

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

2012 MAY 29 AM 9:20  
OSSE  
STUDENT HEARING OFFICE

Parent,<sup>1</sup> on behalf of,  
Student,

Petitioner,

Date Issued: May 26, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,  
Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a \_\_\_\_\_ year old male, who is currently a \_\_\_\_\_ grade student attending School A. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On March 12, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide timely and accurate evaluations or reevaluations for all areas of suspected disabilities; failing to allow an independent evaluator to do an independent educational evaluation (IEE); failing to identify in a timely manner the serious emotional and learning disabilities of a student very much at risk; failing to provide an appropriate individualized education program (IEP); failing to provide an appropriate placement; and failing to send the parent the student's cumulative file. As relief for this alleged denial of FAPE, Petitioner requested that the student be found eligible for special education and related services as a student with emotional disturbance (ED) or specific learning disability (SLD); that an IEP be developed for the student which includes twenty-seven and a half (27.5) hours of specialized instruction outside of the general education setting, therapeutic recreation outside of the general education setting, lunch outside of the general education setting, physical education outside of the general education setting, and therapeutic transportation; placement in a private special education day school; one hundred (100) hours per month of therapeutic recreation and

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

individual and family counseling as extended school year (ESY) services; and compensatory education.

On March 28, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that DCPS does not suspect the student of having a disability; the student is receiving failing grades as a result of non-attendance; the student was not previously identified as a student with disabilities, assuming *arguendo* that the student was previously identified as a student with disabilities, prior eligibility does not establish that a student is currently a student with disabilities, especially if the student was exited from special education as a result of meeting his goals; the parent did not request an evaluation for the student; DCPS timely reviewed the evaluations provided by the student's parent; DCPS was not required to reevaluate the student because the student has never been identified as a student with disabilities; the student does not meet the criteria as a student with disabilities for the ED and/or SLD categories; DCPS has not been able to conduct classroom observations of the child because the child does not attend school; the educational advocate has no entitlement to conduct classroom observations; an IEE has not been authorized so granting access to the evaluator to the student's classroom is not necessary; the student has not been found eligible for special education and related services and therefore would not be entitled to a full-time IEP; the student has not been found eligible for special education and related services and therefore would not be entitled to placement in a private special education day school; the student has not been found eligible for special education and related services and therefore would not be entitled to related services including transportation, home counseling, and therapeutic recreation; and the parent may go to the school to inspect and review the student's educational records.

On March 30, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. Accordingly, the parties agreed that the 45-day timeline started to run on April 12, 2012, following the conclusion of the 30-day resolution period, and ends on May 26, 2012.

On April 6, 2012, Petitioner filed a Motion for Records alleging that DCPS has "covered up" the student's history or has not looked for the student's cumulative and special education file. On April 11, 2012, DCPS filed a Response Petitioner's Motion for Records. On April 6, 2012, Petitioner also filed a Motion for Independent Evaluation on the grounds that an independent evaluation at this time is necessary to substantiate the issues in the Complaint. On April 11, 2012, Petitioner filed a response to Respondent's Motion to Dismiss.

On April 9, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. The Hearing Officer issued the Prehearing Order on April 9, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter and confirmed May 21-22, 2012 as the dates for the due process hearing. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. On April 12, 2012, Petitioner filed comments to the April 9, 2012 Prehearing Order.

On April 26, 2012, a second prehearing conference was held to discuss Issue #3 and Substantive Relief #2 as outlined in the April 9, 2012 Prehearing Order. An Amended

Prehearing Order, clearly outlining the issues to be decided in this matter, was issued on April 30, 2012.

On April 13, 2012, the Hearing Officer issued an Order Denying Petitioner's Motion for Independent Evaluation and Motion for Records but ordered the Respondent permit the parent, or parent representative, to inspect and review any education records for the child in accordance with 34 CFR §300.613.

On April 19, 2012, Petitioner filed a Motion for Reconsideration of Independent Evaluation and for an Evidentiary Hearing. On April 24, 2012, Respondent filed an Opposition to Petitioner's Motion for Reconsideration and for an Evidentiary Hearing. On April 27, 2012, Petitioner filed a Reply to Respondent's Opposition to Petitioner's Motion for Reconsideration and for an Evidentiary Hearing. On May 2, 2012, the Hearing Officer issued an Order Denying Petitioner's Motion for Reconsideration and for an Evidentiary Hearing.

On May 8, 2012 Petitioner filed an Emergency Motion to Inspect Records alleging that the records provided to Petitioner were incomplete and that DCPS has failed to respond to his request of a date to inspect and review the student's records. On May 11, 2012, Respondent filed a Response to Petitioner's Emergency Motion to Inspect Records stating that Petitioner's counsel gave notice of less than one (1) business day of the date and time he intended to inspect and review the student's records and that DCPS have provided all of the student's records to Petitioner. On May 14, 2012, the Hearing Officer issued an Order ordering that the Respondent permit the parent, or parent representative, to inspect and review any education records for the child in accordance with 34 CFR §300.613; that the parent, or parent representative, give reasonable notice (at least two (2) full business days and at a time mutually convenient for [School A]) to DCPS of the date and time she intends to inspect and review the student's records; and that the Petitioner is permitted to disclose any education records after the disclosure deadline of May 14, 2012 that are included in the student's education records and have not been previously provided to Petitioner.

On May 14, 2012, Petitioner filed Disclosures including thirty-three (33) exhibits and thirteen (13) witnesses.<sup>2</sup> On May 14, 2012, Respondent filed Disclosures including fourteen (14) exhibits and eight (8) witnesses.

The due process hearing commenced at approximately 9:03 a.m. on May 21, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. Due to technical difficulties, at approximately 10:30 a.m., the hearing was moved to Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-32 were admitted without objection. Respondent's Exhibits 1-12 and 14 were admitted without objection. Respondent objected to Petitioner's Exhibit 33 on the grounds that the exhibit contained excerpts from other Hearing Officer Determinations (HODs) from other students and has no relevance in this matter and Petitioner objected to Respondent's Exhibit 13 on the ground that the exhibit contained Complaints from other students and has no relevance in this matter. The Hearing Officer did not admit Petitioner's Exhibit 33 or

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Respondent's Exhibit 13 because the exhibits were based on other students and have no relevance in deciding the issues in this matter.

During the April 9, 2012 Prehearing Conference, the Hearing Officer asked the Petitioner's attorney to estimate the amount of time the Petitioner would need to present his case. The Petitioner's attorney stated that he would need eight (8) hours to present his case. Based on this representation, the Hearing Officer scheduled the due process hearing for two (2) days. The Prehearing Order provided that the Petitioner would proceed first at the hearing. On May 3, 2012, the Petitioner filed a Motion for the Hearing Officer to issue a Notice to Appear for Melanie Shapiro because she refused to voluntarily appear to testify. On May 8, 2012, the Chief Hearing Officer's representative signed the Notice to Appear. The Petitioner did not file a Motion for the Hearing Officer to issue any other Notices to Appear.

After the Petitioner presented his first witness, he attempted to contact Dr. Constantine Shustikoff. This witness was unavailable. Throughout the first day of the due process hearing, the Petitioner tried multiple times to contact Dr. Constantine Shustikoff, Dr. Mitchell Hugonnet, Ms. Jeryl McTootle and Dr. Mark Sweeney however the witnesses remained unavailable each time the Petitioner attempted to contact them. Prior to recessing the first day of hearing, the Hearing Officer requested that the Respondent's attorney agree to stay beyond the scheduled hearing time in order for the Petitioner to present another witness. The Hearing Officer also requested that the Respondent agree to permit the Petitioner to call the parent, out of order, to allow Petitioner the opportunity to call another witness. The Respondent agreed to remain beyond the scheduled time for the hearing and agreed to permit the Petitioner to call the parent after the Respondent's attorney presented her case. The Petitioner remained unable to contact any of the remaining witnesses. Based on the Petitioner's inability to contact the remaining witnesses throughout the Petitioner's scheduled day of the hearing, despite multiple attempts, the Hearing Officer denied the Petitioner's request to permit the Petitioner's remaining witnesses to testify out of order. Although Dr. Constantine Shustikoff and Dr. Mitchell Hugonnet did not testify, their evaluations of the student were received into evidence.

The hearing concluded at approximately 12:32 p.m. on May 22, 2012, following closing statements by both parties.

#### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

#### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to provide the student a FAPE by failing to timely evaluate or reevaluate the student in all areas of suspected disability, specifically all evaluations

- necessary to label the student as a student with emotional disturbance and/or specific learning disability?
2. Whether DCPS failed to provide the student a FAPE by failing to identify the student as a student with disabilities?
  3. Whether DCPS failed to provide the student a FAPE by failing to develop an appropriate IEP for the student, specifically, twenty-seven and a half (27.5) hours of specialized instruction outside of the general education setting, therapeutic recreation outside of the general education setting, lunch outside of the general education setting, physical education outside of the general education setting, and therapeutic transportation?
  4. Whether DCPS failed to provide the student a FAPE by not placing the child in a special education day school?
  5. Whether DCPS failed to provide the student a FAPE by failing to provide 100 hours per month of therapeutic recreation and individual and family counseling as extended school year services?
  6. Whether DCPS failed to provide the student a FAPE by failing to allow an IEE of the student?
  7. Whether DCPS failed to provide the student a FAPE by failing to provide the parent a copy of the student's cumulative file?

### 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. The student is not currently identified as a child with a disability. (Petitioner's Exhibits 1, 2, 3, 10 and 12; Respondent's Exhibits 1, 2, 3 and 5)
2. The student became involved with the legal system in 2008. (Petitioner's Exhibits 13, 14, 16, 17 and 18)
3. In 2009, the student had a good relationship with his family members, had friends and a girlfriend, was a leader, had average grades, was engaging and cooperative, was pleasant but reserved, made eye contact and attended well to tasks. The student also smoked marijuana and continuously violated his probation. (Petitioner's Exhibit 13; Student's Testimony; Parent's Testimony)
4. In December 2009, on the WISC-IV, the student obtained an IQ score of 77, a Verbal Comprehension Index (VCI) of 75, a Perceptual Reasoning Index (PRI) score of 84, a Working Memory Index (WMI) of 86 and a Processing Speed Index (PSI) of 85. While the student did not perform at an age appropriate level on reading, mathematics and written expression subtests, the student's achievement scores were comparable with his intellectual functioning. The student had a positive self-concept and a stable sense of self-worth. The student was usually uncritical of himself and attributed personal challenges to external causes, failing to take any responsibility for such. The student was experiencing distress related to his involvement in the legal system. Regarding the student's personality, there were no serious areas for concern. (Petitioner's Exhibit 13)

5. The student was diagnosed with Depressive Disorder NOS (Not Otherwise Specified) in February 2011. (Petitioner's Exhibit 17)
6. On July 15, 2011, the student was cooperative and forthcoming, maintained appropriate eye contact and had organized and coherent thought processes although his judgment was at times questionable. The student's mood was relatively cheerful and he often smiled and laughed throughout testing. The student did not have his eye glasses during testing. (Petitioner's Exhibit 15)
7. The student was referred for an evaluation in July 2011 because in the process of being arrested the student told the police officer that he wanted to be shot. The student later stated that he said this because he "played crazy" because he "knows the consequences." The student knew that had he not said this, he would have gone to jail again for violating his probation. (Petitioner's Exhibits 15, 16, 17 and 18)
8. The student felt "down" in February 2011 but ceased feeling down after beginning medication on June 26, 2011. (Petitioner's Exhibit 15)
9. After the student began medication he began attending therapy and following rules. He ceased "hanging out" and was available to his CBI worker. (CBI Worker Testimony)
10. In July 2011, on the WISC-IV, the student obtained an IQ score of 71, a Verbal Comprehension Index (VCI) of 57, a Perceptual Reasoning Index (PRI) score of 86, a Working Memory Index (WMI) of 86 and a Processing Speed Index (PSI) of 80. Given the discrepancy between the student's nonverbal reasoning abilities and his verbal reasoning abilities, the student's IQ of 71 does not represent a valid estimate of the student's actual ability. (Petitioner's Exhibit 15)
11. The student has a severe discrepancy (a two year discrepancy between the student's age and his level of functioning) in broad reading and broad written language however the student scores above average in the written language subtest. (Petitioner's Exhibit 14)
12. After the July 2011 educational testing, because there is a discrepancy in the student's scores, there was a need for further assessment in order to determine if the student has a learning disability. (Petitioner's Exhibit 1 and 15; Respondent's Exhibit 3)
13. In July 2011, the student had a risk for depression and the potential for suicide however the student denied any past or current suicidal ideation. (Petitioner's Exhibit 15, 16 and 18)
14. In July 2011, while the student's mood was depressed, depression was ruled out as a diagnosis. The student's thought process was goal-oriented and he denied any suicidal or homicidal ideation. During the course of hospitalization, the student participated in the program, adjusted to medication and had a better regulated mood. (Petitioner's Exhibit 18)
15. On October 28, 2011, School A received a referral for an initial evaluation for the student. (Petitioner's Exhibits 3 and 10; Respondent's Exhibits 2 and 5)
16. At the start of the January 13, 2012 Multidisciplinary Team (MDT) meeting, the Petitioner's attorney presented a request, in the form of "Meeting Notes," for the student to be placed in a full-time private special education placement; receive individual and family counseling, including drug counseling; a one-to-one aide; wrap-around services including socialization, therapeutic recreation, therapeutic transport, home based individual and family counseling and tutoring; compensatory education;

- and ESY. These were not notes of the discussion that took place during the meeting. (Petitioner's Exhibits 1 and 4; Respondent's Exhibit 3)
17. On January 13, 2012, the MDT reviewed the student's July 17, 2011 Educational Evaluation, July 19, 2011 School B Report to the Family Division DC Superior Court, July 15, 2011 Confidential Psychological Evaluation, and attendance information. The team did not have individual reports of assessments indicating the instrument used for the assessment. (Petitioner's Exhibit 1; Respondent's Exhibit 3)
  18. On January 13, 2012, the Petitioner requested that the Psycho-educator be permitted to observe the student. School A did not grant permission reasoning that the LEA's policy is for the LEA to first conduct observations and evaluations. The team agreed to reconvene in order to review additional data and discuss the eligibility process. (Petitioner's Exhibit 1; Respondent's Exhibit 3; School Psychologist Testimony)
  19. At the conclusion of the January 13, 2012 MDT meeting, the parent signed consent for DCPS to evaluate the student and received a copy of the Procedural Safeguards Manual for Parents. (Petitioner's Exhibits 1 and 12; Respondent's Exhibit 3)
  20. The MDT reconvened on February 10, 2012 in order to review the student's December 9, 2009 Confidential Psychological Evaluation, the student's suspension record and the student's attendance. The Petitioner informed School A that the student had been in School B since January 13, 2012. (Petitioner's Exhibit 3; Respondent's Exhibit 2; School Psychologist Testimony)
  21. At the February 10, 2012 MDT meeting, the team did not have classroom-based data. The team agreed to reconvene on February 22, 2012, before the expiration of the 120-day evaluation timeline, in order to review any additional data that could be obtained from School B. (Petitioner's Exhibit 3; Respondent's Exhibit 2; School Psychologist Testimony)
  22. On February 14, 2012, the student demonstrated a willingness to comply with medication management to address symptoms of depression but had limited insight in regard to his marijuana abuse. (Petitioner's Exhibits 17 and 18)
  23. On February 16, 2012, the student's behavior was engaging, his mood depressed and his thought process goal-directed. He denied any suicidal or homicidal ideation. During the course of hospitalization, the student attended the therapeutic school, participated in the program and had positive benefits from mediations. His mood improved. (Petitioner's Exhibit 18)
  24. The School Psychologist attempted to observe the student in two classes on at least two different days and one class on a third day however the student was not present in any of the classes. During the 120-day timeline, the student was present in school four days. (Petitioner's Exhibit 9; Respondent's Exhibit 10; School Psychologist Testimony)
  25. The MDT made reasonable attempts to gather classroom-based data from School B, after learning on February 10, 2012 that the student was attending School B, however was not provided with these data until May 5, 2012. (Petitioner's Exhibits 2, 3 and 26; Respondent's Exhibits 1 and 2)
  26. On February 22, 2012 the MDT reconvened to discuss the student's eligibility for special education services. The MDT agreed that ED, "rather than SLD," was the student's suspected area of disability. The team reviewed the student's February 14, 2012 Psychiatric Report and considered all assessments reviewed in the series of

- MDT meetings in making its determination. The team did not have access to the student's academic functioning at School B during the February 22, 2012 meeting. (Petitioner's Exhibit 2; Respondent's Exhibit 1; School Psychologist's Testimony)
27. During the February 22, 2012 MDT meeting, the Social Worker recommended behavioral intervention supports for the student's attendance problems and stated that the student's only other social-emotional issue is substance abuse. (Petitioner's Exhibit 2; Respondent's Exhibit 1)
  28. The purpose of the February 22, 2012 MDT meeting was to determine if the student is a child with a disability and eligible for special education and related services. However, the MDT had no information regarding the student's performance and behaviors in an academic setting and no information as to whether the student's diagnosis has an impact on the student's education. (Petitioner's Exhibit 2; Respondent's Exhibit 1; School Psychologist Testimony)
  29. DCPS believed that interventions needed to be put into place for six weeks in order to evaluate the student's behavior in the school setting. (Petitioner's Exhibit 2; Respondent's Exhibit 1; School Psychologist Testimony)
  30. On February 22, 2012, the MDT determined that it needed additional data to determine if the student met the five criteria needed to find the student eligible for special education and related services as an ED student. The Psycho-educator, Parent, parent's attorney and CBI Worker disagreed with the team's determination. The MDT did not contest the professional psychiatric and clinical opinion of School B's staff but merely sought further information as to whether the student met the criteria as an ED student. (Petitioner's Exhibit 2, Respondent's Exhibit 1; Psycho-educator Testimony; CBI Worker Testimony; School Psychologist Testimony)
  31. On February 24, 2012, DCPS provided the parent with a Prior Written Notice stating that the LEA "refuses to conduct an evaluation or reevaluation" because the school was unable to conduct observations or implement interventions required by the State policy as a result of the student's excessive absences. (Petitioner's Exhibit 10; Respondent's Exhibit 5)
  32. When in class, the student is well-adjusted, able to complete his work, follow directions, ask questions, request assistance, respect school rules, regulate his behavior, socialize appropriately with peers, participate in class and pay attention. His is not talkative, hyperactive, disobedient, distracted by others, restless, easily frustrated, aggressive or attention seeking. (Petitioner's Exhibit 19; Student Testimony; School Psychologist Testimony; Teacher Testimony)
  33. For the first three quarters of the 2011-2012 school year, the student has received all "Fs" on his report card. The student's grades are a result of his attendance. (Petitioner's Exhibits 1, 5, 6, 7 and 9; Respondent's Exhibits 3, 7, 8, 9, 10 and 11; School Psychologist Testimony; Teacher Testimony)
  34. The student leaves school to get something to eat, to meet his probation officer or to attend drug treatment. (Student's Testimony)
  35. The student is complying with court-ordered individual therapy, drug treatment, medication management and community based intervention (CBI). These interventions and treatments have been successful. He currently has a positive relationship with his mother and is emotionally stable. (Petitioner's Exhibit 17; Student Testimony; CBI Worker Testimony)

36. The Petitioner's attorney made multiple requests for DCPS to "send" the student's cumulative file to the attorney. DCPS consistently represented that the student's records were provided to the parent's attorney on more than one occasion and indeed updated records were faxed to the parent's attorney on March 2, 2012. At 8:39 p.m. on May 7, 2012, the parent's attorney sent an electronic communication to School A, stating that he would be present at School A at 1:30 p.m. on May 8, 2012. School A responded stating that the school staff had a busy schedule on May 8, 2012 and would fax the student's most recent report card and attendance summary. (Administrative Record; Petitioner's Exhibits 1, 29, and 32; Respondent's Exhibits 3, 4 and 12)
37. The Psycho-educator did not provide credible testimony. She reasoned that the student's emotional disturbance is a result of untreated ADHD however there is no evidence that the student has ADHD, in fact, the Teacher's testimony, the Student's testimony and the record of the student's behavior in School B indicate that the student participates in class, pays attention, is not talkative or hyperactive, is not distracted, is not restless, is not easily frustrated and is not attention seeking. Further, she consistently stated that the student is in need of special education and related services because the student's mental health issues are untreated yet the record indicates that the student is successfully participating in all treatment ordered through the court system. Additionally, on February 22, 2012, she made a recommendation for an extremely restrictive educational setting for the student and wrap-around services without having met or interviewed the student or the parent or reviewing any classroom-based data regarding the student either from School A or School B. She testified that the student is able to be found as a child with a disability under the category of ED and requires a private school placement and wrap-around services based on the student's evaluations yet also testified that she is unable to make an appropriate recommendation regarding the student without reviewing the student's educational history or conducting a classroom observation of the student. Finally, she testified that her compensatory education recommendation for this student was developed because of her distrust of the school system's ability to provide secondary transition services based on conversations in IEP meetings for other students.
38. The Clinical Psychologist provided generally credible testimony. She was familiar with the student's July 15, 2011 Confidential Psychological Evaluation although she did not personally conduct the evaluation. Her testimony was creditable regarding the student's current mental and educational state on the date of testing and admitted that her recommendations were "ideal" recommendations and based only on information obtained in a psychiatric setting.
39. The School C Education Director provided generally credible testimony. Her testimony was credible regarding the specifics of the School C program however she did not have an in-depth knowledge of the student's needs. She was unable to recall if the student has an IEP.
40. The Social Worker testified that she was unable to recall any specific information regarding the student and therefore shed no light on the issues in this case.
41. The School D Education Director provided credible testimony. Her testimony was credible regarding the specifics of the School D program and she had a basic knowledge of the student's needs. She was aware that the student does not have an IEP and acknowledged the only students with IEPs are appropriate for School D.

42. The Student provided inconsistently credible testimony. His testimony regarding school attendance and school rules was inconsistent and contradictory and therefore not credible. For example, the student testified that he has been attending school however was unable to list his scheduled classes or name his teachers. Likewise, he testified that he is unable to take books home although the Teacher gave credible testimony that students are able to take books home. His testimony regarding his difficulty in school was credible although vague. His testimony regarding past educational history and motivations for his behavior was credible.
43. The CBI Worker provided credible testimony. She was familiar with the student's needs, family interactions and his progress with court orders and therapist recommendations. She admitted that she had not conducted an observation of the student in a general education environment, that she was not aware that he did not have an IEP when she took him on school tours of Schools C and D and that the suggested services for the child were "ideal."
44. The School Psychologist provided credible testimony. He was familiar with the student's evaluations, his educational and attendance history and his problems in the community. His testimony was consistent with the documentary evidence.
45. The Teacher provided credible testimony. She was able to give specific dates of the student's attendance and able to describe the process for tardy arrival in School A. She was familiar with the student's behavior and achievement during the days he was present in her class.
46. The Parent provided generally credible testimony. Her testimony regarding the student's school attendance was based on the student's information rather than personal information and therefore not credible. Her testimony regarding the student's educational history and problems in the community was credible.

### 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:

#### Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

#### Issue #1

Under the IDEA, a state must provide a "free appropriate public education" to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). A state must, *inter alia*, identify and evaluate children with disabilities, and develop an "individual education program" for each child with a

disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). In this case, the Petitioner alleges that DCPS failed to evaluate or reevaluate the student in all areas of suspected disability, specifically, all evaluations necessary to label the student as a student with ED and/or SLD. The Petitioner presented no evidence suggesting that the student is currently identified as a child with a disability therefore the Hearing Officer finds that the student is not entitled to a reevaluation and will focus the analysis solely on the alleged failure to evaluate.

Evaluation is defined as, “procedures used in accordance with §§300.304 through 300.311 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 CFR §300.15. In conducting an evaluation, a local educational agency (LEA) must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability” and the content of the child’s IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.”

An initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. The timeframe does not apply if the parent of a child repeatedly fails or refuses to produce the child for the evaluation. 34 CFR §§300.301(c), (d). The District of Columbia has established a 120-day timeline. *See* D.C. Code §38-2561.02. The timeframe does not apply if the parent repeatedly fails or refuses to produce the child for the evaluation. *See* 34 CFR §300.301(d)(1).

As a part of an initial evaluation (if appropriate), the IEP Team and other qualified professionals must- (1) review existing evaluation data on the child including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine- (i)(A) Whether the child is a child with a disability and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii) Whether the child needs special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed. *See* 34 CFR 300.305.

On October 28, 2011, School A received a referral for an initial evaluation for the student. The record does not contain the reason for the referral or from whom the referral was received. The MDT first met on January 13, 2012, to review existing data for the student. At the start of the meeting, before any discussion took place and before the parent signed consent for DCPS to evaluate the student, the Petitioner’s attorney presented a request, in the form of “Meeting Notes,” for the student to be placed in a full-time private special education placement; receive individual and family counseling, including drug counseling; a one-to-one aide; wrap-around services including socialization, therapeutic recreation, therapeutic transport, home based individual and family counseling and tutoring; compensatory education; and ESY.

The MDT reviewed the student's July 17, 2011 Educational Evaluation, July 19, 2011 School B Report to the Family Division DC Superior Court, July 15, 2011 Confidential Psychological Evaluation, and attendance information. The team noted concerns with some of the assessments including a discrepancy in scores, a lack of data regarding how the child functions in the school setting, and a lack of individual reports of assessments indicating the instrument used for the assessment. The MDT also noted that the student's grades were a result of his attendance and encouraged the student to attend school in order for observations to be completed, interventions to be implemented and next steps in the eligibility process to be taken. The Petitioner requested that the Psycho-educator be permitted to observe the student however School A did not grant permission reasoning that the LEA's policy is for the LEA to first conduct observations and evaluations. The team agreed to reconvene in order to review additional data and discuss the eligibility process. At the conclusion of the January 13, 2012 MDT meeting, the parent signed consent for DCPS to evaluate the student and received a copy of the Procedural Safeguards Manual for Parents.

The MDT reconvened on February 10, 2012 in order to review the student's December 9, 2009 Confidential Psychological Evaluation. The team also discussed the student's suspension record and attendance. The Petitioner informed School A that the student had been in School B since January 13, 2012. Both School A's social worker and the School Psychologist indicated that classroom-based data needed to be obtained. The School Psychologist also explained to the team that the student's diagnosis of Depressive Disorder NOS does not equate to a special education label of ED. The team agreed to reconvene on February 22, 2012, before the expiration of the 120-day evaluation timeline, in order to review any additional data that could be obtained from School B.

On February 22, 2012 the MDT reconvened to discuss the student's eligibility for special education services. The MDT agreed that ED, "rather than SLD," was the student's suspected area of disability. The team reviewed the student's February 14, 2012 Psychiatric Report and noted that all assessments reviewed in the series of MDT meetings for the student would be considered. The Social Worker was asked by the Psycho-educator to recommend a student/teacher ratio for the student but the Social Worker clarified that School B's educational setting is based on psychiatric needs and that she could not evaluate the student's school [placement] and functioning in another setting. The Social Worker recommended behavioral intervention supports for the student's attendance problems and stated that the student's only other social-emotional issue is substance abuse. The team did not have access to the student's academic functioning at School B during the February 22, 2012 meeting.

During the meeting, the School Psychologist emphasized that while the meeting was convened to determine if the student is a child with a disability however the MDT had no information regarding the student's performance and behaviors in an academic setting and no information as to whether the student's diagnosis has an impact on the student's education. The School Psychologist stated that interventions need to be put into place for six weeks in order to evaluate the student's behavior in the school setting and that the only data regarding the student's educational performance was the student's failing grades which were attributed to the student's lack of attendance. The team again engaged in a discussion regarding the student's lack of

attendance and that the student's diagnosis of Depressive Disorder NOS does not equate to a special education label of ED.

The MDT determined that it needed additional data to determine if the student met the five criteria needed to find the student eligible for special education and related services as an ED student. The Psycho-educator disagreed with the team's determination, stating that the team had access to "more than enough data" to label the student ED. On February 24, 2012, DCPS provided the parent with a Prior Written Notice stating that the LEA "refuses to conduct an evaluation or reevaluation" because the school was unable to conduct observations or implement interventions required by the State policy as a result of the student's excessive absences.

Although DCPS sent a Prior Written Notice stating that it refused to conduct an initial evaluation, the Hearing Officer finds that the MDT was indeed engaging in the process of conducting an initial evaluation. The MDT obtained parental consent to evaluate the student on January 13, 2012; reviewed the student's exiting data, including a variety of assessments and other information provided by the parent, at the February 10, 2012 and February 22, 2012 MDT meetings; and remained cognizant of the 120-day initial evaluation timeline. As a part of the evaluation, the School Psychologist also attempted to observe the student in two classes on at least two different days and one class on a third day however the student was not present in any of the classes. While the Petitioner argued that the School Psychologist had an opportunity to observe the child during the four days the student was present during the 120-day timeline, it is unreasonable to expect a school to plan for and execute an observation without knowing when a student will be present in class or to reschedule planned activities when a student unexpectedly attends class.

The Hearing Officer disagrees with DCPS that it is necessary to implement six weeks of interventions in order to evaluate the student's behavior to determine whether the student is eligible for special education and related services. Neither the evaluation procedures in the IDEA regulations nor the State guidelines prescribe this restrictive interpretation of "assessment" or "intervention." In *A.P. v. Woodstock Bd. Of Educ.*, 572 F. Supp. 2d 221, 50 IDELR 275 (D. Conn. 2008), the Court upheld the use of a Child Study Team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. *Id.* However, in *A.P.*, the parents had never submitted a request to have their child evaluated. Here, not only was there a request for the student to be evaluated, on January 13, 2012, the parent signed consent for an evaluation. The student's response to these interventions would have given the MDT valuable data to use in the determination of whether the student is a child with a disability however was not necessary.

Nonetheless, the Hearing Officer agrees with DCPS that additional data were needed to determine if the student is a child with a disability. The MDT made reasonable attempts to gather classroom-based data from School B, after learning on February 10, 2012 that the student was attending School B, however was not provided with these data until after the Complaint was filed. At the February 22, 2012 MDT meeting, the LEA was unable to review current classroom-based, local or State assessments, classroom-based observations and observations by teachers.

The only data the MDT had regarding the student's education was anecdotal information from teachers which indicated that the student behaved appropriately in class, requested assistance in class when needed, was able to complete classroom assignments when he attended class, had failing grades which were attributed to lack of attendance rather than a lack of understanding and had a chronic truancy problem. The MDT did not contest the professional psychiatric and clinical opinion of School B's staff but merely sought further information as to whether the student met the criteria as an ED student.

Pursuant to 300.305(a), as a *part of* an initial evaluation the IEP Team must review existing data to identify what additional data are needed to determine whether the child is a child with a disability (emphasis added). However, pursuant to 300.301(c)(2)(i), the initial evaluation must consist of procedures *to determine* if the child is a child with a disability (emphasis added). The LEA makes a determination as to whether additional data are needed as a part of the initial evaluation process however the end result of the initial evaluation is the determination of whether the child is a child with a disability. The evaluation timeline does not apply if the parent repeatedly fails or refuses to produce the child for the evaluation. *See* 34 CFR §300.301(d)(1).

The MDT met on three occasions to discuss existing data and made reasonable attempts to gather additional data that were needed, which consisted of classroom-based data. However, the LEA's attempts to make a final determination regarding the child's eligibility were frustrated by the parent's repeated failure to produce the child for remaining necessary components of the evaluation. Therefore, the 120-day evaluation timeline does not apply in this case. Accordingly, the Hearing Officer finds that DCPS did not deny the student a FAPE by failing to timely evaluate the student in all areas of suspected disability.

#### Issue #2

The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id.* The Petitioner alleges that DCPS should have found the student eligible for special education and related services as a student with ED or SLD.

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 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."

An 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.” 34 CFR §300.8(c)(4).

Specific learning disability means “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team “may determine” that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child “does not achieve adequately for the child’s age or to meet State-approved grade-level standards” in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child “does not make sufficient progress to meet age or State-approved” standards “when using a process based in the child’s response to scientific, research-based intervention” or the child “exhibits a pattern of strengths and weaknesses in performance, achievement, or both” relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child’s response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the “IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations.” 5 DCMR §E-3006.4(a). The rules also provide that LEAs “may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure.” 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that include the basis for making the determination regarding SLD, including a “statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services.” 5 DCMR §E-3006.5(g)(2), (6). Finally, OSSE states that the “IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child’s eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria.” 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b). The determination of a

child's eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9<sup>th</sup> Cir. 2011).

In the present matter, the student became involved with the legal system in 2008. In the student's December 9, 2009 Confidential Psychological Evaluation, the evaluator noted that the student has a good relationship with his family members, has friends and a girlfriend, is a leader, has average grades, was engaging and cooperative, was pleasant but reserved, made eye contact and attended well to tasks. The evaluator also noted that the student smokes marijuana and has continuously violated his probation. Based on the WISC-IV, the student obtained an IQ score of 77, which places him in the borderline range of intellectual functioning; a Verbal Comprehension Index (VCI) of 75, which falls within the borderline range of intellectual functioning; a Perceptual Reasoning Index (PRI) score of 84, which falls within the low average range of intellectual functioning; a Working Memory Index (WMI) of 86, which is within the low average range of intellectual functioning; and a Processing Speed Index (PSI) of 85, which is within the low average range of intellectual functioning. While the student did not perform at an age appropriate level on reading, mathematics and written expression subtests, the evaluator summarized that the student's achievement scores were comparable with his intellectual functioning as they were "consistently in the average range." The student's results on the Personality Assessment Inventory – Adolescent (PAI-A) indicate that the student has a positive self-concept and a stable sense of self-worth. He is usually uncritical of himself and attributes personal challenges to external causes, failing to take any responsibility for such. He uses relationships for practical reasons rather than enjoyment. The evaluator noted that the student is experiencing distress related to his involvement in the legal system. The evaluator concluded that the "personality inventory does not indicate any serious areas for concern."

The student was diagnosed with Depressive Disorder NOS in February 2011 however this evaluation was not submitted as evidence in this matter.

In the student's July 15, 2011 Confidential Psychological Evaluation, the evaluator noted that the student was cooperative and forthcoming, maintained appropriate eye contact and had organized and coherent thought processes although his judgment was at times questionable. The student's mood was relatively cheerful and he often smiled and laughed throughout testing. During the testing, the student mentioned "family problems." The evaluator noted that the student squinted during the evaluation and after being asked twice, the student admitted that he was supposed to be wearing glasses but did not like them. The student admitted that school was difficult and reported being suspended for fighting. The student was referred for this particular evaluation because in the process of being arrested the student told the police officer that he wanted to be shot. The student later stated that he said this because he "played crazy" because he "knows the consequences." He clearly stated that had he not said this, he would have gone to jail again for violating his probation. The student said that he felt very down and did not care about bad things happening in February 2011 but since he began taking medication on June 26, 2011 has not felt down or depressed. The evaluator noted that it seemed likely that the student was using marijuana to self-medicate. Based on the WISC-IV, the student obtained an IQ score of 71, which places him in the borderline range of intellectual functioning; a Verbal Comprehension Index (VCI) of 57, which falls within the extremely low range of intellectual functioning; a Perceptual Reasoning Index (PRI) score of 86, which falls within the low average

range of intellectual functioning; a Working Memory Index (WMI) of 86, which is within the low average range of intellectual functioning; and a Processing Speed Index (PSI) of 80, which is within the low average range of intellectual functioning. The evaluator noted that given the discrepancy between the student's nonverbal reasoning abilities and his verbal reasoning abilities, the student's IQ of 71 does not represent a valid estimate of the student's actual ability. The assessment of the student's social and emotional functioning revealed a notable risk for depression and the potential for suicide however the student denied any past or current suicidal ideation. The evaluator also concluded that further achievement testing would provide a more accurate picture of the student's academic level and "help to identify is a Learning Disability is present."

The student's July 17, 2011 Educational Evaluation summarized that compared to other at his age level, the student's overall level of achievement is low. His ability to apply academic skills is average. His fluency with academic tasks is low average and his academic skills are low. Compared to others at his age level, the student's performance is average in mathematics, math calculation skills, written language and written expression. His performance is low in broad reading.

The student's July 20, 2011 School B Discharge Summary states that the student presents with substance use and depression is ruled out. During the Mental Status Examination, his mood was depressed, his thought process goal-oriented and he denied any suicidal or homicidal ideation. During the course of hospitalization, the student participated in the program, adjusted to medication and reported a better regulated mood.

The student's February 14, 2012 Psychiatric Report noted that a trigger for the student's marijuana use is a "stressed out" feeling. He demonstrated a willingness to comply with medication management to address symptoms of depression but appeared to have limited insight in regard to his marijuana abuse. The evaluator recommended intensive medication management and an outpatient drug treatment program.

The student's February 16, 2012 School B Discharge Summary stated that the student was previously treated for depression with Lexapro with good results. The student was released, failed a drug screen and reported to the court that he felt depressed and suicidal. During the Mental Health Examination, his behavior was engaging, his mood depressed and his thought process goal-directed. He denied any suicidal or homicidal ideation. During the course of hospitalization, the student attended the therapeutic school, participated in the program and reported positive benefits from mediations. His mood improved.

School A and School B both indicated that, when in class, the student is well-adjusted, able to complete his work, follow directions, ask questions, request assistance, respect school rules, regulate his behavior, socialize appropriately with peers, participate in class and pay attention. His is not talkative, hyperactive, disobedient, distracted by others, restless, easily frustrated, aggressive or attention seeking. The Student testified that sometimes he needs "help" with his work but stated that he is able to complete work in his School A classes without help.

In order for the student to be labeled as a student with ED, the student must, over a long period of time and to a marked degree that adversely affects a child's educational performance, (1) display an inability to learn; (2) display an inability to build or maintain interpersonal relationships; (3) display inappropriate types of behaviors under normal circumstances; (4) display a general pervasive mood of unhappiness or depression; or (4) display a tendency to develop physical symptoms or fears associated with personal or school problems. The term does not apply to child who is socially maladjusted.

In this case, the student has not displayed an inability to learn. At School A and School B, teachers report that the student is able to complete his work and appropriately ask for assistance. The student has not displayed an inability to build or maintain interpersonal relationships. The Student, Parent and CBI Worker testified that the student has friends and currently has a positive relationship with his mother. The student's December 9, 2009 Psychological Evaluation also notes the student's friendships and positive relationships with his family members. The student has not displayed inappropriate types of behaviors under normal circumstances. In School A and School B, the student behaves appropriately in class and he appropriately participates in community based programs. While, in July 2011, the student stated that he wanted a police officer to shoot him, this behavior was not under a normal circumstance, given that the student was being arrested at the time, and the student later admitted that he made this claim so that he would not have to go back to jail. There is no evidence that the student develops physical symptoms or fears associated with personal or school problems.

Here, the most important question is whether the student displays a general pervasive mood of unhappiness or depression, over a long period of time and to a marked degree that adversely affects the student's educational performance. To the extent that the student's mood is the cause of his truancy, this would adversely affect his educational performance. However, the student testified that he does not attend his first period class because he has to go to Tardy Hall and that he otherwise is in school unless he leaves to get something to eat, leaves to meet his probation officer or leaves to attend drug treatment. The Clinical Psychologist testified that truancy can be a cause of depression or can be a symptom of depression. Likewise, to the extent that the student is using marijuana to "self-medicate" and this substance abuse causes truancy issues, this would adversely affect the student's educational performance. However, although it was suggested that the student uses marijuana to self-medicate, the Hearing Officer is not convinced by this argument. First, the student began using marijuana years before any signs of depression were noted and second, the student has not been regularly using marijuana since his involvement with CBI and has still failed to attend classes.

Further, the Petitioner did not prove by a preponderance of the evidence that the student has had a general pervasive mood of unhappiness or depression over a period of time. On July 20, 2011, an evaluator ruled out the diagnosis of depression for the student. On February 14, 2012, the same evaluator stated that the student presents with symptoms of depression. During the course of both of these hospitalizations, the evaluator and School B staff documented that the student's mood improved and stabilized. The CBI Worker testified that the student has been "good" since beginning his medication. He attends therapy, follows rules, has ceased "hanging out" and is stable. It may be that the student has a general pervasive mood of unhappiness or

depression however the record is not consistent on this point. The School Psychologist correctly questioned whether the student meets this criterion.

Further, the term ED does not apply to children who are socially maladjusted. The student's December 9, 2009 Confidential Psychological Evaluation, the Student's Testimony and the Parent's Testimony noted that the student's friends are a bad influence. In 2009, the student stated that his friends were aged thirteen to eighteen and that half of his friends had already been arrested. The parent indicated that the student's behavior changed for the worse after the student was arrested. Further, the evaluator indicated that the student was socially manipulative and detached.

In the student's July 15, 2011 Confidential Psychological Evaluation, the student explained to the evaluator that he had a need to physically fight to maintain his reputation. The student also mentioned that he had been "robbing people almost every day since age nine or ten" and began stealing cars in 2007 in order to financially support himself. His parent again explained that his friends are "troublemakers" and the student stated that he is from a "bad hood." The evaluator concluded that the student's "struggle with accurately comprehending social situations and utilizing appropriate social judgment may lend insight into his tendency to break the law, which is also a reflection of the lifestyle that he is accustomed to." It was also revealed in this evaluation that at the age of nine, the student's father supplied him with marijuana to sell in order to earn money. This is the same age that the student reportedly began using marijuana. If the student's drug use is the root of his problems in school, then a diagnosis of social maladjustment is more consistent with the behavior problems than an emotional disturbance. *See Mr. and Mrs. N.C. v. Bedford Central School District*, 300 F.Appx. 11, 51 IDELR 149 (2<sup>nd</sup> Circuit 2009). The MDT was also correct in questioning whether the student's behaviors are a result of social maladjustment rather than an emotional disturbance.

As it relates to a SLD, the record lacks adequate data to support a finding that the student has a SLD. The student's December 9, 2009 Confidential Psychological Evaluation gives a summary of academic functioning, not individual assessment results, therefore it is difficult to analyze whether the student meets the criteria for SLD based on the educational assessment included within the report. The student's July 17, 2011 Educational Evaluation shows a severe discrepancy (a two year discrepancy between the student's age and his level of functioning) in broad reading and broad written language however the student scored above average in the written language subtest. Both evaluators noted the discrepancy between the student's verbal and nonverbal scores. Based on the student's July 17, 2011 scores, it is possible that the student does have a learning disability in reading however it is improper to make that determination based on one assessment. *See 34 CFR §300.304(b)(1)*. The student's July 17, 2011 evaluator also indicated that further assessments were needed to give the student an SLD label.

It is also possible to use the student's report card as additional data in making this determination however the student's report card reveals very little information. Although School A and School B both indicated that when the student is in class he is able to appropriately complete assignments, for the first three quarters of the 2011-2012 school year, the student has received all "Fs." At least two teachers indicated that the student's failing grade was based on a lack of attendance. An IEP Team may not determine that a child is a child with a disability if it

determines that the determinant factor for the child's eligibility determination is a lack of instruction in reading or mathematics. *See* 34 CFR §300.306(b). The student simply has not attended school for enough time to have received basic instruction in reading and mathematics. It is very possible that the student's academic scores on assessments are a direct result of a lack of instruction. While the Hearing Officer declines to specifically state that a child must attend school in order to be eligible for special education and related services, in this case, the record does not contain adequate data for the Hearing Officer to find that the student has a SLD.

The Petitioner did not meet its burden in proving that DCPS failed to identify the student as a child with a disability, specifically a child with ED or SLD. While numerous assessments and evaluations were considered by the MDT on January 13, 2012, February 10, 2012 and February 22, 2012, the totality of the data is insufficient to identify the student as a child with ED or an SLD.

#### Issues #3, #4 and #5

As stated above, the Petitioner has not proven by a preponderance of the evidence that the student is a child with a disability as defined by 34 CFR §300.8 and therefore the student is not entitled to specialized instruction, related services, a placement in a private special education day school or ESY.

The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Board of Education v. Rowley*, 458 U.S. 176, 200-203 (1982). Additionally, the IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §E-3011 (2006). Children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114(a)(2).

Even had the Hearing Officer found that the student is eligible for special education and related services, the evidence presented does not support the contention that the student is in need of twenty-seven and a half (27.5) hours of specialized instruction outside of the general education setting, therapeutic recreation outside of the general education setting, lunch outside of the general education setting, physical education outside of the general education setting, therapeutic transportation, placement in a private special education day school, or 100 hours per month of therapeutic recreation and individual and family counseling.

All of the Petitioner's witnesses testified that the requested services were "ideal" or "wonderful" for the student. While these services may be ideal for the student, this is not the legal standard with which an LEA must comply. The most compelling description of needed services for the student came from the notes of the February 22, 2012 MDT meeting, where the School B Social Worker stated that the behavioral intervention support in the form of a structured attendance program would benefit the student. Further, the record indicates that, when

present in school, the student behaves appropriately in regular education classes, is able to complete classroom assignments in regular education classes, and appropriately requests assistance in regular education classes. While the student has an IQ in the borderline range and the student testified that he sometimes needs “help” with his classwork, the evidence does not indicate that the nature or severity of the student’s alleged disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

#### Issue #6

Under the IDEA, the parents of a child with a disability have the right to obtain an IEE if the parent disagrees with an evaluation obtained by the public agency. 34 CFR §300.502(b)(1). The IEE must be conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. *See* 34 CFR §300.502(a)(3)(i). Upon request, without unnecessary delay, the public agency must either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an IEE is provided at public expense, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA’s criteria. *See* 34 CFR §300.502(b)(2).

In this case, the parent requested an independent evaluation on January 13, 2012 at the same meeting where the parent signed consent for DCPS to evaluate the student. At the January 13, 2012 meeting, DCPS denied the parent’s request, stating that DCPS policy is for DCPS to conduct the initial evaluation. A school district may insist on having an evaluation conducted by qualified professionals who are satisfactory to the school officials. *Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 49 (2d Cir. 1984).

On January 13, 2012, the parent did not have a right to an IEE because there was not an evaluation obtained by the LEA with which to disagree. There is no evidence that the parent renewed the request for an IEE at any point after January 13, 2012. Further, the evaluation conducted by DCPS consisted of an analysis of existing data in the form of prior evaluations and assessments provided by the parent and DCPS was unable to complete the evaluation process because the parent repeatedly failed to produce the child for the evaluation.

The Hearing Officer finds that DCPS did not deny the student a FAPE by failing to allow an IEE of the student.

#### Issue #7

Pursuant to 34 CFR §300.613(a), each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under the IDEA. The agency must comply with a request without unnecessary delay and before any meeting regarding the IEP, or any due process or disciplinary hearing or resolution session, and in no case more than 45 days after the request has been made. The right to inspect and review education records under this section includes the right to have a representative of the parent inspect and review the records. *See* 34 CFR §300.613(b)(3)

In the present matter, the record indicates that the Petitioner’s attorney made multiple requests for DCPS to “send” the student’s cumulative file to the attorney. DCPS consistently

represented that the student's records were provided to the parent's attorney on more than one occasion and indeed updated records were faxed to the parent's attorney on March 2, 2012. The IDEA regulations do not require an LEA to send educational records to the parent's attorney only that the LEA permit parents, or a representative of the parent, to inspect and review the records.

At 8:39 p.m. on May 7, 2012, the parent's attorney sent an electronic communication to School A, stating that he would be present at School A at 1:30 p.m. on May 8, 2012. School A responded stating that the school staff had a busy schedule on May 8, 2012 and would fax the student's most recent report card and attendance summary. While the IDEA regulations provide that the parent has a right to inspect and review records "without unnecessary delay" before a due process hearing, it is unreasonable to interpret "without unnecessary delay" to mean "with 17 hours notice." To address this issue, the Hearing Officer issued an Order on May 14, 2012, ordering that the Respondent permit the parent, or parent representative, to inspect and review any education records for the child in accordance with 34 CFR §300.613 and that the parent, or parent representative, give reasonable notice (at least two (2) full business days and at a time mutually convenient for School A) to DCPS of the date and time she intends to inspect and review the student's records. The Petitioner was permitted to disclose any education records after the disclosure deadline of May 14, 2012 that were included in the student's education records and had not been previously provided to Petitioner.

The Petitioner did not present evidence that the parent, or a representative of the parent, went to School A to inspect and review the student's education records. The Petitioner did present evidence that DCPS failed to "send" the student's records from the student's early elementary years. The student is currently a 10<sup>th</sup> grade student. To the extent that DCPS was not able to produce educational records that should have been maintained by the LEA, this is a procedural violation that does not amount to a denial of FAPE.

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. §1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that 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 child'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.

If DCPS did not permit the parent to inspect and review the child's education records from his early elementary years, this action did not impede the child's right to FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child and did not cause a deprivation of educational benefit. The parent was given all of the student's current educational records and was able to provide information to the MDT and the Hearing Officer regarding the student's educational progress during his early elementary years.

The Petitioner failed to meet its burden with regard to all issues presented.

**ORDER**

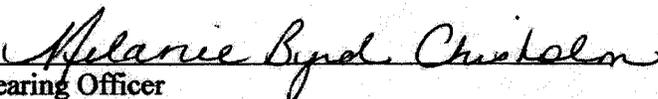
Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The due process complaint in this matter is **dismissed with prejudice**. All relief sought by Petitioner herein is **denied**.

**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: May 26, 2012

  
Hearing Officer