

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
Phone: (202) 698-3819 Facsimile: (202) 698-3825

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STUDENT HEARING OFFICE
2009 APR 20 AM 10:35

In Re the Matter of :)
Parent on behalf of Student,¹)
Petitioner,)
v.)
The District of Columbia Public Schools)
825 North Capitol Street, N.W.)
Washington, D.C. 20002)
(DCPS" or "District"))
Respondent.)

Date of Complaint: March 6, 2009
Date of Pre-hearing: March 23, 2009
Date of Hearing: April 10, 2009

HEARING OFFICERS' DECISION

Hearing Officer: Attorney Ramona M. Justice

Counsel for Petitioner: Attorney Roberta Gambale
The Law Offices of James E. Brown and Associates
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Counsel for Respondent: Attorney Daniel Kim, Assistant Attorney General,
D.C. Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

¹ Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution.

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004
(IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING**

I. INTRODUCTION

The student is _____ years of age, and a _____ grade student, at the _____ for _____ (Lower), a private school, hereinafter referred to as the "Academy", located in the District of Columbia. The student receives general education services, pursuant to the D.C. Washington Scholarship Fund; and is entitled to receive special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

The student is a resident of the District of Columbia, and is not identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

On March 6, 2009, Attorney, on behalf of parent, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) identify the student as eligible for special education services as a student with an emotional disturbance and/or other health impairment, and failed to develop an IEP for the student; (2) conduct comprehensive evaluations for the student by failing to conduct a functional behavioral assessment, classroom observation and/or a psychiatric evaluation.

The due process hearing convened on April 10, 2009, at 1:00 p.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations ("DCMR"), Chapter 30, Subtitle VII, Chapter 25.

III. DUE PROCESS RIGHTS

Petitioners' Counsel waived a formal reading of parent's due process rights.

IV. ISSUES

The following issues are identified in the *March 6, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to identify the student as eligible for special education services as a student with an emotional disturbance and/or other health impairment, and failed to develop an IEP for the student?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct comprehensive evaluations for the student (i.e. Functional Behavioral Assessment, classroom observation and/or a psychiatric evaluation)?

V. RELIEF REQUESTED

Relief Requested:

- (1) A finding that DCPS denied this student FAPE by failing to identify and/or program for this student and/or develop an Individualized Education Program ("IEP").
- (2) DCPS shall conduct or fund the following evaluations for the student: a) psychiatric evaluation; b) functional behavioral assessment; and/or c) classroom observation.
- (3) Upon completion of evaluations, DCPS shall conduct an MDT/IEP meeting for the purpose of developing an IEP; discussing compensatory education; discussing and determining placement and/or developing a behavior plan for this student.
- (4) That at the aforementioned meeting, DCPS shall secure the participation of all necessary IEP team members to include but not limited to the appropriate personnel required to review assessments and develop an appropriate program for this child.
- (5) Until such time as evaluations are completed and the student has an appropriate program and placement, DCPS shall fund the provision of counseling and/or special education instructional services for this student at his current educational placement;
- (6) This student shall be entitled compensatory education for denials of FAPE that have occurred.

- (7) That DCPS agrees to pay counsel for the parent's reasonable attorneys' fees and related costs incurred in the matter.
- (8) All meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esq., in writing, via facsimile, at 202-742-2096 or 202-742-2098.

VI. PROCEDURAL POSTURE

On March 6, 2009, Petitioner, through Counsel, filed a due process complaint. On March 12, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 23, 2009 at 4:30 p.m... The pre-hearing conference convened on March 23, 2009, at 4:30 p.m... On March 23, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the hearing for April 10, 2009 at 11:00 a.m...

On March 23, 2009, DCPS filed "District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice". On April 2, 2009, Petitioner filed disclosures; and on April 3, 2009, Respondent filed a disclosure statement. The due process hearing convened on April 10, 2009 at 1:00 p.m., as scheduled.

At the hearing, DCPS presented no evidence, and rested on the record. During closing arguments DCPS entered on the record a Motion for Directed Finding, arguing that Petitioner failed to demonstrate how it failed to identify and evaluate the student, denying the student a FAPE.

Petitioner represents that the evidence is sufficient, including suspension notices, teacher referrals for evaluations, to demonstrate that the student meets the criteria as a student with an emotional disturbance. The Hearing Officer deferred a ruling on Respondent's motion, pending a review of the evidence.

Motion for Directed Verdict

In law, a **directed verdict** is a ruling by a judge presiding over a jury trial typically made after the prosecution or plaintiff has presented all of their evidence but before the defendant puts on their case, that awards judgment to the defendant.

A directed verdict is usually made because the judge concludes the plaintiff has failed to offer the minimum amount of evidence to prove their case even if there were no opposition. Typically, the judge orders a directed verdict after finding that no reasonable jury could reach a decision to the contrary. After a directed verdict, there is no longer any need for the jury to decide the case. In other words, the judge rules that, as a matter of law, no reasonable jury could decide in the plaintiff's favor.

A judge may order a directed verdict as to an entire case or only to certain issues. While the motion is not often granted, it is routinely made as a means of preserving appeal rights later.

The Hearing Officer finds that Respondent failed to satisfy its burden by demonstrating that Petitioner failed to offer the minimum amount of evidence to prove their case even if there were no opposition; that no reasonable jury could reach a decision to the contrary. Respondent failed to prove that as a matter of law, no reasonable jury could decide in Petitioner's favor. Based on the aforementioned, Respondent's Motion for Directed Verdict is denied.

VII. PRELIMINARY MATTERS

There were no preliminary matters introduced by the parties, or addressed by the court, prior to proceeding with a hearing on the merits.

IIX. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. Receiving no objections to the disclosures submitted, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 23; and a witness list dated April 2, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- A witness list dated April 3, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ grade student, at the _____ (Lower), a private school, hereinafter referred to as the "Academy", located in the District of Columbia. The student receives general education services, pursuant to the D.C. Washington Scholarship Fund; and is entitled to receive special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

2. The student is a resident of the District of Columbia, and is not identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

3. On May 22, 2008, the student was involved in a fighting incident at school, initiated by the student. The student was suspended from school because of the incident, for several days.

4. On October 2, 2008, the student was involved in an incident of disturbing class: distracting others, talking while teacher is teaching, talking excessively in class, and refusing to participate in activities. On October 9, 2008, the student was involved in an incident of breaking a window at the school.

5. On October 6, 2008, the student completed a Behavior Contract with the school, instituted because of the student's behavior since the start of the school term. The contract indicated that should the student violate any of the terms of the contract and school discipline infractions he would face expulsion. The contract was in place for the remainder of the 2008/09 school year.

6. On October 23, 2008, the student's teacher at the completed a "Teacher Referral/Report", referring the student to the District of Columbia, Office of Special Education, Center at School, because the student's social/emotional behavior and defiance/attitude toward adults/authority is hindering his learning; the student is strong in mathematical computation; with weakness in problem solving due to low comprehension level; and his reading fluency is below average.

7. On October 27, 2008, the student was referred by the to the District of Columbia, Office of Special Education, at School, for evaluation. The school reported that the student is below grade level; was retained in a previous school; exhibits social/emotional issues that hinder instruction and learning. The school also reported that the student is often off task, his reading fluency level is below average, and math computation skills are on grade level, however, problem solving is limited.

8. On December 2, 2008, the suspended the student from school for two (2) days, because the student was engaged in a fight with another student, the student's oppositional behavior; and aggressive behavior towards staff.

9. On January 13, 2009, DCPS completed a "Confidential Report of Psychological Evaluation", in response to concerns regarding the student's behavior at home and at school. Reportedly the student can complete the grade level work, however, he had been behaving inappropriately at school, and as of late, had not been turning in homework. The evaluation was requested to determine whether or not the student satisfies eligibility criteria to receive Special Education services as a student with special needs.

The evaluator reported that during the evaluation the student was belligerent and uncooperative during a good portion of the assessment; as a result, he was careless, impulsive, quick to offer no response or to settle for a shrug of the shoulders and "don't know". The evaluator indicated that the cognitive scores obtained are probably not a fair representation of his abilities or potential; and similarly, his score on the test of visual motor integration is probably underestimating his development in that area of functioning.

The evaluator also reported that the student appeared much more motivated and interested during the academic portion of this assessment; his scores reflect academic skills within the average range; and at that time, he appeared to be acquiring grade level academic skills, and is able to demonstrate those skills when he so chooses. No recommendations were made at that time, pending the results from the behavior scales.

10. On January 22, 2009, DCPS completed an addendum to the January 13, 2009 Psychological Evaluation. As part of the Psychological Evaluation Report, and in order to determine whether the student is eligible for special education services, the student's mother and teacher completed Behavior Assessment System for Children (BASC) scales.

The evaluator determined that that the student's behaviors at that time suggest a Conduct Disorder and Oppositional Defiant Disorder; while also finding that at that time, the student failed to satisfy eligibility criteria under IDEA, as a student with special needs. The evaluator recommended that the student participate in intensive individual therapy, with some interventions made available to him in school; and family therapy considered.

11. On February 3, 2009, DCPS convened a Multidisciplinary Development Team (MDT) meeting, to discuss results of the student's evaluations and determine whether there is a disability that warrants special education services. MDT participants included: parent, Special Educator, School Psychologist, Teacher, and Assistant Principal. The MDT determined that according to the Psychological Evaluation the student's academics were within the range considered typical or average for his grade, and that at that time, the student failed to satisfy the eligibility criteria under IDEA.

12. On February 10, 2009, the _____ completed a "Student Incident Report", because the student disturbed class: distracting others, getting out of seat, oppositional behavior, foul/inappropriate language, rudeness to other students, threatening teachers, and threatening behavior. The school issued a notice of suspension, because of the student's disrespected and threatened a student and staff member in the classroom.

13. On February 17, 2009, the _____ forwarded a letter to parent, providing notice of the student's expulsion from school, for the remainder of the school year. The letter indicated that there were a number of incidents since the contract signing on October 3, 2008 in which the student was involved and counseled through them, however, he continued to violate the terms of the agreement. The letter also indicated that the decision was based on the continued classroom disruptions and the disrespectful comments to school staff, and because teaching and the student's learning was being hindered.

14. The student's first advisory mid-term progress report for the 2008/09 school year reflects that the student performed satisfactory in all areas except SSR, which is unexplained in the report.

The student's second advisory mid-term progress report for the 2008/09 school year reflects that the student performed satisfactory in all areas. The Science teacher note that the student is a gifted scientist however lacks focus and confidence.

The student's 2006/07 Report Card reflects that during the fourth advisory, the student received grades of excellent, very good, good, and satisfactory in all subjects; and "improving" in areas of music, art, physical development, respectful and cooperative.

15. On March 6, 2009, Attorney, on behalf of parent, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) identify the student as eligible for special education services as a student with an emotional disturbance and/or other health impairment, and failed to develop an IEP for the student; (2) conduct comprehensive evaluations for the student by failing to conduct a functional behavioral assessment, classroom observation and/or a psychiatric evaluation.

X. WITNESSES

Witnesses for Petitioner

Parent
Assistant Principal,

Witnesses for Respondent

Respondent presented no witnesses.

Witness Testimony

Parent

Parent testified that the student attends the _____ which he began during the 2007/08 school year; and in September or October, 2008 she requested the student be evaluated for special education services, because of his behavior. Parent testifies that the student has had problematic behavior since the third grade, and although the student can perform his class assignments, his behavior impact his learning. Parent testified that she intended to request evaluation of the student while he attended _____ School, however, failed to have the opportunity to request testing, and was advised that the Academy could evaluate the student, therefore, she initiated a request for evaluations.

Parent testified that the student is disruptive in school, fail to follow directions, bullies, engage in fighting, fail to complete homework; and is constantly suspended because of problematic behavior. Parent testified that during the 2008/09 school year the student was suspended from school on three (3) occasions, for a period of three to five days.

Parent testified that in January, 2009, during evaluations, the student failed to cooperate with the evaluator; and the Psycho-educational Evaluation reflects the student's behavior. Parent testified that she participated in a MDT meeting at the Academy, and the student was determined ineligible for special education services. Parent testified that the MDT reasoned that the student-

controlled his behavior during certain segments of the evaluations, and not others, therefore, he has the ability to control his behavior and is not eligible for services. Parent also testified that the MDT determined that the evaluations were not reliable because the student cooperated with the evaluation on certain portions and not on others and the student failed to fully apply himself.

Parent testified that she fail to agree with ineligibility determination, because of the numerous suspensions and expulsion from the Academy, and expulsion from a prior private school, where it was recommended that the student visit a Psychiatrist. Parent also testified that the Principal at School advised parent that the student could not return to school unless he visited a Psychiatrist, and parent accompanied the student to two (2) visits with a Psychiatrist. Parent testified that she is uncertain whether DCPS completed a Psychiatric Evaluation, however, it is recommended that the student continue visits with a Psychiatrist.

During cross-examination, parent testified that the student began attending the Academy during the 2006/07 school years; transferred to during the 2007/08 school year, and returned to the Academy during the 2007/08 school years, and has attended Academy the 2008/09 school year. Parent testified that the student's grades were "not bade two months ago", however, the student was also expelled from school two months ago.

Parent testified that the Psycho-educational and Psychological Evaluation was reviewed at the February 3, 2009 meeting; and the team represented that the student could have performed better than as reflected in the evaluation. During redirect testimony, parent testified that the student was retained twice in the 3rd grade.

Assistant Principal, (1)

The first Assistant Principal (AP) testified that the Academy is a private high school for students in grade pre-k through 12; and that he is familiar with the student by sight; and reviewed the student's official records, IEP, meeting notes, and evaluations. The AP testified that the student visits the school building weekly for physical therapy, and he visits the lower school. The AP testified that as the Special Education Coordinator (SEC), during MDT meetings general and special education teachers provide input regarding student's behavior, which is utilized as a basis for determining necessary evaluations. The AP also testified that the MDT recommended a Psychological and Psychiatric Evaluation because of the student's anger management difficulties, and its impact upon his learning.

During cross-examination, the AP testified that he has not observed the student in the classroom, or participated in a MDT meeting for the student.

Assistant Principal (2)

The AP testified that the student is in the grade, and she participated in the student's eligibility meeting held in February, 2009. The AP also testified that the Academy was not in agreement with DCPS' determination of ineligibility; the student requires an IEP and counseling services because of disruptions in class, number of incident reports filed by teachers, aggressive behavior towards other students, oppositional defiant behavior, and need for social/emotional-

counseling. The AP testified that the student performs below grade level, completes assignments, however, his behavior impacts his learning because of the suspensions.

The AP testified that the Woodcock Johnson academic achievement assessment was completed, however, the school fails to agree with the findings. The AP testified further that the MDT stated that the student fail to require an IEP and it cannot recommend related services unless the student receives specialized instruction.

During cross-examination, the AP testified that during the MDT the team members included a DCPS Psychologist, parent, teacher, and the SEC, however, failed to include a Psychologist from the Academy. The student's teacher reports that the student completes all assignments and the student receives passing grades, and is active in a social group once a week. There is no indication that additional evaluations were requested or recommended.

During redirect, the AP testified that the student was retained twice, suspended and expelled because of aggressive behavior towards a student and teacher; and his behavior impacts his academics.

XI. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to identify the student as eligible for special education services as a student with an emotional disturbance and/or other health impairment, and failed to develop an IEP for the student?

Petitioner represents that according to the IDEIA of 2004, the Local Education Agency and State Education Agency must ensure that:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the District and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and currently receiving needed special education and related services.

Petitioner further represents that the public agency's child find obligation is an affirmative one. *Lincoln County Sch. Dist. A.A., 39 IDELR 185 (D.Or. 2003)*. *Wise vs. Ohio Dept of Education, 80 F.3d 177, 181 (6th Cir. 1996)*; *Robertson County School System v. King, 24 IDELR 1036 (6th Cir. 1996)* (affirmative obligation on states and local school districts—not parents to identify, locate and evaluate all children, including migrants and the homeless, with disabilities residing within the jurisdiction who have disabilities and are in need of special education or related services.)

Petitioner represents that DCPS' awareness of a student's possible disability and need for special education likewise will not relieve it of its obligation, if it should have suspected the student might have such a disability. *Reid v. District of Columbia, 310 F. Supp 2d 137 (D.D.C. 2004)*; 30 DCMR Sec. 3004.1(a) (child with a suspected disability to be referred to IEP team by school staff.)

Petitioner represents that pursuant to 34 C.F.R. §300.8 an emotional disturbance is defined as being "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

Petitioner also represents that in the instant matter, the student clearly meets the above referenced criteria for diagnosis as a student with an emotional disturbance; the student has not made appropriate academic progress as supported by retentions and poor grades; has not been able to maintain or build satisfactory interpersonal relationships with peers and teachers as a result of his bullying and aggressive behavior. Petitioner represents that the student's problematic behavior has existed for several years and resulted in student expulsions and suspensions; as a result, the student's academic performance has been adversely impacted. Petitioner concludes that failure to identify a student who so clearly requires services constitutes denial of a FAPE.

In closing, Petitioner represents that a Psychiatric Evaluation and Functional Behavioral Assessment are warranted, because the student's behavior is extreme, as well as positive behavioral interventions.

DCPS respond to the complaint with a general denial of the allegation that DCPS denied the student a FAPE; and specifically denies the allegation that DCPS failed to identify the student as eligible for special education services as a child with an emotional disturbance. DCPS asserts that the student was properly determined ineligible for special education services, based on the student's Psycho-educational Evaluation dated January 22, 2009; and denies the factual assertion by Petitioner that the MDT agreed that the student should be identified as emotionally disturbed. DCPS further asserts that the student can complete school assignments as well as access the educational curriculum; and has not been denied a FAPE.

DCPS concludes that the student can function academically, and makes academic benefit, receives satisfactory grades in all subjects except SSR; and is successful in all subject areas, therefore, there the behavior is having no impact on his learning. DCPS represents that the MDT failed to recommend additional evaluations, parent failed to testify that she disagreed with the Psychological Evaluation completed by DCPS; and the student maintains social relationships because he is a member of a social group. DCPS also concludes that Petitioner failed to satisfy its burden of proof.

ANALYSIS

“Child Find”

IDEA, at *34 C.F.R. Section 300.111, “Child Find”*, requires that the LEA must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are *identified, located, and evaluated*. In addition, subparagraph (c) of the *“Child Find”* provisions provide that *“Child find”* must also include children who are *suspected* of being a child with a disability under Section 300.8, (*“Other Health Impairment”*), and in need of special education, even though they are advancing from grade to grade.

On January 13, 2009, DCPS completed a “Confidential Report of Psychological Evaluation”, in response to concerns regarding the student’s behavior at home and at school. Reportedly the student can complete the grade level work, however, he had been behaving inappropriately at school, and as of late, had not been turning in homework. The evaluation was requested to determine whether or not the student satisfies eligibility criteria to receive Special Education services as a student with special needs.

The evaluator reported that during the evaluation the student was belligerent and uncooperative during a good portion of the assessment; as a result, he was careless, impulsive, quick to offer no response or to settle for a shrug of the shoulders and “don’t know”. The evaluator indicated that the cognitive scores obtained are probably not a fair representation of his abilities or potential; and similarly, his score on the test of visual motor integration is probably underestimating his development in that area of functioning.

The evaluator also reported that he appeared much more motivated and interested during the academic portion of this assessment; his scores reflect academic skills within the average range; and at that time, he appeared to be acquiring grade level academic skills, and is able to demonstrate those skills when he so chooses. No recommendations were made at that time, pending the results from the behavior scales.

On January 22, 2009, DCPS completed an addendum to the January 13, 2009 Psychological Evaluation. As part of the Psychological Evaluation, and in order to determine whether the student is eligible for special education services, the student’s mother and teacher completed Behavior Assessment System for Children (BASC) scales.

The evaluator determined that at that time the student’s behaviors suggested a Conduct Disorder and Oppositional Defiant Disorder; and that the student has the ability to learn and when he chooses to apply himself is capable of demonstrating grade level work. The evaluator concluded that while noting that there are great concerns regarding the student’s behaviors, he failed at that time, to satisfy the eligibility criteria under IDEA, as a student with special needs; recommending that the student participate in intensive individual therapy, with some interventions made available to him in school; and family therapy considered.

On February 3, 2009, DCPS convened a Multidisciplinary Development Team (MDT) meeting, to discuss results of the student's evaluations and determine whether there is a disability that warrants special education services. MDT participants included: parent, Special Educator, School Psychologist, Teacher, and Assistant Principal. The MDT determined that according to the Psychological Evaluation the student's academics were within the range considered typical or average for his grade, and that at that time, the student failed to satisfy the eligibility criteria under IDEA.

According to IDEA, 34 C.F.R. §300.306 (c), in interpreting the evaluation data for the purpose of determining if the child is a child with a disability under §300.8, and the educational needs of the student, the MDT must :

- (1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information regarding the child's physical condition, social or cultural background, and adaptive behavior; and
- (2) Ensure that information obtained from all of these sources is documented and carefully considered.

The Hearing Officer finds that consistent with the Child Find provisions of IDEA, DCPS suspected the student had a disability, identified and evaluated the student; however, the MDT determined that based on the Psychological Evaluation, and addendum, the student was ineligible for special education services.

However, evaluations are merely one source of information upon which the team must rely in determining a student's eligibility for special education services. In this matter; and in this instance, the MDT failed to draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher referrals and recommendations, as well as information regarding the child's physical condition, social or cultural background, and adaptive behavior in his current classroom environment; and ensure that information obtained from all of these sources is documented and carefully considered, which may be accomplished, in part, by completing comprehensive evaluations.

On February 3, 2009, the MDT also failed to carefully consider information obtained from the Psychological Evaluation and addendum. The Psychological Evaluation indicates among others, that the findings were inconclusive, pending results from the BASC. The Psychological Evaluation addendum included findings *that at that time the student's behaviors suggested a Conduct Disorder and Oppositional Defiant Disorder (ODD)*.

The MDT disregarded findings in the evaluation *that at that time the student's behaviors suggested a Conduct Disorder and Oppositional Defiant Disorder (ODD)*; and merely based its decision on the portion of the evaluation which determined that the student failed at that time to satisfy the eligibility criteria under IDEA. The MDT failed to consider the report in its entirety, the student's academic and behavior history, teacher referrals, parent input; and the criteria in-

IDEA for determining a student eligible for special education services, as a student with a disability of emotional disturbance.

The team also failed to consider the fact that the evaluator's findings that the student behavior suggested a conduct disorder and ODD, conflict with his determination that the student failed to satisfy the criteria under IDEA, as a student with an emotional disturbance. Not only are these findings inconsistent, but a finding that the student's behaviors suggested a Conduct Disorder and Oppositional Defiant Disorder (ODD); and information from the various sources, support a finding that the student satisfies the eligibility criteria under IDEA, as a student with an emotional disturbance.

According to IDEA, 34 C.F.R. §300.8 an emotional disturbance is defined as being "a condition exhibiting *one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance*: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) *An inability to build or maintain satisfactory interpersonal relationships with peers and teachers*; (C) *Inappropriate types of behavior or feelings under normal circumstances*; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

The Hearing Officer finds that the student exhibits one or more of the above characteristics and to a marked degree that adversely affected his educational performance. The student was expelled from two (2) schools, repeatedly suspended, retained twice, and over an extended period of time has demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; and inappropriate types of behavior or feelings under normal circumstances, satisfying the eligibility criteria under IDEA, as a student with an emotional disturbance.

The Hearing Officer concludes that in rendering the eligibility determination, the MDT failed to draw upon information from a variety of sources, including aptitude and achievement tests, parent input, incident reports, suspensions, expulsions, retentions, academic and behavioral history, teacher referrals and recommendations, as well as information regarding the student's social or cultural background, and adaptive behavior.

The MDT erred in its determination that the student was ineligible for special education services, by failing to draw upon information from various sources, and carefully consider evaluation results. The evidence reflects that although the student's progresses academically, over an extended period of time the student's behavior has adversely impacted his learning and that of others. The MDT also failed to consider the likelihood that the student's retentions in grade, were directly related to his problematic behavior; and his ability to progress academically is because he is behind in grade level.

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for finding that DCPS failed identify the student as eligible for special education services, in violation of the "Child Find" provisions of the IDEA.

It is also the Hearing Officers decision that absent a determination of eligibility, any determination regarding development of an IEP, is premature.

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct comprehensive evaluations for the student (i.e. Functional Behavioral Assessment, classroom observation and/or a psychiatric evaluation)?

Petitioner represents that the IDEA, reauthorized as the IDEIA of 2004, requires that evaluations for a student be conducted upon parent's request for evaluations and/or the referral of a child with a suspected disability by his teacher. Petitioner also represents that according to IDEA, 34 C.F.R. §300.302:

“(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part. (b) Request for initial evaluation. Consistent with the consent requirements in §300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.”

Petitioner further represents that classroom observations are a mandatory requirement of the IDEIA; and 34 C.F.R. §300.3324(a)(2)(i) requires that a student's IEP team consider adoption of “strategies, including positive behavioral interventions, strategies and supports” to address behavior that “impedes the student's learning and that of others.” A school district that is required to provide FAPE to a student with a disability has not effectively designed a behavioral intervention plan until it documents particular positive behavioral interventions, strategies, and supports.”

Petitioner also represents that it is necessary to develop a Behavior Intervention Plan when the behavior exhibited by the student is interfering with the student's ability to benefit from her education as is the case with the student. “The student has a significant history of behavior problems and outburst at school that has impeded his ability to learn, however, a FBA has not been conducted and a behavior plan has not yet been completed and/or included in his IEP.”

DCPS specifically denies the allegation that it denied the student a FAPE, by failing to comprehensively evaluate the student; and reasserts that the student was evaluated in January for his Psycho-educational Assessment, which along with the student's addendum to Psycho-educational assessments were utilized to determine the student's ineligibility for special education and related services. DCPS contends that the student has not been denied a FAPE, therefore, compensatory education as an equitable remedy is not warranted at this time.

ANALYSIS

According to **34 C.F.R. §300.304(c)(4) and (6)** DCPS shall ensure that a child is assessed in all areas related to the suspected disability; and in evaluating each child with a disability that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

IDEA, **34 C.F.R. §Section 300.301(a)(b)** provides in pertinent part:

(a) **General.** Each public agency must conduct a full and individual *initial* evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for *initial* evaluation. Consistent with the consent requirements in §300.300, ***either a parent of a child or a public agency may initiate a request for an initial evaluation*** (emphasis supplied) to determine if the child is a child with a disability.

In this matter, DCPS initiated a request for an initial evaluation to determine whether the student is a student with a disability; and the initial evaluation completed by DCPS consisted of a Psychological Evaluation, and Addendum; and no other evaluations. For instance, the student's has a history of problematic behavior, suspensions, expulsions, and grade retentions; and his behavior impedes his learning and that of others, however, the team failed to recommend a Functional Behavioral Assessment (FBA), to address the student's behavior. The MDT's determination that the student is ineligible for special education services is based primarily on results of the evaluation and addendum; and not comprehensive evaluations.

The Hearing Officer finds that in conducting initial evaluations of the student, DCPS failed to comprehensively evaluate the student in all areas of suspected disability, in violation of IDEA, **34 C.F.R. §300.304(c)(4) and (6)**. Therefore the information upon which the MDT relied to render its eligibility determination was insufficient.

The Hearing Officer also finds that according to §300.310 the public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty; which failed to occur in this matter.

It is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comprehensively evaluate the student in all areas of suspected disability, in violation of **34 C.F.R. §300.304(c)(4) and (6)**.

Free Appropriate Public Education (FAPE)

IDEA requires DCPS to assure a “free appropriate public education” (“FAPE”) for all disabled children. 20 U.S.C. §1412(1). A free appropriate public education “consists of educational instruction specifically 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.” *Bd. Of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L.Ed. 2d 690, 102 S.Ct.3034 (1982). DCPS is obligated to provide a FAPE “ for all children residing in the state between the ages of 3 and 21, inclusive.” 34 C.F.R. §300.101.

The FAPE requirement under IDEA, is applicable to substantive and procedural violations, which may result in a denial of a FAPE. In alleging substantive violations under IDEA, a party challenges the *substantive* content of the educational services the disabled student is entitled to receive under the IDEA.

The courts have also held that substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. Courts have also held that procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992); *W.G.*, 960 F.2d at 1484.

The procedural prong of the FAPE analysis, and the *first* prong of *Rowley*, in *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe, 915 F.2d at 658*, assesses whether DCPS complied with the procedural requirements of the IDEA, including the creation of an IEP that conforms to the requirements of the Act. However, a procedural violation of the IDEA, is not a per se denial of a FAPE. The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents. In other words, an IDEA claim is viable only if those procedural violations affected the student’s substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

The 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to procedural violations, if the inadequacies:

- (I) impede the child’s right to a free and appropriate public education;
- (II) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent’s child; or
- (III) caused a deprivation of educational benefit.”

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. A full evaluation of a child is an integral part of developing an IEP for a student, which is the reason IDEA requires public education providers to conduct a full and individual initial evaluation of a child. *See, T.X. ex rel. Skrine v. District of Columbia, 2007 WL 915227 (D.D.C.)*

It is also the reason that IDEA, 34 C.F.R. §300.304(c) (4) and (6) provides that in evaluating a child, the public agency must ensure that the child is assessed in **all** areas related to the **suspected** disability; and that the evaluations are **sufficiently comprehensive** to identify **all** of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; which failed to occur in this matter.

In addition, according to *Harris v. District of Columbia, Civil Action No. 07-1422 (RCL) (2008)*, "the FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." The court explained that the FBA is performed to determine causes of a child's behavior and the concomitant consequences of that behavior; and the information gleaned from the assessment is central in formulating an IEP tailored to the needs of the individual student.

The student's first advisory mid-term progress report for the 2008/09 school year reflects that the student performed satisfactory in all areas except SSR, which is unexplained in the report. The student's second advisory mid-term progress report for the 2008/09 school year reflects that the student performed satisfactory in all areas. The Science teacher notes that the student is a gifted scientist however lacks focus and confidence. The student's 2006/07 Report Card reflects that during the fourth advisory, the student received grades of excellent, very good, good, and satisfactory in all subjects; and "improving" in areas of music, art, physical development, respectful and cooperative.

However, the courts have held that although a student progresses academically, and advances from grade to grade, the public agency is not relieved of its obligation to ensure that the student receives a FAPE. In this matter, the evidence reflects that although the student progresses academically, over an extended period of time he exhibited problematic behavior; and his behavior has adversely affected his learning and that of others, resulting in expulsions from schools, grade retentions, and numerous suspensions.

It is the Hearing Officers' Decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to identify the student as eligible for special education services; and comprehensively evaluate the student in all areas of suspected disability; representing a procedural and substantive violation of IDEA, and denial of a FAPE, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

XII. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that Respondent's Motion for Directed Verdict, is denied; and it is further
- (2) **ORDERED**, that DCPS shall fund the following evaluations for the student: a) psychiatric evaluation; b) functional behavioral assessment; and/or c) classroom observation; and it is further
- (3) **ORDERED**, that within fifteen (15) calendar days of the date of the final independent evaluation, DCPS shall convene a MDT/IEP team meeting for the purpose of reviewing the evaluations, developing an IEP, as appropriate; developing a Behavioral Intervention Plan, and discussing compensatory education services; and it is further
- (4) **ORDERED**, that at the aforementioned meeting, DCPS shall secure the participation of all necessary IEP team members to include but not limited to the appropriate personnel required to review assessments and develop an appropriate IEP for the student; and it is further
- (5) **ORDERED**, that until such time as independent evaluations are completed and the student has an appropriate IEP program, DCPS shall develop an IEP for the student based upon the findings in the January 22, 2009 Psychological Evaluation Addendum, that the student's behaviors suggest a Conduct Disorder and Oppositional Defiant Disorder, and it is further
- (6) **ORDERED**, that DCPS agrees to pay counsel for the parent's reasonable attorneys' fees and related costs incurred in the matter; and it is further
- (7) **ORDERED**, that all meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esq., in writing, via facsimile, at 202-742-2096 or 202-742-2098; and it is further
- (8) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this decision and order, Petitioner's Counsel will contact the Special Education Coordinator at the _____ and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further

(9) **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further

(10) **ORDERED**, that this decision and order are effective immediately.

XIII. APPEAL RIGHTS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date of this decision.

Ramona M. Justice

4-20-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Daniel Kim, Office of the Attorney General
Attorney Roberta Gambale: Fax: 202-742-2098