

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

OSSE
Office of Dispute Resolution
March 11, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: March 11, 2015
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on February 5, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On February 12, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

On February 9, 2015, Petitioner filed a motion for an expedited hearing. On February 11, 2015, Respondent consented to the motion, and on February 13, 2015, the motion was granted. The Standard Operating Procedures of the Office of Dispute Resolution allow for expediting non-discipline cases; however, IDEA does not mandate a particular timeline for expedited hearings that are non-discipline related. The parties convened a Resolution Session Meeting (“RSM”) on February 23, 2015. By mutual agreement of the parties and the IHO, the resolution period ended on the date of the DPH (February 27, 2015), and the HOD is due ten school days after the DPH concluded (March 13, 2015).

¹ Personal identification information is provided in Appendix A.

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The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on February 17, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by February 20, 2015 and that the DPH would be held on February 27, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued February 17, 2015.

The DPH was held on February 27, 2015 at the Office of Dispute Resolution, Petitioner elected for the hearing to be closed.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibit P-10 was admitted without objection. Petitioner’s exhibits P-1 through P-9 and P-11 through P-13 were admitted over Respondent’s objection. Respondent disclosed witnesses, but not exhibits.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Educational Advocate

Respondent called the following witness at the DPH:

- (a) Special Education Coordinator; District Elementary School

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to evaluate Student following Parent’s requests oral requests to the Special Education Coordinator during the 2014-2015 school year, pursuant to 34 C.F.R. § 300.301.²
- (b) Whether DCPS denied Student a FAPE by failing to comply with the child find regulation, 34 C.F.R. § 300.111, during the 2013-2014 and the 2014-2015.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) an Order that DCPS provide a one/one trained aide for Student for the entire school day, until such time as Student is provided with an appropriate placement (or a meeting);

² During the DPH, in response to an objection from Respondent as to the sufficiency of facts pleaded in the DPC, Petitioner modified this issue during the DPH to focus only on school year 2014-2015, rather than the 2013-2014 and 2014-2015 school years, as alleged in the DPC.

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- (b) an Order that DCPS reimburse Parent for independent comprehensive psychological and functional behavioral evaluations that Parent is in the process of obtaining;
- (c) an Order that DCPS fund any other evaluations recommended by Parent's independent evaluator.

FINDINGS OF FACT

1. Student resides with his mother (“Parent”/“Petitioner”) in Washington, D.C.³
2. As of the DPH date, it had not been determined whether Student is eligible for special education and related services.⁴
3. Student is a first grader at District Elementary School, where he also attended Kindergarten during the 2013-2014 school year.⁵
4. During the 2012-2014 school year, Student attended Pre-Kindergarten 4 at a different DCPS elementary school.⁶
5. At both District Elementary School and Student's previous elementary school, Student has consistently demonstrated alarming, and at time dangerous, behavior. He is frequently sent out of the classroom for his behavior, and Parent frequently receives calls from the school regarding Student's problematic behavior.⁷
6. During the 2014-2015 school year, for example: Student's classroom assignment was changed, because the first teacher to whom he was assigned was not able to handle his behavior; Student engaged in behaviors such as hitting and scratching another student, pulling down his pants, defecating on the floor in front of other students, and bringing a knife to school; Student has been removed from class and/or suspended on multiple occasions; the Special Education Coordinator asked Parent to have Student psychologically assessed.⁸
7. Approximately one day after the instant DPC was filed in February 2015, Student went into crisis mode while at school – eating/attempting to eat part of the carpet, biting a chair, threatening to kill himself and one of his teachers. Several police officers and a crisis psychologist were called to the school to stabilize Student.⁹

³ Testimony of Parent.

⁴ Testimony of Parent; testimony of Special Education Coordinator.

⁵ Testimony of Parent.

⁶ *Id.*

⁷ *Id.*

⁸ Testimony of Parent; testimony of Special Education Coordinator.

⁹ *Id.*

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8. During the 2014-2015 school year and at as early as October 2014, Parent made more than one request to Special Education Coordinator that the school evaluate Student for eligibility for special education and related services.¹⁰

9. Special Education Coordinator wanted Parent to participate in a referral meeting prior to giving Parent a form to sign, indicating Parent's consent for Student to be evaluated. A referral meeting had not taken place as of the date of the DPH. Special Education Coordinator nor anyone else from District Elementary School had provided Parent a copy of the consent form by the date of the DPH, and Parent had not signed the consent form as of the date of the DPH.¹¹ Parent wanted Student to be evaluated and was willing to sign a consent form.¹²

10. On or around January 29, 2015, Special Education Coordinator gave Parent a list of community based mental health providers, and encouraged parent to seek guidance regarding the types of behaviors Student was exhibiting.¹³ Special Education Coordinator provided a letter for Parent to provide to the outside mental health provider. The letter indicated that the school had recently met with Parent about matters regarding Student that were "urgent in nature and extremely important and necessary for the safety and well-being of [the] little boy." The letter requested that the outside provider "[p]lease support the parent in providing urgent care to her son immediately, today and possibly at other times." The letter further indicated that "[t]he school thanks [the provider] for supporting the parent and supporting DCPS in keeping all of [its] children safe, healthy and educationally sound."¹⁴

11. Student's severe behaviors alerted District Elementary School that he needed to be evaluated for special education and related services, and Student's severe behavior has impacted his education, at least to some extent.¹⁵

12. As of the date of the DPH, Parent had contracted with an independent psychologist to evaluate Student.¹⁶

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade

¹⁰ *Id.*

¹¹ *Id.*

¹² Testimony of Parent.

¹³ Testimony of Parent; testimony of Special Education Coordinator; P-5-8.

¹⁴ Testimony of Parent; testimony of Special Education Coordinator; P-5-7.

¹⁵ Testimony of Special Education Coordinator.

¹⁶ Testimony of Parent.

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the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

I. Whether DCPS denied Student a FAPE by failing to evaluate Student following Parent's requests oral requests to the Special Education Coordinator during the 2014-2015 school year, pursuant to 34 C.F.R. § 300.301.

DCPS must conduct initial evaluations to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011), quoting D.C. Code § 38-2561.02(a). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia* 2013 WL 620379, 5-6 (D.D.C. Feb. 20, 2013). There are a number of ways a student can be referred to DCPS for initial evaluation for special education eligibility, and one such method is via a parent's request for evaluation. *See* 34 C.F.R. 300.301(b) and 5 D.C.M.R. E-3004.1(a) and (b).

The District of Columbia's Municipal Regulations state as follows:
If the child to be referred attends a D.C. public school or is enrolling in a D.C. public school at the time this referral is made, this referral shall be submitted by his or her parent to the building principal of his or her home school, on a form to be supplied to the parent by the home school at the time of the parent's request.

5 D.C.M.R. E-3004.1(b).

Respondent argues that Parent did not make a written request to the building principal as indicated in 5 D.C.M.R. E-3004.1(b); therefore, Parent could not have made a request that would trigger the start of the 120 day timeline. First, 5 D.C.M.R. E-3004.1(b) makes clear that the school is responsible for providing the parent with the correct form to fill out and submit. The record reflects that District Elementary School did not provide Parent with a consent to evaluate form or any other form for making a written request for an evaluation. Special Education Coordinator wanted Parent to attend a referral meeting prior to giving Parent a consent to evaluate form to sign. Special Education Coordinator testified that she felt Parent was evading Special Education Coordinator in the school building throughout the 2014-2015 school year to avoid setting up such a meeting. The Hearing Officer does not find that Parent was evading a referral meeting. Parent credibly testified that she has seven children and a job, and has to move quickly when she comes to District Elementary School to pick up Student, or for some other reason.

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Even if Parent were evading Special Education Coordinator, it would not relieve Special Education Coordinator or someone else at District Elementary School from at least providing the form to Parent. Respondent further points out that the IDEA charges LEAs with obtaining informed consent from a parent prior to beginning an initial evaluation process. This is true, pursuant to 34 C.F.R. § 300.300(a). Yet, while inviting a parent to a referral meeting in order to explain the process and respond to any questions a parent may have is not an impermissible method of obtaining informed consent, putting the evaluation process entirely on hold pending such a meeting was not reasonable under the facts of this case.

Parent expressly requested to Special Education Coordinator that Student be evaluated. The evidence indicates that Parent understood what she was requesting; therefore, there is no reason to assume her signed consent would not have been informed consent. Failing to provide Parent with whatever forms were necessary to start the evaluation process once Parent made it known that she wanted to have Student evaluated was not appropriate, particularly the school and Special Education Coordinator had contact with Parent at various points during the school year. Parent made a request to have Student evaluated at least as early as October 2014 (and likely earlier). At least 120 days had passed by the time the DPC was filed and by the date of the DPH, yet Student had not yet been evaluated. The failure to initially evaluate a potentially disabled child is a substantive violation of IDEA and, in itself, constitutes a denial of FAPE. *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. 2013), *citing N.G. v. District of Columbia* 556 F.Supp.2d 1, 16 (D.D.C. 2008). Even if it had been a procedural violation, it would have constituted a denial of FAPE because it impeded the child's right to a FAPE and/or caused a deprivation of educational benefit. Therefore, Parent meets the burden of proving that DCPS denied Student a FAPE by failing to evaluate Student following Parent's requests oral requests to the Special Education Coordinator during the 2014-2015 school year.

II. Whether DCPS denied Student a FAPE by failing to comply with the child find regulation, 34 C.F.R. § 300.111, during the 2013-2014 and the 2014-2015 school years.

Pursuant to 34 C.F.R. § 300.111, DCPS is responsible for identifying, locating and evaluating all children with disabilities who reside in the District of Columbia and who are in need of special education and related services, regardless of the severity of their disability. DCPS' Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). Special Education Coordinator credibly testified that Student's troubling behaviors put District Elementary School on notice that he needed to be evaluated for eligibility for special education and related services. Special Education Coordinator also credibly testified that Student's disturbing behaviors have impacted his education, at least to some extent. As stated above, the failure to initially evaluate a potentially disabled child is a substantive violation of IDEA and, in itself, constitutes a denial of FAPE. *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. 2013), *citing N.G. v. District of Columbia* 556 F.Supp.2d 1, 16 (D.D.C. 2008). Even if it had been a procedural violation, it would have constituted a denial of FAPE because it impeded the child's right to a FAPE and/or caused a deprivation of educational benefit. Therefore, Petitioner

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meets the burden of proving that DCPS denied Student a FAPE by failing to comply with the child find regulation during the 2013-2014 and the 2014-2015 school years.

REQUESTED RELIEF

One form of relief Petitioner requests is for a one-on-one trained aide for Student throughout the school day, pending an eligibility determination. The evidence demonstrates that Student's behavior can at times pose a safety risk. However, there was not sufficient evidence at the DPH to establish that a one-on-one trained aide would be the appropriate safety measure for Student. Moreover, Student has not yet been determined eligible for special education and related services pursuant to the IDEA. For these reasons, the Hearing Officer will not order this requested relief. However, the Hearing Officer urges the school to make an eligibility determination as soon as possible, and to take/maintain all appropriate safety measures.

MOTIONS

On February 19, 2015, Respondent filed a notice of insufficiency/motion for an amended DPC asserting that the DPC did not plead sufficient facts. On February 23, 2015, Petitioner filed a motion requesting that the Hearing Officer disregard Respondent's notice of insufficiency and deny Respondent's motion for an amended DPC. On February 24, 2015, Petitioner filed a motion requesting that the Hearing Officer order that Petitioner's DPC is sufficient and that the Hearing Officer deny Respondent's request for an amended DPC. On February 24, 2015, Respondent filed an opposition to Petitioner's February 23, 2015 motion requesting that the Hearing Officer disregard Respondent's notice of insufficiency and deny Respondent's motion for an amended DPC. On February 26, 2015, Respondent's notice of insufficiency/motion for an amended DPC was denied. On February 26, 2015 Petitioner's February 23, 2015 motion requesting that the Hearing Officer disregard Respondent's notice of insufficiency and deny Respondent's motion for an amended DPC was denied as moot. Petitioner's February 24, 2015 motion requesting that the Hearing Officer order that Petitioner's DPC is sufficient and that the Hearing Officer deny Respondent's request for an amended DPC is hereby **DENIED** as it is **MOOT**.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall reimburse Parent for the independent comprehensive psychological and functional behavioral evaluations that Parent is in the process of obtaining;
- B. DCPS shall fund any other evaluations recommended by Parent's independent evaluator, to the extent they are necessary to determine initial eligibility.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: March 11, 2015

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

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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).