DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

STUDENT HEARING OFFICE
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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old male, who currently attends a DCPS charter school.

On April 1, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to find Student eligible for special education services.

On May 26, 2010, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that on March 11, 2011 an MDT team reviewed Student's evaluations, which indicated that Student performed at a solidly average level in all testable areas, and the team determined that Student was not eligible for special education and related services. DCPS further asserted that Parent indicated she did not believe Student needed special education services, and Parent and DCPS agreed that Student would receive SST support, an FBA and a 504 Plan. Based on these assertions, DCPS denied that there had been a denial of a FAPE.

On May 3, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on May 8, 2011.

By their respective disclosure letters dated May 19, 2011, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 – 14), and DCPS disclosed DCPS-1 through DCPS-5.

The hearing officer convened the due process hearing on May 26, 2011.[1] DCPS's disclosed documents and Petitioner's Exhibits 1-6 and 13-14 were admitted without objection. Petitioner's Exhibits 7-10 and 12 were admitted over DCPS's objection, but Petitioner's Exhibit 11 was excluded as incomplete. The parties waived the right to make opening statements. Thereafter, the hearing officer received testimonial evidence and closing statements before concluding the hearing.

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 IDEIA, 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 issue to be determined is as follows:

1. Did DCPS incorrectly find Student ineligible for special education services at his March 11, 2011 eligibility meeting?

FINDINGS OF FACT

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 male, who presently attends grade at a DCPS charter school.[2]

2. On December 15, 2010, a comprehensive psychological evaluation was administered to Student by an independent evaluator. The evaluator administered assessments to measure, *inter alia*, Student's cognitive, academic and social-emotional functioning. The resulting evaluation report was issued on December 22, 2010.

   With respect to Student's cognitive and academic abilities, the evaluation report reveals that Student's Full Scale IQ score is 93, which is in the Average range of functioning. Similarly, Student's scores on the Verbal Comprehension Index (SS=95), Perceptual Reasoning Index (SS=98), and Working Memory Index (SS=102) of the Wechsler Intelligence Scale for Children – 4th Edition were in the Average Range, although his score on the Processing Speed Index (SS=85) was in the Low Average Range. On the Wechsler Individual Achievement Test – 3rd Edition ("WIAT"), Student received scores in the Above Average range on the Basic Reading (SS=121) and Math Fluency (SS=123) Composites, and in the Average range on the Written Expression (SS=102) and Mathematics (SS=104) Composite scales. Moreover, Student's

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] Complaint at 1; *see* DCPS-1, Petitioner's Exhibit 3.

performance on the WIAT resulted in the following grade equivalencies ("GE"): 12.9 GE in Word Reading, Pseudoword Decoding, Spelling, Math Fluency-Subtraction, Math Fluency-Addition, and Math Fluency-Multiplication; 12.4 GE in Math Problem Solving; 9.7 GE in Numerical Operations; 9.6 GE in Sentence Composition; 9.2 GE in Oral Expression; 6.4 GE in Reading Comprehension; and 5.4 GE in Essay Composition.

With respect to Student's social-emotional functioning, the self, parent and teacher rating scales for the Behavior Assessment Scale for Children, 2nd Edition, revealed scores in the clinically significant range for hyperactivity, aggression, conduct problems, atypicality, depression, attention problems, and in the at-risk range for adaptability, activities of daily living, atypicality, attitude to teachers, and hyperactivity. Student's responses on the Multidimensional Sentence Completion Test revealed that he has a general understanding and appreciation for his family, a generally good impression of himself and his abilities, and comfortable social relations with his relatives and adults, although he has some apprehensions about social relations with his peers. The evaluator also noted that Student's school history is significant for multiple suspensions due to impulsive, disruptive, oppositional, and inappropriate behaviors since 1st grade.

Ultimately, the evaluator rendered a diagnosis of Disruptive Behavior Disorder NOS on Axis I. The evaluator recommended a primary disability classification of emotionally disturbed ("ED") for Student, noting that historically Student's difficulties with emotional regulation have negatively impacted his relationships with teachers and peers. The evaluator also recommended that Student would benefit from a full-time out of general education IEP and should be placed in a small, therapeutic setting with a low student to teacher ratio.[3]

3. The independent evaluator who administered Student's comprehensive psychological evaluation testified at the due process hearing in this case. The evaluator's testified that, in her professional opinion, (i) the least restrictive environment for Student would be a full-time out-of-general education school, and (ii) Student's emotional/behavioral problems are such that he should not be educated with any non-disabled peers at all. Moreover, the evaluator recommended in the comprehensive psychological evaluation report that Student receive a full-time IEP, which would, by definition, include full-time specialized instruction. However, in light of Student's strong performance on the objective cognitive and academic assessments the evaluator administered, including the WIAT, which revealed that Student is performing at a 12th grade level in most areas of math and in spelling, word reading and pseudoword decoding, and at a 9th grade level in sentence composition and oral expression, the hearing officer lacks confidence in the evaluator's professional subjective opinion and has not relied upon the evaluator's testimony or subjective conclusions in deciding this case.

4. On January 7, 2011 an independent evaluator administered a speech and language evaluation to Student, which included informal assessments, pragmatic language, articulation/phonology, and vocabulary assessments, and the Comprehensive Evaluation of Language Fundamentals-Fourth Edition assessment. Based on Student's performance on all assessments administered, the evaluator concluded that Student's communication

[3] DCPS-1; Petitioner's Exhibit 3.

skills fall in the Average range, with the result that he does not require speech and language therapy services.[4]

5. On March 11, 2011, DCPS convened an Eligibility Meeting for Student. At the meeting, Parent reported that Student's intellect and academic capabilities have never been in issue, but his behavior and social skills are a serious source of concern and have resulted in multiple suspensions. Student's teachers gave mixed reports, with the English teacher stating that Student had at times exhibited attention deficit behavior in her class but the special education teacher stating that he had not observed Student exhibiting any significant behavior problems. The team reviewed Student's comprehensive psychological and speech and language evaluations, as well as the criteria for an ED classification. Ultimately, all DCPS team members agreed that Student did not qualify for special education services. The DCPS team members focused primarily on Student's strong cognitive and academic evaluation scores and his passing grades. Parent and the advocate disagreed and asserted that Student should be determined eligible as ED, pointing out that Student has always had difficulties relating to teachers and peers, he has been subjected to multiple suspensions in the past, and Parent continues to receive frequent calls about Student's behavior in the school during the current school year. To address these concerns, the team determined that the school SST should conduct a Functional Behavior Assessment and develop a Behavior Intervention Plan and a 504 Plan for Student.[5]

6. Student's discipline report from SY 2009/10, when he attended 8th grade at a different, independent charter school contains 40 entries indicating inappropriate behavior by Student such as not working in class, misusing his cell phone, not showing for detention, not following directions, talking back, arriving late to class, excessive talking, and causing interruption. The report indicates that Student had accumulated a total of 975 points as of May 5, 2010. Parent explained that Student's points were so high that he was on the verge of being expelled from that charter school under the school's strict merit system. Parent further explained that Student had more than 50 behavior incidents during SY 2009/10, but some of the incidents were undocumented and the teachers tried to work with Student because they could see his academic potential even though he was being held back by his behavior/social issues.[6]

7. Student received the following disciplinary referrals during SY 2010/11: a 2/24/11 referral from his French teacher for refusing to do any work in class, which indicates that Student shows up every day with no materials to work with and wants to play with his phone and listen to music in class; and a 4/6/11 referral from his Algebra teacher for causing constant disruption, which indicates that Student spends every class period singing inappropriate songs and making inappropriate comments, and although the teacher called Parent several times Student's behaviors has not changed and the teacher does not know what to do with or for Student.[7]

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[4] DCPS-2; Petitioner's Exhibit 4.
[5] DCPS-4 and DCPS-5; Petitioner's Exhibit 1 and 2.
[6] Petitioner's Exhibit 5; testimony of Parent.
[7] *See* Petitioner's Exhibits 6 and 7.

8. Student has a history of behavioral difficulties in school. Parent first noticed Student's behavior issues in 1st grade, and by 2nd grade, she had Student evaluated for special education services. However, the evaluators determined that Student had no academic problems even though he was disruptive, and they determined that Student was not eligible for special education services. Thereafter, Student went on to attend a series of schools and had behavior problems at all of them, with the result that he was kicked out of some of the schools and Parent removed him from the others. In the past, Student's academic performance was not affected by his behavior/social problems. However, in the past few years Student has been getting Ds on his report cards, and this year his grades have dropped to include Fs. [8]

9. Student received the following grades during the first through third advisories of the SY 2010/11: Algebra I – C+, B- and C; English I – F, D+ and F; Environmental Science – D, C- and D+; French I – F, D+ and F; Introduction to Business – D and F (1st semester grades); Music History – B- (3rd advisory); and World History/Geography – D, C+ and C-.[9]

10. Based on Student's grades in school, his educational history replete with behavior problems, and the concerns outlined in his independent comprehensive psychological evaluation, Student's educational advocate believes that Student should be deemed eligible for special education services as ED. The advocate is of the opinion that Student needs counseling, as well as goals and specialized instruction in the area of social/emotional development.[10]

11. DCPS's school psychologist, who testified in this case, does not know Student personally, but she reviewed Student's records, spoke extensively to the SEC at Student's current DCPS charter school and briefly observed Student for 15-20 minutes on the day of his eligibility meeting. Based on information contained in Student's independent comprehensive psychological evaluation, the school psychologist formed the mistaken conclusions that Student has changed schools frequently because he has moved around frequently and has an unstable home environment, that Student needs a family support system because his family has had to change residences a lot, that the family instability has resulted in a discontinuity between home, community and school for Student, and that Student's basic biological needs are not being met because he has a poor primary support system. Moreover, the school psychologist stated that it was not until Student's March 11, 2011 eligibility meeting that she learned of Student's low grades, because up to that point she was told that Student's grades were fine. Finally, the school psychologist acknowledged that until the due process hearing she had never seen Student's discipline report from SY 2009/10 or Student's disciplinary referrals from SY 2010/11 at the current DCPS charter school.[11] In light of the school psychologist's incorrect beliefs about Student's background, as well as her lack of familiarity with

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[8] Testimony of Parent.
[9] Petitioner's Exhibit 8.
[10] Testimony of advocate.
[11] *See* Findings of Fact 6 and 7, *supra*.

Student's recent discipline history, the hearing officer lacks full confidence in the school psychologist's opinions and has assigned little to no weight to the school psychologist's testimony.

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 Determination

Pursuant to IDEA, a child with a disability is a child evaluated in accordance with the statute as having one or more of a series of specified disabilities, including serious emotional disturbance (referred to in the statute as "emotional disturbance"), and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(i). In this context, emotional disturbance ("ED") 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 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; and/or (E) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i). Although ED includes schizophrenia, the term does not apply to children who are socially maladjusted, unless it is determined that they have ED in accordance with the criteria listed above. *See* 34 C.F.R. § 300.8(c)(4)(ii).

However, if it is determined through an appropriate evaluation that a child has one of the disabilities identified in the statute, such as ED, 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). "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes, *inter alia*, counseling services and social work services in schools. 34 C.F.R. § 300.34(a).

In the instant case, it appears that Student may have exhibited over a long period of time and to a marked degree that has begun to adversely affect his educational performance, in terms of grades, an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Hence, it is arguable that Student has ED within the meaning of IDEA. On the other hand, the evidence also proves that Student is performing at or significantly above grade level in math, spelling, word reading, sentence composition and oral expression, and that his cognitive abilities are solidly within the Average range. As a result, it is clear that Student does not require specialized instruction in any of the basic academic areas, such as reading, math or written expression, even though it appears that Student could benefit from the receipt of behavioral support services designed to address his behavior/social difficulties in school. However, as behavioral support services are related services and those are the only services that Student requires at this time, the hearing officer concludes that Student does not qualify as a child with a

disability within the meaning of IDEA at this time, and that Petitioner has failed to meet its burden of demonstrating that DCPS incorrectly found Student ineligible for special education services at his March 11, 2011 eligibility meeting

The hearing officer notes that the evidence in this case reveals that DCPS has offered to refer Student to the SST process and prepare a Functional Behavior Assessment, Behavior Intervention Plan and 504 Plan for Student. As it appears that Student would greatly benefit from a BIP and a 504 Plan, the hearing officer strongly encourages the parties to proceed with the prompt development and implementation of same for Student.

ORDER

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

1. Petitioner's April 1, 2011 Complaint and all claims and requests for relief therein are **DISMISSED WITH 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 USC §1415(i).

Date: 6/11/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer