OSSE
Student Hearing Office
June 24, 2013

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 PARENT,**[1] ***Petitioners,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: June 22, 2013**

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 District of Columbia Public Schools ("DCPS"), which acts as local education agency ("LEA") under the IDEA. The complaint was filed April 8, 2013, on behalf of a year old student (the "Student") who resides in the District of Columbia and attends her neighborhood DCPS high school. Petitioner is Student's parent.

Petitioner alleges that DCPS has violated the IDEA and denied Student a free appropriate public education ("FAPE"), as described further below under the specified hearing issues. DCPS filed a timely Response to the Complaint on April 18, 2013, which denies the allegations. DCPS asserts that it issued a Prior Written

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

Notice ("PWN") on May 9, 2011, declaring that Student was not eligible for special education services at that time.

On April 18, 2013, DCPS held a resolution meeting, 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 May 8, 2013, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") ends on June 22, 2013.

On May 9, 2013, a Prehearing Conference ("PHC") was held to discuss and clarify the issues; and a Prehearing Order was issued on May 21, 2013. [2] The parties filed their five-day disclosures as required by June 4, 2013; and the Due Process Hearing was held in Hearing Room 2004 on June 11, 2013. 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 without objection:

Petitioners' Exhibits: P-1 through P-21.

Respondent's Exhibits: R-1 through R-27.

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

Petitioners' Witnesses: (1) Parent/Petitioner; (2) Student; and (3) Educational Advocate ("EA").

Respondent's Witness: DCPS School Psychologist.[3]

Both parties submitted written closings on June 11, 2013.

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[2] On May 22, 2013, DCPS also filed an Amended Response and Objection to the 5/21/2013 Prehearing Order. The parties' stipulation modifying Issue 2 at the due process hearing (*see* discussion in Part III, *infra*) mooted DCPS' objection.

[3] DCPS' School Psychologist was qualified (without objection) as an expert in (a) administering and interpreting both cognitive and social/emotional testing, and (b) identifying students with OHI, ED and SLD. Student's EA was proffered, but not qualified, as an expert.

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 the parties at the PHC and the Due Process Hearing, the following issues were presented for determination at hearing:

(1) Failure to Evaluate (Procedural) ─ *Did DCPS fail to evaluate Student in all areas of suspected disability as required by the IDEA (34 CFR §§ 300.301-300.305)?* Specifically, Petitioner alleges that the April 12, 2011, psychological evaluation of Student was not sufficiently comprehensive and that ADHD, emotional, auditory and verbal processing issues were not followed up on as needed.

(2) Substantive Impact of Failure to Evaluate ─ *Did DCPS' procedural violation (if any) under Issue 1 result in educational harm to Student or otherwise have a substantive impact pursuant to 34 C.F.R. 300.513, in that Student was found ineligible for special education and related services and thereby denied a FAPE as of May 9, 2011?* [4]

(3) Child Find (Post-5/9/2011) ─ *Did DCPS thereafter fail 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?* Specifically, Petitioner alleges that Student should have been found as a child suspected of having an Other Health Impairment ("OHI") and/or Emotional Disturbance ("ED") during this time period.

[4] Issue 2 was modified by stipulation at hearing from what was originally stated in the Prehearing Order. Petitioner's Complaint did not allege that DCPS' 5/9/2011 eligibility determination was incorrect based on the data before the MDT/IEP Team on that date.

As relief, Petitioner requests that DCPS be ordered to: (a) fund independent educational evaluations ("IEEs") in the following areas: comprehensive psychological, ADHD/Connors test, functional behavioral assessment ("FBA"), and auditory/visual processing; [5] (b) convene a meeting of Student's multi-disciplinary team ("MDT") to develop an appropriate individualized education program ("IEP") including a behavioral intervention plan ("BIP") and counseling services; (c) fund placement with transportation; and (d) award compensatory education.

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

IV. FINDINGS OF FACT

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

1. Student is a -year old student who resides in the District of Columbia. Petitioner is the Student's parent. *See Parent Test.*

2. Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") when she was a young child, which has been manifested primarily through impulsive behavior and organizational weaknesses. She has taken medication for her ADHD condition in the past, but she does not take medication currently due to negative side effects. *Parent Test; P-7-2.*

[5] As noted in the Prehearing Order, the parties reported at the PHC that Petitioner had filed a written request for independent evaluations on 3/29/2013, and that this request was discussed but not resolved at the 4/18/2013 resolution meeting.

3. Student has attended DCPS schools since the 6th grade. During the 2012-13 school year, she has attended her neighborhood DCPS high school ("High School A"). Before that, she attended a DCPS middle school ("Middle School") through the 2010-11 school year, and then a different DCPS high school ("High School B") that Middle School fed into for the 2011-12 school year. *See Parent Test.*

4. On or about March 9, 2011, when Student was attending the 8th grade at Middle School, Petitioner requested that Student be evaluated for special education eligibility. Petitioner requested that this initial evaluation include a comprehensive psychological evaluation, a functional behavioral assessment ("FBA"), and any other assessments found to be warranted. *R-3-1; see also. R-4* (3/11/2011 referral acknowledgement).

5. At the time of her request, Petitioner was concerned that Student had an attention problem that was impacting her academic performance. Teacher reports indicated that her areas of concern included difficulty focusing and paying attention in class. Teachers also indicated that Student was often absent or late to class and did not complete assigned work, and Student had failing grades in some of her core subjects. *See P-7-1; R-7-1; Parent Test; School Psych. Test.*

6. On or about March 17, 2011, DCPS conducted an initial psychological evaluation of Student. The procedures and test administered included: the Reynolds Intellectual Assessment Scales ("RIAS"); the Behavior Assessment System for Children – 2d edition ("BASC-II"), student form; the Clinical Assessment of Behavior ("CAB"), parent and teacher forms; classroom observation; interviews; and record review. DCPS issued a written report describing the results of this evaluation on April 12, 2011. *See P-7-1; R-7-1.*

7. As described in the 4/12/2011 psychological evaluation report, Student's cognitive profile revealed that she was functioning in the average range overall, with a Composite Intelligence Index ("CIX") score of 92. *P-7-5; p-7-13.* Academically, the evaluator noted that Student was "having trouble accessing the general education curriculum based on her failing and below average grades." *P-7-13.* However, "the results of the CAB revealed that she is not presenting attention or behavior problems in class." *Id.; see also P-7-12.* "Emotionally, the BASC student format revealed that [Student]'s most significant difficulties are relationships with her parents, relationships with her peers, self-esteem and self-reliance." *P-7-12.* Overall, the evaluator concluded that Student did not present the criteria of a student with an OHI disability, because it had not been shown that her ADHD condition was adversely impacting her academically, particularly in light of her severe attendance issues. [6] *See P-7-12 -- 13; School Psych. Test.* (testifying that she did not see evidence of ADHD affecting Student in the school setting).

8. On or about March 17, 2011, DCPS also administered the Woodcock-Johnson Tests of Achievement to measure Student's academic abilities. The results showed that Student's academic skills were within the high average range of others at her age level. Her fluency with academic tasks and her ability to apply academic skills were both within the average range. When compared to others at her age level, Student's performance was superior in

[6] From August 2010 to March 2011, attendance records show Student had 121 unexcused class absences and 41 late arrivals. *R-2-1.*

math calculation skills; high average in mathematics; and average in broad reading, written language, and written expression. *See R-6-1.*[7]

9. In late April 2011, DCPS also completed an FBA and an Analysis of Existing Data for Student. *See R-8; R-9.*

10. On or about May 9, 2011, DCPS convened a meeting of Student's MDT/IEP Team to review the evaluations and determine eligibility .... After analyzing the existing data and evaluations, the Team determined that Student did not qualify as a child with a disability under the IDEA, and thus was not eligible for special education and related services. *See School Psych. Test; Parent Test.*

11. Following the 5/9/2011 MDT/IEP Team meeting, DCPS issued a May 9, 2011, Prior Written Notice ("PWN") informing Petitioner as follows: "LEA refuses to identify the student as a student with a disability as defined in IDEA. Based on the data reviewed [Student] does not qualify as a student with a disability." *R-10-11.* However, Student was referred to the Student Support Team ("SST") to consider eligibility for accommodations, related aids and services under Section 504 of the Rehabilitation Act. *See R-11.*

12. Following receipt of the 5/9/2011 PWN, Petitioner did not request DCPS to conduct any additional evaluations. Petitioner also did not state her disagreement with DCPS' psychological evaluation and request an independent evaluation funded by DCPS.

13. In June 2011, the SST found Student eligible under Section 504 and developed a 504 Plan to accommodate her ADHD impairment. Petitioner

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[7] At the time of testing, Student was 14 years and 11 months old and in the 7th month of 8th grade. She received standard scores of 125 in Math Calculation (>18.0 grade equivalency or "GE"), 114 in Broad Math (13.6 GE), 105 in Written Expression and Broad Written Language (11.1, 10.7 GE), and 95 in Broad Reading (8.3 GE), Her overall Academic Skills measured 115 (13.0 GE). *See R-6-2.*

participated in this process and consented to DCPS' implementation of the 504 Plan for Student. *See R-11; R-12; R-13.* The Plan included preferential seating towards the teacher and away from remote areas of the classroom to encourage appropriate behavior; regular and periodic breaks from the classroom; giving her responsibilities in the classroom to keep her occupied with positive actions; frequent and specific positive reinforcement for acting appropriately and meeting expectations; and regular access to the school counselor. *R-13-2.*

14. Student's 504 Plan has since been reviewed and revised annually. *See R-14* (5/24/2012 plan); *R-19* (5/7/2013 plan). The 504 Plan has helped Student to make academic and behavioral progress over the past two years, although she has continued to experience attendance problems which have largely contributed to her failing grades. *See R-15; R-16; Student Test.* Student also now has an Attendance Support Plan in place, which was completed in March 2013. The Attendance Support Plan includes a daily attendance sheet that is signed by Student's teachers and taken home to the parent. *See R-19-3; R-18..*

15. Student currently is in the h grade at High School A and attends the "twilight program," which combines afternoon and early evening classes and is designed for high school students who need to catch up in their credits and may have experienced attendance problems in the regular school-day program. *See Student Test.; Parent Test.* Student was also placed into this program because she was unable to attend summer school to make up credits before the 2012-13 school year began. *Parent Test.* She has the potential to earn 11 of the 24 credits needed for a high school diploma by the end of this school year. *See R-20 – R-24; Student Test.; EA Test.*

16. During the first semester of the 2012-13 school year, Student passed English I, English II, Geometry, and Business Communications, but failed Biology. *See R-22-1* (Transcript)*; Student Test1*. During the second semester, she has been taking three classes, two in the afternoon and one in the evening session. *Student Test.; R-19-2; R-21*. At the time the Complaint was filed, Student appeared to be earning passing grades in all her courses, including a B in Algebra II & Trigonometry, despite excessive absences. *Student Test; R-20-2* (3/29/2013 Report Card); *R-21*(Student Schedule).

17. Student testified that she is "doing well" and "does not find the work difficult" in her current World History/Geography class and that Algebra II & Trigonometry is "easy for me." *Student Test.; see also id.* ("Some of stuff they teach me is stuff I already know"; "work is easy …I can just do the work"; "taking notes is easy"; and she doesn't really have any homework since she finishes her work in class). She also "likes to learn," likes most of her teachers, plays on her school's softball team and gets along well with the other players, though she has problems with other peers at school she doesn't fit in with. *Id.; see also EA Test.* Student also testified that, while she would rather attend the regular day program, she has experienced less difficulty getting to school on time this year in the twilight program because her first class does not begin until 12:30 PM and she can walk to school in five minutes. *Student Test.* [8]

[8] In contrast, during the 2011-12 school year at High School B – which was further from Student's home, and where the school day started at 8:45 AM− Student missed significantly more classes. This resulted in zeros on graded class work, in addition to missed instruction, which led to failing grades on her report card. *See Student Test.* (cross examination); *R-15.* Student testified that if she had attended all her classes that year, she could have earned A's or B's in all her courses. *Student Test.* (cross examination); *see also Parent Test.* (discussing attendance issues).

18. On or about March 29, 2013, shortly before the Complaint was filed, Petitioner requested in writing that Student be comprehensively re-evaluated for special education eligibility. DCPS had not responded to this request prior to hearing. At hearing, DCPS stated that it was willing to conduct an updated comprehensive psychological evaluation of Student.

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 Petitioner failed to meet her burden of proof on any of the specified issues.

Issue 1 - Failure to Evaluate (Procedural)

As part of either an initial evaluation or re-evaluation, DCPS must ensure that the child "is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. §300.304 (c) (4). DCPS must also ensure that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services

needs, whether or not commonly linked to the disability category in which the child has been classified." *Id.*, §300.304 (c) (6). *See also Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Thus, evaluations are to be conducted to determine both a child's disabilities and the content of the child's IEP. 34 C.F.R. § 300.304 (b) (1). Moreover, where an IEP team determines that additional data is not needed, parents have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g.*, 34 C.F.R. § 300.305 (d); *see also Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005).

In this case, Petitioner claims that the April 2011, psychological evaluation of Student was not sufficiently comprehensive, and that ADHD, emotional, auditory and verbal processing issues were not followed up on as needed. *See Prehearing Order; Issues, supra.* The Hearing Officer concludes that Petitioner failed to prove her claim by a preponderance of the evidence.

First, Petitioner complains that the BASC-II evaluation was performed, but that parent and teacher rating forms under the CAB were utilized instead of the BASC rating forms. (Only the student rating form was used under BASC.) *See Complaint*, ¶ 11.[9] However, the DCPS School Psychologist who conducted the evaluation testified (as an expert witness in both cognitive and social/emotional testing) that these assessment tools were used interchangeably to measure inattention and hyperactivity in the classroom. *See School Psych. Test.* Petitioner presented no evidence to the contrary.

[9] Petitioner also questions the comprehensiveness of the evaluation report because it does not reference the Woodcock-Johnson academic achievement testing (Complaint, ¶ 11). DCPS' School Psychologist testified that the W-J test results arrived after her report was written, but that the scores were reviewed and discussed at the May 9, 2011 meeting. *School Psych. Test.*

Second, Petitioner argues that Student received several clinically significant scores on the BASC (*e.g.*, in the areas of "Personal Adjustment," "Relations with Parents," and "Self-Reliance"), which warranted a follow-up evaluation such as a depression inventory. *See Complaint*, ¶ 12. However, the School Psychologist testified convincingly that no follow-up assessments were appropriate. She explained that the references in her report to "warrants follow-up" (*e.g.*, with regard to Student's low T score on Relations with Parents and Self-Reliance) referred to recommended strategies for addressing such issues with parent and Student, primarily through family therapy and other measures outside school. *School Psych. Test.; P-7-8; R-7-8.* She also testified that a separate depression inventory was not warranted based on the relevant CAB clinical subtest screens, which did not "raise a red flag" suggesting anything other than "typical teen-ager self-esteem issues." *School Psych. Test.; see P-7-9 -- P-7-11.* Again, Petitioner presented no evidence (let alone, expert psychological testimony) to the contrary.

Finally, Petitioner claims that follow-up evaluations were needed in several other areas, based on statements made in the School Psychologist's report. According to Petitioner, the psychological evaluation suggested that Student had difficulty with processing auditory information, as well as verbal reasoning scores that raised potential concerns. *See Complaint*, ¶ 13; *Pet's Closing Argument.* However, the School Psychologist testified that, in her expert opinion, these findings and observations did not warrant any follow-up testing at that time. For example, she felt that the verbal reasoning weakness was primarily a result of deficiencies in vocabulary knowledge that could improve with more reading and critical thinking

outside school. *See School Psych. Test.; P-7-6; R-7-6.* And the auditory processing difficulty supported a recommendation that Student might benefit from the use of visual instructional aides. *Id.; P-7-14.* Neither was seen as providing additional grounds for suspecting a disability. The Hearing Officer finds this testimony to be credible and essentially unrebutted.

Moreover, following the 5/9/2011 meeting and PWN, Petitioner apparently never requested that DCPS conduct any additional evaluations in these or any other areas. Petitioner also did not state her disagreement with DCPS' psychological evaluation and request an independent evaluation funded by DCPS, as she could have under 34 C.F.R. § 300.502.

Accordingly, Petitioner failed to prove by a preponderance of the evidence that DCPS' March 2011 psychological evaluation was not sufficiently comprehensive or that DCPS did not evaluate Student in all areas of suspected disability as required by the IDEA.

Issue 2 − Substantive Impact of Failure to Evaluate

As noted under Issue 1 above, Petitioner has not met her burden of proving that DCPS failed to evaluate Student in all areas of suspected disability as required by the IDEA. As a result, the Hearing Officer need not address Issue2.

In any event, assuming *arguendo* that DCPS did commit a procedural violation in connection with the April 2011 evaluation, the Hearing Officer concludes that such violation has not affected Student's or Petitioner's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006). Petitioner has failed to show that any such procedural inadequacy impeded Student's right to a FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to

her child, and/or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513 (a) (2) (i), (ii).

Student's May 2011 test scores clearly showed that Student was bright and capable of performing grade-level academic work. The results showed no academic achievement deficiencies, thereby negating any educational impact of her diagnosed ADHD condition in school. Indeed, she appears to be gifted in math. The main problem affecting her academic performance in school has been her class attendance. A school system generally does not deny FAPE where a student fails to avail herself of educational benefits by not attending school.[10] Moreover, the IEP Team found that her attendance problems were unrelated to her ADHD condition. Finally, Petitioner's claim that Student would have been found eligible as a result of any additional evaluations in the areas now suggested by Petitioner (*i.e.*, auditory processing, verbal reasoning, etc.) is wholly speculative.

Issue 3 − Child Find (Post-5/9/2011)

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

[10] *See, e.g., Garcia v. Board of Educ. of Albuquerque Public Schools,* 520 F.3d 1116 (10th Cir. 2008) (discussing effect of student's severe truancy); *Hinson v. Merritt Educ. Ctr.,* 579 F. Supp. 2d 89, 103 (D.D.C. 2008) (student "was not 'availing himself of educational benefit' due to extended absences").

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, Petitioner has not proved by a preponderance of the evidence that DCPS has failed to meet these child-find obligations subsequent to the May 9, 2011 non-eligibility determination. Petitioner never made another request to evaluate Student for special education eligibility until a week before filing the Complaint. Petitioner also never informed DCPS that she believed Student's ADHD condition had worsened since May 2011, or that it was having any more pronounced effect on Student's academic performance.[11] Nor has Petitioner presented any evidence to show that Student should have been suspected as having an Emotional Disturbance within the meaning of the IDEA. [12] To the contrary, the

[11] *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).

[12] For Student to be found to have a "serious emotional disturbance" as defined under the IDEA, her condition would need to exhibit one or more of the specific characteristics set forth in Section 300.8 (c) (4), over a long period of time and to a marked degree that adversely affected

Student appears to have shown progress when she attended school over the next two school years. Having just evaluated Student at the end of the 2010-11 school year, DCPS did not act unreasonably by failing to identify and evaluate Student again for a suspected disability, at least in the absence of any new parental request or referral.

Now that Petitioner has requested a new evaluation for special education, as of March 29, 2013, DCPS must move forward to complete the process in a timely manner. *See, e.g., 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."). But no child-find issue is ripe in this respect, since DCPS is only required to act within 120 days of the date a student is referred for evaluation or assessment under D.C. Code § 38-2561.02 (a). Here, the parent's referral was pending for only ***10 days*** when the Complaint was filed, and was still pending for less than ***75 days*** by the date of the due process hearing.

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his educational performance. *See* 34 C.F.R. § 300.8 (c) (4) (i) (A) – (E). In this case, Petitioner 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 DCPS should have suspected that Student had such a condition. The IDEA also 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"); *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) (LEA "was not required to jump to the conclusion that [Student's] misbehavior denoted a disability or disorder" where it was not atypical).

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

VI. 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 in her Due Process Complaint filed April 8, 2013 are hereby **DENIED;** and

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

Bruce Ryan, Impartial Hearing Officer

Dated: June 22, 2013

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).