# DISTRICT OF COLUMBIA
# OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., Second Floor
Washington, DC 20002

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| **STUDENT, through the legal guardian**[1] | ) | |
| | ) | **Case Number:** |
| **Petitioner,** | ) | |
| | ) | **Hearing Date: June 23, 2011** |
| **v.** | ) | **Hearing Room: 2003** |
| | ) | |
| **THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** | ) | |
| | ) | |
| **Respondent.** | ) | **Hearing Officer: Frances Raskin** |

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## HEARING OFFICER DETERMINATION

## I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; the federal regulations at 34 C.F.R. §§ 300.1 *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000 *et seq.*

## II. BACKGROUND

Petitioner is the parent of an -year-old, general education student who attends a public elementary school in the District of Columbia. On April 20, 2011, Petitioner filed a Due Process Compliant ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to IDEA.

In the Complaint, Petitioner alleged that DCPS had failed to identify the Student as a student with a suspected disability, in light of his behavioral difficulties during the 2010-2011 school year, and conduct evaluations in all areas of suspected disability. Petitioner further alleged that DCPS had failed to respond to her November 24, 2010, written request that DCPS

[1] Personal identification information is provided in Attachment A.

conduct a comprehensive psychological evaluation of the Student to determine whether his escalating behavioral difficulties were the result of a disability.[2]

This Hearing Officer was appointed to preside over this case on April 22, 2011. The parties waived the resolution meeting on May 3, 2011. Thus, the resolution period ended on May 3, 2011. The parties agreed that the forty-five day, due process hearing timeline began on May 4, 2011.

On May 6, 2011, this Hearing Officer held a prehearing conference in which Chike Ijeabuonwu, counsel for Petitioner, and Tanya Chor, counsel for Respondent DCPS, participated. Respondent DCPS filed a response to the Complaint ("Response") on May 10, 2011, which was ten days past the deadline established by IDEA.[3]

On May 12, 2011, this Hearing Officer issued a prehearing conference summary and order. On May 23, 2011, this Hearing Officer issued a revised prehearing conference summary and order. On May 25, 2011, the parties exchanged their respective witness lists and five-day disclosures.[4]

On June 7, 2011, both counsel participated a second prehearing conference that this Hearing Officer convened to discuss rescheduling of the due process hearing after a power outage prevented the hearing from taking place on the originally scheduled date of June 1, 2011. During the second prehearing conference, the parties agreed to proceed to a due process hearing on June 23, 2011. On June 7, 2011, counsel for Petitioner filed a motion to continue the due process hearing.

On June 20, 2011, this Hearing Officer held a third prehearing conference to discuss the parties' attempts to resolve this case and whether DCPS would provide the relief Petitioner was seeking, i.e., conduct a comprehensive psychological evaluation by a date certain, then review the evaluation and determine the Student's eligibility for specialized instruction and related services.[5]

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[2] Petitioner also alleged that DCPS had failed to provide her access to the Student's records. Petitioner withdrew this claim prior to the due process hearing.

[3] *See* 34 C.F.R. § 300.508(e) (emphasis added). Because counsel for DCPS failed to file a response prior to the prehearing conference, and could not provide any information on the position of DCPS on the allegations in the Complaint, this Hearing Officer found that its failure to file a timely response has prejudiced Petitioner in the preparation of her case. As a sanction for the failure to file a timely response, this Hearing Officer shifted the burden of production to DCPS.

[4] On June 16, 2011, DCPS served on Petitioner second copy of the witness list and proposed exhibits. On June 20, 2011, Petitioner field a Supplemental Disclosure of Witnesses and Documents, which contained a single document marked as Petitioner's proposed exhibit 8. On June 22, 2011, the day before the due process hearing, Petitioner filed a second supplemental disclosure, which also contained a single document marked as Petitioner's proposed exhibit 9.

[5] During the first prehearing conference, counsel for Petitioner represented that Petitioner would withdraw the Complaint if DCPS committed in writing to perform a psychological evaluation of

The due process hearing convened on June 23, 2011. Petitioner, the Student, and the Special Education Coordinator of the school the Student attends appeared in person at the due process hearing. After this Hearing Officer entered the parties' respective exhibits into evidence,[6] the parties reached stipulations. Petitioner asserted that these stipulations resolved the Complaint. Thus, the parties presented no testimony at the hearing.

## III. ISSUES PRESENTED

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to identify him as a student with a suspected disability and conduct evaluations in all areas of suspected disability in light of his behavioral difficulties during the 2010-2011 school year that lead to several suspensions and impeded the Student's academic progress; and

B. Whether DCPS denied the Student a FAPE by failing to hold a student evaluation plan meeting and evaluate him in all areas of disability after Petitioner requested, on November 24, 2010, that DCPS conduct a comprehensive psychological evaluation of the Student to determine whether his escalating behavioral difficulties were the result of a disability.

Petitioner requests relief in the form of an order requiring DCPS to conduct a psychological evaluation, including a social history assessment, of the Student, convene a meeting of the Student's individualized educational program ("IEP") team, determine his eligibility for specialized instruction and related services, and if found eligible, develop an IEP for the Student.

## IV. FINDINGS OF FACT

At the suggestion of this Hearing Officer, the parties reached several stipulations of fact. After the parties agreed upon the terms of the stipulations, Petitioner asserted that she would not be presenting her case and that she was satisfied that the stipulations resolved the Complaint. Based upon the stipulations of the parties, this Hearing Officer makes the following findings of fact:

1. By August 19, 2011, DCPS will conduct a comprehensive psychological evaluation of the Student, including a social history.

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the Student within thirty days and to review the evaluation within ten days after the evaluation is completed.

[6] This Hearing Officer admitted into evidence Petitioner's exhibits 3, 4, 5, and 6, and excluded Petitioner's exhibits 1, 2, and 7 as not probative of the issues in this case. Petitioner withdrew both sets of supplemental disclosures that she had filed on June 20, and June 22, 2011. This Hearing Officer admitted into evidence Respondent's exhibits 1, 2, 3, and 4.

2. Beginning on August 22, 2011, DCPS will conduct a 30-day review of the Student's academic performance, which will include classroom observations.

3. Within fifteen calendar days of August 22, 2011, DCPS will convene a meeting of the Student's IEP team to review the Student's comprehensive psychological evaluation and determine his eligibility for specialized instruction and related services. If the IEP team finds the Student eligible for specialized instruction and related services, DCPS will develop an IEP for the Student at this meeting.

4. DCPS will conduct a functional behavioral assessment of the Student.

## V. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[7] FAPE is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[8] FAPE "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."[9]

Each local education agency ("LEA") is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[10] In deciding whether an LEA provided a FAPE to a student, the inquiry is limited to (a) whether the LEA complied with the procedures set forth in IDEIA; and (b) whether the student's IEP is reasonably calculated to enable him/her to receive educational benefits.[11]

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.[12] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[13]

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[7] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).
[8] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, D.C. Mun. Reg. tit. 30 § 3001.1.
[9] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[10] 34 C.F.R. § 300.101.
[11] *Rowley* at 206-207.
[12] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[13] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *See also C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective") (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws "automatically

The burden of proof is properly placed upon the party seeking relief.[14] A petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[15] The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.[16] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[17] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[18] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[19]

## VII. DISCUSSION

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] This child-find obligation extends to all children suspected of having a disability, not just children who are ultimately found to have disabilities.[21] The scope of the child-find duty includes children who are suspected of having a disability even though they are advancing from grade to grade.[22]

The duty to locate and complete the evaluation of a student starts "as soon as a student is

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require a finding of a denial of a FAPE"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a "substantive deprivation" of student's rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults did not cause the child to lose any educational opportunity).

[14] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

[15] 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).

[16] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

[17] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), aff'd, 512 U.S. 246 (1994).

[18] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

[19] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

[20] 20 U.S.C. §§ 1412(2)(C);1414(a)(1)(A); *Integrated Design & Elecs. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 30 (D.D.C. 2008).

[21] *McKinley*, 570 F. Supp. 2d at 34-35 (citing 34 C.F.R. § 300.111(c)(1); *N.G. v District of Columbia*, 556 F. Supp. 2d. 11, 25 (D.D.C. 2008).

[22] *Kruvant v. District of Columbia*, 2005 U.S. Dist. LEXIS 34045, 25-26 (D.D.C. Aug. 10, 2005).

identified as a potential candidate for special education services."[23] Once a child is identified, the LEA is then obligated to determine whether the student is in fact a child with a disability.[24] The IEP team must conduct an initial evaluation to determine whether a child is a child with a disability and to determine the educational needs of the child.[25]

In the District of Columbia, an LEA shall evaluate a child suspected of having a disability within 120 days from the date the student was referred for an evaluation.[26] 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.[27] 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.[28]

The failure of an LEA to comply with its child-find obligation may constitute a denial of FAPE.[29] This is not the end of the inquiry, however. The dispositive issue is whether the student was harmed by the failure of the LEA to comply with its obligations.[30] In other words, to succeed on a procedural claim, a petitioner must demonstrate that the school district's procedural violations affected the child's ability to receive the educational benefit that the IDEA requires.[31] If a disabled child received a FAPE in spite of a technical violation of the IDEA, the LEA has fulfilled its statutory obligations.[32]

The threshold issue in this case is when DCPS suspected or should have suspected the Student was a child with a disability under IDEA. The IDEA defines a "child with a disability" as a child with a listed disorder or "specific learning disabilities" who, "by reason thereof, needs special education and related services."[33] An LEA may deny special education services to a

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[23] *McKinley*, 570 F. Supp. 2d at 28-30 (citing, e.g., *Hawkins*, 539 F. Supp. 2d 108; *Abramson*, 493 F. Supp. 2d at 85).
[24] *Abramson*, 493 F. Supp. 2d at 85).
[25] 20 U.S.C. § 1414(a)(1)(C)(i).
[26] D.C. Code § 38-2561.02.
[27] 34 C.F.R. § 300.305.
[28] *Id.*
[29] *Hawkins ex rel. D.C. v. District of Columbia*, 539 F. Supp. 2d 108, 113-14 (D.D.C. 2008); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).
[30] *Kruvant 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").
[31] *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (citing *Lesesne*, 447 F.3d at 834).
[32] *See*, e.g., *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 51 (D.D.C. 2010) (upholding hearing officer who found that, although the student suffered from depression and a mood disorder, he did not suffer an emotional disturbance because "[t]he record is, at best, inconclusive that [the student's] emotional problems adversely affect his educational performance"); *M.M. ex rel. D.M. v. Sch.* Dist., 303 F.3d 523, 533-34 (4th Cir. 2002).
[33] 34 C.F.R. § 300.8 (emphasis added).

child with a disability if it is determined, through an appropriate evaluation, that the child only needs related service(s) and not special education.[34]

The parties resolved this case by entering stipulations on the record and presented no testimony on issues certified for hearing. As a result, this Hearing Officer cannot determine whether DCPS denied the Student a FAPE by failing to comply with its child-find obligations and/or failing to evaluate the Student in response to Petitioner's request for evaluations. Nevertheless, in entering into these stipulations, DCPS agreed to provide the relief that Petitioner requested in the Complaint. Thus, this Hearing Officer will order the relief agreed upon by the parties.

[34] *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 n.4 (D.D.C. 2008) (citing 34 C.F.R. § 300.7 (a)(2)(i)).

## ORDER

Upon consideration of Petitioner's request for a due process hearing, and the stipulations of the parties, it is this 3rd day of July 2011 hereby:

**ORDERED** that, by August 19, 2011, DCPS shall conduct a comprehensive psychological evaluation of the Student, including a social history review, and finalize the report of the evaluation;

**IT IS FURTHER ORDERED** that DCPS shall conduct a functional behavioral assessment of the Student;

**IT IS FURTHER ORDERED** that, beginning on August 22, 2011, DCPS shall conduct a 30-day review of the Student's academic performance, which will include classroom observations;

**IT IS FURTHER ORDERED** that DCPS shall receive one day of delay in conducting the comprehensive psychological evaluation for every day the Student is not available for evaluation purposes;

**IT IS FURTHER ORDERED** that, within fifteen calendar days of the first school day of the 2011-2012 school year, DCPS shall convene a meeting of the Student's IEP team to review the comprehensive psychological evaluation and determine the Student's eligibility for specialized instruction and related services;

**IT IS FURTHER ORDERED** that, if the IEP team determines that the Student is eligible for specialized instruction and related services, DCPS shall develop an IEP for the Student at the meeting required by this Order, i.e., within fifteen calendar days of the first school day of the 2011-2012 school year;

**IT IS FURTHER ORDERED** that DCPS shall receive one day of delay in convening the meeting to review the Student's psychological evaluation, determine the Student's eligibility for specialized instruction, and develop an IEP for the Student, for every day of delay caused by Petitioner, her counsel, and her advocate.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

## NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

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DCPS