

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Parent on behalf of Student)	Case No. 2019-0299
)	
Petitioner,)	Hearing Dates: February 13, 2020
)	Room 112
v.)	Date Issued: March 1, 2020
)	
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On December 17, 2019, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing timely to identify the student as a child with a disability and failed to evaluate Student. On December 26, 2019, DCPS filed a *Response to Parent’s Administrative Due Process Complaint* (“*Response*”) asserting that Student’s performance indicated that Student did not qualify for special education services and did not suggest the need for additional testing.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

The *Complaint* was filed on December 17, 2019 alleging that School A denied Student a FAPE (1) by failing to find the Student eligible on January 11, 2018 when the Independent Education Evaluation (“IEE”) found █████ eligible for special education services, and (2) by failing to provide Student a FAPE by declining to evaluate Student on November 25, 2019.

Respondent filed a response to the *Complaint* on December 26, 2019. It asserted (1) that Early Stages completed evaluations on September 8 and September 15, 2017 that led a Multidisciplinary Team (“MDT”) to determine on September 15, 2017 that Student did not qualify for services, (2) that it developed a Section 504 plan, and completed a functional behavior assessment and a behavior intervention plan due to Student’s ADHD, (3) that DCPS completed a written review of the IEE on January 3, 2018; the MDT reviewed the IEE on January 11, 2018 and concluded that Student did not qualify for special education services without objection by Petitioner, (4) that an MDT was convened on August 9, 2018 at Petitioner’s request and it agreed to collect data at the beginning of the upcoming school year, and it would reconvene to determine if changes were warranted or if Student needed new evaluations. On October 3, 2018, the MDT reconvened and concluded that Student was doing very well academically, that Student’s behavior had improved since the previous school year, and that no further assessments were necessary, and (5) that an MDT was convened on October 16, 2019 at Petitioner’s request concerning Student’s behavior; at Petitioner’s request, the MDT postponed the meeting pending a vision examination. The MDT reconvened on October 28, 2019 and concluded that existing data did not require additional assessments.

The parties participated in a resolution meeting on January 16, 2020 that did not result in a settlement. A prehearing conference was conducted on January 23, 2020, and the Prehearing Order was issued that day. On January 27, 2020, Respondent’s counsel requested by email that Petitioner be precluded from pursuing the first issue in the Prehearing Order, “Whether DCPS denied the student a FAPE by failing to find the student eligible on January 11, 2018 when the Independent Education Evaluation (“IEE”) found █████ eligible for special education services,” based on the terms of a settlement agreement executed on January 11, 2018. On January 31, 2020, Petitioner’s counsel agreed by email to withdraw this issue.

The due process hearing was conducted on February 13, 2020. The hearing was closed to the public. Petitioner moved into evidence Exhibits 1-52 (“P:”) There were no objections and Petitioner’s Exhibits 1-51 were admitted into evidence. Respondent moved into evidence Exhibits 1-27 and 29 (“R:”). There were no objections and Respondent’s Exhibits 1-27 and 29 were admitted (there was no Exhibit 28).² As a preliminary matter, DCPS objected to Petitioner being allowed to request an order for DCPS to conduct evaluations of Student, as no such specific relief was requested in the *Complaint*. I denied the objection, as such an

² The *Prehearing Order* required any objections to witnesses or proposed exhibits to be filed two days before the hearing.

order would be appropriate in the event Petitioner prevails on the issue of failing to evaluate Student on November 25, 2019.

Petitioner presented as witnesses in chronological order: Petitioner and Witness A. Respondent presented as witnesses in chronological order: Witness B, Witness C, and Witness D. Witness A and Witness B were accepted as expert witnesses without objection by opposing counsel. Counsel provided oral closing arguments at the conclusion of the testimony.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issue to be determined in this case is as follows:

Whether DCPS failed to provide Student a FAPE by declining to evaluate Student on November 25, 2019.

FINDINGS OF FACT

1. Student is an X-year-old, in grade A at School A.³
2. On October 16, 2017, Physician A, Student's treating psychiatrist, prepared a letter "To Whom it May Concern," indicating that Student had a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"), "based on symptoms including hyperactivity, restlessness, impulsivity, inattention, distractibility, forgetfulness, and impatience." Physician A recommended, *inter alia*, "The least restrictive classroom setting," a Functional Behavior Analysis, and an incentive-based Behavior Intervention Plan.⁴
3. On October 16, 2017, DCPS developed a Section 504 Plan for Student. For ADHD inattention, the plan established "small group/one on one support for academic redirection to task short/clear directions. Repetition of instructions. Seating near teacher." For ADHD hyperactivity, the plan required "behavior tracker w/stickers (reinforces-computer time, chips, time with preferred adult, drawing, music. Stress ball/ playdoe frequent movement breaks social skill and coping skill lessons with teacher, social worker, counselor, or school psychologist; check-in's in the morning and afternoon review of expectations for behavior before transitions." For ADHD impulsivity, the plan provided "Review of schedule, Countdown to transitions from activities; Safe place to calm down and regulate emotions; Review rules for bathroom, safe body, kind words; Review and model classroom rules frequently."⁵
4. On December 18, 2017, Facility C completed an independent Revised Comprehensive Psychological Evaluation of Student. At that time, Student was in Grade B at School A. Student's general education teacher, Teacher A, reported that "...[Student] is very talkative. [Student] always avoids class lessons, and [Student] avoids them by being

³ Petitioner's Exhibit ("P") 1.

⁴ P36:1.

⁵ P10:2.

physically aggressive. [Student] screams, hits, kicks objects, jumps on objects, and other students. [Student] does not join in with ■ peers, If [Student] is encouraged to play with others, [Student] will only play with one peer. [Student] curses [Student's] teachers, and often fights with them... [Student] has not participated in any academic lessons. When guided to learn new information, [Student] shuts down... The teacher reported that [Student] is in a general education classroom with 18 other children, and this environment does not allow [Student] to be calm. This also makes it difficult to teach the others, when [Student] is constantly acting out, in ways that call for attention. [Student] is very violent, physically and verbally.”⁶ The special education teacher assigned to the classroom, Teacher B, made similar observations about Student's classroom behavior: “Although [Student] has strengths academically (counting and letters), [Student] [Student] does not apply or use ■ skills, because ■ does not participate... [Teacher B] reported that [Student] is very active, [Student] also can describe why a behavior is correct or incorrect, and explain the consequences for ■ or others. [Student] can also identify the emotions others may feel due to the behavior. However, [Student] frequently runs away (in building and out of building). [Student] also screams. Despite being able to understand consequences and label feelings, [Student] will say “He/she does not care,” and will simply misbehave anyway. [Student] does not sit still at all. [Student] is incredibly mean to children and adults.”⁷

5. On the Woodcock-Johnson IV (WJ-IV) Tests of Cognitive Abilities, Student had an average IQ score of 108. ■ scores on six subtests varied between High Average to Average compared to same-aged peers.⁸ On the WJ-IV Tests of Achievement, Student had the following results: Reading was Average (97), Math was High Average (112), Math Calculation was High Average (113), Written Language was Average (101), Spelling was Average (109), and Writing Sample was Average (97).⁹

6. On the Behavior Assessment System for Children, Third Edition (“BASC-3”), Student scored in the Clinically Significant range to Externalizing Problems, Hyperactivity, and Aggression. Student scored in the At-Risk range for Internalizing Problems and Anxiety, and Clinically Significant in Depression.¹⁰ In Adaptive Skills, Student scored in the At-Risk range for Adaptability and Social Skills.¹¹ Four teachers completed the Attention Deficit Hyperactivity Disorder (“ADHD”) Test, and all of their scores indicated that Student was “Very Likely” to have ADHD.¹²

7. The examiner, Examiner A, diagnosed Student with Oppositional Defiant Disorder (“ODD”) and ADHD, and recommended that Student be classified under the special education category of Emotional Disturbance and Other Health Impairment. Examiner A recommended that Student receive special education services 100% outside of general education with an hour of weekly counseling.¹³

⁶ P5:4.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.* at 7.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 9.

¹² *Id.* at 12.

¹³ *Id.* at 13.

8. Witness B completed a Review of Independent Educational Evaluation on January 3, 2018.¹⁴ Examiner B noted Student's behavioral problems and their effect on Student's academic achievement:

Student has a history of academic avoidance and behavioral concerns which are impacting [Student's] ability to access the curriculum. [Student] appears to exhibit strong verbal skills and weaker visual spatial and executive functioning skills. Academically, [Student] has been observed to have stronger math skills and some weakness in reading. All cognitive and academic skills were in the average ranges, however, social emotional concerns have been a significant concern at school and mild concern at home. Due to the level of skills that [Student] has entered [Grade B] with, there does not appear to be an academic impact. [Student] is not below grade level, however, [Student] is not participating in academic tasks in the classroom. Support is currently provided through a 504 plan to address behavioral concerns as well as a Safety Plan, Behavior Plan, and Social, Emotional Support. [Student] has been diagnosed recently by Children's Hospital with ADHD and anxiety which appear to be impacting [Student] in the classroom as well as at home.

In class, due to weak executive functioning skills, [Student] may experience poor concentration and impulsivity. This may include difficulty with learning new concepts and relating information to previous knowledge. In class, [Student] struggles to attend to academic tasks for longer than 10 minutes. [Student] avoids academic tasks but can attend to non-preferred tasks for longer periods of time. In daily life, [Student] may have problems understanding or following long conversations, remembering directions to new places, and generalizing information to new tasks.¹⁵

9. Petitioner has not observed at home the anti-social behaviors that Student reportedly exhibits in the classroom.¹⁶

10. Witness B cited the criteria for eligibility for special education services with a classification of other health impairment and concluded that Student did not qualify:

Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that adversely affects a child's educational performance, due to chronic or acute health problems.

To be eligible, both criterion 1 and 2 must be met and the disability must have an adverse effect on educational performance.

¹⁴ P4.

¹⁵ *Id.* at 8.

¹⁶ Testimony of Petitioner.

Criterion #1 is due to chronic or acute health problems such as asthma, attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia.

Criterion #2 – The impairment adversely affects a child’s educational performance.

[Student] has shown growth in academic areas as evidence of ■ play plans and GOLD assessment since school began. [Student] has demonstrated strengths in the areas of math, letter recognition, and sounds. [Student] is not yet reading sight words or connecting sounds to words. [Student] struggles with ■ attention in all academic areas and small group and one on one instruction is provided to increase ■ focus and work output. Due to the progress in academic samples, it appears that [Student] does not meet the IDEIA criteria for classification as a student with an Other Health Impairment. [Student] will continue to require support through the 504 plan and social emotional support to access the curriculum.¹⁷

11. Witness B cited the criteria for eligibility for special education services with a classification of emotional disturbance and concluded that Student did not qualify:

The child must exhibit one of the following criteria over a long period of time and with a degree of severity: (1) An inability to make educational progress that cannot be explained by intellectual, sensory, or health factors; (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) Inappropriate types of behavior or feelings under normal circumstances; (4) A general pervasive mood of unhappiness or depression; or (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

[Student] is most off task during academic tasks including whole group tasks and independent work. [Student] is easily distracted and distracts other students... [Student] also has tantrums and reacts to normal situations in an inappropriate manner. [Student] is often verbally aggressive when redirected in class and curses, is noncompliant, or disruptive. It has also been noted that [Student] has been recently diagnosed with ADHD, anxiety, and Oppositional Defiance. Behavior reports, teacher observations, and parent interview information have indicated that [Student], though doing somewhat better, has continued to exhibit clinically significant symptoms of ADHD (anxiety, withdrawal, depression, hyperactivity). Observations and reports of defiance and oppositional conduct have also been made. Despite these behaviors, there is not a severe discrepancy in achievement, and though inconsistent, [Student’s] work samples have shown improvement and growth. Accordingly,

¹⁷ *Id.* at 9.

[Student] does not appear to meet the eligibility for special education and qualify as a student with an Emotional Disturbance.¹⁸

12. On October 16, 2018, DCPS developed a Section 504 Plan for grade C. The plan provided the following accommodations: (1) Student will have a tracker for staying in the classroom and keeping █ hands, feet, body to self and weekly check-ins with social worker; (2) Medication at school as needed on Mondays due to weekend not with mom; (3) Sticker chart and visual schedule; (4) Breaks with adults at specified times; and (5) Work in small group or none on one.¹⁹

13. On October 15, 2019, DCPS developed a Section 504 Plan for Grade A. The plan was identical to the plan for Grade C.²⁰

14. DCPS developed Behavior Intervention Plan on October 19, 2017,²¹ a Behavior Plan²² and Safety Plan²³ on December 11, 2017, and a Behavior Plan²⁴ and a Safety Plan²⁵ on September 25, 2019.

15. For the 2018-19 school year, Student earned grades of “Advanced” in Reading, Speaking and Listening, Math, and Health and Physical Education. Student was “Proficient” in Writing and Language, Social Studies, Science, Music, and Art. Student was “Basic” in World Languages. In 19 categories of positive behavior, attention, completing work, and social interaction, Witness D scored Student “Rarely” in all categories.²⁶

16. For the first term of the 2019-20 school year, Student earned grades of Proficient in all but two subjects, and Advanced in those two: Health and Physical Education and World Languages. In 12 categories of positive behavior, attention, completing work, and social interaction, Witness D scored Student “Rarely” or “With frequent prompting;” in no category was Student rated “Independently” or “With limited prompting.”²⁷

17. For the second term of the 2019-20 school year, Student earned grades of Proficient in all but World Languages, in which Student was Basic. In 10 of 12 categories of positive behavior, attention, completing work, and social interaction, Witness D scored Student “Rarely” or “With frequent prompting;” Student required “limited prompting” in the other two categories.²⁸

18. On October 23, 2019, Student hit a schoolmate with Student’s back pack.²⁹ On November 1, 2019, Student was running in and out of the classroom, prompting the school

¹⁸ *Id.* at 10.

¹⁹ P9:2.

²⁰ P8:2.

²¹ P18.

²² P17.

²³ P20.

²⁴ P16.

²⁵ P15.

²⁶ P25:1; R23.

²⁷ P24:1.

²⁸ R22.

²⁹ P38; Testimony of Petitioner.

to call Student's grandfather to come to the school to try to calm Student down.³⁰ On November 12, 2019, the school called Petitioner when Student would not do any work. After Petitioner talked to Student by telephone, there was no further disruption.³¹ On November 14, 2019, Student entered the bathroom reserved for the opposite sex.³²

19. On November 6, 2019, Attorney A, Petitioner's counsel, requested that DCPS evaluate Student to determine eligibility for special education services.³³

20. Witness B, the School Psychiatrist, participated in the Analysis of Existing Data ("AED") Team Meeting on November 25, 2019.³⁴ She did not believe Student should be found eligible for special education services because (1) Student was performing on grade level, (2) Student was showing growth and keeping up vis-à-vis Student's peers, (3) Witness B believed Student's behavior could be adequately addressed in the Section 504 plans (4) Student was making progress academically, and (5) Student was capable of making friends. Witness B was aware of Student's behavior during the 2019-20 school year: Student's behavior was "a little" better, there were fewer elopements, is afforded frequent breaks through the Section 504 plan, and is using visual schedules to assist with transitions.³⁵

21. Witness C, the School A Social Worker, has provided services to Student since December 2017. Witness C prepared Student's October 16, 2017 Section 504 Plan.³⁶ December participated in the AED Team Meeting on November 25, 2019.³⁷ Witness C believes that Student's Section 504 Plans are working; in 2017, Student was "very dysregulated" and had a hard time staying in the classroom. In 2017, Student stood on tables, urinated on the floor once, and was physically aggressive with Student's peers. Witness C does not believe Student now requires evaluation for special education services because Student's behavior has improved, the Section 504 Plan has not needed to be changed and is working, and Student has improved staying in the classroom. Witness called Petitioner approximately ten times during the 2018-19 school year concerning Student's behavior, and approximately five times during the 2019-20 school year.³⁸

22. Witness D is Student's teacher for the 2019-20 school year. Student is above grade expectations in Composite Reading, Letter Names, Phonemic Awareness, Decoding, Word Reading, Letter Sounds, Reading Accuracy, Reading Fluency, and Reading Comprehension. Student achieved the highest possible score in math. Witness D meets with Student daily to hold ■■■ accountable; goals are set throughout the day and a checklist is used. Witness D gives Student breaks as necessary. Witness D opined that interventions to keep Student accountable have been successful; Student always completes daily work assignments. Witness D conceded that she has to take extra time to work with Student to ensure that Student meets daily goals. From the beginning of the school year until the

³⁰ P39; Testimony of Petitioner.

³¹ P40; Testimony of Petitioner.

³² Testimony of Petitioner.

³³ P42.

³⁴ R15; R16.

³⁵ Testimony of Witness B.

³⁶ Testimony of Witness C.

³⁷ R15.

³⁸ Testimony of Witness C.

beginning of November, at least once a week, Witness D had Student removed from the classroom to calm ■■■ down. Thereafter, Student's behavior had been "amazingly" good until the events described in paragraphs 25 and 26 below; the frequency of misbehavior had dropped significantly.³⁹

23. In Mathematics, the AED Team found that Student "shows great strength with numbers and operations and measurement and data...⁴⁰ In Reading, "[Student] shows very strong reading and phonological skills... [Student] has a strong grasp of sight words. In addition, [Student] is able to use multiple sources of information to read accurately and fluently and answer comprehension questions related to a text."⁴¹ In Written Expression, "[Student] is a very strong writer..."⁴²

24. On November 26, 2019, DCPS issued a Prior Written Notice declining to evaluate Petitioner: "The team (including mom and dad) met to discuss data for reading, writing, math, speech, and behavior. The team determined that after reviewing the data we would not move forward with assessments. Academically, [Student] is performing on or above grade level in reading, writing, and math. [Student] is being supported by a 504 plan, behavior support plan, and safety plan to address behaviors. There were no new areas of concern that required additional testing. The team agreed to refer the student for outside wrap around services and to connect with ■■■ psychiatrist."⁴³

25. On January 31, 2020, Student handled scissors in ■■■ hands in a threatening manner.⁴⁴ ■■■ left the school premises for about five minutes and threatened to jump out of a window.⁴⁵ School officials believed that this behavior presented a safety issue and called to inform Petitioner. The school also called Facility B, a firm specializing in child crisis management. A Crisis Specialist for Facility B took Student to Facility A for an evaluation. Student was released to Petitioner later that day as she felt safe with Student.⁴⁶

26. On February 3, 2020, Student expressed suicidal ideation, and temporarily left the school premises. Student express suicidal ideation again, but did not have a specific plan as on January 31st.⁴⁷ School A called Facility B once again. Facility B recommended that Student did need a referral to Facility A.⁴⁸ Student's two recent "dark" threats of self-harm were out of character.⁴⁹ Petitioner opined that Student may have been depressed due to recent sexual assault by Student's older stepbrother.⁵⁰

³⁹ R8; Testimony of Witness D.

⁴⁰ R16:2.

⁴¹ R16:3.

⁴² R16:4.

⁴³ P6:1; R17:1.

⁴⁴ Testimony of Petitioner.

⁴⁵ Testimony of Witness C and Witness D.

⁴⁶ P32; Testimony of Petitioner.

⁴⁷ Testimony of Witness C.

⁴⁸ P33; Testimony of Petitioner and Witness C.

⁴⁹ Testimony of Witness D.

⁵⁰ P46.

27. Witness A, Petitioner's Educational Advocate, met with Student at Attorney A's law firm and conducted an informal assessment. Witness A concluded that Petitioner was functioning at or above grade level in math and reading.⁵¹

28. During the first term of the 2019-20 school year, Student completed 54% of ■ assignments.⁵² ■ remained in class 71% of the time.⁵³

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁵⁴

The sole issue involves the appropriateness of the educational program. Therefore, as to this issue, the burden of persuasion is on Respondent, provided that Petitioner meets the burden to present a *prima facie* case.⁵⁵

Whether DCPS failed to provide Student a FAPE by declining to evaluate ■ Student on November 25, 2019.

On November 6, 2019, Attorney A, Petitioner's counsel, requested that DCPS evaluate Student to determine eligibility for special education services. DCPS declined to evaluate Student after a team meeting on November 26, 2019.

The regulations require schools to evaluate students suspected of having a disability within sixty days upon a parent's request:

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

⁵¹ Testimony of Witness A.

⁵² P13; Testimony of Witness A.

⁵³ P14; Testimony of Witness A.

⁵⁴ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁵⁵ *Schaffer v. Weast*, 546 U.S. 49 (2005).

- (b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.
- (c) Procedures for initial evaluation. The initial evaluation—
 - (1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation; or
 - (ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and
 - (2) Must consist of procedures—
 - (i) To determine if the child is a child with a disability under § 300.8; and
 - (ii) To determine the educational needs of the child.⁵⁶

The courts treat violations of this provision as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it “(1) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.”⁵⁷ In *Mr. P v. West Hartford Board of Education*, the Second Circuit stated that “Child Find does not demand that schools conduct a formal evaluation of every struggling student.”⁵⁸ Although the school district subsequently evaluated the student, the court upheld the district’s decision to decline the parent’s first request for evaluations, because the student “had previously done well in school,” citing 34 C.F.R. §300.8(c)(4)(i): “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*.”⁵⁹ “To hold a school district liable for failing to identify a student who should be evaluated for purposes of receiving special education, a “claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.⁶⁰ Just as there must be an adverse effect on a child’s performance to support a classification of emotional disturbance, the same is true for the classification of “other health impairment,” which incorporates the symptoms of ADHD.⁶¹

Here, an independent examination on December 18, 2017 found Student to have average cognitive abilities and average to high average abilities in math and language skills. Based on social-emotional concerns, distractibility, and inattentiveness, Examiner A recommended full-time services outside of general education. Witness B reviewed that examination and concluded that Student’s emotional instability and inattentiveness did not warrant special education services because there was no adverse impact on Student’s academic achievement.

Instead, School A developed Section 504 Plans in October 2017 that was renewed in the 2018-19 and 2019-20 school years. When Petitioner’s counsel requested evaluations to determine Student’s eligibility on November 6, 2019, DCPS convened an AED Team

⁵⁶ 34 C.F.R. §300.301.

⁵⁷ 20 U.S.C. §1415(f)(3)(E)(ii).

⁵⁸ 885 F.3d 735, (2d. Cir. 2018) (citing *J.S. v. Scarsdale Union Free Sch. District.*, 826 F.Supp.2d 635, 663 (S.D.N.Y. 2011); *A.P. ex rel. Powers v. Woodstock Bd. of Education*, 572 F.Supp.2d 221, 226 (D. Conn. 2008).

⁵⁹ 885 F.3d at 751, emphasis added.

⁶⁰ 885 F.3d at 750, citing *Board of Education of Fayette City v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

⁶¹ 34 C.F.R. §300.8(c)(9)(ii).

Meeting on November 25, 2019, at which Student was found to be performing well academically.⁶² The AED Team discussed ■ behavioral issues,⁶³ but concluded that these factors were not limiting Student's ability to make progress with the benefit of Section 504 Plan interventions. At the hearing, Witness C, who drafted Student's first Section 504 Plan, testified that Student's behavior has significantly improved over the past two school years; the plans have not been changed because the staff believed Student was making steady progress. Witness D, Student's teacher during the current school year, confirmed that while she must devote more attention to Student, Student completes all assignments and is making academic progress.

Recently, in *K.B. on Behalf of S.B. v. Katonah Lewisboro Union Free School District*,⁶⁴ the petitioner alleged that the school district violated its "child find" obligations when it failed to evaluate the student despite obvious emotional problems. The court upheld the State Review Officer who concluded that "it was not clear before August 2015 that SB had an emotional 'disability that may have required special education services,'" because "her attendance was fine and her grades suggested that she 'made continuous steady improvement' despite those difficulties."

I conclude that DCPS has met its burden of persuasion that it is providing an appropriate educational program. The record does not support that DCPS has (1) impeded the child's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the parents' child; or (3) caused the deprivation of educational benefits. On the contrary, with the support of a Section 504 Plan, implemented by a general education teacher and a social worker who discussed their use of various aspects of the Plan to keep Student in class and engaged, Student's academic record indicates that Student is making steady academic progress. Despite Student's behavioral issues, there is no record of disciplinary proceedings against Student. Therefore, as school officials provided credible testimony and documentation that student has been able to make academic progress with the benefit of a Section 504 Plan, I conclude that Student was not denied a FAPE when DCPS declined the request for an evaluation on November 26, 2019.

RELIEF

For relief, Petitioner requests, *inter alia*, (1) that DCPS be ordered to evaluate Petitioner, (2) that the student be found eligible for special education with a classification of other health impaired, (3) that DCPS be ordered to develop an Individualized Education Program ("IEP"), and (4) that DCPS fund compensatory education services.

⁶² R16.

⁶³ *Id.* at 7-8.

⁶⁴ 2019 WL5553292, 75 IDELR 122 (S.D.N.Y. 2019).

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the parties' disclosures, and the testimony presented during the hearing, it is hereby

ORDERED, that the *Complaint* is **DISMISSED** with prejudice.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: March 1, 2020

Copies to: Attorney A, Esquire
Attorney B, Esquire
OSSE Office of Dispute Resolution
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