

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

---

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

Date Issued: June 19, 2012

Hearing Officer: Jim Mortenson

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

---

OSSE  
STUDENT HEARING OFFICE  
2012 JUN 19 PM 3:54

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on April 9, 2012. A prehearing conference was held on April 20, 2012. A response to the complaint was filed during the prehearing conference. A prehearing order was issued on April 20, 2012.

A resolution meeting was held on April 23, 2012, and no agreements were reached.

Disclosures were exchanged, and the Petitioner filed a trial brief, on May 25, 2012.

The hearing was convened at 10:30 a.m. on June 4, 2012, at 810 First Street NE, Washington, D.C., and recessed at 4:30 p.m. The hearing reconvened in room 2009 at 9:30 a.m. on June 5, 2012, and concluded at 11:30 a.m. The hearing was closed to the public. The

---

<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

The Petitioner had a Vietnamese interpreter, Amy Wong-Luc, who was sworn in to provide accurate translation of the proceedings to the Petitioner while the Petitioner was present. The Petitioner was only present on the first day of hearing. A representative of the Respondent agency was not present at the hearing, but through counsel.

The Petitioner's law firm had several observers present at the hearing, including: Danielle Gonnella, Sarah Comeau, and Ehren Wade. The Respondent's law firm had one observer present at the hearing, Lynette Collins.

The due date for this HOD is June 23, 2012. This HOD is issued on June 19, 2012.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the IHO is:

Whether the Respondent has failed to identify the Student as a child with a disability despite her academic struggles, behavioral problems, and a parental referral for an initial evaluation in February 2012?

The substantive requested relief at the time of hearing was:

- (1) Determination of eligibility for special education and related services under the category of emotional disorder (ED).
- (2) Development of an individualized education program (IEP).

Despite several assessments within the past year, the Respondent failed to conduct an initial evaluation of the Student to determine the Student's eligibility for special education and related services. Based on the record in this case, including five assessments conducted within the past year, the Student does not require special education, only related services, and so is not eligible for special education under the Individuals with Disabilities Education Improvement Act (IDEA).

#### IV. EVIDENCE

Six witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were:

- 1) The Student's Mother, Petitioner (P)
- 2) The Student's Sister, (P.N.)
- 3) Nicole Lawrence, Social Worker, (N.L.)
- 4) Dr. Sonali Mahajon (Admitted as expert in adolescent psychiatry), Child and Adolescent Psychiatrist, PIW, (S.M.)
- 5) Jeremy Gates, Clinical Case Manager, PSI Family Services, (J.Ga.)
- 6) Dr. Jessica Gurley (Admitted as expert in clinical psychology with emphasis on clinical assessment), Psychologist, Argosy University, (J.Gu.)<sup>2</sup>

52 exhibits were admitted into evidence of 54 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2	April 23, 2012	Resolution Period Disposition Form

---

<sup>2</sup> Despite being an "expert" witness, this witness's testimony has been carefully weighed in light of conflicts between her testimony and written reports, both her own and the reports she claims to have reviewed. Furthermore, the witnesses opinion as to whether the Student qualifies as a child with a disability under IDEA is not given any more weight than a lay witness because this is a legal conclusion in the context of educational planning and the witness has no legal background nor an educational background.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	February 14, 2012	Letter from Tomkins to Nash
P 5	February 14, 2012	Letter from Tomkins to Dailey
P 6	February 14, 2012	Letter from Tomkins to Peezy
P 7	February 28, 2012	Letter from Tomkins to Nash
P 8	April 19, 2012	Letter from Wulkan to Department of Youth Rehabilitation Services
P 9	May 23, 2012	Letter from Comeau to Caldwell
P 10	February 1, 2012	Letter from Petitioner to Respondent
P 11	February 8, 2012	Email from Bennett to Brown
P 12	February 15, 2012	Fax Cover Sheet from Nash to Tomkins
P 13	February 27, 2012	Letter from Wulkan to Brown
P 14	March 6, 2012	Email from Wulkan to Hudak and King
P 15	March 6, 2012	Letter from Tomkins and Wulkan to Hudak
P 16	March 13, 2012	Email chain ending from Wulkan to McKenzie
P 17	April 25, 2012	Email from Jacobson to Lee
P 18	April 25, 2012	Email from Jacobson to Lee
P 19	April 27, 2012	Email from Lee to Wulkan
P 20	May 2, 2012	Email from Jacobson to Lee
P 21	May 2, 2012	Email from Lee to Wulkan
P 22	May 2, 2012	Email from Jacobson to Lee
P 23	May 2, 2012	Email from Lee to Wulkan
P 24	May 2, 2012	Email chain ending from Jacobson to Lee and Fields
P 25	May 7, 2012	Email from Jacobson to Lee and Fields
P 26	May 16, 2012	Email from Jacobson to Lee and Fields
P 27	May 24, 2012	Email from Jacobson to Lee and Fields
P 28	March 15, 2012	Email chain ending from McKenzie to Wulkan
P 29	March 15, 2012	Email chain ending from Wulkan to McKenzie
P 30	March 15, 2012	Email from Watson to Wulkan
P 31	March 15, 2012	Email from Tomkins to Cooper and Watson
P 32	April 1, 2011	Annual Student Enrollment Profile (and attachments)
P 33	March 16, 2012	Email from Bennett to Gates, et al.
P 34	May 21, 2012	Email from Lee to Wulkan
P 35	May 23, 2012	Email chain ending from Lee to Wulkan
P 36	May 23, 2012	Email from Jacobson to Lee
P 37	November 14, 2011	Diagnostic Assessment
P 38	August 10, 2011	Confidential Psychoeducational Evaluation
P 39	April 24, 2012	Psychiatric Evaluation
P 40	May 6, 2012	Psychiatric Note
P 41	May 22, 2012	Psychological Evaluation
P 42	May 22, 2012	Court Report Update
P 43	May 16, 2011	Letter of Invitation to a Meeting
P 44	May 18, 2012	Transfer Withdrawal Clearance Sheet
P 45	November 1, 2011	Period to Daily Conversion Attendance Summary, Attendance Summary
P 46	January 20, 2012	Report to Parents of Student Progress

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 47	February 15, 2012	Attendance Summary
P 48	November 9, 2011	Email from Speight to Sutton
P 49	June 18, 2010	Report to Parents on Student Progress
P 50	November 3, 2008	Linguistically and Culturally Diverse (LCD) Student Test History Report SY 2008-2009
P 51	September 22, 2010	Preliminary Test History Data
P 52	Undated	Vita Jessica Gurley
P 53	Undated	Curricula Vitae for Sonali Mahajan
P 54	Undated	Curricula Vitae for Todd Christiansen

Two exhibits were admitted into evidence of the Respondent's 16 disclosures.<sup>3</sup> The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 8	Redacted	Email chain ending from Watson to [Redacted]
R 9	Redacted	Email chain ending from Watson to [Redacted]

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

## V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a     year old learner enrolled in the Respondent's schools.<sup>4</sup> The Student was in the     grade during the 2011-2012 school year.<sup>5</sup> Student was born to immigrant parents in

<sup>3</sup> But for these two exhibits, the Respondent's disclosures were duplicates of documents entered as Petitioner's exhibits.

<sup>4</sup> Testimony (T) of P.N.

<sup>5</sup> P 45, P 46, P 47. (P.N. testified the Student is in the     grade. School records provided by the Petitioner show otherwise.)

Washington, D.C.<sup>6</sup> Her mother (Petitioner) is from Vietnam and her father has been deceased since the Student was six years of age.<sup>7</sup>

2. There were no educational problems for the Student during her early childhood years or during elementary school.<sup>8</sup> When the Student moved to middle school she began to have behavioral problems at home and performing poorly academically at school in sixth grade, and began skipping school, during seventh grade.<sup>9</sup>
3. The Student began running away from home during seventh grade as well. She ran away on April 13, 2011, May 23, 2011, and May 30, 2011.<sup>10</sup> The Student has had significant conflict with her mother, who speaks only Vietnamese (in which the Student is also fluent) and is culturally rooted in Vietnam.<sup>11</sup> This difference in acculturation has contributed significantly to the Student's behaviors.<sup>12</sup> The Student also began associating with a "friend" at the beginning of seventh grade whom has been a poor influence on her, including staying away from home and using drugs, including alcohol and marijuana.<sup>13</sup> This behavior has been part of the conflict between the Student and the Petitioner.<sup>14</sup>
4. As a result of her behaviors, specifically "disobeying her mother and being away from home," the Student was brought before the Superior Courts of the District of Columbia as a Child in Need of Supervision.<sup>15</sup>

---

<sup>6</sup> P 38, P 39. (Interestingly, the Petitioner's expert, J.Gu., did not know the Student was born in this Country, despite her testimony that she reviewed the Student's records, including P 38 and P 39.)

<sup>7</sup> P 38, P 39, P 41.

<sup>8</sup> P 39, P 41, T of P, T of J.Gu.

<sup>9</sup> T of P, T of P.N., P 38, P 39

<sup>10</sup> P 38.

<sup>11</sup> P 38, P 39, P 40, P 41, T of J. Gu., T of S.M.

<sup>12</sup> P 41, T of J.Gu.

<sup>13</sup> P 38, P 39, P 41. (The Student told S.M. in April 2012 that she smoked marijuana every day when she was 12 years old, until she was detained in August 2011.)

<sup>14</sup> P 38, P 39, P 41.

<sup>15</sup> P 38, T of J.Gu.

5. The Student was in a group home and the Court ordered a psychoeducational evaluation of the Student on July 20, 2011.<sup>16</sup> The evaluation was conducted by the Child Guidance Clinic of the Family Court – Court Social Services Division.<sup>17</sup> The evaluation was completed and a report generated on August 10, 2011.<sup>18</sup> The purpose of the evaluation was to provide the Court with information about the Student’s “levels of: a) intellectual functioning, b) academic achievement, c) personality functioning, and d) treatment recommendations.”<sup>19</sup> A comprehensive set of assessment tools were used in evaluating the Student including:<sup>20</sup>

- Wechsler Intelligence Scales for Children – Fourth Edition
- Woodcock-Johnson III Tests of Achievement, using subtests for Basic Reading Skills, Reading Comprehension, Math Calculation, Math Reasoning, and Written Expression
- Millon Pre-Adolescent Clinical Inventory-2
- Rorschach Inkblot Method (Exner Comprehensive System)
- State-Trait Anger Inventory-2
- Trauma Symptom Checklist for Children
- Rotter Incomplete Sentence Blanks
- Clinical interview with Student
- Clinical interview with Parent, with P.N. translating
- Clinical interview with P.N.

The diagnostic impression of the evaluators, R. Halle Strauss and Dr. Rachel Martell, was that the Student had an unspecific chronic Adjustment Disorder.<sup>21</sup> A list of recommendations were made, including individual, group, and family psychotherapy.<sup>22</sup> Monitoring for drug use was also recommended as well as “a substantial amount of home, school, and community support to experience more success.”<sup>23</sup> Educational recommendations were limited to attending school regularly, supported by a staff member to build a positive relationship with

---

<sup>16</sup> P 38.

<sup>17</sup> P 38.

<sup>18</sup> P 38.

<sup>19</sup> P 38.

<sup>20</sup> P 38.

<sup>21</sup> P 38.

<sup>22</sup> P 38.

<sup>23</sup> P 38.

the Student.<sup>24</sup> Structured extracurricular activities were also recommended to give her a positive outlet for her energy.<sup>25</sup>

6. In the fall of 2011 the Student was attending \_\_\_\_\_ School and was involved in setting fire to a trash can at school.<sup>26</sup> She was removed from \_\_\_\_\_ and sent to \_\_\_\_\_ Academy where she remained until March 2012 at which time she was enrolled at \_\_\_\_\_ School.<sup>27</sup> The Student exhibited behavior problems at \_\_\_\_\_ Academy and was suspended for a few days due to a “melt-down” following an instruction to remove a head-band.<sup>28</sup>
7. In November 2011 the Student returned home from the group home and a Diagnostic Assessment was completed on the Student by Natasha Miller, a Licensed Graduate Professional Counselor of Youth Villages in Arlington, VA.<sup>29</sup> The assessment included interviews of the Student and P.N., and a review of unspecified records.<sup>30</sup> Miller recommended therapeutic intervention for the Student and her Mother to address communication and parenting issues that were resulting in the Student’s negative behavior, in addition to a drug use program.<sup>31</sup>
8. The Student was removed from the Petitioner by the Court in January 2012 due to ongoing conflict in the home.<sup>32</sup> She was committed to the Child and Family Services Agency (CFSA) on February 14, 2012, for two years and placed in foster care.<sup>33</sup> She continued to repeatedly run away from her foster home and from school during the remainder of the 2011-2012

---

<sup>24</sup> P 38.

<sup>25</sup> P 38.

<sup>26</sup> P 41, T of J.Gu.

<sup>27</sup> T of J.Ga., P 41.

<sup>28</sup> T of J.Ga.

<sup>29</sup> P 37.

<sup>30</sup> P 37.

<sup>31</sup> P 37.

<sup>32</sup> P 40, T of J.Ga.

<sup>33</sup> P 39.

school year, often returning to the Petitioner's home.<sup>34</sup> On at least two occasions she attempted to run away from her clinical case manager, J. Ga., when under his supervision in the community.<sup>35</sup>

9. The Petitioner requested an evaluation for special education services in early February 2012.<sup>36</sup> The Respondent never provided written notice of a proposal or refusal to evaluate the Student.<sup>37</sup> During the last week of April and into May 2012 the Petitioner's Counsel and the Respondent's staff were discussing the initial evaluation of the Student and the need for an eligibility meeting, but no meeting to discuss eligibility ever occurred.<sup>38</sup>
10. A court ordered psychiatric evaluation of the Student was conducted by the District of Columbia Department of Mental Health on April 17, 2012.<sup>39</sup> An evaluation report was issued by Dr. Susan Theut on April 24, 2012.<sup>40</sup> The referral questions were: 1) the prognosis as to the Student's community adjustment potential; 2) recommendations regarding treatment/counseling needs; and 3) placement recommendations.<sup>41</sup> The report was based on an interview of the Student, an interview with her Probation Officer, an interview with her mother, and a review of the following records:

- April 12, 2012 referral
- Probation Officer progress reports of: February 17, 2012; March 19, 2012; and April 10, 2012
- Probation Officer Social Study Report of December 8, 2011
- Psychoeducational Evaluation of August 10, 2011, by Dr. Martell (P 38)
- Undated and unsigned Social Assessment

---

<sup>34</sup> P 39, P 40, P 41, T of J.Ga., T of P, T of J.Gu.

<sup>35</sup> T of J.Ga, P 39.

<sup>36</sup> P 10, P 11, P 12, P 13, T of P.

<sup>37</sup> No such document was produced for the record and therefore the undersigned finds it does not exist.

<sup>38</sup> P 17, P 18, P 19, P 20, P 21, P 22, P 23, P 24, P 25, P 26, P 27. (Respondent's Counsel made argument at hearing, without any evidence, that it would be inappropriate to complete an evaluation of the Student who had been hospitalized. The Respondent also argued, without evidence, that the Student was not its responsibility.)

<sup>39</sup> P 39.

<sup>40</sup> P 39.

<sup>41</sup> P 39.

Dr. Theut recommended that the Student receive individual therapy once per week to address: her relationship with her mother; her anger at being committed to CFSA and placed in foster care and not being able to reside with her Mother; the meaning of her oppositional behavior (including leaving school without permission and not coming home as expected); the death of her father and the trauma of being with him when he died; and to increase her coping skills.<sup>42</sup> Also, family therapy with both her foster parents and her Mother was recommended to address behavior and her relationship with Mother.<sup>43</sup> Regular visitation with her Mother was recommended, as well as drug education and treatment if her drug screens are positive, anger management classes, a mentor, and CBI (community based intervention) services.<sup>44</sup> Dr. Theut also recommended the Student be returned to her foster home with intensive services in place and that a therapeutic group home be considered if she continues to have problems conforming to rules and expectations.<sup>45</sup>

11. Dr. Todd Christiansen of the

Center completed a court ordered forensic psychiatric assessment on an emergency basis on May 6, 2012.<sup>46</sup> The assessment was based on interviews with both the Student and her Guardian Ad Litem, as well as a review of unspecified documents.<sup>47</sup> Dr. Christiansen diagnosed the Student with Depressive Disorder NOS and Conduct Disorder.<sup>48</sup> Dr. Christiansen recommended the Student be admitted to an acute inpatient adolescent psychiatric unit for assessment and stabilization due to her consistent running away in less restrictive settings and lack of toleration for confrontation or exploration of her

---

<sup>42</sup> P 39.

<sup>43</sup> P 39.

<sup>44</sup> P 39.

<sup>45</sup> P 39.

<sup>46</sup> P 40.

<sup>47</sup> P 40.

<sup>48</sup> P 40.

emotional/behavioral issues.<sup>49</sup> Dr. Christiansen also recommended that if there was not substantial progress during a 21 day inpatient stay at an adolescent psychiatric unit, a therapeutic foster home should be considered.<sup>50</sup> This would also, in Dr. Christiansen's opinion, prevent her from running away and afford her some academic stability.<sup>51</sup>

12. The Student was subsequently admitted to the \_\_\_\_\_ on

May 7, 2012, for inpatient psychiatric hospitalization.<sup>52</sup>

13. On May 18, 2012, the Student was provided a psychological evaluation by Dr. Jessica Gurley, upon referral by her Mother's Attorney.<sup>53</sup> Dr. Gurley was asked to assess the Student's "personality and emotional functioning in order to determine if she may meet criteria to receive special education services under the classification of emotionally disturbed."<sup>54</sup> This evaluation was based on interviews conducted with five people, including the Student, a Personality Assessment Inventory – Adolescent conducted as well as a Rorschach Inkblot Method – Comprehensive System conducted, and a review of educational and medical records, including report cards, progress reports, attendance records, and the assessments conducted by the Court Social Services Division in August 2011 (P 38), the Natasha Miller assessment from November 2011 (P 37), the assessment by Dr. Theut from April 2012 (P 39), and the May 2012 assessment by Dr. Christiansen (P 40).<sup>55</sup> Dr. Gurley testified that she agreed with the diagnostic impressions from Dr. Martell's August 2011 evaluation and Dr. Theut's April 2012 evaluation that the Student has an Adjustment Disorder, but she documented in her evaluation report why she believed the diagnosis of

---

<sup>49</sup> P 40.

<sup>50</sup> P 40.

<sup>51</sup> P 40.

<sup>52</sup> P 42.

<sup>53</sup> P 41.

<sup>54</sup> P 41.

<sup>55</sup> P 41.

Adjustment Disorder was not appropriate, including that there was no identifiable stressor that precipitated the symptom.<sup>56</sup> She also agrees with Dr. Theut's diagnostic impression that the Student suffers from Oppositional Defiance Disorder and this, she believes, is the Student's primary disability.<sup>57</sup> Dr. Gurley does not believe the Student suffers from Conduct Disorder, as does Dr. Christiansen, because she believes Dr. Christiansen based his diagnosis on the Student's personality problems, not the behavior problems the Student exhibited.<sup>58</sup> Dr. Gurley notes the Student is experiencing a significant psychopathology.<sup>59</sup> Dr. Gurley testified that she does not know what social maladjustment is, however.<sup>60</sup> Dr. Gurley also significantly downplayed the Student's drug use stating that there is no record any drug use has impacted her.<sup>61</sup> Dr. Gurley ignored the fact that the Student's grades began to drop and behavior problems began to increase during the time the Student was using marijuana.<sup>62</sup> Dr. Gurley believes the Student requires a classroom environment with structure and teachers that can implement a behavior intervention plan, therapeutic support, and security to prevent her from running away.<sup>63</sup> Dr. Gurley believes the Student meets the criteria for special education services under the classification of emotionally disturbed because her symptoms resulting from Oppositional Defiant Disorder are interfering with her ability to access an appropriate education.<sup>64</sup>

---

<sup>56</sup> T of J.Gu., P 38, P 39. (Indeed, J.Gu. testified that the stressor noted in the August evaluation report was the Student's entry into adolescence. This is but one significant contradiction that impinges the weight provided to J.Gu.'s testimony.)

<sup>57</sup> P 39, P 41, T of J.Gu.

<sup>58</sup> T of J.Gu., P 40.

<sup>59</sup> P 41.

<sup>60</sup> T of J.Gu.

<sup>61</sup> T of J.Gu.

<sup>62</sup> T of J.Gu, P 37, P 38, P 39, P 40, P 41. (This is yet another fact that impinges the weight of J.Gu.'s testimony.)

<sup>63</sup> P 41, T of J.Gu.

<sup>64</sup> P 41, T of J.Gu.

14. The Student has no history of health issues.<sup>65</sup> She has been provided with some individual as well as family therapy and has not been on any prescribed psychotropic medications.<sup>66</sup>
15. The Student's cognitive functioning is average. The Student's intelligence is in the average range.<sup>67</sup> There is no significant discrepancy between her Verbal and Performance IQ scores.<sup>68</sup> Her Verbal Comprehension Index, Perceptual Reasoning Index, Working Memory Index, and Processing Speed Index are all in the average range.<sup>69</sup>
16. The Student's most recent DC-CAS scores on record, from 2010, indicate the Student scored proficient in reading and basic in math.<sup>70</sup> Her DC-CAS scores have always been in the basic or proficient range.<sup>71</sup> At the conclusion of the 2010-2011 school year, sixth grade, the Student earned D grades in Language Arts, Science, Social Studies, and Spanish.<sup>72</sup> Nearly all of the teachers for these classes noted the Student "lacks initiative."<sup>73</sup> The same note occurs for the two classes she failed, Math and Health/Physical Education.<sup>74</sup> She earned a C in Music, and the teacher noted the Student both lacked initiative and had excellent behavior.<sup>75</sup> In the one class in which she earned an A, Art, the teacher noted the Student has "[e]xcellent initiative; Pleasure to Have in the Class[.]"<sup>76</sup> In August 2011, the Student's educational achievement was acceptable. Her Broad Reading measured slightly low at an age equivalent of 11 years and 11 months (she was 12 years and 11 months of age at the time).<sup>77</sup> Her Basic Reading Skills were measured at an age equivalent of 14 years five months of age, and her

---

<sup>65</sup> P 38.

<sup>66</sup> P 38.

<sup>67</sup> P 38.

<sup>68</sup> P 38.

<sup>69</sup> P 38.

<sup>70</sup> P 51.

<sup>71</sup> P 51.

<sup>72</sup> P 49.

<sup>73</sup> P 49.

<sup>74</sup> P 49.

<sup>75</sup> P 49.

<sup>76</sup> P 49.

<sup>77</sup> P 38.

Reading Comprehension was at an age equivalent of 12 years two months of age.<sup>78</sup> Her Broad Math Skills were measured at an age equivalent of 12 years six months of age.<sup>79</sup> Her Math Calculation Skills and Math Reasoning were measured at 12 years nine months of age and 12 years six months of age, respectively.<sup>80</sup> Her Broad Written Language measured at 12 years seven months of age, and her Written Expression measured at 14 years one month of age.<sup>81</sup> The Student's grades at Academy as of January 20, 2012, included a C in Pre-Algebra, Ds in Health/Physical Education, Social Studies, and Science, and an F in English.<sup>82</sup> All of the teachers noted items such as: "Does Not Participate," "Needs More Study," "Lacks Initiative," and "Does Not Complete Class Assignments," among others.<sup>83</sup>

17. The Student had excessive absences from school during the 2011-2012 school year, including a high percentage of unexcused absences.<sup>84</sup>
18. The Student requires assistance to address her needs, all of which are related services under 34 C.F.R. § 300.34, and she requires no special education services, such as specialized instruction.<sup>85</sup> Some of the services that may help her are: a small setting as opposed to pull out services to reduce distractions from peers; a quiet space for when she gets angry or irritable; individual, group, and family counseling; a location she cannot run away from; therapeutic support, including a behavior intervention plan than includes consistent redirection.<sup>86</sup>

---

<sup>78</sup> P 38.

<sup>79</sup> P 38.

<sup>80</sup> P 38.

<sup>81</sup> P 38.

<sup>82</sup> P 46.

<sup>83</sup> P 46.

<sup>84</sup> P 45, P 47.

<sup>85</sup> P 37, P 38, P 39, P 40, P 41, T of S.M., T of J.Gu., T of J.Ga.

<sup>86</sup> P 37, P 38, P 39, P 40, P 41, T of S.M., T of J.Gu., T of J.Ga.

## VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., 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); 34 C.F.R. § 300.516(c)(3).
2. "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." Long v. Dist. of Columbia, 780 F. Supp. 2d 49, 56 (D.D.C. 2011), *citing* N.G. v. District of Columbia, 556 F.Supp.2d 11, 16 (D.D.C.2008). DCPS must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment.' D.C. Code § 38-2561.02(a).
3. The Student was referred for an initial evaluation during the first week of February 2012. By the end of April 2012 the Respondent was discussing an initial evaluation of the Student, but had not yet convened a team to conduct the evaluation. The latest date the referral could have been made (it may have occurred as early as February 1, 2012) was February 8, 2012. Based on that date, the evaluation was to have been completed no later than June 7, 2012. The

Respondent made no showing that the evaluation was underway, and in fact argued that the Student should not be evaluated since she was, at the time of the hearing, hospitalized. Given all of the data available for the Student since August of 2011, this argument lacks any merit. No additional testing appears necessary for the Student. There was sufficient existing data and staff who had been observing the Student in hospital and at \_\_\_\_\_ certainly could have provided additional depth to the Student's present levels of academic achievement and functional performance. Had the Respondent indicated the initial evaluation was underway, the outcome may be different. Since the Respondent made no showing or argument of this, there was no record of a written proposal or refusal for an initial evaluation, and the Respondent argued it was not appropriate to conduct the initial evaluation of the Student, it can only be concluded that the Respondent violated the law by not locating and evaluating the Student.<sup>87</sup>

4. The IDEA includes a long list of requirements for initial evaluations of students. *See* 34 C.F.R. §§ 300.301-300.311. The primary purpose of these procedures is to first determine whether the child is a child with a disability under IDEA, by meeting the definition under 34 C.F.R. § 300.8. The other purpose is to determine the educational needs of the child. *See* 34 C.F.R. § 300.301(c)(2). "Upon completion of the administration of assessments and other evaluation measures" the IEP team must make the determination of whether the child is a child with a disability under 34 C.F.R. § 300.8. 34 C.F.R. § 300.306(a)(1).

---

<sup>87</sup> The Respondent also argued that there were times during the 2011-2012 school year when the Student was not its responsibility under IDEA. The Respondent failed to present evidence, however, to support this. The argument, made at the conclusion of the hearing, was that the Student was in the custody of the \_\_\_\_\_ at various points during the course of the year. In fact, the evidence shows the Student was often in the custody of the Child and Family Services Agency (CFSA), the public child welfare agency, not with DYRS, the juvenile justice agency. D.C. Code § 38-2602 provides that the State Education Agency (SEA) must provide for the education of students in the custody of DYRS, not CFSA.

5. In determining whether or not a child is eligible under the definition of emotional disturbance, as the Petitioner argues here, it must be ascertained whether the child a) has an emotional disturbance as defined in the law, and b) whether, as a result of that emotional disturbance, the child requires special education and related services. *See*, 34 C.F.R. § 300.8(a), D.C. Mun. Regs. 5-E3001(1). Even if a child “has one of the disabilities identified [in IDEA], but only needs a related service and not special education, the child is not a child with a disability under this part.” 34 C.F.R. § 300.8(a)(2)(i). *See also*: 34 C.F.R. § 300.306(b)(2) (“A child must not be determined to be a child with a disability under this part – (2) If the child does not otherwise meet the eligibility criteria under § 300.8(a).”)

Exceptions to or clarifications of this rule are:

- (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
- (ii) Travel training; and
- (iii) Vocational education.

34 C.F.R. §§ 300.8(a)(2)(ii), 300.39(a)(2).

6. The Student underwent several assessments since the summer of 2011, yet the evaluation of the Student was never completed by the Respondent. The Petitioner contends the assessments completed show the Student is a child with a disability under IDEA. The Respondent does not argue that more assessments must be conducted, but rather that the evaluation cannot presently be completed because the Student is (was) in hospital. Given the assessment results provided, the Petitioner has shown the Student only requires related services, not special education services. None of the related services she requires qualifies as special education under District of Columbia law or the IDEA. The Student requires no specialized instruction, and therefore does not meet eligibility requirements. She requires no adaptation of the content, methodology, or delivery of instruction. *See* 34 C.F.R. § 300.39(b)(3). The evidence

shows the Student may need behavioral supports and even a more restrictive education setting, such as a secure residential program that will prevent her from running away from school and home. This is not special education, however. Whether or not the Student is disabled under another law, such as 34 C.F.R. § 104, is not determined here, nor is it determined what the Student requires for a FAPE under 34 C.F.R. § 104.33, as the undersigned only has authority to make determinations under IDEA.

7. IDEA claims based on procedural error are "viable only if those procedural violations affected the student's substantive rights." Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006). In this case, because the Student is not eligible for special education, no relief will be granted under IDEA. This determination is not intended to affect any rights the Student has under Section 504 of the Rehabilitation Act of 1973 or any other law.

#### **VII. DECISION**

The Petitioner has not shown the Student is eligible for special education under the IDEA under the definition of emotional disturbance.

#### **VIII. ORDER**

The complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

Date: June 19, 2012



---

Jim Mortenson, Independent Hearing Officer

**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).