DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of STUDENT,[1]	Date Issued: April 12, 2015
Petitioner,	Hearing Officer: Peter B. Vaden
v.	
PUBLIC CHARTER SCHOOL,	
Respondent.	Office of Dispute Resolution, Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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 (DCMR). In her due process complaint, Petitioner alleges that Respondent Public Charter School (PCS) has violated its Child Find obligations under the IDEA to evaluate Student and determine his eligibility for special education and related services.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's due process complaint, originally filed December 15, 2014, named PCS as respondent. The parties met for a resolution session on January 6, 2015 and did not reach an agreement.

On January 8, 2015, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was originally scheduled for February 13, 2015. On January 21, 2015, I granted Petitioner's unopposed motion for leave to amend her due process complaint and ordered the timelines for the resolution period and for issuance of the final decision to begin anew, *nunc pro tunc*, to January 19, 2015. The due process hearing was rescheduled for March 18, 2015. On that date, Respondent's counsel was unavailable for health reasons. The due process hearing was rescheduled to April 8, 2015, the next date available to the parties and the hearing officer. On March 18, 2015, the Chief Hearing Officer granted Respondent's unopposed motion for a 20-day continuance, extending the due date for this decision to April 24, 2015.

The due process hearing was held before this Impartial Hearing Officer on April 8 17, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent PCS was represented by PCS' COUNSEL.

At the due process hearing, Petitioner's Counsel made an opening statement. Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST and Student. PCS called as witnesses MATH TEACHER, SPECIAL EDUCATION TEACHER, HISTORY TEACHER and PCS PSYCHOLOGIST. Petitioner's Exhibits P-1 through P-19 were admitted into evidence with the exception of Exhibit P-17, to which PCS' objection was sustained. Exhibits P-1, P-2, P-4, P-6, P-11 and P-13 were admitted over PCS' objections. Exhibit P-20 was withdrawn. PCS' Exhibits R-1 through R-18 were admitted into evidence without objection. Counsel for both parties made closing

arguments. Neither party requested leave to file post-hearing written argument.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the January 8, 2015 Prehearing Order:

> – Whether PCS failed in its child-find obligations since August 2014 to locate, evaluate and identify Student as a child in need of special education and related services, and/or denied Student a FAPE by failing to evaluate him for special education eligibility upon the requests of the parent beginning in August 2014.

In her opening statement, Petitioner's Counsel clarified that Petitioner alleges that PCS had cause to suspect that Student was a child with a disability since at least January 2013. PCS' Counsel did not object to this clarification of the issue.

For relief, Petitioner requested that PCS be ordered to conduct appropriate initial evaluation assessments of Student and convene an eligibility determination meeting. Petitioner also gave notice that she may seek an award of compensatory education if Student is determined eligible for special education and related services.

STIPULATIONS OF THE PARTIES

At the beginning of the due process hearing, counsel for the respective parties agreed to the following stipulations:

1. The student is currently in E GRADE at PCS.

2. The student did not attend PCS for the 2013-2014 school year.

3. The student was in the D GRADE at PCS for the 2012-2013 school year

4. The student was in the C GRADE at PCS for the 2011-2012 school year.

5. The student was in the B GRADE at PCS for the 2010-2011 school year.

6. The student was in the A GRADE at PCS for the 2009-2010 school year.

FINDINGS OF FACT

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

1. Student is a AGE youth. He resides with Petitioner in the District of Columbia. Student has never been determined eligible for special education and related services. Testimony of Mother.

2. Student is currently in E Grade at PCS. He has been enrolled in PCS since A Grade, except for the 2013-2014 school year when he was enrolled in DCPS High School. Testimony of Student.

3. PCS has elected to be treated as an "LEA Charter," *i.e.*, as its own LEA for purposes of Part B of the IDEA. *See* 5E DCMR § 923.3. Therefore, with respect to students enrolled in PCS, the charter school is responsible for meeting the IDEA requirements applicable to a local education agency (LEA). Hearing Officer Notice.

4. Mother thought Student was doing well at PCS, prior to when he transferred to DCPS High School for the 2013-2014 school year. Testimony of Mother. Students grades at PCS were C's and higher for the 2009-2010 school year, all B's except for one C for the 2010-2011 school year, C's and higher for the 2011-2012 school year, and all C's except for one B for the 2012-2013 school year. For the 2012-2013 school year, Student had 9 days of unexcused absences and 17 unexcused tardies. Exhibits R-2 through R-4.

5. In March 2012, Student was suspended from PCS for 33 days for the alleged infractions, physical assault upon another student and use of a weapon with

threat to do serious bodily harm. Exhibit P-6. He was involved with the D.C. juvenile justice system in the winter and spring of 2013 in connection with an attempted robbery charge. Exhibit P-11, Testimony of Student.

6. For the 2013-2014 school year at DCPS High School, Student was recorded absent for 62 days. That school year, Student failed all classes, except for Physical Education and Advisory. Exhibit P-4.

7. Student's homeroom teacher at PCS for the 2014-2015 school year is TEACHER 1. Testimony of Student. At the first parent-teacher conference for the current school year, in September 2014, Mother spoke to the homeroom teacher about her concerns over Student's behavior and grades. The homeroom teacher directed Mother to the special education coordinator (SEC). Mother wanted Student to evaluated for special education eligibility. Mother left a message for the SEC to call her, but the SEC never called her back. Testimony of Mother.

8. In the current school year, Student has had numerous unexcused absences and tardy arrivals. At the end of the first semester, Student was failing chemistry and geometry. He was involved in several behavior incidents and was "written up" repeatedly for failure to attend class. In October 2014, Student was disciplined on two occasions for refusing to go to class, which resulted in two two-day out-of-school suspensions. Exhibits P-5, R-6.

9. Mother filed her original due process complaint in this case on December 15, 2014. At the January 6, 2015 Resolution Session Meeting, PCS stated that it was willing to expedite an initial special education eligibility evaluation for Student and to convene an eligibility meeting once the evaluation was completed. On January 7, 2015, PCS' Counsel sent Petitioner's Counsel, by email, a Prior Written Notice of its proposal

to conduct a comprehensive psychological evaluation of Student and a consent to evaluate form for the parent to execute. Exhibit R-9. On January 26, 2015, Petitioner's Counsel responded (after receiving a follow-up email from PCS' counsel) that the parent was requesting an independent education evaluation and the right to choose her own provider. PCS' Counsel responded that PCS wanted the opportunity to evaluate Student before considering a request to fund an independent evaluation. Exhibit R-11. PCS' Counsel followed up again on February 2, 2015 to request that the parent execute the consent to evaluate form. On February 5, 2015, Petitioner's Counsel provided PCS' Counsel the consent to evaluate form executed by Petitioner. However, in the same email, Petitioner's Counsel stated that the parent was seeking an independent educational evaluation. Exhibit R-14.

10. On February 26, 2015, Clinical Psychologist emailed PCS Psychologist to state that she was in the process of completing a comprehensive psychological evaluation of Student and to inquire as to what tests the PCS Psychologist had administered. PCS Psychologist responded that Student's case had been assigned to an evaluator, but no assessments had been completed because PCS had learned that Student was being evaluated (by Clinical Psychologist) outside of school. Exhibit R-15. On February 26, 2015, PCS' Counsel wrote Petitioner's Counsel, by email, that if the assessments administered by Clinical Psychologist and PCS' Psychologist were duplicated, the evaluations would not be valid. PCS' Counsel wrote that PCS could not continue its evaluation of Student until Clinical Psychologist worked with PCS Psychologist to ensure that no assessments were duplicated. Exhibit R-16. Clinical Psychologist issued her Comprehensive Psychological Evaluation report on March 11, 2015. Exhibit P-12.

11. In her March 11, 2015 report, Clinical Psychologist diagnosed Student with Persistent Depressive Disorder and recommended, *inter alia*, that he be identified as a student with an Emotional Disturbance (ED) and that he receive an IEP that "mandates him to be educated in a self-contained class." Exhibit P-12.

12. PCS Psychologist has reviewed Clinical Psychologist's report and recommendations and concluded that the report was insufficiently comprehensive because it did not address the distinction between social maladjustment and the IDEA ED disability and did not have sufficient teacher ratings input. PCS has proposed to conduct more assessments of Student and has requested written consent from the parent. The parent's written consent has not been received. Testimony of PCS Psychologist.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 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).

Analysis

> Did PCS fail in its child find obligations since January 2013 to locate, evaluate and identify Student as a child in need of special education and related services, and/or deny Student a FAPE by failing to evaluate him for special education eligibility upon the requests of the parent beginning in January 2013?

In this case, Petitioner contends that PCS violated its IDEA "Child Find" obligations by not evaluating Student for special education eligibility before the complaint in this case was filed. Under the IDEA, "[s]chool districts have a continuing obligation under the IDEA . . . — called 'Child Find'— to identify and evaluate all students who are *reasonably suspected* of having a disability under the statutes." *D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir.2012) (emphasis in original) (citations and internal quotations omitted.) "Child Find is [the LEA's] affirmative obligation under the IDEA: 'As soon as a child is identified as a potential candidate for services, [the LEA] has the duty to locate that child and complete the evaluation process.' . . . *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008). [The LEA] must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.' D.C. Code § 38–2561.02(a)." *Long v. District of Columbia* 780 F.Supp.2d 49, 56 (D.D.C.2011).

The question in this case is when was PCS' child find obligation "triggered" with respect to Student. *See Long, supra* at 57. PCS argues that it has never had a reason to suspect that Student has an IDEA disability and that Mother did not request for her son to be evaluated before filing her due process complaint on December 15, 2014. The parent maintains that Student's behavior concerns, as far back as the 2012-2013 school year, gave PCS cause to suspect that Student had an IDEA disability. (Student was enrolled in another LEA, DCPS, for the 2013-2014 school year.) Student was suspended from PCS for 33 days in March 2012 for alleged assault and use of a weapon against another Student. Petitioner's Counsel argues that this incident should have caused PCS to suspect that Student might have a qualifying disability. I disagree. Delinquent behavior, without more, does not give rise to a suspicion of an IDEA disability. *See, e.g., Tracy v. Beaufort County Bd of Ed.*, 335 F.Supp.2d 675, 688-689 (D.S.C. 2004) *(*mere fact that student engaged in delinquent

behavior did not put the School District on notice that he possibly was suffering from a serious emotional disturbance); *Springer v. Fairfax County School Bd.,* 134 F.3d 659, 664 (4th Cir.1998) (Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities.) Aside from the March 2013 discipline incident, Petitioner has not shown any reason that PCS should have suspected that Student had a disability during the 2012-2013 school year. Student's grades for the 2012-2013 school year were average and he did not have an excess of unexcused absences. Even Mother testified that it seemed like Student was doing well until the 2013-2014 school year, when he attended a DCPS school. I conclude that Petitioner has not established that in the 2012-2013 school year, PCS had cause to reasonably suspect that Student had a disability.

Student enrolled in a DCPS school for the 2013-2014 school year. According to Mother, when Student returned to PCS in the fall of 2014, she alerted Homeroom Teacher at the first parent-teacher conference of her concerns about Student's academics and behavior. Homeroom Teacher referred Mother to the Special Education Coordinator. Mother testified that she contacted the PCS special education office about evaluating Student and that the office did not respond to her. Overall, Mother's testimony was confused and of questionable reliability. However, she was definite that she had contacted the special education office to request that Student be evaluated and that testimony was not rebutted by PCS. I find, therefore, that Mother has established that by September 2014, Student had been identified to PCS as a potential candidate for special education services and it was PCS' duty to complete the initial evaluation process pursuant to D.C. law. *See Long, supra.*

Under D.C. Code § 38–2561.02(a), PCS had 120 days from Mother's evaluation request to evaluate Student for special education eligibility. Mother did not state the date that she contacted the PCS special education office except that it was in September 2014.

For purposes of this analysis, I will assume that the referral date was no later than September 30, 2014. Therefore, PCS should have completed Student's initial evaluation by January 28, 2015 (120 days after September 30, 2014). On January 6, 2015, after Petitioner filed her due process complaint in this case, PCS agreed to evaluate Student on an expedited basis – but only committed to complete the evaluation by March 6, 2015. This was some 37 days after the 120-day period specified in Code § 38–2561.02(a). I find this failure by PCS to ensure that Student's evaluation was completed within 120 days of Mother's request was a procedural violation of the IDEA. *See, e.g., P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 738 (3rd. Cir.2009) (Unduly long time to complete evaluation was a procedural violation.)

Procedural violations of the IDEA do not necessarily lead to a denial of FAPE. *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Such violations are only actionable if they compromise the student's educational opportunities or seriously infringe parents' participation in their child's education. *Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C.Cir.2006); see* 20 U.S.C. § 1415(f)(3)(E)(ii). In this case, the evidence does not establish that Student lost educational opportunity or that Mother's participation rights were affected by PCS' not timely completing Student's evaluation. After PCS agreed to evaluate Student on January 6, 2015, the parent initially withheld her consent because she preferred to obtain an independent evaluation. Parent did grant her consent on February 5, 2015, but in the meantime pursued having Student independently evaluated by Clinical Psychologist. When Clinical Psychologist began her assessment of Student, PCS Psychologist put PCS' evaluation on hold, because she determined it was contrary to assessment protocol to proceed with the school evaluation until PCS learned what assessment instruments were

used by Petitioner's independent evaluator. Clinical Psychologist completed the independent evaluation of Student on March 11, 2015. After reviewing the independent evaluation, PCS' Psychologist determined that further assessments were needed in order for the MDT eligibility team to have sufficient data to determine Student's eligibility.

PCS has the right to conduct its own evaluation of Student and is not required to rely exclusively on Clinical Psychologist's report. *See M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153, 1160 (11th Cir.2006) (Every court to consider the IDEA's reevaluation requirements has concluded if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir.1996) ("[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation."). As of the due process hearing date, Mother had not yet given her consent for PCS to conduct additional assessments of Student.

Because it has not been yet determined whether Student is a child with a disability in need of special education and related services, the effect, if any, of PCS' procedural violation in not completing Student's initial evaluation within 120 days has not been established. Moreover, while PCS was at fault for not starting Student's evaluation when first requested by Mother in September 2014, at this juncture the completion of Student's initial evaluation has been held up by Mother's election to obtain an independent evaluation and by her not executing a consent for PCS to complete its additional assessments. I conclude that the evidence does not establish that PCS' initial failure to complete Student's evaluation in 120 days has resulted in loss of educational opportunity to Student or infringed upon the parent's participation rights. Therefore, PCS' procedural violation in not timely completing Student's initial eligibility evaluation is not actionable.

Compensatory Education/Other Relief

Petitioner's counsel argues that I should award compensatory education relief to Student for the violations alleged in the complaint. Compensatory education is the remedy for a denial of FAPE to a child with a disability. *See Mary McLeod Bethune Day Academy Public Charter School v. Bland,* 534 F.Supp.2d 109, 115 (D.D.C.2008) (citing *G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir.2003)). Here Student has not yet been determined to be a child with a disability who is entitled to a FAPE.[2] Moreover, in this case, the only IDEA violation proven by Petitioner, was PCS' not completing its initial eligibility evaluation within 120 days of Mother's September 2014 referral. Petitioner has not shown that Student has suffered any educational harm as a result of that procedural violation. Therefore, a compensatory education award is not appropriate.

In her due process complaint, the Petitioner requested that I order PCS to conduct appropriate initial evaluation assessments of Student and to convene an eligibility determination meeting. However, PCS agreed in January 2015 to conduct its initial eligibility evaluation of Student and to convene an MDT team to make the eligibility determination. As the due process hearing, PCS' Counsel represented that her client

[2] In closing argument, Petitioner's Counsel argued that the Hearing Officer could determine from the hearing evidence, principally from Clinical Psychologist's testimony, that Student is a student with an ED disability. However, PCS' Psychologist testified, credibly, that there was not sufficient data to make an eligibility determination. Moreover, in her due process complaint, Petitioner did not request that the Hearing Officer determine that Student was eligible for special education. She requested that I order PCS to conduct appropriate initial evaluation assessments of Student and to convene an eligibility determination meeting. *See* Prehearing Order, Jan. 8, 2015. I find it is appropriate in this case for a multidisciplinary team to make the initial determination of Student's eligibility in accordance with 34 CFR § 300. 306 and I decline to reach the issue of whether Student is a "child with a disability" as defined in the IDEA.

remains willing and able to proceed with its evaluation and eligibility determination as soon as the parent gives her written consent for PCS to complete its additional assessments of Student. Therefore an order for PCS to perform this duty is not warranted.

Although I decline to grant compensatory education or other relief to Petitioner in this case, my order herein will be without prejudice to Petitioner's right to seek further relief hereafter if Petitioner has concerns about PCS' initial evaluation of Student or disagrees with the MDT team's eligibility determination.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

> All relief requested by Petitioner herein is denied, without prejudice to Petitioner's rights, if any, to seek relief hereafter for any matter relating to the completion of Student's initial evaluation and Student's identification as a potential child with a disability.

Date: April 12, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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 U.S.C. § 1415(i).