

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

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

2011 SEP 22 PM 4:39

OSSE  
STUDENT HEARING OFFICE

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PETITIONER, on behalf of  
[STUDENT],<sup>1</sup>

Date Issued: September 22, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Petitioner seeks an award of compensatory education for DCPS' alleged failure to evaluate Student in all areas of suspected disability, failure to make needed revisions to her IEP and failure to make an appropriate placement for part of the 2010-2011 school year.

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Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. The Petitioner's Due Process Complaint, filed on July 19, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 20, 2011. The parties met for a resolution session on August 3, 2011, but did not reach an agreement before the end of the 30-day resolution period. The 45-day time line for issuance of this HOD began on August 18, 2011. On August 10, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on September 14, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses PSYCHOLOGIST, GRANDMOTHER, PSYCHIATRIC SOCIAL WORKER and EDUCATIONAL ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 and P-3 through P-24 were admitted into evidence without objection, with the exceptions of Exhibits P-19 and P-21 which were withdrawn. DCPS' objection to Exhibit P-2 was overruled. DCPS Exhibits R-1 through R-8 were admitted into evidence without objection. At the conclusion of Petitioner's case-in-chief, DCPS made a motion for a directed finding, which was denied. At the request of Petitioner, the parties were permitted to file post-hearing memoranda. Petitioner filed a post-hearing memorandum on September 16, 2011. DCPS did not file a post-hearing memorandum.

## JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

## ISSUE AND RELIEF SOUGHT

WHETHER DCPS DENIED A FAPE TO STUDENT BY NOT CONDUCTING EVALUATIONS, NOT REVISING STUDENT'S IEP, AND NOT CHANGING HER PLACEMENT WHEN STUDENT'S IN-SCHOOL BEHAVIOR WORSENER, BEGINNING IN OCTOBER 2010?

Petitioner requests that Student be granted an award of compensatory education.

## FINDINGS OF FACT

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

1. Student is an AGE child. Student resides with Mother in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education and related services under the Primary Disability classification, Other Health Impairment ("OHI"), based upon the qualifying disabilities, Pervasive Developmental Disorder (NOS), Reading Disorder and Attention Deficit Hyperactivity Disorder. Exhibits R-4, P-16.
3. In an April 5, 2007 psychological report, LICENSED CLINICAL PSYCHOLOGIST reported that Student exhibited a number of disruptive behaviors that interfered with her learning, including hyperactivity, poor attention span, defiance, and an inability to complete tasks independently. Licensed Clinical Psychologist reported on the "constellation of behavioral difficulties" Student exhibited, including that Student "is very inflexible and has difficulty adjusting to changes in her daily routine, and becomes very oppositional or defiant when she is unable to have her way." Exhibit P-18.

4. In a May 5, 2010 Comprehensive Psychological Evaluation, SCHOOL PSYCHOLOGIST related that Student displayed an unusually high number of aggressive behaviors, such as being argumentative, defiant, and/or threatening to others. School Psychologist recommended, *inter alia*, that Student's case should be referred to the IEP team for development of a behavior plan to address her behavioral difficulties, and that Student would benefit from a minimum of one 45-minute session of individual counseling per week to address behavioral and emotional concerns. Exhibit P-16.

5. Student was placed at EDUCATION SERVICES AT DCPS ("ES") in 2008. Exhibit P-5. For the 2010-2011 school year, Student was enrolled in GRADE at ES. Testimony of Mother. Under her March 3, 2010 Individualized Education Plan ("IEP"), Student received full-time Specialized Instruction in a self-contained classroom. The IEP team reported that Student required a small class setting with a low teacher/student ration in a classroom designed for students with developmental disabilities. The IEP also provided for 30 minutes per week of Speech-Language ("S/L") Pathology. Exhibit P-15.

6. Student's IEP was revised on July 22, 2010. *See* Exhibit P-15. However the July 22, 2010 IEP was not introduced into the record and no evidence regarding its content was offered.

7. Student's classroom at ES was staffed with 1 teacher, 2 aides and 3 dedicated aides (not assigned to Student). Exhibit P-5.

8. In October 2010, Student moved from Grandmother's home to live with Petitioner. From that time, a gradual increase in her problem behaviors in school was noted. Behaviors of concern included stabbing a teacher with a pencil (in January 2011), noncompliance, etc. Exhibit P-4.

Testimony of Mother, Testimony of Grandmother.

9. Until January 2011, Student was “pretty good” in school and her teachers were able to handle her behaviors. Testimony of Grandmother.

10. In late January 2011, Student was from ES for a teacher with a pencil and for behaviors toward other students. She was for two weeks and only allowed to return to school on condition that she be seen weekly by a psychiatrist. Testimony of Mother, Exhibit P-5. (Exhibit P-5 indicates that the suspension occurred in March 2011. However, based upon testimony of Mother, the testimony of Psychiatric Social Worker and the Functional Behavioral Assessment, Exhibit R-6, I find that the suspension occurred in late January 2011.)<sup>2</sup>

11. During the suspension, school work and supplies were sent home for Student. Exhibit P-5.

12. Student was seen on February 11, 2011 by Psychiatric Social Worker at Psychiatric Social Worker conducted an initial psychiatric evaluation. Student continued to be followed at initially weekly and later on a biweekly basis. Testimony of Psychiatric Social Worker. DCPS was not involved in Student’s evaluation or treatment at Testimony of Mother.

13. After Student returned to school in February 2011, she was subjected to daily searches of her clothing, book bag and shoes for weapons. Testimony of Mother.

14. Prior to January 10, 2011, Student had been referred to DCPS Office of Special Education for a functional behavior assessment (“FBA”). Student’s identified behaviors of

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<sup>2</sup> Although ES apparently did not conduct a Manifestation Determination Review (“MDR”) in connection with Student’s removal from school (*See* 34 CFR 300.530), whether ES failed to conduct an MDR was not an issue specified by Petitioner for determination at the due process hearing. *See* Prehearing Order, August 10, 2011.

concern in the referral were defiance, physical aggression, social skills, noncompliance, "picks on others," yelling and distracting others. Her behaviors were reported as infrequent but could have severe consequences, and last from a few minutes to upwards of all day. The FBA assessor observed Student at ES on January 10, 2011 and January 26, 2011. Exhibit R-6.

15. On March 15, 2011, Student's Multidisciplinary Team ("MDT") developed a Behavior Support Plan ("BSP") for Student. Petitioner participated in this MDT team meeting. Exhibit R-5. At the time of the March 15, 2011 meeting, Student was already receiving counseling services to increase her coping skills. Exhibit R-6. The date when the counseling services commenced was not established.

16. On March 22, 2011, Student's IEP team at ES met to update and revise Student's IEP. Petitioner attended the meeting. SCHOOL PSYCHOLOGIST reviewed the FBA and BSP. Petitioner reported that Student was receiving outpatient therapy once per week to address behavior issues and coping mechanisms. The IEP team agreed to add one hour per week of behavior support services to Student's IEP. Petitioner signed the IEP to indicate her agreement with its content. Exhibit R-3, R-4. At that time, Petitioner was not yet represented by counsel. Testimony of Petitioner.

17. Student remained at ES until near the end of the 2010-2011 school year. At some point between June 10, 2011 and June 22, 2011 (the last day of school), Petitioner took Student out of school. Testimony of Petitioner, Exhibit R-8.

18. On June 9, 2011, Petitioner's Counsel wrote ES to object to physical searches of student and to request that DCPS authorize an Independent Educational Evaluation ("IEE") psychiatric evaluation "to access [Student's] emotional well-being." Exhibit P-2. On June 30,

2011, PROGRESS MONITOR from DCPS responded that a psychiatric evaluation was not necessary “to determine how to best educate the student.” Exhibit P-8.

19. On June 16, 2011, Student’s MDT Team met at ES to review Student’s placement. PRIOR EDUCATIONAL ADVOCATE proposed three alternative private school placements for Student. The MDT Team recommended that DCPS conduct a comprehensive psychological evaluation. Exhibit P-5, P-13.

20. On July 8, 2011, DCPS sent a Prior to Action Notice to Parent notifying her that Student’s placement was being changed to PRIVATE SCHOOL, one of the schools proposed by Prior Educational Advocate, for the 2011-2012 school year. Exhibit P-14. Petitioner concurs in the change in placement. Representation of Counsel.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### DISCUSSION

##### Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

DID DCPS DENY FAPE TO STUDENT BY FAILING TO RESPOND  
APPROPRIATELY TO CHANGES IN STUDENT'S IN-SCHOOL BEHAVIOR IN  
OCTOBER 2010?

The theory of Petitioner's case is that Student developed worsening aggressive behaviors in school in the fall of 2010 and DCPS failed to respond. Specifically, Petitioner contends that the IDEA required DCPS to conduct new evaluations, to revise Student's IEP and to change her school placement in response to Student's behavior changes. Before addressing these contentions, it will be helpful to review the background of Student's disability and education in DCPS schools.

Student's school records show a history of serious emotional and behavioral concerns, including oppositional and defiant behaviors which predate her 2008 enrollment at ES. At least since 2007, Student has been placed in a self-contained classroom due, in part, to her emotional and behavioral deficits. These behaviors, notably aggressive behaviors such as being argumentative, defiant, and/or threatening to others, continued at ES, where Student was placed in a self-contained classroom, with a low student to teacher ratio, designed for students with developmental disabilities. In October 2010, after Student moved to Mother's home from Grandmother's home, her problem behaviors in school gradually increased. However, there is no evidence that the change was dramatic or even unexpected for a child with Student's psychological history. For the remainder of the fall semester, Student's teachers did not alert Mother about any concerns because they were able to handle her behaviors in the special education classroom. The situation changed in late January 2011, when Student was from ES for a teacher with a pencil and for threatening behaviors toward other students.

### Need for Additional Evaluations

Petitioner contends that Student's escalating behaviors in October 2011 warranted conducting a FBA.<sup>3</sup> Under 34 CFR § 300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. In the fall of 2010, Student was already placed in a self-contained classroom for children with developmental disabilities, where, according to Grandmother, Student was doing "pretty good." The classroom was staffed with 1 teacher, 2 aides and 3 dedicated aides (not assigned to Student). DCPS did conduct an FBA in January 2011. There was no testimony that Student's behavior impeded her learning or that of her classmates before the January 26, 2011 stabbing incident, by which time the FBA was already underway. I find, therefore, that the evidence does not establish that DCPS denied Student a FAPE by not conducting an FBA before January 2011. *Compare Long v. District of Columbia*, Civ. Action No. 09-2130, (D.D.C. Mar. 23, 2011) (Student's behavior problems seriously affected his academic performance during the school year.)

With regard to reevaluations generally, under the IDEA, a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. 34 CFR § 300.303(b). Student received comprehensive psychological and psychoeducation evaluations in May 2010. The May 5, 2010 comprehensive psychological evaluation report expressly addressed Student's aggressive behaviors in school. Petitioner has not established that the

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<sup>3</sup> In May 2010, School Psychologist had recommended that Student's IEP team develop a behavioral plan to address her behavioral difficulties. Psychologist opined in her testimony that an FBA should have been conducted soon after the May 2010 comprehensive psychological evaluation was completed. delay in obtaining the FBA recommend by School Psychologist, was not explained at the hearing, but the record does not show that the delay resulted in harm to the Student. Parent's complaint in this case addresses DCPS's alleged failure to conduct evaluations after Student "displayed 'escalating behavior' by October 2010." Complaint for Due Process, page 6.

gradual increase in Student's aggressive and problem behaviors in fall 2010 warranted mid-year reevaluations.<sup>4</sup>

Parent also contends that DCPS should have obtained a psychiatric evaluation of Student. U. S. Department of Education regulations require that a child be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR § 300.304(c)(4). The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. *Long, supra*. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). In this case, Child had been assessed in the social and emotional status area when the May 5, 2010 comprehensive psychological evaluation was conducted. Petitioner offered no evidence that a psychiatric evaluation was also needed to determine Student's educational needs. Moreover, Petitioner obtained a psychological evaluation of Student at \_\_\_\_\_ on February 11, 2011, which Student's IEP team sought to review.<sup>5</sup> I find that the evidence does not establish that, in this case, the IDEA required DCPS to administer a separate psychiatric assessment to determine Student's needs.

#### Revision of IEP

Parent argues that DCPS was required to revise Student's IEP after she exhibited increased aggressive behaviors beginning in October 2010. Under the IDEA, the IEP team must

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<sup>4</sup> In June 2011, Student's MDT team at ES recommended a comprehensive psychological reevaluation in order to inform the team's decisions about Student's educational needs.

<sup>5</sup> At the March 22, 2011 IEP team meeting, the Director of ES requested a release of information so that Student's ES therapist could contact Student's psychiatric therapist at

Petitioner indicated that she would consent at a later time. The evidence does not establish whether that consent was ever given.

review a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals. 34 C.F.R. § 300.324(b). In March 2011, following Student's return from suspension in February 2011, Student's IEP team met at ES<sup>6</sup>. The team added 60 minutes per week of behavioral support services as a related service to Student's IEP and developed a BMP. I find that DCPS fully met its obligation to timely review and revise Student's IEP.

#### Change in Placement

Lastly, Petitioner contends that DCPS should have changed Student's school placement after her aggressive behaviors increased beginning in October 2010. Under the IDEA, after devising IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities, DCPS is obliged to match the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991). Under her IEPs developed on March 3, 2010, July 22, 2010 and March 23, 2011, Student was placed in a self-contained setting in an ES classroom, with a low student to teacher ratio, designed for students with developmental disabilities.<sup>7</sup>

In June 2011, DCPS agreed to place Student at Private School, a school requested by Petitioner's advocate. The fact that DCPS ultimately placed Student at Private School does not mean that the self-contained classroom where Student was placed at ES was not a placement

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<sup>6</sup> Petitioner offered no evidence that the March 22, 2011 IEP was not reasonably calculated to provide educational benefit to Student. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit.)

<sup>7</sup> Student's July 22, 2010 IEP was not introduced into evidence. The hearing officer assumes that it contained the self-contained classroom provision found in the March 3, 2010 and March 23, 2011 IEPs.

capable of fulfilling Student's educational goals and requirements when her March 3, 2010, July 22, 2010 and March 23, 2010 IEPs were developed. Generally, an IEP is reviewed prospectively – not in hindsight. “[T]he question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (citations omitted.) Petitioner has not established that Student's placement at ES in her 2010-2011 IEPs was not adequate at the time the IEPs were offered to Student.

#### SUMMARY

In summary, I find that Petitioner has not established that DCPS denied FAPE to Student be failing to conduct evaluations, not revising her IEP or not changing Student's placement following the gradual increase in Student's problem behaviors at ES beginning in October 2010.

#### ORDER

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

All relief requested by Petitioner herein is denied.

Date: September 22, 2011

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).