

DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
Student Hearing Office  
810 First Street, N.E.  
Washington, D.C. 20002

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STUDENT HEARING OFFICE  
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Parent <sup>1</sup> , on behalf of	)	
Student,	)	
	)	
Petitioner,	)	
	)	Hearing Officer: James McKee
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC	)	
SCHOOLS	)	Hearing Date: February 17, 2012
	)	
Respondent.	)	

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HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 *et seq.*, against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a 14 year-old boy who resides in the District of Columbia and who presently attends a DCPS Middle School. The Student is not classified as a Student with a disability under the IDEA.

On December 22, 2011, Petitioner filed a Due Process Complaint (DPC) against DCPS alleging that DCPS inappropriately determined that the Student was ineligible for special education services under the IDEA during a meeting held on December 20, 2011.

On January 6, 2012, DCPS filed its response. DCPS asserted a general denial to the allegations contained in the DPC and asserted that the Student did not meet the criteria for eligibility under the IDEA based on teacher reports, a social worker report, grades and evaluations (DCPS Response).

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<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

The Resolution period expired on January 21, 2012. The Resolution session was held on January 25, 2012. The parties did not resolve the issues raised in the DPC. The initial forty-five day HOD timeline began on January 22, 2012.

The prehearing conference (PHC) was held on January 31, 2011. Counsel for Petitioner and counsel for DCPS participated in the PHC. During the conference, the parties discussed the issues raised in the DPC and Petitioner's requested relief (set forth below). It was agreed that the Due Process Hearing (DPH) would be held on February 17, 2012 and that the disclosures would be filed by February 10, 2011.

The disclosures were filed as agreed on February 10, 2012. Petitioner's Exhibits 1-30 were admitted into evidence. Respondent's Exhibits 1-6 were also admitted into evidence.<sup>2</sup>

At the impartial hearing, counsel for Petitioner advised that the only issue for the hearing was whether the Student school be found eligible as a Student with a disability under the IDEA based on an "Emotional Disturbance" (ED) and/or a "Specific Learning Disability (SLD) classification and, if so, requested that DCPS be directed to convene a MDT meeting to develop an appropriate IEP for the Student or have the Hearing Office (HO) find the Student eligible and develop an IEP for the Student. Petitioner withdrew all other claims raised in the DPC (Statement of Petitioner's Counsel).

The following witnesses testified on behalf of the Petitioner: Parent and Advocate.

The following witnesses testified on behalf of the Respondent: School Psychologist.

## II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEA), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f); 34 C.F.R. §300.513.

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<sup>2</sup> A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

### III. ISSUES PRESENTED

The following issue was certified for adjudication at the due process hearing:

Whether DCPS denied the Student a FAPE by failing to determine that the Student was eligible for special education services under the IDEA based on an ED and/or a SLD classification at a meeting held on December 20, 2011.

Petitioner requests an Order directing DCPS to convene a MDT meeting to develop an appropriate IEP for the Student or have the Hearing Officer (HO) find the Student eligible and develop an IEP for the Student.

### IV. FINDINGS OF FACT

Based upon the evidence adduced at the Due Process Hearing, I make the following findings of fact:

The Student is a 14-year-old boy who resides in the District of Columbia. At an MDT meeting held on December 20, 2012, DCPS found the Student ineligible for special education services under the IDEA.

During the 2010-2011 school year the Student attended a Charter School that is its own Local Educational Agency (LEA). While at the Charter School, the Student received numerous discipline referrals for oppositional behavior and for fighting with other students. As a result of his behavior, he was suspended several times (Testimony of Petitioner and Exhibit 22). On or about November 2010, the Student was expelled from the Charter school for carrying a gun to school (Exhibit P-11, 18). From November 2010 to April 2011, the Student did not attend any school (Testimony of Petitioner).

Prior to attending the Charter School, the Student attended 4 other DCPS schools from first grade through sixth grade. The student was suspended from each of these schools (Testimony of Petitioner).

On or about March 11, 2011, Petitioner filed a DPC against DCPS and the Charter School for violations pertaining to DCPS "child find" obligations and DCPS' failure to hold a manifestation determination (DCP).

On or about March 22, 2011, Petitioner executed a Settlement Agreement (SA) with the Charter School (Exhibit P-3). Pursuant to the SA, the Charter School agreed to conduct a comprehensive psychological assessment (Exhibit P-3).

On or about April 2011, Petitioner placed the Student at a DCPS School (Academy), which was a temporary placement for students on long-term suspensions (Testimony of Petitioner). The Academy has a rolling admission. The Academy is a highly structured environment with intensive behavior supports available to all students. During his placement at the Academy, the Student was taught in a class of 2- 4 students and received one hour of behavior support services in the form of counseling for 45 minutes each day (Testimony of Petitioner). The Student remained at the Academy until November 2011. During his time at the Academy, the Student received 6 discipline referrals (Testimony of Petitioner and Exhibits 8, 10, 1314, 15, 16). Nevertheless, due the small and highly structured classroom and the intensive behavior supports, the Student's academic performance and behaviors improved at the Academy (Testimony of Petitioner, P-7).

On May 5, 2011, Petitioner executed a SA with DCPS. DCPS agreed to provide compensatory educational services and to convene a meeting to review the psychological assessment conducted by the Charter School and determine whether the Student was eligible for special education services under the IDEA (Exhibit P-32).

The Charter School completed a psychological evaluation on May 20, 2011 (Exhibit P-4). The tests administered to the Student as part of the psychological evaluation included the following: BASC II: completed by Student, Parent and Student's teacher. Berry-Buktenica Developmental Test of Visual Motor Integration (VMI); House Tree Person Drawing; Incomplete Sentences Techniques; Wechsler intelligence Scale for Children (IV Edition) (WISC IV); Woodcock Johnson III; parent interview, Student interview and Teacher interview (Exhibit P-4).

The results of the WISC IV revealed that the Student was in the "Low Average" range cognitively, with a particular weakness in perceptual reasoning (Low Average), which measures visual processing and problem solving abilities and a weakness in process speed (Borderline), which measures "paper and pencil speed and accuracy" and is characteristic of students struggling with attention deficits (Exhibit P-4, pages 5-6).

The results of the Woodcock Johnson III revealed that the Student's academic functioning was at the 2<sup>nd</sup> grade to 5<sup>th</sup> grade level, with the exception of "applied problems" where he scored at the early 6<sup>th</sup> grade level and "handwriting," where his score was "Average" (Exhibit P-4, pages 6-7).

With respect to the Student's social emotional functioning, the BASC II rating scale, which was administered to the Parent, Student and the Student's teacher, revealed attention deficits, hyperactivity issues, depression

and aggressive behavior, among others issues (Exhibit P-4, page 8). The Student's teacher reported that these behaviors were in the "clinically significant" range (Exhibit P-4, page 8).

The House Tree Person Drawing and Incomplete Sentences Technique demonstrated aggression and conduct problems as well as attention and hyperactivity (ADHD) and a mood disorder (Exhibit P-4, page 9, Exhibit P-9).

The VMI reflected Average visual -motor integration and motor skills compared to his peers (Exhibit P-4).

The evaluator's diagnostic impressions included: Attention Hyper-Activity Disorder, a Learning Disability (NOS), Oppositional Defiant Disorder and Dysthymic Disorder (Provisional). The evaluator recommended eligibility for special education services as a student with "multiple disabilities", which would account for the Student's learning and emotional disabilities. The evaluator recommended a small structured classroom, tutoring, a Functional Behavioral Assessment (FBA) and individual therapy (Exhibit P-4).

The Student's slow processing speed makes learning difficult for him resulting in problems completing assignments in math, reading and written language (Exhibit P-4).

The Student's symptoms of aggression, oppositional behaviors and depression have made him unavailable for academic instruction and impact his ability to learn (Exhibit P-4).

On May 26, 2011, the Charter School held a meeting and determined that the Student was eligible for special education services under the IDEA under a LD and ED classification (Exhibit P-9). However, the team did not develop an IEP because the Student was not attending the Charter School at the time (Exhibit P-9, Testimony of Petitioner).

On June 30, 2011, DCPS convened a meeting to review the psychological assessment conducted by the Charter School. DCPS determined that there was not enough data to support eligibility and therefore declined to classify the Student as a child with a disability (Exhibit P-5). Specifically, DCPS found that the psychological assessment conducted by the Charter School did not include the Student's present levels of performance and did not include a classroom observation (Exhibit P-5)

Petitioner and Petitioner's Advocate believed that there was sufficient data to support eligibility at the June 30, 2011 meeting (Testimony of Petitioner and Advocate).

On or about September 29, 2011, Petitioner filed a DPC regarding DCPS' determination on June 30, 2011 that the Student was ineligible for services under the IDEA. A SA was reached regarding that DPC on October 26, 2011 (Exhibit 26). Pursuant to the SA, DCPS agreed to "complete" a psychological assessment within 15 days of receiving signed consent from Petitioner and to convene an IEP meeting to determine whether the Student was eligible under the IDEA (Exhibit P-26, page 2, paragraph 4 (a)). On October 26, 2011, Petitioner provided written consent for the psychological assessment (Exhibit P-29).

On or about November 2011, the Student transferred from the Academy to his neighborhood Middle School where he attends a general education program (Testimony of Petitioner).

On November 16, 2011, DCPS generated a report, which served as a supplement to the psychological assessment conducted by the Charter School on May 20, 2011. The DCPS report included a class observation and a BASC II assessment completed by the Student's social worker at the Academy as well as interviews with the Student's teachers at the Academy (Exhibit P-28). DCPS did not dispute the validity of the cognitive and academic testing that was conducted as part of the evaluation performed by the Charter School (Exhibit P-28).

The DCPS School Psychologist noted that during her observation of the Student there was no evidence of "impulsivity or an inability to attend" (Exhibit P-28). However, the classroom observation conducted by the DCPS School Psychologist occurred when the Student was attending the Academy in a highly structured class with a low student to teacher ratio (5:1). The observation was also conducted when the Student was receiving intensive counseling services, both individual and in a group, 5 times per week for 45 minutes (Exhibit P-28).

The Student has difficulty staying engaged and is at times non-compliant (Exhibit P-28, page 10). Although the Student's grades had improved during his time at the Academy, the Student needs significant support in reading and math and the Student needs counseling services (Exhibit P-28, page 10).

The Student benefits from small group instruction and intensive counseling services (Exhibit p-28).

On December 20, 2011, DCPS convened a meeting to review the report generated by the DCPS School Psychologist. After reviewing the report, DCPS determined that the Student was ineligible for any classification under the IDEA (Exhibit P-25).

On December 20, 2011, the Student was suspended from the DCPS Middle School he is currently attending for pushing two younger students into a shower (Exhibit P-27).

#### V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

#### VI. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to the claims raised in her DPC.

#### VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony.

#### VII STATUTORY FRAMEWORK

Through the IDEA, the federal government provides funding to state and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)). The IDEA also guarantees a student's parents "both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Id.* at 890 (*quoting Honig v. Doe*, 484 U.S. 305, 311-12 (1988)) (internal quotation marks omitted).

#### VI. ANALYSIS AND CONCLUSIONS OF LAW

Whether DCPS denied the Student a FAPE by failing to determine that the Student was eligible under IDEA for special education services based on an ED and/or a SLD classification at a meeting held on December 20, 2011.

Pursuant to Section 34 C.F.R. Section 300.8(a)(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: (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. However, the term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

Here, the evidence supports a finding that the Student qualifies for special education services under the IDEA based on an ED classification. As indicated above, beginning in the first grade and for each school year thereafter, with the exception of the brief time when the Student attended the Academy, the Student was suspended for oppositional behavior and for fighting with his peers (Testimony of Petitioner). Additionally, the evidence shows that the Student has exhibited symptoms of aggression, oppositional behaviors and depression over a long period of time and that these symptoms have made him unavailable for academic instruction and has impacted his ability to learn (Exhibit P-4). Although the DCPS School Psychologist observed the Student demonstrating compliant behaviors during the 40 minutes she observed him at the Academy, the evidence shows that at the time of her observation the Student was in a highly structured class with a low student to teacher ratio (5:1). The evidence also shows that the observation was conducted when the Student was receiving intensive counseling services, both individual and in a group, 5 times per week for 45 minutes (Testimony of DCPS School Psychologist and Director of Academy). Significantly, and contrary to DCPS' assertion, these facts support an eligibility determination under that IDEA because it is apparent that the Student can benefit from a small structured classroom environment with intensive behavior supports. Moreover, without these supports, the evidence shows that over the course of the Student's entire educational experience in the District of Columbia, the Student has been unable to access his grade level curriculum in the general education setting. Accordingly, I find that the

Student is eligible for special education services under the IDEA because the facts demonstrate that the Student's emotional disturbance has caused him to act in ways that impede his learning and that DCPS' decision not to find the Student eligible for special education services under an ED classification at the meeting held on December 20, 2011 denied the Student FAPE.

Pursuant to Section 34 C.F.R. Section 300.8 (a)(10) a Specific Learning Disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Here, the results of the WISC IV revealed that the Student was in the "Low Average" range cognitively, with particular weaknesses in perceptual reasoning, which measures visual processing and problem solving abilities. The Student also scored in the "Borderline" range for process speed, which measures "paper and pencil speed and accuracy" and is characteristic of students struggling with attention deficits (Exhibit P-4, pages 5-6). Additionally, the Student's results of the Woodcock Johnson III revealed that the Student, who is thirteen years old and currently attends the 10<sup>th</sup> grade, is functioning at the 2<sup>nd</sup> grade to 5<sup>th</sup> grade level, with the exception of "applied problems" where he scored at the early 6<sup>th</sup> grade level and "handwriting" where his score was "Average" (Exhibit P-4, pages 6-7).

The diagnostic impressions reported by the evaluator of the Charter School, whose testing was not disputed by the DCPS School Psychologist, included Attention Hyper-Activity Disorder, a Learning Disability (NOS), Oppositional Defiant Disorder and Dysthymic Disorder (Provisional). The Charter School evaluator recommended eligibility for special education services as a student with "multiple disabilities", which accounts for his learning and emotional disabilities. The evaluator also recommended a small structured classroom, tutoring, a Functional Behavioral Assessment (FBA) and individual therapy (Exhibit P-4).

Based on these facts, I find that the results of the Student's cognitive and achievement testing conducted by the Charter School on May 26, 2011, supports a finding that the Student has a learning disability. Specifically, I find that the Student's weaknesses in perceptual reasoning and processing speed has impacted his ability to obtain an educational benefit from instruction in a general education setting without the support of special education services. Accordingly, I find that the Student is eligible for special education services under the IDEA because the facts demonstrate that the

Student has a Specific Learning disability that has impeded his ability to learn and that DCPS' decision not to find the Student eligible for special education services under an SLD classification at the meeting held on December 20, 2011 denied the Student FAPE.

Compensatory Education:

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place. Reid v. District of Columbia, 401 F 3d 516 (D.C. Cir. 2005). Because compensatory education is a remedy for past deficiencies in student's educational program, a finding as to whether a student was denied a FAPE in the relevant time period is a "necessary prerequisite to a compensatory education award," Peak v. District of Columbia, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

As indicated above, Petitioner has proven that the Student was denied a FAPE for the 2011-2012 school year. As such, the Student is entitled to compensatory education. (See, The Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115 (D.D.C. 2008). However, no evidence was presented at the hearing in support of a compensatory education award. Nevertheless, as I have found that the Student is eligible for special education services under the IDEA and that DCPS' decision not to determine the Student eligible for special education services under the IDEA on December 20, 2011 denied the Student a FAPE, DCPS is directed to reconvene an IEP meeting and develop a compensatory education services award to address the special education services that the Student did not receive, but should have received, from of December 20, 2011 to the date of this HOD.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 5<sup>th</sup> day of March 5, 2012, it is hereby

ORDERED that, on or before March 31, 2012, DCPS shall convene an IEP meeting and develop an appropriate IEP for this Student based on the classifications of ED and SLD.

ORDERED that, during the IEP meeting referenced in the above paragraph, DCPS shall develop a compensatory education services award to address the special education services that the Student did not receive, but should have received, from of December 20, 2011 to the date of this HOD.

Dated March 5, 2012

By: /s/ James McKeever  
Hearing Officer

**NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination 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. Section 1415(i)(2).