

<p>STUDENT<sup>1</sup>, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: June 23, 2009</p> <p>Date of Complaint: May 11, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento C. R. Hill, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Tanya J. Chor, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
--	--

2009 JUL -6 AM 9:08  
 STUDENT SERVICE  
 OSSE

---

<sup>1</sup> 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 June 23, 2009, at the Van Ness School, 1150 5<sup>th</sup> Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on May 11, 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 1-22 and DCPS Exhibits 1-7 which were admitted into the record.

## **ISSUE(S):<sup>2</sup>**

1. Did DCPS deny the student a free and appropriate public education by failing to evaluate the student with a functional behavioral assessment ("FBA")?
2. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate Individualized Educational Program ("IEP") for the student that is reasonably calculated to provide a FAPE? Specifically, Petitioner alleges the IEP does not include a behavior intervention plan resulting from the FBA.

## **FINDINGS OF FACT<sup>3</sup>:**

1. The student is \_\_\_\_\_ years old and currently attends School A, a full time special education District of Columbia Public School. The student resides in the District of Columbia with his parent(s). (Petitioner's Exhibit 7)

---

<sup>2</sup> 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.

<sup>3</sup> 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.

2. The student has been identified a child with a disability under the Individuals with Disabilities Education Improvement Act ("IDEIA") with a disability classification of specific learning disability (SLD). The student's most recent individualized educational program ("IEP") was developed on May 7, 2009, which prescribes the following weekly services: 27.5 hours of specialized instruction and 1 hour of behavior support services. The IEP does not contain a behavior intervention plan. (DCPS Exhibit 2)
3. A multidisciplinary team ("MDT") meeting was convened on behalf of the student on March 17, 2008. The MDT added psychological counseling to the student's IEP "to address anger management and coping skills". At the MDT meeting, the IEP team, after a discussion of the student's increase in behavioral problems, recommended that the student be evaluated with a functional behavioral assessment, develop a behavior intervention program, and conduct a clinical psychological evaluation on the student "...for further assessment of [the student's] social emotional functioning." The MDT also determined that a behavior intervention plan ("BIP") would be developed. (Petitioner's Exhibit 20)
4. The student's next educational evaluation was administered on October 10, 2008. The student, according the evaluator, while in the 6<sup>th</sup> grade, received the following scores:

CLUSTER/Test	Age Equivalent	Grade Equivalent
ORAL LANGUAGE	<2.0	<K.0
BROAD READING	7-11	2.6
BROAD MATH	5-7	K.4
BROAD WRITTEN LANG.	8 7	3.4
MATH CALC SKILLS	10-1	4.6
WRITTEN EXPRESSION	10-3	4.8
ACADEMIC SKILLS	8-1	2.8
ACADEMIC FLUENCY	10-0	4.6
ACADEMIC APPS	5-7	K.3
LETTER WORD IDENT	7 10	2.5
READING FLUENCY	8-8	3.2
STORY RECALL	2-0	<K.0
UNDERSTANDING DIRECT.	2-0	<K.0
CALCULATIONS	9 8	4.1
MATH FLUENCY	11-0	5.6
SPELLING	7-9	2.2
WRITING FLUENCY	12-1	6.6
PASSAGE COMPREHENSION	7-6	2.1
APPLIED PROBLEMS	<2.0	<K.0
WRITING SAMPLES	7-7	1.9

(Petitioner's Exhibit 21)

5. On October 21, 2009, an IEP meeting was convened for the student at School A. The student's father attended the meeting and requested that the school address the student's

anger management issues. The MDT initiated a request for a triennial psychological evaluation to rule out emotional disturbance. (Petitioner's Exhibit 17)

6. On March 17, 2009, DCPS conducted a comprehensive psychological evaluation.<sup>4</sup> The evaluator recommended the student "be referred for individual therapy within the community health system, that he received individual counseling at school to assist him in accepting and understanding his learning disability, improving his social skills, and developing effective strategies to control his emotions, and that he receive academic support to assist him in developing organization and planning skills..." (DCPS Exhibit 5)
7. The student's IEP team reconvened on March 14, 2009. When the MDT convened DCPS had yet to conduct the student's clinical psychological, FBA, or develop his BIP despite the fact that the MDT had recommended the items a year prior. (Petitioner's Exhibit 18)
8. A MDT meeting was convened on May 7, 2009, which the parent participated in by telephone. There was a discussion and review of the student's recent psychological evaluation but there was no FBA that was discussed and no FBA has been provided to the parent. (DCPS Exhibit 4)
9. The student has had behavior difficulties at School A and was suspended on three or four occasions for fighting. In addition to fighting the student behaviors have included arguing with teachers, name calling and destruction of school property. (Parent's testimony)

#### **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.

Procedural violations raise a viable claim only if the procedural violations affect a student's substantive rights under IDEIA (Lesesne v. District of Columbia 447 F. 3d 828, United States Court of Appeals, District of Columbia (2006))

---

<sup>4</sup> The evaluation included the following assessments of social-emotional and behavioral factors: Conner's Third Edition, Devereux, Reynolds Children Depression Scale, Revised Children's Manifest Anxiety Scale, Projective Drawings (House-Tree-Person), Clinical Interview, Review of School Records.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.<sup>5</sup> 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.

1. Did DCPS deny the student a free and appropriate public education by failing to evaluate the student with a functional behavioral assessment? Conclusion: Petitioner's sustained the burden of proof by a preponderance of the evidence.
2. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate Individualized Educational Program ("IEP") for the student that is reasonably calculated to provide a FAPE? Specifically, Petitioner alleges the IEP does not include a behavior intervention plan resulting from the FBA. Conclusion: Petitioner's sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.304(c)(4) and (6), DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

At a MDT meeting held for the student on March 17, 2008, the MDT recommended a clinical psychological evaluation to rule out the student's possible emotional disturbance and a functional behavioral assessment be conducted and behavior intervention plan developed. As of the date of the due process hearing DCPS had conducted the psychological evaluation but had yet to conduct the functional behavioral assessment and the student's IEP does not contain a behavior intervention plan.

The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004 requires all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...

20 U.S.C. § 1401(9). 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. §

---

<sup>5</sup> 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.

300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is reasonable calculated to permit the child to benefit educationally. Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982).

According to 34 C.F.R. § 300.324(a)(2) states that the IEP Team must:

In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.

A FBA is the assessment tool used to develop a behavior intervention plan ("BIP"). There is no indication that DCPS ever completed a functional behavioral assessment ("FBA"), which is the necessary to develop a proper BIP.<sup>6</sup>

The parent's credibly testified the student had repeated behavior difficulties at School A in the most recent school year for which he was suspended on several occasions. This evidence demonstrates the student has suffered harm a result of the FBA not being timely conducted and the IEP not containing a BIP.

**ORDER:**

1. DCPS shall, within five (5) business days of the issuance of this Order, DCPS shall provide Petitioner's counsel a copy of the student's FBA if it has already been conducted.
2. If the FBA has not already been conducted by DCPS and/or has not been provided to Petitioner's counsel in the required time frame, DCPS shall fund<sup>7</sup> and that parent shall obtain an independent FBA.

---

<sup>6</sup> Petitioner's counsel cited in the complaint the *DCPS Special Education Reference Guide*, which purportedly states: a FBA is

[C]onsidered to be a problem-solving process that relies on a variety of techniques and strategies to identify the purposes of specific behavior and to help IEP teams select interventions to directly address the problem behavior. Functional behavioral assessment should be integrated, as appropriate throughout the process of developing, reviewing, and if necessary revising a student's IEP...

In conducting a functional behavioral assessment, the IEP team identifies and defines the problem behavior first in broad and then specific terms. The team review information from various sources (e.g., questionnaires; semi-structured interviews with students, teachers, and others; or observations of students in various settings) and in various forms...Next, the team carefully examines what they have learned about the behavior and its context in order to determine its functions and decides what to do next.

<sup>7</sup> The independent evaluation shall be funded at the DCPS prescribed rate and if there no prescribed rate at the current prevailing market rate.

3. DPCS shall, within five (5) business days after the start of the 2009-2010 school year,<sup>8</sup> convene a multidisciplinary team (MDT) meeting to review the student's FBA and develop a BIP and review and/or revise the student's IEP as appropriate.
4. The MDT meeting shall be scheduled through counsel for the student and parent.
5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

**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: July 3, 2009**

---

<sup>8</sup> If it is practicable to convene the MDT on a date an earlier than the start of the new school year the parties are free to do so.