

JURISDICTION

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for the IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

PROCEDURAL HISTORY

On 09/30/09, a *Due Process Complaint Notice* ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the 9 years old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of the IDEIA. The sole issue in the Complaint was whether, on 09/17/09, DCPS failed to determine Student eligible for special education services as a student with a disability classification of Emotional Disturbance ("ED"). Petitioner requested the following relief: (1) A finding of a denial of a FAPE; (2) A finding that on 09/17/09, the Individualized Education Program ("IEP") Team erred by failing to determine that Student had a disability classification of ED pursuant to the IDEIA; (3) DCPS to issue a Notice of Placement to a private placement, i.e., Foundations School, providing funding for placement and transportation; and (4) DCPS to convene an IEP Team meeting to develop an IEP consistent with a disability classification of ED.

In the Complaint, Petitioner waived the Resolution Session. DCPS did not file a written waiver of the Resolution Session, and the due process hearing was scheduled for 12/03/09. A pre-hearing conference occurred on 11/03/09 and a Pre-Hearing Conference Order memorializing the pre-hearing conference was issued by the Hearing Officer on 11/03/09. At the pre-hearing conference, parties related that a Resolution Session between DCPS and Petitioner had occurred on 10/16/09, but an agreement could not be reached. However, parties related that at the Resolution Session, DCPS agreed to place Student in a special education classroom pending the outcome of the due process hearing, even though Student had been enrolled as a general education student since 09/17/09, i.e., the date that Student had been determined ineligible for special education services.

On 10/09/09, DCPS filed *District of Columbia Public School's Response and Motion To Dismiss To Petitioner's Due Process Complaint*. In *DCPS' Motion to Dismiss To Petitioner's Due Process Complaint*, DCPS asserted that (1) the Complaint did not assert a denial of a FAPE, (2) the sole issue raised in the Complaint should have been litigated at a prior due process hearing that resulted in a Hearing Officer Determination dated 09/24/09, (3) Student did not exhibit the criteria for classification of an Emotional Disturbance over a long period of time to a marked degree, and (4) Dr. Richard Nyankori, Vice Chancellor for Special Education, did not make a comment about Student's special education services to Councilman Marion Barry. At the pre-hearing conference on 11/03/09, the Hearing Officer gave Petitioner's Attorney until 11/09/09 to respond in writing to *DCPS' Motion to Dismiss To Petitioner's Due Process Complaint*, even though the three business days permitted by the District of Columbia Public Schools

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Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures, Section 401.C.5, had expired. On 11/09/09, Petitioner filed an *Answer to the District of Columbia Public Schools' Motion to Dismiss Petitioner's Due Process Complaint*. On 11/13/09, the Hearing Officer issued an *Interim Order on DCPS' Motion To Dismiss Petitioner's Due Process Complaint* that denied DCPS' Motion to Dismiss To Petitioner's Due Process Complaint.

THE DUE PROCESS HEARING

The due process hearing convened on 12/03/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., Washington, D.C. 20003.

Petitioner was represented by John Straus, Esq. ("Petitioner's Attorney") and DCPS was represented by Blair Matsumoto, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing in person.

Parties were offered the opportunity to discuss settlement prior to the presentation of opening statements. Petitioner was amenable to a settlement discussion, but DCPS was not.

Disclosures:

Petitioner's Five-Day Disclosure dated 11/24/09 contained Petitioner's Exhibits #1-17. Petitioner's Exhibits #1-17 were admitted into evidence without objection. Petitioner's Supplemental Disclosure dated 12/02/09 contained Petitioner's Exhibit #18, which was admitted into evidence without objection.

DCPS' Disclosure Statement dated 11/24/09 contained DCPS' Exhibits #1-29. DCPS' Exhibits #1-29 were admitted into evidence without objection. DCPS' Supplemental Disclosure Statement dated 12/02/09 contained no exhibits, and was admitted into evidence without objection after DCPS withdrew witness #1 from the Supplemental Disclosure Statement.

Witnesses:

Petitioner presented the following witnesses: (1) [REDACTED] dedicated aide; (2) [REDACTED] Ph.D., who qualified as an expert in the administration of psychological assessments (via telephone); (3) [REDACTED] who qualified as an expert in special education; and (4) [REDACTED] admissions representative (via telephone).

DCPS presented the following witnesses: (1) [REDACTED] DCPS school psychologist; (2) [REDACTED] S special education teacher; and (3) [REDACTED] DCPS special education coordinator.

FINDINGS OF FACT

#1. Student, with a date of birth of 01/17/2000, resides in the District of Columbia with Student's parent who is the Petitioner. (*Petitioner's Exhibit #5, IEP dated 06/04/09*).

#2. On 04/02/08, Student attended 2nd grade at [REDACTED] located in the District of Columbia, and was classified as a "child with a disability" under the IDEA with a disability classification of Multiple Disabilities ("MD") that consisted of ED and Other Health Impairment ("OHI") (ADHD). (*DCPS' Exhibit #7, IEP dated 04/02/08; DCPS' Exhibit #23, Meeting Notes of Educational Advocate dated 01/12/09*). Student had an IEP dated 04/02/08 that prescribed 26.0 hours/week of specialized instruction, 1.0 hour/week of psychological services, and 0.5 hours/week of occupational therapy services; with 85% of services to be provided outside of the general education setting. At the time the 04/02/08 IEP was developed, Student's educational performance levels were at or above grade level in mathematics, reading and written expression. The impact of Student's disability on educational performance in the general education curriculum in the social emotional and behavioral context, as stated in the 04/02/08 IEP, was that Student's behavior was oppositional, Student experienced interpersonal conflicts, had low frustration tolerance, exhibited failures to follow adults' directives, expressed verbal aggression towards adults, failed to follow instructions and failed to cooperate with adults, left the classroom without permission, ran around the building without permission, failed to effectively utilize verbal skills to express needs and feelings, failed to maintain positive peer relationships, and acted out aggressively with peers. Student's 04/02/08 IEP contained a Behavior Intervention Plan ("BIP") that specified intervention strategies for addressing Student's targeted behaviors of conflicts with authority, under-developed social skills, low frustration tolerance, overstimulation, distracting behavior, and difficulty following directions. The rationale for the BIP, as stated in the BIP, was that *Student required behavior interventions and modifications that could not be met within the general education classroom*. Additionally, Student's 04/02/08 IEP provided for the services of a dedicated aide within the special education setting for 32 hours/week, and the services of a dedicated aide had begun on 06/01/07. (*DCPS' Exhibit #7, IEP dated 04/02/08*).

#3. On 11/24/08, the Multidisciplinary Team ("MDT") convened at [REDACTED] Elementary School in response to Petitioner's request for a change of placement for Student. (*DCPS' Exhibit #20, MDT Notes dated 11/24/08*). On 01/12/09, Petitioner accepted a placement for Student at Ferebee Hope Elementary School in the District of Columbia. (*DCPS' Exhibit #22, MDT Notes dated 01/12/09*).

#4. On 06/04/09, Student attended 3rd grade at [REDACTED] and Student had a disability classification of MD and an IEP that prescribed 25.5 hours/week of specialized instruction outside of general education, 2 hours/week of behavioral support services outside of general education, and a full time dedicated aide who would provide services outside of the general education setting. *The 06/04/09 IEP*

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stated that the rationale for removing Student from the general education curriculum for specialized instruction was that Student's behavior negatively impacted Student's ability to progress academically, and the rationale for removing Student from the general education curriculum for behavioral support services was that Student's below expected grade and age level performance in social emotional skills impacted Student's ability to function effectively in the school environment. Additionally, Student's 06/04/09 IEP prescribed Extended School Year services from 06/29/2009 through 08/07/09 consisting of 20 hours/week of specialized instruction outside of general education and 2 hours/week of behavioral support services outside of general education, based on the rationale that Student would experience regression in social skills and emotional stability unless Student continued with counseling and the prescribed behavior modification program over the summer. (DCPS' Exhibit #8, IEP dated 06/04/09).

#5. Student's 06/04/09 IEP contained a Functional Behavior Assessment ("FBA") that described Student's behavior problems that interfered with learning as follows: Student has consistent and regular disruptive/non-complaint behavior that negatively impacts Student's academic progress and these behaviors manifest in the form of physical aggression towards peers and adults; leaving the assigned area; inappropriate verbal and non-verbal responses; and emotional outbursts consisting of screaming, cursing and lashing out at those close to Student. Also, the FBA indicated that Student frequently blurted out in class during instruction, and was oppositional and defiant towards adults when redirected and these behaviors occurred more frequently during school arrival, during transition, recess and lunch. These behaviors were characterized as severe, lasting less than 15 minutes, occurring throughout the day, and occurring daily. Student's 06/04/09 IEP contained a BIP that provided intervention strategies for Student's problem behaviors of failing to follow adult directions, failing to remain in assigned areas, hitting or yelling out when upset, and not utilizing coping strategies/skills in response to challenging situations. (DCPS' Exhibit #8, IEP dated 06/04/09).

#6. At the time the 06/04/09 IEP was developed, Student's achievement scores as measured by the Woodcock Johnson III assessment, were at the 4th grade level in mathematics, at the 3rd grade level in reading, and at the 3rd and 4th grade levels on various subtests in written expression. (DCPS' Exhibit #8, IEP dated 06/04/09).

#7. On 03/20/09, the DCPS psychologist at [REDACTED] conducted a Psychological Evaluation and concluded that Student did not qualify for special education services because (A) Student's general cognitive ability was in the Average range, Student's general verbal comprehension abilities were in the Low Average range, Student's general perceptual reasoning abilities were in the Average range, and Student was at grade level or above, (B) Student did not demonstrate the essential characteristics associated with Asperger's Syndrome, and (C) there was insufficient documentation to conclude that Student had a diagnosis of attention deficit hyperactivity disorder ("ADHD"). The DCPS psychologist recommended that additional testing be conducted to determine whether or not Student had an existing diagnosis of ADHD. (DCPS' Exhibit #14, Psychological Evaluation dated 03/20/09).

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#8. An independent Speech and Language Evaluation Report dated 06/25/09 revealed that although Student received average scores in receptive and expressive language skills, Student received a below average score in Understanding Spoken Paragraphs – a subtest that assessed Student’s ability to sustain attention and focus while listening to spoken paragraphs of increasing length and complexity, understand oral narrative and text, answer questions about the content of the information given, and think critically to arrive at logical answers. The academic significance of understanding oral information is that it is necessary in the classroom to understand stories, descriptions of actions, events or opinions and instructional materials, then use the information and apply critical thinking to make inferences and predictions from the information presented. The evaluator recommended that Student participate in Speech-Language therapy for 60 minutes/week to address social language skills, self-advocacy skills (requesting clarification and help), organization (graphic organizers, etc.) and retention. (DCPS’ Exhibit #15, *Speech and Language Evaluation Report dated 06/25/09*). At the MDT meeting on 09/17/09, the DCPS speech-language pathologist stated that Student’s weak speech-language area consisted of following directions and understanding spoken paragraphs; however, those weak areas could be addressed in the classroom because part of the special education teacher’s curriculum was designed around following instructions; and as a result, Student did not need pull out special education speech and language services. (DCPS’ Exhibit #26, *MDT Meeting Notes dated 09/17/09; Testimony of [REDACTED]*)

#9. A Comprehensive Independent Psychological Evaluation completed on 06/30/09 revealed that Student demonstrated average verbal reasoning skills, low average nonverbal, visual-spatial skills, and below average visual-spatial integration skills. Student’s academic achievement was average in reading decoding, reading comprehension, spelling, and mathematics computation, and was low average in applied mathematics skills. The evaluator, Dr. [REDACTED] noted a previous diagnosis for Student of Asperger’s Disorder, Post-Traumatic Stress Disorder, and Obsessive – Compulsive Disorder, and did not rule out these disorders as current diagnoses based on the data presented. The evaluator interviewed Student’s dedicated aide who stated that Student’s behavior in the classroom was difficult to manage, and when the evaluator saw Student at summer school in June 2009, Student had already acted out. Dr. [REDACTED] Price opined that Student’s behavior of kicking and screaming upon entry into school is not normal behavior for a student with a normal IQ, and she opined that Student’s behaviors would exempt Student from academic time which will take away from Student’s ability to complete assignments and be successful in school. Dr. [REDACTED] Price recommended that Student have an educational environment with a small teacher ratio, one where Student’s behavior could be addressed immediately in a crisis management setting, and one where Student could receive therapeutic services throughout the day. (DCPS’ Exhibit #17, *Comprehensive Independent Psychological Evaluation completed 06/30/09; Testimony of [REDACTED] Ph.D.*). Dr. [REDACTED] recommendations were based on Student’s negative behaviors in class, and not on academic testing. (Testimony of [REDACTED]).

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#10. On 09/17/09, the MDT went through the eligibility criteria checklist and determined that Student did not meet all of the criteria for a disability classification of MD. (DCPS' Exhibit #19, DCPS Disability Worksheet dated 09/17/09; Testimony of [REDACTED]; Testimony of Dr. [REDACTED]). After DCPS went through the MD eligibility checklist and Student was determined ineligible for special education, Petitioner's educational advocate requested that the MDT go through the disability eligibility checklist for ED and OHI, and DCPS refused. (Testimony of Dr. [REDACTED] Holman). The DCPS representatives of the MDT did not want to qualify Student for special education services because Student was performing on grade level and the 03/20/09 DCPS Psychological Evaluation that confirmed that Student was performing on grade level, also stated that Student did not need special education services. (Testimony of Dr. [REDACTED]; Testimony of [REDACTED]). Furthermore, the DCPS representatives of the MDT concluded that Student did not require special education services because Student did not have educational deficits, Student's behaviors could be managed in the general education program, and Student's speech-language deficits could be addressed in the classroom. (Testimony of [REDACTED]) At the MDT meeting on 09/17/09, Student's dedicated aide came down to the meeting to provide information regarding Student's behavior, and while the aide was absent from the general education class that Student was participating in, Student got into a fight with the entire class and had to be physically restrained by the teacher and another student. (Testimony of Dr. [REDACTED])

#11. Student's dedicated aide has been working exclusively with Student for 1 ½ years and describes Student's behavior as follows: not being able to sit still, can't stop talking, generally ready to fight other students at recess, inappropriate touching of other students, having to be physically restrained for more than 20 minutes to calm down on an almost daily basis, running laps around the lunchroom until physically exhausted before and after eating lunch, blurting out answers in class or disrupting the lesson by inappropriate behavior, and as recently as the day before the due process hearing, Student picked up a chair and threw it at another student following an argument over a pencil. On a daily basis, the aide has to remove Student from class to calm Student down, bribe Student with the use of the computer or snacks to appease Student, and when Student returns to class, Student refuses to participate in class work and touches other students which eventually leads to an incident in the classroom. All of these behaviors routinely occur in Student's special education classroom that is comprised of six students. (Testimony of [REDACTED])

#12. For one month during the 2009-2010 school year beginning on 09/18/09, Student participated in the general education curriculum with the full time assistance of the dedicated aide. Student was calm in the general education environment at first, but still exhibited the same misbehaviors exhibited in the special education class and at times Student's behaviors required intensive intervention. (Testimony of [REDACTED] Fofana; Petitioner's Exhibit #17, Correspondence from [REDACTED] general education teacher). The general education teacher asked repeatedly for a suggestion to make Student calm down and do class work (Testimony of [REDACTED]), was

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concerned about Student disrupting class, and was fearful that Student would hurt the other children. (*Testimony of Dr. [REDACTED]*)

#13. Dr. [REDACTED] who qualified as an expert in special education, opined that Student could qualify for a disability classification of ED under the IDEIA based on Student's inability to make good interactions with peers and adults, and based on Student's inappropriate behaviors in normal circumstances. (*Testimony of Dr. [REDACTED]*) [REDACTED] qualified as an expert in the administration of psychological assessments, opined that given Student's pervasive difficulties and the need for a dedicated aide, consideration should be given to an educational disability classification of Emotional Disturbance. ((DCPS' Exhibit #17, *Comprehensive Independent Psychological Evaluation completed 06/30/09; Testimony of [REDACTED]*)

#14. Student's behavior in the special education classroom during the 2009-2010 school year (except for one month while Student attended a general education class), was described by the special education teacher as disruptive, off task, getting other children off task, and with redirection being successful using treats and computer time. If Student was off task and was being redirected, Student could complete the assignment at grade level. Student is redirected approximately 10 times per day, and on three of those occasions, the special education teacher has to physically go over to Student to get Student back on task. Student takes walking breaks from the classroom with the aide, on a daily basis for about 15 minutes to calm down. Student's current aide is not necessarily effective in modifying Student's behavior because the aide does not always use a calm voice and contributes to Student escalating, and often the aide counters the special education teacher's suggestions for specific types of assistance with Student. Student is described by the special education teacher as being intelligent and having no difficulty with the level of class work. (*Testimony of [REDACTED]*)

#15. DCPS' goal is to transition Student to a lesser restrictive environment than a full time special education program because Student is achieving academically. However, since Student has impulse control issues and a lot of behaviors that need to be remediated, Student still needs the benefit of a dedicated aide until Student is successfully transitioned to a larger setting such as the general education curriculum. (*Testimony of [REDACTED]*)

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 535-37 (2005), 44 IDELR 150. "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. 3030.3.

Issue #1 – Whether DCPS failed to determine Student eligible for special education services as a student with an Emotional Disturbance, thereby denying Student a FAPE?

From 04/02/08 until 09/17/09, Student was classified as a student with a disability under IDEIA, and Student had a full time IEP that prescribed 27.5 hours/week of specialized instruction and related services outside of the general education setting, a BIP, and the services of a full time dedicated aide. And, during the time that Student had a full time IEP, a BIP, and the services of a dedicated aide, Student maintained average or above average academic achievement scores; however, during this time, Student also had a plethora of maladaptive behaviors that Student freely and chronically exhibited in the school environment. (*Findings of Fact #2, #4, #5, #6, #11, #14*).

On 09/17/09, DCPS pulled out the special education rug from beneath Student when it determined that Student was no longer eligible for any special education services. (*Finding of Fact #10*). The determination was made at a time when nothing about Student's severely maladaptive school behaviors, cognitive ability, or academic achievement scores had changed. What changed was DCPS' perception of when a Student needs special education services. According to DCPS, because Student had achieved average or above average academic achievement scores, Student no longer needed *any* special education services. What DCPS failed to recognize was that Student's academic success was totally dependent on the intensive special education services that Student received and needed to stay on task, complete class assignments, and exhibit marginally socially appropriate behavior. The intensive special education services were what enabled Student to achieve average and above average achievement scores. Based on a preponderance of the evidence, the Hearing Officer concludes that DCPS denied Student a FAPE when it determined that Student was ineligible for all special education services on 09/17/09.

DCPS, as a local education agency, is required to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1, 300.2(b)(1)(ii), 38 D.C. Code 2561.01(2). Under the IDEIA, "a child with a disability" means a child evaluated in accordance with the IDEIA as having ...a speech or language impairment,...a serious emotional disturbance,...and who, by reason thereof, needs special education and related services." 34 C.F.R. 300.8(a).

The record in this case clearly establishes that at least as of 04/02/08 and until 09/17/09, while Student attended 2nd and 3rd grades at a public school in the District of Columbia, Student was classified as a student with a disability under IDEIA and had a full time special education program that consisted of 27.5 hours/week of specialized instruction and related services, to be provided outside of general education. In addition, Student had the educational benefit of a FBA, a BIP, and a full time dedicated aide. (*Findings of Fact #2, #4, #5*). With this extremely high level of services, Student thrived

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academically, performing at grade level or above in all areas of core academics. (*Finding of Fact #2, #6, #9*).

In January 2009, Student transferred to [REDACTED] (*Finding of Fact #3*), and this is where the difference of opinion begins regarding the level of services that Student needed to continue to receive educational benefit.

On 03/20/09, DCPS conducted a Psychological Evaluation that concluded that Student did not qualify for special education services because (1) Student had an Average cognitive ability, (2) Student was performing at grade level or above, (3) the existence of Asperger's Syndrome could not be validated by the evaluator, and (4) the existence of attention deficit hyperactivity disorder ("ADHD") could not be substantiated by the evaluator. The evaluator recommended that Student be given additional testing to determine where Student truly had ADHD. (*Finding of Fact #7*). In response to the alarming conclusion in DCPS' Psychological Evaluation, i.e., that Student no longer qualified for special education services, Petitioner's educational advocate requested that DCPS fund independent educational evaluations. (*Testimony of Dr. Ida Jean Holman*).

An independent Speech and Language Evaluation dated 06/25/09 revealed that Student achieved a below average subtest score in Understanding Spoken Paragraphs and the evaluation recommended that Student receive 1 hour/week of speech language special education services because understanding multistep directions was important for Student to be able to grasp lengthy instructions while in the classroom. (*Finding of Fact #8*).

A Comprehensive Independent Psychological Evaluation completed on 06/30/09 concluded that Student's previous medical diagnoses of Asperger's Disorder, Obsessive-Compulsive Disorder, and Post-Traumatic Stress Syndrome were not ruled out as current diagnoses (*Finding of Fact #9*), and concluded that given Student's pervasive behavioral difficulties and the need for a dedicated aide, consideration should be given to a disability classification of Emotional Disturbance. (*Finding of Fact #13*). This evaluation also noted that Student's cognitive scores and Student's achievement scores were in the average range. (*Finding of Fact #9*).

On 09/17/09, the MDT convened at [REDACTED] to review the independent evaluations and determine Student's eligibility for special education services. The MDT went over the eligibility checklist for the disability classification of MD (Student's then existing disability classification), and determined that Student did not meet the eligibility criteria. Petitioner's educational advocate requested that the MDT review the eligibility criteria for ED and OHI, and DCPS refused. (*Finding of Fact #10*). [REDACTED] DCPS psychologist, testified that the MDT went over the eligibility criteria for ED and OHI, but her testimony was not credible and not supported by the documentation submitted in the record. Submitted into evidence as DCPS' Exhibit #19 was the Disability Worksheet dated 09/17/09, that attested to an actual eligibility determination for MD. The absence of any written documentation in the record pertaining to eligibility determinations for the disability classifications of ED and OHI, although not conclusive, was persuasive to the Hearing Officer's Finding of Fact #10 that

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the ED and OHI eligibility determinations never occurred, as was credibly testified to by Dr. [REDACTED]

At the 09/17/09 MDT meeting, the DCPS representatives of the MDT essentially concluded that since Student's achievement scores were Average, whether or not Student had a diagnosis of Asperger's Syndrome or ADHD or any other qualifying medical diagnosis, there was no adverse impact on Student's educational performance; therefore, Student no longer qualified for special education services. (*Finding of Fact #10; Testimony of [REDACTED]*) Petitioner and Petitioner's educational advocate disagreed with the determination, and this Complaint ensued.

Under the two-part analysis laid out in *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 202 (1982), "it must first be determined whether DCPS has complied with the procedures set forth in the IDEIA in order to determine whether the child has been denied a FAPE. Second, it must be determined whether the IEP developed through those procedures is reasonably calculated to enable the child to receive educational benefit. This case involves an ineligibility determination, and thus there is no IEP. Therefore, the second step of the inquiry is whether the ineligibility determination was proper" under the IDEIA. *N.G., et. al. vs. District of Columbia*, 556 F. Supp.2d 11 (D.C.D.C. 2008), 50 IDELR 7.

Petitioner argues strenuously that DCPS used Student's academic scores as the sole criteria in determining that Student was ineligible for special education services on 09/17/09, and this was in contravention of 34 C.F.R. 300.304(b)(2) which states that in conducting the evaluation, the public agency must not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. "Evaluation" under the IDEIA, is defined as "procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. 300.15.

The evidence is uncontroverted that on 09/17/09, the MDT used Student's achievement scores as the sole criterion or essential basis for the determination of Student's ineligibility for special education services. (*Finding of Fact #7, #10; Testimony of [REDACTED]*). DCPS' logic was that since Student was performing at grade level or above, there was no adverse impact on educational performance; therefore, Student no longer required any special education services and all of Student's educational needs could be met in the general education environment, but initially with the full time services of a dedicated aide. (*Findings of Fact #15*).

With respect to following the procedural mandates of the IDEIA, DCPS committed two errors. Firstly, before DCPS made a determination of ineligibility, it should have conducted additionally testing for ADHD as was recommended in its own Psychological Evaluation dated 03/20/09. (*Finding of Fact #7*). 34 C.F.R. 300.304(b)(1) requires the public agency to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child..., and 34 C.F.R. 304(c)(4) requires the public agency to assess the child in all areas related to the

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suspected disability, including, if appropriate, health, vision, hearing, social and emotional status... The record was bereft of any evidence that DCPS complied with the procedural requirement of IDEIA to follow up with testing for ADHD. This was particularly important not only because Student's behavior had been the sole basis for the provision of special education services at least since 04/02/08, as was easily gleaned by review of 04/02/08 IEP and the 06/04/09 IEP, but also because Student's school record contained documentation not only that Student had ADHD, but also that Student had a disability classification of ED as recent as 04/02/08. (*Findings of Fact #2, #4*). Under the IDEIA, a diagnosis of ADHD coupled with an adverse impact on educational performance, would qualify Student as a student with OHI, and therefore a disability, pursuant to 34 C.F.R. 300.8(b)(9). The Hearing Officer speculates that the previous diagnosis of ADHD is what led to the prior disability classification of OHI.

Secondly, DCPS failed to follow the procedures outlined in the IDEIA, 34 C.F.R. 300.304(b)(2), when it used Student's achievement scores as the sole determinant in determining eligibility and ignored other prominent data such as Student's severely maladaptive behaviors in school, the existence of a FBA and BIP, Extended School Year Services to address Student's anticipated regression in social skills and emotional stability over the summer, the increase of pullout psychological services from one hour to two hours on 06/04/09, and the ever present existence of a full time dedicated aide for Student. (*Findings of Fact #2, #4, #5, #11, #12, #14*). There was ample evidence in the record that DCPS denied eligibility based on the fact that Student was achieving academically. (*Finding of Fact #7, #10*). In making the determination that Student was ineligible for special education services due to Average cognitive ability and Average achievement scores, DCPS failed to take into account the extremely relevant data of Student's pervasive and ongoing behavior problems that for at least the two preceding years had resulted in Student having a full time special education program, a Functional Behavioral Assessment, a Behavior Intervention Plan and the services of a full time dedicated aide. (*Findings of Fact #2, #4*). And, all of these services were deemed necessary for Student to have while Student performed academically at grade level or above. (*Findings of Fact #2, #4, #6*). Thus, DCPS committed a second blunder when it failed to recognize that Student's behavior, not Student's achievement scores, was the basis for special education services in the past.

The second prong of the *Rowley* analysis is whether the ineligibility determination was proper. "Emotional Disturbance" is defined as 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 health factors, (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior 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).

In this case, the most appropriate characteristic applicable to determining whether Student meets the eligibility criteria for Emotional Disturbance is category (C),

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“Inappropriate types of behavior or feelings under normal circumstances.” DCPS needed to have looked no further than Student’s 04/02/08 IEP and 06/04/09 IEP in order to obtain information about Student’s inappropriate behaviors under normal circumstances. The detailed FBA and BIPs that were attachments to the IEPs were evidence enough that Student’s behaviors were not normal for the school environment. Most poignantly, during the eligibility meeting when the dedicated aide left Student in the general education classroom and came to the MDT meeting to provide current information about Student’s behaviors, Student got into a fight with the entire class and had to be restrained by the teacher and a student. (*Finding of Fact # 10*). That is certainly not normal behavior under normal circumstances. Moreover, the ongoing and chronic behaviors of running laps around the perimeter of the cafeteria, always poised to fight other children, disrespect to authority, kicking and screaming when entering the school, running out of the classroom without permission, being restrained in class, disrupting class daily, etc., were certainly inappropriate behaviors under normal circumstances, particularly for a student with a normal IQ. (*Testimony of Dr. [REDACTED]*). And, most compelling was the overwhelming and obvious evidence that even with the full time assistance of a dedicated aide, Student’s behaviors were over the top on a daily basis, both in the special education classroom and the general education classroom. (*Findings of Fact #2, #4, #5, #11, #14*). There was credible evidence that Student’s behavior in the general education class was anything but stellar, and that the general education teacher was at a loss for how to motivate Student to complete class work. Additionally, the general education teacher feared for the safety of the other children in the class. (*Finding of Fact #12*). How DCPS could conclude that Student could be behaviorally successful in the general education setting without special education supports is beyond comprehension, because the evidence was clear that Student could not even be behaviorally successful in a full time special education program with built in intensive behavioral supports. That is why Student required a full time dedicated aide. Interestingly enough, even though DCPS contended that Student no longer required special education services, DCPS maintained the presence of the full time dedicated aide as an essential support service for Student while Student participated full time in the general education curriculum. (*Finding of Fact #15*).

Student’s chronic behavior problems from 04/02/08 until 09/30/09 (the date the Complaint was filed) clearly met the criteria for a disability classification of ED in that Student exhibited abnormal behaviors in normal circumstances over a long period of time and to a marked degree that adversely affected Student’s educational performance. As [REDACTED] redibly opined, “Student’s behaviors would exempt Student from academic time which will take away from Student’s ability to complete assignments and be successful in school.” (*Finding of Fact #9*). And indeed, Student took 15 minute walking breaks away from the special education classroom on a daily basis to calm down (*Finding of Fact #14*), during which time Student certainly missed vital classroom instruction. If DCPS had gone through the eligibility criteria worksheet for ED, as suggested by Petitioner and Petitioner’s advocate, DCPS would easily have come to the conclusion that Student met the criteria for eligibility as a student with ED, and Student’s full time IEP, BIP, and dedicated aide would have remained in place.

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Here, as in the case of *N.G., et. al. vs. District of Columbia*, 556 F. Supp.2d 11 (D.C.D.C. 2008), 50 IDELR 7. the MDT failed to take into account the small structured setting of Student's special education class that contained six students, specialized instruction all day long, and the support of a full time dedicated aide who spent many hours chasing Student inside and outside the classroom and calming Student down (*Testimony of Mohammedali Fofana; Findings of Fact #11, #14*), as the necessary special education supports that in fact enabled Student to thrive academically. For DCPS to terminate the very services that enabled Student to be successful in the special education environment in one fell swoop defies logic. If the MDT felt that Student could achieve academically in a lesser restrictive educational setting, then the prudent and logical thing for DCPS to do would be to reduce services slowly with constant measurement of the impact of the reduction of services, but not a swift and sudden withdrawal of all services.

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or deliver of instruction – (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(b)(3). In this case, providing Student with the maximum amount of special education services allowed Student to perform academically on grade level or above. That Student performed so well while loaded down with special education services only speaks positively of the effectiveness of the 04/02/08 and the 06/04/09 IEP. These services were precisely the services that Student needed to thrive, and these are the services that Student will continue to receive, with one small modification. Student shall receive one hour/week of speech-language services as a related service. The speech-language service provider shall determine whether the service will be more effective inside or outside of the special education setting. If Student is ever to become successful in the general education setting, Student will have to be able to decipher multi-step verbal instructions. As the speech and language testing revealed, Student is able to perform well on information that has been learned by repetition. It is the ability to grasp new verbal material that causes Student to test below grade level. (*DCPS' Exhibit #15, Speech and Language Evaluation Report dated 06/25/09*).

Although Petitioner requested placement of [REDACTED] Student's placement shall remain at [REDACTED] because in the past Student has been academically successful at [REDACTED] with a full time special education program and the services of a dedicated aide. Pursuant to 38 D.C. Code 25561.02(c), placement at a non-public educational institution is only appropriate if there is no public institution that can meet Student's educational needs. The Hearing Officer concludes that [REDACTED] is an appropriate placement for Student at this time.

Petitioner has met its burden of proof by a preponderance of the evidence that the ineligibility determination on 09/17/09 was improper under the IDEIA, that Student should have been classified as a student with an Emotional Disturbance, and that as a result, Student was denied a FAPE.