

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE 2nd Fl.
Washington, DC 20002

PETITIONER, on behalf of
[STUDENT],¹

Date Issued: May 26, 2012

Petitioner,

Hearing Officer: Ternon Galloway Lee

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
2012 MAY 29 AM 9:19

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCUDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT ("Parent"), through her attorney, under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint ("Complaint"), Parent alleges that District of Columbia Public Schools ("DCPS") failed to provide Student a Free Appropriate Public Education ("FAPE") because DCPS failed to conduct initial evaluations and determine Student's eligibility within 120 days from Parent's request for evaluation. Parent also contends that DCPS failed to provide FAPE because it did not conduct a comprehensive evaluation on or about July 21, 2011.

For relief, Petitioner seeks an award of compensatory education.

Student, a teenager, is a resident of the District of Columbia. Subsequent to Parent filing her Complaint on March 12, 2012, on April 10, 2012, Student was found eligible for special education services under the disability category, Other Health Impaired. Parent's Complaint named DCPS as respondent. The Hearing Officer was appointed on March 13, 2012. The parties met to discuss resolution on March 22, 2012; however, settlement was not reached.

¹ Personal identification information is provided in Appendix A.

Initially the case was placed on an expedited track; however, Petitioner's counsel withdrew the request for an expedited hearing after determining Student had not been suspended for more than 10 school days² nor had Student been placed in an interim alternative educational setting under 34 C.F.R. § 300.530(g). Thus, it was determined that an expedited hearing was unjustified and the hearing would proceed as a non-expedited one. Accordingly, the 30 day resolution period under 34 C.F.R. § 300.510 applied in this case. No request was made to adjust the resolution period applicable and it was agreed that the non-expedited 45 day due process hearing time period would begin on April 11, 2012. Also during the prehearing conference ("PHC") held on April 11, 2012,³ the issues were further clarified and determined as well as other matters related to managing the case and the due process hearing.

The Hearing Officer held the due process hearing on May 2, 2012, at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public by Parent's choice, was recorded on an electronic audio recording device. Petitioner was represented by an attorney at the hearing as well as DCPS. On behalf of Parent, three witnesses testified – Parent, the educational advocate, and the Special Education Coordinator. No witnesses testified on behalf of DCPS by its choice. The Hearing Officer admitted Parent's Exhibits P-1 through P-21.⁴ She also admitted DCPS' exhibits R-1 through R-3.⁵

II. ISSUES

The issues presented to the Hearing Officer to be determined are as follows:

A. Whether pursuant to D.C. Code § 38.2561.02 and 20 U.S.C. § 1414 (a) (1), DCPS denied Student a FAPE when it failed to conduct initial evaluations and determine Student's eligibility within 120 days from Parent's June 27, 2011 request for evaluation?⁶

B. Whether DCPS denied Student a FAPE when it failed under 34 CFR § 300.304 to conduct a comprehensive evaluation on July 21, 2011?⁷

Petitioner seeks an award for compensatory education should the Hearing Officer find a denial of FAPE.

² Under 34 C.F.R. §§ 300.530; 300.532(c); and 300.536(a), Student is entitled to an expedited hearing if he (1) has been suspended for more than 10 consecutive school days or (2) removed for disciplinary reasons from his current placement for more than 10 school days within a school year and those removals constitute a change in placement.

³ The Hearing Officer held an initial PHC on March 29, 2012. At that proceeding there was a dispute regarding whether this case should proceed on an expedited schedule. After lengthy discussions, the Hearing Officer determined additional time was needed to clarify the issues. Thus, the April 11, 2012 PHC was set.

⁴ "In this HOD, P" refers to Petitioner's exhibits, "R" to Respondent's exhibits.

⁵ At least five business days prior to the hearing, the Hearing Officer had informed counsel that all emails, correspondence, documents, notices, and orders she had received/issued would be made part of the record.

⁶ Information presented in the Complaint suggests Parent provided her consent for Student's evaluation on or about June 27, 2011.

⁷ Issues in addition to the two certified were presented in the Complaint, but Counsel agreed they have been resolved or are moot.

III. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer Findings of Fact are as follows:

1. Student has been attending _____ since the _____ grade. He is now _____ years old and a _____ grader at _____ for the 2011-2012 school year. Student failed the sixth grade; however, he attended summer school in 2011 and passed two courses. He was then promoted to the seventh grade. (P-8, p. 3; P-13, p. 3). Student had 44 disciplinary infractions during the 2010-2011 school year. (P-13, p. 3). As noted below here in Findings of Fact #15," Student continues to have similar behavior problems during the 2011-2012 school year with more frequency. Those problems include but are not limited to difficulty controlling his temper, not responding to authority figures, and overreacting when redirected. (P-13, p.4; P-18).
2. Student receives counseling for anger management through First Home Care ("FHC"), a mental health provider obtained by Parent to assist Student in handling his anger. Reportedly, staff at this agency has given Student a diagnosis of Oppositional Defiant Disorder ("ODD"). (P-13, p. 4)
3. On June 27, 2011, Student's mother requested DCPS evaluate Student to determine eligibility for special education and related services because of her concerns about his failing classes and many behavior problems. As noted above, Student had 44 behavior infractions during the 2010 - 2011 school year. During what DCPS described as a MDT/IEP meeting on June 27, 2011, Parent provided written consent for Student to be evaluated. (P - 11, 12, 14, 15, and 17; Testimonies of Parent and Special Educational Coordinator ("SEC")).

A. July 21, 2011 Psychological Assessment

4. DCPS then caused Student to undergo a confidential psychological evaluation which resulted in a Confidential Psychological Evaluation report dated July 21, 2011 ("July 21, 2011 Psychological Assessment"). In the report the school psychologist noted that Student had experienced academic and behavioral issues throughout the 2010-2011 school year and failed all his classes. The school psychologist also reported that in early February 2011, a functional behavior assessment ("FBA") had been conducted and a behavior intervention plan ("BIP") developed, but there was no information indicating the BIP had been implemented. (P - 14).⁸
5. No interviews and/or observations were conducted during the July 21, 2011 psychological assessment. Further, the school psychologist performed no testing, nor did she obtain any behavior ratings from teachers and others who knew or worked with Student. The explanation offered by the school psychologist for not using these tools to evaluate Student was consent was not obtained until summer 2011⁹ and more information was needed from Student's

⁸ The evidence did not establish the exact date in February 2011, that reportedly the FBA was done and the BIP developed.

⁹ The evidence establishes that Student's father did not give consent for an evaluation during the second semester of the 2010-2011 school year. It is not clear which parent Student resided with during this time and whether any attempt was made to obtain the mother's consent prior to June 27, 2012. (P- 13, p. 3)

sixth grade teachers who were not available to provide the school psychologist with input during the summer for an evaluation; the referral question was not clear; DCPS was waiting on more information from Parent and/or Student's community base service provider; and the structure of summer school, which Student was attending during the time of the July 21, 2011 evaluation, was much different from regular school. (P - 14, pp. 1-2, 4).

6. The evaluator also requested in her report that a multi-disciplinary team ("MDT") meeting be convened and a formal "SEP"¹⁰ meeting be held soon after the beginning of the 2011-2012 school year. Further, she noted that the participants in the MDT and SEP meeting should include a teacher(s) who taught Student during the 2010-2011 school year. Also, she suggested documentation on strategies used in the classroom and the results of using those strategies should be made available at the MDT meeting she recommended. (. P-14, p. 3)

B. July 23, 2011 Social Work Assessment

7. A confidential social work assessment was conducted also pursuant to Parent's request for Student to be evaluated for special education. The report of the Social Work Assessment was submitted on July 23, 2011 ("July 23, 2011 Social Work Assessment"). (P-15).

8. The social worker conducting the evaluation determined that Student was under great psychological distress. (P-15, p. 5)

9. In the July 23, 2011 Social Work Assessment, the evaluator also recommended that Student undergo comprehensive, psychological testing. Specifically, the evaluator recommended that cognitive, achievement, behavior, and personality tests be administered to Student. She suggested behavior ratings be obtained as well. The evaluator explained in her report that cognitive and achievement tests will provide Student's MDT with some information about Student's cognitive capabilities as compared to his classroom achievement. Further, she noted that behavior and personality testing would be especially helpful in understanding Student's disruptive behavior. (P-15, p. 5).

C. November 21, 2011 Meeting

10. On November 21, 2011 an IEP/eligibility meeting ("November 21, 2011 meeting") was held to review student evaluations. Those participating in the meeting were Parent; the school psychologist, who conducted the July 21, 2011 psychological evaluation; another psychologist, Dr. N; and a special education teacher. (P-11).

11. No decision was made about Student's eligibility at the November 21, 2011 meeting. The evidence does not establish that prior to or after the November 21, 2011 meeting, DCPS issued Parent a prior written notice indicating Student was not eligible for services. Notes of the November 21, 2011 meeting reflect that the school psychologist who conducted the July 21, 2011 psychological assessment contended that more information was needed about Student to determine his eligibility. Specifically reflected in the notes was that this school psychologist sought additional information about Student from Parent to include information from Student's

¹⁰ The evidence did not establish what the acronym "SEP" represented.

community service provider; a social history; documentation regarding strategies, modifications and accommodations implemented by Student's teachers; and information from FHC – as noted above, a community base provider of anger management services to Student. (P – 11; P – 13; Testimony of SEC).

12. During the November 21, 2011 meeting no disability worksheets were used to assist the participants in considering all categories of disabilities and determining if Student met any category of disability. (Testimony of SEC).

13. DCPS held no meetings to evaluate/determine Student's eligibility prior to the November 21, 2011 IEP/eligibility meeting. (Testimony of SEC).

D. March 23, 2012 Psychological Assessment

14. The school psychologist who conducted the July 21, 2011 psychological assessment conducted a more comprehensive psychological assessment of Student on March 14, 2012. The ensuing report was prepared on March 23, 2012. (P-13).

1. Problematic Behavior History

15. The March 23, 2012 Psychological Assessment report noted Student's history of extensive behavior problems. For example, the school psychologist stated that Student repeated the third grade and the explanation provided by Parent for the retention was Student missed 36 days during that school year for suspensions. Parent further expounded that Student had been assessed as having ODD, but the school failed to understand the diagnosis. (P – 13, p. 2). Also, the evaluator noted that during the 2010-2011 school year, Student received 44 behavior infractions. They included Student refusing to follow directions from teachers, talking back, lying, interrupting class, making inappropriate comments (including of a sexual nature), yelling, and on several occasions Student failing to report to detention. (P – 13, p. 4). The psychological report as well as Student's disciplinary log for the 2011-2012 school year reflect that from September 7, 2011, through January 26, 2012, Student had engaged in 47 behavior infractions which included skipping/walking out of class, refusing to follow school rules, displaying open defiance toward teachers, disrespecting peers and teachers, using inappropriate language, and over all noncompliance. Documentation of these behavior problems were also substantiated by teacher reports/observations. (P – 13, pp. 1, 4, and 6).

The March 23, 2012 Psychological Assessment report also indicated that due to Student's anger control problem, he receives anger management services from FHC. The March 23, 2012 Psychological Assessment indicates the school psychologist reviewed Student's individualized service plan developed by FHC.¹¹ Documentation from FHC indicated Student was diagnosed with ODD. (P – 13, p. 4). Further FHC individualized service plan reported that "Student gets in trouble at school due to his temper, that he does not respond well to authority figures and overreacts when redirected.... He can be disrespectful when angry and does not care to whom he is showing disrespect." The school psychologist noted that needs and goals identified in the plan included Student being respectful to teachers, attending afterschool tutoring, avoiding in school

¹¹ The evidence did not provide a date for the individualized service plan.

suspensions, respecting adults, and following class rules. She noted that the goals were about identifying feelings and emotions, controlling anger and impulsive behaviors, maintaining a positive relationship with Parent, being respectful to his mother, and choosing an appropriate group of friends. (P-13, p. 4).

Further, the March 23, 2012 Psychological Assessment reflected Student has a history of excessive absences from school during multiple school years. (P-13, p. 5).

2. FBA/BIP and Student's Grades

16. The psychological report also indicated that two FBAs and ensuing BIPs had been developed to address Student's behaviors. In her report, the school psychologist reported that in February 2011, a FBA had been conducted and a BIP developed, but there was no documentation to support the BIP's implementation. Her psychological report also noted that an FBA had been conducted November 2011; that it noted that (i) Student's poor academic performance and behavior issues were attributable to ineffective coping skills and impulsivity, and (ii) Student has limited problem solving and conflict resolution skills. The psychological report noted that a BIP had been developed and the targeted behaviors are as follows:

- (i) Student's inability to follow directions;
- (ii) Student's frequent class disruptions;
- (iii) Student's inappropriate comments and gestures to teachers and peers; and
- (iv) Students' poor academic performance.

The psychological report reflected that to address the targeted behaviors, Student would be able to:

- (i) use a cool-down pass as needed;
- (ii) receive tutoring;
- (iii) receive weekly in school group counseling; and
- (iv) receive in school individual counseling as needed.

Further, according to the March 23, 2012 Psychological Assessment, the BIP noted Student was to continue participating in outside wraparound services. (P-13, p. 5).

The Hearing Officer finds that no FBAs/BIPs were entered into evidence.

17. The school psychologist could not substantiate claims by Student's teachers that they had implemented strategies and interventions in the classroom. (P-13, p. 5).

18. The March 23, 2012 Psychological Assessment also indicated that Student's grades reflecting his progress as of February 27, 2012 were F's in math, English, social studies, and math lab. Student had a B in reading development and an incomplete in science. (P – 13, p. 4). The report also noted Student failed the sixth grade and was only promoted after taking two courses in summer school and passing them. (P-13, p. 3).

3. Procedures and Tests Administered

19. Procedures and tests administered to conduct the March 14, 2012 Comprehensive Psychological evaluation included the following:

- Classroom Observation
- Interview with teachers
- Interview with parent
- Interview with student
- Reynolds Intellectual Assessment Scales (RIAS)
- Woodcock-Johnson III Tests of Achievement (WJ III ACH)
- Behavior Assessment System for Children-Second Edition- Self Report- Adolescent (SRP-A)
- Behavior Assessment System for Children-Second Edition- Teacher Rating Scales- Adolescent (TRS-A)
- Behavior Assessment System for Children-Second Edition- Parent Rating Scales- Adolescent (PRS-A)
- Devereux Behavior Rating Scale- School Form (teacher and parent) (P-13).

a. Observations and Interviews

20. In assessing Student, the school psychologist interviewed Student's math teacher, Student's community service worker, and Student. The psychologist's interviews with Student's math teacher substantiated Student's behavior problems noted above. The teacher interviewed reported that Student's work in class is limited and he fails to complete homework and class assignments. Student was reported to be failing in math class. (P-13, p. 6). The community

service worker noted in his interview that while Student's behavior had improved, he continues to engage in impulsive behavior and has a major problem focusing. (P-13, p. 7). The school psychologist also remarked that while testing Student, she observed that his mood was constantly shifting and she had to get through as much of the testing as possible while she could engage Student. (P-13, p. 7).

21. Moreover, in her report the school psychologist described other observations of Student while she tested him on March 14, 2012. She described Student's behavior as bizarre at times. She noted he would push his chair back and paced the floor. He would make a loud outburst one moment and then become quiet afterwards. Further, she reported that during testing Student's behavior ranged from being cooperative, interested and motivated to being noncompliant, stubborn and defiant. The school psychologist noted that as a result of these behaviors, Student's testing results may not necessarily be a valid representation of his current levels of cognitive and academic functioning. (P-13, p. 8-9).

b. Reynolds Intellectual Assessment Scales (RIAS)

22. During the evaluation, the school psychologist also administered the Reynolds Intellectual Assessment Scales ("RIAS") to determine Student's general intelligence. The RIAS contains individual tests to determine an individual's verbal intelligence (Verbal Intelligence Index or "VIX") and nonverbal intelligence (Nonverbal Intelligence Index or "NIX"). The scores from the VIX and NIX are combined to determine Student's overall intelligence or Composite Intelligence Index. ("CIX"). The testing reflected Student's VIX was 94 and in the average range and Student's NIX score was 75 indicating Student was below average in this area. The school psychologist noted in her report that there was a 19 point difference between the two indexes, suggesting a real difference between these two domains. She noted the CIX was 83 which represented an overall cognitive potential in the low average range. The school psychologist qualified the CIX scoring by stating it may not be a reliable estimate of Student's intellectual abilities. As noted previously here, the school psychologist commented in her report that Student did not maintain focus throughout the testing and did not always appear to perform at his best. (P-13, pp. 9 - 10).

23. Administered subtests of the RIAS that are designed to assess non-verbal reasoning spatial ability indicated that Student was deficient in processing information and doing nonverbal problem solving. The school psychologist noted that this weakness may make the learning process more difficult for Student. (P-13, p. 11).

24. The school psychologist also administered testing to determine Student's working memory skills. The Student's Composite Memory Index ("CMX") scoring reflected his skills in this area. The school psychologist reported that Student's CMX score was 79 which indicated Student's memory skills fell in the moderately low average range. After considering Student's performance on the CMX, the school psychologist concluded that Student's retention of information presented verbally should be good. She noted that rote learning, where applicable, would be a useful tool for Student. She also noted that the testing revealed that Student was likely to not perform as well on tasks relying on visual spatial cues, and other nonverbal memory features. (P-13, p. 11). (P-13, p. 11).

c. Woodcock-Johnson III

25. The Woodcock Johnson III ("WJ III") is an academic achievement test. Several battery of test of achievement from the WJ III were administered to Student during the March 14, 2012 Psychological Assessment.. (P-13, p. 11).

26. The score Student obtained from being administered the WJ III indicated Student's overall achievement was in the low average range. Testing reflected that Student's academic skills and academic fluency were both in the average range. The school psychologist noted that Student did better on the testing he took first because as time passed, he lost focus. The psychologist concluded that the test scores do not accurately reflect what Student knows. She noted that Student "continues to fail his classes not because he's unable to understand the concepts and learn the skills, but because he is not investing in his school experience at a level that is conducive to success." (P-13, p. 12).

The Hearing Officer identifies a contradiction between the immediate above stated conclusion of the school psychologist and the school psychologist's finding that Student demonstrates an inability to self monitor and control his impulses and Student's behavior shows symptoms of ADHD. (P-13, p. 17; Findings of Fact number 35).

d. Behavior Assessments

27. The school psychologist administered the Behavior Assessment System for Children, Second Edition ("BASC-2") to assess the Student's behaviors and self-perceptions. The BASC-2 has five components: self-report of personality, teacher rating scales, parent rating scales, structural, developmental history, and student observation system. (P-13, p. 13).

28. The Student's scoring on the self-report component of the BASC-2 indicated his inattentiveness and hyperactivity fell in the clinically significant range, thus indicating a severe maladjustment. Further his sense of inadequacy scoring indicated Student fell in the at risk range, thus indicating a significant problem for Student. (P-13, p.14).

29. The teacher scales component of the BASC-2 was completed by two of Student's teachers.

Student's social studies teacher noted that Student engages an unusually high number of behaviors that adversely affect other children in the classroom and are disruptive to the class environment. She expressed concerns about Student being disruptive, intrusive and threatening. Further she expressed concerns about Student's inadequate social skills and difficulty overcoming stress and adversity. Also, this teacher noted Student had significant difficulty maintaining the level of attention needed at school. She noted Student has difficulty comprehending and completing school work. Also, this teacher expressed that Student's inattentiveness is likely interfering with his academic performance and his ability to function in the school environment. She also commented that Student lies. Student's "School Problems" score resulting from the social studies teacher's completed scale indicated Student has significant problems functioning at school. (P-13, p. 14).

30. Student's reading teacher also completed the teacher scale. Her assessment of Student was similar to that of the social studies teacher. The reading teacher noted that Student engages in a high number of behaviors that adversely affect other students in the classroom and are disruptive to the classroom. It was also noted that he had significant difficulty paying attention in class and that this inattentiveness was likely interfering with Student's school work and performance. This teacher also noted that Student engages in strange or odd behaviors that are disconnected from the school setting. She also reported that Student lies and cheats. This teacher's scale also reflected Student had severe difficulty functioning at school. (P – 13, p. 15).

31. The profile of Student presented by his Parent resulted in an "at risk" scoring indicating Student has significant behavior problems. Concerns expressed by Parent were about Student's aggression, attention problems, Student's tendency to be disruptive and intrusive, his poor social and communication skills, and his display of frustration and anger. Parent also noted that Student had difficulty overcoming stress and adversity. (P-13, p. 15).

32. Due to Student receiving elevated scores on hyperactivity and conduct problems based on the completed scales, the school psychologist determined that Student's externalizing problems composite score was in the clinically significant range, indicating Student has a severe disruptive behavior problem. (P – 13, p. 15).

33. The school psychologist reported that the BASC-2 testing indicated that Student presents as a typical adolescence, but he has difficulties at school and problems with attention and hyperactivity. (P-13, p. 13).

34. Of the four individuals rating Student - two teachers, Parent, and Student - the school psychologist found three indicated Student has conduct problems, two indicated Student displays oppositional behaviors, one indicated Student experiences some depression, and three (including Student) reported Student displays odd behaviors at a clinically significant level. (P-13, p. 15).

35. The school psychologist did not conclude that Student has an emotional disturbance. She did conclude that Student demonstrates an inability to self monitor and to control his impulses. She noted that a number of Student's behaviors and tendencies suggest he is ADHD. (P-13, p. 17). The school psychologist also concluded that there were specific characteristics of Student that seem to be associated with social maladjustment, which she noted was not a disability category for educational purpose. (P-13, p. 17).

E. April 10, 2012 Eligibility Meeting

36. DCPS held an eligibility meeting on April 10, 2012. Student's educational advocate, a general education teacher, a special education teacher, the SEC, the school psychologist who conducted the March 23, 2012 Psychological Assessment, another DCPS psychologist, and Parent attended the meeting. A teacher report was made, the psychological evaluations, and an educational evaluation were reviewed as well as other data. The team also utilized a disability worksheet to determine if Student met a disability category. It then found Student eligible under

the disability category other health impaired (“OHI”). The March 23, 2012 Comprehensive Psychological Assessment was the basis for finding Student eligible. (P-9; P-10; R-2).

37. The IEP/MDT team proceeded to develop an IEP for Student. On or about April 21, 2012, a resulting draft IEP proposed Student receive 15 hours of specialized instruction per week and 1 hour of behavior supports per week. The duration and location of those services had not been determined by that time. Neither had the goals been developed. (Testimony of SEC; Testimony of Educational Advocate). (Testimony of SEC).

38. For a compensatory education award, Parent proposed 240 hours of specialized instruction and eight hours of behavior supports.

39. Parent based her proposed compensatory education plan on the specialized instruction and behavior supports she believed were proposed by DCPS on or about April 21, 2012. Thus, by inference, Parent agreed with the services proposed on the draft IEP. (Testimony of Educational Advocate; P-21).

40. Parent did not waive the statutory time for evaluating Student and determining his eligibility for services. (Testimony of SEC).

41. Student’s final grades for the first semester of the 2011-2012 school year are noted below:

Math 7	F
English 7	F
Reading Development	F
Social Studies	F
Mathematics Lab	C
Science	F

(P-19).

42. The Hearing Officer finds that no FBAs/BIPs were entered into evidence. (Review of P-1 through 21 and R-1 through R-3; Review of all witness testimony).

IV. BURDEN OF PROOF

The Burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, Parent. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 62, 126 S. Ct. 528 536, 163 L.Ed.2d 387 (2005); *Hester v. District of*

Columbia, 433 F. Supp.2d 71, 76 (D.D.C. 2006). Below, the Hearing Officer examines the issues and evidence to determine if Parent has met her burden.

V. CONCLUSIONS OF LAW/APPLICABLE LAW AND ANALYSIS

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the undersigned Conclusions of Law are as follows:

The pivotal purpose of the Individuals with Disabilities Education Act ("IDEA") is to ensure that students with disabilities have available a free appropriate public education ("FAPE"). See *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 179-81, 200-01. A FAPE must be available to all children between the ages of three and 21 who are residing in the District of Columbia. 34 C.F.R. § 300.101(a) and DCMR. 5 § 3002.1. Under applicable law - 34 C.F.R. § 300.17 - FAPE is defined as special education and related services that are provided at public expense, under public supervision, and without charge; meets the standards of the state education agency; include an appropriate pre-school, elementary school, or secondary school; and are provided consistent with an individualized education program ("IEP") that meets the mandates of 34 C.F.R. §§ 300.320 through 300.324.

Under IDEA, DCPS is required to locate and identify children in the District of Columbia who have disabilities that place them in need of special education and related services. 20 U.S.C. 1412(a)(3); 34 C.F.R. § 300.111(a). In general, DCPS must conduct evaluations before special education and related services are commenced. 34 § 300. 301(a). A parent's request for the initial evaluation triggers a requirement that the evaluation be conducted, and that it be completed within 120 days. D.C. Code § 38.2561.02¹² Moreover, the evaluation to determine eligibility must be comprehensive. 34 § C.F.R 300. 304(b)(c); 34 C.F.R. § 300.305(a)(1).

Petitioner asks the Hearing Officer to find that DCPS denied Student FAPE because it (1) failed to timely evaluate Student and determine his eligibility and (2) did not initially conduct an adequate evaluation. Below, the Hearing Officer addresses Petitioner's prayer.

A. ISSUE 1

Whether pursuant to D.C. Code § 38.2561.02 and 20 U.S.C. § 1414 (a) (1), DCPS denied Student FAPE when it failed to conduct initial evaluations and determine Student's eligibility within 120 days from Parent's June 27, 2011 request for evaluation?

When a parent requests the evaluation of her child to determine special education eligibility, DCPS must evaluate the child within 120 calendar days. D.C. Code § 38.256.02 and 20 U.S.C. § 1414 (a) (1).

¹² Under 34§ 300.11(a) "day" means calendar day, unless otherwise indicated as a business or school day. Thus, since the referenced law does not specify school or business day, the Hearing Officer finds that "120 days" means 120 calendar days.

The evidence shows that on June 27, 2011, Parent requested that DCPS evaluate Student, and Parent also provided written consent for the same. The evidence does demonstrate that a psychological assessment was performed by the school psychologist on or about July 21, 2011. A review of this assessment indicates that when the school psychologist conducted the assessment, she did not administer any intelligence/achievement testing, did not observe Student, did not assess his personality/behavior, and did not gather additional information about Student by conducting interviews with Student, Parent, Student's current/former teachers, and/or Student's community based mental health provider.

Several reasons were given by the school psychologist for not taking steps at that time to acquire more than the "sparse data" she had reviewed and reported was available about Student. For one, the psychologist noted that Student's 2010-2011 teachers were unavailable to interview as it was summer. She commented that these teachers would be the best individuals to speak to about Student's academic performance and to comment on his behavior in the school environment. Even though Student was enrolled in summer school, which is an educational setting, the school psychologist also contended that Student should be observed in a classroom setting that more resembled a school day during the regular school year.

The school psychologist also commented that while in February 2011, a FBA had been conducted and a BIP developed, no documentation existed showing the strategies and interventions used and the outcome after using the strategies and interventions. The school psychologist concluded that more detailed information was needed on Student and she recommended revisiting the evaluation and Student's eligibility at the start of the 2011-2012 school year.

The Hearing Officer finds the school psychologist's excuses incredible and unacceptable for conducting such a meager psychological assessment in July 2011. The Hearing Officer notes that summer school is an educational setting and DCPS presents no rule saying it is not beneficial to observe a student in summer school. Further, DCPS presented no evidence explaining why Student's teachers from the 2010-2011 school year were unavailable to provide input regarding Student. Moreover, the psychologist failed to explain why behavior scales could not have been obtained from Parent, Student's community service provider, and Student during the summer. The psychologist does not explain why it was not appropriate to conduct individual intelligence and/or achievement testing of Student during the summer. The Hearing Officer finds these tests could have been administered properly during the summer. In fact the acquisition of behavior and personality assessments as well as intelligence testing were recommended by the social worker in her July 23, 2011 social work assessment, another assessment undertaken as a result of Parent's request that Student be evaluated.¹³

¹³ The Hearing Officer is cognizant that the social worker's assessment post-dates the July 21, 2011 psychological assessment by two days; however, the Hearing Officer finds the school psychologist knew or should have known of the social worker's assessment soon after it was completed. This is so because the letterhead of each of the assessments reflects that the social worker and the school psychologist are employed by DCPS with offices located at the same address in the Office of Special Education. Further, both conducted their assessments about the same Student in the same timeframe.

Yet in the face of the social worker's recommendation, the social worker's finding that Student is in psychological distress, Student's 44 behavior infractions during the 2010-2011 school year, and Student failing all his subjects during the immediate past school year, the school psychologist deemed it appropriate to wait almost two months (when a new school year begins) to revisit evaluating Student to determine if he is eligible for special education.

Aggravating the unjustifiable reasons the school psychologist provided for delaying Student's evaluation for eligibility, the Hearing Officer notes that when the new school year started, DCPS still did not timely resume its evaluation of Student. This is so even though as noted above, the school psychologist recommended such in her July 21, 2011 assessment, and the July 23, 2011 social work assessment noted Student was psychologically distressed and a comprehensive psychological assessment should be conducted.

Disturbingly, the evidence shows that, DCPS did not even hold a meeting regarding Student's evaluation/eligibility until November 21, 2011, almost a month after it should have evaluated Student. Even then, with the exception of a FBA reportedly conducted in November 2011,¹⁴ no additional assessments had been performed. Again the school psychologist did not conduct a comprehensive psychological evaluation. Instead, she claimed she needed more information from Student's community based service provider and Parent. Meanwhile Student continued to fail many of his classes, classwork and homework assignments were not completed, his already severe behavior problem worsened as by November 16, 2011, Student had 34 behavior infractions. Those were increased to 47 by the end of the first semester of the 2011-2012 school year. In comparison, Student had 44 behavior infractions during the entire 2010-2011 school year.

As noted before, the Hearing Officer finds incredible and of no validity DCPS' general reasoning that it needed additional information, in part and/or particularly, from Student's community based provider and Parent before it could evaluate Student. DCPS has an affirmative duty under its child find obligations to evaluate a child for services once he/she is identified as a possible candidate for services. *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008); 20 U.S.C. § 1412(a)(3). Thus, it is not proper for DCPS to delay the child find process by sitting back and waiting to acquire data from others that DCPS is legally obligated to obtain by evaluating a Student suspected of being eligible for services.

The Hearing Officer also notes that DCPS makes an unsubstantiated argument that Student was found ineligible at some point between June 27, 2012, and when the March 14, 2012 comprehensive psychological assessment was conducted. This argument is not persuasive and lacks any basis in facts presented. DCPS produced no documentation indicating Parent was notified of any decision that Student had been evaluated and deemed ineligible for services.

Not until Parent filed the Due Process Complaint on March 12, 2012, did DCPS conduct the comprehensive psychological assessment. This wide ranging assessment was done on March 14, 2012, two days after Parent filed her Complaint and practically eight months after the social

¹⁴ As noted above here, no documented FBA/BIP was entered into evidence.

worker recommended it.¹⁵ The report of the comprehensive psychological assessment was issued on March 23, 2012. It was reviewed by the eligibility team along with other information, and on April 10, 2012, Student was found eligible for services under the category OHI. The March 23, 2012 comprehensive psychological evaluation, which used a variety of tools and strategies to gather information about Student, was the basis for Student's eligibility.

The evidence shows that by the time Student was found eligible for services, nine months had elapsed since the Parent's request for evaluation. Further, the evidence shows that 120 days from Parent's request for evaluation was October 25, 2011. Thus, the nine months it took to evaluate and determine Student's eligibility violated the time period permitted under D.C. Code § 38.2561.02(a) and 20 USC § 1414 (a) (1). Hence, DCPS' long delay was procedural error.

In order to establish a violation of the IDEA based on DCPS' failure to follow statutory procedures, Parent must show that Student's substantive rights were affected. *See Lesesme ex rel. B.F. v. District of Columbia*, 447 F. 3d 828, 834 (D.C. Cir. 2006) ("[A] claim is viable only if those procedural violations affected the Student's substantive right."). In other words, Student has been denied FAPE only if there was harm; that is, if the procedural violations (1) impede the child's right to a FAPE, (2) significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or (3) cause a deprivation of educational benefits. 20 U.S.C. Section 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

The Hearing Officer now addresses any harm to Student.

The evidence shows that at the end of the first semester of the 2011-2012 school year, Student had failed all but one of his six classes. By February 27, 2012, the evidence showed Student was not performing much better as he was failing four of his classes – English, math, social studies, and math lab. Student had an "Incomplete" in science and a "B" in science. Also, the evidence demonstrates that during the 2011-2012 school year at least some of Student's teachers reported that he had severe problems concentrating. His teachers also noted that this deficiency interferes with his academic functioning and that Student did not complete class and homework assignments.

Further, the evidence shows that during the first semester of the 2011-2012 school year, Student's behavior problems worsened. He violated the school's code of conduct 47 times. Behavior rating scales completed by two of Student's teachers, Student, and Parent reflected that Student has severe conduct problems, oppositional behaviors, and odd behaviors. Teachers reported Student is disruptive in class and impedes the learning of others.

DCPS' Disability/Eligibility Worksheet shows that the March 23, 2012 comprehensive psychological assessment was the data that justified Student's eligibility. It had been recommended by the social worker in her July 23, 2011 social work assessment. And as noted previously, this assessment was also recognized as being required by the school psychologist who conducted the sparse assessment in July 2011, but for reasons previously noted, this school

¹⁵ Considering the facts and sequence of events in this case, the Hearing Officer finds it is reasonable to conclude that this testing was done only because the Complaint was filed.

psychologist delayed conducting the comprehensive psychological evaluation for months. Had DCPS not deferred evaluating Student, the evidence shows that Student's eligibility would have been determined five months earlier and close to the beginning of the 2011-2012 school year. An IEP would have been developed under 34 C.F.R. § 300.306(c)(2). Student then would have received services designed to enable Student to receive educational benefits. *Rowley*, 458 at 206-07.

Considering the above, the Hearing Officer finds the harm to Student has been he continued to not receive educational services and behavior planning to improve his behavior and academic functioning since on or about October 25, 2011, the date Student's evaluation should have been completed and Student should have been found eligible for services. Thus, the Hearing Officer finds Student was denied FAPE.¹⁶

B. ISSUE 2

Whether DCPS denied Student a FAPE when it failed under 34 C.F.R § 300.304 to conduct a comprehensive evaluation on July 21, 2011?

The IDEA sets forth procedures to be followed when a child is being evaluated to determine if he is eligible/continues to be eligible for special education and related services. This law requires that a variety of assessment tools and strategies be used to gather relevant functional, developmental, and academic information about the child. 34 C.F.R. §300. 304(a)(1). Further a school district is required to not use any single measure or assessment as the sole criterion for determining if a child is eligible for special education and related services. 34 C.F.R. §300. 304(a)(2). Moreover, 34 C. F. R. § 300. 304 (c) (6), requires the evaluation to be sufficiently comprehensive to identify all of the child's special education and related needs.

For reasons already noted the initial psychological evaluation conducted on or about July 21, 2011, was legally insufficient. Further, it was only in March 2012 that such an evaluation that meets the requirements of the above noted law was performed. What resulted was Student was determined eligible for services over five months after he should have been found eligible.

Considering the above, the Hearing Officer finds that the school denied student FAPE also because its meager July 21, 2011 psychological assessment severely delayed Student being found eligible for services and receiving them.

¹⁶ The Hearing Officer does note that once a Student is found eligible for services, IDEA requires the school district to develop an IEP within 30 days of that decision and provide services within a reasonable time thereafter. 34 C.F.R. § 300.323(c). It is therefore reasonable to conclude that DCPS should have been providing services to Student in the fall of the 2011-2012 school year had it timely evaluated Student.

IV. REMEDY

The Hearing Officer has determined DCPS' procedural violation and failure to initially conduct a comprehensive psychological evaluation denied Student FAPE.

For relief Parent seeks compensatory education.

"Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA." *Wilson v. District of Columbia*, 2-11 WL 971503, (D.D.C. March 18, 2011) citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education is designed "to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518. Denial of a FAPE is a prerequisite to an award of compensatory services. *Id.* Further, the inquiry for compensatory education must be fact specific. *Reid*, 401 F. 3d at 524.

In this case, the Hearing Officer has found DCPS's delay in evaluating Student denied him FAPE. Further, the Hearing Officer found DCPS denied Student a FAPE because its July 21, 2011 Psychological Assessment was legally insufficient for the reason previously discussed.

The effect of the procedural violation and initial deficient evaluation was Student did not receive services. This is so because if DCPS had complied with statutory law, it would have evaluated Student and found him eligible for services by October 25, 2011, the date D.C. Code § 38.2561.02(a) required his evaluation to be completed. An IEP would have been developed within 30 days from his eligibility determination and services provided within a reasonable time thereafter as required by 34 C.F.R. § 300.323(c).

The evidence shows that without services Student failed all but one of his classes during the first semester of the 2011-2012 school year. Moreover, well into the second semester of the 2011-2012 school year, he continued to fail most of his classes. Also, the evidence shows that consistent with his disability category OHI- ADHD, Student does not have the ability to self monitor and control his impulses and has a severe problem focusing. What is more, his behavior problems include disruptions in the class room that significantly impede his and other student's learning at school.

For the harm caused Student by DCPS' denial of FAPE, Parent has requested a compensatory award that consist of (1) 240 hours of independent tutoring in reading, written language, and mathematics and (2) behavior supports in the amount of 8 hours of mentoring services. The Hearing Officer notes controlling authority mandates that any award of compensatory education be reasonably calculated to provide the educational benefit that likely would have accrued from special education services if DCPS had supplied them in the first place. *Reid*, 401 F. 3d at 524.

Student has lost educational benefit. This is so because DCPS failed to timely evaluate Student for special education services. The date Student was determined eligible was five

months late. Thus, Student has been harmed for those months he did not receive special education and related services for which he was entitled during the 2011-2012 school year.

Regarding services, since Student was found eligible for services, DCPS has developed a draft IEP and proposed 15 hours of specialized instruction and one hour of behavior supports per week. By inference as noted in "Findings of Fact # 39," Parent approves of these services.

Having considered all the facts of this case the Hearing Officer finds that it is reasonable to conclude that tutoring for an extended period of time will enable Student to catch up in academic areas where he lost instruction due to his behavior problems and severe deficiency in concentration, both symptoms of his ADHD and OHI disability category.

Parent by proposing a compensatory award based on DCPS' proposed IEP offering 15 hours of specialized instruction per week has agreed by inference that 15 hours a week of individualized instruction is appropriate. Accordingly, the Hearing Officer finds a total of 240 hours of such tutoring is an appropriate compensatory award.

Further, the Hearing Officer finds it reasonable to conclude that behavior supports for an extended period of time are required to enable Student to improve his behavior and social/emotional development – areas affected by Student's ADHD but not addressed by an IEP because DCPS failed to timely evaluate and determine Student's eligibility and provide services. Parent by proposing a compensatory award based on DCPS' proposed IEP offering of behavior supports per week has agreed that weekly behavior supports are appropriate. Accordingly, the Hearing Officer finds one hour of behavior counseling for 16 weeks is also an appropriate compensatory award.

VII. DECISION

The Hearing Officer has reviewed and considered all the evidence of record whether specifically mentioned in this decision or not. Based upon the above Findings of Fact and Conclusions of Law, the Hearing Officer finds that DCPS denied Student a FAPE because it did not evaluate Student within the time prescribed by law. Further, its initial evaluation was insufficient.

VIII. ORDER

Thus, for the reasons discussed here, the Hearing Officer orders compensatory education. Specifically, the Hearing Officer orders DCPS to

- (1) provide 240 hours of independent tutoring in math, written language, and reading. The obligation of DCPS to begin providing this tutoring starts 14 days from the date of this decision and ends September 30, 2012. The Hearing Officer understands Student's schedule will likely change from the date of this order until September 30, 2012, especially considering Student may be on summer break within the next few weeks which will permit Student to receive more hours of tutoring weekly than when regular school is in session. The tutoring is to be scheduled at the discretion of Student's parent

and all hours must be used by September 30, 2012, or lost by September 30, 2012 if not used; and

(2) provide 1 hour of behavior counseling per week by a behavior counselor for 16 weeks beginning 10 days from the date of this order. The obligation for DCPS to start providing this service is 14 days from the date of this decision.

Further, DCPS is ordered to provide the compensatory education listed above because the Hearing Officer finds Student may benefit if these services are provided by DCPS as DCPS maybe in the best position to coordinate them for Student's educational benefit. DCPS may, however, decide to allow Parent to select a provider(s) for these services. If DCPS decides to allow parent to select the providers, DCPS must notify Parent within 10 calendar days of this decision and must promptly pay the cost of these services.

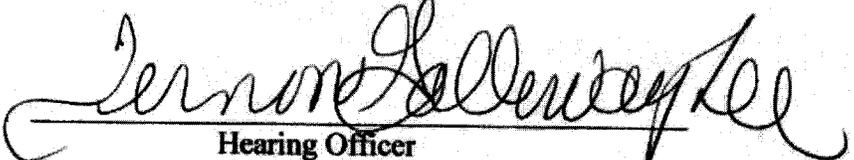
IX. PREVAILING PARTY

The Petitioner prevails on both issues for the reasons provided in this HOD.

X. NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: May 26, 2012


Hearing Officer