STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

STUDENT,[1] by and through his Parent,

Petitioners,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Case No.
Bruce Ryan, Hearing Officer

Hearing: July 13 and 20, 2009
Decided: July 28, 2009

2009 JUL 29 AM 9:27 OSSE STUDENT HEARING OFFICE

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The due process complaint in this matter was filed May 29, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint concerns a year old student who resides in the District of Columbia and attends The complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") by (a) failing to identify him as eligible for special education services as a student with an emotional disturbance ("ED") and/or other health impairment ("OHI"), at an eligibility meeting held on or about May 25, 2009, and (b) failing to develop an individualized educational program ("IEP") for him.

On June 2, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS then filed a response to the complaint on June 12, 2009, which asserts that the Student is not eligible for special education services under the IDEA, for the reasons stated in the meeting notes and review of independent psychological assessment attached to the response.

A Prehearing Conference ("PHC") was held on June 17, 2009. Following the PHC, on June 23, 2009, Petitioners filed a consent motion for continuance requesting that the due process hearing be rescheduled to July 13, 2009, due to unavailability of the parent. That motion was granted and a Prehearing Order was issued on June 29, 2009. The parent elected for the hearing to be closed.

Five-day disclosures were filed by both parties as required on or about July 3, 2009; and the Due Process Hearing convened on July 13, 2009. At the hearing, 21 documentary exhibits submitted by Petitioner (identified as -1" through -21") and two documentary exhibits submitted by DCPS (identified as "DCPS-1" and "DCPS-2") were admitted into evidence without objection. Testifying at the hearing on behalf of Petitioners were: (1) Dr. Pius O.

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[1] Personally identifiable information is attached as an Appendix to this decision and must be removed prior to public distribution.

Ojevwe, Psy.D. (Examining Psychologist, Di Con, LLC); (2) Ms. Lore Camialani (Educational Advocate); and (3) Parent.[2] Testifying for DCPS was Andrew Johnson (DCPS School Psychologist).

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and *SOP* Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner, along with the pleadings filed by both parties, has resulted in the following issue being presented for determination at hearing:

> ***Whether DCPS has denied the Student a FAPE by (a) failing to identify the Student as eligible for special education services as a student with a disability (specifically, ED and/or OHI), and (b) failing to develop an IEP for the Student.***

As relief, Petitioners request: (1) a finding of FAPE denial; (2) an order requiring DCPS to convene an MDT/IEP meeting with all necessary team members, for the purpose of developing an IEP, discussing compensatory education, discussing and determining placement, and/or developing a behavior plan; (3) placement and/or funding of the Student in a full-time therapeutic setting for the 2009/10 school year; and (4) compensatory education for the denials of FAPE.

III. FINDINGS OF FACT

1. The Student is a year old resident of the District of Columbia who is currently enrolled at *See 4; Parent Testimony.*

2. The Student started attending Shaw in the 7th grade, when he first began exhibiting behavior problems in school. *13*, p. 5; *Parent Testimony*. He was retained in 7th grade at "due to excessive absences, skipping class, and failing grades," *13,* p. 5.

3. The Student was removed from Shaw by his mother and enrolled at School for the 2007-2008 school year. His "behavioral problems (*i.e.,* fighting, skipping classes, etc.) persisted at and he was eventually expelled and/or instructed not to return the following year. *13,* p. 5; *see -4; -18; Parent Testimony.* The Student also has "acknowledged a history of marijuana abuse, which began when he was 13 years old," and has "admitted to engaging in gang-related activities." *13,* p. 5.

4. After leaving the Student was re-enrolled at Shaw for the 2008-2009 school year, where he attended the grade. *-4; 13; Parent Testimony.* During the 2008/09 school year, the Student engaged in disruptive behavior in school that led to multiple suspensions for violations of student conduct rules, totaling more than 20 school days as of March 2009. *See 5 (*May 21, 2009 HOD*)*, pp. 2-3.

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[2] Parent testified at a second hearing session held July 20, 2009, pursuant to agreement of the parties, due to her unavailability on July 13. The Hearing Officer granted a joint motion to recess the hearing to July 20 and to continue the 45-day HOD timeline for an additional seven (7) days for this purpose, pursuant to Section 402 (B) (11) of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*").

5. On or about August 13, 2008, a written request for initial evaluations was submitted to Shaw on behalf of the Student.

6. On January 26, 2009, a Hearing Officer Decision ("HOD") was issued finding that DCPS had failed to conduct an initial evaluation and determine eligibility of the Student within the 120-day timeline provided by D.C.Code §38-2561.02. The 1/26/09 HOD ordered DCPS to convene an MDT/IEP team meeting to determine eligibility within 20 school days of receiving the completed results of independent evaluations authorized and funded by DCPS. *See HOD, Case No.* (Jan. 26, 2009).

7. Between February and April 2009, independent evaluations of the Student were completed. These included a comprehensive psychological on February 27, a speech and language evaluation on April 1, and a functional behavioral assessment ("FBA") on April 2. The evaluations were provided to DCPS on or about April 14, 2009. *See -9— 13. See also 5 (5/21/09 HOD).* The independent psychological evaluation found that the Student did not have a specific learning disability. *13,* p. 14. However, the examiner diagnosed the Student with Major Depressive Disorder and Disruptive Behavior Disorder and recommended that he be placed in a full-time therapeutic setting. *-13.*

8. On or about May 21, 2009, an MDT/IEP team meeting was convened to comply with the 1/26/09 HOD, to review the evaluations, and to determine if the Student was eligible for special education services. The participants included the special education teacher, a general education teacher, DCPS school psychologist,[3] speech-language pathologist, DCPS compliance case manager, SEC/LEA designee, parent, and educational advocate. *DCPS-1.* The MDT determined that the Student does not meet the criteria for special education services. *Id; 7.* The MDT's non-eligibility determination was based on its review of the FBA, speech-language evaluation, social history and comprehensive psychological evaluation, along with other information concerning the Student's performance in school (*e.g.,* grades, absences, suspensions, etc.). *See DCPS-1,* p. 5; *DCPS Psychologist Testimony.*

9. The DCPS psychologist's review of the comprehensive psychological evaluation indicated that the Student's Full-Scale IQ (FSIQ) score is 78, as measured by the Wechsler Intelligence Scale for Children (WISC-IV) conducted February 27, 2009. *See DCPS-1; 7; -13,* p. 7. The review also found that the Student's academic achievement level scores "were mostly higher than his cognitive functioning predicts." *DCPS-1,* p. 2; *-7,* p. 2. For example, the Student had recorded academic achievement test scores of 97 in Broad Reading, 101 in Oral Language, and 91 in Broad Written Language. *SeeDCPS-2,* p. 2; *-13,* p. 14. As the examining psychologist observed, "his Broad Reading, Oral Language and Broad Written Language scores were all in the Average range...all of which are higher than expected given his Borderline Intellectual Functioning." *-13,* p. 14.[4]

10. Based on this evaluation and review, the DCPS psychologist agreed with the independent examiner that the Student does not have a specific learning disability. *See DCPS-1,*

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[3] The DCPS school psychologist holds a Masters degree in Clinical Psychology and has 17 years experience working in the D.C. public schools. .

[4] As the independent psychological report observed: "Overall, the results of the current cognitive testing suggest that [the Student] may experience difficulty in keeping up with his peers in a wide variety of situations that require age-appropriate thinking and reasoning abilities." *13,* p. 8. *See also DCPS Psychologist Testimony* (the Student's major problem academically is due to "how he thinks, reasons, and solves problems," *i.e.,* his basic cognitive level) .

p. 2; *DCPS-2* (Review of Independent Assessment). In addition, the DCPS psychologist concluded that there was not enough evidence to support or suggest that the Student qualifies as a child with a "serious emotional disturbance" as that term is defined under the IDEA (20 U.S.C. §1401; 34 C.F.R. §300.8). He concluded that a comparison of the Student's academic achievement level scores with his cognitive assessment indicated that the emotional and behavioral issues found by the examiner had not resulted in academic delay or deficit, and thus had not adversely affected the Student's educational performance so as to qualify him for special education services. *See DCPS Psychologist Testimony; DCPS-2.*

11. As noted by the MDT, the Student has had a poor attendance record that has impacted his grades at school. *DCPS-1,* p. 2; *-7,* p. 2. During the 2007-2008 school year in Grade 7 at the Student had 28 days of absences and 75 tardy days according to school records. *See -18.* The poor attendance continued during the 2008-2009 school year at Shaw, and he also failed to complete homework and class work assignments; this contributed to a decline in academic performance, from "C" grades during the first advisory to some failing grades by the 4th advisory. *DCPS-1,* p. 2; *-7,* p.4; *see also Advocate Testimony; DCPS Psychologist Testimony.* According to teacher reports summarized in the FBA, "since January 2009 [the Student] has been frequently absent from school without the permission of his parent or his school." *10,* p. 6. *See also id.* at p. 7 ("Teachers have talked with [the Student] about his absences and the effects it has on his grade[s]"; "Excessive absences have hindered [the Student's] academic performance.").

12. The record evidence supports DCPS' determination that the Student does not have a serious emotional disturbance and does not qualify as a child with a disability under the IDEA.

IV. DISCUSSION AND CONCLUSIONS OF LAW

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and/or to determine a child to be eligible for special education services. 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. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence.

2. Petitioners claim that DCPS should have determined the Student to be eligible for special education and related services and developed an IEP for the Student. Specifically, Petitioners allege that the evaluations and other information considered at the 5/21/09 MDT meeting indicate that the Student has a "serious emotional disturbance," as defined under the IDEA, 34 C.F.R. §300.8 (c)(4).

3. A "determination as to eligibility of a student for special education is a decision made by a team, including the parent." *Richardson v. District of Columbia,* 541 F. Supp. 2d 346, 357 (D.D.C. 2008). In challenging such action in this case, Petitioners must show by a preponderance of the evidence that DCPS' ineligibility determination was not proper under the IDEA. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008). For the

reasons discussed below, the Hearing Officer concludes that Petitioners have failed to carry their burden of proof on this issue.

4. Under the IDEA (in relevant part), the term "child with a disability means a child – (i) with ...serious emotional disturbance (referred to in this chapter as 'emotional disturbance')...; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. §1401(3)(A). The regulations further define the term "emotional disturbance" as follows:

> "*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."

34 C.F.R. §300.8 (c)(4)(i). The regulations further provide that the "term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined under subparagraph (c)(4)(i). *Id.* §300.8(c)(4)(ii).

5. In this case, Petitioners claim that the Student's condition exhibits the characteristics of subparagraphs (B), (C) and/or (D) of Section 300.8 (c)(4)(i) – *i.e.*, that the Student has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; that the Student exhibits inappropriate types of behavior under normal circumstances; and that the Student has been diagnosed with depression. *See -4*, p. 6; *Educational Advocate Testimony; Examining Psychologist Testimony.*

6. The evidence presented at the due process hearing does not establish that the Student's condition exhibits the characteristics of subparagraph (B) (inability to build or maintain satisfactory interpersonal relationships with peers and teachers). For example, both the FBA and the independent psychological evaluation note that the Student "does not appear to have difficulty making friends. *10*, p. 2; *-13*, p. 5. *See also* . *-13*, p. 6 (noting that the Student "enjoys going outside and 'hanging' with people," and "spends a great deal of time on the computer/internet chatting with friends on MySpace..."); *id.*, p. 12 (Student "denied having trouble making friends and reported having a lot of friends"). Rather, the problem appears to concern the types of friends that the Student makes and their effect on his own behavior. *See, e.g.,* *10*, p. 8 (noting that the Student "feels the need to fit in with his peers that are aggressive and frequently engage in rule breaking behavior. His aggressive behavior is one way of gaining their acceptance."); *-13*, p. 12 ("Of major concern is his gang membership, which places him at high risk for antisocial/delinquent behavior and danger of being harmed.")

7. The evidence appears similarly insufficient with respect to the characteristics of subparagraph (C) (inappropriate types of behavior under normal circumstances). For example, nearly all of the behavioral incidents resulting in suspensions have involved typical school misconduct such as cutting classes, leaving school, dress code and similar rule violations. *See 14 – -17; Parent Testimony; Educational Advocate Testimony* (describing instances of "acting out" in classroom). For the most part, as in *N.C. v. Bedford Central School District,* 51 IDELR 149 (2d Cir. 2008), Petitioners simply have "not produced enough evidence of an 'accompanying emotional disturbance beyond the bad conduct. '" *Cf. Eschenasy v. New York City Dept. of Education,* 604 F. Supp. 2d 639 (S.D. N.Y. 2009) (while lying, stealing, truancy and drug abuse may be "symptomatic of social maladjustment"; self-cutting, pulling out hair, and suicide attempts are "inappropriate behavior under otherwise normal circumstances").

8. With respect to subparagraph (D), the independent evaluation found that the Student is currently experiencing significant depression, which DCPS does not appear to dispute. The Hearing Officer concludes that the examiner's diagnosis and other uncontroverted evidence of record would likely be sufficient to establish the characteristics of a "general pervasive mood of unhappiness or depression" within the meaning of Section 300.8(c)(4)(i)(D).

9. However, even assuming that one or more of the characteristics listed in Section 300.8(c)(4)(i) are present here, the evidence presented at the due process hearing is insufficient to establish eligibility. Under the IDEA, it is not sufficient merely to be diagnosed with a disability that meets one of the listed criteria; there must also be a demonstrated adverse effect on the child's educational performance such that the child needs special education. *See* 34 C.F.R. §300.8 (c)(4)(i) ("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....*")(emphasis added); *N.C. v. Bedford Central School District, supra*; *N.G. v. District of Columbia, supra. See also Springer v. Fairfax County School Board,* 134 F. 3d 659, 664-66 (4th Cir. 1998) (any adverse effects on student's educational performance were result of his truancy and drug use, not an emotional disturbance).

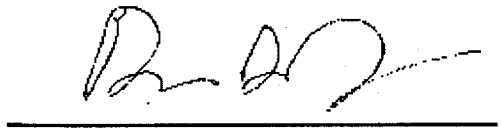
10. In this case, the team determined that the Student's emotional issues did not adversely affect his educational performance, primarily because (as both DCPS and the independent examiner agreed) his academic achievement scores were generally higher than his Borderline intellectual functioning would predict. The team also considered the Student's overall grades, behavior, and school attendance record. *See Findings ¶¶8-10.* Based on the record as a whole, the Hearing Officer concludes that the team's determination in this regard was proper under the IDEA. From this evidence, it was reasonable for DCPS to determine that (a) the Student's emotional issues have not adversely affected his academic functioning, and (b) any recent grade declines have likely resulted from other factors such as his failure to attend classes and to complete necessary school assignments. In short, Petitioners have failed to demonstrate a valid basis for overturning the team's considered non-eligibility determination.

V. ORDER

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

1. Petitioner's requests for relief shall be, and hereby are, **DENIED**;
2. Petitioner's Due Process Complaint shall be, and hereby is, **DISMISSED, With Prejudice;** and
3. This case shall be, and hereby is, **CLOSED.**

Dated: July 28, 2009



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).