DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

OSSE
STUDENT HEARING OFFICE
2012 OCT -9 AM 8: 56

Parent,[1] on behalf of,
Student,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: October 5, 2012

Hearing Officer: Melanie Byrd Chisholm

Case No: 2012-0510

Hearing Dates: September 18, 2012

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [redacted] who is a 9th 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 July 25, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to by failing to identify the student as eligible for special education and related services as a student with an emotional disturbance (ED) and by failing to develop an individualized education program (IEP) for the student. 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 an ED; an IEP be developed for the student which includes specialized instruction in all academic areas, one to two (1-2) hours per week of counseling services, the accommodations of individualized attention, constant redirection, small setting and supportive structure; and behavioral support through a behavioral intervention plan in a therapeutic setting; an updated educational evaluation including a cognitive assessment once the student's emotional functioning has stabilized; and compensatory education in the form of independent tutoring and counseling for no less than six (6) months. On July 31, 2012, the Petitioner confirmed that although the Complaint contained facts regarding discipline, the issues to be decided by the Hearing Officer are limited to the student's eligibility for special education and related services and the development of an IEP.

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[1] Personal identification information is provided in Appendix A.

On August 9, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that the student was evaluated and the Multidisciplinary Team (MDT) determined that the student is not eligible for special education and related services; the student has not been denied a FAPE; and any issue regarding evaluation was dismissed by a prior evaluation claim filed in January 2012.

On August 9, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on August 25, 2012, following the conclusion of the 30-day resolution period, and ends on October 8, 2012. The Hearing Officer Determination (HOD) is due on October 8, 2012.

On August 21, 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 August 24, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter and identified September 25, 2012 as the date for the due process hearing to be held. 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. Neither party disputed the issue as outlined in the Order.

On August 23, 2012, the Petitioner requested that the due process hearing be held on an earlier date due to the unavailability of the student's mother during the week of September 25, 2012. On August 28, 2012, the Respondent agreed to hold the due process hearing on September 18, 2012. On August 30, 2012, the Hearing Officer issued a Rescheduling Order, rescheduling the due process hearing for September 18, 2012.

On September 11, 2012, Petitioner filed Disclosures including twenty-six (26) exhibits and four (4) witnesses.[2] On September 11, 2012, Respondent filed Disclosures including six (6) exhibits and six (6) witnesses.

The due process hearing commenced at approximately 9:00 a.m. on September 18, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-21 and 26 were admitted without objection. Respondent's Exhibits 1-4 and 6 were admitted without objection. Petitioner's Exhibits 22, 24 and 25 were admitted over Respondent's objections however the Hearing Officer noted that the unavailability of the authors of the documents and the dates of the documents would affect the weight of the evidence for Petitioner's Exhibits 22 and 25. The Hearing Officer did not admit Petitioner's Exhibit 23, concluding that the exhibit was not an evaluation and was highly prejudicial, without the Respondent having an opportunity to cross-examine the author of the document. The Hearing Officer admitted Respondent's Exhibit 5, over Petitioner's objection, finding that the document we relevant and citing *Friendship Edison Public Charter School v. Smith*, 561 F.

[2] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Supp. 2d 74 (D.D.C. 2008) (finding that discussions held during the resolution meeting are not confidential).

The hearing concluded at approximately 1:48 p.m. on September 18, 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.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS denied the student a FAPE by failing to find the student eligible for special education and related services on May 21, 2012 as a student with an emotional disturbance and by failing to develop an IEP for the student?

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 diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Adjustment Disorder with Depressed Mood and Oppositional Defiant Disorder (ODD). (Petitioner's Exhibits 1, 22 and 24; Mother's Testimony; Community Support Worker's Testimony)
2. Prior to their deaths in 2010, the student had close relationships with her Godmother and great aunt. (Petitioner's Exhibits 1, 3 and 22; Mother's Testimony)
3. After the deaths of the student's Godmother and great aunt, the student began exhibiting negative behaviors in the home and at school. (Petitioner's Exhibits 1 and 22; Mother's Testimony; Psychologist's Testimony)
4. During the 2010-2011 school year, that the student was absent 4.5 days during the school year, with 3.5 of the days being excused absences. (Respondent's Exhibits 1 and 2)
5. In August 2011, the student was psychiatrically hospitalized because of her behaviors in the home. At that time, the student presented as an adolescent with problems managing feelings of anger and depression, however was cooperative and pleasant during the hospitalization. (Petitioner's Exhibit 1)
6. At the end of the 2010-2011 school year, the student scored in the Basic range for reading and the Proficient range for math. (Respondent's Exhibit 1)

7. On her final report card for the 2010-2011 school year, the student earned the grade letter "B" in English, math, science and Spanish. For the first three quarters of the school year, the student received the grade letter "A" in math. The final grade letter "B" was the result of a "D" on her final exam for math. The student earned the grade letter "C" in World Geography and band. (Respondent's Exhibit 1)
8. During the 2011-2012 school year, the student scored in the Proficient range in Numbers, in the Advanced range in Expression and Geometry, and in the Below Average range in Functions and Statistics. (Petitioner's Exhibit 16; Mother's Testimony)
9. The student excels in math and receives above grade level work. She is able to quickly grasp mathematics concepts and completes standard assignments as well as extra assignments. (Petitioner's Exhibits 2 and 3; Respondent's Exhibits 1 and 2)
10. The student has an independent reading level of 6.1, an instructional reading level of 7.0 and a frustration reading level of 8.0. (Petitioner's Exhibit 3; Respondent's Exhibit 2)
11. The student has a strong sense of phonemic awareness. (Petitioner's Exhibit 3; Respondent's Exhibit 2)
12. After the first semester of the 2011-2012 school year, the student had average to above average grades in all subject areas. The student concluded the 2011-2012 school year with two "B's" and six "C's." (Petitioner's Exhibits 3 and 6)
13. The student's level of functioning in listening comprehension, oral expression, basic reading skills, reading comprehension, written expression, math calculation and math reasoning as compared to other classmates is average to above average. (Petitioner's Exhibit 3)
14. During the 2011-2012 school year, the student received two two-day suspensions, one in October 2011 for profane language and verbal threats toward a student and the other in November 2011 for insubordination and excessive disruptive behavior on a field trip. (Petitioner's Exhibits 9 and 10; Respondent's Exhibit 2; Mother's Testimony)
15. During the 2011-2012 school year, the student received four Authorizations to Release Student from School/Street Passes (March 16, 2012, March 23, 2012, March 30, 2012 and April 30, 2012). Three of the four releases were by "Parental Request" and one release was for "Behavior." (Petitioner's Exhibits 11, 12, 14 and 15; Mother's Testimony)
16. During the student's March 2012 psychological evaluation, the student displayed oppositional behaviors to the point of invalidating academic measures attempted by the evaluator. (Petitioner's Exhibit 1; Psychologist's Testimony)
17. At the May 21, 2012 MDT meeting, it was determined that the student was not eligible for special education and related services. The parent did not agree with this determination. (Stipulated Fact)
18. The student participates fully in class, manages assignments well and is eager to learn. (Petitioner's Exhibits 1, 2 and 3; Respondent's Exhibit 2)
19. School is a positive experience for the student. (Petitioner's Exhibit 2)
20. The student has a long-term goal of becoming a lawyer because she enjoys solving problems. (Petitioner's Exhibit 2)

21. The student is likeable, has a wonderful sense of humor and a genuine interest in getting to know people. (Petitioner's Exhibits 1 and 3)
22. The student is self-confident and takes pride in her appearance. (Petitioner's Exhibits 1 and 3)
23. The student has good relationships with her math teacher and her therapist, and has several friends that consist of mostly girls. (Petitioner's Exhibits 1, 2 and 3)
24. The student is defiant, oppositional and verbally aggressive. (Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 13 and 18; Mother's Testimony; Community Support Worker's Testimony; Psychologist's Testimony)
25. The student's inappropriate behaviors in school decreased from 2010-2011 to 2011-2012 and during the 2011-2012 school year. (Petitioner's Exhibits 1 and 2)
26. The student's behavior improved when she had a "private conference" with the teacher, received positive attention, was given extra responsibilities in the classroom, was given advanced work and was given a behavior chart. (Petitioner's Exhibits 1, 2 and 3; Respondent's Exhibit 2)
27. The student is opposed to receiving special education services. (Petitioner's Exhibits 1 and 22)
28. The student has insight into her problems and chooses when to follow directions. (Petitioner's Exhibits 1 and 2; Community Support Worker's Testimony)
29. Through community services, the student is receiving therapy, medication and community support. (Mother's Testimony; Community Support Worker's Testimony)

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).

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.

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).

In this case, the student has not displayed an inability to learn over a long period of time and to a marked degree. At the end of the 2010-2011 school year, the student scored in the Basic range for reading and the Proficient range for math. On her final report card for the 2010-2011 school year, the student earned the grade letter "B" in English, math, science and Spanish. For the first three quarters of the school year, the student received the grade letter "A" in math. The final grade letter "B" was the result of a "D" on her final exam for math. The student earned the grade letter "C" in World Geography and band. On a formal math assessment taken during the 2011-2012 school year, the student scored in the Proficient range in Numbers, in the Advanced range in Expression and Geometry, and in the Below Average range in Functions and Statistics. On a formal reading assessment taken during the 2011-2012 school year, the student scored an independent reading level of 6.1, an instructional reading level of 7.0 and a frustration reading level of 8.0. For the 2011-2012 school year, the student had average to above average grades in all subject areas. The student participates in class and is eager to learn.

It was uncontested that the student excels in math and receives above grade level work. She is able to quickly grasp mathematics concepts and completes standard assignments as well as extra assignments. While the student is slightly behind grade level in reading, this does not indicate an "inability to learn over a long period of time to a marked degree." The student has a strong sense of phonemic awareness and according to her teachers during the 2011-2012 school year, the student basic reading skills, reading comprehension and written expression as compared to her other classmates is average to above average. The MDT suggested that the student increase her reading during leisure time in order to increase her vocabulary exposure and practice using contest to determine the meaning of unfamiliar grade level words.

The student has not displayed an inability to build or maintain interpersonal relationships over a long period of time and to a marked degree. The student has a "wonderful" sense of humor and a genuine interest in getting to know people. The student's mother described the student's relationships with her siblings as "strained" because the distress the student caused when she made allegations of abuse and/or neglect, however the student described her

relationship with her siblings as "fine." The Mother described her relationship with the student as "poor" because of the student's negative behaviors, yet the student described her relationship with her mother as "fine...I don't know." Prior to their deaths in 2010, the student had close relationships with her Godmother and great aunt. While the student is defiant with teachers and challenges authority, she has good relationships with her math teacher and her therapist, and has several friends that consist of mostly girls. There is conflicting evidence regarding the student's ability to build or maintain personal relationships, however where there is "conflicting evidence regarding whether [a student] could maintain satisfactory relationships" a student is not eligible for IDEA under this prong. *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.,* 496 F.3d 932, 944-945 (9th Cir. 2007).

The record does not prove, by a preponderance of the evidence, that the student has displayed inappropriate types of behaviors under normal circumstances over a long period of time and to a marked degree which adversely affects the student's educational performance. In late 2010, the student experienced the death of her Godmother and great aunt. The experience of the two deaths for a young teen is not a "normal circumstance." For the 2010-2011 school year, the student attended a DCPS school and reportedly displayed oppositional behaviors however, other than parental reports in evaluations, the record does not contain evidence of oppositional behaviors during the 2010-2011 school year. Nonetheless, it was uncontested that the student is defiant, oppositional and verbally aggressive. At the beginning of the 2011 school year, the student enrolled in School A and although exhibited behavior problems, did so to a lesser degree than the previous year. In fact, during the student's October – December 2011 FBA, teachers reported that the defiant and attention-seeking behaviors exhibited by the student decreased in both frequency and intensity by the time the report was issued in January 2012. The student's behavior improved when she had a "private conference" with the teacher, received positive attention, was given extra responsibilities in the classroom, was given advanced work and was given a behavior chart.

The Petitioner argued that the student's academic performance is impacted by the amount of time the student is out of class due to inappropriate behavior however the student's final 2010-2011 report card shows that the student was absent 4.5 days during the school year, with 3.5 of the days being excused absences. During the 2011-2012 school year, the student received two two-day suspensions, one in October 2011 for profane language and verbal threats toward a student and the other in November 2011 for insubordination and excessive disruptive behavior on a field trip. Although the record contains four Authorizations to Release Student from School/Street Passes (March 16, 2012, March 23, 2012, March 30, 2012 and April 30, 2012), three of the four releases list "Parental Request" as the reason for the release and only one lists "Behavior" as the reason for release. The Petitioner's contention that the student was "sent home with street passes at least two times per month" is not supported by the record. In her November 16, 2011 evaluation of the student, the School A Director of Special Education concluded that the "student has emotional challenges which disrupt the flow of learning, but have not adversely impacted her academics to the degree that Special Education Services are warranted." The Hearing Officer agrees with this conclusion. While the student missed five days of school because of her behavior, the student continued to receive average to above average grades, participated in class and displayed an eagerness to learn and complete extra assignments and classroom tasks.

The record does not prove, by a preponderance of the evidence, that the student has a general pervasive mood of unhappiness or depression over a long period of time and to a marked degree which adversely affects the student's educational performance. The student has been diagnosed with Adjustment Disorder with Depressed Mood and ODD. However, the IDEA requires more than a diagnosis of a disability or of a disorder. It requires that the child exhibit symptoms of a qualifying disability and exhibit them to such a degree that they interfere with the child's ability to benefit from the general education setting. *See* 34 CFR §300.8(a); *see also Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). In late 2010, the student experienced the deaths of her Godmother and great aunt. Shortly after the deaths of these two women who had an "exceptionally close" relationship with the student, the student's behavior in the home became "unmanageable." The student's behavior at school became disrespectful and oppositional. In August 2011, the student was psychiatrically hospitalized because of her behaviors in the home. At that time, the student presented as an adolescent with problems managing feelings of anger and depression, however was cooperative and pleasant during the hospitalization.

During her March 2012 psychological evaluation, the student denied symptoms of depression however the evaluator noted that the student's reported mood of irritability is often a symptom of depression in children. During her FBA conducted October 2011 through December 2011, the student reported that school is a positive experience for her and was able to clearly articulate a long-term goal of becoming a lawyer and her reasoning for that choice. In March 2012, the parent indicated on the MACI that the student is performing in the Elevated range on the Emotional Distress Total scale however the evaluator noted that the validity scales indicated that the parent endorsed items in a manner that possibly suggested a negative impression of the student and may have led to a less favorable impression than was warranted.

The student is self-confident and takes pride in her appearance. School is a "mostly" positive experience for the student and she participates in class. The student is likeable despite her displays of oppositional behavior. At no point during the observations conducted for the student's FBA did the evaluator note a mood of unhappiness or depression. Likewise, in none of the evaluations in the record where teacher input was provided did a teacher describe the student with having a mood of unhappiness or depression. Further, while the student was clearly impacted by the deaths of her family members, the symptoms of her diagnoses have not been to such a degree that they interfere with her ability to benefit from the general education setting. The student has maintained average to above average grades, she excels in math and she responds positively to positive interventions and positive attention. The student has been oppositional and defiant in school however her more significant behavior episodes seem to have occurred in the home and are being addressed through therapy, medication and community support services.

There was no evidence presented which suggests the student develops physical symptoms or fears associated with personal or school problems. During her March 2012 psychological evaluation, the student noted no unusual fears, persisting or irrational worries or Post-Traumatic Stress Disorder (PTSD) symptoms. On the MACI, the parent indicated that the student is performing in the Elevated range on the Physical Symptoms scale however the evaluator noted

that the validity scales indicated that the parent endorsed items in a manner that possibly suggested a negative impression of the student and may have lead to a less favorable impression than was warranted.

During the student's March 2012 psychological evaluation, the student displayed oppositional behaviors to the point of invalidating academic measures attempted by the evaluator. The student made it clear that she objected to the testing and the possibility of being placed in special education. The student stated that she was "not dumb" and did not need her academic skills assessed. The student had insight into her problem behaviors and was able to reason that she treats adults poorly when she finds them "irritating." During her December 2011 interview with the evaluator for her FBA, the student explained that she refuses to follow directions because "it just be that I don't want to follow them, I don't follow them." The student's behavior in school confirms this statement in that the student responded well to a behavior chart, responded well with private conferences with her math teacher and, at times, responded well to redirection. The Hearing Officer concludes that the student's behaviors present more like social maladjustment than ED. *See Hansen v. Republic R-III Sch. Dist.,* 632 F.3d 1024, 56 IDELR 2, (8th Cir. 2011) (the team determined that [the student] exhibited behaviors more akin to social maladjustment than emotional disturbance because "[the student] controls his behavior. He turns it on and turns it off.").

The Petitioner also argued that the MDT determined that the student met the criteria for ED. Petitioner's Exhibit 17 contains a Disability Worksheet for ED allegedly completed by the MDT. However this document is neither signed by any members of the MDT nor completely filled out, is in directly conflict with the testimony provided by all witnesses who attended the MDT meeting and was not properly identified by the parent.

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

In the present matter, the Petitioner did not prove by a preponderance of the evidence that the student is a student with a disability, specifically a student with ED, as defined by 34 CFR §300.8. Therefore, the student is not entitled to a FAPE and DCPS was not required to develop an IEP for the student.

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: October 5, 2012

Melanie Byrd Chisholm
Hearing Officer