DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: December 8, 2012
v.	)	Hearing Officer: Virginia Dietrich
District of Columbia Public Schools Respondent.	)	Case No: 2012-0672
	)	Hearing Date: December 3, 2012
	)	Hearing Room: 2004

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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of [redacted], filed a due process complaint notice on September 26, 2012 alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that during Student's Kindergarten year and during the first twenty days of the first grade, Student's misbehavior and substandard academic performance were sufficient indicators for DCPS to suspect that Student might have a disability that required special education services. Petitioner alleged that DCPS failed in its affirmative Child Find obligation under the IDEA to locate, identify and evaluate Student as a child who might need special education services in order to access the general education curriculum.

DCPS asserted that although Student exhibited some behavior problems at the beginning of each school year, the behaviors were consistent with those of Student's very young peers who were making the transition from home to school, that Student's academic and behavioral performance improved and was at grade level as each academic year progressed, and that the teachers who worked closely with Student had no reason to suspect that Student had a disability that required special education services in order for him to access the general education curriculum. DCPS denied the allegation that it had failed to locate, identify and evaluate Student as a child with a suspected disability who might be in need of special education services.

[1] Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 09/26/12. This Hearing Officer was assigned to the case on 09/28/12. DCPS filed a response to the complaint on 10/04/12. A prehearing conference took place on 10/18/12 and a Prehearing Order was issued the same day. A resolution meeting took place on 10/17/12, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 10/26/12, the 45-day timeline to issue a final decision began on 10/27/12, and the final decision was due on 12/10/12.

The due process hearing was a closed hearing that took place on 12/03/12. Petitioner was represented by Nicholas Ostrem, Esq. and DCPS was represented by Yvonne Burnley, Esq.[2] Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person for a few hours, but was excused to attend a necessary medical appointment.

Petitioner presented two witnesses: Petitioner; and Petitioner's educational advocate.

DCPS presented two witnesses: Student's Kindergarten teacher during the 2011-2012 school year ("Kindergarten Teacher"); and Student's first grade teacher during the 2012-2013 school year ("First Grade Teacher").

Petitioner's disclosures dated 11/26/12, containing a witness list and Exhibits P-1 through P-17, were admitted into evidence without objection.

DCPS' disclosures dated 11/26/12, containing a witness list and Exhibits R-1 through R-11, were admitted into evidence without objection. DCPS' exhibits were improperly labeled in that the page numbers did not match the table of contents exhibit numbers, but DCPS' exhibits were not corrected and renumbered since reference was made to the improperly labeled exhibits throughout the hearing.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate or timely identify, locate and evaluate Student to determine whether Student was in need of special education services during the 2011-2012 and

[2] Attorney Maya Washington and Attorney Tanya Chor each acted as co-counsel with Attorney Yvonne Burnley at various times throughout the due process hearing.

2012-2013 school years, based on Student's behavioral problems and academic difficulties within the general education curriculum.

For relief, Petitioner requested a finding that Student was denied a FAPE; and that DCPS fund an independent comprehensive psychological evaluation and Attention Deficit Hyperactivity Disorder evaluation and any other evaluation recommended by those evaluations; and that DCPS convene an Individualized Education Program ("IEP") Team meeting within 15 days of receipt of the final evaluation, to review all independent evaluations, discuss and determine Student's eligibility, and if Student is eligible, DCPS to develop an appropriate IEP that includes a Behavior Intervention Plan; and if Student is determined to be eligible for special education services, that DCPS discuss and determine compensatory education for DCPS' failure to timely locate, identify and evaluate Student, or that DCPS fund an independent evaluation at market rate to determine compensatory education, with Petitioner reserving the right to a later claim for compensatory education.

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, age 6, is a resident of the District of Columbia who attended the same DCPS public school for Kindergarten during the 2011-2012 school year and for 1st grade during the current 2012-2013 school year. Student has never been evaluated for or received special education services; he has participated solely in the general education curriculum since he began attending school.[3]

#2. During the first half of the 2011-2012 school year when Student was in Kindergarten, Student consistently exhibited behavior problems that primarily consisted of hitting other students, but also included non-attentiveness, playing and talking in class.[4] Student's conduct, although unacceptable in school, was typical of a Kindergarten child and consistent with the behavior of Student's Kindergarten peers. In order to help Student gain the proper foothold into the academic environment, Kindergarten Teacher and the paraprofessional assigned to Student's class gave Student 1:1 assistance during the first half of the Kindergarten year, mainly to address Student's hitting behaviors and not academics. Other students received extra instruction as well.[5]

#3. Student's adjustment to school during the first quarter of Kindergarten, as indicated by his report card, was not satisfactory; he did not meet the basic level of performance in both academics and behavior. However, Student's progress report, written to encourage rather than discourage Student during his very first school experience, bolstered Student's academic and behavioral performance to the level of satisfactory.[6] By the end of the second quarter of the school year, Student's overall performance in academics and behavior had improved; Student

[3] Petitioner, Kindergarten Teacher, First Grade Teacher.
[4] R-1-7, Kindergarten Teacher.
[5] Kindergarten Teacher.
[6] R-1-1, R-1-7, Kindergarten Teacher.

had met the basic standard of performance in all academic areas, which meant that Student showed a basic working knowledge of skills/concepts, produced satisfactory work and usually applied skills/concepts correctly in all academic areas.[7] And, although Student still required frequent prompting in work habits and physical development, Student's social development had improved in that he only required limited prompting instead of the frequent prompting that was necessary during the first quarter.[8]

#4. In January 2012, Kindergarten Teacher expressed concern to Student and Petitioner that although Student was making progress, he was not making enough progress to be promoted to the first grade. Kindergarten Teacher gave Petitioner books and charts to use at home and encouraged Petitioner to work with Student to reinforce principles of behavior and academics that were necessary for Student's successful adjustment at school. After that, Student's behavior and academic performance improved tremendously;[9] Student's hitting behaviors subsided, Student easily was able to count past 100 whereas he had been unable to count to 50 prior to January 2012, and Student's ability to identify numerals and letters of the alphabet doubled.[10]

#5. During the second half of Student's Kindergarten year, classroom educators were no longer providing Student with 1:1 assistance because Student was making progress.[11] Student's progress report and report card for the 3rd quarter of Student's Kindergarten year revealed that Student was performing in the "satisfactory" category in all academics and behavior and Student had met the basic standard of performance in all academic areas. Student's behavioral adjustment improved a great deal during the second half of the school year and by the end of the 4th quarter, all areas of Student's academic and behavioral performance had advanced to the category of "good."[12] When Student concluded Kindergarten at the end of the 2011-2012 school year, Student met the basic level of performance in all academic areas and Student was able to demonstrate acceptable behaviors with limited prompting. Student was performing on grade level in all respects.[13] At no time during the 2011-2012 school year did Kindergarten Teacher or DCPS have reason to suspect from Student's behavior or academic adjustment that Student should be referred for an evaluation to determine whether or not Student needed special education to access the general education curriculum.[14]

#6. Student's first grade year began on 08/27/12 and Student got off to a rocky start. After the first nineteen days of school, Student's progress report indicated unsatisfactory performance in the academic areas of reading and social studies, but satisfactory performance in math and science. At that time, Student's ability to work independently, make effective use of time, apply himself and work effectively with others was at the unsatisfactory level; however, Student was able to work well in groups, complete homework assignments and demonstrate appropriate behavior in class.[15] Student's initial unsatisfactory performance was typical of other

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[7] R-1-2, R-1-7, Kindergarten Teacher.
[8] R-1-7.
[9] Petitioner, Kindergarten Teacher.
[10] R-1-4, Kindergarten Teacher.
[11] Kindergarten Teacher.
[12] R-1-5, R-1-6, R-1-7.
[13] R-1-7, Kindergarten Teacher, First Grade Teacher.
[14] Kindergarten Teacher.
[15] R-1-8, First Grade Teacher.

first grade students who went through an adjustment period at the beginning of the school year. It also was typical that after a few weeks, the children begin working together on completing assignments and showing positive responses to the behavior and consequence system used in the classroom. Student followed the typical pattern of adjustment. Since 09/21/12, Student has adjusted very well; Student's timidity has decreased, Student has taken responsibility for his actions, and First Grade Teacher's informal assessments revealed that Student's scores in math and verbal fluency have risen. Student was progressing in line with the rest of his first grade peers.[16]

#7. Petitioner never asked the school to evaluate Student to determine whether or not Student needed special education services; however, on 09/10/12, Petitioner gave a Vanderbilt Scale (behavior rating scale) to First Grade Teacher to be filled out and returned to Student's pediatrician. First Grade Teacher rated Student as very often being unable to pay attention in class, not listening or following through on tasks, forgetful in daily activities, avoiding or disliking tasks that required sustained mental effort, and easily distracted by external stimuli.[17] At that time, Student's organizational skills, assignment completion and ability to follow directions in the classroom were problematic and Student's overall academic performance was also problematic; however, these areas of unsatisfactory performance were observed on the 10th day of the school year, during the typical adjustment period that followed the summer recess.[18]

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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making

[16] First Grade Teacher.
[17] P-9-1.
[18] R-1-8, First Grade Teacher.

process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate or timely identify, locate and evaluate Student to determine whether Student was in need of special education services during the 2011-2012 and 2012-2013 school years, based on Student's behavioral problems and academic difficulties within the general education curriculum.

DCPS is responsible for identifying, locating and evaluating all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services. 34 C.F.R. 300.111(a)(1)(i); 5 D.C.M.R. E-3002.1(d). The duty to find these children, known as Child Find, also includes children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111(c)(1).

Special education means specially designed instruction to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the educational district. 34 C.F.R. 300.39.

Petitioner failed to meet her burden of proof that DCPS should have suspected that Student was a child with a disability during the 2011-2012 and 2012-2013 school years and taken steps to identify, locate and evaluate Student to determine whether or not Student was in need of special education services that would allow him to access the general education curriculum.

Student began his Kindergarten year with unsatisfactory marks in academics and behavior, but his misbehaviors that mainly consisted of hitting others, was not uncommon for Kindergarten children. Kindergarten Teacher and the assigned classroom paraprofessional worked 1:1 with Student during the first half of the year to address his hitting behaviors. Student's teacher gave Petitioner books and charts for Student to use at home so that the principles learned at school could be reinforced. These strategies were effective. Following a warning from Student's teacher in January 2012 that Student would have to repeat Kindergarten if his progress did not improve, Student improved to the extent that both his academic and behavioral performance were at grade level without any 1:1 assistance during the second half of the 2011-2012 school year.

The testimony of Kindergarten Teacher was given the most weight. Kindergarten Teacher, a very credible witness, was the person who worked closely with Student every school day and had an in depth working knowledge of Student's strengths, weaknesses and abilities. Due to the fact that Student's behavior problems were typical of Kindergarten children; that Student showed academic and behavioral progress during the year and ended the school year on

grade level in both academics and behavior, the Hearing Officer determines that DCPS had no reason to suspect that Student was a child with a disability who might be in need of special education services during the 2011-2012 school year. Student was able to access the general education curriculum without supports during the second half of his Kindergarten year. Student was on grade level at the end of his Kindergarten year, which meant that Student had met the established educational standards.

Student's academic and behavioral performance during the first three weeks of Student's first grade year was by and large unsatisfactory; however, his adjustment was not inconsistent with very young children who were returning to the structure and discipline that school demands following a summer recess. The testimony of First Grade Teacher was credible and uncontroverted. After she filled out the Vanderbilt behavior rating scale on 09/10/12, which revealed that Student had both academic and behavioral problems, Student's behavior and academic performance improved.

At no time from the start of the 2012-2013 school year until the time the complaint was filed or at any time thereafter until the time of the due process hearing, did DCPS have reason to suspect from Student's behavior or academic adjustment that Student should be referred for an evaluation to determine whether or not Student needed special education to access the general education curriculum. On 09/21/12, Student was functioning on grade level in reading and his adjustment problems were typical of the first grade group. At the conclusion of Student's Kindergarten year, Student had been performing on grade level in all areas of academics and behavior; therefore, the unsatisfactory marks that Student received during the first few weeks of his first grade year were reasonably attributable to the normal adjustment period following the summer recess. And, in line with the expectation that Student was only going through an initial adjustment period, Student's behavior and academic performance improved after 09/21/12 and he was soon on grade level.

The evidence in the record was insufficient for the Hearing Officer to conclude that DCPS should have suspected that Student was a child with a disability who might be in need of special education services, based on Student's academic and behavioral performance during the first few weeks of the 2012-2013 school year. The length of time from the start of school until the complaint was filed on 09/26/12 was too short a duration of time to suspect that Student might have a disability based on his behavior and academic performance. After 09/21/12, Student' overall performance improved and he was soon on grade level. There also was no evidence in the record that during the first few weeks of the 2012-2013 school year, Student was unable to make progress towards achieving grade level standards without supports. Student's initial poor adjustment to school was typical of other first grade students and was expected to improve over time, and it did. The Hearing Officer determines that DCPS did not fail to carry out its Child Find obligations from the time the 2012-2013 school year started until the time the due process complaint was filed or at anytime thereafter until the time of the due process hearing.

And, even if the Hearing Officer were to find that there was sufficient evidence as early as 09/10/12 or 09/21/12 for DCPS to suspect that Student had a disability that might require special education services, which the Hearing Officer decisively does not, DCPS had 120 days to

conduct an evaluation and determine eligibility from the time a referral for an evaluation was made. See 34 C.F.R. 300.301, 38 D.C. Code 2561.02. That amount of time had not transpired by the time the due process complaint was filed.

ORDER

Petitioner failed to meet her burden on proof on the issue presented in the complaint. All requested relief is denied. The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

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).

Date: December 8, 2012

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:
Petitioner: (U.S. Mail)
Petitioner's Attorney: Nicholas Ostrem (electronically)
DCPS' Attorney: Yvonne Burnley, Esq. (electronically)
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