

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
2012 APR - 9 AM 9:44

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a -year old female, who currently attends grade at a DCPS public charter school.

On January 23, 2011, Petitioner filed a Complaint against DCPS, alleging that DCPS (1) had denied Student a free appropriate public education ("FAPE") by failing to determine Student eligible for special education services, and (2) owed Student compensatory education services for the denial of FAPE. As relief for this alleged denial of FAPE, Petitioner requested findings in its favor, funding for 1:1 independent tutoring, funding for an independent speech and language evaluation, and an MDT meeting with all appropriate personnel to review the evaluation results, revise Student's program, discuss and determine compensatory education, and discuss and determine placement.

On February 2, 2012, DCPS filed its Response, which primarily asserted that Student was determined ineligible at a January 10, 2012 meeting after the team reviewed Student's most recent formal evaluation report and other evaluative data and information and determined that Student does not qualify under IDEA as a student with a disability.

The parties concluded the Resolution Meeting process by participating in a resolution session on February 24, 2012. No agreement was reached, but the parties did not agree to shorten the 30-day resolution period. Therefore, the 45-day timeline began on February 23, 2012 and will end on April 7, 2012, which is the HOD deadline.

On February 29, 2012, the hearing officer convened a prehearing conference for this case and led the parties through a discussion of the issues, relief requested, and other relevant topics. On March 5, 2012, the hearing officer issued a Prehearing Order.

By their respective letters dated March 15, 2012, Petitioner disclosed seventeen documents (Petitioner's Exhibits 1 – 17) and DCPS disclosed eleven documents (Respondent's Exhibits 1 – 11).

The hearing officer convened the due process hearing on March 22, 2012, as scheduled.¹ New DCPS counsel appeared to defend DCPS, and the DCPS supervisory attorney sat in for a significant portion of the hearing. All documents disclosed by both parties were admitted without objection, and neither party sought to have any emails included in the administrative record. Thereafter, the hearing officer received opening statements and testimonial evidence, and the hearing officer granted counsel's request to submit written closing statements.² The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to determine Student eligible for special education and related services at Student's January 12, 2012 eligibility meeting?

FINDINGS OF FACT³

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a _____ -year old female, who currently attends _____ grade at a DCPS public charter school.⁴
2. Student attended a DCPS elementary school through 5th grade, then she went for two years to a non-DCPS middle school that offered a smaller setting and focused on math

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² Both parties subsequently submitted their written closing statements by the established deadline of March 26th.

³ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved..

⁴ See Complaint at 3.

and science, and then she began attending 8th grade at the current DCPS charter school she has attended for the past two years. Student has always had a strong attendance record and she has received tutoring for many years. Nevertheless, Student has received poor grades year after year beginning in kindergarten.⁵

3. Student has experienced bullying over the years. There were a few instances of bullying in elementary school, more severe bullying at her non-DCPS middle school where other students threatened to fight her after school, and Student also experienced some bullying by a few students during the first few months after she began attending her current DCPS charter school.⁶
4. Student has experienced severe anxiety on the first day of attending new schools. On the first day of attending the non-DCPS middle school, Student was so anxious that she began throwing up on the way to school because she felt nervous and jittery about the work and the teachers and the other things involved with school. Similarly, Student was unable to go to school on the first day of her current DCPS charter school during SY 2010/11 because she became so anxious on the way to school that she began throwing up and lost her bowels, with the result that Parent had to take Student back home that day instead of taking her to school.⁷
5. Student has anxiety all the time, even at home. She stresses about things over which she has no control. Student has learned to mask her anxiety in school because she does not want to be embarrassed. She feels the other students think she's stupid or dumb.⁸
6. Student's cognitive abilities range from low average to average, with a Full Scale IQ score of 88, which is at the high end of the low average range of functioning.⁹
7. Student's academic skills, as measured by recent psychoeducational testing, are in the low average to average range.¹⁰
8. Student has a significantly high level of hyperactivity and attention problems resulting from her discomfort in classroom situations. Student's social agitation causes her to become self-isolated and intensely focused on her personal actions and self-amusing activities. These hyperactive, socially detached actions block Student's attention from the teacher and the instructional classroom activities. Student also struggles with learning new concepts.¹¹
9. Student has been diagnosed with Social Phobia, which previously was called Social Anxiety Disorder, and which can, in appropriate circumstances, meet the criteria for an emotional disturbance under IDEA. Moreover, a DCPS school psychologist opined in a

⁵ Testimony of Parent.

⁶ Testimony of Parent; testimony of Student.

⁷ Testimony of Parent.

⁸ Testimony of Parent; testimony of Student.

⁹ Petitioner's Exhibits 8 and 9; testimony of licensed psychologist.

¹⁰ Petitioner's Exhibits 8 and 9.

¹¹ Petitioner's Exhibit 8 at 9-11; Respondent's Exhibit 5 at 9 -11; *see also* Petitioner's Exhibit 9 at 5-7.

May 21, 2011 confidential psychological evaluation report that Student meets the eligibility criteria for Other Health Impaired (“OHI”) due to behaviors caused by her desire for peer acceptance, anxiety, and reactive behavior from recent bullying and teasing by peers and/or feeling ostracized by teachers.¹²

10. Despite her average to low average cognitive and academic abilities, Student has primarily earned grades of F for the past few school years. Hence, at the end of 7th grade in SY 2009/10, Student earned five Fs, one D-, one D+, and a C. At the end of SY 2010/11, Student earned three Fs, two grades of C-, and one B-. By the third quarter of the current school year, SY 2011/12, Student was earning an F in each of her six classes.¹³
11. Student performs at approximately a C level on her math classwork, and she can follow instructions once she has been shown an example. However, when critical thinking is involved and Student has to perform on her own, she shuts down. Student also shuts down during projects and gets very anxious during standardized tests. When Student shuts down, she falls asleep or she amuses herself by playing with a pen or drawing something so that she looks busy. This “self-amusing” tactic is one that Student uses often.¹⁴
12. Organization is also an issue for Student, because she does not take clear notes and does not keep her notes in one place. The lack of notes causes Student to stall when it is time to complete an assignment.¹⁵
13. Student currently works with a co-teacher on a regular basis in approximately four of her classes. The co-teacher is a special education teacher who helps Student get physically prepared to complete her work. All of the students in the classes involved benefit from the co-teacher’s assistance, as his presence creates a smaller student-teacher ratio. Without the co-teacher, Student would not be performing as well as she does now in class.¹⁶
14. Overall, Student is not turning in enough of her classwork or homework in math to earn a passing grade. She is at an approximately 50% completion rate for both types of work. Her classwork is being negatively affected because Student gets distracted by social interactions and because of her lack of organization.¹⁷
15. Student does her homework every day but she does not turn it in. She is doing the homework on her own, because even though she attends after school tutoring every day, there are a lot of students in the program and the teachers do not help her with her homework unless she asks for help. Student does not turn in her homework because she

¹² See Petitioner’s Exhibit 8 at 10; Petitioner’s Exhibit 9 at 8; testimony of DCPS school psychologist.

¹³ Petitioner’s Exhibits 10, 11, 13, and 15; Respondent’s Exhibit 3.

¹⁴ Testimony of math teacher.

¹⁵ Testimony of math teacher.

¹⁶ Testimony of math teacher.

¹⁷ Testimony of math teacher.

does not understand it and she knows it's wrong. Student feels that it is not worth the effort to turn in homework that is wrong because only half of the credit will be awarded and she will still fail anyway. She feels embarrassed when she gets her homework back and it's wrong because she knows she tried her best and she already knows she did not understand the homework while she was doing it.¹⁸

16. Student now has a best friend in school. The best friend is Dominican, and she and Student cling to each other because they are both different.¹⁹
17. DCPS produced in connection with this hearing a May 21, 2011 DCPS confidential psychological initial evaluation report and a June 7, 2011 "updated" copy of the psychological report. The initial version of the report stated that Student may meet eligibility criteria for OHI based on her teacher's perceptions of her behavior but the final determination was to be made by the MDT, whereas the updated version of the report stated that Student appears to meet the eligibility criteria for OHI and the classification of ED is the most appropriate classification for her behavior. However, when DCPS convened its eligibility meeting for Student, it did not have the June 7, 2011 updated DCPS psychological report and Student was determined ineligible, even though the MDT normally follows the recommendations of DCPS evaluators.²⁰
18. At Student's January 12, 2012 eligibility meeting, the team reviewed Student's recent psychoeducational testing, noting that cognitive and academic skills were in the average range. The DCPS school psychologist noted that teacher scales were elevated in the areas of inattention and hyperactivity due to behavior at school, but Parent did not indicate any elevations in the home arena. The team reviewed the criteria for ED and determined that Student did not meet the criteria because she does not display an inability to maintain personal relationships with peers or teachers. The DCPS school psychologist further indicated that Student did not meet the criteria for OHI due to ADHD because Student's hyperactivity and inattention were not present in multiple locations, namely both at home and at school. The team noted Student's poor organization and planning skills. The team discussed Student's failure to turn in homework and how this negatively affects her grades. Student's teacher noted that, with respect to classwork, Student has difficulty getting motivated and getting started on writing assignments and has a hard time excluding all possible distractions and getting started on math assignments. Overall, the teacher felt Student is stimulated by many things and has a hard time honing in on one thing. The team discussed strategies that could be put in place to help Student in school.²¹
19. Petitioner has requested as compensatory education in this case 70 hours of academic instruction and 3 hours of independent mentoring services, based on Petitioner's estimate that Student would have received 2.5 hours of specialized instruction per day and 45 minutes of behavioral support services for the past 8 weeks had she been determined

¹⁸ Testimony of Parent; testimony of Student.

¹⁹ Testimony of Parent.

²⁰ Respondent's Exhibit 8 at 8; Respondent's Exhibit 9 at 3; testimony of DCPS school psychologist.

²¹ Petitioner's Exhibit 6; Respondent's Exhibit 3.

eligible for special education and related services on January 10, 2012.²² However, Petitioner failed to provide any expert or other convincing testimony establishing the reliability of its estimate of the amount of services and related services Student would have received.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Eligibility

Pursuant to IDEA, upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8. 34 C.F.R. § 300.306(a)(1). In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, and ensure that information obtained from all of these sources is documented and carefully considered. 34 C.F.R. § 300.306(c)(1). If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child. 34 C.F.R. § 300.306(c)(2).

IDEA provides that a child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having, *inter alia*, a serious emotional disturbance, an other health impairment, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1). For these purposes, emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or other health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers or teachers; (C) Inappropriate types of behaviors or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i). Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems such as, *inter alia*, attention deficit disorder or attention deficit hyperactivity disorder, and adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(9).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to determine her eligible for special education and related services at Student's January 10, 2012 eligibility meeting, while DCPS argues that the team properly determined Student ineligible after reviewing her most recent formal evaluation report and other evaluative data and information.

²² Petitioner's Exhibit 16.

A review of the evidence in this case reveals that three psychological evaluation reports have been issued for Student within the past year. The first report was issued by DCPS on May 2, 2011, and the evaluator opined that Student may meet eligibility criteria for OHI. The DCPS evaluator subsequently issued a corrected version of the evaluation report on June 7, 2011, stating once again that Student appears to meet eligibility criteria for OHI but recommending ED as the most appropriate classification for Student. Finally, the independent evaluation report issued for Student on December 11, 2011 diagnosed Student as having Social Phobia and recommended that she be determined eligible for services under IDEA with an ED classification. Hence, Student has been evaluated as having ED and possibly having OHI, but DCPS has determined that she is not a child with a disability under IDEA. *Compare* 34 C.F.R. § 300.8(a)(1), *supra* (child with disability means child evaluated as having serious emotional disturbance or other health impairment).

Moreover, DCPS admittedly failed to consider the updated June 7, 2011 DCPS evaluation report for Student at her eligibility meeting, despite IDEA's requirement that the eligibility team consider information from a variety of sources, including aptitude and achievement tests, and ensure that information obtained from all of these sources is documented and carefully considered. *See* 34 C.F.R. § 300.306(c)(1). Hence, the eligibility team failed to consider the DCPS evaluator's recommendation that Student be determined eligible under an ED classification, which was a significant departure from IDEA's procedural requirements given that the MDT normally adopts the recommendations of DCPS evaluators. *See* Finding of Fact ("FOF") 17.

Substantively, the evidence further reveals that although Student has average to low average cognitive abilities and academic skills, she has earned failing grades in almost all of her classes for the past three years and struggles with learning new concepts. *See* FOFs 8 and 10. DCPS asserts that Student's grades would be better if she simply turned in her homework assignments, but the evidence reveals that Student does not turn in her homework because she doesn't understand the homework when she's doing it, knows the homework is wrong, and knows she will receive a failing grade. *See* FOF 15. Hence, the evidence indicates that Student has an inability to learn that cannot be explained by intellectual, sensory, or other health factors. The evidence further reveals that Student displays inappropriate types of behaviors or feelings, such as anxiety, shutting down and resorting to self-amusing tactics, under normal circumstances. *See* FOFs 5, 8 and 11. Moreover, Student has manifested both of these characteristics for a long time, *i.e.* more than a year in this case, and to a marked degree that adversely affects her educational performance, which is proof that Student is a child with an emotional disturbance. *See* 34 C.F.R. § 300.8(c)(4)(i).²³

²³ The evidence also indicates that Student has heightened alertness to environmental stimuli in class due to a significantly high level of hyperactivity and attention problems, which may be evidence of an attention deficit disorder or attention deficit hyperactivity disorder and tends to indicate that Student may be a child with the disability of OHI. However, because the evidence does not contain documentation establishing an ADD or ADHD diagnosis for Student, the hearing officer declines draw such a conclusion under the facts of this case. *Compare* 34 C.F.R. § 300.8(c)(9).

Based on the evidence outlined herein, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to determine Student eligible under IDEA for special education and related services as a student with ED. *See e.g., N.G. v. District of Columbia*, 556b F. Supp. 2d 11 (D.D.C. 2008) (school district's ineligibility determination was incorrect); *Board of Education of Montgomery County v. S.G.*, 45 IDELR 93 (D.Md. 2006) (same).

To remedy this denial of FAPE, the hearing officer will order DCPS to reconvene the MDT to develop an IEP for Student that will provide her with the special education and related services she requires as a child with the disability of ED. *See* 34 C.F.R. § 300.306(c)(2), *supra* (once child determined eligible for special education and related services under IDEA, an IEP must be developed for child). As the hearing officer is not persuaded of the reliability of Petitioner's estimate of the amount of special education and related services Student would have received had she been determined eligible at her January 2010 eligibility meeting, the hearing officer declines to award Petitioner any compensatory education at this time, but will dismiss without prejudice Petitioner's compensatory education claim to allow Petitioner the option of re-filing that claim once the MDT has had an opportunity to determine the amount of services Student requires.

ORDER

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

1. Within 14 calendar days of the issuance of this Decision and Order, DCPS shall reconvene the MDT to develop an IEP for Student that will provide her with the special education and related services she requires as a child with the disability of emotional disturbance.
2. Petitioner's claim for compensatory education is **DISMISSED WITHOUT PREJUDICE**.

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).

Date: 4/7/2012

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer