DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENTS,**[1] ***Petitioners,*** **v.** **D.C. PUBLIC CHARTER SCHOOL,** ***Respondent.***	)))))))))))	**Bruce Ryan, Hearing Officer** **Issued: December 16, 2012**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an administrative due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent D.C. Public Charter School ("PCS"), which acts as its own local education agency ("LEA") under the IDEA. The complaint was filed October 19, 2012, on behalf of student (the "Student") who resides in the District of Columbia and attends the PCS. Petitioners are the Student's parents.

In their complaint, Petitioners allege that that PCS has failed and/or failed timely to identify, locate, and evaluate Student in violation of its "child find" responsibilities under 20 USC 1412 (a) (3) and 34 CFR 300.111 (a) & (c). PCS filed a timely Response to the Complaint on October 29, 2012, which denies the allegations. PCS admits that the Student "did experience some problematic behaviors" during October and November, 2011, but PCS asserts that "they did not give cause for [PCS] to suspect that the Student has a disability requiring special education." *Response,* p. 1.

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

On November 1, 2012, a resolution meeting was held, which did not resolve the complaint. The parties also agreed that no agreement was possible prior to hearing. Thus, the 30-day resolution period early as of 11/01/2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") ends on December 16, 2012.

On November 8, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues; and a Prehearing Order was issued on November 14, 2012. The parties filed their five-day disclosures as required by November 21, 2012; and the Due Process Hearing was held in Hearing Room 2009 on November 29, 2012. Petitioner elected for the hearing to be closed and attended the hearing in person.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners' Exhibits: P-3; P-8 through P-16; and P-18. [2]
Respondent's Exhibits: R-1 through R-7.[3]

In addition, the following Witnesses testified on behalf of each party:

Petitioners' Witnesses: (1) Parent #1; (2) Parent #2; (3) Natasha Nelson, Ph. D, Clinical Psychologist; and (4) Mia Long, Educational Advocate ("EA").

Respondent's Witnesses: (1) Teacher; (2) Assistant Principal ("AP"); and (3) Early Childhood Intervention Specialist ("ECIS").

Both parties submitted written closing arguments on December 6, 2012.

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[2] Respondent's objections to Exhibits P-1, P-2, and P-4 through P-7 were sustained, and those exhibits were excluded from evidence, for the reasons stated on the record at hearing. Petitioner withdrew Exhibit P-17.

[3] Petitioners' objection to Exhibit R-6 was overruled for the reasons stated on the record at hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*").

III. ISSUES AND REQUESTED RELIEF

As discussed and clarified by counsel at the PHC and the Due Process Hearing, the following issue was presented for determination at hearing:

> **Child Find** — Did PCS fail and/or fail timely to identify, locate, and evaluate the Student as a child who was suspected of having a disability and who was in need of special education and related services?

As relief, Petitioners request that PCS be ordered to: (a) fund independent educational evaluations ("IEEs") to include a comprehensive psychological, ADHD, and speech/language assessments; and (b) convene a meeting of the Student's multi-disciplinary team ("MDT") to review all evaluations, discuss and determine eligibility, and develop an appropriate individualized education program ("IEP") for the Student. [4]

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005).

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[4] As noted in the Prehearing Order, Petitioners do not seek a determination of eligibility in this proceeding, and thus do not request an award of compensatory education services by the Hearing Officer as relief at hearing. However, Petitioners argue that if they prevail on the above issue, then the Hearing Officer may order PCS to discuss and determine compensatory education at the MDT meeting or, in the alternative, to fund an independent evaluation to determine appropriate compensatory education. *See Complaint,* p. 3; *Pets' Closing Argument,* pp. 9-10.

IV. FINDINGS OF FACT

Based upon the evidence presented at the Due Process Hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a resident of the District of Columbia. Petitioners are the Student's parents. *See Parent #1 Test.*
2. The Student attended pre-school at PCS for the 2011-12 school year and currently attends Pre-Kindergarten at PCS for the 2012-13 school year. *Parent #1 Test.*
3. During the 2011-12 school year, the Student experienced problematic behaviors at school,
4. During the 2011-12 school year, Petitioners had frequent discussions with PCS staff regarding these behaviors. *See Parent #1 Test.; Parent #2 Test.; Complaint* ¶ 3; *Answer,* ¶ 3. Petitioners also talked on the telephone with Student or came to school at staff's request to calm down the Student. *Parent #1 Test.; Parent #2 Test.*
5. PCS admits that it did not consider evaluating the Student for special education during the 2011-12 school year because it believed there was no reason to suspect that he has a disability requiring special education. *Answer,* ¶ 8.
6. The Student's report card for the 2011-12 school year reflects mostly final grades of "A" (representing "Always" achieving specified milestones) in the areas of Literacy, Mathematics, and Social Studies & Science. *R-5.* Under "Approaches to Learning & Social Emotional Skills," the Student received a combination of "A" and "S" grades (with "S" representing "Sometimes" achieving specified milestones). *Id.*
7. During the 2nd Quarter of the 2011-12 school year, the Student received the following General Comment: "[Student] has made substantial gains in his social skills! He is beginning to learn how to accept no and move on without throwing a tantrum." *R-5,* p. 3.
8. During the 3rd Quarter of the 2011-12 school year, the Student received the following General Comment: "[Student] continues to improve with his behavior every day. He is

getting much better at following directions the first time given and accepting the answer and moving on, although occasionally he still struggles with moving on." *R-5,* p. 3.

9. During the 4th Quarter of the 2011-12 school year, the Student received the following General Comment: "It has been a joy having [Student] in our class this year. [Student] is ready for Pre-Kindergarten!" *R-5,* p. 4.

10. During the first few months of the 2012-13 school year, the Student again experienced some problematic behaviors at school, similar to those experienced at the beginning of the 2011-12 school year.

11. During the 2012-13 school year, Petitioners have again had discussions with PCS staff regarding these behaviors. *See Parent #1 Test.; Complaint* ¶ 9; *Answer,* ¶ 9. Petitioners also have talked on the telephone with Student or have come to school at staff's request to calm down the Student. *Parent #1 Test.; Parent #2 Test.; R-2.* He has been sent home at least once for hitting a teacher. *Parent #1 Test.; R-3.*

12. PCS admits that it has not considered evaluating the Student for special education during the 2012-13 school year because it believes there is no reason to suspect that he has a disability requiring special education. *Answer,* ¶14.

13. The Student's 1st Quarter report card for the 2012-13 school year reflects mostly grades of "M" (for having "Mastered" the specified performance levels) in Literacy, Math and Social Skills Development. *R-6.* His Homeroom Teacher's Comments included the following: "[Student] comes to school every day on time in uniform ready to engage with his peers. In Literacy, he has strengths in identifying letter names and their most common sound, and matching rhyming pictures in a given sequence of pictures .... In Math, {Student] has strengths in counting up to 10 and counting objects up to 10 .... [Student] has strengths in 'being a good friend' to his peers during the play...." *Id.,* p. 2. His Physical Education Teacher commented that "Student can be disruptive during crucial lesson time." *Id.*

14. Prior to the filing of the Complaint in this matter, Petitioners did not specifically request PCS to evaluate the Student for special education and related services, and PCS has not

requested consent from Petitioners to conduct an initial evaluation. *See Parent #1 Test.; AP Test.*

15. On or about November 1, 2012, DCPS convened a resolution meeting in this case. At the resolution meeting, Petitioners reiterated their concerns regarding the Student's behaviors. *P-3.* PCS stated that it does not have any concerns about the Student's academic performance, and stated that he is performing on grade level. *Id.* PCS indicated that it would review Student's behavioral issues through the Student Support Team ("SST") process, but that it was not willing to conduct an initial evaluation for special education eligibility. *Id.* PCS representatives stated that they did not want to "continue the trend of over-identifying students" for special education. *Id. See also AP Test.*

16. On or about November 7, 2012, while this proceeding was pending, PCS initiated the SST process for the Student. The SST process was initiated by a referral from the Early Childhood Intervention Teacher, following an 11/05/2012 pre-referral observation. *P-14 –P-15; R-4.* The SST found that the Student was having difficulty consistently responding positively to teacher directions, and sometimes will talk back, run away, or hit them. *R-4,* pp. 2-3. The SST also found that, despite such behaviors, the Student is progressing well in all academic areas of literacy, math, science, social studies, and specials. *Id.*, p. 2.

17. As a result of the SST process, PCS has put various interventions in place to address the Student's problem behaviors and has discussed such interventions with the parents. These include: providing at least three warnings for the Student to comply with teacher directions; using a behavior tracker that is visible to him at all times; and receiving incentives for 3/6 opportunities each day on 80% of the days present. *See R-4,* p. 3; *Teacher Test.* [5]

[5] In the behavior tracker, each segment of the day has a 'smiley face" and a "frown face." If the Student responds positively to directions during a given segment, then he colors a smiley face. When he has two consecutive smiley faces, he earns an incentive of his choice from a list (*i.e.*, special snack, pick a friend to sit with him, go to dramatic play, or play a game). *R-4, p. 3.* If the Student does not respond positively to teacher directions after three warnings, then he sits in time-out for four minutes. *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioners were required to proceed first at the hearing and carried the burden of proof on the issue specified above. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005); 5-E DCMR §3030.3 ("Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education"). The Hearing Officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioners have failed to meet their burden of proving that PCS violated its child-find obligations.

The IDEA's "child find" provisions require each State to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are ***identified, located, and evaluated***." 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §300.111(a) (emphasis added). Child find must include any children "***suspected*** of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. §300.111(c) (1) (emphasis added). OSSE regulations further require all LEAs, including DCPS, to ensure that such procedures are implemented for all children residing in the District. 5-E DCMR §3002.1(d).

As the courts have made clear, these provisions impose an affirmative duty to identify, locate, and evaluate all such children. *Reid v. District of Columbia,* 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Hawkins v. District of Columbia,* 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory and regulatory language, such affirmative duty "extends to all children ***suspected*** of having a disability, not merely to those students who are ultimately determined to have a disability." *N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008) (emphasis in original). "[A]s soon as a student is identified as a ***potential*** candidate for special education services, [LEA] has a duty to locate that student and complete the evaluation process." *Id.* (emphasis in original).

In this case, Petitioners do not assert that they ever requested PCS to evaluate the Student for special education eligibility prior to filing the instant complaint. Thus, a parental request did not obviate the LEA's need to "identify" the Student as a student suspected of having a disability. *See District of Columbia v. Abramson,* 493 F. Supp. 2d 80, 85 (D.D.C. 2007) (quoting hearing officer decision) ("In the case of a parental request for evaluation, the student has already been 'identified' by the parental request, thus obviating the LEA need to identify the student as a possible student with a disability. However, the LEA is then obligated to move forward with the requirement of [IDEA] § 1414 (a) (1) and determine whether the student is in fact a child with a disability.").

Nor is there any evidence that Petitioners ever informed PCS that the Student had been diagnosed or assessed as having one or more of the specific conditions listed in 34 C.F.R. § 300.8, including an emotional disturbance or a qualifying "Other Health Impairment" such as Attention Deficit Hyperactivity Disorder ("ADHD"). [6] Indeed, even in their complaint and testimony at hearing, Petitioners failed to identify what disability they suspected the Student to have. Moreover, Petitioners present no evidence that the Student's academic performance has suffered as a result of any such condition.

Instead, Petitioners essentially argue that (a) the Student engaged in extreme misbehaviors in school, and (b) based on such misbehaviors, PCS should have suspected a disability and evaluated him under the IDEA, even without a parental request or referral.

The IDEA does not dictate that every child with behavioral problems in school must be suspected of having an emotional or other disability. To the contrary, the IDEA expressly cautions that the "emotional disturbance" disability category "does not apply to children who are socially maladjusted" unless they meet the specific criteria for emotional disturbance. 34 C.F.R. §300.8 (c) (4) (ii). *See also N.C. v. Bedford Central School Dist.,* 51 IDELR 149 (2d Cir. 2008) (distinguishing qualifying emotional disturbance from mere "bad conduct"). For the Student to be found to have a "serious emotional disturbance" as defined under the IDEA, his condition would need to exhibit one or more of the specific characteristics set forth in Section 300.8 (c)

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[6] *Cf. N.G. v. District of Columbia, supra* (LEA should have evaluated where it was on notice of substantial evidence that student may have qualified for special education, including psychiatric hospitalizations, suicide attempts, medical diagnosis of major clinical depression, and severe deterioration in academic performance).

(4),[7] over a long period of time and to a marked degree that adversely affected his educational performance. *See* 34 C.F.R. §300.8 (c) (4) (i) (A) – (E). In this case, Petitioners failed to allege or prove which, if any, of these characteristics were exhibited – let alone "over a long period of time" and "to a marked degree" – such that PCS should have suspected that the Student had such a condition.

PCS staff also testified that the Student's behaviors were not atypical of students in the very early (*e.g.,* pre-school and kindergarten) school years, and that the misbehaviors generally improve after the first part of the school year. *See Teacher Test.; AP Test.; ECIS Test.*[8] In these circumstances, PCS "was not required to jump to the conclusion that [Student's] misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions and tantrums are not atypical during early primary years." *D.K. v. Abington School District,* 59 IDELR 271 (3d Cir. Oct. 11, 2012), slip op. at 14 (*quoting Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 314 (6th Cir. 2007)). In addition, evidence presented by PCS indicates that the Student's educational performance has ***not*** been adversely affected and that he is generally performing on grade level. *R-5; R-6; Teacher Test.; PCS Closing Argument,* pp. 5-6.[9]

Accordingly, the Hearing Officer concludes that Petitioners failed to prove by a preponderance of the evidence that PCS should have identified, located and evaluated the Student as a child reasonably suspected of having a disability prior to the filing of the Complaint on October 19, 2012. Thus, PCS prevails under the specified child-find issue.

Finally, the Hearing Officer notes that PCS has not neglected the Student's behavioral difficulties. While this proceeding has been pending, PCS initiated the SST process for the Student and has put various interventions in place to address the Student's problem behaviors.

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[7] The characteristics include: "(A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; [and] (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. §300.8 (c) (4) (i).

[8] The Hearing Officer finds this testimony to be more credible on this subject than the testimony of Petitioners' witnesses (*i.e.*, the EA and clinical psychologist), who had not met or observed the Student, had not talked with any of his teachers, and had not attended any meetings at the school.

[9] *L.M.* similarly found no child-find violation where a student was "meeting expectations" in academic areas despite struggling with social and behavioral problems in elementary school. 478 F.3d at 314 (noting that "[s]chool personnel testified that [student's] behavioral and learning problems were not atypical of immature young boys").

See Findings, ¶¶ 16-17. If the SST process is not successful in resolving such behaviors – and/or if the parents identify and make a specific request that the Student be evaluated in one or more areas of suspected disability – then PCS will need to revisit whether it needs to conduct a full and individual initial evaluation based on all updated facts. This HOD decides only that PCS has not violated its child-find obligations with respect to the Student as of October 19, 2012.

VI. ORDER

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

1. Petitioners' requests for relief in their Due Process Complaint filed October 19, 2012 are hereby **DENIED;** and

2. The Complaint is **DISMISSED, With Prejudice.**

IT IS SO ORDERED.

Impartial Hearing Officer

Dated: December 16, 2012

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).