

**District of Columbia  
Office of the State Superintendent of Education**

**Office of Review and Compliance**

**Student Hearing Office**

**Terry Michael Banks, Due Process Hearing Officer**

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**Confidential**

STUDENT, through the legal guardian <sup>1</sup>	)	Complaint Filed: February 27, 2009
	)	
Petitioner,	)	Prehearing Order: March 25, 2009
	)	
v.	)	Hearing Date: April 1, 2009
	)	
THE DISTRICT OF COLUMBIA	)	Docket No.
PUBLIC SCHOOLS	)	
	)	
Respondent.	)	
	)	
Student Attending:	)	
School	)	

OSSE  
STUDENT HEARING OFFICE  
2009 APR 13 AM 9:29

**HEARING OFFICER'S DECISION**

<b>Counsel for the Petitioner:</b>	Chike A. Ijeabunwu, Esquire 6495 New Hampshire Avenue, Suite 200 Hyattsville, Maryland 20783-3245 (301) 270-9170; Fax (301) 270-9173
<b>Counsel for DCPS:</b>	Daniel McCall, Esquire Office of the General Counsel, DCPS 825 North Capitol Street, N.E.; 9 <sup>th</sup> Floor Washington, D.C. 20002

<sup>1</sup> Personal identification information is provided in Attachment A.

## **Jurisdiction**

This hearing was invoked in accordance with the rights established under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **Background**

Petitioner is a \_\_\_\_\_ year-old student attending \_\_\_\_\_ School. On February 27, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the District of Columbia Public Schools ("DCPS") failed to (1) evaluate Petitioner in all areas of suspected disability, (2) evaluate Petitioner at the request of the parent, (3) evaluate Petitioner timely, (4) perform a functional behavior assessment ("FBA") and develop an intervention behavior plan ("IBP"), (5) classify Petitioner, (6) identify Petitioner as a child with a disability, (7) invite Petitioner's parent to a Multidisciplinary Team ("MDT") meeting, (8) and provide Petitioner's educational records.<sup>2</sup> The due process hearing was convened on April 1, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing.

## **Record**

*Due Process Complaint Notice* dated February 27, 2009  
*District of Columbia Public School's Second Amended Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice* dated March 24, 2009  
Prehearing Order dated March 25, 2009  
DCPS' Five-Day Disclosure dated March 25, 2009 (Exhibits 1-2)  
Petitioner's Five-Day Disclosure dated March 25, 2009 (Exhibits 1-4)  
Attendance Sheet dated April 1, 2009  
CD-Rom of Hearing conducted on April 1, 2009

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<sup>2</sup> In the Prehearing Order, the Hearing Officer narrowed the issues to childfind and the failure to provide access to Petitioner's records: "All of the other allegations in the *Complaint* relating to evaluations and childfind violations are redundant of the first bulleted issue [DCPS' alleged failure to complete childfind procedures within prescribed timelines] and will not be specifically adjudicated. This includes the following allegations: the failure to (1) evaluate Petitioner in all areas of suspected disability, (2) classify Petitioner, and (3) invite Petitioner's parent to an MDT meeting."

## **Witnesses for Petitioner**

Petitioner's Mother  
Petitioner

## **Witnesses for DCPS**

None

## **Findings of Fact**

1. Petitioner is a \_\_\_\_\_ year-old student attending \_\_\_\_\_
2. On August 7, 2008, Petitioner's counsel filed a request with the principal at \_\_\_\_\_ to have Petitioner evaluated to determine her eligibility for special education services.<sup>4</sup>
3. Petitioner is repeating the \_\_\_\_\_ grade at \_\_\_\_\_. She has been persistently truant for most of the 2008-2009 school year.<sup>5</sup>
4. Petitioner is failing all of her courses and her poor attitude causes her to be routinely removed from class. Petitioner's attendance and attitude have improved since she started to attend evening classes in the \_\_\_\_\_ program in February 2009.<sup>6</sup>
5. DCPS has not evaluated Petitioner.
6. On March 20, 2009, the Office of the Chancellor of DCPS issued a letter to Petitioner's counsel authorizing Petitioner to obtain an independent comprehensive psychological evaluation and an independent functional behavior assessment ("FBA"). The letter provided that "DCPS will reimburse reasonable and documented fees for this student's requested evaluations."<sup>7</sup>

## **Conclusions of Law**

The LEA must evaluate a child suspected of a disability 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

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<sup>3</sup> *Complaint* at 1.

<sup>4</sup> Petitioner's Exhibit ("P.Exh.") No. 3.

<sup>5</sup> Testimony of Petitioner's mother.

<sup>6</sup> Testimony of Petitioner.

<sup>7</sup> DCPS Exh. No. 1.

motor abilities.<sup>8</sup> Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.<sup>9</sup>

DCPS did not respond to Petitioner's August 7, 2008 request for evaluations. Moreover, despite Petitioner having failed the ninth grade in 2008 and despite her antisocial attitude, DCPS took no unilateral action to evaluate Petitioner. DCPS' sole defense is that it authorized an independent comprehensive psychological evaluation after the *Complaint* was filed. However, that offer was conditioned on Petitioner first paying for the evaluation and then seeking reimbursement for "reasonable" fees for the evaluation. "Reasonable" is not defined in the Chancellor's Office's letter of March 20<sup>th</sup>. If "reasonable" is intended to incorporate the requirements of 5 D.C.M.R. Section 3027.5, that intention should be explicit. Moreover, the Hearing Officers were advised by officials of the Office of the State Superintendent of Education ("OSSE") at a training session many months ago that the DCPS Superintendent's Directive of 2002, that sets limits on fees for evaluations, had been suspended. This Hearing Officer has never been informed that the Directive has been reinstated. Moreover, there is no longer a "Superintendent" of DCPS, which underscores the fact that the "reasonableness" of the fee limitations in the Directive has not been reviewed for a considerable period of time. For these reasons, this Hearing Officer will not limit successful litigants to arbitrary fee limitations for independent evaluations. November 19, 2008

Under local law, DCPS has 120 days to conduct initial evaluations and determine a child's eligibility for special education services ("childfind").<sup>10</sup> In this case, Petitioner's educational advocate initiated childfind proceedings on August 7, 2008. As of the date the *Complaint* was filed, February 27, 2009, DCPS still had not begun to evaluate Petitioner. The Hearing Officer concludes that Petitioner has met her burden of proving that DCPS failed to evaluate Petitioner in all areas of suspected disability, and failed to complete childfind proceedings within 120 days of the August 7, 2008 referral.<sup>11</sup>

## ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented at the hearing, and the representations of the parties' counsel at the hearing, this 11<sup>th</sup> day of April 2009, it is hereby

**ORDERED**, that Petitioner is authorized to obtain an independent comprehensive psychological evaluation and an independent FBA and *is not bound by 5 D.C.M.R. Section 3027.5*. Petitioner's counsel shall provide copies of the completed evaluations to

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<sup>8</sup> 34 C.F.R. §300.304(c)(4).

<sup>9</sup> 34 C.F.R. §300.303(b)(2).

<sup>10</sup> D.C. Code §38-2561.01(a).

<sup>11</sup> 5 D.C.M.R. §3004 (a) and (b)(1) provides that a referral for evaluations may be initiated in writing by the parent.

the Special Education Coordinator at \_\_\_\_\_ and the DCPS Office of Special Education (“OSE”) Legal Unit<sup>12</sup> by facsimile transmission and first-class mail along with a written request to schedule the MDT meeting described below.

**IT IS FURTHER ORDERED**, that within fifteen school days of its receipt of the independent evaluations, DCPS shall convene an MDT meeting. DCPS shall coordinate scheduling the MDT meeting, and any meeting in which Petitioner’s placement is discussed or determined, with Petitioner’s counsel, Chike Ijeabuonwu, Esquire. The MDT shall review all current evaluations and determine Petitioner’s eligibility for special education services. If the MDT determines that Petitioner is not eligible, it shall issue a Notice of Ineligibility. If the MDT determines that Petitioner is eligible for services, it shall develop an IEP and discuss placement alternatives.

**IT IS FURTHER ORDERED**, that DCPS shall afford Petitioner’s parent an opportunity to participate in any meeting in which Petitioner’s placement is discussed or determined. The DCPS placement representative shall advise Petitioner’s parent of the advantages and disadvantages for Petitioner with respect to each school that is discussed, including any schools proposed by the parent. DCPS shall provide Petitioner’s parent in an explanation for the placement DCPS proposes, and the reasons for the proposal shall be provided in the Meeting Notes. DCPS shall issue a Prior Notice within seven days if Petitioner is placed in a public facility or within 30 days if Petitioner is placed in a private facility.

**IT IS FURTHER 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 OSE Legal Unit to attempt to bring the case into compliance prior to filing a hearing request alleging DCPS’ failure to comply.<sup>13</sup>

**IT IS FURTHER 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.

**IT IS FURTHER ORDERED**, that this Order is effective immediately.

### **Notice of Right to Appeal Hearing Officer’s Decision and Order**

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision may bring a civil action in any state court of competent

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<sup>12</sup> [ose.legalunit@dc.gov](mailto:ose.legalunit@dc.gov); fax: (202) 645-8828.

<sup>13</sup> If DCPS fails to contact Petitioner’s counsel to coordinate scheduling the MDT meeting by a date that would make compliance with this Order feasible, Petitioner’s counsel shall initiate telephone calls and electronic correspondence to attempt to effect compliance within the timelines set out herein.

jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) days of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

\_\_\_\_\_/s/\_\_\_\_\_  
Terry Michael Banks  
Hearing Officer

Date: April 11, 2009