

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
OFFICE OF COMPLIANCE & REVIEW  
STATE ENFORCEMENT & INVESTIGATION DIVISION  
STUDENT HEARING OFFICE**

2009 JUL 21 AM 11:55  
OFFICE OF COMPLIANCE & REVIEW

**CONFIDENTIAL**

Jane Dolkart, Due Process Hearing Officer  
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Washington, D.C. 20003  
202-698-3819; 202-698-3825 (Fax)

**HEARING OFFICER'S DETERMINATION**

IN THE MATTER OF:	)	
	)	
<b>DOB</b>	)	DATE OF HEARING
	)	
I.D.	)	July 20, 2009
Petitioner,	)	
	)	DATE OF COMPLAINT
V.	)	June 15, 2009
	)	
<b>The District of Columbia</b>	)	ATTENDING SCHOOL:
<b>Public Schools,</b>	)	
Respondent	)	

**COUNSEL FOR PARENT/STUDENT:** Pierre Bergeron  
406 5<sup>th</sup> Street, NW, 2<sup>nd</sup> Fl  
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**COUNSEL FOR DCPS:** Laura George  
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STUDENT<sup>1</sup>, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S  
DETERMINATION

July 30, 2009

Representatives:

Petitioner – Pierre Bergeron  
DCPS – Laura George

Hearing Officer:

Jane Dolkart

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<sup>1</sup> 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 found eligible for special education on April 30, 2009 under the disability classification of multiply disabled (MD) with emotional disturbance (ED) and Learning Disabled (LD). The student completed eighth grade at                     at the end of the 2008-2009sy. A June 9, 2009, meeting was held to draft the student's IEP. The parent was not present at the meeting although her attorney was there. The draft IEP did not provide for a full time placement which Petitioner alleged had been agreed upon at the April 30, 2009 eligibility determination meeting.

Pursuant to intervention by the Hearing Officer, an IEP meeting was held on July 15, 2009. The IEP provided for 25 hours of specialized instruction, 1 hour of counseling, and 1 hour of behavioral support services per week, in a full time out of general education setting. Placement was proposed at                     Ppetitioner disagreed with the placement and with the sufficiency of the special education and related services to be provided to the student.

This due process complaint was filed alleging failure to identify and evaluate the student for special education, failure to develop an IEP, failure to provide an appropriate IEP, failure to provide an appropriate placement, failure to conduct a speech and language evaluation (S/L), and failure to provide needed wrap around services.

As indicated, an IEP has been developed, although Petitioner disagrees that it is adequate.

## 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 identify and evaluate the student for special education?
2. Failing to develop an appropriate IEP?
3. Failing to provide an appropriate placement?

4. Failing to conduct a S/L evaluation?

5. Failing to provide wrap around services including individual and family counseling, medication assessment and management, substance abuse counseling, community based services to get the student ready for school, make sure he goes to and comes home from school, homework support, socialization training, and therapeutic recreation.?

#### **IV. MOTIONS**

On June 29, 2009, DCPS filed a Motion to Dismiss for Lack of Standing based on the fact that Petitioner's attorney had listed himself on the complaint, rather than the parent, as the person bringing the complaint. On June 30, 2009, Petitioner filed an Opposition to the Motion to Dismiss. On July 10, 2009, Petitioner filed a Motion to Replace Page 2 of the Complaint to cure the issue raised in DCPS' Motion to Dismiss. The Motion to Dismiss was denied at the pre-hearing conference, and the Motion to Amend the Due Process Complaint was granted.

On June 30, 2009, DCPS served Petitioner with a Request for Production of Documents and for Production of the Parent. Neither the Student Hearing Office nor the Hearing Officer was provided a copy of the request. On July 7, 2009, DCPS filed a Motion to Compel Production. The Hearing Officer ordered Petitioner to make the parent available to testify at the hearing and to have Dr. Ava Booker prepared to testify concerning her professional relationship with several special education schools and a wrap around service provider, if relevant. Otherwise, the Motion to Compel was denied at the July 8, 2009 pre-hearing conference, and memorialized in a July 17, 2009 Order.

On July 10, 2009, DCPS filed a Second Motion to Dismiss for Lack of Standing arguing that the parent had never consented to the provision of services and therefore could not file a due process complaint. Petitioner filed an Opposition on July 13, 2009, and DCPS filed a Reply to the Opposition on July 14, 2009. The Hearing Officer determined that the parent had consented to services on April 30, 2009. On July 17, 2009, the Hearing Officer issued an Order denying the motion and memorializing in writing her decisions in all previous motions decided at pre-hearing conferences.

On July 12, 2009, Petitioner filed a motion to allow Petitioner's expert to remain in the room during all testimony. On July 13, 2009, DCPS filed an opposition to the motion. On July 17, 2009, the Hearing Officer granted the motion. At the hearing DCPS withdrew its objection to having Petitioner's expert remain during all testimony.

Petitioner filed two motions to amend her 5-day disclosure on July 13, 2009, and July 17, 2009. The motions were granted in the July 17, 2009 Order. DCPS filed a motion to amend their disclosure on July 17, 2009. In the July 17, 2009 Order a decision on this motion was put off until the hearing and was withdrawn by DCPS at the start of the hearing..

#### **IV. DOCUMENTS AND WITNESSES**

Petitioner submitted a five day disclosure letter dated July 12, 2009, containing a list of witnesses with attachments P 1-9. The disclosure was admitted in its entirety. Petitioner submitted a First Amended disclosure on July 13, 2009, substituting the name of one witness. The amendment was granted. Petitioner submitted a Second Amended disclosure on July 17, 2009, consisting of documents P 10-14. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's educational consultant, the student's probation officer, the psychologist who supervised the student's comprehensive psychological evaluation, and the Sr. Director of School.

DCPS submitted a five day disclosure letter dated July 13, 2009, containing a list of witnesses with attachments DCPS 1. The disclosure was admitted in its entirety. DCPS called as witnesses the SEC at \_\_\_\_\_ and a supervisor at First Home Care, a wrap around service provider.

#### **V. FINDINGS OF FACT**

1. This is a \_\_\_\_\_ year old student first found eligible for special education on April 30, 2009 under the disability classification of multiply disabled (MD) with emotional disturbance (ED) and Learning Disabled (LD). The student completed eighth grade at \_\_\_\_\_ at the end of the 2008-2009sy. [P 2]
2. The student was retained in grades 3 and 4 while attending \_\_\_\_\_ a DCPS school. [P 4]
3. The student has a history of school-related problems and suspensions. [P 4]
4. The student attended school in Maryland for the \_\_\_\_\_ and \_\_\_\_\_ grades. He attended the \_\_\_\_\_ school for troubled youths where he was in small classes. [Testimony of mother]
5. The student began attending \_\_\_\_\_ in the \_\_\_\_\_ grade. The mother brought the student's records from \_\_\_\_\_ to \_\_\_\_\_. The student was not evaluated for special education services. [Testimony of the mother]
6. On February 20, 2009, Pierre Bergeron was appointed counsel for the parent concerning the student's educational needs, by the Superior Court of the District of Columbia. The appointment was in relation to the student's court involvement. [P 7]
7. On March 2, 2009, the Superior Court of the District of Columbia Child Guidance Clinic completed a comprehensive psychological evaluation of the student. In mid-March this report was provided to the SEC at \_\_\_\_\_ with a request that the student be found eligible for special education. The report was reviewed by DCPS on April 28, 2009, and an eligibility meeting was held on April 30, 2009. Present at the meeting were \_\_\_\_\_

the mother, the court appointed attorney, the SEC, the social worker, the case manager connected to the student's court case, the school psychologist, and the probation officer. [P 2, 4, 6]

8. The student was found eligible for special education as an ED student. It was recommended that the student be placed in a full time ED placement within DCPS. It was agreed that \_\_\_\_\_ would begin providing the student 1 hour of counseling beginning May 1, 2009, and would conduct a S/L evaluation, a Functional Behavior Assessment, and formulate a Behavior Intervention Plan. An IEP meeting to develop the student's IEP was to take place at a future date. [ 2]

9. The SEC at \_\_\_\_\_ stated that the student was placed in a full time ED setting and began receiving counseling on May 1, 2009. DCPS provided no proof of this change of placement. There is no documentation of such a change. The \_\_\_\_\_ SEC did not testify. The student's progress notes and attendance record do not reflect a change in any of the student's classes. [P 10, 12, DCPS 1]

10. The S/L evaluation was partially completed and a report written on June 10, 2009. The evaluation could not be completed because of the truancy and limited motivation of the student. An FBA was never conducted, nor was a BIP prepared as of the end of the 2008-2009sy. [P 11]

11. An IEP meeting was convened on June 29, 2009. The parent was not at the meeting because she was in the hospital. Her educational attorney was at the meeting. The draft IEP proposed less than a full time placement in special education. The SEC at \_\_\_\_\_ was to fax the IEP to the mother's attorney so that he could go over it with her. The draft IEP was never provided to the attorney and was not placed in evidence by DCPS. [Testimony of parent]

12. On July 15, 2009, upon order of the Hearing Officer, a second IEP meeting was convened. Present were the mother, the educational attorney, the SEC at \_\_\_\_\_ the social worker at \_\_\_\_\_ and the student's educational consultant. This was not a fully constituted IEP team, as reflected in the MDT notes. This draft IEP provided the student with 25 hours of specialized instruction and 1 hour of behavioral support services in an out of general education setting. A Behavior Intervention Plan was included providing for earned time incentives, counseling, and referral to the respect center. Consequences for poor behavior were listed as contact parent and inform administration. The parent agreed to the provision of services but did not agree with the IEP and did not sign it. [P 10]

13. It was proposed that the student be placed in a new program for ED students to begin in the 2009-2010sy at \_\_\_\_\_. One of the two SECs at \_\_\_\_\_ was present at the July 15, 2009 IEP meeting and testified at the hearing. It is her belief that the IEP team needs to reconvene, review the student's evaluations and revise the IEP. She testified that the student needed 26.5 hours of specialized instruction, that the goals in the IEP were not specific enough, and that the vocational transition plan was insufficient and not practical. [P 10, Testimony of Shamele Straughter]

14. The SEC described the program at . She was a credible witness. She is excited about the program and is committed to it. It is a new program that does not presently exist at or any other DCPS school. It will commence at the start of the 2009-2010sy. The program is still in the planning stage. There are to be two classrooms of up to 8 students each plus a special education teacher and a para-professional instruction aide. At present one teacher and one aide have been identified to staff the program. One or more as yet to be hired behavioral specialists will be available and a points based incentive system will be put in place for behavioral management. The program will be housed in the larger Project based learning will be used to allow students to be successful and use multiple kinds of intelligence.

There are 4 social workers at the school assigned to the 300 special education students and a psychologist. Two social workers will be assigned to the special program on a part time basis. Each of these social workers serves on average 50 students. Almost all counseling occurs in group sessions. Only a handful of students receive individual counseling.

The special education teachers will not be certified in substantive subjects. General education teachers will come into the classroom to teach substantive courses.

There is vocational training offered at which will be made available to the ED cluster students, but in a general education setting.. All students will enter school through the same entrance and the ED cluster students will have lunch and gym with their non-disabled peers. ED cluster staff will be on site.

If a student walks out of class, the paraprofessional or teacher will go after them, or a behavioral specialist will be called. If a student does not go to school, home visits will be made.

There is nothing in writing describing the planned program.

has approximately 1,300 students, of which approximately 300 are special education students.

[Testimony of SEC]

15. Ms. Straughter indicated that the student needs outside support as well as a special education program in school. For instance, the student is in need of substance abuse counseling. [Testimony of SEC]

16. The student's comprehensive psychological evaluation was conducted by a psychology intern under the supervision of Dr. Mary Donnelly. Dr. Donnelly is employed by the Child guidance Clinic and has been a clinical psychologist specializing in adolescence for 30 years. Dr. Donnelly reviewed all the data, the court records, and made the diagnosis for the student. No school records were available at the time. Both the

psychological report and Dr. Donnelly's testimony are accorded great weight. [Testimony of Dr. Donnelly]

17. The student was administered the WISC-IV to determine his cognitive abilities. The student's full scale IQ was 70, within the borderline range. On the Verbal Comprehension Index, the student obtained a composite score in the borderline range of functioning. Likewise, his performance on nonverbal tasks was in the borderline range. The student's working memory index was borderline and his processing speed index was borderline. [P 4]

Selected subtests on the W-J III Tests of Achievement were used to assess the student's academic skills. The student was administered 6 subtests and his overall academic skills level was at the 1 percentile, which is in the moderately impaired range. All of the subtest scores were in the mildly or moderately impaired range. [P 2]

The evaluation noted that

[the student] demonstrated significant deficiencies in all areas of cognitive and academic functioning. He has a long history of school difficulty with multiple grade retentions, failure to attend summer school and poor achievement. There are indications of significant developmental delays in learning and behavior....

The low academic scores suggest that [the student] cannot function at an adolescent level in school; he needs a great deal of structure, monitoring and guidance to manage a routine day.

[P 4]

18. Concerning the student's emotional state, the student was administered the Adolescent Substance Abuse Subtle Screening Inventory (SASSI-A2), the Million Adolescent Clinical Inventory (MACI), the Trauma Symptom checklist for Children (TSCC), and the Rorschach Inkblot Technique. A clinical interview was also conducted.

The student was given a diagnosis of Learning disorder, Mood Disorder, Cannabis Dependence, PTSD, and R/O Substance Dependence. The summary report, based on the testing and court documents, describes the student as

aggressive, disruptive, emotionally unstable, and agitated. He may also be out of touch with reality, socially, withdrawn and depressed. [The student] lacks self-awareness, social awareness, appropriate adolescent goals, poor peer and family relationships and has become a habitual runaway and truant. Because of his difficulty in verbal skills and therefore in describing symptoms, it is difficult to discern if his depression and anxiety are part of a post traumatic stress disorder, are genetic, or reactive.

[The student] is engaged in such high risk behaviors, reports some suicidal type feelings as well as fears of being killed, that he is unable to function.

19. Dr. Donnelly testified that the student is both depressed and agitated with great emotional volatility. She noted that his verbal problems cause him to avoid things.

The student is older than most 8<sup>th</sup> graders which causes him to be embarrassed to go to school. In part because of his poor language skills, he has few friends and has trouble understanding instructions.

Dr. Donnelly recommended a multi-prong intervention for the student involving school and community based interventions. She testified that the student needs a small therapeutic environment where therapy is available all day and where the student can get individual attention and someone is keeping an eye on him all day. The therapeutic environment would include counseling with a social worker assigned to him who could establish an on-going relationship with him. The student also needs therapeutic recreation, substance abuse counseling and crisis intervention. Dr. Donnelly did not believe the program at \_\_\_\_\_ was appropriate for the student. If he attends a neighborhood school he will not go to school and will get in trouble. His problems are too severe for the \_\_\_\_\_ program. [Testimony of Dr. Donnelly]

20. Dr. Booker testified and was qualified as an expert in special education for ED and LD students, and in placement of such students. Dr. Booker holds a BS in elementary education and special education, a M.Ed. in special education of ED students, and an Ed.D in psycho-education. She has worked in the area of special education in DC for over 30 years, including 19 years at DCPS in a variety of roles involving special education. She is presently the President and CEO of Special Education Advocacy Services For Challenged Individuals, Inc. Dr. Booker's testimony was credible.

Dr. Booker reviewed the disclosures of both parties, interviewed the student and the parent, and attended the July 15, 2009 IEP meeting. She was present for the testimony of the DCPS witnesses, who testified first due to scheduling conflicts.

Dr. Booker described the student as very disturbed and someone who should have been identified for special education much earlier. He has remained untreated and has developed school avoidance, depression, and a lack of connection to school, family or community. The student is at risk for residential treatment if he is not placed in an intense community and school based program.

The student needs a full time out of general education program in a small therapeutic school with total supervision. He needs an intense behavioral management program, multi-sensory learning, and crisis intervention. There needs to be a "time out" room where the student can be sent when he needs to be removed from class because of his behavior.

Dr. Booker rejected the \_\_\_\_\_ program as an appropriate placement because it will not provide a sufficiently strong structure and intense therapeutic environment. She agrees that \_\_\_\_\_ is a much improved school. However, the student is in need of a tested and tried program. He needs to be out of general education all day, including lunch and gym if he is going to successfully remain in school. [Testimony of Dr. Booker]

21. Dr. Booker also testified to the student's need for wrap around community based services. Dr. Donnelly also recommended such services, as did the student's probation officer. DCPS also agrees that some wrap around services are needed.

The student will need help orienting to his new school, reconnecting with his family, doing his home work, and going to school. He also needs to acquire socialization skills. Family and individual counseling are needed. Dr. Booker recommended that the student receive 5 hours per day of wrap around services. [Testimony of Dr. Booker, Testimony of Tamia Henry, Testimony of Shamele Straughter]

22. The student's probation officer, Rick Ballard testified. He has an MSW and is licensed as a professional counselor. He has been trained as an advocate for special education students. When the student was assigned to Mr. Ballard, he thought the student should be in special education given his low academic levels and his emotional issues. He requested that a psycho-educational evaluation be completed as part of the court's evaluative process. Mr. Ballard has observed the student at \_\_\_\_\_ and has had several meetings with personnel at the school. The student did not do his homework, acted out, left the classroom or threw papers around in class. The student is a follower. He did not observe any change or improvement in the student's educational placement. The student was lost with no one paying attention to him.

It was Mr. Ballard's belief that the student needs a therapeutic school away from the negative influences at his school. \_\_\_\_\_ is too large and he will succumb to peer pressure and not attend school.

Mr. Ballard also believes that the student needs substantial community support for the first 3 months, as much as 6 hour per day, and 5 days a week. [Testimony of Mr. Ballard]

23. The student's attendance during the 2008-2009sy was abysmal. He was also suspended on numerous occasions. The student received F's in his classes. (DCPS 1, P 12, 13).

24. Tamia Henry, a supervisor at First Home Care testified for DCPS. First Home Care is a service agency that provides mental health services, including individual and family therapy, community support, community based intervention, medicine management, and certified addiction counselors. It is owned by Psychiatric Solutions. The agency has a contract with DCPS to provide services through Medicaid. Medicaid requires that assessments be done every 90 days and services are dictated by need and Medicaid guidelines. The student was referred to First Home Care through the DC Office of Special Education. Someone was assigned to work with the student although she has not

yet interviewed him. A treatment team consisting of the parent, the student, therapists and other service providers assesses the student's needs. Therapy takes place at the agency's office and a support worker picks the student up and takes him to the office. Generally, 1-2 hours of support are provided per week. [Testimony of Tamia Henry]

25. Dr. Booker recommended Independence/Dependence as the service provider to provide wrap around services for the student. They are able to provide all the services he needs. Dr. Booker has consulted with the company and has also had clients who have used the company. She finds them to be a professional and reliable company and her clients have had good results working from working with them. [Testimony of Dr. Booker]

26. The student has been accepted at \_\_\_\_\_ in Beltsville, Maryland. \_\_\_\_\_ the Senior Director of the school testified. He interviewed the student and reviewed his IEP and psychological evaluation.

\_\_\_\_\_ provides small classes and is a highly structured therapeutic school for students with ED. Students receives substantial individual attention. There is a comprehensive behavioral management plan at the school. There are 5 full time social workers for a student population of 72. If a student acts out there is a prompt warning, consequences, a time out room if necessary and the social worker or behavioral intervention specialist are consulted.

There is a special education teacher and a para-professional in each class with no more than 10 students. The classroom the student would be in presently has 5 students with a special education teacher and a para-professional. The special education teacher is certified to teach English. Students can earn Carnegie Units. There is a reading specialist and all teachers are trained in various reading programs. [Testimony of Keith White] the school has a vocational program.

## **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 (3<sup>rd</sup> 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. Failure to Identify and Evaluate the Student For Special Education**

The IDEA places an affirmative duty on states to identify, locate, and evaluate all children with disabilities residing within their boundaries. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.125. This duty, called “child find” is triggered when a school has reason to suspect a child has a disability, and has reason to suspect that special education services may be needed. *Reid v. District of Columbia et al.*, 310 F.Supp.2d 137, 146 (D.D.C. 2004), *aff’d in relevant part and rev’d in part*, 401 F.3d 516 (D.C. Cir. 2005). The IDEA states that an

educational agency shall be deemed to have knowledge that a child has a disability if—

- (i) the parent of the child has expressed concern in writing...that the child is in need of special education and related services;
- (ii) the behavior or performance of the child demonstrates the need for such services;
- (iii) the parent has requested an evaluation of the child...;
- (iv) the teacher...or other personnel of the LEA, has expressed concern....

20 U.S.C. § 1415(k)(8)(B)(i-iv).

Thus, a school district may not ignore disabled students' needs and may not wait until a parent demands special education before providing such specialized instruction. *Scott v. District of Columbia*, 2006 WL 1102839 (D.D.C. 2006).

Before the initial provision of special education to a child, the agency must conduct full and individual initial evaluations. These evaluations must be conducted within 60 days of receiving parental consent, or, if the State establishes a timeframe within which the evaluations must be conducted, within that timeframe. 34 CFR § 300.301 (c)(1)(i) & (ii). Pursuant to D.C. Municipal Code § 38-2561.02, an initial evaluation for special education eligibility in the District of Columbia shall occur within 120 days from the date that the student was referred for an evaluation.

The question before the Hearing Examiner is when DCPS should have known the student was in need of evaluation pursuant to child find. Petitioner has the burden of proving that the record supports a finding that DCPS should have initiated the child find process prior to the mid-March 2009 request from Petitioner.

The record in this case clearly supports a finding that DCPS failed in its child find obligations. This student has had serious academic and behavioral problems in school from the start. He was held back in both 3<sup>rd</sup> and 4<sup>th</sup> grade. The student went to school in Maryland for 5<sup>th</sup> and 6<sup>th</sup> grade. He was placed in a school for troubled youth. Obviously Maryland determined that the student was having problems. The IDEA statute of limitations allows Petitioner to bring claims that go back two years prior to the filing of the due process complaint., or July 20, 2007. This period encompasses the time the student spent at

The student moved from a Maryland school for troubled youth to . This alone should have been sufficient to alert the school that the student might be in need of special education. The student's mother testified that she gave the student's records from Maryland. In addition, the student was habitually truant, absent from class, and suspended. He failed all his classes. Yet no one thought to commence the evaluation process to determine if the student was in need of special education. It was not until mid-March 2009, when the parents attorney contacted the school that any effort was made to determine eligibility. In spite of the fact that the primary evaluation had already been completed, never managed to develop a completed IEP for the student before classes ended for the school year.

DCPS denied the student FAPE from the time the student enrolled at . by failing to find and evaluate the student for special education.

#### **B. Is the Student's IEP Appropriate**

At present, the student does not have a completed initial IEP. The proposed IEP at the June 20, 2009 IEP meeting was a draft and was never finalized. A second IEP meeting

was held on July 15, 2009, at which a full time out of general education IEP was proposed for the student. However, it was agreed that there was not a full IEP team at the July 15, 2009 meeting, and that another meeting would need to be held. Additionally, the Ms. Straughter, the SEC at \_\_\_\_\_ testified that the IEP was in need of revision since it did not contain specific enough goals, the transition plan was not realistic, and the student should have 26.5 hours of specialized instruction, not 25 hours. Thus, even DCPS believes that the present draft IEP is inappropriate as written.

However, Petitioner's primary concern when the complaint was filed was that the student was not given a full time out of general education IEP. DCPS has conceded that the student needs a full time IEP. \_\_\_\_\_ has shown itself unable to develop an IEP for this student, and it certainly has not done so in a timely manner. If the three months that have now passed between the eligibility determination and the development of an IEP had been during the school year, DCPS might have denied this student FAPE. However, the delay has occurred during the summer and the student is not in ESY. Therefore, the student has not suffered any educational harm as yet from the fact that his IEP has not been completed. However, if the student does not have a completed IEP by the time school starts or very shortly thereafter, the student will likely suffer educational harm.

### **C. Did DCPS Fail to Provide a S/L Evaluation**

At the April 30, 2009, eligibility meeting it was agreed that DCPS would conduct a S/L evaluation. DCPS attempted to conduct the evaluation over a period of two months and was unable to do so because of the student's truancy and his lack of effort. This lack of effort is consistent with the student's disability. DCPS can not be faulted for the failure to complete a S/L evaluation.

### **D. An Appropriate Placement**

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006).

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

Technically, a placement cannot be made until the IEP is completed. However, the parties

agree that the student requires a full time out of general education placement, counseling, and some wrap around services in the form of community support. The IEP is sufficiently developed to make a determination of whether \_\_\_\_\_ or some other placement is appropriate for the student.

This is a student with particularly severe emotional and educational problems as testified to by the psychologist, the educational advocate and the probation officer. The student is extremely depressed, agitated, and volatile. He has suicidal thoughts, is involved with the criminal justice system, and does not go to school. He is in danger of needing a residential placement unless he can be stabilized at both school and in the community.

It is welcome news that DCPS is starting a program for emotionally disturbed high school students of the type described by Ms. Straughter. It has many of the elements needed by this student. However, it is not an appropriate program for the student. First, it is a new program still in the developmental stage. This student's problems and risks are too severe to put him in an untried program. Second, the program takes place at \_\_\_\_\_ a school with 1,300 students where the student has consistently gotten into trouble. Dr. Donnelly, Dr. Booker, and Mr. Ballard all testified that if the student attends school at Ballou he will be influenced by his peers not to attend classes. Also, the student will be exposed to the same influences that have caused him problems in the past. He would enter school through the same entry way as all other students, eat lunch with general education students, take gym with general education students, and possibly take vocational courses with general education students. It would be a recipe for failure.

Third, the described program at \_\_\_\_\_ is not intense enough for this student. There are insufficient personnel to provide the necessary emotional support this student needs. There are insufficient personnel simply to keep him in class. It is not realistic to expect that the teacher and the aide will be able to run after the student when he leaves class. The behavioral management program does not sound rigorous enough. In particular, the lack of a time out room and personnel to monitor such a room is problematic.

There was a lack of testimony concerning how the program can address the student's learning needs. In short, at present, the program is not appropriate for this student. It is certainly possible that after a year of the intense program suggested by the experts and probation officer, the student may be ready to enter the program at \_\_\_\_\_. That remains to be seen.

\_\_\_\_\_ can provide the kind of intense program needed by this student. It provides a small therapeutic environment with small classes, and a very structured and intense behavioral program. It has the counseling and behavioral support services the student needs. The special education teachers are also certified in subject areas and the student can earn Carnegie Units. The school provides vocational training.

There is one concern about \_\_\_\_\_. It is in Beltsville, Maryland, a 40 minute commute for the student. For a student who so lacks motivation and is so volatile, that is a long commute. If DCPS and Petitioner can agree on another, similar school, that is

closer to the student's home, that would be preferable.

### **E. Wrap Around Services**

All of the witnesses agree that the student requires some wrap around community services to be successful in attending school and obtaining educational benefit. The student needs support in transitioning to school, getting to and from school and in doing his homework. He is in need of individual counseling, substance abuse treatment, and family counseling. He needs help in learning socialization. DCPS proposes that these services be provided through First Home Care. First Home Care has a contract with DCPS to provide services that are paid for through Medicaid. This means that the amount and type of services are determined through Medicaid rules and regulations. Services must be assessed and re-approved every 90 days. There is no way to assure that the student will get the services he needs for the period he needs them. Therefore, First Home Care is not a viable option.

Interdependence/Dependence is a service provider with which Petitioner's attorney and educational consultant have worked in the past with good results. It can provide the student with all the services he requires for whatever period they are required.

### **F. Remedy**

The student is to be placed at \_\_\_\_\_ of PG County or a similar school closer to home. The student's IEP is to be completed by that school in cooperation with DCPS.

Petitioner has asked for compensatory education in the form of continued wrap around services when the student ages out of special education. This is not a reasonable request. The student is only \_\_\_\_\_ and is eligible for special education for 5 more years. It is impossible to determine whether the student will even need such services so far into the future. However, the student was denied special education services for the two years he attended \_\_\_\_\_. Rather than provide compensatory education, the focus should be on providing the services he needs now to succeed. These services are greater as a result of the failure to provide earlier intervention.

Dr. Booker recommends that the student initially receive 5 hours per day of services 5 days a week, and Mr. Ballard suggested 6 hours per day. This is a significant number of hours of wrap around services. However, intense services for a limited period of time, tapering off over time is appropriate in this case. It is particularly important to prepare the student for school and ensure his regular attendance and participation over the first three months. Therefore, the student will be provided with up to 5 hours per day of services for three months. At that time, MDT meeting will be called to assess the success of the services and the level of services needed. The student is to receive at least 2 hours a day of services for one year.

## **VII. SUMMARY OF RULING**

DCPS denied the student FAPE by failing to identify him as a student in need of evaluation for special education.

DCPS has not denied the student FAPE by failing to complete a S/L evaluation and providing an inappropriate IEP.

DCPS denied the student FAPE by providing an inappropriate placement.

The student is entitled to wrap around services.

## VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at \_\_\_\_\_ of PG County or a comparable private school closer to the student's home at DCPS expense, including transportation.
2. The student's IEP shall be revised, updated, and finalized no later than the second week of the 2009-2010 school year.
3. DCPS shall provide the student with 5 hours per day of wrap around services 5 days a week, to be provided by Interdependence/Dependence, through October 31, 2009, at which time an MDT meeting shall be called to determine the level and type of services the student continues to need. The student shall receive at least 2 hours per day of services 5 days a week until July 31, 2010.
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: July 30, 2009