

DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
1150 5th Street, S.E.
Washington, D.C. 20003
202-698-3819; 202-698-3825 (Fax)

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
)	
DOB)	DATE OF HEARING
)	July 22, 2009
Student I.D.)	
Petitioner)	DATE OF COMPLAINT
)	June 24, 2009
V.)	
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Miguel Hull
James E. Brown & Assoc.,
1220 L St., N.W., Suite 700
Washington, D.C. 20005

COUNSEL FOR DCPS: Laura George
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

August 1, 2009

Representatives:

Petitioner – Miguel Hull
DCPS – Laura George

Hearing Officer:

Jane Dolkart

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student who completed the grade at during the 2008-2009sy. The student is above average in cognitive abilities and achievement but has had behavioral issues. A meeting was held on April 23, 2009 to determine if the student was eligible for special education due to his behavioral problems. DCPS determined that he was not eligible but recommended that the school take certain actions to control his behavior. This complaint was filed on June 24, 2009, alleging that DCPS denied the student FAPE by failing to comprehensively evaluate him, failing to find him eligible for special education, and failing to complete a Functional Behavioral Assessment (FBA) and a Behavioral Intervention Plan (BIP) as agreed to at the April 23, 2009 meeting.

A pre-hearing conference was held on July 14, 2009, and a pre-hearing order was issued on July 17, 2009.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to comprehensively evaluate him in all areas of suspected disability?
2. Failing to find him eligible for special education as a result of his behavioral problems?
3. Failing to complete an FBA and BIP?

IV. DOCUMENTS AND WITNESSES

The parties submitted a joint 5-day disclosure consisting of a list of witnesses and documents J 1-11. Additionally, at the request of the Hearing Officer, and by agreement of the parties, an updated 1st Grade Report Card and an attendance record for the student were provided after the close of the hearing. These documents are numbered J 12 & 13. The disclosure was admitted in its entirety.

Petitioner called as witnesses the student's mother and the DCPS psychologist who conducted the student's comprehensive psychological evaluation. DCPS also called the DCPS psychologist as its witness.

Petitioner also requested that the student's teacher be made available, and DCPS agreed to attempt to contact her. The teacher was not working over the summer and could not be reached.

V. FINDINGS OF FACT

1. This is a year old student who completed the grade at during the 2008-2009sy.
2. At the age of the student attended a day care center for 6 months. He was asked to leave the day care center as a result of his behavior. He then attended the SED Center for Head Start for 6 months. The student continued to have behavioral issues and the parents would get calls asking them to pick the student up because of his behavior. (J 5).
3. The student continued to have behavioral difficulties at During first grade he exhibited low frustration tolerance and sever temper tantrums. The teacher comments on the student's first advisory stated that "[the student's] classroom behavior is severe, [and] does not allow him to complete all class assignments....[The student] often rips up his work and the work of his classmates. [The student] has been working with the school counselor to improve his behavior."

The student's report card for the first advisory indicates that he rarely completes class work on time, rarely works well with others, rarely participates in class, rarely makes an effort, rarely uses time wisely, rarely follows classroom rules, rarely follows playground rules, rarely respects the rights of others, and rarely practices self-control. His teacher noted that the student's incomplete class work will not allow him to receive a grade above 1 or 2 (does not meet standard or approaches the standard).

J 4, 7))

4. The student was referred for evaluation due to his behavioral difficulties. A comprehensive psychological evaluation was completed on January 22, 2009, and a report written on March 5, 2009. (4).
5. The evaluation report refers to MDT meeting notes for an MDT meeting held on December 5, 2008, to discuss the student's behavior. DCPS could not locate the MDT notes for this hearing and they are not included as an exhibit. According to the evaluation report, the notes reflect that

the student's dramatic behavior often results in his removal from class, preventing him from completing many assignments. His teachers as well as the school

counselors have struggled to find strategies to implement that would effectively reduce the frequency with which he misbehaves, but their search has been unsuccessful. [The student's] desire to be in his classroom is inconsistent, and it's not known whether he possesses one "good" friend in class.

(J 4)

6. When the student's behavior was severe, he was taken out of the classroom. On a number of occasions the mother was called to pick the student up from school. The student was informally suspended on a number of occasions. The mother was told not to bring him back to school for a period of time. No paperwork or notation of suspensions were ever completed. (Testimony of mother).

7. In a one page letter dated February 27, 2009, Dr. Bhavin Dave, Associate Director-Infant and Toddler Mental Health Program, Department of Psychiatry and Behavioral Sciences, Children's National Medical Center, wrote that the student was being treated for Anxiety Disorder, NOS. The letter noted that

This diagnosis greatly impairs his ability to interact with his environment, follow the directions from caregivers and manage his emotions and behaviors, leading to frequent and severe behavioral outbursts.

The student was prescribed medication to help reduce the severity of his emotional outbursts.

The letter further noted steps that needed to be taken in his school environment, including a comprehensive behavioral protocol, access to a quiet room, continuous access to an on-site therapist, and continuous supervision by staff trained in implementing and managing behavioral systems. (J 3)

8. No further documentation or diagnostic basis concerning the student's emotional problems was provided with the one page letter.

9. The student was seen by Dr. Dave at the suggestion of the social worker, who helped arrange the appointment. The school indicated that the student could not come back without medical treatment. (Testimony of mother)

10. The student was administered the Reynolds Intellectual Assessment Scales (RIAS) to determine his cognitive level, and the Wechsler Individual Achievement Test – Second Edition (WIAT-II) which measures the student's achievement levels. The student's cognitive level of functioning on the RIAS was significantly above average. The student's academic achievement in reading, math, and spelling ranged from the 1.8 grade level to the 5.5 grade level. All were in the superior range. (J 4)

11. The only assessment of the student's emotional functioning was the Clinical Assessment of Behavior (CAB), a self-reporting scale completed by the school counselor.

Neither the student's teacher nor his parents were asked to complete any rating forms. The school did not obtain any further information to amplify the letter received from Dr. Dave. The school counselor rated the student within the normal range on all scales. Given these results, the report concluded that the student does not appear to be hampered by significant behavior problems that would significantly impact his learning. (J 4)

12. The school psychologist testified that in order to find that a student was eligible for special education for emotional problems, the student's academic performance would have to be below grade expectations. Otherwise, there could be no finding of educational impact.

He further testified that the school counselor had informed him that the student had severe tantrums and was often removed from class. The psychologist was aware of consistently poor behavior at least until March when he wrote his report. The student's behavior was not common. (Testimony of school psychologist)

13. The psychological evaluation concluded that the student was not eligible for special education. However, the report stated that the student was in dire need of a well-structured BIP, preceded by a FBA, to ameliorate his behavioral concerns. A number of other recommendations to address the student's behavioral and attention issues were also made. The report indicated that the student would benefit from a well-structured learning environment that is carefully planned and consistently implemented in terms of the physical arrangement, schedule of activities, and expected behaviors. (J 4)

14. is an open space school. Classrooms are not self-contained but rather separated by partitions. When in the classroom it is possible to hear some of what is going on in other classrooms. (Testimony of school psychologist)

15. On April 23, 2009, an eligibility meeting was held for the student. Present at the meeting were the mother, the teacher, two special education teachers, the social worker, the school counselor, and the school psychologist. The student was found not eligible for special education. The reason given was that the student received high scores on both his IQ and academic evaluation.

The team discussed the fact that the open space school and large classroom size impact negatively on the student's behavior. The psychologist also testified that an open space school is not a good environment for the student.

The team further strongly suggested to the parent that the student continue with his medication and psychiatric appointments. Recommendations were also made for individual and group counseling outside of school.

16. The psychologist testified that he had been told that the student's behavior had improved by the April meeting. The student's Report Card improved in the 3rd and 4th quarters in terms of his grades and work habits and social skills. The 3rd quarter advisory states that the student has made substantial progress. The 4th quarter advisory notes that

the student continues to have excessive absences due to his behavior. (Testimony of psychologist, J 12)

17. The mother testified that the student's behavior was out of control from April to the end of the school year. She was asked to take the student home from the after school program and at the end of the year was asked to keep him home for the last two weeks of class. He was allowed back three days before school ended. On the last day of school the class went to McDonalds. The student was not allowed to go because of his behavior. The school counselor took the student to McDonalds by himself. The school psychologist corroborated the McDonalds incident. (Testimony of mother, school psychologist)

18. The student's attendance records show that he was absent 42 days during the school year. (J 13)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEAs guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...." 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 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 IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Did DCPS Fail to Evaluate the Student in All Areas of Suspected Disability?

The IDEA requires that DCPS ensure that all children who are in need of special education and related services are identified and evaluated. 34 CFR 300.111 (a)(1)(i). The student being evaluated must be assessed in all areas of suspected disability, and the evaluation must be sufficiently comprehensive to identify all of the student's special education needs. 34 CFR 300.304 (b) & (c); 34 CFR 300.301.

DCPS fell short of its obligation in this case in several ways. First, the comprehensive psychological report strongly recommended that a FBA be administered and highlighted in large bold letters that an effective behavioral intervention plan be put in place. The FBA was never conducted, nor was a BIP developed and put in place.

Second, the comprehensive psychological evaluation fell far short in its evaluation of the student's social/emotional problems. The only test administered to explore the student's behavior was the CAB that the school counselor was asked to complete. The ratings completed by the school counselor are not credible in that they are inconsistent with the record in the case and with the counselor's own reports of the student's extreme behavior and her referral of the student to a psychiatrist for medication. More testing is required to get a full picture of the student's social/emotional problems.

DCPS denied the student FAPE by failing to evaluate the student in all areas of suspected disability and failing to put in place a BIP.

B. Did DCPS Deny the Student FAPE by Failing to Find Him eligible for Special Education

Due to the failure to fully evaluate the student's social/emotional needs, or to evaluate behavioral success under a BIP, it is impossible to determine whether the student is or is not eligible for special education. However, it is noteworthy that the MDT team did not even discuss placing the student under a 504 Plan, a step short of special education. The MDT team failed to effectively address the student's problems.

In the eligibility meeting that did occur, DCPS used an incorrect standard in determining eligibility. The primary reason given by the team for finding the student ineligible for special education was the fact that the student has a high IQ and received high scores on his achievement tests. The case law makes clear that special education is not available

only to students whose cognitive and/or achievement level falls below grade level. Each child must be evaluated as an individual and in accordance with his/her own capabilities. Thus, even if a student is performing well in school, their behavior may be having an educational impact in that they could be performing even better. In this case the student should have been receiving grades of 4 in all his substantive courses and was not. Indeed, during the first semester the student received grades of below basic. Further, the student was kept out of school on many days. The record does not allow determination of all the days since no paperwork was ever completed. The number of absences undoubtedly effected his educational benefit.

The IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (citing *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)). The determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood*, 172 F.3d at 248. A court must "analyze the type and amount of learning of which a student is capable in order to determine how much of an educational benefit must be provided." *Kingwood*, 205 F.3d at 577-78 (quoting *Ridgewood*, 172 F.3d at 248). "Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004).

C. The Student's School

The MDT Team, including the school psychologist, agree that _____ and its open space environment is not an appropriate school for this student. The new school year will be beginning in less than a month. The student should be transferred to another school and should not have to wait for further evaluations to be completed. The mother testified that the student attends _____ because it is close to her work and she is able to pick the student up from school. _____ is also close to the mother's work, has a good academic reputation suited to a student with high academic achievement, and has a well regarded special education program should the student qualify. The student should be allowed to enroll at _____

VII. SUMMARY OF RULING

DCPS denied the student FAPE by failing to assess him in all areas of suspected disability and failing to complete an FBA and put in place a BIP.

Additional testing must be done before it is possible to determine the student's eligibility for special education.

The student is to be transferred from _____ to _____

VIII. ORDER

It is hereby ORDERED that

1. DCPS shall fund an independent Functional Behavioral Assessment and shall, within 20 days of the completion of the assessment, convene an MDT meeting in order to develop a Behavioral Intervention Plan for the student.
2. DCPS shall fund an independent clinical psychological evaluation to determine the bases for the student's behavior problems, including but not limited to whether the student has an anxiety disorder or ADHD.
3. DCPS shall transfer the student from _____ to the _____
4. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

 /s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: August 1, 2009