

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
Frances Raskin, Due Process Hearing Officer
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OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

Confidential

STUDENT, through the legal guardians¹)
)
 Petitioner,)
)
 v.)
)
 THE DISTRICT OF COLUMBIA)
 PUBLIC SCHOOLS,)
)
 Respondent.)
)

Hearing Dates:
May 21, 2009
May 28, 2009
June 30, 2009

HEARING OFFICER DETERMINATION

Counsel for Petitioner: Olekanma Ekekwe, Attorney at Law
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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding 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 Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. Both Petitioner and the Student reside in the District of Columbia, and thus this Hearing Officer has subject matter and personal jurisdiction.

II. BACKGROUND

The Student is an _____ year-old, _____ grade, general education student attending a DSPS elementary school ("School"). Petitioner is the parent and next friend of a _____ year-old student ("Student") who attends _____

On March 18, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint"), alleging that the Student's recent psychological evaluation found that the Student had regressed academically, recommended that the Student be found eligible for special education, receive academic instruction pursuant to an individualized educational program ("IEP"), and that the Student requires a behavioral intervention plan ("BIP"). The Complaint also alleged that District of Columbia Public Schools ("DCPS") failed to:

- (a) Identify the Student as eligible for special education pursuant to its "child find" obligations;
- (b) Provide special education services for the Student; and
- (c) Provide an appropriate placement for the Student.

Petitioner requested relief that includes determination by this Hearing Officer finding:

- (a) DCPS denied the Student a FAPE by failing to find him eligible for special education; and
- (b) DCPS failed to provide the Student an appropriate placement.

Petitioner requested relief that included an order requiring DCPS to:

- (a) Provide the Student special education and related services and placing the Student in an appropriate placement;
- (b) Provide compensatory education to the Student; and
- (c) Fund Petitioner's choice of non-public educational placement for the Student.

On April 13, 2009, Counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint ("Response").² The Response asserted that DCPS held an eligibility meeting on March 17, 2009, within two weeks of receiving the Student's evaluations and found the

² This Response was date-stamped by the Student Hearing Office on April 13, 2009, and thus was untimely. The signature date was March 31, 2009.

Student ineligible for special education. The Response further asserted that educational performance below grade level is not sufficient to determine the Student eligible for special education and related services, and that DCPS referred the Student to the Student Support Team for further review and consideration for accommodations. Finally, the Response denied the remaining allegations in the Complaint and requested that it be dismissed with prejudice.

This Hearing Officer held a prehearing conference on April 10, 2009. During the prehearing conference, counsel for Petitioner informed this Hearing Officer that Petitioner had not yet found a non-public placement at which the Student had been accepted. This Hearing Officer informed Petitioner that the Complaint lacks any facts to support the assertion that the Student's current placement is inappropriate. Counsel for Petitioner then asserted that Petitioner would not to proceed on the placement issue. Counsel were informed that Petitioner would proceed first at the due process hearing and had the burden of proof.

The due process hearing convened on May 21, 2009, then continued to May 28, 2009, and June 30, 2009. The hearing concluded on June 30, 2009.

III. RECORD

Due Process Complaint Notice, filed March 18, 2009;
DCPS Response to Parent's Administrative Due Process Complaint, filed April 13, 2009;
Petitioner Five-Day Disclosure, identifying five witnesses and including fourteen documents, filed April 22, 2009;
DCPS Five-Day Disclosure, identifying twelve witnesses and including fifteen documents, filed April 23, 2009;
Letter Motion for Continuance, filed April 22, 2009;
Interim Order on Joint Continuance Motion, issued May 2, 2009;
Joint Motion to Continue Hearing, filed April 28, 2009;
Interim Order on Joint Continuance Motion, issued May 9, 2009;
Letter Motion for Continuance, filed May 21, 2009;
Interim Order on Joint Continuance Motion, issued May 27, 2009;
Letter Motion for Continuance, filed May 21, 2009;
Interim Order on Joint Continuance Motion, issued June 7, 2009;
Compact Disc of Hearing, conducted May 21, 2009; and
Compact Disc of Hearing, conducted May 28, 2009.

IV. ISSUES PRESENTED

A. Whether DCPS denied the Student FAPE by failing to identify the Student as a student with a disability pursuant to IDEIA; and

B. Whether DCPS failed to provide the Student an appropriate educational placement.

V. FINDINGS OF FACT

1. The Student is a general education Student.³ His Student's class is comprised of grade boys.⁴ He has different teachers for math, reading, social studies, science and music.⁵

2. The Student's school is a SAM school, which is a DCPS model school that does not instruct special education students separately.⁶ Under the SAM model, special education teachers are available in the general education classroom to help every student, regardless of whether a student has been found eligible for special education.⁷ When a child who is eligible for special education requires assistance, the special education teacher provides IEP instruction.⁸ When a general education student requires her support, the special education teacher provides that student support as well.⁹

3. The Student's school was restructured last school year because fewer than 10 percent of the students at the school were proficient in grade-appropriate academic skills.¹⁰ As a result of the restructuring, ninety percent or more of the staff have been at the school for only the 2008-2009 school year. At the start of the 2008-2009 school year, when the Special Education Teacher began working at the Student's school, fewer than 10 percent of the students were proficient in math and reading.¹¹ The Student was among the students who were not proficient in reading and math.¹²

4. Proficiency is not the only measure of whether a student has a learning disability.¹³ If a student is not exposed to appropriate instruction, he may appear learning disabled but not actually require special education.¹⁴

5. The Special Education Teacher assists students in the Student's classroom.¹⁵ Her focus is on the special education students, but if the Student requires help with his assignment, she assists him.¹⁶ Sometimes, the Student refuses her help, at which times she does not provide him assistance.¹⁷ When the Student is not focused on his classroom assignment, the Special

³ Testimony of DCPS Special Education Teacher.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Education Teacher redirects him to the assignment.¹⁸ The Student may seem immature, but when prompted he is able to complete his schoolwork.¹⁹

6. For most of the 2008-2009 school year, the Student did not consistently turn in his homework or complete classroom assignments.²⁰ The Student's behavior prevented him from completing his assignments.²¹ He started turning in his homework and completing classroom assignments consistently in mid-April 2009, when students began preparing for the DC-CAS, the annual system-wide, standardized testing conducted by DCPS.²² The Student has consistently completed class work in his math and science classes since then.²³ The Student has made progress in math.²⁴ However, his behavior has not improved.²⁵

7. The Student's full scale IQ is 84, which is in the low average range.²⁶ This places the Student in the fourteenth percentile of the people his age.²⁷ On his most recent psycho-educational evaluation, the Student performed better than expected on achievement tests; he had average scores on most skills and in visual motor functioning.²⁸ Thus, the Student does not have a learning disability ("LD").²⁹

8. The Student's attention issues and impulsivity are hampering his educational progress.³⁰ His Student's difficulties are due more to his opposition to authority than attention problems.³¹ Last year, he was struggling so much that his teachers suggested he repeat the grade because his academic performance was below basic knowledge skills in all academic areas.³² During the 2008-2009 school year, the Student's performance in reading and language arts was at a basic knowledge level and he was below basic in mathematics.³³

9. The Student's behavior has improved this year but he still lacks self-control and talks excessively.³⁴ He needs frequent prompting to follow classroom rules, respect the rights of others, and not interrupt while others are speaking.³⁵ He has difficulty following directions,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* The annual testing is known as the D.C. Comprehensive Assessment System or DC-CAS, and is mandated by the federal No Child Left Behind act

²³ *Id.*

²⁴ Testimony of the Student's Math Teacher. The Math Teacher also teaches the Student in his science class. *Id.*

²⁵ *Id.*

²⁶ Testimony of Independent Psychologist; Petitioner Exhibit 5 (February 23, 2009, Confidential Psycho-educational/Clinical Evaluation). Given the chance of measurement error in all tests, there is a 90 percent likelihood that his true score is between 80 and 89. Petitioner Exhibit 5.

²⁷ Petitioner Exhibit 5.

²⁸ Testimony of Independent Psychologist.

²⁹ *Id.*

³⁰ *Id.*; Petitioner Exhibit 11 (2007-2008 school year report cards).

³¹ Testimony of Math Teacher.

³² Petitioner Exhibits 5 and 11.

³³ Petitioner Exhibit 5; Petitioner Exhibit 11 (report cards for the first and second advisory of the 2008-2009 school year).

³⁴ Petitioner Exhibit 5.

³⁵ *Id.*

completing assignments, returning homework, and using time wisely.³⁶ He is very active and defiant.³⁷

10. During the 2007-2008 and 2008-2009 school year, the Student was suspended for fighting, threatening to kill another student, throwing objects, leaving the classroom without permission, and refusing to complete school work.³⁸ The Student was suspended from school at least four times over the two years.³⁹

11. Three of the Student's teachers reported clinically significant externalizing behaviors and clinically significant hyperactivity, aggression, and conduct problems.⁴⁰ His teachers think he is at risk of experiencing internalizing problems such as anxiety and depression.⁴¹ They described his behaviors as atypical and related to attention problems.⁴² They reported that the Student's behaviors are creating problems at school but are not the result of learning problems.⁴³ They also believe that the academic problems the Student is experiencing are a result of his behavior problems and not cognitive or processing problems.⁴⁴

12. The results of the Student's 2009 Psycho-educational/Clinical evaluation revealed that he exhibits elevated levels of hyperactivity consistent with a clinical diagnosis of hyperactive-impulsive type of attention-deficit, hyperactivity disorder ("ADHD").⁴⁵ Additionally, the Student's conduct problems in school and at home are marked with defiant, hostile, confrontational, and argumentative behaviors.⁴⁶

13. The Student meets the diagnostic criteria for oppositional defiant disorder and ADHD predominantly hyperactive-impulsive type.⁴⁷ Because the Student's oppositional defiant disorder and ADHD interfere with his ability to access the general education curriculum, the Student meets the eligibility criteria for other health impairment ("OHI") under IDEIA.⁴⁸

14. The Student requires a behavioral intervention plan ("BIP") and counseling to address his defiant, argumentative, and hostile behaviors.⁴⁹ The BIP should address his noncompliance in completing assignments.⁵⁰ He would benefit from individual counseling that focuses on meditational and control strategies that will help him make the connection between his behaviors and consequences.⁵¹

³⁶ *Id.*

³⁷ *Id.*

³⁸ Petitioner Exhibits 5 and 9; Testimony of Petitioner.

³⁹ Petitioner Exhibit 9.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* Cognitive and academic testing did not support attention problems. Petitioner Exhibit 5.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*; Testimony of Independent Psychologist.

⁴⁸ Testimony of Independent Psychologist, Petitioner Exhibit 5.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

15. The Student also requires an IEP that provides specialized instruction to help him organize his work and outlines of what is expected of him to assist him in following classroom instruction.⁵² The specialized instruction also should help the Student manage his time on assignments.⁵³ His approach to math was very time consuming because he used hatch marks and addition when working on multiplication problems.⁵⁴ His main area of need is in math and organization, executive functioning, and frustration tolerance.⁵⁵ The Student also needs positive reinforcements for when he performs well.⁵⁶

16. At the March 17, 2009, MDT meeting, the MDT reviewed the Student's independent February 23, 2009, psycho-educational/clinical evaluation, a speech and language evaluation, and a social history assessment.⁵⁷ The DCPS Psychologist reviewed the Student's psycho-educational evaluation and informed the MDT that she did not believe the Student was eligible as OHI or LD for special education.⁵⁸ The DCPS Psychologist opined that the Student's ADHD and oppositional defiance did not affect his educational performance.⁵⁹

17. At the March 17, 2009, MDT meeting, the Math Teacher reported that the Student's behavior prevents him from completing class work.⁶⁰ He reported that the Student misbehaves in class and does not pay attention; he frequently calls out in class.⁶¹ The Math Teacher informed the MDT that the Student would be capable of doing his class work if he were able to pay attention and complete the work.⁶²

18. The MDT found that the Student was not eligible for special education services.⁶³ The team referred the Student to the DCPS Student Support Team with instructions for the SST to develop a functional behavioral assessment and BIP if warranted.⁶⁴ Petitioner and her counsel disagreed with the MDT's decision.⁶⁵

⁵² Testimony of Independent Psychologist.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Petitioner Exhibit 10; Testimony of DCPS Project Coordinator.

⁵⁸ *Id.* The DCPS Psychologist has only a bachelor's degree and post-graduate certificates. Thus, she is not as qualified in the field of child psychology as the Independent Psychologist, who holds a Ph.D. in psychology.

⁵⁹ *Id.*

⁶⁰ Petitioner Exhibit 10.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*; Testimony of DCPS Project Coordinator.

⁶⁴ Testimony of DCPS Project Coordinator.

⁶⁵ *Id.*

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found Petitioner to be credible because her testimony was uncontroverted, although her knowledge was limited. The Independent Psychologist was both knowledgeable and credible, in part due to his extensive experience evaluating students and doctorate in psychology. The Math Teacher also was credible. His testimony was corroborated by the remarks he made at the March 17, 2009, MDT meeting. He testified frankly about the Student's limitations and how his behavior impeded his learning, testimony that was not helpful to DCPS.

The DCPS Project Coordinator was cagy but credible. When this Hearing Officer attempted to impeach him with his notes from the March 17, 2009, MDT meeting, the Project Coordinator changed his testimony to comport with his notes. Otherwise, this witness's testimony was generally credible as he focused on the discussion at the MDT meeting.

The DCPS Psychologist was not credible. Her knowledge of the Student was limited to two short observations in his classroom. She discounted the findings of the February 23, 2009, psychoeducational-clinical evaluation with no apparent basis for her opinion that the Student was not eligible for special education. Her testimony was especially incredible because it contradicted the testimony of the Math Teacher, who has intimate knowledge of the Student's behavior and the way in which it impedes his ability to access the general education curriculum. In short, the testimony of the DCPS Psychologist was biased in favor of DCPS and the decision of the MDT, which she greatly influenced with her interpretation of the psychological evaluation, and had little foundation in fact.

VII. DISCUSSION

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.⁶⁶ In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights.⁶⁷

⁶⁶ 20 U.S.C. § 1415 (f)(3)(E)(ii).

⁶⁷ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (internal citations omitted). *Accord, Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

VIII. DECISION

A. Petitioner Established by a Preponderance of the Evidence that DCPS Violated Its Child Find Obligations Under IDEIA .

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). A free, appropriate public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

Among the specific conditions a state must satisfy is the requirement that it demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated." 20 U.S.C. § 1412(2)(C). *See also* 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. §§ 300.128(a)(1) and note 1, 300.220 and note, 300.300 note 3. This is known as the "child find" duty.

As soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate him and complete the evaluation process. *See District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007) (explaining that once a child is identified the local educational agency "is then obligated to move forward with the requirement of [IDEA] § 1414(a)(1) and determine whether the student is in fact a child with a disability"). *See also Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 114 (D.D.C. 2008).

Once a child has been referred to an IEP team for an eligibility determination, the IEP team must conduct an "initial evaluation" which "shall consist of procedures (I) to determine whether a child is a child with a disability . . . within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child." 20 U.S.C. § 1414(a)(1)(C)(i). In the District of Columbia, DCPS shall evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation. D.C. Code § 38-2561.02

As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child. 34 C.F.R. § 300.305. On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child. *Id.*

Before a State or local educational agency may commence the initial provision of special education services, it must first determine whether a student is a "child with a disability." A

"child with a disability" is a child with a listed disorder or "specific learning disabilities" who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8.

Here, the Student's February 23, 2009, psycho-educational/clinical evaluation concluded that the Student was eligible for specialized educational services as a child with OHI. The Student's Math Teacher, who testified frankly that the Student's behavior impedes his academic progress, corroborated that observations in the psycho-educational evaluation. Over the past two school years, the Student has performed below basic in most academic areas.

The finding by the MDT that the Student was not eligible for special education ignores the opinion of the Math Teacher, the only member of the MDT who has intimate knowledge of the Student. The MDT also ignored the information presented by Petitioner and her counsel. And most egregiously, the MDT ignored the extensive testing in the psycho-educational/clinical evaluation and the Student's low academic performance in finding that he was not eligible.

The testimony and documentary evidence introduced at the due process hearing overwhelmingly established that this Student is eligible for special education as a student with other health impairment. The MDT's refusal to find him eligible denied the Student a free, appropriate, public education. The Student is entitled to individualized instruction in a structured setting, which may not be possible for DCPS to provide in the Student's current school due to its lack of self-contained classrooms as a result of the SAM model.

B. Petitioner Did Not Establish that DCPS Failed to Provide an Appropriate Educational Placement to the Student.

IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 C.F.R. § 300.116 (c). In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs. 34 C.F.R. § 300.116 (d). A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum. *Id.* at (e).

To the maximum extent appropriate, children with disabilities, including children in public or private institutions with other care facilities, are to be educated with children who are nondisabled. 34 C.F.R. 300.114 (2) (i). This requirement also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups, and clubs. 34 C.F.R. § 300.117.

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and

(3) Facilities outside of the District of Columbia.

D.C. Code § 38-2561.02.

Counsel for Petitioner presented no testimony on the appropriateness of the Student's placement, i.e. educational setting, other than to prove that DCPS failed to find the Student eligible for special education and develop an IEP for him. While the IEP drives the Student's placement, Petitioner presented no evidence to show that the failure of DCPS to develop an IEP for the Student deprived him of an appropriate educational placement. Thus Petitioner offered no evidence that the Student's current placement would compromise his substantive rights. *See Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007) (upholding placement in public school).

VII. DECISION AND ORDER

Upon consideration of Petitioner's Complaint and the Response thereto, the parties' Five-Day Disclosures, and the testimony at the hearing, it is this 5th day of July 2009 hereby:

ORDERED that, on or before July 15, 2009, DCPS shall convene a meeting of the multidisciplinary team to develop an IEP for the Student;

IT IS FURTHER ORDERED that the Student's IEP shall specify that the Student is eligible for specialized instruction and related services as a Student with an Other Health Impairment due to his ADHD and Oppositional Defiant Disorder;

IT IS FURTHER ORDERED that the Student's IEP shall include specialized instruction in math, reading, and language arts, to help him organize his work and manage his time on assignments; counseling to address his defiant, argumentative, and hostile behaviors; and a behavior implementation plan to address his noncompliance in completing assignments;

IT IS FURTHER ORDERED that DCPS shall schedule all meetings through the office of Petitioner's attorney, and include Petitioner and all independent evaluators in developing the Student's IEP;

IT IS FURTHER ORDERED that DCPS shall be granted an additional day of delay or scheduling the MDT meeting for every day of delay caused by Petitioner;

IT IS FURTHER ORDERED that all claims in this Complaint, except for the claim regarding compensatory education, are **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that this Order is effective immediately.

By: _____ /s/
Frances Raskin
Hearing Officer

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 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).

Copies to:

Olekanma Ekekwe, Attorney at Law
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Hearing Office