DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Bruce Ryan, Hearing Officer** **Issued: December 9, 2012**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an administrative due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed September 25, 2012, on behalf of a six-year old student (the "Student") who resides in the District of Columbia and attends his neighborhood DCPS elementary school ("School"). He has not yet been evaluated or found to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's mother.

In her complaint, Petitioner alleged that that DCPS denied the Student a free appropriate public education ("FAPE") by: (1) failing to evaluate the Student when DCPS first suspected that he may be a child with a disability under its "child find" obligations; and (2) failing to evaluate the Student after the parent made a request for evaluations at the start of the 2012-13 school year. DCPS filed a timely Response to the Complaint on October 2, 2012, which denied the allegations that it failed to provide a FAPE.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On October 23, 2012, a resolution meeting was held. DCPS offered to settle the case by authorizing an independent educational evaluation ("IEE") and convening a meeting of the Student's multi-disciplinary team ("MDT") to review the evaluation and determine eligibility within 30 days of receiving the evaluation results. However, Petitioner disagreed with DCPS' proposed settlement agreement. Petitioner wanted the IEE to include a speech/language assessment and functional behavioral assessment ("FBA"), in addition to the comprehensive psychological assessment offered by DCPS. Petitioner also wanted an MDT meeting to be convened in less than 30 days. *See Resolution Meeting Notes* (Oct. 23, 2012) (Exhibit *R-5*).

As a result, the parties did not agree to resolve the complaint. They also did not agree to end the 30-day resolution period early. The resolution period therefore ended on October 25, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") ends on December 9, 2012.

On October 25, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues; and a Prehearing Order was issued thereafter. The parties filed their five-day disclosures as required by November 2, 2012; and the Due Process Hearing was held in Hearing Room 2009 on November 9, 2012. Petitioner elected for the hearing to be closed and attended the hearing in person.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-12.
Respondent's Exhibits: R-1 through R-5.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Educational Advocate ("EA"); and (3) Student's Brother.

Respondent's Witnesses: DCPS presented no witnesses.

At the conclusion of the evidence, the parties presented oral closing arguments.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is December 9, 2012.

III. ISSUES AND REQUESTED RELIEF

As discussed and clarified by counsel at the PHC and the Due Process Hearing, the following single issue was presented for determination at hearing:

> **Failure to Evaluate** — Did DCPS fail to evaluate the Student for special education eligibility, after the parent requested evaluations at the start of the 2012-13 school year?
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> Specifically, Petitioner alleges that: (a) on or about August 23, 2012, she made a written request for an initial evaluation to determine eligibility; (b) on or about September 5, 2012, DCPS issued a Prior Written Notice informing her that "LEA refuses to conduct an initial evaluation" based on its analysis of existing data; and (c) the Student needs certain formal assessments in order for DCPS to determine eligibility.

As relief, Petitioner requests that DCPS be ordered: (a) to fund IEEs to determine eligibility, including comprehensive psychological, speech/language, and FBA; and (b) to convene MDT meetings to determine eligibility and develop an IEP. As noted in the Prehearing Order, Petitioner does not seek an award of compensatory education relief because the Student has not yet been determined to be eligible and Petitioner did not attempt to prove his eligibility at hearing. [2]

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005).

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[2] The Prehearing Order also specified a separate "child find" issue, consistent with the claims made in the complaint, but Petitioner was permitted to withdraw that issue without prejudice at the outset of the Due Process Hearing. While it is not clear to the Hearing Officer that this materially changes the nature of the evaluation dispute presented at hearing (*see* Discussion & Conclusions of Law, *infra*), the withdrawal was nevertheless permitted in light of the late issuance of the Prehearing Order and Petitioner's expressed desire to preserve a potential claim that could support compensatory education relief in the event DCPS does not ultimately determine the Student to be eligible in a timely manner. However, this HOD does not address or decide this hypothetical question.

IV. FINDINGS OF FACT

Based upon the evidence presented at the Due Process Hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a resident of the District of Columbia. Petitioner is the Student's mother. *See Parent Test.*
2. The Student attends his neighborhood DCPS elementary school (the "School"), where he currently is in the 1st grade for the 2012-13 school year. He also attended the School for Pre-K and Kindergarten during the 2010-11 and 2011-12 school years. *Parent Test.*
3. On or about August 23, 2012, just prior to the start of the 2012-13 school year, Petitioner requested that DCPS evaluate the Student for special education eligibility. The request was made orally, in person to the Special Education Coordinator ("SEC") at the School. *Parent Test.* Petitioner made this request because she was concerned about observed behavior problems and speech/language deficits. *Id.* The SEC asked Petitioner to put her request in writing, which she did shortly thereafter. *Id.*
4. On September 4, 2012, the SEC sent an "Acknowledgement of Referral to Special Education Letter" to Petitioner acknowledging that DCPS had "received a referral for an initial evaluation of your child ... to determine whether he/she is a child with a disability." *R1-1.* The letter stated that "[t]he next step is for school staff to review various educational and behavioral data and determine whether to proceed with an evaluation." *Id.*
5. On the very next day, September 5, 2012, DCPS issued a "Prior Written Notice-Evaluation" signed by the SEC informing Petitioner of the following refused action: "LEA refuses to conduct an initial evaluation." *R3-1; P8-1.* The 09/05/2012 Prior Written Notice ("PWN") continued as follows: "Analyzing data shows academic strength for [Student] in all core areas. Behavior is a concern but will be addressed through Pre-SST team through implementation of various strategies." *Id.*
6. The reasons for the 09/05/2012 refused action were stated to be as follows: "Student's academics are not being impacted by behaviors and there are presently no academic concerns." *R3-1; P8-1.*
7. The 09/05/2012 PWN described the evaluation procedure, assessment, record, or report used as a basis for the refused action as follows: "Observation by Special Educator,

Social Worker, Speech Pathologist, and input from General educator. Class work samples." *R3-1; P8-1.*[3]

8. The 09/05/2012 PWN described the other options considered by the IEP Team as follows: "Referral to Pre-SST process to identify and put strategies in place for behavioral concerns." *R3-1; P8-1.*

9. At or about this same time, DCPS completed an "Analysis of Existing Data" with respect to the Student, which is undated. *See R2-1; P8-2.* The data reviewed included classroom observations and student work samples taken on 08/30/2012. *Id.* In reading, the Student "had trouble focusing" and "had to be redirected several times to stay on task and complete the page that he was reading." *R2-2; P8-3.* In math, the Student "never focused on the teacher as she read the story," "was constantly moving around," and "does not keep still for extended periods of time." *R2-1; P8-2.* However, the teacher did not see any academic weaknesses in math during the first week of the school year. *Id.* Behaviorally, the Student was observed as "being fidgety a great deal of the time," and his "inattentiveness" and "questioned behaviors" were also areas of concern. *R2-3; P8-4.*

10. About a month and a half later, while the complaint was pending, the Student was referred for a further "speech-language screening/information gathering to determine if there is sufficient educational data that supports a suspected disability in the area of speech and language/communication ... and resulting adverse effect on educational performance, thus warranting a speech and language assessment." *R4-1.* The DCPS screening was done on or about October 17, 2012, and a written report was prepared on October 22, 2012, the day before the parties' resolution meeting. *Id.* The screening procedures/data gathering included a classroom observation and a speech/language teacher questionnaire. *Id.* The report found (*inter alia*) that the Student "demonstrated good oral communication skills," that his "speech was clear and understandable to the listener," and that "[t]here was no evidence of communication breakdown in the classroom." *R4-2.* Overall, the DCPS SLP examiner found that there was "no evidence

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[3] As discussed in the MDT meeting notes, the general educator reported that the Student was "active but not a major behavior problem" and "is able to do work ...." *P7-1.* The social worker similarly reported that the Student was "being very busy" but "still is able to respond to work being presented in the classroom." *P7-2.* And the speech/language pathologist observed that Student "does not present with any speech concerns." *P7-1.*

of a suspected disability in the area of speech and/or language"; that the Student was accessing the educational curriculum; that his "speech/language development appears age appropriate"; and that a complete speech/language assessment was not warranted at this time. *R4-5.*

11. On or about October 23, 2012, DCPS convened a resolution meeting in this case. At the resolution meeting, DCPS offered to resolve the issues described in the complaint by proposing a settlement agreement ("SA"). Under the proposed SA, DCPS would have authorized an independent comprehensive psychological assessment of the Student, conducted its own FBA, and convened a meeting of the Student's MDT/IEP Team to review the assessments and determine eligibility within 30 days of receiving the assessment results. Petitioner rejected the proposed SA because she wanted an independent FBA and a speech/language assessment, and she wanted an MDT meeting to be held sooner than 30 days. She also disagreed with certain other provisions, including the amount of attorney fees. *See P1-5; R5-2* (10/23/2012 Resolution Meeting Notes).

12. The relief obtained by Petitioner in this administrative proceeding is not more favorable to Petitioner than the offer of settlement received by Petitioner at the October 23, 2012 resolution meeting.

13. The date that the Student was referred by his parent for an evaluation to determine eligibility for special education and related services is August 23, 2012. 120 days from that date is December 21, 2012.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005); 5-E DCMR §3030.3 ("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 a Free Appropriate Public Education"). The Hearing Officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner met her burden of proving entitlement to a portion of her requested relief. Petitioner will be authorized to obtain an independent comprehensive psychological assessment of the Student, and DCPS will be ordered to convene an MDT/IEP Team meeting to review the results of such assessment and to determine the Student's eligibility for special education and related services within 20 days of receiving such results. DCPS will also be ordered to conduct an FBA of the Student during the same time period. Petitioner's other requested relief is denied.

A. Relevant Legal Principles

Child Find

The IDEA's "child find" provisions require each State to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are ***identified, located, and evaluated***." 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §300.111(a) (emphasis added). Child find must include any children "***suspected*** of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. §300.111(c) (1) (emphasis added). OSSE regulations further require all LEAs, including DCPS, to ensure that such procedures are implemented for all children residing in the District. 5-E DCMR §3002.1(d).

As the courts have made clear, these provisions impose an affirmative duty to identify, locate, and evaluate all such children. *Reid v. District of Columbia,* 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Hawkins v. District of Columbia,* 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory and regulatory language, such affirmative duty "extends to all children ***suspected*** of having a disability, not merely to those students who are ultimately determined to have a disability." *N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008) (emphasis in original). Generally speaking, when a parent makes a specific request for evaluation (as here), such request serves to "identify" the child as a potential candidate for services, for whom the LEA must then activate the initial evaluation process.

Conduct of Initial Evaluations

Each public agency must conduct a "full and individual initial evaluation" in order to determine a child's eligibility for special education and related services. 20 U.S.C. § 1414 (a) (1) (A); 34 C.F.R. §300.301 (a); 5-E DCMR §3005.1. Either a parent or public agency may initiate the initial evaluation process. 20 U.S.C. § 1414 (a) (1) (B); 34 C.F.R. §300.301 (b). In general, LEAs must ensure that the child "is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. §300.304 (c) (4). LEAs must also ensure that 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." *Id.,* §300.304 (c) (6). *See also Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008).

As part of an initial evaluation of eligibility, the IEP Team and other qualified professionals (as appropriate) must review existing evaluation data on the child, including: (1) evaluations and other information provided by the parents; (2) current classroom-based assessments and observations; and (3) observations by teachers and related service providers. *See* 20 U.S.C. § 1414 (c) (1) (A); 34 C.F.R. §300.305 (a) (1); 5-E DCMR §3005.4 (a). On the basis of that review, and input from the parents, the IEP Team must then identify "what additional data, if any, are needed" to determine eligibility. 20 U.S.C. § 1414 (c) (1) (B); 34 C.F.R. §300.305 (a) (2); 5-E DCMR §3005.4 (b).

Where an IEP team determines that additional data is not needed, the LEA must notify the child's parents of that determination and the reason for it. *See* 20 U.S.C. § 1414 (c) (4) (A) (i); 34 C.F.R. §300.305 (d) (1) (i); 5-E DCMR §3005.6. Parents then have a right to request a formal assessment to determine whether their child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414 (c) (4) (A) (ii); 34 C.F.R. §300.305 (d) (1) (ii); 5-E DCMR §3005.6. However, the public agency "shall not be required to conduct such an assessment unless requested to do so by the child's parents." 20 U.S.C. § 1414 (c) (4) (B); *see* 34 C.F.R. § 300.305 (d) (2); 5-E DCMR §3005.6. *See also Herbin v. District of Columbia,* 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005).

Under the IDEA and D.C. statutory law, DCPS has 120 days from the date of a parent referral to complete the initial evaluation process and determine a student's eligibility for special education and related services. *See* D.C. Code § 38-2561.02 (a); 34 C.F.R. § 300.301 (c); *IDEA Public Charter School v. McKinley,* 570 F. Supp. 2d 28 (D.D.C. 2008); *Hawkins v. D.C.,* 539 F. Supp. 2d 108 (D.D.C. 2008).

B. Application to Facts and Specified Issue

In this case, the Student was first "identified" as a child suspected of being disabled by means of Petitioner's August 23, 2012 written request. This meant that, under the IDEA and D.C. statutory law, DCPS had until approximately December 21, 2012 to complete the initial evaluation process in a timely manner.

DCPS appears generally to have followed correct procedures in reviewing existing evaluative data as a first step following the referral. However, it then engaged in a truncated review based on informal observations over only the first six days of the school year before prematurely calling a halt to the process via the September 5, 2012 PWN. In doing so, the Hearing Officer concludes that DCPS failed to conduct a "full and individual initial evaluation" as required by 20 U.S.C. § 1414 (a) (1) (A) and 5-E DCMR § 3005.1. DCPS' review also was not sufficiently comprehensive to identify all of the Student's potential special education needs, as required by 34 C.F.R. §300.304 (c) (6). [4]

The Hearing Officer concludes that DCPS' failure to conduct a more thorough initial evaluation of the Student in these circumstances constitutes a procedural violation of the IDEA, which has affected the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006). Such procedural inadequacy has impeded the Student's right to a FAPE, as well as significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, by frustrating their ability to demonstrate

[4] DCPS recognized that the Student had a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"), and that such condition manifested itself in the classroom setting. *See P4-2; P7-1; P11-2; R2; Findings* ¶ 9. DCPS also was aware that the Student had behavioral issues in school. Nevertheless, DCPS refused to fully explore the educational ramifications through a comprehensive psychological assessment, despite Petitioner's request for such assessment. Moreover, educators and courts have consistently stressed the importance of identifying students who may be in need of special education supports during the early school years, when appropriate interventions can often have greatest impact.

special education eligibility based on a broader set of relevant information. *See* 34 C.F.R. §300.513 (a) (2) (i), (ii). Accordingly, Petitioner has met her burden of proof in this respect, and appropriate relief will be provided in the form of an independent comprehensive psychological assessment and MDT meeting as set forth below. Even DCPS appeared to acknowledge in closing argument that such an assessment would now be appropriate. *See DCPS' Closing.*

The Hearing Officer concludes, however, that Petitioner has failed to prove her entitlement to the other forms of requested relief. Specifically, Petitioner has not shown that DCPS has unlawfully failed to conduct a formal, comprehensive speech/language assessment, or that an independent speech/language evaluation is warranted. Initial observation by the DCPS speech/language pathologist in early September revealed that the Student did not present with any speech concerns. *See P7-1* (9/5/2012 MDT notes). Moreover, the further screening conducted in October (still well within the statutory 120-day timeline) found "no evidence of a suspected disability in the area of speech and/or language." *R4-5.* To the contrary, DCPS found (*inter alia*) that the Student "demonstrated good oral communication skills," that his "speech was clear and understandable to the listener," that "[t]here was no evidence of communication breakdown in the classroom"; that the Student was accessing the educational curriculum; that his "speech/language development appears age appropriate"; and that a complete speech/language assessment was not warranted at this time. *R4-2; R4-5.* At hearing, Petitioner presented no expert testimony or other evidence to contradict this data. [5]

Nor did Petitioner prove that an *independent* functional behavioral assessment ("FBA") is warranted at this time. Courts have recognized that "[t]he FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of the IEP." *Harris v. DC,* 561 F. Supp. 2d 63, 68 (D.D.C. 2008). However, DCPS has already offered to conduct an FBA to address any behavioral issues that may be impeding the Student's learning or that of others. If the Student is determined eligible, the results of such FBA can and should be considered in developing the content of his initial IEP, including an appropriate behavior intervention plan ("BIP") or other set of supports. *See* 34 C.F.R. § 300.324 (a) (2) (i). If

[5] Petitioner also did not present evidence to show that she requested any specific assessments in response to the 9/5/2012 PWN and her referral to the SST process, prior to filing a due process complaint. *See* 20 U.S.C. § 1414 (c) (4) (B); *see* 34 C.F.R. § 300.305 (d) (2); 5-E DCMR §3005.6.

Petitioner disagrees with the FBA conducted by DCPS, then she may invoke her right to an independent evaluation under 34 C.F.R. § 300.502 at the appropriate time.

C. Appropriate Relief

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-23 (D.C. Cir. 2005). Based on the evidence presented at the due process hearing; the findings, discussion and conclusions set forth above; and relevant equitable considerations, the Hearing Officer concludes that the relief set forth in the Order is appropriate.

The Hearing Officer notes that the relief obtained by Petitioner under this HOD is not more favorable to the parent than DCPS' October 23, 2012 offer of settlement (which was essentially reiterated at the due process hearing). Thus, it would appear that Petitioner was not substantially justified in rejecting the settlement offer and proceeding to a due process hearing, and that such action unreasonably protracted the final resolution of the controversy. *See* 34 C.F.R. § 300.517 (c).

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner shall be authorized immediately to obtain a **Comprehensive Psychological Assessment** of the Student (including social history, academic achievement, cognitive, and clinical components) independently, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). Upon completion of the assessment, Petitioner shall submit copies of the final written report to DCPS. Absent other agreement of the parties, the report of independent assessment shall be completed and submitted to DCPS within **60 calendar days** of this Order (i.e., by **February 7, 2013).**
2. Within **30 calendar days** of this Order (*i.e.*, by **January 8, 2013**), DCPS shall complete a **Functional Behavioral Assessment ("FBA")** of the Student and prepare a written report. Should DCPS not complete either such assessment in a timely manner, Petitioner shall be authorized to obtain such FBA independently, at the expense of DCPS and consistent with the other requirements of paragraph 1 above.

3. Within **20 calendar days** of receiving the last of the assessment reports pursuant to this Order, DCPS shall convene a meeting of the Student's MDT/IEP Team with all necessary members (including Petitioner) to: (a) review the assessments and all other relevant information; (b) determine whether the Student is eligible for special education and related services under the IDEA; (c) if eligible, develop an appropriate individualized education program ("IEP") and propose an appropriate educational placement and school for the Student; and (d) if eligible, determine if in the Team's judgment any compensatory education services are warranted.

4. Any delay in meeting any deadline in this Order caused by Petitioner or Petitioner's representatives (*e.g.,* absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadline by the number of days attributable to such delay.

5. All other requests for relief in Petitioner's Due Process Complaint filed September 25, 2012 are hereby **DENIED;** and

6. The case shall be, and hereby is, **CLOSED.**

IT IS SO ORDERED.

Impartial Hearing Officer

Dated: December 9, 2012

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).