

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

OSSE
Office of Dispute Resolution
November 20, 2015

STUDENT, ¹)	
through the PARENTS,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioners,</i>)	
)	Case No: 2015-0311
v.)	
)	Date Issued: November 20, 2015
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and Chapter 38 of the D.C. Code.

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on September 21, 2015 by Petitioners (Student’s parents), residents of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On October 1, 2015, Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). On October 6, 2015, the parties agreed to waive the resolution period. Accordingly, the 45-day due process hearing timeline began on October 6, 2015, and the hearing officer determination (“HOD”) is due on November 20, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on October 13, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by October 28, 2015 and that the DPH would be held on November 4, 2015 and November 5, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on October 13, 2015.

¹ Personal identification information is provided in Appendix A.

The DPH was held on November 4, 2015 and November 5, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioners elected for the hearing to be closed. Petitioners were represented by Paula Rosenstock, Esq. and Benjamin Massarsky, Esq. and DCPS was represented by Steven Rubenstein, Esq.

Petitioners' and Respondent's disclosures were timely filed.² At the DPH, Petitioners' exhibits P-1 through P-25; P-27; P-28; P-30 through P-44; P-46 through P-47; P-50 through P-63 were admitted without objection. Petitioners' exhibits P-26, P-29; P-45; P-48; and P-49 were admitted over Respondent's objection. Respondent's exhibits R-1 through R-24 were admitted without objection.

Petitioners called the following witnesses at the DPH:

- (a) Parent A³
- (b) Parent B⁴
- (c) School Psychologist (Nonpublic School-2)⁵
- (d) School Administrator (Nonpublic School-1)⁶
- (e) Special Education Teacher (Nonpublic School-1)⁷
- (f) Social Worker (Nonpublic School-1)⁸
- (g) Educational Consultant⁹

Respondent called the following witness at the DPH:

- (a) Social Worker (DCPS)
- (b) General Education Teacher (DCPS)
- (c) School Psychologist (DCPS)¹⁰

Petitioners and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to determine her eligible for special education and related services under the disability classification

² Petitioners' exhibit P-63 was filed one day after the disclosure deadline; however, it was deemed timely filed by mutual agreement of the parties.

³ The HOD will refer to Student's mother who testified first at the DPH as "Parent A."

⁴ The HOD will refer to Student's mother who testified second at the DPH as "Parent B."

⁵ Qualified, without objection, as an expert in clinical psychology with an emphasis in the evaluation and programming of students with disabilities.

⁶ Qualified, over Respondent's objection, as an expert in special education.

⁷ Qualified, without objection, as an expert in special education.

⁸ Qualified, without objection, as an expert in social work.

⁹ Qualified, without objection, as an expert in special education.

¹⁰ Qualified, without objection, as an expert in clinical and school psychology.

“Emotional Disturbance” (“ED”) and/or other disability classification on January 26, 2015 and/or May 20, 2015.

- (b) Whether DCPS denied Student a FAPE by predetermining in October 2014 that she was ineligible for special education services prior to the completion of her assessments.
- (c) Whether DCPS denied Student a FAPE by refusing to allow Educational Consultant to observe her in the classroom in November 2014 and/or April 2015.

RELIEF REQUESTED

Petitioners requested the following relief:

- (a) An Order that DCPS fund the student at Nonpublic School-1 for the 2015-2016 school year, with all related costs and fees, including for related services.

FINDINGS OF FACT

1. Student is [AGE] years old. Prior to the 2013-2014 school year, Student attended Area School and City School. During the 2014-2015 school year she was a [GRADE-A] student at District Elementary School, and during the 2013-2014 school year she was a [GRADE-B] student at District Elementary School.

2. Student started the 2014-2015 school year in the Spanish immersion program at District Elementary School. This was Student’s first experience with Spanish immersion; however, most of her classmates had already been in Spanish immersion for several school years. Student was frustrated to be unable to communicate with or understand her teacher and acted out with adverse behaviors. District Elementary School staff did not believe the Spanish immersion program was a good fit for Student’s needs, or positioning her for success.¹¹

3. By September 2014 Student had seemed to gravitate to General Education Teacher, and District Elementary School moved Student from the Spanish immersion class to General Education Teacher’s traditional classroom. Initially, the move to General Education Teacher’s classroom on September 4, 2014 was temporary and with Parents’ agreement. The following week, however, the school determined that Student would remain assigned to General Education Teacher’s classroom. Parents were not in agreement that Student should be permanently removed from Spanish immersion until they felt adequate behavioral supports had been put place for Student in Spanish immersion.¹²

4. From July 2015 through the present time, Student has attended Nonpublic School-1 in [GRADE-C]. Parents unilaterally placed Student at Nonpublic School-1,¹³ which is a full-time special education school with small class sizes, for students with multiple disabilities or emotional disabilities, particularly with attachment and anxiety disorders, and who are on track to receive a high school diploma.¹⁴

¹¹ Testimony of Parent A; P-9-6 through P-9-7; P-9-8; P-10; R-11-2.

¹² Testimony of Parent A; P-9-6 through P-9-7; P-9-8; P-10; R-11-2.

¹³ Testimony of Parent A; testimony of Parent B; P-42.

¹⁴ Testimony of School Administrator (Nonpublic School-1).

5. Student resides with her two mothers (“Parents”/“Petitioners”) in Washington, D.C. Student has not been determined eligible for special education and related services.¹⁵

Family History

6. Student was originally placed into foster care in [YEAR] due to domestic violence in her biological mother’s home and the death of her baby sister from SIDS. She resided with a foster family during the weekdays, and with her biological mother on weekends. She was returned home to her biological mother approximately 11 months after her removal.¹⁶

7. In [YEAR+2], Student was again removed from her biological mother’s home after her biological mother left her at home alone overnight with no food in the home, and due to concerns about her biological mother’s mental stability.¹⁷

8. Upon coming into foster care in [YEAR+2], Student was placed in Parents’ home for the first time, where she has remained. On or around September 15, 2014, Parents adopted Student, changed the spelling (but not the pronunciation) of her first name, and changed her last name.¹⁸

9. Student had been excited and happy to live with Parents for the first six weeks she was in foster care in [YEAR+2], but after that time she began to feel distressed and wanted to return to her biological mother/original home. Student continues to experience strong and adverse emotions due in part to a combination of past trauma; missing her biological mother and her deceased biological sister, and fears that she will never see her biological mother again; and a struggle to fully embrace her adoption, though she is happy that Parents love her and take care of her. Student is self-conscious about having a different skin color than Parents, but is striving to fully identify with her new family and to be a good daughter to Parents. At present, Student tends to direct many of her difficult and conflicting feelings toward Parents, including through anger and aggression toward them.¹⁹

10. Starting in September 2014, Student experienced an intensely volatile six-week period, characterized by kicking, spitting and cursing, and at times requiring multiple adults to restrain her (“the six-week period”). The six-week period was largely precipitated by Student’s anxieties around her September 15, 2014 adoption finalization. Life transitions, anniversaries of past life transitions, holidays such as Mother’s Day and other events that stir up stressful emotions for her continue to trigger emotional dysregulation for Student; however, she has not subsequently experienced a period of similarly intense behaviors such occurred during the six-week period.²⁰

¹⁵ Testimony of Parent A; P-3-1.

¹⁶ P-3; P-5-2; P-23-2; P-32-2; P-32-13; R-11-3.

¹⁷ Testimony of Parent A; P-3; P-5-2; P-23-2; P-32-2; P-32-13.

¹⁸ Testimony of Parent A.

¹⁹ Testimony of Parent A; P-32-2; P-32-3.

²⁰ P-32-12; R-11-15.

11. Parents are expecting a new baby in December 2015. Student has a lot of concerns about her mother's pregnancy and what it means for Student's role in the family. Student also has fears for the new baby's well-being, given that her biological baby sister died.²¹

Diagnoses, Medication & Hospitalizations

12. Student was identified with sensory seeking behaviors by at least October 23, [YEAR+3].²²

13. During the summer of 2014, Student was diagnosed with Post Traumatic Stress Disorder ("PTSD"). By approximately August 22, 2014, Parents had informed District Elementary School of the PTSD diagnosis, and that Student's doctor had recommended she receive a 504 Plan.²³

14. Prior to December 13, 2014, Student had a diagnosis of Reactive Attachment Disorder.²⁴

15. In an independent psychological evaluation by School Psychologist (Nonpublic School-2), Student was diagnosed with Attention Deficit/Hyperactivity Disorder/Impulsive Type on March 23, 2015.²⁵

16. In May 2015, Student was diagnosed with Mood Disorder, Not Otherwise Specified.²⁶

17. Starting from at least August/September 2014, Student has been prescribed medications, including to treat her impulsivity, anxiety, aggression, and attention issues, and to assist her with sleeping at night.²⁷

18. On approximately September 24, 2014 Student was admitted for a one-day psychiatric hospitalization at the request of her community-based therapist, after Student became agitated and unable to calm down during her weekly community-based therapy session.²⁸

19. From approximately May 3, 2015 through May 8, 2015, Student was admitted for a six-day psychiatric hospitalization after Student had a week, and particularly a weekend, full of escalating behaviors and aggressive episodes at home, culminating in her unlocking an upstairs window, which she appeared to be preparing to jump out of.²⁹

²¹ Testimony of Parent A.

²² P-5-1.

²³ P-7-5.

²⁴ P-22-3.

²⁵ P-32-16.

²⁶ P-39-1.

²⁷ P-8-1; P-13-7; P-22-1; P-22-3; P-37-1.

²⁸ Testimony of Parent A; P-13-3; P-22-1; P-23-2.

²⁹ Testimony of Parent A; P-35-1; P-38-1. Student denies that she intended to jump out of the window. Testimony of General Education Teacher.

504 Plan

20. Parents and DCPS met on September 16, 2014 to discuss Student's eligibility for services pursuant to Section 504 of the Rehabilitation Act of 1973 ("504 Plan") based on Student's PTSD diagnosis. On that date, Student was determined eligible for a 504 Plan.³⁰

21. On September 16, 2014, Student's multidisciplinary team ("MDT") prepared a draft 504 Plan for Student, which called for Student to receive social skills supports, largely integrated with regular classroom instruction.³¹ The September 16, 2014 draft also indicated that District Elementary School agreed to complete a functional behavior assessment ("FBA") and a behavior intervention plan ("BIP").³²

22. Parents requested modifications to the September 16, 2014 draft 504 plan, and after a lengthy delay a finalized version of the 504 Plan was prepared on March 17, 2015.³³

23. The March 17, 2015 finalized 504 Plan calls for Student to receive behavioral support services through mental health professionals to address social skills, social skills supports integrated with regular classroom instruction, seating in close proximity to the teacher and other special seating arrangements, an introduction to pertinent school staff/teachers before Student attends classes/significantly interacts with them, repetition of instructions, clear expectations to be set for Student throughout the day, classroom rules/goals to be reviewed with Student throughout the school day, a BIP, a cool out space for Student within the classroom setting, and that Student would be tested in a small group setting or one-on-one with a familiar facilitator.³⁴

In-School Experiences/Behaviors

24. During the 2013-2014 school year, Student experienced some adverse behaviors, some which were "very bad" and some of which were "not too bad."³⁵ Student's 2013-2014 school year teacher made a few calls to Parents throughout the school year with questions about Student's behavior. However, overall, Student's in-school behavior was largely positive and better than Parents had anticipated it would have been that school year, which Parents attributed to the fact that she had been assigned to a veteran teacher.³⁶

25. Student's behavior at the beginning of the 2014-2015 school year was more challenging, especially during the six-week period. For example, on approximately September 8, 2014, Student became disruptive in the school library and began climbing shelves and throwing books. Student's classmates had to be removed from the library due to safety concerns. Student

³⁰ Testimony of Parent A; P-11.

³¹ P-12-4.

³² P-12-5.

³³ Testimony of Parent A; P-31.

³⁴ P-31-4 through P-31-5.

³⁵ Testimony of Parent A.

³⁶ P-8-1.

would not cooperate in cleaning up the mess, and was escorted by the security guard to the main office.³⁷

26. Student's behavioral challenges are mostly evident at home, though sometimes in the academic setting as well,³⁸ particularly during less structured times such as during "specials" (non-Core Classes), during transitions and with substitute teachers.³⁹

27. Student's behavior improved over the course of the 2014-2015 school year, especially after the six-week period. District Elementary School used an electronic application to track the behavior of their students, including Student. Student's behavioral points were relatively low some weeks during the school year (e.g. a 65% and a 71% after the six-week period in May 2015);⁴⁰ however, overall her in-school behavior was largely positive (83% positive overall, out of a possible 100%). For instance, while Student had approximately four adverse behavioral incidents in September 2014,⁴¹ she did not have any significant adverse behaviors from October through December 2014.⁴² The overall intensity of Student's behavioral challenges was low.⁴³

28. Student generally responds well to positive behavioral support interventions in the classroom.⁴⁴

29. There have been no attendance concerns for Student during the 2013-2014, 2014-2015 or 2015-2016 school years.⁴⁵

30. Student has never been suspended from school.⁴⁶

31. Student tends to feel self-conscious with respect to adult conversations about her, and can perceive adult meetings regarding her as occasions for adults to discuss her in a negative manner. Student is concerned with peer teasing, which causes her anxiety and anger.⁴⁷

School Responses to Student's Experiences/Behaviors

32. During the final month of the 2013-2014 school year, Student had been injured several times in one week, including with her braids being pulled so hard that her decorative hair beads came out and some hair was pulled from her scalp, her lip being cut with scissors on one occasion, and with her being left alone to change clothes with a male student in the bathroom,

³⁷ P-24-4.

³⁸ R-11-4.

³⁹ P-13-6; P-22-2.

⁴⁰ P-41-2; P-41-3.

⁴¹ P-22-1.

⁴² P-24-2.

⁴³ P-24-1.

⁴⁴ P-32-5.

⁴⁵ P-22-4; P-63-1.

⁴⁶ Testimony of Parent B.

⁴⁷ P-32-13.

resulting in both children running around the classroom naked, and to which the response from the District Elementary School staff who responded to the situation (three of them looming over her demanding to know why she had run around naked) was likely overwhelming and possibly traumatizing to Student given her trauma history.⁴⁸

33. On several occasions in September 2014, during adverse behavioral incidents, a security guard would escort Student from one area of the school building to another. Given her history of home removals by police officers, such interactions with security guards were triggers for Student's anxiety and PTSD. Parents requested that District Elementary School avoid having Student escorted by security guards.⁴⁹

34. In September 2014, Student had an adverse behavioral incident in physical education. The physical education teacher indicated to Parent A in front of Student that Student was not welcome to return to his classroom.⁵⁰ Given her trauma history and diagnoses, this type of response could be triggering and traumatizing for Student, and interpreted as rejection.⁵¹

35. In March 2015, the physical education teacher called Parents expressing concerns that Student was punching, kicking or hitting someone, and asked that Parents speak with Student to try to find a solution.⁵²

36. District Elementary School at times responded to Student's adverse behaviors by removing her from recess and/or not allowing her to attend specials, practices with which Parents strongly disagreed.⁵³

37. To minimize singling Student out and making her feel self-conscious, Social Worker (DCPS) would often provide social skills support to Student's entire class 2-3 times per week during the 2014-2015 school year, rather than pulling Student out of class. Social Worker (DCPS) also at times pulled Student out of class for social skills support.⁵⁴ Student could benefit from a social skills support group; however, District Elementary School did not have an age-appropriate social skills group for Student to join.⁵⁵

38. District Elementary School utilized a "buddy classroom" strategy to assist students, including Student, with calming down when needed. This means that when a student is having behavioral difficulties in their assigned classroom, s/he may be sent to another classroom for a period of time, led by another teacher with whom the student has built a rapport.⁵⁶ Student's teacher from the 2013-2014 school year (one grade level below Student's then-current

⁴⁸ Testimony of Parent A; P-7-1 and P-7-2.

⁴⁹ Testimony of Parent B; P-9-3; P-9-6; P-9-10; P-9-11; P-9-13; P-24-4.

⁵⁰ P-13-1.

⁵¹ Testimony of Parent A.

⁵² Testimony of Parent A.

⁵³ Testimony of Parent B; P-21-1; P-21-2; P-33-3.

⁵⁴ Testimony of Parent B; testimony of Social Worker (DCPS); P-13-6.

⁵⁵ Testimony of Parent A; P-13-6; P-22-5; P-26-31; P-31-2.

⁵⁶ P-9-6; P-10-2; P-24-2.

grade) was often used as a buddy classroom teacher for Student during the 2014-2015 school year when General Education Teacher was out for the day, as Student tended to have difficulty responding appropriately with a substitute teacher at the beginning of the school year.⁵⁷ On some occasions Parents were supportive of this practice,⁵⁸ but they did not anticipate or approve of the practice being used as often as it was during the 2014-2015 school year.⁵⁹ There were three other classrooms in Student's grade. Two of three were inappropriate buddy classrooms because they were Spanish immersion. The third classroom was led by a male of the same race as Student's biological father. Parents had requested that Student not be sent to his room, because of the traumatic experience Student had with her biological father.⁶⁰

39. Student made socio-emotional progress throughout the 2014-2015 school year. For instance, she learned leadership skills. She was a line leader, hall monitor, bathroom monitor, and a table leader with small group assignments. She was able to finish her work and answer other students' questions.⁶¹

40. Both District Elementary School and Nonpublic School-1 utilize positive reward systems, to which Student responds well.⁶²

41. Student receives weekly individual and group counseling at Nonpublic School-1, in addition to integrated therapy throughout the school day.⁶³ Nonpublic School-1 is able to counsel students at a deeper level than District Elementary School could do, as counseling support at District Elementary School is designed solely to help students in the context of the educational setting.⁶⁴

42. Nonpublic School-1's disciplinary techniques include physical restraint and time-out/exclusion. Nonpublic School-1 uses physical restraint only as a last resort; however, Student has had to be physically restrained while at Nonpublic School-1. Student has also been placed in time out at Nonpublic School-1; however, they have learned that isolating Student from the classroom setting does not work well for her.⁶⁵

School Relationships

43. Student was generally friendly with her classmates at District Elementary School, and was able to work well with others with redirection. She had a small circle of close friends in

⁵⁷ P-13.

⁵⁸ P-13-1.

⁵⁹ Testimony of Parent A; testimony of Parent B.

⁶⁰ Testimony of General Education Teacher.

⁶¹ Testimony of General Education Teacher.

⁶² Testimony of Special Education Teacher (Nonpublic School-1); testimony of General Education Teacher.

⁶³ Testimony of School Administrator (Nonpublic School-1); testimony of Social Worker (Nonpublic School-1)

⁶⁴ Testimony of Parent A; testimony of School Administrator (Nonpublic School-1); P-13-6.

⁶⁵ Testimony of School Administrator (Nonpublic School-1); P-44.

the 2014-2015 school year. In particular, she called one close friend her “brother, and another close friend her “sister.”⁶⁶

44. Student was nurturing and protective toward her friends at District Elementary School. She wanted to make sure they had what they needed, and she was willing to share with them.⁶⁷ However, sometimes Student would allow herself to be taken advantage of by classmates, such as when she allowed a classmate to pull her hair in exchange for the classmate giving her some chips.⁶⁸

45. Student had a very close relationship with General Education Teacher, her teacher from the 2013-2014 school year, and the school psychologist. Student loved going to General Education Teacher’s class, and would tell Parents that she missed going to District Elementary School during breaks. During one 2014-2015 school year break, Student drew a picture of her “school family” which included General Education Teacher, her teacher from the 2013-2014 school year and others. Student referred to the school psychologist as “her mother,” in part because they physically resemble one another. The District Elementary School staff members with whom Student closely bonded have a reciprocal, genuine, and deep level of care, concern and love for Student.⁶⁹

46. On the second to the last day of the 2014-2015 school year (last full day of the school year), Student became extremely distraught because she knew she would not be returning to District Elementary School the following school year. She grieved the notion of possibly never again seeing General Education Teacher and some of the other District Elementary School personnel with whom she had developed a close relationship. General Education Teacher asked Parent A to come inside the school to help calm Student, and they found Student in the stairwell standing on a stack of books. Student was inconsolable, and General Education Teacher had to literally carry her to the car and prove to her that she and Parents had each other’s cell phone numbers and could reach each other in the future before Student could begin to calm herself.⁷⁰

47. When Student first entered Nonpublic School-1 in July 2015, she was guarded, reserved, hypervigilant, competitive with other students and in a bit of a shell. These behaviors persist, but there has been some improvement in these behaviors.⁷¹ When Parents are with Student at Nonpublic School-1 (such as when they are picking her up from school), Student can be loving towards them one minute and aggressive toward them the next.⁷²

⁶⁶ Testimony of General Education Teacher.

⁶⁷ Testimony of Social Worker (DCPS).

⁶⁸ Testimony of General Education Teacher.

⁶⁹ Testimony of Parent A; testimony of General Education Teacher.

⁷⁰ Testimony of Parent A; testimony of General Education Teacher.

⁷¹ P-50; P-61.

⁷² Testimony of School Administrator (Nonpublic School-1); testimony of Special Education Teacher (Nonpublic School-1).

48. Student sometimes exhibits disruptive behaviors towards others and has displayed overly sensitive feelings in the each of the various schools she has attended, as well as at home.⁷³

2014 Request for Evaluation

49. Right after Student was hospitalized in September 2014, Parents requested that DCPS evaluate her for special education and related services.⁷⁴

50. In October 2014, the school psychologist who worked at District Elementary School at that time (a different person from “School Psychologist (DCPS),” who testified at the DPH) asked Parents to reconsider their request to evaluate Student, because she did not think Student would qualify. Student had previously been evaluated through Early Stages and not found eligible, and the school psychologist did not believe Student’s eligibility status had changed since that time, given her strong academic performance.⁷⁵

Educational Evaluations

51. On approximately September 29, [YEAR], Student received a developmental evaluation from Children’s National Medical Center⁷⁶ at the request of Child and Family Services Agency. Student, who was not yet school aged, was determined to have significant language delays at that time, as well as immature nonverbal problem solving skills. Student was said to engage in “searching” behavior when upset.⁷⁷

52. On October 23, [YEAR+3], Student received an evaluation from DCPS Early STAGES to assess whether Student would qualify for special education and related services as a student with a developmental delay. Student tested in the average range in verbal reasoning, visual spatial abilities and working. Student’s nonverbal reasoning and processing speed abilities fell within the low average range.⁷⁸ With respect to her academic functioning, Student tested in the average range in reading, mathematics and early achievement composite; and Student tested in the high average range in general information, writing, and spoken language.⁷⁹

53. On October 23, [YEAR+3], Student’s socio-emotional and behavioral status was also assessed. Student’s scores reflected very elevated levels of inattentiveness/hyperactivity and defiance/aggressive behaviors at home and at school. The data also reflect elevated levels of anxiety and very elevated mood/affect concerns for Student at home, though Student scored in the average range for these measures at school.⁸⁰

54. The October 23, [YEAR+3] evaluation concluded that the data did not support a conclusion that Student could be classified as having a developmental delay under the IDEA.

⁷³ P-22-10.

⁷⁴ Testimony of Parent A; P-13-5.

⁷⁵ Testimony of School Psychologist (DCPS); P-13-9.

⁷⁶ P-2

⁷⁷ P-2-3.

⁷⁸ P-6-3 through P-6-5.

⁷⁹ P-5-3.

⁸⁰ P-6-5.

The report concluded that the impact of Student's removal from her home and placement in foster care could not be ruled out as a factor for her delays.⁸¹

55. On approximately December 13, 2014, Student received an educational evaluation from DCPS.⁸² With respect to her cognitive abilities, Student tested in the average range for verbal intelligence, nonverbal intelligence, composite memory index (a combined score representing verbal and nonverbal memory subtests), and composite intelligence (a combined score representing verbal and nonverbal intelligence index scores).⁸³ With respect to her academic functioning, Student tested in the average range in general information, reading, mathematics and writing; and Student tested in the above average range in spoken language and early achievement composite.⁸⁴

56. On December 13, 2014, Student's socio-emotional status was also assessed, by way of questions posed to Parents and to General Education Teacher. Parents' scores reflected that Student had characteristics that were indicative of an emotional disturbance in the areas of relationship problems and unhappiness/depression. Both Parents and General Education Teacher reported scores that were indicative of an emotional disturbance in the area of inappropriate behavior. Both Parents and General Education Teacher reported scores that were highly indicative of an emotional disturbance in the area of physical symptoms (including distressful feelings and thoughts; maladaptive motor behavior and verbal behavior; as well as unpleasant physical reactions). Neither Parents nor General Education Teacher reported scores that were indicative of emotional disturbance in the area of inability to learn.⁸⁵ Both Parents and General Education Teacher reported clinically significant internalizing behaviors from Student, consistent with her PTSD diagnosis, which warrant intervention at school and at home. Parents reported clinically significant externalizing behaviors at home in the areas of aggression and conduct problems, while General Education Teacher reported at-risk scores in these domains. Parents and General Education Teacher reported clinically significant scores of hyperactivity for Student. Parents and General Education Teacher reported clinically significant behavioral scores.⁸⁶

57. The December 13, 2014 evaluation concluded Student was not experiencing an adverse effect on her educational performance so as to render her eligible for special education and related services under the educational classification of Emotional Disturbance.⁸⁷

58. Student received a functional behavior assessment ("FBA") on December 19, 2014.⁸⁸ The FBA found that Student has a history of physical aggression, defiant behaviors,

⁸¹ P-6-7.

⁸² P-20.

⁸³ P-2

⁸³ P-6-3 through P-6-5; P-22-4.2-6 through P-22-7.

⁸⁴ P-22-9 through P-22-10.

⁸⁵ P-22-10 through P-22-11.

⁸⁶ P-22-12.

⁸⁷ P-22-16.

⁸⁸ R-11.

property destruction and elopement,⁸⁹ and that her behavioral difficulties had significantly decreased since September 2014.⁹⁰ Among other things, the FBA recommended that a behavioral intervention plan be developed for Student, that negative stimuli be reduced and throughout the day, that Student be taught alternative ways to deal with stressful situations and that school staff collaborate with Student's community-based therapist.⁹¹

59. On February 6, 2015, Student's MDT developed a Behavior Intervention Plan ("BIP") for her, with the goal of increasing Student's ability to remain on task, follow staff instructions, effectively manage her feelings of anger/frustration, and improve her ability to maintain positive relationships with peers and adults.⁹²

60. On approximately March 23, 2015, Student received an independent psychological evaluation ("IEE") from School Psychologist (Nonpublic School-2).⁹³ School Psychologist (Nonpublic School-2) did not conduct additional academic testing, but reviewed and summarized some of the academic and cognitive testing previous reviewers had conducted.

61. The March 23, 2015 IEE indicates that Student's "difficulties with school routines may not be solely a matter of will or emotionally-driven responses but may reflect executive functioning weaknesses that interfere with her ability to grasp and manage tasks."⁹⁴ School Psychologist (Nonpublic School-2) concluded that Student "should be provided with special education services as a student with Emotional Disturbance to improve her coping and develop basic social skills. While some of [Student's] behaviors are being contained in the school setting at present," School Psychologist (Nonpublic School-2) is of the opinion that "this approach does not teach [Student] important skills she will need to progress in the school environment."⁹⁵ School Psychologist (Nonpublic School-2)'s IEE did not take the position that Student required special education services in order to access the general education curriculum.⁹⁶

62. On May 20, 2015, DCPS reviewed the IEE and determined it to be valid, though the DCPS members of Student's MDT did not agree with the evaluator's conclusion that Student should be determined eligible for special education and related services.⁹⁷

63. On approximately May 18, 2015, Student received an occupational therapy screening from DCPS which demonstrated that Student falls in the typical range of performance on most measures; however, she engages in sensory seeking behaviors, can be easily distracted and needs prompting to stay on task.⁹⁸

⁸⁹ R-11-2.

⁹⁰ R-11-2.

⁹¹ R-11-5.

⁹² P-28.

⁹³ P-32.

⁹⁴ P-32-15.

⁹⁵ P-32-16.

⁹⁶ Testimony of School Psychologist (Nonpublic School-2).

⁹⁷ P-39; P-40.

⁹⁸ P-38.

Academic Performance

64. During the 2013-2014 school year, Student's report card grades were at the Basic (second lowest of four possible levels) level in reading, writing/language, speak and listening, mathematics, social studies, and science ("Core Classes") for the first term of the school year. By the third term of the school year, she was at the Proficient level (second highest of four possible levels), and by the final term of the school year, she was at the Advanced (highest of four possible levels) in three of the Core Subjects and the Proficient level in the remaining Core Classes.⁹⁹ Student's grades in specials were largely in line with her grades in Core Classes.

65. During the 2014-2015 school year, Student's report card grades were at the Basic level in reading, writing/language, mathematics, social studies and science and the Proficient level in speaking and listening for the first term of the school year. By the second term of the school year, she remained at the Basic level in reading, improved to the Advanced level in speaking and listening, and improved to the Proficient level in the remaining Core Classes. By the third term of the school year, Student remained at the Advanced level in speaking and listening, and was at the Proficient level in her remaining Core Classes. By the fourth term of the school year, Student was at the Advanced level in all her Core Classes.¹⁰⁰ Student's grades in specials were largely in line with her grades in Core Classes.

66. During the 2014-2015 school year, Student's DIBELS scores (measuring her reading levels) reflected that she was reading at the Proficient level at the beginning of the school year, had reached a higher level within the Proficient level by the middle of the school year, and had progressed to Above grade-level by the end of the school year.¹⁰¹

67. During the 2014-2015 school year, Student's iReady scores (measuring her mathematics levels) reflected that she was less than one grade level below expectations at the beginning of the school year (October 24, 2014). By the middle of the school year (January 20, 2015), her score was higher and still less than one grade level below expectations. By the end of the school year (June 3, 2015), Student's score had significantly improved and she had exceeded the goal for her grade.¹⁰² Student made significant progress on this test even though 2014-2015 was the first year students in her grade had taken this type of assessment. The school no longer administers that examination to students in that age group because, as a computerized examination, it is not considered developmentally appropriate for them.¹⁰³

68. During her first term at Nonpublic School-1, Student performed at or above grade level in all subjects. She was Proficient (second highest of four levels) in language arts, reading and science and Advanced (highest of four levels) in mathematics and social studies.¹⁰⁴

⁹⁹ R-6.

¹⁰⁰ R-16; R-17.

¹⁰¹ R-18.

¹⁰² R-21.

¹⁰³ Testimony of General Education Teacher.

¹⁰⁴ P-63.

January 2015 Eligibility Meeting

69. On January 26, 2015, Student's MDT met to determine her eligibility for special education and related services under the disability classification "Emotional Disturbance." Finding that Student did not have an adverse impact her educational performance, the team did not find her eligible for special education and related services.¹⁰⁵ Parents did not agree with the MDT's conclusion that Student was not eligible;¹⁰⁶ however, they were meaningful participants in the meeting.

May 2015 Eligibility Meeting

70. On May 20, 2015, Student's MDT met to determine her eligibility for special education and related services under the disability classification "Emotional Disturbance." Finding that Student did not have an adverse impact her educational performance, the team did not find her eligible for special education and related services.¹⁰⁷ Parents did not agree with the MDT's conclusion that Student was not eligible;¹⁰⁸ however, they were meaningful participants in the meeting.

Requests for Educational Consultant to Observe

71. In November 2014, Educational Consultant requested permission from District Elementary School to observe Student in the classroom. District Elementary School denied the request.¹⁰⁹

72. In April 2015, citing recent changes to DCPS observation policy, Educational Consultant again requested permission from District Elementary School to observe Student in the classroom. District Elementary School again denied the request.¹¹⁰

73. Educational Consultant was attempting to observe Student in November 2014 and April 2015, but was not seeking to conduct an evaluation of Student.¹¹¹

74. DCPS did not prevent Parents themselves from visiting/observing Student in the classroom.¹¹²

CONCLUSIONS OF LAW

"Based solely upon 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 FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

¹⁰⁵ R-13.

¹⁰⁶ Testimony of Parent A.

¹⁰⁷ P-40.

¹⁰⁸ Testimony of Parent A.

¹⁰⁹ Testimony of Parent A; testimony of Educational Consultant; P-19.

¹¹⁰ Testimony of Educational Consultant; P-34.

¹¹¹ Testimony of Educational Consultant.

¹¹² Testimony of Parent B.

Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

(a) Whether DCPS denied Student a FAPE by failing to determine her eligible for special education and related services under the disability classification “Emotional Disturbance” (“ED”) and/or other disability classification on January 26, 2015 and/or May 20, 2015.

The IDEA defines a student as eligible for special education and related services under the disability classification “Emotional Disturbance” when the student exhibits “one or more of the following characteristics over a long period of time and to a marked degree that adversely affects [the] child’s educational performance.”

(A) *An inability to learn that cannot be explained by intellectual, sensory, or health factors.* Student has not demonstrated any inability to learn. Her evaluations, report card grades, iReady and DIBELS assessments all reflect that Student is a strong learner, tremendously bright, and an effective student, despite hospitalizations and other challenges.

(B) *An inability to build or maintain satisfactory interpersonal relationships with peers and teacher.* Student has some interpersonal relationship struggles. However, she has the ability to develop and maintain not only satisfactory but also strong relationships with peers and adults she connects with, despite her attachment disorder and significant stream of broken attachments over the years that were outside of her control (such as the death of her infant sister, removal on two occasions from her biological mother, placement in a foster home and then removal after nearly a year, attendance at four different schools, loss of contact with her biological mother, etc.). Student’s ability to build and maintain interpersonal relationships is demonstrated by her close relationship with her “brother”/friend and her “sister”/friend at District Elementary School, and the close relationships she developed with General Education Teacher, her 2013-2014 school year teacher, and the school psychologist at District Elementary School. Ideally, Student will soon be able to bond with Parents above all others. However, given the number of significant life changes Student has experienced in the not-too-distant past, it is perhaps understandable, while lamentable, that her parental relationships are not yet as strong and close they likely will be with time.

(C) *Inappropriate types of behavior or feelings under normal circumstances.* Student has demonstrated inappropriate behaviors. One example of particularly concerning behavior is when Student appeared to be preparing to jump out of the window. On the other hand, she has not experienced what could be considered “normal”/typical circumstances since at least [YEAR],

if ever. Prior to coming into foster care for the first time, Student lived in a home with domestic violence, where her biological mother may have been mentally unstable. Her baby sister whom she loved and still mourns died, which was heartbreaking and traumatizing to her. She was removed on two occasions from her home by strangers, and placed on two occasions in the home of strangers. She went from seeing her biological mother on a regular basis to not seeing her at all. She has attended four different schools in a relatively few years. She has been adopted and had her name changed. And while many of these changes are vitally important to her best interests, she has nonetheless likely experienced them as series of painful upheavals. She is now in a stable and loving home, but some of her major life transitions are still fairly fresh. Under these atypical circumstances, it is not unexpected that she would struggle with strong and adverse feelings at this early point in her journey, even while undergirded with the abiding love, support, protection and unyielding commitment of Parents.

(D) A general pervasive mood of unhappiness or depression. Student struggles with mood swings, unhappiness and depression at times, but can also be joyful.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems. Student has a tendency to be anxious, largely over family concerns such as learning to allow herself to fully embrace Parents' love for her while finding peace with the loving feelings and loyalty she perhaps still feels for her biological family. She has some fears, such as for the safety of her soon-to-born sibling. Like many children, she also fears being teased. Student's anxieties and specific fears are of heightened significance due to her attachment issues and trauma history; however, the record does not seem to indicate that Student has a general *tendency* to develop physical symptoms or fears associated with personal or school problems.

The Hearing Officer credits the opinion in the December 2014 DCPS psychological evaluation that Student does not meet either of the five characteristics, over the testimony of School Psychologist (Nonpublic School-2) that Student meet characteristics "(B)," "(D)" and "(E)." Overall, the conclusions of the DCPS psychological evaluation align with the Hearing Officer's reading of the bulk of the evidence. Additionally, the DCPS evaluation's conclusions are more closely focused on, and based on more direct knowledge of, the extent to which Student's emotional difficulties impact her educational performance than the IEE. Because the IEE recommended that Student be found eligible solely based on her socio-emotional needs even though Student is accessing the general education curriculum, the Hearing Officer assigned less weight to the IEE and the testimony of School Psychologist (Nonpublic School-2).

Witnesses for Petitioners testified that they thought Student met some of the five characteristics "(A)" through "(E)," and the socio-emotional testing conducted by both sets of evaluators can be interpreted as consistent with their conclusions. While the Hearing Officer concurs with the DCPS psychological evaluation, that based on the totality of the data she does not meet the five criteria, even if *arguendo* Student does meet one or more of characteristics, the Hearing Officer does not find that Student has suffered any of these characteristics over a long period of time and to a marked degree. Particularly in the school setting, Student does not demonstrate any of these characteristics to a marked degree. She has had periods of intense and

severe in-school behaviors, but these periods have been relatively short-lived, such as the six-week period. Otherwise, Students behaviors are largely mild.

Additionally, Student does not meet a central criterion for Emotional Disturbance eligibility – an adverse effect on her educational performance. Student’s academic abilities, as demonstrated by her cognitive testing, are average or above. There are students with average or high cognitive ability who nevertheless require special education and related services to access their education, even if they are progressing from grade to grade. 34 C.F.R. §300.101(c). However, the Hearing Officer does not conclude that Student is such a student. Every measure, including report cards, formal assessments, subject-specific assessments such as the iReady and DIEBELS show Student learning, growing, progressing and even thriving academically – in the general education setting of District Elementary School as well as in the small special education setting at Nonpublic School-1 – even while experiencing several rapid and significant changes in her life. To the extent that experts for Petitioners assert that Student is experiencing adverse educational impact, the Hearing Officer does not credit their conclusions, as the data do not support such as conclusion.

For instance, School Psychologist (Nonpublic School-2) concluded in her IEE that Student “should be provided with special education services as a student with Emotional Disturbance to improve her coping and develop basic social skills. While some of [Student’s] behaviors are being contained in the school setting at present,” School Psychologist (Nonpublic School-2) took the position that “this approach does not teach [Student] important skills she will need to progress in the school environment.” However, School Psychologist (Nonpublic School-2)’s IEE did not take the position that Student required special education services in order to access the general education curriculum. Pursuant to the IDEA, even if a child would otherwise has a disability such Emotional Disturbance, “but only needs a related service and not special education, the child is not a child with a disability.” 34 C.F.R. § 300.8(a)(2)(i). Petitioners assert that a broader definition of educational performance should apply to Student. However, Student’s situation is distinct from cases Petitioners cite such where the students’ behaviors are so severe that they interfere with their ability to remain in school and/or make academic progress, such as *Indep. Sch. Dist. No. 284 v. A.C., by & through her Parent, C.C.*, 258 F.3d 769 (8th Cir. 2001) and *Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir.1992).

The buddy classroom system District Elementary School utilized with Student was not ideal, particularly because the buddy classroom they used for her was in a lower grade. However, classrooms on Student’s grade level were not excluded because Student could not handle being on grade level. Two of the same-grade level options were Spanish immersion, which had not worked well for her, and the remaining grade-level classroom was not selected at Parents’ request. The buddy classroom selected was led by Student’s 2013-2014 teacher, with whom Student had a rapport. Notwithstanding the time Student spent in the buddy classroom, she continued to make significant academic progress.

The Hearing Officer does not find that Petitioners met their burden of proving that DCPS denied Student a FAPE by failing to determine her eligible for special education and related services on January 26, 2015 and/or May 20, 2015.

(b) Whether DCPS denied Student a FAPE by predetermining in October 2014 that she was ineligible for special education services prior to the completion of her assessments.

The IDEA requires “[u]pon completion of the administration of assessments and other evaluation measures,” LEAs to ensure that a “group of qualified professionals and the parent of the child determines whether the child is a child with a disability.” 34 C.F.R. § 300.306(a)(1). Petitioners argue that when the school psychologist attempted to persuade Parents not to pursue eligibility, she and by extension Respondent had determined that Student was not eligible prior to the completion of the requested assessments. However, Student had been assessed in [YEAR+3] and not been determined eligible due to lack of adverse educational impact. Student’s academic performance had remained strong since that time, and based on that fact, the school psychologist was of the opinion that Student would not meet the eligibility criteria. Petitioners cite to several cases dealing with predetermination with respect to appropriate IEPs and placements for students who have already been determined eligible for special education and related services.¹¹³ Though these cases are distinguishable, applying them by analogy, it is clear that “although a school board must come to the [eligibility process] with an open mind, it does not have to come with a blank mind.” *M.C.E. v. Board of Education*, 2011 WL2709196, *9 (D. Md. 2011). “[S]chool officials are permitted to form opinions” prior to eligibility determinations, “as long as school officials are ‘willing to listen to the parents.’” *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), citing *Ms. C. ex rel. N.L. v. Knox County Schools*, 315 F.3d 688, 693-94 n.3 (6th Cir. 2003).

Based on the available data, including Student’s previous eligibility process, the school psychologist was of the opinion that Student would not meet the adverse educational impact prong of the eligibility test. Sharing this caution with Parents before undertaking a rigorous course of testing with Student did not constitute predetermination, particularly since Student was in fact thoroughly assessed, including through various testing measures administered to Parents. DCPS also authorized Parents to obtain an IEE when Parents did not agree with the conclusions of the DCPS evaluations, and the team considered the IEE for the May 2015 eligibility determination. Parents were meaningful participants in the January 2015 and May 2015 eligibility meetings, though DCPS members of Student’s MDT concluded at each meeting, and the Hearing Officer agrees, that the description of adverse educational impact Parents were advancing is more expansive than the law requires. “While [Petitioners] object[] to [the ultimate eligibility determinations, their] disagreement does not constitute exclusion from the decision-making process.” *Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 38 (D.D.C. 2014). The Hearing Officer does not find that the evidence establishes by a preponderance of the evidence that DCPS predetermined that Student was not eligible.

¹¹³ The IDEA also requires LEAs to ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” See 20 U.S.C. § 1414(e); 34 C.F.R. § 300.327.

(c) Whether DCPS denied Student a FAPE by refusing to allow Educational Consultant to observe her in the classroom in November 2014 and/or April 2015.

Petitioners cite to the DCPS Chancellor's February 2013 Directive on "School Visitors, School Records Release, and Barring Notice Procedures" ("Chancellor's Directive") and to D.C. Code § 38-2571.03(5) and for the proposition that DCPS denied Student a FAPE by refusing to allow Parents' educational consultant to observe Student at District Elementary School. The Chancellor's Directive indicates that "[c]lassroom observations can be conducted by parents," but that "[t]hird party persons (including attorneys and educational advocates) who are not evaluators or parents shall not be allowed to observe classrooms while children are in the classroom." Chancellor's Directive 4. Parents were not prohibited from observing Student. Educational Consultant is a third party who was not seeking to evaluate Student. A hearing officer's jurisdiction stems from the IDEA, its implementing regulations, Title V, Chapter E-30, of the D.C.M.R.; and chapter 38 of the D.C. Code. It would not extend to this administrative policy. However, even if it did, the Hearing Officer does not see a basis for concluding that DCPS violated the Chancellor's Directive.

D.C. Code § 38-2571.03(5), which went into effect in March 2015, indicates that "[u]pon request, an LEA shall provide timely access" to observe "a current or proposed special education program" to certain individuals including parents of a child with a disability, or a designee appointed by the parent of a child with a disability who professional expertise in the area of special education being observed. Student had not been determined to be a child with a disability in November 2014 or April 2015. The Hearing Officer has also not found Student to be a child with a disability under the IDEA in this decision. Additionally, Student was a general education student in 2014-2015, and did not have a current or proposed special education program. For these reasons, the Hearing Officer does not conclude that DCPS denied Student a FAPE pursuant to D.C. Code § 38-2571.03(5), by refusing to allow Educational Consultant to observe Student in November 2014 and/or April 2015.

ORDER

As no denial of FAPE was found on the issues alleged, Petitioners' requested relief must be **DENIED**. The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: November 20, 2015

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:

Petitioners (by U.S. mail)

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Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

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2015-0311
Hearing Officer Determination

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination, in accordance with 20 U.S.C. §1415(i).