

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

On behalf of,

(DOB Student,
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Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing: May 1, 2009
Decided: May 11, 2009

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 5, 2009, on behalf of a now year old student (the "Student") who resides in the District of Columbia and attends School his neighborhood school. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. Petitioner was represented by Miguel Hull, Esq., and Respondent District of Columbia Public Schools ("DCPS") was represented by Tanya Chor, Esq., Assistant Attorney General for the District of Columbia.

The complaint alleged that DCPS denied the Student a free appropriate public education ("FAPE") by (1) failing to place the Student in an appropriate classroom, (2) failing to conduct a functional behavioral assessment ("FBA") and develop a behavioral intervention plan ("BIP") to address the Student's problem behavior at school, and (3) failing to re-evaluate the Student's gross motor skills. 1. The complaint further claimed that because of these violations, *inter alia*, compensatory education was appropriate for the Student. *Id.*

The complaint then proceeded to Resolution Session on or about March 20, 2009. Following unsuccessful resolution, DCPS filed its response on April 17, 2009, which asserts that the Student is being provided a FAPE and requests that Petitioner's request for relief be denied. *DCPS-01.* DCPS' response further asserted that the Student had been moved into a different classroom with the same supports and services in order to address the parent's concern about the Student's behaviors in the previous classroom; that DCPS had agreed to conduct psycho-educational, speech and language, and physical therapy assessments; and that the MDT had agreed to compensatory education at its 2/20/09 meeting. *Id.*

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STUDENT HEARING OFFICE

A telephonic Prehearing Conference ("PHC") was held on April 28, 2009, to clarify issues and discuss various pre-hearing matters. Because the Student's classroom had now been changed, Petitioners withdrew their claim that DCPS had failed to place the Student in an appropriate classroom (Issue #1 in 3/4/09 complaint). Petitioners also withdrew the claim for compensatory education (Issue #4 in 3/4/09 complaint).

Five-day disclosures were thereafter filed by both parties on or about April 24, 2009. Petitioners elected for the hearing to be closed and requested the assistance of a Spanish-speaking interpreter at the hearing, which was provided.

The Due Process Hearing convened on May 1, 2009. At the hearing, 21 documentary exhibits submitted by Petitioner (identified as -1" through -21") and five (5) documentary exhibits submitted by DCPS (identified as "DCPS-01" through "DCPS-05") were admitted into evidence. The following witnesses testified at the hearing: Mr. Juan Fernandez, Educational Advocate ("EA") for the Student, on behalf of Petitioners; and Special Education Coordinator ("SEC") at for DCPS.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As discussed at the PHC and at the outset of the Due Process Hearing, the following issues were presented for determination:

- a. *Whether DCPS failed to conduct an FBA and develop a BIP to address the Student's problem behavior at school;*
- b. *Whether DCPS failed to complete a physical therapy re-evaluation to reassess the Student's gross motor skills; and*
- c. *Whether either of the above failures constitutes a denial of FAPE or otherwise constitutes a substantive ground for granting relief.*

As relief, Petitioner requested that DCPS be ordered (or agree) to: (1) fund an independent FBA, physical therapy assessment, and any other resulting assessments; and (2) convene an MDT meeting within 10 business days of receiving the independent assessments to review and revise the IEP, develop a BIP, and determine appropriate placement.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is . The Student currently attends Kindergarten at School -1; -3; EA Testimony.
2. The Student has been determined eligible for special education and related services as a disabled child with Developmental Delays. -1; -3; -12.
3. The Student's current Individualized Education Program ("IEP") is dated October 1, 2008. 1; 3. The IEP provides for eight (8) hours per week of specialized instruction

and 45 minutes per day of speech language pathology services, both in a general education setting. . . 3, p.3.

4. A physical therapy (“PT”) assessment dated May 22, 2007, found that the Student was within the average range for his gross motor skills, and therefore “further physical therapy is not recommended at this moment.” -4, at p. 4. The report went on to say that a “new evaluation in 6 months is recommended to ensure that his gross motor skills progress at age-appropriate levels.” *Id.*

5. On or about November 28, 2007, the MDT met “to review all current evaluations that have been completed on [the Student] and determine his eligibility for special education services.” -12. DCPS (and/or Bridges PCS, the charter school the Student was then attending) reviewed the 5/22/07 PT assessment as one of the evaluations that had been completed prior to the meeting and noted its findings. *Id.*, pp. 5-6. However, DCPS did not conduct any new evaluation or assessment of the Student’s gross motor skills within approximately six months of 5/22/07, as had been recommended in the original physical therapist report. . . -1; *EA Testimony.*

6. The Student’s Multi-disciplinary Team (“MDT”) met on or about February 20, 2009. During that meeting, the DCPS school psychologist indicated that the environment in the Student’s then current classroom was causing him anxiety, which in turn was causing behavior problems that negatively impacted his academic progress. . . 17 (MDT meeting notes).

7. At the 2/20/09 MDT meeting, the parents requested that the Student be moved to a different classroom, and the school psychologist then suggested putting the Student in another kindergarten class “for a two-week trial period as an intervention” 17, pp.3-4. Ultimately, the team decided that a different match of student/teacher should be explored as an intervention, before any further assessments were recommended and conducted regarding the Student’s behavior. *Id.*, p. 5.; *SEC Testimony.*

8. At the 2/20/09 MDT meeting, the team agreed to conduct updated psycho-educational, social history, and speech/language evaluations. *SEC Testimony;* 17.

9. As of the date the complaint was filed, DCPS had not conducted or agreed to conduct a formal FBA or developed a BIP with respect to the Student’s behavioral problems. 1; *EA Testimony.*

10. As a result of a March 20, 2009 Resolution Session, DCPS agreed to move the Student into a different classroom effective March 30, 2009. *DCPS-03; DCPS-04.* In addition, DCPS agreed to conduct an updated PT evaluation. *Id.*

11. With respect to the parent’s request for an FBA, DCPS again indicated at the 3/20/09 resolution session that it wished to see first if the behavioral problems improved following the classroom reassignment before initiating an FBA. However, if the behavioral problems did not improve with this intervention, then DCPS would complete an FBA/BIP, according to the notes of the session. *DCPS-03; DCPS-04.*

12. As of the date of hearing, the Student had been in his new classroom with greater bilingual capability for approximately three (3) weeks. His behavior has improved. *SEC Testimony.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

3. For the reasons stated below, the Hearing Officer concludes that Petitioners have not carried their burden of proving either claim by a preponderance of the evidence.

(1) *Whether DCPS failed to conduct an FBA and develop a BIP to address the Student's problem behavior at school.*

4. Petitioners first claim that DCPS failed to conduct a functional behavioral assessment ("FBA"), which they assert was warranted to address strategies for the Student's problem behavior. Petitioners argue that the classroom change recently effected by DCPS is not equivalent to a formal FBA.

5. The IDEA requires that, in developing each child's IEP, the "IEP team must — in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. §300.324(a)(2)(i). D.C. law further provides in such circumstances that an "individual behavior plan shall be developed and incorporated into the IEP." DCMR 5-3007.3.

6. The U.S. District Court for the District of Columbia has held that an FBA is an evaluation under IDEA, and therefore parents have the right to request an independent FBA if they disagree with the school's assessment. *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). As the court explained, the "FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." 561 F. Supp. 2d at 68.

7. In this case, however, the evidence indicates that the problem behavior only recently surfaced and was discussed for the first time by the MDT/IEP team at its February 20, 2009 meeting when it met to discuss evaluations being requested by the parent (*i.e.*, psycho-educational, social history, and classroom observation). *See* JA-17. The principal focus of the parents' behavioral concern was the negative impact of the Student's relationship with his classroom teacher. *Id.*, pp. 2-3. As a result, the parents requested that the team recommend a change in classroom assignment, *id.*, which ended up being implemented the next month following spring break. The team decided to see if this classroom change resulted in behavioral improvements before recommending any further assessments. *Id.*, p. 5.

8. Petitioners have not shown that the MDT/IEP team acted unreasonably with regard to implementing this initial intervention strategy and observing results over a short-term period of a few weeks before undertaking additional assessments, including a more full-scale FBA. This course of action appears to be consistent with DCPS' obligations under Section 300.324(a)(2)(i), and obviously cannot be compared to the two-year delay in acting on a request for an independent FBA held to deny a FAPE in *Harris*.¹ Indeed, in this case, it does not even appear that Petitioners requested an FBA (as opposed to the classroom change) when they went before the 2/20/09 MDT meeting or in connection with the last IEP meeting. Moreover, Petitioners' counsel agreed in closing argument that the Student's behavior has improved since the classroom change took place.

9. Accordingly, the Hearing Officer concludes that, at this juncture, the absence of a formal FBA and BIP does not violate IDEA requirements relating to consideration of behavioral strategies and interventions. DCPS has already indicated that it will conduct an FBA and develop a BIP to be incorporated into the Student's IEP (DCMR 5-3007.3) if the behavior problems continue or resurface within the new classroom environment.

(2) *Whether DCPS failed to complete a physical therapy re-evaluation to reassess the Student's gross motor skills.*

10. Petitioners next claim that DCPS has failed to complete a physical therapy re-evaluation to reassess the Student's gross motor skills. Petitioners base this claim entirely on a passing reference in a May 22, 2007 physical therapy evaluation report, which found no need for any further physical therapy but recommended an updated evaluation in six months. 4.

11. When the MDT reviewed this evaluation (along with several others) five months later in determining eligibility, there is no indication that the MDT adopted this "recommendation" for a six-month follow-up as part of the Student's IEP or SEP. 12. Nor was DCPS required to update the evaluation this quickly, which would have occurred only a month after it determined initial eligibility. Notably, the IDEA requires no more than annual IEP reviews and triennial re-evaluations. See 34 C.F.R. §§ 300.303; 300.324(b).²

(3) *Whether either of the above failures constitute a denial of FAPE or otherwise constitute a substantive ground for granting relief under IDEA.*

12. As explained above, DCPS has not been shown to have violated any IDEA requirements or denied a FAPE in connection with the behavior issues or the physical therapy evaluation. Nor have Petitioners shown that the Student has suffered educational harm as a result of these actions. Thus, the Hearing Officer concludes that no relief is appropriate. See 20 U.S.C. §1415(i)(2)(C)(iii).

¹ See also *Alex R. v. Forrestville Valley Community Unit School District*, 375 F. 3d 603 (7th Cir. 2004) (although an IEP must address disability-related behaviors, the IDEA does not contain specific substantive requirements for IEP behavior intervention plans); *Sarah Z. v. Menlo Park City School District*, 48 IDELR 259 (N. D. Ca. 2007) (brief, two-week gap in behavioral supports called for in IEP did not result in a denial of FAPE since it was not a material failure).

² In any event, DCPS has now agreed to conduct updated psycho-educational, speech/language, and PT evaluations as part of the resolution process. Although Petitioners' complaint may have precipitated these actions, the Hearing Officer still finds no basis to grant relief in the absence of some showing of an antecedent violation.

V. **ORDER**

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

1. Petitioner's requests for relief be, and hereby are, **DENIED**; and
2. Petitioner's due process complaint be, and hereby is, **DISMISSED, with prejudice.**
3. This case shall be, and hereby is, **CLOSED.**

Dated: May 11, 2009


/s/ _____

Impartial Hearing Officer

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 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).