

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 7/23/21; 7/29/21
v.)	Hearing Officer: Michael Lazan
)	Case No. 2021-0077
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is not currently eligible for services (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on June 7, 2021. The Complaint was filed by the Student’s parent (“Petitioner”). On June 21, 2021, Respondent filed a response. The resolution period expired on July 7, 2021. The Hearing Officer Determination (“HOD”) was due on August 21, 2021.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 *et seq.*, its implementing regulations, 34 C.F.R.

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

Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference was held on July 6, 2021. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on July 9, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing order was revised on July 16, 2021 as a result of emails by the parties. Respondent filed a motion to dismiss the second issue in the Complaint on July 14, 2021. Petitioner filed opposition on July 16, 2021. The motion to dismiss was denied by an order dated July 22, 2021.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was an open proceeding. The matter proceeded to trial on July 23, 2021, and July 29, 2021. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-25. Respondent objected to exhibits P-10, P-16, P-20, P-21, and P-23. These objections were overruled. Exhibits P-1 through P-25 were admitted. Respondent moved into evidence exhibits R-1, R-2, R-7, R-8, R-9, and R-10 without objection. Petitioner presented as witnesses, in the following order: Witness A, an educational advocate (expert in special education as it relates to IEP development and placement); Witness B, a psychologist (expert in clinical psychology and school psychology); and herself. Respondent presented Witness D, a special education coordinator (expert in special education planning, programming, and placement); and Witness E, a psychologist (expert in school psychology). Oral closing

arguments, including a rebuttal by Petitioner, were presented after the end of testimony on July 29, 2021.

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did Respondent fail to determine the Student to be eligible for special education services because the Student should have been determined to be eligible as a student with emotional disturbance? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the Student’s mood disorder, attendance issues, and related long-standing behavioral and academic issues should have resulted in a finding that the Student was eligible for services as a student with emotional disturbance.

2. Did Respondent fail to provide the Student with an appropriate location of services after failing to determine that the Student was eligible for services? If so, did Respondent deny the Student a FAPE?

As relief, Petitioner seeks a determination of eligibility, compensatory education, and a new location of services for the Student.

V. Findings of Fact

1. The Student is an X-year-old who is ineligible for services. The Student has experienced behavior problems outside of school, especially with respect to his/her mother, including alleged involvement in criminal activity. The Student has been diagnosed with Unspecified Bipolar and Related Disorder, Unspecified Cannabis-Related Disorder, and Parent-Child Relational problem. Testimony of Witness B; P-17. The Student has had difficulty attending school. Testimony of Witness A; Testimony of

Witness B. The Student spends much of his/her day smoking marijuana and playing video games. P-19-121-122.

2. The Student functions below grade level in reading but is considered a capable student by his/her teachers at School B. The Student has been characterized as being ahead of some of his/her peers at School B but has lost interest in going to school. Testimony of Witness A; P-17-104, 112; P-19-121.

3. The Student initially resided with his/her mother. The Student then moved to Texas to be with his/her father. The Student completed the 2018-2019 school year in Texas, and started the 2019-2020 school year while in Texas, but had behavioral problems at home. The Student then moved to live with his/her mother, who ended up moving to Washington, D.C. P-19-121; Testimony of Mother.

4. The Student attended School A, a DCPS school, during the 2019-2020 school year, during which time s/he was threatened by a group of children from the school through an online site. The Student then began to resist going to the school building. Though the Student began to attend more once the COVID-19 pandemic (and virtual instruction) commenced, the Student received failing grades during his/her year at School A. P-4-47-49; P-19-121; P-5; Testimony of Witness A.

5. The Student was assigned to School B, a DCPS school, for the 2020-2021 school year. Petitioner told the school staff about the Student's issues with behavior, including the Student's issues in Texas. Petitioner felt that some of the children who threatened the Student at School A were friendly with students at School B. Testimony of Mother; Testimony of Witness A. On September 15, 2020, the Student took the

Scholastic Reading Inventory test (“SRI”) and scored 413, at the “below basic” level. P-11-77.

6. By October 30, 2020, the Student had logged on to virtual instruction at School B at least once per day the majority of the time. The Student was considered to be absent on two of thirty-nine days of school that had been scheduled. The Student’s geometry teacher reported that s/he was capable in class but needed to put forth more effort to complete distance learning and to attend office hours. The Student earned a “B” grade in geometry for the first term of the 2020-2021 school year. The Student’s Advanced English 2 teacher and AP Psychology teacher indicated that s/he had “very good” participation and engagement in the virtual setting. The Student earned a “B-” in Advanced English 2 and a “C+” in AP Psychology for the first term of the 2020-2021 school year. However, the Student was not consistent in these classes and missed learning tasks. P-7-58-59.

7. An Analysis of Existing Data (“AED”) meeting was held for the Student by DCPS on November 20, 2020. The purpose of the meeting was to review the Student’s data, and to determine if any other data was needed. Petitioner attended the meeting and spoke about the Student’s difficulties during online learning. The school social worker indicated that the Student did not have behavioral concerns during online learning. Teachers at the meeting felt that the Student could do all of the work in school, but needed to stay in class, participate, and turn in assignments. P-8. Petitioner also sought an evaluation for the Student, but DCPS would not evaluate the Student and indicated that the Student should be provided with additional support through the school’s Multi-Tier System of Supports (“MTSS”) team. P-8-65; Testimony of Witness

C; Testimony of Witness D. On November 24, 2020, DCPS sent Petitioner a Prior Written Notice indicating that the Student was ineligible for services and referred to the Student to the MTSS team. P-9.

8. The Student took the SRI test again on January 8, 2021 and scored 576, at the below basic level. P-19-127. After Petitioner filed a due process complaint to challenge Respondent's refusal to evaluate, DCPS agreed to evaluate the Student. P-10.

9. By February 21, 2021, the Student had been absent for six days overall. For the second term of 2020-2021 school year, the Student earned a "B-" in mathematics. The Student scored well on assignments when s/he completed them but struggled with completing assignments and with attendance for the full period. In Advanced English II, the Student received a "B" for the term and was somewhat successful with group and 1:1 work but did not complete all assignments or participate in class. In AP Psychology, the Student received an "F" for the term. In writing, it was reported that the Student was using relatively short sentences, had below average spelling skills, and struggled with organizing and combining sentences. P-11.

10. The Student was assessed by Witness B, an independent psychologist, in April, 2021. A corresponding report was issued on April 27, 2021. Witness B administered the Woodcock-Johnson IV, Tests of Cognitive Abilities ("WJ-IV Cognitive"), Woodcock-Johnson IV, Tests of Achievement, Form B ("WJ-IV Achievement"), Behavior Assessment System for Children, Third Edition ("BASC-3"), and conducted interviews with Petitioner and the Student. On the WJ-IV Cognitive, the Student earned a 101 IQ, in the average range. All of his/her subtests on the WJ-IV Cognitive were also in the average range. On the WJ-IV Achievement, the Student's

reading was scored at the low average range. Math was a relative strength for the Student, at the 8th grade level, while the Student's writing scores were also at the 8th grade level. Testimony of Witness B; P-17.

11. On the BASC-3, parent scale, the Student was considered to be "clinically significant" for hyperactivity, aggression, conduct problems, and attention problems. The Student was considered to be "at risk" for depression, atypicality, and activities of daily living. Petitioner indicated that the Student manifested a high number of aggressive behaviors, was argumentative, threatened her, broke rules, stole, and had difficulty with simple tasks. On the BASC-3 teacher scale, the Student's art teacher indicated that s/he was "clinically significant" for adaptive skills, social skills, study skills, and leadership. The Student was considered to be "at risk" for attention problems and functional communication. The teacher also indicated that the Student had issues with, among other things, attention, changing situations, making decisions, communicating, turning his/her camera on, and organization. The teacher reported that the Student did not have unusual difficulty comprehending and completing schoolwork and appeared to be capable of developing and maintaining friendships with others. The Student was responsive when working with the teacher after class. P-17.

12. In her report summarizing the assessments and interviews, Witness B concluded that the Student showed extreme anger under normal circumstances and had difficulty with attention and focus while in the classroom. She also concluded that the Student required specialized instruction in the classroom for at least fifteen hours per week, with counseling for one hour per week. P-17-114-115; Testimony of Witness B.

13. Evaluator A reviewed the assessment by Witness B and wrote her own report. Evaluator A also conducted additional testing, interviews, and an observation. On May 17, 2021, Evaluator A issued a report indicating that the Student was not always attending classes regularly despite logging in each day, but otherwise presented with appropriate behavior in the virtual setting. P-19-126-128.

14. The Student's extended mathematics teacher reported to Evaluator A that the Student attended class "maybe" twice per week, but often did not stay for the whole period. She also reported that the Student is a "self-sufficient problem solver" who "picks up the concepts and materials being taught quickly" but "becomes frustrated quickly and shuts down on tasks that are not of interest or (that s/he) sees no purpose in completing." She reported that the Student nevertheless earned a "B" during term three. The Student's chemistry teacher reported that the Student has only been present three times in her class but passed term three, earning a "D" grade. P-19-128-130.

15. On the BASC-3 measure administered by Evaluator A, the Student's mathematics teacher indicated that the Student was "clinically significant" for adaptive skills (study skills, social skills) and "at-risk" for school problems (attention, learning), behavioral symptoms index (withdrawal), leadership, and functional communication. Also on the BASC-3 measure administered by Evaluator A, the Student's Advanced English II teacher indicated that the Student was "clinically significant" in social skills and at-risk in adaptive skills, leadership, and study skills. P-19-131-136. Also on the BASC-3 measure administered by Evaluator A, Petitioner indicated to Evaluator A that the Student "will not do anything [s/he] doesn't want to do" and "if we put things in place

for [him/her], [s/he] is not going to do it, and no one is going to make [him/her] do anything.”

16. In her report, Evaluator A discussed a Functional Behavior Assessment (“FBA”) of the Student, which had been completed on December 9, 2020. The FBA stated that the Student was presenting with appropriate behavior in the virtual setting. She also discussed her observation of the Student on May 4, 2021 in his/her geometry class. During the observation, the Student was one of two students in the session. The Student did not log on in time. When the Student did log on, the Student was observed to be walking around outside. The teacher instructed the Student to complete questions, which s/he answered correctly. The Student needed to go indoors to answer one of the questions, asked the teacher and a classmate for assistance when problems appeared to be challenging, and was able to quickly grasp the concepts after being retaught. P-19-130; P-5-24.

17. On May 21, 2021, DCPS conducted another AED meeting for the Student. The team reviewed the psychological assessment by Witness B and the report of Evaluator A, discussed the Student’s grades, and found that the Student was ineligible for services. The team felt that the Student did not have an inability to make educational progress that cannot be explained by intellectual, sensory, or health factors because s/he demonstrated average cognitive abilities and average to “slightly” low average reading, writing and math skills. The team determined that the Student did not have an inability to build or maintain satisfactory interpersonal relationships with peers and teachers because s/he was able to build and maintain relationships with peers in his/her community and school as reported by Petitioner. The team felt that s/he did not exhibit inappropriate

types of behavior or feelings under normal circumstances based on the results of the BASC-3, asserting that the Student did not have unusual thoughts and perceptions any more than others his/her age based on teacher ratings. The team felt that the Student did not have a general pervasive mood disorder, or unhappiness, or depression, based on the data from the Student's self-ratings and the ratings from three of his/her academic teachers. The team also felt that the Student did not tend to develop physical symptoms or fears associated with personal or school problems based on the Student's self-report. The team felt that the Student had average intelligence and performed on an average level, that his/her explosive behaviors were at home only, and that the Student's bipolar disorder and cannabis-related disorder were "beyond the school scope." At the meeting, there was no discussion of the Student's attendance issues except to state his/her days of attendance. Testimony of Witness C; R-4-14. It was also reported that the Student had been absent for thirteen full days during the year. R-3-7. The team determined that the Student was ineligible for services. The team was concerned about overidentifying students as students with disabilities. Testimony of Witness C; Testimony of Witness D.

18. A Prior Written Notice was issued on June 1, 2021, determining that the Student was not eligible for services under the IDEA. R-8. The Student's final grades for the 2020-2021 school year were: Geometry, "B-"; AP Psychology, "P"; Advanced English "B-"; Principles of IT, "B"; Extended Geometry, "B"; World History and Geography II, Modern World, "P"; Chemistry, P; Art "P"; From Bach to Rap, "P"; and general music, "F." The Student's report card indicated that the Student missed eleven days during the 2020-2021 school year. R-9-56-59.

VI. Conclusions of Law

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.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, relating to the Student’s eligibility, the burden of persuasion is on Petitioner. Should Petitioner prevail on Issue #1, the burden of persuasion for Issue #2 is on Respondent since Petitioner is effectively challenging the Student’s placement.

1. Did Respondent fail to determine the Student to be eligible for special education services because the Student should have been determined to be eligible as a student with emotional disturbance? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student’s mood disorder, attendance issues, and related long-standing behavioral and academic issues should have resulted in a finding that the Student was eligible for services as a student with emotional disturbance.

School districts are required to identify and evaluate children who may be disabled through what is referred to as the “Child Find” provision. N.G. v. District of Columbia, 556 F. Supp. 2d 11, 16 (D.D.C. 2008) (citing 20 U.S.C. Sect. 1412(a)(3)(A)). The Child Find obligations of a Local Education Agency (“LEA”) are triggered either by awareness of the child's circumstances or by parental request. Long v. District of

Columbia, 780 F. Supp. 2d 49, 57 (D.D.C. 2011). The failure of a school district to identify a child does not necessarily result in a denial of a FAPE. G.G. ex rel. Gersten v. District of Columbia, 924 F. Supp. 2d 273, 279 (D.D.C. 2013).

A child's eligibility for a FAPE under the IDEA is determined by the results of testing and evaluating the student, and the findings of a team of qualified professionals and the parent of the child. Achievement Preparatory Acad. Pub. Charter Sch. v. Williams, No. 19-cv-2596, 2020 WL 5038763, at *5 (D.D.C. Aug. 25, 2020). To comprehensively evaluate a child for special education needs, a school district must: (1) “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information,” (2) “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability,” and (3) “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” 20 U.S.C. Sect. 1414(b)(2)(A)–(C).

After the evaluation, pursuant to the IDEA, students can be deemed eligible for services as students with “Emotional Disturbance.” “Emotional Disturbance” is defined as “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.” 34 CFR Sect. 300.8(c)(4)(i); 5-E DCMR Sect. 3001.1.

Petitioner contended that the Student meets the criteria within the definition of emotional disturbance in the applicable law and regulations. Petitioner’s witness, Witness B, testified that the Student has potential, but not the wherewithal to show his/her potential because of his/her Unspecified Bipolar and Related Disorder and Cannabis-Related Disorder. She testified that the Student therefore needs accommodations in the classroom in order to be able to be successful at school. Witness B pointed to the fact that the Student’s art teacher at School B had to employ several accommodations in order to get the Student to perform in the classroom. Though she testified that, at School B, the Student could be seen as a “star,” s/he was not a star compared to the rest of the population in the United States of America. She pointed out that the Student received “below basic” scores on standardized tests and will require an Individualized Education Program (“IEP”) for at least fifteen hours per week of specialized instruction to function appropriately at school. She added that the Student feels unsafe at School B, and that there is a very high probability that, when school reconvenes for “in-person learning,” the Student will not attend classes at School B.

Respondent disagreed, contending that the Student does not fall within one of the five subsections mentioned in the statute. Respondent argued that Unspecified Bipolar and Related Disorder does not necessarily equate with emotional disturbance, pointing out that the federal definition of “emotional disturbance” does not say that students have to have mental health challenges or diagnoses in order to be classified as eligible for services. Respondent contended that the Student did not need an IEP, that the Student’s

educational placement helps him/her in term of modeling, and that the Student was without behavioral issues and reasonably successful during virtual instruction in the 2020-2021 school year at School B.

A. An Inability to Learn That Cannot Be Explained By Intellectual, Sensory, or Health Factors.

Witness B argued that the Student has not made adequate progress, pointing to low standardized testing scores. She contended that his/her Unspecified Bipolar and Related Disorder impacts his/her ability to make meaningful, pro-active decisions, and that the Student is constantly in a state of “catch up” with his/her schoolwork. She said that the Student tends to miss classes, and then does just enough to pass the classes. She testified that the Student’s cannot effectively attend school online and asserted that any success the Student might have had during the 2020-2021 school year was due to the fact that the teachers merely required that students try in class.

However, Petitioner’s witnesses did not testify in sync on this issue. Witness A went so far as to say that he felt that the Student was doing well in classes at School B during the 2020-2021 school year. In fact, the Student received final grades in the “B” range, or “P” grades, in all of his/her courses during the school year save one. Witness A, an expert in special education as it relates to IEP development and placement, said that the Student’s main issue was that s/he was not attending school. He did not mention any accommodations that the Student required in order to succeed in class, nor did Petitioner herself.

Witness B also testified that the Student only received good grades because s/he tried in class. While I agree that some of the Student’s grades were questionable, especially the Student’s grades in Chemistry, the record does not establish that all of the

Student's grades were merely a function of effort. The Student's Advanced English 2 teacher and AP Psychology teacher indicated that s/he had "very good" participation and engagement in the virtual setting. No person with direct knowledge of the classrooms at School B was called as a witness to substantiate Witness B's contention. Moreover, while Witness B was right to point out that the Student's SRI test scores were low, she failed to underscore that the Student's SRI scores in reading improved during the 2020-2021 school year, from 413 to 576. In fact, Witness B suggested that the Student was functioning at a higher level than many of the other students in general education classes at School B. Neither witness made clear why fifteen hours of specialized instruction per week was necessary for the Student. Neither witness provided meaningful detail on why a special education teacher was necessary in order to make the Student attend class.

Nor did Petitioner herself contend the Student's grades were inaccurate, or that the Student's SRI scores in reading were a function of the Student's emotional disturbance. Petitioner also did not indicate that the Student had an inability to learn, to a marked degree, for an extended period of time. Moreover, while the Student failed classes during the 2019-2020 school year at School A, the record makes it clear that this is because s/he was apparently threatened by other students at the school and would not attend. There is nothing in the record to suggest that the Student was otherwise unable to access the education at School A, or at any other school earlier in the Student's academic career, including in Texas. In fact, there is virtually nothing in the record to describe the Student's academic performance at School A or at schools in Texas.

Petitioner argued that the Student will not attend School B for the 2021-2022 school year for safety reasons, pointing out that the students at School B knew the

students who were threatening the Student at School A. However, Petitioner's contentions are speculative. Petitioner did not explain who the problematic students were at School B or School A, provide any details about the relationships between these students, or mention any specific threats that had been made to the Student at School B or even School A. Under the circumstances, I must find that Petitioner did not meet her burden of showing that the Student had an inability to learn that cannot be explained by intellectual, sensory, or health factors, or that such inability to learn adversely affected the Student to a marked degree for a long period of time.

B. An Inability to Build or Maintain Satisfactory Interpersonal Relationships with Peers and Teachers.

Petitioner's argument is that the Student had an unsatisfactory relationship with her, and that since she was helping him/her with virtual school during the 2020-2021 school year, this Hearing Officer should effectively view her as a teacher for the purposes of the statute and find that the Student should be eligible for services as student with emotional disturbance. However, the Student was not home-schooled during the 2020-2021 school year. The Student was taught online by teachers from DCPS. There is nothing in the record to suggest that the Student did not get along with his/her teachers at School B. In fact, the record indicated that the Student was able to work after class with his/her art teacher, who told Witness B that the Student "does not avoid social situations and appears to be capable of developing and maintaining friendships with others."

Accordingly, Witness B did not indicate that the Student had an inability to build or maintain satisfactory interpersonal relationships in her report, though she did testify that this subsection applied here in light of the report by Evaluator A. However, Evaluator A's report indicated that the Student was able to manage well with teachers. Petitioner

herself told Witness B that the Student has sufficient social skills and generally does not experience debilitating social difficulties and was capable of making friendships. P-17-111.

Petitioner also argued that the Student's history at School A and in Texas suggests that the Student had an inability to build or maintain satisfactory interpersonal relationships. However, virtually no specific information was provided about the nature of the Student's interactions with peers at School A or in Texas, though Petitioner bears the burden of persuasion. I must find that Petitioner did not meet her burden of showing that the Student had an inability to build or maintain satisfactory interpersonal relationships with peers and teachers that adversely affected the Student to a marked degree for a long period of time.

C. Inappropriate Types of Behavior or Feelings Under Normal Circumstances.

Petitioner, through Witness B, argued that it is not "normal" behavior for the Student to turn off his/her camera during a lesson, or to constantly be in a state of catch-up in school, or to frequently use marijuana, or to have attendance issues. Petitioner contended that these actions are a function of the Student's Unspecified Bipolar and Related Disorder and Unspecified Cannabis-Related Disorder, and that the Student should therefore be deemed eligible for services as a student with emotional disturbance.

There is nothing in the record to clearly state that the Student was using marijuana at school, and there is no authority to suggest that off-campus marijuana use can establish that a Student is *a fortiori* eligible for special education services under the IDEA. Generally, students who use drugs or alcohol are not classified as children with disabilities under the IDEA unless they meet the specific criteria in for eligibility in the

statute. See e.g., Springer v. Fairfax County Sch. Bd., 134 F.3d 659 (4th Cir. 1998); Letter to Matsui, 49 IDELR 16 (OSEP 2007). Petitioner cites to Oakland Unified Sch. Dist., 114 LRP 49754 (SEA CA November 3, 2014) in this connection. However, in Oakland, the Student's eligibility for services was not at issue.

Nor was Witness B convincing in her attempts to connect the Student's issues with appearing on camera, or needing to "catch up," with the Student's Unspecified Bipolar and Related Disorder. There is nothing in the record to corroborate these claims save Witness B's own report, and Petitioner presented no on-point caselaw to support her position. Moreover, there is nothing in the record to establish that it is especially unusual for students to turn off their cameras during virtual instruction, or to be in a state of catch-up in school, especially during a school year that is shaped by a pandemic.

The main issue with respect to this subsection is the Student's difficulties with attendance. However, courts have held that the primary inquiry when determining eligibility under this subsection is academic in nature. In E.L. Haynes P.C.S. v. Frost, 115 LRP 58575 (D.D.C. September 12, 2015), this Hearing Officer determined a student to be eligible for services as a result of the Student's social and emotional issues, including issues relating to attendance. The court reversed, holding that the Student was able to do her schoolwork and that "academic progress should be the primary focus in this Court's evaluation of whether A.T.'s disability had an adverse impact" on her educational performance. Id. at 11. Moreover, while some courts do consider attendance as a factor in determining eligibility for services under the classification of emotional disturbance, those courts rely on clear, credible evidence to link the Student's disability to the issue. For instance, in N.G., a student was found eligible for services because, at

least in part, the Student's severe depression and suicidal intent caused her to be hospitalized and have issues with attendance. The court went out of its way to point out that DCPS was presented with significant evidence that N.G.'s declining grades and poor attendance were caused by her disabilities, including letters from physicians explaining the circumstances which led to N.G.'s hospitalization, and how that hospitalization had affected her academic performance all year.

There is no such record here. To the contrary, the record suggests that the Student missed time at School A during the 2019-2020 school year because s/he was threatened by other students. There is nothing in the record to establish that the Student was not in fact threatened by other students, or that the Student was somehow imagining that the other students were threatening him/her. Additionally, there is nothing in the record to suggest that the Student had attendance issues prior to the 2019-2020 school year, and during the 2020-2021 school year, the Student's attendance improved. The Student's final report card indicated that the Student was absent for eleven days during the school year. While the parent said that the Student only went to class because s/he was forced to by a court, the parent also testified that the court order was issued in approximately April-May, 2021, toward the end of the school year. Finally, while the record contains references to the effect that the Student would skip classes while s/he was logged in during the school year, the best explanation for this is that the Student has simply lost interest in school. Indeed, the parent did not testify or state that the Student's bipolar disorder is what kept him/her from attending regularly. Instead, the parent told Evaluator A that the Student "cares nothing about school."

Relevant authority in support of the LEA includes Nguyen v. District of Columbia, 681 F. Supp. 2d 49, 51–52 (D.D.C. 2010), where a student had a difficult time waking up in the mornings and slept excessively. This, to one of the parent witnesses, was a classic symptom of depression. Affirming a hearing officer, the court found that the Student nevertheless did not suffer from an emotional disturbance within the meaning of IDEA because the record was inconclusive that the Student’s emotional problems adversely affected his educational performance and instead found that “[t]he factor most affecting [his] educational performance is his non-attendance.”

It is noted that the Student has engaged in inappropriate types of behavior or feelings under normal circumstances. There is no dispute that the Student has engaged in inappropriate behavior in the home. The police have apparently been called to the Student’s residence no less than thirty or forty times, at least in part because of threats and violence by the Student against his/her mother. The record, through the testimony of Petitioner and the reports of Witness B and Evaluator A, suggests that these incidents occur during “normal” days of the week. See e.g., Angela Day, et al., v. Kipp DC Public Charter Schools, No. 19-CV-1223-RBW-ZMF, 2021 WL 3507602, at *6 (D.D.C. Jan. 20, 2021) (threatening to kill); A.A. v. District of Columbia, No. CV 16-248 (RBW), 2017 WL 11589194, at *7 (D.D.C. Apr. 20, 2017) (jumping out of a bedroom window). However, the fact that a student has a turbulent relationship with his/her parents or engages in problem behaviors at home will not in itself qualify the student as a child with an emotional disturbance. See, e.g., Letter to Anonymous, 213 IDELR 247 (OSEP 1989). The question, for the purposes of the determining whether a student is emotionally disturbed under the IDEA statute, is whether the Student’s inappropriate behavior is a

function of the Student's disability, and if the behavior has adversely affected the Student in school for an extended period of time to a marked degree in the school setting. On this record, I must find that Petitioner did not establish that such actions were a function of the Student's Unspecified Bipolar and Related Disorder or Cannabis-Related Disorder. Accordingly, I find that the Student should not be deemed to be eligible for services under this provision.

D. A General Pervasive Mood of Unhappiness or Depression.

None of Petitioner's witnesses testified that the Student should be eligible for services as a result of this subsection, and there is no evidence in the record to suggest that the Student suffered from a general pervasive mood of unhappiness or depression. As a result, I must rule that this subsection does not apply.

E. A Tendency to Develop Physical Symptoms or Fears Associated with Personal or School Problems.

In her report, Witness B wrote that this subsection did not apply to this fact pattern but changed her mind during testimony because the Student had been threatened by other students and was afraid to go to school. Witness A testified similarly. However, as mentioned previously, there is nothing in the record to suggest that the Student's fears were a function of emotional disturbance or that s/he was not really being threatened by students at School A. Accordingly, pertinent authority suggests that this fact pattern does not fall within this subsection. In Lakeside Joint Sch. Dist., 110 LRP 24088 (SEA CA April 13, 2010), a twelve-year-old with post-traumatic stress disorder stemming from childhood abuse was assaulted at school on two different occasions. Following the second incident, the father of the attackers contacted the victim's father and threatened to

kill the child. The principal warned the parents that the assailants' family was dangerous and suggested that they obtain a restraining order. The parents claimed that the student was afraid to go to school as a result of the incidents and withdrew him/her from the school, and his grades declined. After the school district found him ineligible, the parents filed a due process complaint, arguing that the school district reached the wrong conclusion. The hearing officer agreed with the school district, finding that the student's fear was not abnormal under the circumstances and did not directly impact his/her performance. The hearing officer observed that students eligible based on this provision have abnormal emotional conditions that prevent them from choosing normal responses in normal situations. See also Independent School Dist. No. 284 v. A.C., 258 F.3d 769, 775-776 (8th Cir. 2001) (“Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations.”); Torrance Unified School Dist. v. E.M., 51 IDELR 11, 108 LRP 49372 (C.D. Cal., Aug. 21, 2008, No. CV 07-2164 CAS) (the inquiry is “whether (the student's) reactions to everyday occurrences, such as teasing or frustration, were appropriate when considered in relation to how [his/her] peers would react.”).

Petitioner did not provide any authority in support of this proposition except for Hill v. School Bd. for Pinellas County, 954 F. Supp. 251 (M.D. Fla. 1997), *aff'd*, 137 F.3d 1355 (11th Cir. 1998), which did not involve eligibility and instead pertained to

stay-put rights. I therefore cannot agree with Petitioner that the Student is eligible for services as a result of this subsection.²

2. Did Respondent fail to provide the Student with an appropriate location of services after failing to determine that the Student was eligible for services? If so, did Respondent deny the Student a FAPE?

This contention is premised on a finding that this Hearing Officer find the Student to be eligible for services in Issue #1. Since no such finding was made in this HOD, this contention must be summarily dismissed because this Hearing Officer has no jurisdiction over such claims.

VII. Order

As a result of the foregoing, the Complaint is dismissed with prejudice.

Dated: August 21, 2021

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE
[REDACTED]/DCPS
[REDACTED]/DCPS

² Alternatively, DCPS argued that the Student should not be determined to be eligible for services because of social maladjustment, appearing to contend that social maladjustment is an exception to the provisions in 34 C.F.R. 300.8(c)(1)(4)(i) relating to emotional disturbance. However, the statute states that “(t)he 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.” Hansen v. Republic R-III School District, 632 F.3d 1024 (8th Cir. 2011) (a student with bipolar disorder who had multiple disciplinary referrals over a four-year span for threatening students and teachers, fighting, and disrespecting teachers and peers and who did poorly in class and on standardized tests was not merely social maladjusted and was eligible based on an inability to build or maintain satisfactory interpersonal relationships).

VIII. Notice of Appeal Rights

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 days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: August 21, 2021

Michael Lazan
Impartial Hearing Officer