

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
August 07, 2014

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: August 6, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Office of Dispute Resolution,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner contends that Respondent District of Columbia Public Schools (DCPS) violated the IDEA's Child Find mandate by not timely evaluating Student for special education eligibility.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 6, 2014, named DCPS as Respondent. The parties met for a resolution session on June 24, 2014 and did not reach an agreement. On July 2, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on July 7, 2014.

The due process hearing was held before this Impartial Hearing Officer on July 21, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by PCS PRINCIPAL and DCPS' COUNSEL.

Counsel for both parties made opening statements. Petitioner testified and called SERVICE PROVIDER as her only witness. DCPS made an oral motion for a directed finding at the conclusion of Petitioner's case-in-chief, which I denied. DCPS called PCS SPECIAL EDUCATION DIRECTOR as its only witness. Petitioner's Exhibits P-1, P-6, P-9 through P-14 and P-17 were admitted into evidence without objection. Exhibits P-3, P-4, P-7, P-16 and parts of P-5 were admitted over DCPS' objections. DCPS' Objections to Exhibit P-8 and parts of Exhibit P-5 were sustained. Exhibits P-2, P-15 and part of P-5, were not offered. Exhibit P-5 was not offered except for pages 18-19 and 21-22, which were admitted for notice only and pages 10-11, to which DCPS' objections were sustained. DCPS' Exhibits R-2, R-5 and R-9 were admitted into evidence without objection, with the exception of Exhibit R-2 as to which Petitioner's objection was overruled. Exhibits R-1, R-3, R-4, R-6 through R-8 and R-10 were not offered. Although neither party requested leave to file post-hearing written argument, counsel for

Petitioner filed a post-hearing brief on July 24, 2014, to which no objection has been made.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

### **ISSUE AND RELIEF SOUGHT**

The following issue for determination was certified in the July 2, 2014 Prehearing Order:

Whether DCPS has violated the IDEA's Child-Find requirements and has denied the student a free appropriate public education (FAPE) by failing to evaluate the student for eligibility for special education services during the 2013-2014 school year and by failing to develop an appropriate Individualized Education Plan (IEP).

For relief, Petitioner requests that DCPS be ordered to fund an independent psycho-educational evaluation of Student, and to convene an Multidisciplinary Team (MDT) team meeting, within five calendar days of receipt of the evaluation report by DCPS, to determine Student's special education eligibility and develop an IEP and review and revise Student's functional behavioral assessment (FBA) and Behavior Intervention Plan (BIP). In addition, Petitioner seeks an award of compensatory education to compensate Student for educational harm resulting from DCPS' alleged denial of FAPE in the 2013-2014 school year.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument and memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE child resides with Mother in the District of Columbia.

Testimony of Mother.

2. For the 2013-2014 school year, Student was enrolled in GRADE at PUBLIC CHARTER SCHOOL (PCS). He has attended Public Charter School for three years.

Testimony of Mother.

3. Public Charter School has elected to be part of the DCPS Local Education Agency (LEA) for special education purposes. Hearing Officer Notice. Therefore, with respect to children enrolled in Public Charter School, DCPS is responsible for meeting the IDEA requirements for evaluations and assessment applicable to an LEA. *See* 5E DCMR § 923.3.

4. From the beginning of the 2013-2014 school year, Mother was repeatedly contacted by Public Charter School concerning Student's behavior issues. Testimony of Mother. In Public Charter School 2013-2014 disciplinary actions, Student received one-day in-school suspensions for behavior incidents on October 25, 2013 and on April 28, 2014, and was suspended out-of-school for code of conduct violations on May 21, 2014, May 30, 2014 and June 11, 2014. Each out-of-school suspension was for one day.

Exhibit P-9.

5. Prior to March 2014, teachers completed the The Devereux Early Childhood Assessment Clinical Form (DECA) for Student, which indicated typical scores in the area of Attachment and scores indicating some need in the areas of Self-Regulation, Initiative and Behavior Concerns. Exhibit P-13.

6. Student was referred to PCS SOCIAL WORKER for a functional behavioral assessment (FBA) due to frequent tantrum behaviors, including yelling out and name-calling toward teachers, refusal, crying and "becoming aggressive toward classroom materials." In March 2014, Social Worker made three classroom observations. She observed that during these observations Appropriate Behaviors were seen, on average,

53% of the time. Off Task Behaviors were seen 25% of the time. Verbally Districting Behaviors were seen 13% of the time. Physically Distracting Behaviors were seen 9% of the time. Questionnaires completed by classroom teachers indicted that Student's scores for Overall Stress, Emotional Distress, Behavioral Difficulties and Hyperactivity/Attention Difficulties were High or Very High. Mother told Social Worker that she did not see the same unwanted behaviors at home. Social Worker concluded that Student displayed tantrum behaviors to gain attention from adults and peers as well as to obtain a wanted activity. Exhibit P-13.

7. Up until that the March 2013 FBA, Student's reported disciplinary history included spending time in the office for throwing materials, refusing to comply, screaming and hitting teachers four times. He had been absent from school for one day. Exhibit P-13.

8. On April 24, 2014, Public Charter School staff developed a Behavior Intervention Plan (BIP) for Student intended to decrease his verbal distraction, name-calling and mean words behaviors. Mother attended the BIP development meeting. The BIP provided that the plan would be implemented for up to nine weeks and would be reviewed at a follow-up meeting. Exhibit P-12. At the April 24, 2014 meeting, Mother asked Principal if the school was going to develop an IEP for Student. Principal responded that they were not there yet. Testimony of Mother.

9. At the April 24, 2014 meeting, Mother requested a pschoeducational evaluation of Student. SCHOOL PSYCHOLOGIST provided Mother contact information for mental health providers in Maryland and the District. Testimony of Mother.

10. Public Charter School's policy is that if a parent has a concern about a child's having a disability, the school immediately makes a referral for an evaluation. The school never denied Mother's request for an evaluation of Student. Testimony of

Special Education Director.

11. The due process complaint in this case was filed on June 6, 2014. In its June 16, 2014 response, DCPS affirmed it was willing and able to conduct an initial evaluation of the student. At the resolution session meeting on June 24, 2014, counsel for DCPS informed Mother that DCPS would either conduct an initial special education eligibility evaluation or issue authorization for Mother to obtain an independent educational evaluation (IEE). Testimony of Special Education Director, Exhibits R-1, R-2. To the extent that Mother denied in her testimony that DCPS offered to conduct an eligibility evaluation of Student at the June 24, 2014 meeting, I find Special Education Director's testimony, which is supported by contemporaneous meeting notes, more credible. At the due process hearing on July 21, 2014, DCPS's Counsel affirmed the LEA's willingness to fund an IEE evaluation of Student. Representation of DCPS counsel.

12. At the end of the 2013-2014 school year, Student was retained in Grade at Public Charter School. Exhibit P-17. Mother disagreed with the school's decision not to promote Student. Testimony of Mother.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

**Burden of Proof**

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387

(2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Analysis

Did DCPS violate the IDEA's Child-Find requirements and deny the student FAPE by failing to evaluate the student for eligibility for special education services during the 2013-2014 school year and by failing to develop an appropriate IEP?

In this case, Petitioner seeks a determination that DCPS denied Student a FAPE by not timely evaluating him for special education eligibility and not developing an IEP for him. DCPS counters that it moved promptly to conduct an evaluation when Mother requested an evaluation. The IDEA requires that the District must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). "The IDEA requires LEAs to have a comprehensive Child Find system to ensure that all children who are in need of early intervention or special education services are located, identified, and referred appropriately. See 20 U.S.C. § 1412(a)(3). Child Find is DCPS' affirmative obligation under the IDEA: 'As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.' *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008). DCPS must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment.' D.C.Code § 38-2561.02(a)." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). "[A] school is obligated to evaluate a student once that student is suspected of having a disability." *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013) (citation and internal quotation omitted.)

DCPS contends that prior to Mother's filing her due process complaint in this case, the parent never requested that Student be evaluated. Petitioner's Counsel countered, in

closing argument, that by January 2014, Public Charter School staff should have suspected Student of having a disability. I find little evidence to support the Petitioner's position. Mother testified that she first became aware of Student's behavior issue in school in October 2013 when he was suspended, in-school, for one day. He was not suspended again until April 2014. Student was referred for an FBA prior to March 2014. Up until that time, his reported disciplinary history included spending time in the office for throwing materials, refusing to comply, screaming and hitting teachers four times. Prior to the FBA in March, Student had only been absent from school for one day. Mother reported to the school Social Worker that Student did not have behavioral problems at home and that he was not receiving outside services, counseling or medication. School Social Worker concluded that Student displayed tantrum behaviors in order to gain attention from adults and peers and to gain a wanted activity. At the due process hearing, Mother introduced no evidence from medical or mental health providers that Student has a behavior impairment or other IDEA disability. *See D.K. v. Abington School Dist.*, 696 F.3d 233 (3<sup>rd</sup> Cir.2012) ("As several courts have recognized, however, Child Find does not demand that schools conduct a formal evaluation of every struggling student. . . . A school's failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities 'are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all.' *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn.2008).") *D.K.* at 249.)

The hearing evidence does establish that at the April 24, 2014 BIP meeting, Mother did ask about having Student evaluated and that School Psychologist referred her to community mental health providers. Even though Mother did not explicitly request a special education eligibility evaluation at the April 24, 2014 meeting, she did ask whether Student would get an IEP. I find that her inquiry about having Student evaluated and

whether Student would get an IEP sufficed to give rise to suspicion that Student could have qualifying disability and/or constituted a constructive request for an eligibility evaluation. At that point, the 120-day period for DCPS to evaluate Student began. *See* D.C.Code § 38–2561.02(a) (“DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment.” *Id.*) As of the due process hearing date in this case, the 120-day evaluation period had not been exhausted. Moreover, in its June 16, 2014 response to the due process complaint in this case, DCPS affirmed that it was “willing and able” to conduct an initial eligibility evaluation of Student and DCPS confirmed its willingness to evaluate Student both at the resolution session meeting and at the due process hearing.<sup>2</sup> In sum, I find that Petitioner has failed to establish that DCPS has violated the IDEA’s child-find mandate. Until the evaluation is completed, and Student is determined eligible for special education, DCPS has no duty to develop an IEP for the child. *See* 34 CFR § 300.323 (Meeting to develop an IEP must be conducted within 30 days of a determination that the child needs special education and related services.)

#### ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by Petitioner herein is denied, without prejudice to

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<sup>2</sup> It is evident from the pleadings in this case and the evidence at the due process hearing that if Mother had requested an eligibility evaluation of Student, DCPS would have conducted the evaluation without the need for a due process proceeding. *See Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985) (Cooperative approach envisioned by Congress to produce a consensus between school officials and the parents.)

Student's right to be evaluated for special education eligibility and to an IEP if determined eligible.

Date: August 6, 2014

s/ Peter B. Vaden  
Peter B. Vaden, 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 U.S.C. § 1415(i).