

OSSE  
Office of Dispute Resolution  
May 17, 2023

<sup>1</sup> Personal identification information is provided in Appendix A.

process complaint. On April 26, 2023, I convened a telephone prehearing conference with Father and DCPS' counsel to discuss the issues to be determined, the hearing date and other matters. My final decision is due by May 27, 2023.

With consent of the Parents, the due process hearing was held online and recorded, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on May 15, 2023. DCPS was represented by SPECIAL EDUCATION DIRECTOR (SE Director) and by DCPS' COUNSEL. Mother and Father appeared online for the hearing.

DCPS' Counsel and Father made an opening statements. DCPS called as witnesses RESTORATIVE PRACTICE COORDINATOR (RPC), TEACHER and SE Director. Father testified as the only witness for the Parents. DCPS' exhibits DCPS-1 through DCPS-15<sup>2</sup> were admitted into evidence without objection. Parents' exhibits Parent-1 through Parent-7 were all admitted into evidence, including Exhibits Parent-1, Parent-5 and Parent-7 admitted over DCPS' objections. At the conclusion of the taking of the evidence, DCPS' Counsel and Father made oral closing arguments. There was no request to file written closings.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

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<sup>2</sup> In their prehearing disclosures, both DCPS and the Parents marked their respective exhibits with the "R-" prefix. To avoid confusion, in this decision, I identify DCPS' exhibits as "DCPS-#" and Parents' exhibits as "Parent-#".

**ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the April 26, 2023

Prehearing Order, are:

1. Whether the DCPS complied with 34 C.F.R. §300.111(a) when it located, identified, and proposed evaluation for [REDACTED] in March 2023;
2. Whether DCPS can pursue and proceed with an initial evaluation procedure and appropriate assessment of Student pursuant to 34 C.F.R. §300.300(a)(3)(i) and §300.301(a).

For relief, DCPS requests that the hearing officer,

1. Make a finding that DCPS complied with its Child Find obligations under IDEA and its regulations and
2. Order that DCPS can complete and proceed with the initial evaluation to determine Student's eligibility for special education and related services.

**FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides with Mother in the District of Columbia. Father lives in another state. Testimony of Father.
2. Student attends CITY SCHOOL, where he/she is enrolled in GRADE. Student has never been evaluated for special education eligibility. Educators at City School suspect that Student may have one or more of the disabilities defined in the IDEA, 34 C.F.R. § 300.8(c). Testimony of SE Director
3. In the 2022-2023 school year, Student has had numerous aggressive

behavior outbursts at school. Exhibits DCPS-2, DCPS-3, DCPS-15. During these incidents, Student would cry and scream and, at times, be physically aggressive to school staff, including kicking, hitting, punching, head-butting and throwing things. Student also engaged in self-injurious behaviors, punching and kicking wood and glass structures in the building. When these outbursts occurred, Student had to be removed from the classroom to avoid self-injury or injury to other children. At times, Student has had to be forcibly carried away from the classroom or hallway. At least two of these incidents caused physical injury to teachers requiring healthcare attention. Testimony of RPC, Teacher, SE Director. In one incident in March 2023, Student threw a chair and his/her tablet computer in the classroom and the other children had to be removed from the room out of concern for their safety. Testimony of SE Director. Student's outbursts are typically triggered when the child is told "No" or held accountable for misbehavior. Testimony of RPC.

4. Following Student's outbursts, it would take at least 30 minutes and sometimes up to two hours for Student to de-escalate. At times, Student would go into "sleep mode" following the outbursts. One or two times, the school had to get a parent to come to school to pick up Student. Testimony of SE Director.

5. Mother has not seen these behavior outbursts of Student at home. Father believes that school staff is blowing the incidents out of proportion. The Parents intend to obtain counseling, outside of school, for Student, but as of the hearing date, they had not set up outside counseling for the child. Testimony of Father.

6. Student is a bright child and is performing well academically. Testimony of Teacher. Typically, Student is a “cheerful kid” and the behavior outbursts only occur when Student gets upset. Testimony of RPC.

7. Around January or February 2023, CLASSROOM TEACHER, brought her concerns about Student’s challenges to SE Director, including Student’s outbursts, tantrums, difficulty getting along with classmates and sustaining attention to task. SE Director scheduled a multidisciplinary team meeting with Mother, who was supportive of the Tier 1 and Tier 2 strategies being used for Student at school and said that she would carry that over at home. Testimony of SE Director.

8. On February 14, 2023, school staff referred Student for an initial special education eligibility evaluation and issued a Prior Written Notice (PWN) concerning the evaluation referral to the Parents. Exhibits DCPS-4, DCPS-5 and DCPS-6. City School followed up by setting an Analysis of Existing Data (AED) meeting, which was held on March 16, 2023. Exhibit DCPS-10.

9. Father and Mother attended the March 16, 2023 AED meeting. At the meeting, Father expressed concern regarding the validity of the behavioral data on Student recorded in the AED report. Father stated that Student’s academics and behavior were fine and he did not trust City School to evaluate Student. Father stated that a DCPS evaluation of Student would not be beneficial and requested that the meeting end. DCPS’ interim school psychologist stated that she did not believe there was enough data to support the need for an evaluation. The other school representatives

disagreed that no evaluation was needed, because Father had requested that the meeting end without further analysis. Father withheld consent for an initial eligibility evaluation. Exhibit DCPS-10, Testimony of SE Director.

10. In addition to implementing Tier 1 and Tier 2 interventions for Student, City School provided Student weekly counseling by a contract in-school social worker. Testimony of SE Director. Other interventions attempted by City School included regular “check in” and ask the student how things are going; 1:1 conversations lasting 5 to 15 minutes with school social worker; Student check-in with a supporting adult daily; Teachers checking in with student; Behavioral Improvement Plan; Positive praise; Positive behavior interventions and supports (PBIS); Rewards/Token Boards; Negotiating rewards and consequences in a “kind” way; Breaks when needed; Self-regulation/coping strategies provided by the school social worker; Smaller group instruction with support of an Applied Behavior Analysis (ABA) certified staff member; Social-emotional learning (SEL), Restorative strategies, and trauma responsive supports with Student; Meetings with parents, and Behavioral support from an additional staff member while in other teacher-assigned classrooms. Exhibit DCPS-15; Testimony of SE Director.

11. On March 20, 2023, DCPS provided a PWN to the Parents of its intent to proceed with the initial evaluation process. In the PWN, DCPS proposed additional formal assessments to determine Student’s special education eligibility, including a comprehensive psychological evaluation and a functional behavioral assessment (FBA)

II to be completed by a DCPS qualified evaluator. The PWN explained, as reasons for proceeding with the evaluation, that it has taken multiple DCPS School resources to de-escalate, stabilize, and keep Student safe; that Student's "unpredictable [maladaptive], aggressive, and violent behaviors" impeded Student's learning and disrupted the learning of other children in the classroom and that Student's intense outbursts were both atypical and concerning, which warranted further analysis through formal evaluations to determine eligibility for additional specialized instruction support and/or related services." A copy of the procedural safeguards was enclosed with the PWN.

Exhibit DCPS-11. The Parents did not give consent for Student to be evaluated.

Testimony of Father.

12. On April 12, 2023, DCPS filed its due process complaint to pursue an initial evaluation, without the parents' consent, to determine if Student qualifies as a child with a disability under 34 C.F.R. § 300.8.

**CONCLUSIONS OF LAW**

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

**Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, DCPS in this case, shall bear the burden of production and the burden of persuasion. The burden of persuasion shall be met by a

preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Has DCPS established that it should be permitted to evaluate Student despite the Parents' withholding their consent?

DCPS contends it has reason to suspect Student has an IDEA disability and that because of the suspected disability, he/she may require special education and related services. DCPS sought the Parents' consent to conduct an initial evaluation to determine whether Student has an IDEA disability. The Parents have declined to provide their consent. In this proceeding, DCPS seeks authorization from the hearing officer to proceed with an initial evaluation without the Parents' consent. For the reasons explained below, I will grant that authorization.

Under the IDEA, DCPS has an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities who are residents of the District of Columbia but not enrolled in a public charter school local education agency (LEA), and who may be in need of special education and related services. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); 5A DCMR § 2003.2. The scope of this "child find" duty includes "children who are suspected of being a child with a disability . . . even though they are advancing from grade to grade." 34 C.F.R. § 300.125(a)(2)(ii). *Kruvant v. District of Columbia*, No. CIV.A. 03-1402 JDB, 2005 WL 3276300, at \*7 (D.D.C. Aug. 10, 2005). Thus, as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process. *B.R. by*



*Rempson v. District of Columbia*, No. CV 07-0578 (RMU), 2010 WL 11578733, at \*7 (D.D.C. Sept. 29, 2010).

Before conducting an initial evaluation to determine if a student is a child with a disability, the District must provide the parent with prior written notice in accordance with 5A DCMR § 3032 and a copy of the procedural safeguards notice in accordance with 5A DCMR § 3033. The prior written notice shall also contain:

- (a) Information about the purpose of the evaluation process;
- (b) The types of child-level data being assessed; and
- (c) Any additional assessments needed.

#### 5A DCMR § 3005.3

After providing prior written notice, normally a local education agency (LEA) shall obtain consent from the parent of the child before proceeding with the initial evaluation. 20 U.S.C. § 1414(a)(1)(D), 5A DCMR 3005.7 The IDEA regulations provide an override procedure for LEAs, if the parents do not provide consent for an initial evaluation:

- (i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

34 C.F.R. § 300.300(a)(3)(i); 20 U.S.C. § 1414(a)(1)(D)(ii)(I)

In the present case, Student's 2022-2023 school year general education classroom teacher was very concerned by Student's emotional outbursts in school. These outbursts included crying and screaming, physical aggression toward adult staff, with kicking, hitting, punching, head-butting and throwing things, as well as self-injurious behaviors. During these outbursts, Student had to be removed from the classroom, which interfered with Student's learning and the learning of classmates. At least two teachers have been physically injured by Student in these incidents. Despite City School's providing Tier 1, Tier 2 and Tier 3 interventions and supports, Student continued to have aggressive behavior outbursts at school, which compromised Student's safety as well as the safety and well-being of classmates and adult staff.

In January or February 2023, Student's classroom teacher referred the child to City School's Special Education Director for consideration of further assistance. After convening a meeting with Mother and the school team to discuss these concerns, the school convened an Analysis of Existing Data (AED) meeting on March 16, 2023, which both parents attended. The AED meeting was curtailed at the request of Father, who maintained that Student's behavior was fine and stated that he did not trust the school team to evaluate his child. The father's objection notwithstanding, on March 20, 2023, DCPS provided a PWN to the Parents of its intent to proceed with the evaluation process and requested their consent. The March 20, 2023 PWN stated that it had taken

multiple City School resources to de-escalate, stabilize, and keep Student safe; that Student's "unpredictable [maladaptive], aggressive, and violent behaviors" impeded Student's learning and disrupted the learning of other children in the classroom and that Student's intense outbursts were both atypical and concerning, which warranted further analysis through formal evaluations to determine eligibility for additional specialized instruction support and/or related services. City School proposed to conduct formal assessments to determine Student's special education eligibility, including a comprehensive psychological evaluation and an FBA II. The school requested parental consent for the initial evaluation, which the Parents withheld.

As required by the District's regulations, 5A DCMR § 3005.2, DCPS' March 20, 2023 PWN contained information about the purpose of the initial evaluation process for Student and the types of child-level data being assessed – that is, a comprehensive psychological evaluation and an FBA. DCPS supplied its procedural safeguards notice with the PWN. DCPS' expert witness, SE Director, opined credibly in her testimony that Student's behaviors at school could be related to the IDEA disabilities Emotional Disturbance, high functioning Autism Spectrum Disorder or both. *See* 34 C.F.R. § 300.8. I find that DCPS has met its burden of persuasion that it has a reasonable basis to believe that Student's behavioral challenges at school could be related to an IDEA disability and that the assessment plan it developed was properly presented to the Parents, who refused consent. Accordingly, I determine that DCPS may conduct the assessments, described in the March 20, 2023 PWN, without the Parents' consent.

**ORDER**

1. In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that DCPS is authorized to evaluate Student in accordance with its Prior Written Notice - Proceed with Evaluation Process (After Referral or Prior to Reevaluation) Form dated March 20, 2023, in the absence of parental consent. This shall not be construed as authorization for the initial provision of special education and related services
2. All other relief requested by the Petitioner DCPS herein is denied.

SO ORDERED.

Date: May 17, 2023

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).

cc: Counsel of Record  
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