

<p>STUDENT¹, by and through his Parent Petitioners, v. Public Charter School ("School A") Respondent. Case # 2009-1037</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Dates of Hearing: September 18, 2009 & September 21, 2009</p> <p>Date of Complaint: July 15, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Zachary E. Nahass, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Ellen Dalton, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened September 18, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing resumed on September 21, 2009, and was concluded with the submission of written closing statements on September 28, 2009. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on July 15, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-11 and Respondent's Exhibits 1-26) which were admitted into the record.

ISSUE(S):²

Did DCPS deny the student a free and appropriate public education ("FAPE") by failing timely to conduct and review evaluations in all areas of suspected disability and by failing timely to determine the student eligibility for special education and related services such that the student is entitled to compensatory education? Petitioner specifically alleges School A violated its "Child Find" obligations pursuant to IDEIA as to this student by failing to identify and find the student eligible by the start of the spring semester of SY 2008-09.

FINDINGS OF FACT³:

1. The student is a [REDACTED] resident of the District of Columbia who attended School A in the [REDACTED] during the 2008-09 School Year ("SY"). (Parent's testimony)
2. The parent enrolled the student and one of his two older siblings in School A for SY 2008-09 in April 2008.⁴ When the parent completed the enrolment forms for the student she filled out a student history form in which she stated the student did not an individualized educational program ("IEP") and the student did not have any medical or

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

health conditions that that require special attention from the school. (Respondent's Exhibit 1)

3. The student left his previous school in March 2008 and went to live with his father in [REDACTED]. [REDACTED] The student had issues fitting in but never displayed any academic difficulties prior to attending School A. Prior to him leaving the previous school the parent had no concerns about his academics or behavior. The student was enrolled in School A in April 2008 and started school there the first day of school in SY 2008-09. (Parent's testimony)

4. Because of the emotional issues the student began to display at home the parent initiated and had the student participate in private mental health treatment (therapy) outside of the school setting. The student and his siblings participated in individual and family therapy once a week with the parent. The therapy began near the start of SY 2008-09. The private therapy continued most of the time during SY 2008-09, but the parent later changed the therapy to another private provider. (Parent's testimony)

5. During SY 2008-09 the student's attention became of concern to the parent as well as his focus on school work and homework. The student's teacher in aftercare mentioned to the parent that the student was daydreaming a month into the school year. He did not mention any follow up and did not discuss this again. The parent informed the student's classroom teacher that the student was going to counseling outside the school. The student was exposed to inappropriate video and being encouraged by the father to fight with his siblings. But the parent did not reveal any further details of these issues. (Parent's testimony)

6. During the second quarter of the school year the student changed classroom teachers. The student began to display self esteem issues. The teacher mentioned to the parent that the student was shy. The parent noted the student had articulation issues in his self expression. The parent shared with the classroom teacher that the student was receiving tutoring at the afterschool program. And the teacher asked that the student attend Saturday School. (Parent's testimony)

7. The parent shared with Ms. [REDACTED] the school counselor, the feedback provided by the out of school counseling. The parent was not aware of any disruptive behaviors in the classroom. The behaviors were primarily displayed at home and in after care. (Parent's testimony)

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

⁴ The student and his younger sibling began attending School A at the start of SY 2008-09. The student other younger sibling enrolled in School A near the middle of the school year.

8. Dr. [REDACTED] the school's special education teacher began to provide the student additional instruction to address his reading deficits early in the school year. Dr. [REDACTED] was in the student's classroom three times per week and also worked with the student two times per week outside of the classroom. In neither of those settings did Dr. [REDACTED] observe any of the alleged behaviors or affect. (Dr. [REDACTED]'s testimony)
9. Ms. [REDACTED] the school principal, taught the student in kindergarten and observed the student both in and out of the classroom on at least a weekly basis and did not observe any of the alleged behaviors or affect. Ms. [REDACTED] did not observe that the student exhibited any behavior problems at School A or any atypical behaviors that would have led her to suspect that he had a disability. (Ms. [REDACTED] testimony)
10. Ms. [REDACTED] the school counselor began working with the student in April 2009. She did not observe any depressed affect and disruptive behaviors by the student during his counseling sessions. The student's teacher did not express any concerns to Ms. [REDACTED] about the student's behavior or affect in the classroom that would put Ms. [REDACTED] on notice the student was in need of evaluation. (Ms. [REDACTED] testimony)
11. The report card for SY 2008-09 reflects that the student performed basic or proficient in all the social/emotional areas that were measured on the report card. The report card reflects the student performed below basic starting with the second quarter in most if not all areas of reading and math. The student was rated as basic or proficient in all areas of science and social studies. The teacher comments on the report card stated in the third quarter (March 2009) that the student was bright but very shy and did not participate too much. The teacher noted the student was working below grade level. (Respondent's Exhibit 23)
12. School A conducted a Saturday School in which students were provided extra academic assistance on Saturdays. The student attended Saturday School and continued with the assistance until almost the end of the year. (Parent's testimony)
13. On April 1, 2009, after the student's sibling was suspended from the afterschool program and at the behest of the aftercare program, a meeting was convened at School A with the parent, the school staff including the principal and counselor, and the aftercare personnel. The aftercare staff was hoping to devise a consistent approach to address the behaviors of the student and his siblings that were being displayed in aftercare and there difficulty in completing homework in aftercare. The discussion was mostly about a sibling but there was discussion about all three children. (Parent's testimony)
14. Following the April 1, 2009, meeting the student and his siblings began seeing the school counselor, Ms. [REDACTED]. After meeting with Ms. [REDACTED] the parent saw some improvement in the student and his siblings' interaction but no improvement in his academics. As a result of the meeting in April the parent began to disclose more information and detail about the student and the siblings to Ms. [REDACTED]. There were subsequent meetings held on April 22, 2009, and May 20, 2009, between the school and the aftercare staff. (Ms. [REDACTED] testimony)

15. Ms. [REDACTED] came aware in late April that the student and a sibling were involved in an assault in the bathroom at a previous school. In the midst of talking about the history of the student and siblings at the April meeting the parent stated that she was having the student tested by an outside organization. Although Ms. [REDACTED] began working with the student and his brothers and she never had any concerns that made her think the student should be evaluated for special education services. Ms. [REDACTED] worked with the student once a week from April until the end of the year for perhaps as many as twelve sessions. (Ms. [REDACTED] testimony)
16. Ms. [REDACTED] was not aware of the degree of trauma to which the student had been exposed until evaluations were later conducted of the student. Had she known earlier she would have changed her opinion as to whether the student should be evaluated. Ms. [REDACTED] did not mention to the student's classroom any of the issues addressed during the counseling because she considered them confidential. (Ms. [REDACTED] testimony)
17. The principal of the school had the opportunity to observe the student in and around the school and did not observe any unusual behaviors from the student. The student was not being brought to the principal's office and there was no information from the teacher to the school principal regarding the student's behavior. The principal had not reviewed the student's report cards. After the April 1, 2009, meeting the principal agreed to counseling being provided and that if any behaviors arose in school the parent would be informed. As the meetings began in April and agreed to provide the student counseling at school. (Ms. [REDACTED] testimony)
18. School A's has procedures in place to identify students with disabilities in need of special education services - "Child Find" procedures. Younger students are screened for speech and developmental delay at the beginning of the year. The Student Support Team ("SST") process was used for all other students. If a teacher has a concern with a student the student is sent through the SST process. If there is severe problems then the student's will be immediately evaluated. The school's special education coordinator provides training for all teachers at the beginning of the school year as to what teachers should look for in order to identify the students who might in need of special education services. The special education coordinator periodically conducts classroom observations to identify students but did not observe the student's classroom. The student's teacher(s) never said anything to the special education coordinator about this student. (Mr. [REDACTED] s testimony)
19. On May 11, 2009, the Petitioner, through counsel, requested that School A conduct and review evaluations to determine the student's eligibility for special education services. The correspondence also included a request for copies of the student's educational records and consent from the parent to conduct the evaluations. (Petitioner's Exhibit 11) In June 2009, the student's began taking medication to treat Attention Deficit Hyperactivity Disorder ("ADHD"). Since the medication and therapy began the parent reported seeing improvement in the student's behavior. (Parent's testimony, Petitioner's Exhibit 7)

21. In early July 2009, the Petitioner was informed by School A that evaluations of the student would not begin before the start of the 2009-2010 school year. The parent had conversations with the school staff about the evaluations and Ms. [REDACTED] called the parent and said that the evaluations would not be completed until the following school year. (Parent's testimony)

22. On July 15, 2009, Petitioner filed the due process complaint. (Respondent's Exhibit 5)

23. As a result of the request for evaluations School A had initial evaluations conducted of the student in July 2009. On July 27, 2009, School A had a clinical psychological evaluation conducted of the student. The report noted the student's experience of suffering an incident of abuse from other student's at a prior school he attended. The report revealed that student lived with his father in Las Vegas during the summer of 2008. While there the student observed the father engage in sexual abuse of his older (yet still under-age) half sister. A few years prior the student along with his siblings observed the father abuse his mother and directed him and his siblings to engage in the abuse of his mother. The parents later separated and the student and his siblings resided with his mother only. The father has since been incarcerated for the abuse of the sister. Mental health professionals have concluded that these experiences have contributed to the student developing mental health difficulties and he has been diagnosed with the following disorders: Major Depressive Disorder, Dysthymic Disorder, Attention Deficit Hyperactivity Disorder ("ADHD") and Posttraumatic Stress Disorder. (Respondent's Exhibits 9 & 10, Parent's testimony)

24. A psycho-educational evaluation was conducted on July 20, 2009, which was reported on July 27, 2009. The evaluator conducted a Wechsler Intelligence Scale, 4th Edition, Woodcock Johnson Tests of Achievement 3rd Edition and the Bender Visual-Motor Gestalt Test. The evaluation determined the student had a full scale IQ in the average range. The student's was determined to have minor delays in academic functioning earning the following standard scores on the educational achievement assessment: Broad Reading 83, Math Calculation 115 and Academic Skills 95. The student was determined to be more than a grade level behind in reading and math. The evaluator recommended the student be determined eligible under the classification of emotional disturbance and other health impaired and that his school placement include "extremely intensive therapeutic services." (Respondent's Exhibit 8)

25. A speech language evaluation was also conducted which revealed the student's exhibited and language based disorder and an articulation disorder. The evaluator recommended the student receive speech and language therapy. (Respondent's Exhibit 11)

26. After attempts to convene in August 2009, on September 8, 2009, a multidisciplinary team ("MDT") convened at School A to review the student's evaluations and determine his eligibility for special education services. The parent participated in the meeting along

with her counsel. The MDT found the student eligible with a disability classification of emotional disturbance ("ED") and "ADHD"⁵. The MDT developed an IEP for the student which prescribes the following weekly services: 15 hours of specialized instruction in the special education setting, 1 hour of group counseling, 1 hour counseling consultation, and 1 hour of speech therapy. (Respondent's Exhibit 14 & 17)

27. The parent did not know that the School's special education teacher was providing the student instruction. She did not become aware of this fact until the student's eligibility/IEP meeting. (Parent's testimony)

28. At the start of SY 2009-10 the parent enrolled the student in a new school because of her dissatisfaction with School A. (Parent's testimony)

29. On September 9, 2009, Petitioner's proposed to School A a compensatory education plan for the student. Pursuant to the plan Petitioner asserted the student should have been receiving services to address his needs during SY 2008-09 and the summer of 2009 and to start the SY 2009-10. Petitioner asserts the student's attendance at Saturday School was mandated by his classroom teacher due to his poor academic performance. As a result of the alleged untimely identification of the student Petitioner is seeking the following compensatory education. 20 hours of academic instruction through Lindamood Bell Learning Center to address the student's academic deficits, a laptop computer with two items of age appropriate academic software; 6 months of family therapy (one session per week) through a provider of parent's choosing; funding, not to exceed \$750 for an athletic program during school vacation. (Respondent's Exhibit 19)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁶ In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

⁵ The Hearing Officer notes that ADHD is not a disability under IDEA.

⁶ 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Did DCPS deny the student a free and appropriate public education (“FAPE”) by failing timely to conduct and review evaluations in all areas of suspected disability and by failing timely to determine the student’s eligibility for special education and related services such that the student is entitled to compensatory education? Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

The IDEA requires the Local Education Agency (“LEA”) and State Education Agency to 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. 20 U.S.C. § 1412(a)(3).⁷

The “child-find” provisions of the IDEA impose an affirmative duty on state educational agencies to “identify, locate, and evaluate” students who may be in need of special education services, and states must promulgate policies and procedures to fulfill that duty. District of Columbia municipal regulations have placed responsibility on the local educational agencies to “ensure that procedures are implemented to identify, locate, and evaluate all children with disabilities residing in the District who are in need of special education and related services, including children with disabilities attending private schools, regardless of the nature or severity of their disabilities” and regardless whether the child is registered as an attending or non-attending student. (Hawkins v. District of Columbia 539 F. Supp. 2d 108 (United States District court, District of Columbia (2008))).

Petitioner asserts that the student’s academic and behavior problems were evident and present when the student enrolled at School A which should have motivated School A to evaluate student. Respondent asserts the parent never notified the School A staff of any of the student emotional trauma and did not ask until May 2009 that any assistance be provided. Respondent also asserted School A had to be allowed some degree of time to determine the student’s deficits.

⁷ 20 U.S.C. § 1412 (a)(3) and 34 CFR § 300.111 describes the requirements for child find and provide:

Child find. (a) General. (1) The State must have in effect policies and procedures to ensure that-- (i) All children with disabilities residing in the State, 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, are identified, located, and evaluated; and (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services. (b) Use of term developmental delay. The following provisions apply with respect to implementing the child find requirements of this section: (1) A State that adopts a definition of developmental delay under Sec. 300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five). (2) A State may not require an LEA to adopt and use the term developmental delay for any children within its jurisdiction. (3) If an LEA uses the term developmental delay for children described in Sec. 300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State. (4) If a State does not adopt the term developmental delay, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part. (c) Other children in child find. Child find also must include-- (1) Children who are suspected of being a child with a disability under Sec. 300.8 and in need of special education, even though they are advancing from grade to grade; and (2) Highly mobile children, including migrant children. (d) Construction. Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in Sec. 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act. (Authority: 20 U.S.C. 1401(3); 1412(a)(3))

Every student with a condition which might be a disability is not necessarily and automatically a child with a disability in need of special education as to make him or her eligible for special education services under IDEA. Every student with an academic deficit is not a necessarily a child with a disability. There must be both an apparent condition present and the condition must impact the student educational ability and/or performance.

However, a school as an LEA is responsible for the whole of the information that the school staff has about a student even if parts of that information lie with different individuals among the school staff. The school is responsible for identifying and evaluating a student who possibly could be a child with a disability under IDEA based upon all the information available to its staff.

Dr. [REDACTED] the school's special education teacher credibly testified that he observed the student in and out of the classroom throughout the 2008-2009 school year and was in the student's classroom three times per week and also worked with the student two times per week outside of the classroom. Although the student clearly had significant academic deficits Dr. [REDACTED] did not observe any of the alleged behaviors or affect. Ms. [REDACTED] the school principal, also credibly testified that the student did not exhibit any behavior problems at School A or any atypical behaviors that would have led them to suspect that he had a disability.

In this instance, it was apparent from the student's report cards and the comments made by the teacher in the report cards that the student's academic performance was deficient. Although the student teacher was informed the student was participating in outside therapy soon after school started the details of the issues addressed in the therapy were not fully revealed to the School A Staff until the student began to participate in counseling in April 2009, and the full extent of the emotional trauma the student had suffered was not known until the evaluation were conducted.

Ms. [REDACTED] and Ms. [REDACTED] testified that concerns were raised by the Petitioner at the April 2009 meeting and those concerns involved behavior at home and in after care. As a result of the meetings were held on April 1, April 22, and May 20, 2009, School A began providing counseling at the Petitioner's request. There is no question that the student was identified at the beginning of the school year as a student who would benefit from extra academic support in reading but this alone did not put School A on notice that the student was perhaps a child with a disability. School A as of those meetings agreed to provide counseling for the student and his siblings at school, perhaps gratuitously at first.

However, as of the April 1, 2009, meeting, and the subsequent counseling that followed there was information available to School A regarding the student's behaviors out of school as well as social/emotional concerns such that the School A staff should have been put on notice that the student's academic problems may be related to these social/emotional issues.

Therefore, the Hearing Officer concludes that based upon the information shared with School A staff as of the April 1, 2009, meeting the student's behaviors and academic deficits that the teachers were clearly aware of, School A staff should have been put on notice the student should have been identified as of that meeting, despite the fact that those exact behaviors were not exhibited in the classroom.

Pursuant to the D.C. Code a student is to be evaluated within 120 days of the request for evaluations.⁸ Thus the Hearing Officer concludes that the student should have been evaluated and found eligible by August 2009, the start of SY 2009-10. The school year began in late August 2009. The Hearing Officer does not conclude the student was due or missed any services in the 2008-09 school year. There was no evidence the student would have been eligible for Extended School Year ("ESY") service. There were apparently attempts to convene the MDT meeting prior to the start of SY 2009-10 but the meeting was not held due to scheduling difficulties. By the time the student was found eligible student was attending another school. Thus, the Hearing Officer also concludes the student is not due any compensatory education for missed services.

ORDER:

The due process complaint in this matter is hereby dismissed with prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: October 4, 2009

⁸ Chapter 25 § 2561.02 of the District of Columbia Code replaced § 38-2501 and maintains the 120 day time frame for conducting initial evaluations in the District of Columbia. Chapter 30 of Title 5 of the District of Columbia Municipal Regulations also maintains the 120 day time frame for completing initial evaluations, specifically as it relates to charter schools. See 5 DCMR § 3019.4.