

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of,
[Student],¹

Petitioner,

v

Respondent.

Date Issued: May 5, 2011

Hearing Officer: Jim Mortenson

Case No:

STUDENT HEARING OFFICE
MAY 5 PM 4:58
DSE

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on February 22, 2011. The case was assigned to Independent Hearing Officer (IHO) Wanda Resto. The Petitioner is represented by Nicholas Ostrem, Esq., and the Respondent is represented by Lauren Baum, Esq. A response was filed on March 4, 2011. A resolution meeting was held March 10, 2011, and did not result in a settlement or any other agreements. The case was reassigned to the undersigned on March 21, 2011. A prehearing conference was held on March 28, 2011, and a prehearing order issued on that date. The prehearing order was amended on or about March 31, 2011. The Respondent filed a motion to dismiss on April 1, 2011. The Petitioner filed a reply on April 6, 2011. The motion was denied in a written order issued April 12, 2011.

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

The hearing was convened on April 26, 2011, in room 2004 at 810 First Street, NE, Washington, D.C. The due date for the hearing officer's determination (HOD) is May 8, 2011. This HOD is issued on May 5, 2011.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUE, RELIEF SOUGHT, AND DETERMINATION

The issue to be determined by the Independent Hearing Officer (IHO) is:

Whether the Respondent failed to identify the Student as a child with a disability as a result of exhibited behavior issues and/or the Petitioner's request for a functional behavioral assessment (FBA)?

The substantive requested relief includes:

- 1) An independent FBA.
- 2) Compensatory education.

Based on the findings of fact and conclusions herein, this IHO has determined that the Respondent was not required to identify the Student as a child with a disability as a result of the Student's behaviors nor the Petitioner's request for an FBA.

IV. EVIDENCE

Four witnesses testified at the hearing, two for the Petitioner and two for the Respondent.

The witnesses for the Petitioner were:

- 1) Petitioner (P)
- 2) Educational Advocate, Dr. Ida Jean Holman (I.H.)

The witnesses for the Respondent were:

- 1) Compliance Specialist, Cristina Brennan (C.B.)
- 2) Teacher,

Seven documents were disclosed by the Petitioner and all were admitted into evidence. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	September 10, 2010	Letter from Wight to Parent
P 2	March 10, 2011	Log Entries
P 3	September 6-10, 2010	Social Skills for Life Success Progress Card
	September 27-31, 2010	[Untitled behavior tracking forms]
	[Undated]	[Untitled behavior tracking forms]
	February 9 & 10	[Untitled behavior tracking forms]
	February 14	[Untitled behavior tracking forms]
	February 15-18	[Untitled behavior tracking forms]
	February 21	[Untitled behavior tracking forms]
	September 31, 2010	[Untitled behavior tracking forms]
	October 4-8, 2010	[Untitled behavior tracking forms]
	October 25-28, 2010	[Untitled behavior tracking forms]
P 4	September 24, 2010	Elementary Mid-Quarter Progress Report
P 5	March 10, 2011	[Handwritten meeting notes]
P 6	March 31, 2011	Email from Ostrem to Mortenson
P 7	[Undated]	Resume Ida Jean Holman, Ph.D.

Seven documents were disclosed by the Respondent and all were admitted into evidence. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	September 10, 2010	Letter from [Petitioner]
R 2	September 14, 2010	Parent Conference Summary
	September 14, 2010	[Handwritten notes] Meeting for [Student]

R 3	February 10, 2011	Student Support Process Form 1
R 4	School Year 2010-2011	Preschool Report Card
R 5	[Undated]	Behavior Plan for [Student]
R 6	March 10, 2011	Resolution Meeting [Notes]
R 7	April 12, 2011	Email from Baum to Mortenson

V. FINDINGS OF FACT

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

1. The Student is currently in a preschool program at The
2010-2011 school year is his first year at the school.³ Prior to enrollment at DC Prep the Student was in an unstructured day care.⁴
2. The Student was not yet four years old when the current school year began and he started in a prekindergarten class.⁵ During the week of September 6, 2010, through September 10, 2010, the Student exhibited behaviors including hitting other children and throwing tantrums.⁶ On September 10, 2010, he was suspended for one day for hitting another student.⁷ A meeting was convened to discuss the Student's behavior on September 14, 2010.⁸
3. The Petitioner sent a letter to the school advising that she believed the Student's behavior at school was the result of not being used to the "learning environment" and that he needed to learn the skills of his peers prior to continuing on with them.⁹ The Petitioner felt the Student needed to be in a preschool environment and requested this in writing and at the meeting on

² Testimony (T) of P.

³ T of P.

⁴ T of P.

⁵ R 5.

⁶ P 3, T of P.

⁷ P 1.

⁸ P 1, R 2, T of P.

⁹ R 1.

September 14, 2010.¹⁰ The Petitioner explained to the school staff that the Student thought hitting other kids was a game and that he was simply playing superhero and that she would talk to him about this.¹¹ She was also open to suggestions the school staff would have to deal with this behavior.¹² The Petitioner never raised a concern that the Student may have a disability in writing, nor did she or her education advocate raise such a concern at the September 14, 2010, meeting.¹³

4. At the September 14, 2010, meeting, it was agreed the Student would be placed in a preschool classroom and that if the behaviors had not improved over the next few weeks in that environment, a functional behavioral assessment (FBA) and resulting behavior intervention plan (BIP) would be discussed.¹⁴
5. No behavior problems were recorded for the Student until December 1, 2010, when the Student was in a fight in the bathroom.¹⁵ The next behavior problem recorded occurred on January 13, 2011, when the Student refused to follow teacher instructions.¹⁶ The following week, on January 18, 2011, the Student hit another child in a dispute in the classroom.¹⁷ On January 21, 2011, the Student walked out of the classroom without permission to fill a cup of water for a painting project.¹⁸ After the complaint was filed, the Student had a series of behavior issues in March, including: refusing to following directions on March 8, 2011; repeated talking and fidgeting instead of sitting quietly on March 9, 2011, and a failure to

¹⁰ R 1, R 2, T of P.

¹¹ R 1, T of P.

¹² R 1.

¹³ T of P, T of I.H., R 1, R 2.

¹⁴ R 2, T of I.H., T of P (The Petitioner testified that she thought the FBA was an initial evaluation for determining eligibility for special education and related services. There is no corroborating evidence that she, or her advocate, thought the Student may be a child with a disability and that he should undergo an initial assessment at the time of the September 14, 2010, meeting.)

¹⁵ P 2.

¹⁶ P 2.

¹⁷ P 2.

¹⁸ P 2.

follow instructions 100 percent of the time on March 10, 2011.¹⁹ The Student's behaviors are not out of the norm for the Student's peers and have been addressed as necessary.²⁰

6. The Student is not behind academically.²¹
7. The Petitioner, through her counsel, raised concern that the Student may have a disability, on March 10, 2011.²² She suspects the Student may have Attention Deficit Hyperactivity Disorder (ADHD) or an emotional disturbance of some sort, based on the behaviors the Student had exhibited at school.²³ The Petitioner requested, through counsel, an independently provided FBA at a meeting on March 10, 2011, which the Respondent refused.²⁴

VI. CONCLUSIONS OF LAW

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

1. States have an affirmative duty to identify, locate and evaluate children with disabilities. *See*, 34 C.F.R. § 300.111, Kruvant v. District of Columbia, 44 IDELR 242, p 7 (D.D.C. 2005). The District of Columbia has in place policies and procedures to ensure child find at D.C. Mun. Regs. tit. 5, § 3004.1. This regulation requires a referral, "which shall state why it is thought that the child may have a disability[,]" be made in writing. D.C. Mun. Regs. tit. 5, § 3004.1(a) & (b). The referral may be made by a parent or staff member of the school. *Id.* at

¹⁹ P 2.

²⁰ R 3, R 4, R 5, P 3, P 4, T of C.B., T of K.L. (I.H. testified that the Student had an excessive amount of behaviors, based on her review of the same behavior logs reviewed by the IHO. Her opinion carries little weight in light of the testimony of the staff working with the Student and his peers on a daily basis (I.H. has not worked with the Student), and her own lack of experience or knowledge with regard to preschool age children (T of I.H., P 7.)).

²¹ T of K.L., R 4.

²² R 6.

²³ R 6.

²⁴ R 6, P 5. (Respondent did offer to conduct its own FBA and the Petitioner rejected this.)

(b). "The scope of the 'child find' duty includes 'children who are suspected of being a child with a disability ... even though they are advancing from grade to grade.'" Kruvant at p 7, 34 C.F.R. § 300.111(c)(1).

2. The question in this case is whether child find was triggered by either a referral by the Parent in September 2010 or by a suspicion of a disability by the school staff. In this case there was neither a referral by the Parent in September 2010, nor the basis for a legitimate suspicion of a disability by the Respondent.
3. The Petitioner/Parent never made a written referral or request for an initial evaluation of the Student and no written referral was made on her behalf. The only written request from the Petitioner was made September 10, 2010, to move the Student from his classroom to a pre-school class "until he gets accustomed to the learning environment and to provide him with the skills needed to bring him up to the same level as his peers." The Petitioner also noted that she believed the Student's hitting behavior, for which he was disciplined, was a game to the Student, not the result of a disability. The parties had a meeting to discuss the disciplinary matter concerning the Student on September 14, 2010. It was agreed that the Student would be moved to a pre-school setting and that the team would reconvene to discuss a functional behavioral assessment if the Student's behaviors did not improve. The Petitioner's advocate, a highly educated and experienced professional in the field of special education, never requested an initial evaluation or suggested to the team that she or the Petitioner suspected the Student had a disability. Prior to the Complaint initiating this matter there was never a written referral nor a written description of why the Petitioner or her advocate thought the Student may have a disability.

4. Prior to being enrolled in the Respondent's school for the 2010-2011 school year, the Student was in an unstructured day care. At the end of the week of September 7-10, 2010, the Petitioner relayed her belief the Student was not yet ready for a structured school program, that his hitting and having tantrums that week were the result of increased and unfamiliar structure, and that he was playing (albeit inappropriately). There is no evidence that anyone thought this behavior was the result of a disability at the time. There is no current convincing evidence that this behavior, or subsequent behaviors, was the result of a disability.
5. The Petitioner has not established that the Student should be evaluated for initial eligibility under the IDEA. The Student's behaviors have not been significant enough and have not had an adverse impact on his academic progress (albeit the Student is still in preschool) to indicate he is or may be entitled to special education and related services. Whether he is a child with a disability under some other law is not addressed here.

VII. ORDER

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

The Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: May 5, 2011



Independent 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 USC §1415(i).