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

District of Columbia Public Schools (DCPS),
on behalf of KIPP Public Charter School (KIPP),

Respondent.

Date Issued: December 20, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0722

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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on October 14, 2012. A response to the complaint was filed on November 2, 2012. A prehearing conference was held, via telephone, on November 6, 2012, and a prehearing order was issued on November 7, 2012.

No resolution meeting was held and the 30 day resolution period was not adjusted. The 45 day hearing timeline began on November 15, 2012.

The Respondent provided the Petitioner with disclosures for hearing on November 27, 2012. The Petitioner provided the Respondent with disclosures for hearing on November 28, 2012. Only the Petitioner filed the required trial brief.

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

The hearing was convened at 12:00 p.m. on December 5, 2012, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Michelle Kotler, Esq., and the Respondent was represented by Tanya Chor, Esq. The hearing concluded by 5:00 p.m. The Petitioner requested, and it was agreed, that the parties would file written summations no later than Tuesday, December 11, 2012. Both parties timely filed written summations on December 11, 2012. The due date for this HOD is December 29, 2012. This HOD is issued on December 20, 2012.

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., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent has failed to identify the Student as a possible child with a disability following behaviors, such as stomping, screaming, and throwing chairs?

(2) Whether the Respondent has failed to conduct an initial evaluation of the Student in all areas of suspected disabilities following staff advising the Parent that the Student required an initial evaluation?

The substantive requested relief at the time of hearing was:

(1) An independently provided comprehensive psychological assessment; and

(2) An individualized education program (IEP) team meeting to review the initial evaluation and develop an IEP for the Student, if eligible, and a compensatory education plan for missed services for the 2011-2012 and 2012-2013 school years.

The Respondent failed to identify the Student as a suspected child with a disability and refer him, in writing, to an IEP team. The Respondent did not fail to conduct an initial evaluation of the Student under IDEA because after the Student was provided interventions to assist with concerns about his academic achievement, the Student made adequate progress in the general education curriculum and demonstrated no need for special education services. The Student may be a child with a disability under other laws and the Respondent may be required to evaluate the Student under those laws.

IV. EVIDENCE

Four witnesses testified at the hearing, two for the Petitioner and two for the Respondent. The Petitioner's witnesses were:

1) The Petitioner, Student's Mother (P)
2) [redacted], Advocate ([redacted])[2]

The Respondent's witnesses were:

1) [redacted] Director of Special Education, KIPP ([redacted]
2) [redacted] School Social Worker, KIPP ([redacted])

All witnesses testified credibly.

Two exhibits were admitted into evidence of 10 disclosures from the Petitioner.[3] The

[2] Witness offered an expert opinion about triggers for identification of a child with a disability as well as fact testimony.

Petitioner's exhibits are:

Ex. No.	Date	Document
P 8	November 8, 2012	Attendance records
P 10	Undated	Resume of Twilah Anthony

All four of the Respondent's disclosures were entered into the record as exhibits. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	August 25, 2010- October 2, 2012	[Staff Log concerning Student]
R 2	February 22, 2012	Attendance Meeting Notes/Attendance Plan
R 3	Undated	Letter from Clayman to Whom It May Concern
R 4	Undated 2010-2011	[Pre-K Student Performance report] Pre-School Report Card

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

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. Student is a kindergartener at Respondent public charter school.[4] He is in his third year at the school, previously participating in preschool classes.[5] He is currently [redacted].[6]

[3] The majority of the Petitioner's disclosures were not, in fact, evidence, but rather documents and pleadings already part of the administrative record, as well as her trial brief, which the Undersigned has treated as filed and part of the record separately from the disclosures.
[4] Testimony (T) of P, T of J.H.

2. The Student has exhibited tantrums and other outbursts ("melt-downs") at school as early as August 25, 2010, after he began attending, which included crying, stomping his feet, yelling, crossing his arms, and saying he was angry.[7] He had difficulty regulating his emotions and became very upset over small incidents.[8] He was able to be redirected at times and other times required removal from the classroom to calm down.[9] This happened weekly, sometimes several times per week prior to the current school year.[10]
3. During the first two years the Student was not brought to school on time by the Petitioner, often 20 to 30 minutes late, due to issues the Petitioner had with another child at home.[11] The school staff repeatedly attempted to address the Student's tardiness with the Petitioner, and this has improved during the current school year.[12]
4. Teachers raised concerns with the Petitioner about the Student's behavior and literacy during the 2011-2012 school year.[13] The Student's teacher advised the Petitioner to consider having him evaluated by a doctor, and gave her a checklist to bring to the doctor, because his behavior was impacting him academically to the point the teacher was concerned he would not be promoted to kindergarten.[14] The Student was referred to a RTI (Response To Intervention) Team, not an individualized education program (IEP) team, that considered the Student's progress, standardized test scores, and teacher concerns, and then implemented a four to six week plan of interventions to ensure academic growth.[15] The Petitioner was not

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[5] T of P, T of [redacted]
[6] Administrative Record, Undisputed.
[7] R 1, T of P, T of [redacted]
[8] T of P, T of [redacted], R 1
[9] R 1, R 4, T of P, T of [redacted]
[10] T of P, T of [redacted]
[11] T of P, R 1.
[12] T of P, R 1.
[13] R 1, T of P, T of [redacted]
[14] T of P.
[15] T of P, T of [redacted]

invited to be part of this team and did not participate in the decision making of the team.[16] The interventions were successful and the Student met his developmental benchmarks and was promoted to kindergarten for the 2012-2013 school year.[17] He is not having unusual behavioral or academic problems this year.[18]

5. On August 28, 2012, the Petitioner met with [redacted] to discuss the Student's behaviors the prior school year, sharing the concerns his teachers had shared with her.[19] The Petitioner stated that she wanted evaluations for Attention Deficit Hyperactivity Disorder completed and [redacted] advised her schedule an appointment with the Student's pediatrician.[20] [redacted] had witnessed the Student's behaviors and advised the Petitioner of a social skills group she was putting together for students, which the Petitioner agreed she would like the Student to participate in.[21] The Student has been participating in this group, enjoys it, is a good participant, and is demonstrating an understanding of the concepts imparted.[22]

6. The Respondent's practices with regard to children suspected of having a disability and needing special education is to review their educational records, including standardized assessment data, discuss classroom performance with teachers, and a RTI team makes a determination about the implementation of strategies to assist the child.[23] If the child does not show growth with the implementation of strategies there will be a referral for special education and the parents are called in to meet and to request consent for an initial

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[16] T of [redacted]
[17] T of P, T of [redacted], R 4.
[18] T of P, R 1.
[19] R 1, T of P, T of [redacted]
[20] T of P, T of [redacted], R 1.
[21] T of P, T of [redacted], R 1.
[22] T of [redacted]
[23] T of [redacted]

evaluation.[24] The Respondent would forgo the intervention process if a parent had requested an initial evaluation and, when interventions were proposed, rejected the interventions.[25]

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. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. "A child with a suspected disability who may need special education and is at least two years, eight months of age and less than twenty-two years of age, shall be referred, in writing, to an IEP team." D.C. Mun. Regs. 5-E3004.1(a). Referrals may be made by a parent or a professional staff person of the public school, among others. *See* D.C. Mun. Regs. 5-E3004.1(b).
3. The Respondent suspected the Student may have a disability and may have needed special education and staff did not refer him, in writing, to an IEP team. This was demonstrated by advice to the Petitioner to have the Student evaluated by a doctor and the referral to a "RTI

[24] T of [redacted].
[25] T of [redacted]

Team" that made considerations and determined to provide the Student with interventions to see how he would respond. The Petitioner was not part of the RTI Team. Because District of Columbia law requires a referral, in writing, to be made upon suspicion of a disability and possible need for special education services the staff concerns should have been referred to the IEP team in writing. This referral may have resulted in the implementation of interventions rather than an initial evaluation, if so determined by the IEP team, and with the opportunity for the Petitioner to be involved and with proper notice. The Petitioner's procedural rights would have been protected and she would have been fully informed of her rights and what is happening with the Student, and provided an opportunity to object or demand a different course of action, such as an immediate initial evaluation. *See e.g.* 34 C.F.R. §§ 300.503 & 300.504. In this case, the Respondent acted without the full involvement of the Petitioner by employing a team that was not the IEP team (which would have included the Petitioner) to make determinations about the application of interventions in lieu of an initial evaluation, thus impacting the Petitioner's notice rights and opportunity to be involved in the decision-making process.

4. Despite the Respondent's failure to properly refer the Student to an IEP team to determine whether to implement interventions or an initial evaluation for special education eligibility, the Student did respond positively to interventions put in place to both assist in his literacy development and his behavior. Thus, there was no educational harm and there was no reason to proceed with an initial evaluation for eligibility for special education because the Student's disability was adequately addressed with the interventions. However, the Petitioner and Student still retain rights under other laws, such a Section 504 of the Rehabilitation Act of 1973 and the American with Disabilities Act (ADA), which include procedural safeguards

and substantive rights that are not addressed here as they are beyond the authority of this IDEA tribunal.

VII. DECISION

The Respondent failed to refer the Student, whom it suspected of having a disability and possibly requiring special education, to an IEP team. The Respondent's unilateral application of interventions did address the Student's educational growth and no harm resulted. Further, because interventions worked, there was no reason to conduct an initial evaluation of the Student under IDEA. Whether the child must be evaluated by the Respondent under another law, or whether the interventions are accommodations for his disability under another law is not addressed here.

VIII. ORDER

The complaint is dismissed with prejudice. The parties are advised to examine the Student's and the Parent's rights under other laws pertaining to disability.

IT IS SO ORDERED.

Date: December 20, 2012

Jim Mortenson, 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).