(g) (2006). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. tit. 5, § 3005.9(h) (2006).

A review of the educational evaluation indicates "the Student demonstrates very serious and disruptive uncooperative, withdrawn, aggressive, and other inappropriate (not aggressive) behaviors. The teacher rated the Student's levels of oral expression, listening comprehension, basic reading skill, reading comprehension, mathematic calculation, mathematics reasoning, basic reading skill and written expression as average and within the fourth grade level. The Student's overall academic skills and the ability to apply academic skills are in the average to advance level, when compared to others at his grade level, the Student's standard score are high average in math calculation skills and brief writing.

The evaluation shows behavioral problems but does not reflect any significant deficiency in academics or that special education services are needed. There was no evidence provided on how and whether the Respondent actions or inactions impacted negatively on the child. While it can be argued that the evaluation period should have begun as soon as November 2008 when the Mother spoke with the Principal, there was no evidence that there was a substantive violation to the Student's rights. The evaluation process has begun and the Respondent has agreed to a meeting as soon as the reports of the evaluations are received. Furthermore, the Petitioner contributed to the delay in the process. Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.

Pursuant to the IDEIA at 20 U.S.C. § 1414 (E)-(ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

i. impeded the child's right to a free appropriate public education;
ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
iii. caused a deprivation of educational benefits."

In the present case there was no evidence put forth that would be sufficient to meet any of

V. SUMMARY OF DECISION

The Petitioner failed to provide evidence on how and whether DCPS actions or inactions produced an educational harm to the child or that the parent was seriously deprive of her participation or rights under the IDEIA. There was no evidence that a substantive violation to the Student's rights has occurred. Therefore, in consideration of the evidence, the hearing officer finds that the Respondent did not deny the Student a FAPE.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint **is Dismissed.**

This order resolves all issues raised in the Petitioner's March 13, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the **FINAL ADMINISTRATIVE DECISION**. An Appeal can be made to a court of competent jurisdiction within ninety **(90)**-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

/s/WIRestorres electronically signed
Wanda I. Resto - Hearing Officer

Date: April 26, 2009