



## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on December 2, 2013, and concluded on December 4, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is \_\_\_\_\_ at a DCPS school (“School A”). She has attended School A since school year (“SY”) 2012-2013. Prior to attending School A the student attended a District of Columbia public charter school where during SY 2009-2010 she was evaluated and determined ineligible under IDEA. Although found ineligible, the student was provided a 504 plan for social/emotional issues while at the charter school.

The student’s academic performance at School A has been varied. During SY 2012-2013 she earned high grades in a number of classes but failed or nearly failed others. As result she attended summer school during Summer 2013 and barely passed two make-up classes. During the first advisory of SY 2013-2014 the student was performing poorly, excessively absent and exhibiting poor behavior in all of her classes.

In April 2013 the student became the subject of a D.C. Superior Court neglect case and the Court appointed the student a Guardian Ad Litem (“GAL”) and an educational attorney. The Court also ordered a psycho-educational evaluation conducted by a D.C. Department of Mental Health psychologist on June 24, 2013. The evaluation found the student has average intellectual functioning but academic deficits in math. The evaluator diagnosed the student with Mood Disorder, and a Mathematics Disorder and a “Rule out” diagnosis for a number of other clinical disorders.

DCPS reviewed the evaluation and scheduled an eligibility meeting for October 16, 2013. Prior to the eligibility meeting, on October 8, 2013, the student engaged in conduct at school that resulted in disciplinary action. As a result she received a long-term suspension.

On October 16, 2013, DCPS held both an eligibility meeting and a manifestation determination review (“MDR”). The student’s parent, GAL and educational attorney participated in the meeting. The DCPS personnel included two school psychologists, the school social worker a special education teacher and an assistant principal.

DCPS first found the student ineligible under both the emotional disturbance (“ED”) and specific learning disability (“SLD”) classifications. DCPS concluded, however, the student was eligible for a 504 plan and developed a plan. DCPS concluded the student would receive interventions through the student support team (“SST”) process to determine if interventions would

successfully improve her academic performance, attendance and in-school behavior. The student's representatives at the meeting disagreed with the finding of ineligibility.

The October 16, 2013, team concluded the student's behavior of October 8, 2013, (allegedly lighting a fire in the school along with two other students) was not a manifestation of a suspected disability. Thus, the student's long-term suspension at an alternative placement ("School B") was instituted. The student began attending School B on October 26, 2013.

Petitioner filed this complaint on November 1, 2013. Petitioner asserted that DCPS should have found the student eligible under the SLD and/or ED classifications and should have found that the student's behavior was a manifestation of her disability. Petitioner sought as relief a finding by the Hearing Officer that the student is eligible under SLD and/or ED classifications, and ordering DCPS to develop an individualized educational program ("IEP") for the student and determine an appropriate school placement.

DCPS filed a response to the complaint on November 13, 2013. DCPS denied any alleged denial of a FAPE and specifically asserted the student was properly found ineligible and not entitled to protections under IDEA.

A resolution meeting was held on November 18, 2013. The issues were not resolved. A pre-hearing conference was held on November 18, 2013, and a pre-hearing conference order was issued outlining, inter alia, the issues to be adjudicated. Evidence on all issues was presented in a single hearing on December 4, and December 6, 2013. The Hearing Officer's Determination ("HOD") on Petitioner's challenge to the manifestation determination was issued on December 19, 2013. A decision on the remaining two issues is due on or before January 15, 2014, and is the subject of this HOD.

## **ISSUES: <sup>2</sup>**

### **The issues adjudicated are:**

1. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing find the student eligible for special education services under IDEA on October 16, 2013, under the disability classification(s) of SLD and/or ED.
2. Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to comply with Petitioner's request at the October 16, 2013, eligibility meeting that behavior rating scales be administered to the student to address the provisional and rule out diagnosis raised in the June 24, 2013, independent psychological evaluation.

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<sup>2</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. The HOD dated October 19, 2013, addressed the single expedited issue related to the MDR. This HOD issued January 7, 2014, addresses the remaining two issues that were adjudicated at the December 2 & 4, 2013, hearing.

## **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 19 and Respondent's Exhibits 1 through 25) that were admitted into the record and are listed in Appendix A

## **FINDINGS OF FACT:**<sup>3</sup>

1. The student is \_\_\_\_\_ at School A. She has attended School A since SY 2012-2013. Prior to attending School A the student attended a District of Columbia public charter school where during SY 2009-2010 she was evaluated and determined ineligible under IDEA. Although found ineligible, the student was provided a 504 plan for social/emotional issues while at the charter school. (Petitioner's Exhibit 18-3, 18-4, 18-5, Respondent's Exhibit 10)
2. The student's academic performance at School A has been varied. During SY 2012-2013 she earned high grades in a number of classes but failed or nearly failed others. As a result she attended summer school during Summer 2013 and barely passed the two make-up classes. During the first advisory of SY 2013-2014 the student was performing poorly, excessively absent and exhibiting poor behavior in all of her classes. (Petitioner's Exhibits 9, 10, Respondent's Exhibit 17-6, 17-7, 17-8, 17-9)
3. In April 2013 the student became the subject of a D.C. Superior Court neglect case and the Court appointed \_\_\_\_\_ an educational attorney. The student is currently in the custody of the District of Columbia and has been living in a foster home since April 2013. (Witness 1's testimony)
4. The Court also ordered a psycho-educational evaluation that was conducted by a D.C. Department of Mental Health psychologist on June 24, 2013. The evaluation report is dated July 18, 2013. The evaluation found the student has average intellectual functioning but academic deficits in math. The student's math functioning was three levels below her current grade. The evaluator diagnosed the student with Mood Disorder, and a Mathematics Disorder and a "Rule Out" diagnosis for a number of other clinical disorders. (Witness 1's testimony, Petitioner's Exhibit 14-5, 14-6, 14-7, 14-8, 14-9)
5. The student's cognitive scores in her evaluation conducted during SY 2009-2010 were comparable to those in the 2013 evaluation. Similarly, the student's academic functioning in SY 2009-2010 showed significant deficits in math. In assessing the student's social emotional functioning the 2010 evaluation indicated the student had an

adjustment disorder coupled with anxiety and that she was acting out in school and at home. The evaluation noted the student's inattention and lack of focus suggested that a rule out of Attention Deficit Hyperactivity Disorder ("ADHD") be made. (Witness 2's testimony, Petitioner's Exhibit 15-3, 15-6, 15-10, 15-12, 15-14)

6. The 2013 evaluator was unable to make a full assessment of the student's emotional functioning and noted that the student's focus and behavior in school could improve when the student's level of depression was addressed. The evaluator recommended that a clinician who has regular contact with the student rule-out the various diagnoses and make a more accurate diagnosis than the evaluator was capable of doing at the time. The evaluator stated that the student would benefit from an assessment with a treating psychiatrist within the community to assist with diagnosis and to determine if psychotropic medication may help reduce the student's then current depressive symptoms and rapid changes in mood. (Petitioner's Exhibit 14-5, 14-6, 14-7, 14-8)
7. The student participates in individual and family therapy outside of school. (Parent's testimony, Petitioner's Exhibit 14-10)
8. DCPS reviewed the Court ordered evaluation and scheduled an eligibility meeting for October 16, 2013. Prior to the eligibility meeting, on October 8, 2013, the student engaged in conduct at school that resulted in disciplinary action. As a result she received a long-term suspension. (Witness 1's testimony, Respondent's Exhibits 1, 14, 17-3)
9. On October 16, 2013, DCPS held both an eligibility meeting and a MDR. The student's parent, GAL, educational attorney, among others representing the student, participated in the meeting. The DCPS personnel included two school psychologists, the school social worker, a special education teacher and an assistant principal. (Respondent's Exhibits 15, 16-1)
10. The DCPS team relied upon the student's teachers' statements<sup>4</sup> that the student has the capability to perform, based on her cognitive abilities, when she attends and focuses and when her behaviors do not get in the way. The teachers confirmed that the student was disruptive in the classroom and would become angry when she was not called on to give an answer when she knew it. They indicated, however, that with interventions in place the student could be successful. Based upon this teacher input the team noted the student was "interfering with any learning in the classroom for herself or others." (Witness 3's testimony, Petitioner's Exhibit 9, Respondent's Exhibit 19-5)
11. The team also discussed the student's sporadic school attendance. The DCPS team members reviewed the student's report card and concluded the student was failing her classes due to her absences and poor behavior. The student's in prior school years was not available to the team. (Witness 3's testimony)

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<sup>4</sup> The meeting notes and eligibility determination report (Respondent's Exhibit 15) do not indicate that the student's teachers were present for the meeting.

12. At the October 16, 2013, the team went through checklists for SLD and ED. As to SLD the team used the “discrepancy model” because it was considered the standard criteria for SLD eligibility determination. The DCPS team members did not find the student eligible under either classification. The eligibility decision was based on a vote and the student’s representatives were in disagreement with the DCPS team members on both eligibility decisions. (Witness 3’s testimony)
13. The DCPS team members agreed that the student had behavioral issues that were impacting her learning but disagreed that she needed supports through special education to address the behaviors. During the meeting someone on behalf of the parent requested that a behavior rating scale be conducted. (Parent’s testimony, Petitioner’s Exhibit 11-5)
14. DCPS completed a disability worksheet for SLD and ED. The worksheet for SLD indicated the student met the requirements for eligibility under that classification in math. Nonetheless, the DCPS representative indicated on the form that the student was not eligible. (Respondent’s Exhibit 19, Petitioner’s Exhibit 4)
15. The disability worksheets state that they are to be used by the team as a tool to facilitate a discussion about the determination of eligibility. The forms state: “Teams are expected to use evidence including evaluations, information and other existing data to confirm or deny each criterion in order to make a differential determination of eligibility.” (Respondent’s Exhibits 19-1, 20-1)
16. The SLD worksheet stated the following: (Respondent’s Exhibit 19-2)

Criterion 1: The student does not achieve adequately and/or does not make sufficient progress to meet age or State approved grade level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the student’s age or state approved grade level standards (At least one of the following must be marked in order to meet the requirement). Two areas were checked: (1) mathematics calculation and (2) mathematics programs solving (“based on test data results and parent concerns”).

- This criterion was checked “Yes” indicating the student met the criterion.

Criterion 2: The student demonstrates a discrepancy between achievement (as measured by the academic evaluation and measured ability (as measured by the intellectual evaluation ) of two years below a student’s chronological age and/or at least two standard deviations below the student’s cognitive abilities as measured by appropriate standardized diagnostic instruments and procedures. (Must be yes in order to meet the requirement).

- This criterion was checked “Yes” indicating the student met the criterion.

Criterion 3: Is the impact on the student’s achievement level the result of: (All of the following must be “No” in order to meet the requirement).

- All the items were checked “No” indicating the student met this criterion.

In the “Documentation of Other Factors” section: the checklist noted the following: “[the student] is interfering with any learning in the classroom for herself and others. Teachers indicated she can perform if she attends and focuses. There are no medical findings in any of the submitted documents.” (Respondent’s Exhibit 19-5)

- Despite meeting all the criteria, the Decision section of the checklist stated that the student did not meet all the required criteria for SLD.<sup>5</sup> (Respondent’s Exhibit 19-5)

17. The student meets all the required criteria to be found eligible under the SLD classification and is so eligible under the classification because: (1) the student has been diagnosed with a learning disability in math as evidenced by the June 24, 2013, evaluation, (2) she is operating at least three grade levels behind in math, (3) according to the DCPS disability checklist for SLD the student meets all the criteria to be found eligible under SLD and (4) the DCPS witnesses failed to sufficiently explain why despite the eligibility checklist stating that the student met all the criteria for SLD she was still not found eligible under that classification. (Witness 3’s testimony, Respondent’s Exhibit 19, Petitioner’s Exhibit 14-7, 14-8)

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<sup>5</sup> The SLD worksheet also included the following statements:

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- Federal and State regulation reference: 34 C.F.R. 300.8(c)(10) 5 E DCMR 3001.1
- Requirements of eligibility determination: The team which must include the student’s general education teacher (or if the student does not have a general education teacher, a general education classroom teacher qualified to teach student of his or her age; or for a child of less than school age, an individual qualified by the SEA to teach a child of his or her age and at least one person qualified to conduct individual diagnostic examination of students must determine and certify that the student meets each numbered criterion for either option A- Discrepancy Model or Option B- Scientific Research Based Intervention Model.
- Directions: Use the information below to guide discussion and as a worksheet to document evidence to support criteria for SLD. If found eligible for SLD this information must be entered into EasyIEP in order to meet the specific requirements for SLD determination 34 C.F.R.§ 300.311.
- Part I: SLD Identification Model (Team must discuss and record decisions related to All of the requirements of Either the Discrepancy Model or the Scientific Research-Based Interventions Model.)

18. The student's ED disability worksheet stated: "The student must meet each numbered criteria (and have documentation to support decision) in order to be considered eligible as a student with the ED disability."<sup>6</sup>

There were two criterion listed:

- (1) The student exhibits one or more of the five following characteristics over a long period of time and to a marked degree:... and
- (2) The emotional disturbance adversely impacts the student's educational performance.

The student's form had two of the five criteria in section 1 above checked: (1) inability to make educational progress that cannot be explained by intellectual, sensory, or health factors, and (2) inappropriate types of behavior or feelings under normal circumstances.<sup>7</sup>

Although two of the five criteria were checked on the form the box was checked in the "Decision" section of the form that the student did not meet all the required criteria for ED. (Petitioner's Exhibit 2, Respondent's Exhibit 20)

19. After a review of the independent evaluation the DCPS psychologist filled out an evaluation checklist form in which he noted that there was additional data available to the school which suggested that other factors significantly impact the student including the student's behavior and her skipping class as documented by behavior reports and attendance sheets. (Witness 4's testimony, Respondent's Exhibit 14-1, 14-11)
20. The DCPS psychologist noted in his review the student only had two behavior incidents in the current school year. He also noted that the situation between the student and her mother might have been a factor in the student's recent behaviors and once that relationship healed the student behaviors might improve. Principally, the student was

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<sup>6</sup> A condition exhibiting one or more of the characteristics described in the eligibility criteria below that exist over a long period of time and to a marked degree that adversely affects a student's educational performance. ED includes schizophrenia. ED may not apply to student who are socially maladjusted, unless it is determined that they meet the criteria for the ED disability category according to the criteria in this policy 34 C.F.R § 330.8(c)4, 5 E DCMR 3001.1.

<sup>7</sup> The fact that two of the factors were checked indicated that a "group of qualified professionals reviewed and/or conducted two scientific research-based interventions that are based on a problem solving model that addresses behavioral/emotional skill deficiency and documentation of the results of the intervention, including progress monitoring documentation, and determined that the student exhibits one or more of the five following characteristics over a long period of time and to a marked degree. The form also included the following statements:

- Federal and State regulation reference: 34 C.F.R. 300.8(c)(4) 5 E DCMR 3001.1
- Requirements of eligibility determination: The student must meet each numbered criterion (and have documentation to support decision) in order to be considered eligible as a student with an ED disability.
- Directions: Check the box below if the team has evidence to show that the student meets the following criteria:

found ineligible under the ED classification because a belief by DCPS team members that the student's behaviors were related to the recent problems with her family relationships. (Witness 4's testimony, Respondent's Exhibits 12-9, 14-1, 14-11)

21. At the October 16, 2013, meeting the DCPS school psychologist concluded that because he had no documentation that evidenced based interventions had been tried with the student and it was not clear that the behaviors described in the Court ordered evaluation had been displayed at school over a long period of time, he could not use the social/emotional information from the evaluation to conclude the student yet met the ED classification.<sup>8</sup> (Witness 4's testimony, Respondent's Exhibit 14-11)
22. The DCPS psychologist reviewed the student's evaluation and teachers' input and the psychologist then recommended that the student be referred to the SST to provide evidence based interventions and counseling and that a SST team determine if any further testing is needed. (Witness 3's testimony, Respondent's Exhibits 14-14, 16-4)
23. Ultimately the DCPS team determined the student was ineligible under both the SLD and ED classifications. DCPS concluded, however, the student was eligible for a 504 plan and developed a plan. DCPS also concluded the student would receive interventions through the SST process to determine if interventions would successfully address her poor academic performance, class attendance and behavioral difficulties. The student's representatives at the meeting disagreed with the finding of ineligibility. (Parent's testimony, Petitioner's Exhibit 17, Respondent's Exhibit 15, 16, 17, 18, 19, 20-4, )
24. The team agreed to conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP") to address the student's behaviors. (Witness 3's testimony)
25. The School A social worker was to begin the SST process which would take six weeks of meetings and interventions that each of the student's teacher would implement. If there was no improvement in the student's performance and behavior that information was to be forwarded to the School A special education coordinator for a team to consider moving forward with evaluations. (Witness 3's testimony)
26. Following the eligibility meeting the School A SEC completed the prior written notice and a form titled: "Analysis of Existing Data" that purported to summarize the information that was reviewed by the eligibility team in determining whether the student was eligible. The form stated the following: (Respondent's Exhibit 18)

The data indicated the student was absent 5 of 25 days enrolled and tardy 9 of 25 days enrolled; that the student failed a vision screening and that the student's most recent evaluation indicated she has prescription glasses. The form also included a summary of the student's strengths in math: "Her abilities fall within the average range and an 8<sup>th</sup>

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<sup>8</sup> Neither the DCPS psychologist nor the psychologist Petitioner presented as an expert at the hearing had ever met, observed or evaluated the student.

grade level<sup>9</sup> she is able to perform addition and subtraction involving regrouping and renaming worth with common fractions, and work with negative integers. Summary of Concerns: [the student] has difficulty solving word problems, as well as grasping and retaining higher math concepts. Based on testing [the student's] Broad math score of 88 fell within the low range and has a sixth grade-four month level. She failed Algebra 1 in the ninth grade. She will have to enroll in evening credit recovery in order to take Algebra 1 and pass. She is currently in Geometry during the day and her percentage is 14%. A description of previous or current intervention attempted and progress monitoring tools and outcomes: small group instruction and peer tutoring/ report card and interim report/ This strategy is helpful in the short term, but long term retention has not been sustained.”

In the area of Emotional, Social and Behavioral Development the form stated the following:

The type information reviewed: Observations and the type of specific data used: Teacher Input (teachers completing an input form) and some of the teachers were interviewed.) Analysis of Information Revealed by Observations: Current Observations: “Each of [the student's] teachers indicate that she has strong academic abilities. She seems to become distracted with the teacher management of the classroom. She wants to answer all questions not allowing others to participate. When she does not have her way she attempts to argue with one of her peers or the classroom teacher. The ultimate goal is to shut down learning in the classroom. When she is focused she participates well. She often cuts class.”

The form also noted the student's 2010 observation: “[the student] works and stays on task for part of a class period if she does not become irritated or frustrated. She tends to fidget by herself or engage in sensory activities. She struggles with classroom dynamic and the demands, redirects , or request placed on her. At times, this results in verbal outburst. Other times, she leaves the classroom without permission or not following procedures. Once upset, [the student] is hard to console or comfort and she refuses to accept or comply with the consequences. She also refuses to accept or acknowledge her responsibility for the behavior. She seems to have difficulty with feed-back. It is hard for [the student] to ignore her classmates. She has difficulty following the directions given to al students.”

A summary of strengths in this area: “[the student] is very eager to help both teachers and classmates. She is motivated by attention from adults and peers and seems to have a strong desire to do the right thing.”

And a summary of concerns in this area: “The concern is [the student's] ability to self-regulate her emotions or reactions to problematic situations. When she has escalated, she becomes verbally aggressive and disrespectful to adults and peers. [the student has fairly quick emotional shift in the course of a class period. She struggles with focusing and avoiding off-task behaviors. He emotional reactions to peers teachers or learning concepts, result in a state in which [the student ] is not long mentally available for learning or completing tasks.”

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<sup>9</sup> There was no independent evidence in the record to support the finding that the student's math performance was different than when assessed in the June 24, 2013, evaluation.

A description of previous or current intervention attempted and progress monitoring tools and outcomes: Redirections and positive praise when performing well. Class period feedback and daily reporting, reporting to mother. [The student] enjoyed the positive comments and feedback. However, if she knew it was going to be negative, she effused to present her contract sheet to the teacher. At other times she did not keep up with the sheet to share it with her teachers. There was a slight improvement when communication was made with mother on a daily basis. (Respondent's Exhibit 18)

27. DCPS issued a prior written notice to the parent indicating the student was not eligible. The notice was titled "Prior Written Notice - Do Not Proceed with Evaluation after Team Analyzes Existing Data." The form informed the parent that DCPS would "implement the following change: "Do Not Proceed with Evaluation after Team Analyzes Existing Data." In the section describing the proposed or refused action the form read as follows: "The team has enough data and information from the parent requested assessments and teacher input to make a decision. There is no need for any additional testing at this time in order to make a decision. The team can move forth with the data provided." (Petitioner's Exhibits 3, 5)

### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. <sup>10</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the

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<sup>10</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence

student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing find the student eligible for special education services under IDEA on October 16, 2013, under the disability classification(s) of SLD and/or ED.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of evidence that DCPS inappropriately determined the student ineligible at the October 16, 2013, eligibility meeting. The evidence demonstrates that team had enough information to conclude the student was eligible for special education under the SLD classification. The Hearing Officer thus concludes the student is eligible under the SLD classification.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).<sup>11</sup>

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presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

<sup>11</sup> 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

Petitioner asserted that the student could and should be found eligible under the classification of SLD and/or ED.

34 C.F.R. §300.308 states:

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in Sec. 300.8, must be made by the child's parents and a team of qualified professionals, which must include-

- (a) (1) The child's regular teacher; or
- (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
- (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

Petitioner presented evidence including testimony interpreting evaluative data that clearly demonstrates the student has continued to have significant deficits in math for years, is currently performing at least three grade levels below in math and has been diagnosed with a Math Disorder.<sup>12</sup> Because student has been diagnosed with a learning disability in math as evidenced by the June 24, 2013, evaluation and she operating at least three grade levels behind in math and because according to the DCPS disability checklist for SLD the student meets all the criteria to be found eligible under SLD, the Hearing Officer has found and concludes that the student meets all the required criteria to be eligible under the SLD classification and is so eligible.<sup>13</sup>

The DCPS witnesses failed to sufficiently explain why despite the eligibility checklist stating that the student met all the criteria for SLD she was still not found eligible under the SLD classification. The Hearing Officer did not find credible DCPS' claim that the student's behaviors and school attendance were the cause of her math deficits. Her significant math deficits have persisted for years despite any recent behaviors and there was no evidence the student's attendance in prior school years had been a problem that would have contributed to her deficits.<sup>14</sup>

Petitioner asserted that the student also could and should be found eligible under the classification of ED for Mood Disorder.

ED is a condition exhibiting one or more of the characteristics described in the eligibility criteria that exist over a long period of time and to a marked degree that adversely affects a student's

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<sup>12</sup> FOF #s 4, 5, 16

<sup>13</sup> FOF # 17

<sup>14</sup> FOF #s 5, 11

educational performance. ED may not apply to student who are socially maladjusted, unless it is determined that they meet the criteria for the ED disability category according to the criteria in this policy 34 C.F.R § 330.8(c)4, 5 E DCMR 3001.1.

Pursuant to 34 C.F.R. § 300.306<sup>15</sup> a school district must ensure that after a student has been appropriately evaluated for special education and that a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8.

Although the student was diagnosed with a Mood Disorder in the June 24, 2013, evaluation, the evaluator was unable to make a full assessment of the student's emotional functioning, and the evaluator noted that the student's focus and behavior in school may improve when the student's level of depression is addressed.<sup>16</sup> The August 16, 2013, team found the student ineligible under ED but the team also determined that there was a need for additional data and that the student might benefit from social/emotional interventions including a FBA and development of a BIP.<sup>17</sup> The Hearing Officer concludes based on this evidence that it was reasonable for DCPS to have found the student ineligible under the ED classification at least until further assessments and interventions had been implemented.

Although Petitioner presented expert testimony from Witness 2 coupled with the Court ordered psycho-educational evaluation that the student's diagnosed Mood Disorder results in her impulsivity, and it was found in the previous HOD that the student's behavior related to the MDR was a manifestation of a suspected disability, the Hearing Officer was not convinced by the evidence, despite the student's history of disruptive behaviors in school, that she is in fact a child with ED. The additional assessments and interventions are appropriate before such a final determination is made.

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<sup>15</sup> 34 C.F.R. § 300.306 provides:

Determination of eligibility.

(a) General. Upon completion of the administration of assessments and other evaluation measures-

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and... A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math...or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).

<sup>16</sup> FOF #6

<sup>17</sup> FOF # 23, 24

Because the team has yet to obtain such additional data the Hearing Officer directs in the Order below that the IEP team review the student's updated information and data to determine if the student should also be given the ED classification.

**ISSUE 2:** Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by failing to comply with Petitioner's request at the October 16, 2013, eligibility meeting that behavior rating scales be administered to the student to address the provisional and rule out diagnosis raised in the June 24, 2013, independent psychological evaluation

**Conclusion:** Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

Although the facts indicate a request was made at the October 16, 2013, meeting that rating scales be administered to the student, and during the hearing Petitioner's counsel represented that the student has now completed the behavior rating scales and they are available to DCPS to review, there was no independent evidence of this presented in the hearing and no evidence from which the Hearing Officer could reasonably conclude the student was denied a FAPE as a result of the behavior rating scales not being administered and reviewed by the date this complaint was filed.

Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue. Nonetheless, because the Hearing Officer has in the discussion of the initial issue adjudicated in this case concluded that the student is eligible and has in the Order below ordered an IEP meeting, the Hearing Officer will also direct that the IEP team when it meets review the behavior rating scales as a part of reviewing all information to develop an appropriate IEP for the student.

**ORDER:<sup>18</sup>**

In addition to the directives contained in the Order section of the HOD issued December 19, 2013, in this matter, the Hearing Officer hereby orders the following:

1. The student is hereby found eligible under SLD classification in the area of math.
2. DCPS shall within fifteen (15) school days of the issuance of this Order convene an IEP team meeting to (1) review the student's evaluation data (including the behavior rating scales that were administered to the student and not yet reviewed) and any other updated information and/data to determine if the student's disability classification should also include ED and (2) shall develop an IEP for the student to appropriately and sufficiently address her academic and social emotional concerns.
3. The parties by mutual assent may agree to combine the meeting to be held in this Order with the meeting that has already been ordered pursuant to the HOD issued December 19, 2013.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: January 7, 2014**

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<sup>18</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.