



## **I. JURISDICTION**

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## **II. BACKGROUND**

Petitioner is the mother of a -year-old student ("Student") who attends School of Prince George's County, Maryland. On March 20, 2009, counsel for Petitioner filed a Due Process Complaint Notice ("Complaint") alleging that the District of Columbia Public Schools ("DCPS") had failed to conduct evaluations that Petitioner requested on January 14, 2009, and again on January 28, 2009. The requested evaluations were (1) a functional behavioral assessment ("FBA") to address the Student's failure to attend school; and (2) a psychiatric evaluation to address the Student's defiant behaviors.

Petitioner requests as relief that this Hearing Officer issue an order requiring:

- a. DCPS to fund an independent psychiatric evaluations and FBA for the Student;
- b. DCPS to hold a meeting of the multi-disciplinary team within ten calendar days of its receipt of the independent evaluations to review the evaluations, revise the Student's individualized educational plan as appropriate, and discuss and determine the Student's placement; and
- c. Placement in another non-public school if this Hearing Officer finds that the Student needs a more restrictive setting.

On April 10, 2009, counsel for DCPS filed a Motion to Reset Hearing Date and Response to Parent's Administrative Due Process Complaint ("Response"). In the Response, Counsel for DCPS asserted:

- a. DCPS is ready and willing to evaluate the Student once he makes himself available;
- b. The Student has a current FBA and psychiatric assessment;
- c. The Student has chronic attendance issues and has not made himself available for testing; since January 14, 2009, the Student has not been present at school for more than three school days at the time the Response was filed; and
- d. DCPS has not denied the Student a FAPE.

The Response also requested that this Hearing Officer reset the due process hearing date to allow DCPS and Petitioner to engage in a resolution session. On April

14, 2009, counsel for Petitioner filed a Response to District of Columbia Public School's (sic) Motion to Reset Hearing Date ("Response to DCPS Motion"). The Response to DCPS Motion asserted that Petitioner has agreed to participate in a resolution session on April 15, 2009. On that basis, this Hearing Officer reset the case timeline and the 45-day due process hearing timeline began on April 16, 2009.

This Hearing Officer held a prehearing conference on April 13, 2009. The due process hearing occurred on May 14, 2009. At the outset of the hearing, this Hearing Officer admitted into evidence all of the proposed exhibits submitted by both parties. The due process hearing concluded after two hours of testimony.

### III. RECORD

Due Process Complaint Notice, filed March 20, 2009;  
DCPS Motion to Reset Hearing Date and Response to Parent's Administrative Due Process Complaint, filed April 10, 2009;  
Petitioner Response to DCPS Motion to Reset Hearing Date, filed April 14, 2009;  
Petitioner Five-Day Disclosures, filed April 17, 2009 (listing seven witnesses and including eighteen proposed exhibits);  
DCPS Five-Day Disclosures, filed May 7, 2009 (listing fifteen witnesses and including six proposed exhibits);  
Letter Motion for Continuance, filed April 30, 2009;<sup>2</sup>  
Prehearing Order, issued May 13, 2009; and  
Compact Disc of Hearing, conducted May 14, 2009.

### IV. ISSUES PRESENTED

A. Whether DCPS denied the Student FAPE by failing to conduct timely evaluations of the Student?

B. Whether the Student Needs a More Restrictive Setting?

### V. FINDINGS OF FACT

The Student was assaulted by a teacher when he was in grade.<sup>3</sup> The teacher hit the Student in the chest and shoved him into a cabinet, causing blunt force trauma and bruising.<sup>4</sup> The Student suffered both physical and psychological damage from the assault.<sup>5</sup> After this, the Student began to act out more in school.<sup>6</sup>

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<sup>2</sup> A continuance was not necessary after this Hearing Officer reset the timeline to allow for the resolution session.

<sup>3</sup> Testimony of Petitioner.

<sup>4</sup> Petitioner Exhibit 12 (August 23, 2007, psychological evaluation of Student).

<sup>5</sup> Petitioner Exhibit 14 (June 18, 2008, cognitive/clinical evaluation of Student).

Psychological evaluations conducted in November 2003 and November 2007 diagnosed the Student with Attention Deficit, Hyperactivity Disorder (“ADHD”) and Chronic Adjustment Disorder with Mixed Disturbance of Emotions and Conduct.<sup>7</sup> The evaluations also indicated a need to rule out post-traumatic stress disorder related to the separation of his parents and the assault at the school.<sup>8</sup>

The Student continues to exhibit executive functioning concerns with regard to his ability to monitor and regulate his emotions and behaviors, hold and retrieve information in short term memory, set goals, and organize materials.<sup>9</sup> These types of executive functioning concerns are commonly exhibited in students with learning and behavioral problems and are indicative of characteristics related to ADHD.<sup>10</sup>

The Student continues to meet the criteria of ADHD.<sup>11</sup> However, the Student no longer meets the diagnosis of adjustment disorder.<sup>12</sup>

The Student presents with an average (FSIQ: 100) intellectual ability.<sup>13</sup> He learns best through instructional strategies that promote rote memorization and short-term recall of information.<sup>14</sup> His weakest area is his visual spatial reasoning ability, which is in the lower range of average.<sup>15</sup> His deficits in this area may likely be related to his history of visual motor integration difficulties.<sup>16</sup>

The Student currently attends School of Prince George’s County, Maryland a full-time, non-public, special education placement.<sup>17</sup> The Student formerly attended Academy, a full-time, special education placement in Virginia.<sup>18</sup>

Academy developed the Student’s current individualized educational program (“IEP”) on July 23, 2008.<sup>19</sup> The IEP identifies the Student’s disability as other health impaired (ADHD).<sup>20</sup> The IEP requires the Student to receive 30.75 hours per week of specialized instruction and 1.25 hours of psycho-social counseling per week.<sup>21</sup> Petitioner signed this IEP signifying that she agreed with its contents.<sup>22</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Petitioner Exhibits 12 and 14.

<sup>8</sup> *Id.*

<sup>9</sup> Petitioner Exhibit 14.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Petitioner Exhibit 15 (June 18, 2008 educational evaluation).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Testimony of Petitioner.

<sup>18</sup> *Id.*

<sup>19</sup> DCPS Exhibit 1 (July 23, 2008, IEP).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Academy conducted an FBA of the Student on July 18, 2008.<sup>23</sup> The FBA examined the Student's behavior in the classroom.<sup>24</sup> The FBA stated that the Student exhibits difficulty with using appropriate language and impulse control when he engages with peers.<sup>25</sup>

developed a behavior intervention plan ("BIP") on July 23, 2008, and again on August 23, 2008.<sup>26</sup> The first BIP contained strategies for limiting the Student's inappropriate language and behavior in the classroom as identified in the FBA.<sup>27</sup> The second BIP contained similar strategies for limiting the Student's inappropriate behavior and language in the classroom.<sup>28</sup>

The Student receives weekly psychotherapy from an outside therapist.<sup>29</sup> Last year, the therapist diagnosed the Student with anxiety disorder.<sup>30</sup> The Student had a good relationship with the therapist and opened up to him.<sup>31</sup> In late January, the Student started missing his therapy and often disappeared to avoid having to attend therapy.<sup>32</sup> This was about the same time the Student stopped attending school.<sup>33</sup> The therapy center recently closed and the Student no longer receives outside psychotherapy.<sup>34</sup>

The Student does not respond well to stressors, and when faces with a stressful situation, he leaves his house or classroom.<sup>35</sup> These behaviors began in fifth grade after he was assaulted by the teacher.<sup>36</sup> The Student's FBA and BIP do not address the stressors that trigger the Student's flight from the situation.<sup>37</sup> Petitioner requested assistance from \_\_\_\_\_ in addressing these behaviors, but she received no response from the school.<sup>38</sup>

On January 14, 2009, Petitioner requested through a letter from her counsel that \_\_\_\_\_ perform an updated FBA in light of the Student's recent behavioral and attendance issues.<sup>39</sup> In this letter, Petitioner also requested a psychiatric evaluation,

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<sup>23</sup> DCPS Exhibit 2. Petitioner disclosed a similar document but it was undated and contains different information.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> DCPS Exhibits 3 and 4. Petitioner did not disclose these documents even though they were central to her claim.

<sup>27</sup> DCPS Exhibit 3.

<sup>28</sup> DCPS Exhibit 4.

<sup>29</sup> Testimony of Petitioner.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; DCPS Exhibits 3 and 4.

<sup>38</sup> Testimony of Petitioner.

<sup>39</sup> Petitioner Exhibit 6.

stating that she has concerns that the Student may need a more restrictive setting.<sup>40</sup> Petitioner reiterated these requests in a letter from her counsel on January 28, 2009.<sup>41</sup>

After the Student was absent for 75 days, a representative from the Links program visited the Student's home.<sup>42</sup> The person from the Links program also works in the front office at <sup>43</sup> He offered to be the Student's therapist and drive the Student to school every day.<sup>44</sup> Petitioner did not believe this would make a difference as the Student would continue to barricade himself in his room.<sup>45</sup>

Petitioner is concerned that the Student will not finish high school if his attendance does not improve.<sup>46</sup> She has told the Student that he would be allowed to attend the neighborhood school if he will take his medication for ADHD.<sup>47</sup> So far, the Student has resisted.<sup>48</sup>

The Student gets very agitated, has a "total meltdown" and barricades himself in his room when it is time to leave for school.<sup>49</sup> Sometimes he leaves the house and does not return for hours.<sup>50</sup> The Student used to return home by 9:00 p.m., which is the time Petitioner asked him to return, but lately he has been staying out past midnight.<sup>51</sup> Petitioner tried rewarding the Student to attend school by buying him new tennis shoes and paying for boxing classes, but the Student still refused to go to school.<sup>52</sup>

The Student has not attended school for months.<sup>53</sup> Between November 21, 2008, and April 2, 2009, the Student was truant on fifty-six days of school.<sup>54</sup> On April 2, 2009, referred the Student for a truancy hearing.<sup>55</sup>

The Student would prefer to attend his neighborhood public school.<sup>56</sup> He does not like the long commute to and claims this is the reason he refuses to attend there.<sup>57</sup> The Student believes the commute to which is in Largo, Maryland,

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Testimony of Petitioner.

<sup>54</sup> Petitioner Exhibit 4 (April 2, 2009, Superior Court of the District of Columbia Truancy Referral Form); DCPS Exhibit 6 (attendance spreadsheet for school year 2008-2009).

<sup>55</sup> Petitioner Exhibit 4.

<sup>56</sup> Testimony of Petitioner and Student.

<sup>57</sup> *Id.*

takes about an hour, whether it is on the school bus or his mother drives him.<sup>58</sup> The Student's neighborhood school is a four-minute walk from his house.<sup>59</sup>

Petitioner is concerned that her son will not finish high school.<sup>60</sup> The Student wants to earn his diploma.<sup>61</sup> As of February 2009, the Student was currently failing all of his classes except ceramics, in which he had earned a D.<sup>62</sup>

## VI. CREDIBILITY DETERMINATIONS

This Hearing Officer finds that Petitioner's testimony was credible. DCPS presented no witnesses to counter Petitioner's testimony, and her testimony was corroborated by Petitioner's exhibits. The Student's testimony was credible, although this Hearing Officer did not find it to be convincing.

## VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. § 1412(1). FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA... include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such

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<sup>58</sup> Testimony of Student.

<sup>59</sup> *Id.*

<sup>60</sup> Testimony of Petitioner.

<sup>61</sup> Testimony of Student.

<sup>62</sup> DCPS Exhibit 5 (February 4, 2009, report card).

services as are necessary to permit the child to benefit from the instruction.” *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted). DCPS is obligated to provide a FAPE “for all children residing in the state between the ages of 3 and 21, inclusive.” 34 C.F.R. § 300.101.

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. 20 U.S.C. § 1415 (f)(3)(E)(ii). In other words, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”).<sup>63</sup>

**A. Petitioner Proved By a Preponderance of the Evidence that DCPS Failed to Conduct Timely Evaluations Upon Petitioner’s Request.**

IDEIA requires DCPS to assure a “free appropriate public education” (“FAPE”) for all disabled children. 20 U.S.C. § 1412(1). A free, appropriate public education “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982) (citation omitted).

A public agency must ensure that a re-evaluation of each child with a disability is conducted (1) if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant an evaluation; or (2) the child’s parent or teacher requests a reevaluation. 34 C.F.R. § 300.303 (a). Re-evaluations requested by a parent should be conducted in a

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<sup>63</sup> See also, *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir. 2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective”) (citations omitted); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992) (rejecting the proposition that procedural flaws “automatically require a finding of a denial of a FAPE”); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements because the alleged violations did not result in a “substantive deprivation” of student’s rights); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education because procedural faults committed by Board did not cause the child to lose any educational opportunity).

“reasonable period of time,” or “without undue delay,” as determined in each individual case. *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (finding that IDEA requires DCPS to conduct evaluations upon parental request and that parent need not justify a need for re-evaluations) (citations omitted); *Cartwright v. District of Columbia*, 267 F. Supp. 2d 83, 86-87 (D.D.C. 2003) (parent need not show that “conditions warrant” new evaluations).

However, DCPS is not solely to blame for the failure to evaluate the Student. The Student, who is nearly an adult, has steadfastly refused to attend school since January 2009. His failure to attend school would have made it quite difficult for DCPS to conduct an FBA.<sup>64</sup> Nonetheless, neither DCPS nor \_\_\_\_\_ responded to Petitioner’s request, either in correspondence or by scheduling a meeting to discuss the evaluations. Because the regulations implementing the IDEIA require DCPS to conduct evaluations upon parental request, DCPS had an obligation to do so. Instead, DCPS and \_\_\_\_\_ allowed this Student to miss three months of school before they took any action, and that action was solely a truancy referral. Both DCPS and \_\_\_\_\_ should have done more to ensure that this Student receives the education to which he is entitled.

The failure of DCPS and \_\_\_\_\_ to, at a minimum, respond to Petitioner’s requests for an FBA and psychiatric evaluation has cost this Student at least five months of school. Thus, Petitioner proved that DCPS denied the Student a FAPE in failing to heed the parent’s request for evaluations.

**B. Petitioner Failed to Prove that the Student Requires a More Restrictive Educational Placement.**

Petitioner neglected to present testimony or other evidence that supported her request for a more restrictive placement. Thus, Petitioner failed to prove that the Student’s placement is inappropriate.

**ORDER**

Upon consideration of Petitioner’s March 20, 2009, Complaint, the Response thereto, and the testimony and evidence presented at the due process hearing, on this 24th day of May 2009, it is hereby

**ORDERED** that Petitioner shall obtain an independent psychiatric evaluation and an independent functional behavior assessment of the Student at the expense of DCPS on or before June 30, 2009;

**IT IS FURTHER ORDERED** that, within five business days of receiving the Student’s evaluations, counsel for Petitioner must provide the evaluations and reports to

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<sup>64</sup> When a student is placed in a private school by DCPS or through a hearing officer determination that found that DCPS had not and could not provide the Student a FAPE, DCPS retains the responsibility for ensuring that the Student receives a FAPE in the private placement, and for ensuring that the Student is guaranteed all rights under the IDEIA. Here, the Student was placed in a private placement by a Hearing Officer Determination, which required DCPS to fund the Student’s placement and related services.

counsel for DCPS, Daniel Kim, as well as the special education coordinator for the Student's school;

**IT IS FURTHER ORDERED** that within fifteen (15) school days of receiving all of the Student's evaluations, DCPS shall convene an MDT/IEP meeting to review the evaluations, develop a behavior plan to address the Student's failure to attend school; review and revise the Student's IEP in accordance with the findings of the evaluations, and determine an appropriate educational placement for the Student;

**IT IS FURTHER ORDERED** that DCPS shall include all independent evaluators, the school psychologist, and the Student in the MDT meeting at which, , pursuant to this Order, the behavioral plan is to be developed and/or revised and the Student's IEP reviewed and revised;

**IT IS FURTHER ORDERED** that DCPS shall receive a one-day extension of the MDT meeting for every day of delay caused by Petitioner, her counsel, her advocate, or the evaluators who conducted the evaluations required by this Order; and

**IT IS FURTHER ORDERED** that this Order is effective immediately.

/s/

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Frances Raskin  
Hearing Officer

#### **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Copies to:

Roberta Gambale, Attorney at Law  
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Student Hearing Office