

***DISTRICT OF COLUMBIA***  
Office of the State Superintendent of Education  
Office of Review & Compliance  
Student Hearing Office

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OSSE  
STUDENT HEARING OFFICE  
APR 27 AM 11:02

*Confidential*

<p>STUDENT<sup>1</sup>, by and through parent,  Petitioner,  <i>vs.</i>  District of Columbia Public Schools,  Respondent.</p>	<p><b><u>HEARING OFFICER'S DETERMINATION</u></b></p> <p>Counsel for Petitioner/Parent: Iris S. Barnett, Esq.</p> <p>Asst. Attorney General for DCPS: Laura George, Esq.</p> <p><u>Impartial Hearing Officer</u> H. St. Clair, Esq.</p>
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<sup>1</sup> Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

## BACKGROUND

The student attended a DCPS elementary school and exhibited problem behavior during the 2007-08 School Year; to date, DCPS had not identified the student as a child with a disability under *IDEIA 2004*.

On March 16, 2009, Counsel for the Parent filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Parent complained DCPS failed at "child find" and failed further to complete evaluation of the student for special education services within the legally mandated 120-day timeline and, for relief, requested an ORDER declaring the student Emotionally Disturbed.

The parties waived the Resolution Session.

The Student Hearing Office, OSSE, scheduled a hearing in this matter for 1:00 P.M., Monday, April 20, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 4B, Washington, D.C. 20003. The hearing convened as scheduled.

## JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

- ISSUES:**
- 1. Did DCPS fail "to find" the student?**
  - 2. Did DCPS violate the legally mandated 120-day timeline for evaluation of the student for special education services after referral?**
  - 3. Should the hearing officer disability code the student Emotionally Disturbed?**

## FINDINGS of FACT

By facsimile dated April 10, 2009, the parent disclosed 2 witnesses and 20 documents.

By facsimile dated April 20, 2009, DCPS disclosed 6 witnesses and 6 documents. The documents were admitted into the record and are referenced/footnoted herein

where relevant.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. Report cards from the 2005-06 School Year indicated that the student's academics were satisfactory but noted the beginning of tantrums during the third advisory; misbehavior continued during the fourth advisory.<sup>2</sup>
2. The student's 1st grade reports cards for the 2007-08 School Year indicated progress that achieved the "basic" standard.<sup>3</sup>
3. The student was suspended for 3 schooldays on January 11, 2008.<sup>4</sup> On February 29, 2008, the student was proposed for expulsion for "stabb[ing]" a schoolmate with a pencil.<sup>5</sup>
4. The October 8, 2008 Student Support Team (SST) meeting notes described the student's escalating misbehavior but did not refer the student for evaluation for special education services.<sup>6</sup>
5. The student's 2nd grade report cards for the 2008-09 School Year indicated the "below basic" standard for the first and second advisories.<sup>7</sup> The November 4, 2008 teacher comment read, "referring to (SST) team for immediate evaluation."<sup>8</sup> The January 1, 2009 teacher comment warned the student maybe retained in the 2nd grade.<sup>9</sup>
6. In the November 18, 2008 Behavior Modification Documentation Sheet, the teacher stated that she could, ". . . no longer tolerate the verbal and physical abuse from this student;" the recommendation was to transfer the student to another class.<sup>10</sup>
7. On November 19, 2008, the SST met again, discussed the student's deteriorating behavior but, still, did not refer the student for evaluation for special education services.<sup>11</sup>

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<sup>2</sup> Parent Document No 1, Winston Education Center, pre-kindergarten

<sup>3</sup> Par. Doc. No 2

<sup>4</sup> Par. Doc. No 3

<sup>5</sup> Par. Doc. No 4

<sup>6</sup> Par. Doc. No 9

<sup>7</sup> DCPS Doc. No 5

<sup>8</sup> *ibid*, page 5-3

<sup>9</sup> *ibid*

<sup>10</sup> Par. Doc. No 10

<sup>11</sup> Par. Doc. No 11

8. The SST met on December 9, 2008 and, with the documentation of the student's in school misbehavior, should have referred the student for evaluation of special education services; members of the SST included a school psychologist and a social worker. Furthermore, the team reviewed an observation of the student from the District of Columbia Child and Family Services Agency.<sup>12</sup>

8. The District of Columbia Department of Mental Health completed the February 12, 2009 Psychological Evaluation of the student;<sup>13</sup> The evaluation was delivered to DCPS on February 20, 2009.<sup>14</sup>

9. The Parent described the student's behavior during the 2007-08 School Year as disrespectful and violent towards schoolmates and staff; that twice during the school year the student attacked schoolmates with a pencil. The Parent testified that staff often called her about the student's misbehavior.<sup>15</sup>

10. The D.C. Depart. Of Mental Health Psychologist testified via telephone that he evaluated the student and determined that the student met the definition of Emotional Disturbance as setout in *IDEIA 2004*; in his evaluation<sup>16</sup> of the student, the Psychologist diagnosed the student with Anxiety Disorder, NOS, R/O Communication Disorder, Depressive Disorder and Disruptive Disorder, NOS, each an Axis I diagnoses.

11. On March 9, 2009, with the Parent and Counsel for the Parent as team members, the MDT met, reviewed the February 12, 2009 Psychological Evaluation, and completed a Student Evaluation Plan (SEP) that recommended comprehensive psychological and speech/language evaluations, a social history, and a functional behavior assessment of the student.<sup>17</sup> Further at the meeting, the Parent requested an eligibility determination; the MDT decided to make the eligibility determination later, after the completion of the referred evaluations. The Parent signed the Consent to Evaluate on March 9, 2009.<sup>18</sup>

12. On March 10, 2009 DCPS sent a letter to the Parent stating that the student had been referred for special education services by the school on February 27, 2009.<sup>19</sup>

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<sup>12</sup> Par. Doc. No 15

<sup>13</sup> Par. Doc. No 17; DCPS Doc. No 4

<sup>14</sup> a facsimile notation on the bottom of DCPS Doc. No 5, the February 12, 2009 Psychological Evaluation

<sup>15</sup> -testimony of the Parent

<sup>16</sup> *ibid*, 11, above

<sup>17</sup> DCPS Doc. No 3

<sup>18</sup> DCPS Doc. No 1

<sup>19</sup> DCPS Doc. No 2; the mentioned February 27, 2009 school referral was not in the record.

13. A Special Education Teacher at the school testified via telephone that DCPS had completed an evaluation of the student on March 16, 2009, but that, to date, the evaluation had not been sent to the Parent; the evaluation was not in the record. The Teacher had not taught the student; no Letters of Invitation were in the record..

## **CONCLUSIONS of LAW**

**DCPS is required to make FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.** *IDEIA 2004* requires DCPS to evaluate fully every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 21, determine eligibility for special education services and, if eligible, provide same through an appropriate IEP and Placement.

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a).

District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by the preponderance.

### **ONE & TWO**

**DCPS failed “to find” the student as of November 4, 2008.**

*IDEIA 2004* implementing regulation 34 CFR 300.111 sets out the obligation on the part of DCPS to identify, locate and evaluate all children in the District of Columbia who maybe in need of special education services.

At District of Columbia Municipal Regulation 5 DCMR 5-3004.1(b)(3), a teacher can refer a student for evaluation for special education services, and once referred, DCPS has 120 days in which to make FAPE available to the referred student. *See* D.C. Code 38-2561.02.

The November 4, 2008 teacher comment: “referring to (SST) team for immediate evaluation” was a teacher referral for the student for evaluation for special education services, an evaluation that DCPS had 120 days or until March 5, 2009 to complete and offer FAPE.

### **THREE**

**As opposed to the hearing officer, DCPS should disability code the student.**

The MDT met on March 9, 2009, considered the February 12, 2009 Psychological Evaluation and, as provided for at regulation 34 CFR 300.305(a), decided that additional evaluations were needed. With the existing evaluation, could the MDT have then disability coded the student Emotionally Disturbed (ED)? Yes, they could have; but,

under the said regulation, the MDT's decision to postpone the eligibility determination for the completion of their recommended additional evaluation of the student was not an abuse their discretion. Had the MDT decided the student was not ED, a different question would have been presented.

## **SUMMARY of the DECISION**

The student was making progress before the 1st grade. In the 1st grade, he began to act out, disrespecting and sometimes violent toward schoolmates and staff; on two occasions he attacked a schoolmate with a pencil. Still, he achieved the basic academic level.

At the beginning of the 2nd grade, the SST met on October 8, 2008 to discuss the student's misbehavior in school. The November 4, 2008 teacher comment read, "referring to (SST) team for immediate evaluation." On November 18, 2008, the student's teacher stated that she could not stand his verbal and physical abuse any longer. The next day, the SST met a second time and again discussed the student's misbehavior; by then his academic performance had slipped to "below basic." Behavior Modification Documentation Sheets were completed on at least two occasions detailing the student cursing and threatening misbehavior, on November 18, 2008 and on November 21, 2008. DCPS should have identified the student in need of evaluation for special education on the basis on the November 4, 2008 teacher comment, and certainly by the November 19, 2008 SST meeting. Counting 120 days from November 4, 2008, DCPS should have made FAPE available to the student by February 5, 2009.

As to issues 1, & 2, the Parent was the prevailing party.

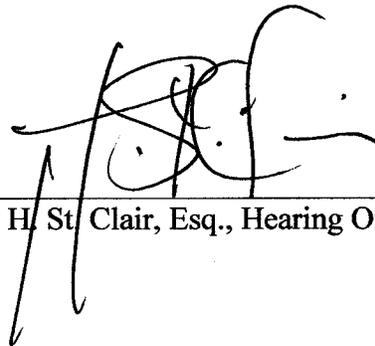
In consideration of the foregoing, the hearing officer made the following

## **ORDER**

1. Within 30 days hereof, DCPS will have completed comprehensive psychological and speech/language evaluations, a social history and a functional behavior assessment of the student. DCPS failing the said evaluation schedule, the parent is authorized to arrange independent evaluations for which DCPS will pay according to Superintendent's Directive 530.6. Within 15 schooldays of completion/receipt of the last evaluation report, DCPS will convene an MDT/Eligibility/IEP/Placement meeting during which evaluations will be reviewed and the student's eligibility for special education services discussed and determined. If the student is determined ineligible, a

Notice of Ineligibility will be issued at the said meeting. If the student is determine eligible, an IEP will be completed and a Notice of Placement issued within 5 schooldays of the said meeting if a DCPS placement is recommended; if a non-public placement is recommended, a Notice of Placement will be issued within 30 days of the said meeting.

Dated this 27<sup>th</sup> day of April, 2009



H. St. Clair, Esq., Hearing Officer

**This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.**