District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Guardian, on behalf of Student,[1] Petitioner,	)	
	)	**Hearing Date: 8/29/19 (Room 423)**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2019-0152**
District of Columbia Public Schools, Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently ineligible for services (the "Student"). A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on June 17, 2019. The Complaint was filed by the Student's grandmother, who is also his/her guardian ("Petitioner"). On June 27, 2019, Respondent filed a response. The resolution period expired on July 17, 2019.

II. 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. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

III. Procedural History

On July 31, 2019, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on August 5, 2019, summarizing the rules to be applied in this hearing and identifying the issues in the case. The original Hearing Officer Decision ("HOD") due date was August 31, 2019. Because of the unavailability of counsel and witnesses, and to allow a hearing to be scheduled on August 29, 2019, Petitioner filed a motion for continuance, on consent. This Hearing Officer granted the motion on August 31, 2019, extending the decision date to September 14, 2019.

There was one hearing date: August 29, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-12. There were no objections. Exhibits 1-12 were admitted. Respondent moved into evidence exhibits 1-20. There were no objections. Exhibits 1-20 were admitted. Written closing statements were presented by both sides on August 29, 2019.

Petitioner presented as witnesses: Witness A, the Student's case manager at Agency A; and Witness B, a clinical psychologist (expert: clinical psychology). Respondent presented as witnesses: Witness C, a school psychologist (expert: school psychology).

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issue to be determined in this case is as follows:

Did DCPS fail to determine that the Student was eligible for services as a student with emotional disturbance at the meeting on or about May, 2019, and therefore fail to provide the Student with an Individualized Education Program ("IEP")? If so, did DCPS act in contravention of 34 CFR 300.300.8(c)(4) and related provisions? If so, did DCPS deny the Student a FAPE?

As relief, at the prehearing conference, Petitioner sought a determination that the Student is eligible for services, compensatory education, and a therapeutic educational placement.

V. Findings of Fact

1. The Student is an X-year-old who is not currently eligible for special education services. The Student did not attend his/her assigned school, School C, for the 2018-2019 school year. The Student has stated that s/he dislikes school and considers teachers to be unfair, uncaring, and overly demanding. The Student worries a lot about school. The Student also worries about social issues, feels inadequate, has health-related problems, and is isolated and alone. The Student has difficulty getting out of bed, is very depressed, has poor hygiene, and wears "heavy clothing." P-5-10-11; Testimony of Witness A; Testimony of Witness B.

2. The Student first developed a dislike toward school while attending School A, feeling that the school was "dirty" and that his/her teacher was "petty." The Student then changed schools, but continued to have difficulty at school, felt bullied, and began to develop physical symptoms at school. The Student then attended School B beginning in the 2016-2017 school year. The Student initially enjoyed chorus at the

school, but eventually became overwhelmed by homework and began experiencing physical symptoms, including panic attacks. The Student felt the school day was too long, felt that s/he was forced to participate in activities, reported that s/he was bullied, and had few friends. The Student continued to attend School B throughout the 2016-2017 and 2017-2018 school years. P-11-1-2.

3. On or about August 29, 2017, the Student was tested via Scholastic Reading Inventory ("SRI"). The SRI testing indicated that the Student was reading on grade level at the time, with a score at the Lexile level of 1249. P-1-5.

4. For the 2017-2018 school year, the Student failed two classes during this school year and did not receive credit for either one: world history, where the Student received an "F" grade in every term; and geometry, where the Student received an "F" grade in in every term but one, when s/he received a "C+." In chemistry, the Student received grades ranging from "A" to "D," with a final grade of "B-." In English II, the Student's grades ranged from "B-" to "D," with a final grade of "C-." In Spanish, the Student received grades ranging from "C+" to "B," with a final grade of "B." The Student received higher grades in non-academic classes such as Singing II (final grade, "A-"), Piano and Music Theory II (final grade, "A-"), and Choir II (final grade, "B"). P-1; P-11.

5. The Student began the 2018-2019 school year by again attending School B. The Student had issues with attendance at the school and, as a result, a plan for the Student's education was developed pursuant to Section 504 of the Rehabilitation Act of 1973 ("Section 504"). The Student's Section 504 plan found that the Student had issues with working individually, learning, concentrating, sleeping in class, and reading. The

plan recommended that teachers should provide the Student with checks for understanding, use of a fidget, visual cues and prompts, frequent breaks, breaking assignments into chunks, extended time, preferential seating, and small group testing. The plan also recommended sixty minutes per month of counseling and indicated the following counseling goals: identify stressors, discuss coping skills, and use problem-solving skills. P-2; Testimony of Witness A.

6. Toward the end of October, 2018, the Student was "removed" from School B and assigned to School C. However, the Student has refused to attend School C. The Student dislikes the school and has expressed wariness about safety at the school, and Petitioner believes School C has a poor reputation. P-11; P-6-2; Testimony of Witness A.

7. On February 6, 2019, Petitioner asked DCPS to evaluate the Student to determine if the Student was eligible for special education services, citing the Student's diagnoses of Major Depressive Disorder and Generalized Anxiety Disorder. P-3-1.

8. DCPS then reviewed some of the Student's records, including report cards, testing, and attendance records, and prepared an "Analysis of Existing Data" report. These documents reported that the Student had not attended School C during the school year, had received a score of 730 on PARCC geometry testing, and had received a score of 738 on PARCC reading testing. Both scores were considered to be "approaching expectations" in the subjects. P-4; R-15.

9. On or about April 29, 2019, Witness C conducted testing on the Student. On the Woodcock Johnson Tests of Cognitive Abilities, 3rd Edition ("WJ-IV Cog"), the Student fell in the high average range in reading, average range in math, and superior

range in writing, a "significant strength." On the Woodcock-Johnson Tests of Achievement, Form B ("WJ-IV Ach"), the Student's scores were above, at, or near grade level. Behavior Assessment System for Children, Third Edition ("BASC-3") scales, as calculated through the response of Witness A, indicated that the Student had "clinically significant" issues with externalizing problems, internalizing problems, school problems, adaptive skills, social skills, leadership, and study skills. Testing on the "Guess Why Game" showed that the Student was preoccupied with being picked on, and on the Revised Children's Manifest Anxiety Scale, Second Edition ("RCMAS-2"), the Student's anxiety was deemed to be clinically significant across several functional areas. P-5.

10. Witness C concluded that the Student had an emotional disturbance pursuant to applicable law because of his/her: 1) inability to learn; 2) relationship problems; 3) unhappiness; 4) depression; and 5) physical symptoms and fears. Witness C concluded that all of these symptoms had been occurring over a long period of time. Witness C therefore recommended that the Student receive behavioral support services and that the school "insist" on the Student's attendance, put a special effort into establishing a personal relationship with the Student, place the Student with other students who have "good habits," allow the Student to leave class, and eliminate time restraints for the Student. P-5-14-16.

11. An eligibility meeting was held on May 6, 2019. Attending the meeting were Petitioner, the Student (via phone), Witness A, Special Education Coordinator A, Special Education Teacher A, Science Teacher A, and Witness C. The team went over the Student's PARCC and achievement testing results, noted that the Student's scores were strong in mathematics, reading, and written language, and observed that the primary

concern was the Student's social and emotional needs. The DCPS members of the team felt that a Section 504 plan would meet the Student's needs by providing counseling. Witness A indicated that the Student needed to be in smaller classes. Petitioner indicated that the Student had become disinterested in school at School B, and Petitioner did not want to send the Student to School C because of its reputation. Petitioner also expressed discomfort with the distance between the School C and the Student's home, which resulted in expenses. The Student said that s/he wanted to go to work and did not want to go to school, except for an online school. The Student said that s/he did not want to sit in a classroom for seven hours a day. Special Education Coordinator A related that the Student had a particular problem with School C, and suggested that the Student go to School D because a traditional school is not what the Student requires. The team concluded that the Student's Section 504 plan should be updated, that the Student requires an attendance plan and a behavior intervention plan, and that additional interventions should be tried before the Student could be deemed to be eligible for services. P-6; Testimony of Witness A; Testimony of Witness C.

12. A Final Eligibility Determination Report was written on May 6, 2019. The report indicated that the Student's disability adversely affected his/her performance because the Student has not attended school since being enrolled at the end of October, 2018. R-13.

13. Witness B evaluated the Student on August 13, 2019, a little more than two weeks prior to the hearing date. She found the Student to be a very depressed adolescent. Witness B administered the Minnesota Multiphasic Personality Inventory Adolescent-Restructured Format ("MMPI-A-RF") to the Student, which indicated that

s/he had severe emotional distress with physical manifestation of the distress. The Student was diagnosed with Major Depressive Disorder ("MDD"), Generalized Anxiety Disorder ("GAD"), Binge-Eating Disorder, and Circadian Rhythm Sleep-Wake Disorder, Delayed Sleep Phase Type. P-11.

VI. 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.

See D.C. Code § 38-2571.03(6)(A)(i)

The sole FAPE issue in this case involves a challenge to DCPS's eligibility determination. While this issue does relate to whether the Student should or should not have an IEP, this issue does not directly relate to the "appropriateness" of the Student's existing or proposed IEP or placement. Accordingly, on this issue, the burden of persuasion is with Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

Did DCPS fail to determine that the Student was eligible for services as a student with emotional disturbance at the meeting on or about May, 2019, and

therefore fail to provide the Student with an IEP? If so, did DCPS act in contravention of 34 CFR 300.300.8(c)(4) and related provisions? If so, did DCPS deny the Student a FAPE?

The purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs, provided in conformance with a written IEP (i.e., a FAPE). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

A student may become eligible for services after an eligibility team determines that the student fits within one of the categories of disability listed in the applicable regulations. 34 CFR Sect. 300.308(a)(1). One such category is "serious emotional disturbance," which is also referred to as "emotional disturbance" in the federal and District of Columbia regulations. Emotional disturbance is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c)(4)(i); 5-E DCMR Sect. 3001.1.

There is no dispute that the Student suffers from an emotional disturbance as defined by the applicable regulations. Witness C, the DCPS psychologist who evaluated the Student in April, 2019, concluded as much in his report of April 29, 2019. The report stated that the Student manifested all five characteristics of long-term emotional disturbance cited in the regulations, and only one such characteristic has to be identified to establish that a student has emotional disturbance under the IDEA. Witness C explained that the Student's depression, attitude toward school, somatization, and withdrawal have led to the Student having issues with happiness, school attendance, and isolation from peers.

However, not all students with emotional disturbance are eligible for special education services. A student deemed to have emotional disturbance may be eligible for special education services only if that emotional disturbance adversely affects the student's academic performance to the extent that the student, "by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(a)(2); Mr. and Mrs. I. v. Maine School Administrative District No. 55, 480 F.3d 1, 13 (1st Cir. 2007).

There is no dispute that the Student's academic performance has been adversely affected by his/her emotional disturbance. The parties agreed that the Student's emotional disturbance caused the Student to remain at home rather than attend School C after the Student was placed at School C in October, 2018. The Student instead spent his/her time in his/her room, sleeping during the day, learning virtually nothing, and seeing virtually no people.

The main dispute in this case is whether the "adverse effect" of the Student's emotional disturbance, i.e., the Student's attendance issues, can be effectively addressed

by the provision of special education services at this point. At the Student's eligibility meeting, DCPS simply took the position that the Student does not need specialized instruction to function in the classroom because s/he performs on or about grade level in general education classes. DCPS contended that, since the Student does not need "specialized instruction" from a certified special education teacher, the Student is not eligible for special education services. In fact, students who advance from grade to grade in general education classes, and who function at or near grade level, may nevertheless be eligible for services under the IDEA because special education services consist of more than merely "specialized instruction." Indeed, the District of Columbia Municipal Regulations ("DCMR") does not state or suggest that special education must be "specialized instruction" by a special education teacher. Instead, the DCMR states that "special education" is "specially designed instruction, at no cost to the parent, to meet the unique needs of a child with a disability, including the instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." Instruction is deemed to be "specially designed" if there is "adaptation of content, methodology, or delivery of instruction, as appropriate to meet the unique needs of a child with a disability in order to ensure access to the general curriculum, so that the child can meet the educational standards that apply to each child within the jurisdiction of the District." 5-E DCMR 3001.1

Accordingly, in A.A. v. District of Columbia Public Schools, 70 IDELR 21 (D.D.C. 2017), a case involving a bright student with severe emotional problems, Judge Reggie B. Walton reversed the hearing officer who determined that the student in that case was ineligible for services because the student had good grades. Judge Walton

relied on the testimony of a witness who said that the student needed "special behavior management techniques to access the curriculum, because her functioning fluctuates during the school day." Similarly, in L.J. v. Pittsburg Unified School District, 850 F.3d 996 (9th Cir. 2017), the parties agreed that the child met the IDEA's standards for specific learning disability, other-health impairment, and serious emotional disturbance, but the school district maintained that the child did not need special education because he was performing academically at an average or above average level. The court held that the child should have been found eligible for services because he was in need of special education, stressing that his successful academic performance occurred when he was provided services, including specially designed mental health services, assistance from a one-on-one aide, and the school district behavior specialist's clinical interventions.

Additionally, in M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 256 (S.D.N.Y. 2014), a case squarely on point, a federal judge reversed a state review officer who focused on an assessment of a student's grades without considering the more fundamental question of whether the student could even attend school. In reversing the state review officer, the court found that the student, who had significant attendance issues, needed home instruction in order to be educated, and that such home instruction was a form of specialized instruction. The court stated that: "(t)he government must find ways to open the school house doors, by helping children who suffer from emotional problems to attend school." See also Marshall Joint Sch. Dist. No. 2 v. C.D., 592 F. Supp. 2d 1059 (D. Wisc. 2009) (modifications deemed specially designed instruction); Bd. of Educ. of Montgomery Cty. v. S.G., 45 IDELR 93 (D. Md. 2006) (general education student with passing grades and recent psychiatric events deemed eligible, with

court noting that specialized instruction does not have to relate to the content or direct delivery method of the instruction); Yankton School District v. Schramm, 93 F.3d 1369 (8th Cir. 1996) (orthopedic impairment caused child to need transition services that IDEA provides for, even if some of those needed services and accommodations were also required under Section 504); Memorandum to State Directors of Special Educ., 65 IDELR 181 (OSEP 2015) (noting that high cognition does not bar eligibility).

As in M.M., the school district in this case should have found the Student to be eligible and offered services to the Student that might have addressed his/her attendance issues. The psychological evaluation of Witness B indicated that the Student would have gone to school if s/he had been provided with an environment that was specially geared to students with emotional disturbance. Even more convincing were the Student's own statements at the eligibility meeting on May 6, 2019. While the Student discussed his/her dislike of education at the meeting, the Student also suggested that s/he would have participated in education if it were fashioned in such a way to address his/her emotional issues. Specifically, the Student said that s/he wanted his/her own schedule and an "online school," and did not want to be "stuck in a classroom for seven hours a day."

It is noted that, at the eligibility meeting, DCPS took the position that the Student's issues could have been resolved through accommodations at the school and sixty minutes a month of counseling, which was the proposal in the Section 504 plan. But an offer of counseling with related accommodations at school cannot help a student who refuses to go to school. It was apparent from the testimony of Witness A and Witness B that the Student is currently in great distress. There is no reason to believe that the mere availability of counseling and accommodations at School C, or at any school,

will cause the Student to suddenly want to attend a traditional school at this point in his/her academic career.

DCPS argued that this Hearing Officer recently ruled to the contrary in a case involving a student who would not attend school and submitted a copy of that decision. Hearing Officer Determination, Case # 2019-0077 (Lazan, IHO) (D.C. Office of Dispute Resolution) (June 10, 2019). However, in Case # 2019-0077, the student did not attend school because the student was assigned to a highly competitive general education school that the student could not manage academically. Other general education schools appeared suitable for the student. In this case, however, DCPS proposed no other viable options for the Student, though, at the Student's eligibility meeting, DCPS did propose that s/he could possibly explore an alternative general education program at School D. But the record does not establish that School D is a fit for this Student. There was little, if any, discussion of the program at School D, and there was no testimony explaining how the Student's assignment to School D could result in the Student actually attending school.

As a result of the foregoing, the Student is hereby determined to be eligible for services as a student with an emotional disturbance.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a

hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

At the prehearing conference, Petitioner indicated that she was seeking compensatory education.[2] But Petitioner did not call a witness or present a plan to explain what compensatory education services should be due. Even more tellingly, Petitioner did not mention compensatory education during closing argument, which solely focused on the Student's eligibility and placement. Gill ex rel. W.G. v. District of Columbia, 770 F. Supp 2d 112 (D.D.C. 2010) (hearing officer cannot order compensatory education without any evidence). Under the circumstances, this Hearing Officer must deny any compensatory education award. It is noted that if DCPS had determined the Student to be eligible for services at the May 6, 2019, meeting, DCPS would not have been obliged to provide Petitioner with an IEP for an additional thirty days, by which time the school year would have been almost over.[3]

At the prehearing conference, Petitioner also sought placement of the Student at a "therapeutic school." However, Petitioner did not present any witness from a proposed school at the hearing, did not request placement at any particular school, and did not even

[2] In regard to the request for compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student").

[3] In the District of Columbia, the local education agency ("LEA") must conduct an initial evaluation to determine a child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code Sect. 38–2561.02(a). Once the eligibility determination has been made, the LEA must conduct a meeting to develop an IEP within thirty days. 34 CFR Sect. 300.323(c)(1); G.G. ex rel. Gersten v. District of Columbia, 924 F.Supp. 2d 273, 279 (D.D.C. 2013).

specifically describe what a "therapeutic school" is, except to reference Witness B and her report. However, Witness B's report describes "therapeutic school" only in general terms, mentioning that it is a placement with "teachers who have experience in working with students with emotional disturbance" and "highly coordinated services."

Indeed, Petitioner softened her request for a therapeutic placement during closing argument, explaining that she wants DCPS to reconvene an IEP team to consider Witness B's recommendation that the Student be provided with a therapeutic setting. This is a reasonable request. Under the circumstances, given the Student's unique needs, the matter of the Student's placement shall be reviewed by an IEP team within twenty school days to create an IEP for the Student. The IEP team must consider the recommendations in Witness B's August, 2019, report, as well as the Student's apparent preference for a school program that is home-based.

VII. Order

As a result of the foregoing, the following is ordered:

1. The Student is hereby deemed to be eligible for services as a student with emotional disturbance;

2. Respondent shall convene an IEP team within twenty school days to create an IEP for the Student;

3. At such IEP review, the team will meaningfully consider the placement recommendations of Witness B and statements of the Student from the May, 2019, eligibility meeting;

3. Petitioner's other requests for relief are hereby denied.

Dated: September 14, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
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VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: September 14, 2019

Michael Lazan
Impartial Hearing Officer