

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
1050 - First Street, N.E.; Washington, D.C. 20002  
(202) 698-3819 www.osse.dc.gov

OSSE  
Office of Dispute Resolution  
May 31, 2020

**Confidential**

<b>Parent on behalf of Student<sup>1</sup></b>	)	<b>Case No. 2019-0042</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: May 7-8, 2020</b>
	)	<b>Conducted by Video Conference</b>
<b>v.</b>	)	
	)	<b>Date Issued: May 31, 2020</b>
<b>District of Columbia Public Schools</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student attending School A. On February 14, 2020, 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 to identify the student (“Student”) as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”), failing to permit an observation of the child, and failing to provide Petitioner Student’s educational records. On February 25, 2020, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint Notice* (“*Response*”).

**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

<sup>1</sup> 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

Petitioner filed the *Complaint* on February 14, 2020 alleging that DCPS denied the student a FAPE when it (1) failed to find the student eligible for special education services at meetings on November 6, 2019 and January 23, 2020, (2) failed to permit the student's educational advocate to observe the student in the educational setting, and (3) failed to provide Petitioner access to the student's educational records that Petitioner had requested.

Respondent filed a response to the *Complaint* on February 25, 2020 asserting that (1) pursuant to a settlement agreement on October 9, 2020, DCPS conducted a comprehensive psychological evaluation, an occupational therapy evaluation, and a functional behavior assessment in October 14, 2019. Based on these evaluations, DCPS determined that the student was not eligible for special education services and developed a Section 504 plan, (2) as the student is not a student with a disability, Petitioner has no right to an observation, and (3) Petitioner has been provided with all eligibility documentation, all evaluation data, and all Section 504 data.

The parties participated in a resolution meeting on April 2, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on March 16, 2020, and the Prehearing Order was issued that day. A second prehearing conference was conducted by telephone on March 26, 2020 concerning the potential need for accommodations for one of the witnesses that did not result in an amended order.

The due process hearing was conducted on May 7-8, 2020 by video conference. The hearing was closed to the public. Petitioner's counsel disclosed Exhibits P1-P63 and moved into evidence Exhibits 1-31, 34-55, and 57-63 ("P:") There were no objections and Petitioner's Exhibits 1-31, 34-55, and 57-63 were admitted into evidence. Respondent's counsel moved into evidence Exhibits 1-30 ("R:"). By email on May 5, 2020 Petitioner's counsel objected to Respondent's Exhibits 19, 20, and 22 on the basis of relevance.<sup>2</sup> I overruled the objections to Exhibits 19 and 20, and deferred a ruling on Exhibit 22. At the conclusion of the testimony, I sustained the objection to Exhibit 22. Thus, Respondent's Exhibits 1-21 and 23-30 were admitted.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner. Respondent presented as witnesses in chronological order: Witness C, Witness D, and Witness E. Thereafter, Petitioner provided rebuttal testimony. Petitioner offered Witness A as an expert in School Psychology, Special Education Programming, and Eligibility Determination. I overruled Respondent's objection to Witness A testifying as an expert in Special Education Programming. I sustained Respondent's objection to Witness B providing expert testimony due to the witness' limited experience in special education. However, Respondent did not object to certain questions eliciting opinion testimony from Witness B, particularly regarding the development of Petitioner's compensatory education plan. Witness

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

C, Witness D, and Witness E were accepted as expert witnesses without objection by Petitioner's counsel. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

### ISSUES

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

1. Whether DCPS denied the student a FAPE when it failed to find the student eligible for special education services at meetings on November 6, 2019 and January 23, 2020.
2. Whether DCPS denied the student a FAPE by failing to permit the student's educational advocate to observe the student in the educational setting.
3. Whether DCPS denied the student a FAPE by failing to provide Petitioner the student's educational records.

### FINDINGS OF FACT

1. Student is an X-year-old, in grade D at School A.<sup>3</sup>
2. Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and bipolar disorder.<sup>4</sup> Petitioner has not given Student medication for these disorders during the 2019-20 school year.<sup>5</sup>
3. At the end of the 2016-17 school year, Student scored Proficient in Text Reading and Comprehension ("TRC")<sup>6</sup> and was performing at grade level.<sup>7</sup> Student's final grades were Basic in Music and Art, Proficient in Writing & Language, Health & Physical Education, and World Languages, and Advanced in Reading, Speaking & Listening, Math, Social Studies, and Science.<sup>8</sup>
4. During the 2017-18 school year, when Student attended School B, school officials called Petitioner 20-30 times to report Student's disruptive behavior including running out of class and fighting. Petitioner would sometimes come and sit with Student or take Student home.<sup>9</sup>
5. At the end of the 2017-18 school year, Student scored Proficient in TRC.<sup>10</sup> Student's final grades were Basic in Music, Art, and Health & Physical Education, Proficient

<sup>3</sup> Petitioner's Exhibit ("P:") 46 at 2 and 6.

<sup>4</sup> Respondent's Exhibit ("R:") 10:28.

<sup>5</sup> *Id.* at 27; Petitioner's testimony.

<sup>6</sup> P15:2.

<sup>7</sup> P14:2.

<sup>8</sup> P21:1.

<sup>9</sup> Petitioner's testimony.

<sup>10</sup> P12:2.

in Reading, Writing & Language, Speaking and Listening, Social Studies, Science, and World Languages, and Advanced in Math.<sup>11</sup> Homeroom Teacher D noted that “There has been a noticeable improvement in [Student’s] reading and math habits this reporting period, which is very encouraging!” With respect to Student’s Work Habits, personal and social skills, Teacher D indicated that Student needed “frequent prompting” to comply in all twelve behavioral categories. Student was absent 39 days, 31 unexcused.<sup>12</sup>

6. During the 2018-19 school year, when Student attended School A, school officials called Petitioner approximately 20 times to report Student’s disruptive behavior including unruliness in class and fighting. Petitioner would sometimes take Student home.<sup>13</sup> ds Disciplinary Action indicating that it was Student’s “43<sup>rd</sup> office referral. On this occasion Student was suspended for three days for spitting on multiple students and throwing on crayons at students.<sup>14</sup> Student received a separate notice the same day, also a three-day suspension to be served concurrently, for punching a student in the back.<sup>15</sup>

7. By the end of the 2018-19 school year, Student had regressed from Proficient in the middle of the school year, to Below Proficient at the end of the school year in TRC.<sup>16</sup> Student’s final grades were Basic in Reading and Writing & Language, Proficient in Speaking and Listening, and Math, and Advanced in Music and Health & Physical Education.<sup>17</sup> In the twelve behavioral categories, Homeroom Teacher C indicated that Student acts Independently in Uses time wisely, Participates in class discussion, and Makes an effort, that Student needed limited prompting in Follows directions, Completes and returns homework, and Respects the rights/property of others, and that Student needed frequent prompting in Completes class work on time, Works well with others/cooperates, Follows classroom rules, Follows playground rules, Listens while others speak, and Practices self-control. Student had 27 unexcused absences.<sup>18</sup>

8. During the 2018-19 school year, Student had seven Dean Office Referrals on November 28, 2018, March 13, 20, 20 and 29, 2019, April 1 and 10, 2019, and May 15, 2019 for leaving the classroom without permission, lying or giving misleading information to school staff, inappropriate or disruptive physical contact between students, engaging in reckless behavior that may cause harm to self or others, fighting where there is no injury or weapon, and directing profanity or obscene/offensive gestures toward staff.<sup>19</sup>

9. On August 20, 2019, Petitioner requested that Student be evaluated to determine eligibility for special education services.<sup>20</sup> The Analysis of Existing Data indicated that “[Student] ended the 2018-19 school year approaching grade level expectations in reading, writing and language. [Student] is strong at mentally adding and subtracting tens and

<sup>11</sup> P20:1.

<sup>12</sup> *Id.*

<sup>13</sup> Petitioner’s testimony.

<sup>14</sup> P36:1.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> P9:2.

<sup>17</sup> P18:1.

<sup>18</sup> *Id.*

<sup>19</sup> P2:3.

<sup>20</sup> P5:1.

hundreds from a number up to 1000, without having to count on paper or using [Student's] fingers. In addition, [Student] solves problems involving adding and subtracting up to 100.”<sup>21</sup> In reading, “According to [Student's] 2018-2019 academic year report card, [Student] is a developing reader who needs additional support in English Language Arts... [Student] struggles with reading and understanding literature and informational texts on grade level. In addition, [Student] struggles with reading fluency, which includes sounding out and decoding words. [Student] has a hard time supporting [Student's] opinions with reasons that are connected with linking words, and providing concluding statements. [Student] also struggles with using standard English as it pertains to spelling, punctuation and capitalization when writing.”<sup>22</sup>

10. On August 22, 2019, DCPS provided Petitioner's counsel, *inter alia*, the following documents: (1) Grade A, B, and C report cards, (2) iReady reports from June 2, 2017 and January 18, 2018, and (3) Dibels testing reports from May 25, 2017, June 4, 2018, and June 3, 2019.<sup>23</sup>

11. On August 22, 2019, DCPS issued a Prior Written Notice (“PWN”) indicating that “Per parental request for evaluation, DCPS will conduct a comprehensive psychological evaluation, occupational therapy evaluation, and a functional behavior assessment.”<sup>24</sup>

12. On September 4, 2019, DCPS issued a PWN indicating that it would proceed with an evaluation of Student's eligibility for special education services.<sup>25</sup>

13. On October 14, 2019, Witness D completed a Functional Behavior Assessment (“FBA”) of Student. Student's behavior problems were described as follows: “As reported by [Student's] teachers [Student] exhibits impulsive behaviors that distract others, which might include, but are not limited to yelling out, taking other students belongings and being out of [Student's] seat. By history, [Student] has exhibited aggressive behaviors to include hitting students while in line or kicking them under the desk. [Student's] behaviors are often disruptive to the learning environment. They are reported to be random and can last throughout the day, with a moderate level of intensity.”<sup>26</sup> The Problem Behavior Questionnaire, completed by grade A Teacher A and Teacher B, and the Strengths and Difficulties Questionnaire (“SDQ”), completed by those teachers and Petitioner, revealed that Student “has very high endorsements in the areas of overall stress, behavioral difficulties, hyperactivity and concentration, getting along well with others and impact of any difficulties on a child's life. [Student's] behaviors are a function of [Student's] desire to seek/gain adult attention.”<sup>27</sup> Witness D observed Student on three occasions in developing the FBA: “Behaviors were denoted every 2 minutes using a scatter plot and there were 30 opportunities captured during the observations. Student exhibited Appropriate behavior 90% of the total time, Impulsive behavior 10% of the total time and Physical Aggression 0% of the total

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2.

<sup>23</sup> R26-161.,

<sup>24</sup> P35:1.

<sup>25</sup> P34:1.

<sup>26</sup> P4:2.

<sup>27</sup> *Id.* at 4.

time.”<sup>28</sup> Teacher A described Student as “a helpful, friendly and easygoing student. She is concerned that [Student] is easily distracted and can be distracting to others. When [Student] is off task, [Student] might display behaviors that include leaning back in [Student’s] chair, tapping pencils on the desk and taking other students’ belongings. [Student’s] behaviors are noticed daily and can last throughout the day with a severe level of intensity...”<sup>29</sup> Teacher B reported that Student “is kind to adults and an easygoing student. She is concerned about [Student] being confrontational with other students. These behaviors consist of [Student] hitting [Student’s] classmates while in line or kicking under the desk when the teacher is not looking. The above behaviors have been noticed daily and lasts throughout the school day with a severe level of intensity. After the behavior occurs, [Student] will deny the accusation which can also cause the situation to escalate. Both [Teacher A and Teacher B] have implemented interventions that include relocating the student’s desk, moving distracting objects away from desk, seating student by {Student’s} self, assigning a job or task or sending student with another teacher to take a break and reset.”<sup>30</sup>

14. On October 18, 2019, Examiner B completed an Occupational Therapy Assessment Report. On the Beery-Buktenica Developmental Test of Visual-Motor Integration, Student scores were Average in Visual-motor Integration, Below Average in Visual Perception, and Average in Motor Coordination.<sup>31</sup> On the Motor-Free Visual Perception Test, Student demonstrated average visual perceptual skills.<sup>32</sup> Based on the tests she administered, two observations she conducted, and interviews of Teacher B, Teacher C, and Student, Examiner B concluded:

Based on scores achieved on the Beery-Buktenica Developmental Test of Visual Motor Integration (6<sup>th</sup> Edition), [Student] presents with average visual motor skills... below [average] visual perception skills...and average motor coordination skills... Based on scores on the Motor-Free Visual Perceptual Test – 4<sup>th</sup> edition, [Student] demonstrated average visual perception skills. Based on [Student’s] Fine Motor Screening, [Student] is able to engage with [Student’s] environment using [Student’s] fine motor skills to manipulate [Student’s] school environment without difficulties. [Student] scored in the typical performance range on the Short Sensory Profile.<sup>33</sup>

The Short Sensory Profile is a 38-item questionnaire, a screening tool that helps identify children with sensory processing difficulties, and was completed by Teacher B and Teacher C.<sup>34</sup>

15. On October 18, 2020, Witness C completed a Comprehensive Psychological Re-Evaluation of Student. During the. 2016-17 school year, when Student was in grade A, Student had final grades of Basic in Art, Proficient in Writing and Language, Advanced in

<sup>28</sup> *Id.* at 6, 8.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> P3:3-4.

<sup>32</sup> P3:4.

<sup>33</sup> P3:7.

<sup>34</sup> P3:5.

Reading and Math, and was absent 28 days.<sup>35</sup> During the 2017-18 school year, when Student was in grade B, Student had final grades of Basic in Art, Proficient in Math, Reading, Writing & Language, and was absent 38 days.<sup>36</sup> For the 2018-19 school year, when Student was in grade C, Student had final grades of Basic in Reading and Writing & Language, Proficient in Math, and was absent 30 days.<sup>37</sup>

Witness C interviewed Teacher A and Teacher B. Teacher A, Student's English Language Arts teacher, described Student as helpful, friendly, and an easygoing student. She was concerned that Student was easily distracted and could be distracting to others. She noted off-task behaviors of leaning back in the chair, tapping pencils on the desk, and taking other students' property. Teacher B, Student's Math teacher, reported that Student is kind to adults and was an easygoing student, but who engages in the following behaviors daily throughout the school day: hitting classmates while in line, and kicking under the desk when the teacher is not looking.<sup>38</sup>

Witness C conducted the WISC-V examination. Student scores were Average in Verbal Comprehension, Below Average on the Visual Spatial Index, Average in Fluid Reasoning, Low in Working Memory, Average in Processing Speed, and Student's Full Scale IQ of 91 was in the Average range.<sup>39</sup> On the Woodcock Johnson Test of Achievement IV (WJ-IV), Student scored Average in Reading, Low Average in Broad Reading, Average in Basic Reading Skills, Average in Reading Comprehension, Low Average in Reading Fluency, Low in Reading Rate, Average in Mathematics, Average in Broad Mathematics, Average in Math Calculation Skills, High Average in Math Problem Solving, Average in Written Language, Average in Broad Written Language, Average in Written Expression, Average in Academic Skills, Low Average in Academic Fluency, Average in Academic Applications, Average in Phoneme-Grapheme Knowledge, Average in Brief Achievement, and Average in Broad Achievement.<sup>40</sup>

On the Behavior Assessment for Children (BASC-3), Witness C found:

Overall, [Student's] scores on Interpersonal Relations (Social Skills) and Anxiety fall in the clinically significant range and probably should be considered among the first behavioral issues to resolve. [Student's] score on Attitude to Teachers (Academic Problems) is also elevated and may warrant targeted interventions and/or further monitoring to ensure it doesn't worsen. It is important to note that [Student] has scores on Atypicality, Hyperactivity, and Attention Problems that are areas of concern as well. Interventions for these areas may require follow up given the student has a medical diagnosis of ADHD and Bipolar Disorder.<sup>41</sup>

<sup>35</sup> P2:4.

<sup>36</sup> *Id.* at 3-4.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> P2:10.

<sup>39</sup> *Id.* at 13.

<sup>40</sup> *Id.* at 17-18.

<sup>41</sup> *Id.* at 21-22.

In Atypicality, Student's score was in the Clinically Significant range, while in Attention Problems and Hyperactivity, Student scored in the At-Risk range.<sup>42</sup>

Witness C administered the Scales for Assessing Emotional Disturbance (SAED-2) to assess Student's social-emotional functioning. Based on the ratings of Teacher B and Petitioner, Student's behavior was indicative of emotional disturbance.<sup>43</sup>

Witness C opined the following educational implications:

Given the student's WISC V results, [Student's] overall performance on the Working Memory Index WMI was Very Low compared to other children [Student's] age. With working memory skills lower than many children [Student's] age, [Student] may have difficulty concentrating and attending to information that is presented to Student... Relatively weak working memory skills can lead to reading comprehension problems as text becomes more complex in future grades. [Student's] performance on the WJ IV Achievement Tests revealed some strengths and weaknesses with overall average performance... Depression-related symptoms and behaviors are considered one of [Student's] most significant behavioral and emotional problems. The Depression scale on the BASC-3 rating scales indicates feelings of unhappiness, sadness, and stress that may result in an inability to carry out everyday activities... Conduct problems are considered one of [Student's] most significant behavioral and emotional problems. In general, children with conduct disorder usually exhibit a repetitive and persistent pattern of behaviors in which the basic rights of others or major age-appropriate societal norms or rules are violated... According to parent report, Aggression is also considered one of [Student's] most significant behavioral and emotional problems. It is characterized by hostile or destructive behaviors that can be both physical and verbal.<sup>44</sup>

With respect to eligibility for services due to emotional disturbance, Witness C concluded that "[Student] has the ability [to] make educational progress given standardized testing data and report card records."<sup>45</sup> With respect to eligibility due to attention deficit hyperactivity disorder (ADHD), Witness C concluded that [Student's] assessment revealed average academic performance. This school year there were no documented discipline records or dean referrals at the time of this evaluation."<sup>46</sup> Witness C opined that Student did not qualify for special education services: "Although [Student] has a medical diagnosis of ADHD and Bipolar Disorder the present examiner does not support an educational disability that warrants an Individual Education Plan IEP. This examiner concludes that a 504 Plan would be appropriate at this time with proper behavior supports and accommodations to address areas of need."<sup>47</sup>

<sup>42</sup> *Id.* at 20-21.

<sup>43</sup> *Id.* at 24-25.

<sup>44</sup> *Id.* at 25-26.

<sup>45</sup> *Id.* at 26.

<sup>46</sup> *Id.* at 27.

<sup>47</sup> *Id.* at 30.



16. On October 28, 2019, DCPS provided Petitioner the Comprehensive Psychological Evaluation, the Functional Behavior Assessment, and the Occupational Therapy Evaluation.<sup>48</sup>

17. On November 6, 2019, DCPS convened a meeting to determine Student's eligibility for special education services. The meeting notes indicate that Teacher A, a general education teacher, indicated that Student's "... current reading level is BR. Not the best tester. Gets distracted easily and sometimes can distract others. Distractions prevent possible academic progress. [Teacher E] noted [Student] is able to do the work, but behavior concerns prevent work completion... Overall academic performance is impacted. [Student] is able to perform on grade level. [Student] is able to do the work. [Student] is able to read and comprehend." The team determined that it "Believes a 504 plan will meet [Student's] needs to address accommodations, attention and hyperactivity. [Student] doesn't meet criteria for IEP."<sup>49</sup> Witness C, who completed the Psychological Re-evaluation, did not believe Student was eligible for services because Student's academic performance was "average" except for Student's reading rate. Her characterization of Student's performance as "average" was based on Student's WJ-IV scores, not Student's grades during the first term of the 2019-20 school year. The IEP team adopted Witness C's recommendation as to eligibility.<sup>50</sup>

18. At the end of the first term of the 2019-20 school year, Student had earned the following grades: Below Basic in Reading, Writing & Language, Math, and World Languages, Basic in Speaking and Listening, Music, and Art, and Proficient in Health & Physical Education.<sup>51</sup> Homeroom Teacher B noted that Student was performing below grade level in Math. "However, [Student] has the ability and potential to be doing so much better. [Student] is often off task and disrupting [Student's] classmates. For the next quarter, [Student] needs to work on staying focused in class. [Student] is showing improvement in [Student's] fast math facts."<sup>52</sup> In Reading, "[Student's] current reading score based on our beginning of the year inventory test is a 9 which is equivalent to a [grade A] reading level. [Student] has a lot of catching up to do. [Student's] overall comprehension of the text and focus in class has not improved since this assessment. [Student] spends a lot of time off task, and [is] very easily distracted. I am very concerned that if [Student's] focus and distractions continue [Student] will not meet the standards of [grade D]..."<sup>53</sup> Teacher B indicated that Student was Independent in using time wisely and participating in classroom rules, needed limited prompting in completing work on time, working well with others, completing and returning homework, making an effort, following playground and school rules, and that Student needed frequent prompting in following directions, following classroom rules, respecting the rights and property of others, listening while others spoke, and practicing self-control.<sup>54</sup>

<sup>48</sup> R26:152.

<sup>49</sup> R14:78.

<sup>50</sup> Testimony of Witness C.

<sup>51</sup> P17:1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

19. On August 14, 2018,<sup>55</sup> August 15, 2018,<sup>56</sup> November 12, 2018,<sup>57</sup> April 8, 2019,<sup>58</sup> and April 9, 2019,<sup>59</sup> Petitioner's attorneys requested Student's educational records. On January 22, 2020, Witness E sent Petitioner's representatives Student's BIP and report card.<sup>60</sup>

20. On January 23, 2020, DCPS completed a Behavior Intervention Plan ("BIP").<sup>61</sup> The plan was developed to address impulsive behaviors including yelling out, taking others' belongings, and being out of the seat. The plan also addressed aggressive behaviors including hitting students while in line or kicking them under the desk.<sup>62</sup> The plan prescribed the following strategies to change Student's behavior: (1) providing public recognition for work, fist bumps, verbal praise, and smiles when on task, (2) providing a meaningful menu of activities when Student finishes assignments, (3) allowing Student to work with preferred peers, (4) allowing Student to have personal space away from others in the classroom, (5) using a daily behavior chart and checklist, (6) allowing Student the opportunity to engage in positive peer activities, and (7) providing clear, concise and consistent rules and expectations.<sup>63</sup> The plan suggested offering incentives to reinforce appropriate behaviors including (1) being assigned a leadership role or a job assignment in the classroom, (2) spending time with supportive staff in the building, and (3) earned computer time or reading time.<sup>64</sup>

21. On January 23, 2020, DCPS also convened a Section 504 Eligibility Meeting. Witness D and Teacher A reported that they were unaware Student engaging in any egregious behaviors this school year. Teacher A "...noted that [Student] has not shown any aggression toward anyone. [Teacher A] noted that [Student] is almost always distracted. She stated that [Student] is very intellectual but requires redirection often. The Dean of Students, [Dean A], stated that he agrees with [Teacher A] and the FBA. He reported that [Student] has only had 1 incident, in October, when [Student] became frustrated and banged [Student's] head on the desk. [Dean A] reported that, since then, [Student] hasn't shown any aggressive behaviors in class or outside of class. [Dean A] stated that [Student] has had some back and forth with other students but [Student] has not exhibited any aggressive behaviors that have gotten out of control."<sup>65</sup>

[Petitioner] interjected that she has received many phone calls about [Student's] behavior. She reported that she receives phone calls about [Student's] behavior, routinely, specifically about Student fighting and leaving class. She also stated that she too has observed the need for redirection. She reported that [Student] is trying to do better but [Student] is set-

<sup>55</sup> P62:1.

<sup>56</sup> P61:1.

<sup>57</sup> P60:1.

<sup>58</sup> P59:1.

<sup>59</sup> P58:1.

<sup>60</sup> R26-268.

<sup>61</sup> P1.

<sup>62</sup> *Id.* at 1.

<sup>63</sup> *Id.* at 2-3.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> R16:84.

off easily and in class, some of [Student's] peers will pick on [Student]. She reported that [Student] has continued to show some aggression toward [Student's] younger brother. [Petitioner] reported that she stopped making [Student] take [Student's] medication for ADHD and Bipolar disorder. [Witness B] suggested that the school should develop a plan to communicate all behavior referrals to the parent. The Dean of Students, [Dean A], stated that he is the individual responsible for reporting behavior referrals to [Petitioner] and has done so for the behavioral incident that occurred earlier in the school year.

There were no questions about the FBA. [Witness E] moved on to review the BIP.<sup>66</sup>

Resolution Specialist A reiterated that the team had determined that Student was not eligible for specialized instruction. Attorney C and Witness B noted their objections to this decision. The team then determined that Student qualified for a Section 504 Plan.<sup>67</sup> The team developed a plan,<sup>68</sup> but Petitioner declined to sign it. Resolution Specialist A advised Witness B that Petitioner would need to give her consent in writing before services could be initiated.<sup>69</sup> Petitioner gave written consent to the Section 504 Plan on January 27, 2020.<sup>70</sup>

22. The Section 504 Plan includes the following accommodations: Preferential seating as close as possible to adults, blank scratch paper and a sharpened pencil with an eraser, repetition of directions, being tested in a separate location to address Student's attention and focus, extended time on tests, frequent breaks, and small group testing.<sup>71</sup>

23. On February 25, 2020, DCPS issued a PWN indicating that Student was not eligible for services:

Although [Student] has a medical diagnosis of ADHD and Bipolar Disorder the present Confidential Comprehensive Psychological Re-evaluation does not support an educational disability that warrants an Individualized Education Plan IEP. This examiner concluded that a 504 Plan would be appropriate at this time with proper behavioral supports and accommodations to address areas of need. The MDT Team makes the final determination for a student's eligibility for special education and related services based on the data and evidence presented. The team made the decision to keep the eligibility process open (meaning not finalize the paperwork) until the FBA could be reviewed.<sup>72</sup>

24. On the 2019-20 Reading Inventory, Student's reading Lexile score improved

<sup>66</sup> *Id.* The BIP is at R13:71.

<sup>67</sup> *Id.* at 85-86.

<sup>68</sup> R17:89.

<sup>69</sup> R16: 87. R

<sup>70</sup> P38:1.

<sup>71</sup> R17:89-90.

<sup>72</sup> R15:81.

from 9 on September 4, 2019 to 507 on January 29, 2020, which is considered Basic. Year-end Proficiency Ranges are 420-650 for Grade C and 520-820 for Grade D.<sup>73</sup> The growth of 498 Lexile points exceeded the expected growth.<sup>74</sup>

25. Since the beginning of the 2019-20 school year, School A officials have called her approximately ten times to report Student's disruptive behavior.<sup>75</sup>

### 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.<sup>76</sup>

The issues in this case involve neither the appropriateness of a developed IEP nor placement. Therefore, the burden of persuasion is on Petitioner as to all issues presented.<sup>77</sup>

#### **Whether DCPS denied the student a FAPE when it failed to find the student eligible for special education services at meetings on November 6, 2019 and January 23, 2020.**

On August 20, 2019, Petitioner requested that Student be evaluated to determine eligibility for special education services. DCPS conducted an Occupational Therapy Evaluation, an FBA, and a Comprehensive Psychological Re-evaluation in October 2019.

Petitioner has been diagnosed with bipolar disorder and ADHD.<sup>78</sup> In order for a child to be found eligible for services due to bipolar disorder, he or she must meet the criteria for an emotional disturbance:

(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:

<sup>73</sup> R19:109.

<sup>74</sup> R20:113.

<sup>75</sup> Petitioner's testimony.

<sup>76</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>77</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>78</sup> R10:28.

(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.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.<sup>79</sup>

To qualify for services due to ADHD, a student must meet the criteria for the Other Health Impaired classification:

(9) 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—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.<sup>80</sup>

Witness A testified that Student's WISC scores on the Comprehensive Psychological Reevaluation reveal significant academic deficiencies warranting specialized instruction. She noted that Student has a processing deficit in working memory which is evidence of the difficulty Student has in maintaining attention. Witness A also noted that Student has a weakness on the Visual Spatial Index, which measures the ability to evaluate visual details and understand visual spatial relationships. While Student was Low on Working Memory and Below Average on the Visual Spatial Index on the WISC, Student's Verbal Comprehension, Fluid Reasoning, Processing Speed, and Full-Scale IQ were in the average range. Witness A testified that Student has been consistently below grade level in Math and Reading, and that Student's scores on the BASC-3 and the SAED-2 were indicative of an emotional disturbance.

While Witness A testified that Student was consistently below grade level in Math and Reading, the objective evidence does not support this contention. In 2016-17, Petitioner's grades in all core subjects were Proficient and Advanced, including Advanced in Reading, Speaking & Listening, Math, Social Studies, and Science, and Student scored Proficient in TRC. In 2017-18, Student again had Proficient and Advanced grades in all core subjects including Advanced in Math, and Student again was Proficient in TRC. There was regression in Student's performance during the 2018-19 school year, where Student was only Basic in Reading and Writing & Language, but Proficient in Math. Student's TRC score fell to Below

<sup>79</sup> 34 C.F.R. §300.8(a)(4).

<sup>80</sup> 34 C.F.R. §300.8(a)(9).

Proficient. There was further regression during the first term of 2019-20 where Student's grades were Below Basic in Reading, Writing & Language, and Math, and Teacher B stated that Student was below grade level in Math. However, on the Reading Inventory on January 29, 2020, Student's score of 507 was considered Basic, but the Year-end Proficiency Ranges are 420-650 for Grade C.

Student's performance on the WJ-IV also undercuts the contention of significant deficits in math and language arts. Student scored Low Average in Reading Fluency, Reading Rate, and Academic Fluency, which Witness A attributed to Student's deficit in working memory. However, Student was Average in Reading, Basic Reading Skills, Reading Comprehension, Broad Mathematics, Math Calculation Skills, Written Language, Broad Written Language, Written Expression, Academic Skills, Academic Applications, Brief Achievement, Broad Achievement, and High Average in Math Problem Solving.

Petitioner relied on three cases to support the position that DCPS erred in failing to find Student eligible for services. In *Parent v. District of Columbia Public Schools*,<sup>81</sup> DCPS declined to find the student eligible for special education services. The student admitted to setting a fire in the girl's locker room, prompting DCPS to impose a long-term suspension. DCPS then convened an eligibility meeting and a Manifestation Determination Review ("MDR"). During the 2012-13 school year, the student had earned high grades in a number of classes, but failed or nearly failed others. In the first advisory period of the 2013-14 school year, she performed poorly, was excessively absent, and exhibited poor behavior in all of her classes. Petitioner's expert testified that the student's mood disorder caused her to act impulsively and impaired her ability to make sound decisions. Thus, for example, she cut class and engaged in destructive behaviors with classmates. The expert also testified that her setting the fire was a manifestation of a disability of emotional disturbance due to her mood disorder. The MDR team determined that the student was not eligible for special education services, but reserved a final decision until the school trialed some interventions to determine if interventions would successfully address her poor academic performance, attendance and behavior. The team indicated that it would consider further evaluations if the interventions were unsuccessful. Despite finding the student ineligible for services, it proceeded with an MDR team, which determined that the arson was not a manifestation of a suspected disability. When the team "left open the issue of whether the student might be eligible," the Hearing Officer ruled that this deferral of a decision on eligibility constituted a suspected disability, thereby affording the student protection under IDEA. The Hearing Officer made no ruling on eligibility, but he found that Petitioner's expert's testimony, that the student's truancy and arson were symptoms of her mood disorder, was uncontroverted. Therefore, he ruled that the student's behavior was a manifestation of her suspected emotional disturbance.

In *Hansen v. Republic R-III School District*,<sup>82</sup> Republic's Due Process Panel found the student ineligible for services, but this decision was reversed by the district court, which found that the child met the statutory definition of a child with a disability. The Eighth Circuit upheld the district court. The court noted that the student received numerous disciplinary referrals over a four-year period for threatening students, fighting students, treating peers and teachers disrespectfully, threatening Republic's mental health clinician, struggled to pass his

<sup>81</sup> 114 LRP 3336 (2013).

<sup>82</sup> 623 F.3d 1024 (8th Cir. 2011).

classes, failed the standardized test required to advance to the next grade, “and suffered academically because of his diagnosed bipolar disorder.”<sup>83</sup> On this issue, the court noted that the student had difficulty focusing during tutoring session, that his concentration improved after he began taking ADHD medication, Republic’s clinician found that the student’s hyperactive, impulsive, and inattentive behavior severely impaired his ability to learn, and the student passed his standardized test once he retook it on the ADHD medication.<sup>84</sup> The court distinguished *Springer v. Fairfax County School Board*,<sup>85</sup> where the student had progressed successfully from grade to grade, had maintained positive relationships with teachers and peers, and despite a significant deterioration in his behavior, continued to score in the average to superior range on standardized tests, and the consensus among psychologists was that he did not suffer from an emotional disturbance.<sup>86</sup>

In *H.M. v. Weakley*,<sup>87</sup> the student suffered from major depression and post-traumatic stress disorder (“PTSD”). After being placed on antidepressant drugs, she was still unable to attend a regular school because her anxiety level interfered with her concentration, her teachers rated her as “at-risk” with “Depression in the Clinically Significant range,” as well as low adaptive skills, had failing grades during her junior year, failed to turn in work, cheated in school, skipped school, and had a “recurrent pattern of acting-out, disruptive, negative attention-seeking behavior in the academic setting, and was recommended for long-term residential treatment. The court reversed the ALJ’s finding of not eligible, finding that “it is more likely than not that her major depression, not just her misconduct and manipulation, underlay her difficulties at school, and accused the ALJ of “cherry-picking” evidence in the record to justify a negative determination.

Each of the cases cited by Petitioner is distinguishable from the facts in this proceeding. In *Parent v. District of Columbia Public Schools*, the Hearing Officer did not rule that the student was eligible for special education services. Rather, because the MDR deferred a decision on eligibility, the Hearing Officer ruled that the student was, at least temporarily, entitled to IDEA protections due to a “suspected disability.” Thus, the student’s arson was deemed a manifestation of her suspected disability, and she should not have been suspended. *Hansen* is distinguishable as to the student’s academic performance. There, the student struggled to pass his classes, failed the standardized test required to advance to the next grade, “and suffered academically because of his diagnosed bipolar disorder.” In this case, Student was consistently promoted from grade A to grade D with Proficient and Advanced grades in the core subjects. Only Student’s first-term 2019-20 report card reflects Below Basic grades in a core subject. Similarly, the student in *H.M. v. Weakley* had a history of very poor academic performance, unlike Student, and whose conduct was so disruptive as to warrant a recommendation for a residential placement.

The evidence is clear that in past years, Student exhibited *behaviors* that would meet the requirements for the classifications of emotional disturbance and other health impaired. In 2017-18, school officials called Petitioner 20-30 times to report Student’s disruptive

<sup>83</sup> *Id.* at 1027.

<sup>84</sup> *Id.* at 1028.

<sup>85</sup> 134 F.3d 659 (4th Cir. 1998).

<sup>86</sup> 623 F.3d at 1027.

<sup>87</sup> 2015 WL 1179615, 65 IDELR 68 (W.D. Tenn. 2015).

behavior including running out of class and fighting. In the 2018-19 school year, the record reflects that Student had 43 “office referrals,” which may or may not include the seven Dean Office Referrals documented by Witness C in the Psychological Reevaluation, for leaving the classroom without permission, lying or giving misleading information to school staff, inappropriate or disruptive physical contact between students, engaging in reckless behavior that may cause harm to self or others, fighting where there is no injury or weapon, and directing profanity or obscene/offensive gestures toward staff. On the Psychological Reevaluation, Witness C found that In Atypicality, Student’s score was in the Clinically Significant range, while in Attention Problems and Hyperactivity, Student scored in the At-Risk range.

However, to qualify for either classification, the record must also show that the condition adversely affects the child’s educational performance. During the 2016-17 school year, Student scored Proficient in TRC, was performing at grade level, and had Proficient and Advanced grades in Student’s core subjects. There was no indication in the record of significant behavioral problems during the 2016-17 school year. During the 2017-18 school year, Student again scored Proficient in TRC and was Proficient and Advanced in all core subjects. In the 2018-19 school year, Student had regressed from Proficient in the middle of the school year, to Below Proficient at the end of the school year in TRC. Student’s final grades were Basic in Reading and Writing & Language, Proficient in Speaking and Listening, and Math, and Advanced in Music and Health & Physical Education.. Student had 27 unexcused absences during the school year.

Student’s worst grades were earned during the first term of the 2019-20 school year. Below Basic in Reading, Writing & Language, Math, and World Languages, Basic in Speaking and Listening, Music, and Art, and Proficient in Health & Physical Education. Student was performing below grade level in Math and Reading; the opinion about Student’s Reading level was based on Student’s score of 9 on the Reading Inventory given in August 2019. But Teacher B thought Student had the ability and potential to do much better by working on staying focused in class. On the first term Report Card, Teacher B reported that Student was doing better on fast math facts. A week later, on the Reading Inventory on January 29, 2020, Student’s score of 507 was considered Basic, but the Year-end Proficiency Ranges are 420-650 for Grade D. This clearly refutes data indicating that Student can read only at a grade A level. Petitioner performance on the WJ-IV in October 2019, where Student’s scores in the 19 categories were Average to High Average in 15 of those categories, also indicates that Student is making academic progress.

Curiously, Student’s poor first term grades coincide with the best reported behavior since the 2017-18 school year. At the time of the Psychological Reevaluation on October 18, 2019, there were no records of any disciplinary action during the current school year.<sup>88</sup> Teacher B reported on the Report Card on January 22, 2020 that Student was nearly always distracted, and at the Section 504 meeting on January 23, 2020, Witness A reported the same. However, Witness D and Teacher A reported that they were unaware of Student engaging in any egregious behaviors this school year. Dean A reported that Student had only had one incident this school year, in October, when Student became frustrated and banged Student’s head on the desk. Since then, Student had not shown any aggressive behaviors in class or

<sup>88</sup> P.2: 27.



outside of class. It is also noteworthy that Student's diminished aggression during the current school year occurred despite Petitioner withholding Student's medication since August 2019.

I conclude that Petitioner has failed to prove by a preponderance of the evidence that Student's ADHD and bipolar disorder have an adverse effect on Student's educational performance. Here, Student achieved Proficient grades despite disruptive behavior and distractibility throughout the 2017-18 school year. Despite numerous office referrals, Dean Office referrals, and distractibility in the 2018-19 school year, Student was Basic in language arts and Proficient in Math. In the first term of the current school year, reports of Student's aggressive behavior ended, but Student's grades were lower than ever. Nevertheless, Student's scores on the WJ-IV and the January 29, 2020 Reading Inventory reveal Student's ability to perform at grade level in Math and Reading. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*,<sup>89</sup> the Supreme Court stated that the goal and purpose of a special education IEP is "to enable the child to achieve passing marks and advance from grade to grade."<sup>90</sup> Despite behavior problems including severe aggression and distractibility, Student has been able to achieve better than average grades without accommodations, and standardized testing confirms Student's educational progress. DCPS has determined that Student has shown the ability to make academic progress despite behavioral issues, that Student's behavior has improved during the current school year, and that Student's behavioral issues can be adequately addressed short of specialized instruction, through a Section 504 Plan. For the reasons stated above, Petitioner has not met her burden of proving that this determination constitutes a denial of FAPE.

**Whether DCPS denied the student a FAPE by failing to permit the student's educational advocate to observe the student in the educational setting.**

At the conclusion of the testimony, Petitioner withdrew the allegation regarding the denied observation.

**Whether DCPS denied the student a FAPE by failing to provide Petitioner the student's educational records.**

The regulations require local education agencies to provide parents the opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child.<sup>91</sup> The evidence in the record as to record requests and responses thereto is as follows: On August 14, 2018,<sup>92</sup> August 15, 2018,<sup>93</sup> November 12, 2018,<sup>94</sup> April 8, 2019,<sup>95</sup> and April 9, 2019,<sup>96</sup> Petitioner's attorneys requested Student's educational records. On August 22, 2019, DCPS provided Petitioner's counsel, *inter alia*, the following documents: (1) Grade A, B, and C report cards,

<sup>89</sup> 458 U.S. 176, 187 (1982).

<sup>90</sup> *Id.* at 203-04.

<sup>91</sup> 34 C.F.R. §300.501.

<sup>92</sup> P62:1.

<sup>93</sup> P61:1.

<sup>94</sup> P60:1.

<sup>95</sup> P59:1.

<sup>96</sup> P58:1.

(2) iReady reports from June 2, 2017 and January 18, 2018, and (3) Dibels testing reports from May 25, 2017, June 4, 2018, and June 3, 2019. On October 28, 2019, DCPS provided Petitioner the Comprehensive Psychological Evaluation, the Functional Behavior Assessment, and the Occupational Therapy Evaluation. On January 22, 2020, Witness E sent Petitioner's representatives Student's BIP and report card.

In his closing statement, Petitioner's counsel did not reference any specific document that he had requested prior to the filing of the *Complaint* that DCPS had not provided. Nor did he state any basis for believing that education records of Student exist that DCPS has not provided. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to provide her an opportunity to inspect and review Student's education records.

### **RELIEF**

For relief, Petitioner requests, *inter alia*, that (1) DCPS find the student eligible and develop an appropriate Individualized Education Program ("IEP"), (2) DCPS fund compensatory education services for missed services since November 6, 2019, (3) Petitioner's educational advocate be permitted to observe the student in the classroom, and (4) DCPS provide Petitioner with all outstanding records.

### **ORDER**

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, 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: May 31, 2020

Copies to: Attorney A, Esquire  
Attorney B, Esquire  
OSSE Office of Dispute Resolution  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS