

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

OSSE  
Office of Dispute Resolution  
May 18, 2015

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STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
	)	
<i>Petitioner,</i>	)	
	)	Case No:
v.	)	
	)	Date Issued: May 17, 2015
District of Columbia Public Schools,	)	
	)	
<i>Respondent.</i>	)	

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**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 D.C. Code 38-2561.02(a).

**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 March 3, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On March 13, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) on March 20, 2015. The parties did not reach an agreement during the RSM, but agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on April 3, 2015, and 45 day period concludes on May 17, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on April 2, 2015, during which the parties discussed and clarified

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<sup>1</sup> Personal identification information is provided in Appendix A.

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the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by April 17, 2015 and that the DPH would be held on April 24, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on April 2, 2015.

The DPH was held on April 24, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by Kimberly Glassman, Esq. and DCPS was represented by Tanya Chor, Esq.

Petitioner’s and Respondent’s disclosures were timely filed on April 17, 2015. At the DPH, Petitioner’s exhibits P-1 through P-26 were admitted into evidence, without objection. Respondent’s exhibits R-1 through R-12 were admitted into evidence without objection.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Parent’s Psychologist<sup>2</sup>

Respondent called the following witness at the DPH:

- (a) Special Education Coordinator<sup>3</sup>

Petitioner and Respondent each gave an oral closing argument.

### 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 meet its child find obligations pursuant to 34 C.F.R. §300.111 and DCMR 5E-3002.1(d), from at least November 2012 to the present time.
- (b) Whether DCPS denied Student a FAPE, by failing to determine Student eligible for special education services, either with the classification of other health impairment or emotional disturbance, pursuant to 34 C.F.R. §300.8, and/or by relying on a definition of emotional disturbance that is more restrictive than and contrary to federal law.

### RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner’s favor on all issues;
- (b) a finding that Student is eligible for special education and related services under the classification of other health impairment or emotional disturbance;

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<sup>2</sup> Qualified as an expert clinical psychology specializing in the area of interpreting educational records and making recommendations for educational programming for students with disabilities, with no objection from Respondent, except that Respondent objected to the portion of the designation “making recommendations on educational programming.”

<sup>3</sup> Qualified as an expert in school psychology, and in making appropriate determinations as to eligibility under the IDEA, with no objection from Petitioner.

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- (c) an Order that DCPS shall not rely on a definition of “emotional disturbance” more restrictive than contemplated in the IDEA;
- (d) an Order that within 15 days of the HOD, DCPS shall develop an IEP (including specialized instruction in math, reading, writing and behavioral support services, and accommodations and modifications found necessary by the hearing officer, and determining an appropriate placement/location of services for Student).
- (e) an Order reserving compensatory education.

### FINDINGS OF FACT

1. Student is     years old and resides with his mother (“Parent”/“Petitioner”) in Washington, D.C.<sup>4</sup>
2. Student is a ■■■ grader at District High School, and this is his second year in ■■■ grade at District High School, as Student was retained.<sup>5</sup>
3. Student does not like or want to attend District High School, in part because he does not get along with some of the students there.<sup>6</sup>
4. Prior to attending District High School, Student attended District Middle School.<sup>7</sup>
5. Student has not been determined eligible for special education and related services under the IDEA.<sup>8</sup>

### *Student’s Attendance and Behavior*

6. Student’s behavior began sharply deteriorating when he was in the 8<sup>th</sup> grade. He and his family moved around this time, and Student was having problems with peers in his neighborhood. Parent began noticing a shift in Student’s attitude and behavior during this time.<sup>9</sup>
7. Since his eighth grade school year, Student has had extreme lapses in school attendance and frequent behavioral challenges when he was in school, such as fighting with school peers.<sup>10</sup>
8. Student has had a high number of suspensions since his 8<sup>th</sup> grade school year.<sup>11</sup>
9. Since November 2012, DCPS has convened several attendance support meetings with Parent to discuss the attendance problems Student was having. Some of the barriers to Student’s attendance were cited as: the fact that Student fell behind in coursework and could not

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<sup>4</sup> Testimony of Parent; P-3;

<sup>5</sup> Testimony of Parent.

<sup>6</sup> Testimony of Parent; P-2-4.

<sup>7</sup> Testimony of Parent.

<sup>8</sup> P-3.

<sup>9</sup> R-7-1.

<sup>10</sup> Testimony of Parent.

<sup>11</sup> Testimony of Parent; P-2-4; P-5-1; P-5-2; P-6, P-7; P-14; P-16-1; P-23.

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catch up, the fact that Student had no reliable means of transportation to get to school, and the fact that Student had health issues that were not specified on the form.<sup>12</sup>

10. At the March 2013 attendance support meeting, a staff member from District Middle School offered to begin transporting Student to school. During the time the staff member from District Middle School was transporting Student to school, Student's attendance improved.<sup>13</sup> Other resources offered to assist Student with his truancy, such as tutoring and the ability to talk to a social worker, are generally only available when Student attends school. For the most part, Student has not accessed these resources, and they have not improved his attendance.<sup>14</sup>

11. In December 2013, DCPS referred Student to the D.C. Superior Court for truancy. By this point, DCPS had made at several interventions for Student that had not been successful.<sup>15</sup>

12. Student has a history of fighting in school, and frequently has outbursts of anger and lashing out,<sup>16</sup> which in addition to his not being in class when he should have been and other reasons, has often led to Student being suspended.<sup>17</sup>

13. While Student has a history of interpersonal conflict with peers, he can also be highly social with his peers.<sup>18</sup> Frequently, he will be inside the school building, but will not go to class, in part because after socializing with his peers, he would be late for class, and opts to remain in the hallways alone rather than going to class late.<sup>19</sup> Student sometimes remains awake late into the night talking on his cell phone with friends, and then sleeps during the day.<sup>20</sup>

14. During the 2012-2013 and 2013-2014 school years, Student received a high number of failing grades.<sup>21</sup> During this current school year (Student's second year in █ grade) Student has been on track to receive mostly failing grades, largely due to missed assignments.<sup>22</sup>

15. When Student is in class and completes assignments, he is often able to perform reasonably well.<sup>23</sup>

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<sup>12</sup> P-6; P-7; P-15.

<sup>13</sup> Testimony of Parent.

<sup>14</sup> P-9-2; P-15, P-2-3; R-7-2.

<sup>15</sup> P-16-2.

<sup>16</sup> Testimony of Parent; P-1-12.

<sup>17</sup> Testimony of Parent; P-23; P-2-4; P-5-1; P-5-2; P-14; P-16-1.

<sup>18</sup> Testimony of Special Education Coordinator.

<sup>19</sup> P-1-5.

<sup>20</sup> P-1-4.

<sup>21</sup> P-18; P-2-3; P-20.

<sup>22</sup> P-2-6.

<sup>23</sup> P-2-4; testimony of Special Education Coordinator.

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### ***Student's Cognitive Functioning***

16. Student received a confidential psychological evaluation from the Superior Court of the District of Columbia, detailed in an evaluation report dated August 21, 2014.<sup>24</sup>

17. District High School reviewed the Superior Court confidential psychological evaluation in February 27, 2015, within about three weeks of Student returning to District High School from Youth Services Center, where he had been placed due to involvement in the juvenile court system.<sup>25</sup>

18. Student has borderline intellectual functioning, with low average processing speed and working memory, and verbal comprehension and perceptual reasoning in the lower borderline range.<sup>26</sup>

### ***Depression***

19. Student meets the criteria for Persistent Depressive Disorder (“PDD”).<sup>27</sup>

20. Student’s teachers have not observed symptoms of irritability, social isolation or depressive symptoms to be a factor in his ability to go to or remain in class, or complete his work.<sup>28</sup>

21. It is possible for PDD to interfere with a student’s ability to apply himself and/or with a student’s willingness to participate in services.<sup>29</sup>

22. Additional school-based testing (such as behavior rating scales) could be helpful in determining the extent to which Student is manifesting symptoms of PDD in school. Such additional testing had not been conducted as of the date of the DPH.<sup>30</sup>

### ***Eligibility Determination***

23. On February 27, 2015, Student’s multi-disciplinary team (“MDT”) met and considered whether Student was eligible for special education and related services under the classification “Other Health Impairment” (“OHI”). The team determined that while Student met the first of two OHI criteria by way of his meeting the criteria for PDD, Student did not meet the second OHI criterion – “the health impairment adversely affects a student’s educational performance” – because Student’s environmental circumstances were determined to be what impacted Student’s performance.<sup>31</sup>

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<sup>24</sup> P-1.

<sup>25</sup> P-2-3.

<sup>26</sup> P-1-10; testimony of Parent’s Psychologist; testimony of Special Education Coordinator.

<sup>27</sup> P-1-12.

<sup>28</sup> P-2-8; P-3-8.

<sup>29</sup> Testimony of Special Education Coordinator.

<sup>30</sup> Testimony of Special Education Coordinator.

<sup>31</sup> P-3-3. R-6-1.

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24. On February 27, 2015, Student's MDT considered whether Student was eligible for special education and related services under the classification "Emotional Disturbance" (ED). The team determined that Student did not meet the criteria for emotional disturbance, in part because the team did not have before it documentation of Student's response to at least two scientific research-based interventions based on the problem solving method, seeking to address Student's emotional/skill deficiency.<sup>32</sup>

### 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-E D.C.M.R. § 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). 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).

#### **I. Whether DCPS denied Student a FAPE by failing to meet its child find obligations pursuant to 34 C.F.R. §300.111 and DCMR 5E-3002.1(d), from at least November 2012 to the present time.**

Pursuant to 34 C.F.R. § 300.111, DCPS is responsible for identifying, locating and evaluating all children with disabilities who reside in the District of Columbia and who are in need of special education and related services, regardless of the severity of their disability. DCPS' "child find" obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011).

Student is urgently in need of successful interventions that he will buy into, so that he can begin to benefit from his education and build toward a positive, healthy and productive future. Each witness at the DPH testified, and the record reflects, that Student is a good young man with tremendous potential, and who needs help navigating back to a path that will enable him to achieve the type of life he desires for himself (Student's career aspirations include becoming a nurse and/or a professional football player, and to help people), and can attain with assistance.

With respect to whether DCPS denied Student a FAPE by failing to meet its child find obligation toward Student from as early as November 2012, the hearing officer concludes that Respondent has not denied Student as FAPE on this issue. Beginning at an age when Student

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<sup>32</sup> R-4; testimony of Special Education Coordinator.

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was starting to be able to make more decisions on his own, and at an age when his peer relationships started to get more complex and volatile, Student began missing class, even when he was in school, and incurring repeated disciplinary infractions. Student's former middle school and current high school attempted some interventions, and only one such intervention achieved some degree of success in improving Student's attendance – when a staff member at District Middle School began coming to Student's home and transporting him to school. Student has had a pattern of failing grades since he was in 8<sup>th</sup> grades; however, when he does attend class he can do his work reasonably well.

Additionally, some non-school related factors seem to have had an impact on Student's school performance. For example, part of his initial difficulties appears to be correlated in time with a period in which Student's family relocated to a different neighborhood, which was not an easy transition for Student. Additionally, Student often stays up late into the night talking on his cell phone, then has a difficult time getting up in the morning on time for school, and then does not feel comfortable at times going into class late. As a result of so much missed instruction time, Student has consistently received failing grades. It was not unreasonable for Respondent to explore the impact such factors may have had on Student's attendance and behavior problems. Arguably, the interventions Respondent put in place for Student did not go far enough, with the possible exception of the one intervention that seemed to help while it was offered – a staff member transporting him to school. However, with respect to the issue before this hearing officer, the hearing officer does not conclude that Student's behavior in and of itself, and prior to his being determined to meet the criteria for PDD, was of the nature that it triggered Respondent's child find obligation as far back as November 2012. District High School reviewed and considered the Superior Court evaluation within about six months of its completion, and within three weeks of Student's returning to District High School from YSC. For these reasons, the hearing officer does not find a denial of FAPE on this issue.

### **II. Whether DCPS denied Student a FAPE by failing to determine Student eligible for special education services, either with the classification of other health impairment or emotional disturbance, pursuant to 34 C.F.R. §300.8, and/or by relying on a definition of emotional disturbance that is more restrictive than and contrary to federal law.**

Pursuant to 34 C.F.R. § 300.8(c)(9), a student is eligible under the disability classification OHI when the student has “limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—(i) Is due to chronic or acute health problems . . . and (ii) Adversely affects a child's educational performance.” Finding that Student's PDD did not have an adverse effect on his educational performance, Student's MDT did not find him eligible under the category of OHI. It could well be that environmental factors, rather than PDD, is what is impacting Student's educational performance. However, in light of the fact that Student was determined to have met the criteria for PDD, and in light of the fact that it can be difficult to discern the extent to which PDD is or is not driving behaviors Student has been consistently exhibiting, such as class avoidance and lack of effort, it would have been important to gather data from school-based assessments to determine what if any impact Student's PDD has on his learning experience prior to determining that he was not eligible. As a result, the hearing officer concludes that

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determining that Student did not meet the criteria for OHI without having collected such data was a denial of FAPE.

Pursuant to 34 C.F.R. § 300.8(c)(4), a student is eligible under the disability classification 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 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; (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.”

Student’s MDT determined that Student was not eligible as a student with emotional disturbance, in part because the MDT had no documentation of Student’s response to at least two scientific research-based interventions based on the problem solving method, seeking to address Student’s emotional/skill deficiency. District High School’s position is that without its additional criterion, the definition of emotional disturbance is broad and runs the risk of causing African-American students such as Student to be over-identified for special education. Nonetheless, the additional criterion created a definition of emotional disturbance that is more restrictive than that set out in the IDEA; therefore, the hearing officer finds that determining Student’s eligibility based on the additional criterion denied him a FAPE. Petitioner met her burden on this issue.

### **ORDER**

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Within 15 school days of this Order, DCPS shall conduct appropriate school-based assessments to determine what if any impact Student’s PDD has on his educational performance;
- B. Within 10 school days of the completion of the school-based assessments referenced in Order (A) above, DCPS shall reconvene Student’s MDT to determine Student’s eligibility under the disability classification OHI (factoring in school-based assessments to determine what if any impact Student’s PDD has on his educational performance), and emotional disturbance (using the definition of emotional disturbance set out in 34 C.F.R. §8(c)(4));
- C. As it is not yet possible to determine whether Student is entitled to compensatory education, compensatory education is dismissed without prejudice.

All other relief Petitioner requested in the complaint is **DENIED**.

**IT IS SO ORDERED.**

Hearing Officer Determination

Date: May 17, 2015

/s/ NaKeisha Sylver Blount  
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney: Kimberly Glassman, Esq. (electronically)

DCPS' Attorney: Tanya Chor, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE (electronically)

ODR (electronically)

**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).