

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
August 17, 2015

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PETITIONER, on behalf of	)	
STUDENT, <sup>1</sup>	)	Date Issued: August 17, 2015
	)	
Petitioner,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2015-0210
	)	
DISTRICT OF COLUMBIA	)	Hearing Date: August 12, 2015
PUBLIC SCHOOLS,	)	
	)	Office of Dispute Resolution, Room 2003
Respondent.	)	Washington, D.C.
	)	
	)	

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleges that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not determining him eligible for special education and related services.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on June 22, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on June 23, 2015. The parties met for a

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<sup>1</sup> Personal identification information is provided in Appendix A.

resolution session on July 2, 2015, but did not reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on July 23, 2015. On July 20, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on August 12, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by DCPS PSYCHOLOGIST and by DCPS' COUNSEL.

Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE, DEAN OF STUDENTS and LICENSED PSYCHOLOGIST. DCPS called DCPS Psychologist as its only witness. Petitioner's Exhibits P-1 through P-21 and P-23 through P-30, were admitted into evidence, with the exception of Exhibits P-18 and P-21. Pages P-22-1 through P-22-4 and P-22-7 through P-22-10 of Exhibit P-22 were also admitted into evidence. Exhibits P-12, P-20, P-22 (in part), P-26 and P-29 were admitted over DCPS' objections. DCPS' objections to Exhibits P-18, P-21 and the remaining pages of Exhibit P-22 were sustained.<sup>2</sup> DCPS' Exhibits R-1 through R-10 were admitted into evidence without objection. Counsel for the respective parties made opening statements and

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<sup>2</sup> A number of exhibits offered by Petitioner contained personally identifying information relating to other students. Counsel for Petitioner were directed to review all of Petitioner's proffered exhibits, to remove all personally identifying information relating to other students and to file replacement electronic copies of all exhibits for which personally identifying information had to be removed. Following the hearing, Petitioner's Counsel filed replacement, redacted, electronic copies of Exhibits P-11, P-20, P-21 and P-22.

closing arguments. Petitioner's Counsel requested leave to file a post-hearing brief, which I denied in favor of receiving oral closing argument.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The following issue for determination was certified in the July 20, 2015

Prehearing Order:

– Whether DCPS denied Student a FAPE and failed to comply with its Child Find obligations by failing to determine that Student was eligible for special education and related services at initial eligibility meetings on January 22, 2015 and June 9, 2015.

Petitioner's Co-counsel clarified on the record at the due process hearing that the parent contends that Student should have been found eligible for special education as a student with an Emotional Disturbance (ED) disability. For relief, Petitioner requests that the Hearing Officer determine that Student is a student with an ED disability in need of special education and related services and order DCPS to ensure that an appropriate IEP is developed for him. In addition, Petitioner reserves any right to seek an award of compensatory education hereafter, if Student is determined to be a child with a disability.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia. Exhibit P-9.

Student has never been determined eligible for special education and related services.

2. Student currently lives with his uncle and cousin. He visits Mother and siblings on weekends. Mother has a long history of drug addiction and mental health issues. Student was removed from Mother's home when he was in elementary school. Mother is a disabled veteran. She has stated that her memory is poor since being deployed with the U.S. military during the Gulf War. Exhibit P-2.

3. For the 2013-2014 and 2014-2015 school years, Student was enrolled in CITY MIDDLE SCHOOL 3. Student attended CITY MIDDLE SCHOOL 1 for the 2011-2012 and 2012-2013 school years. At City Middle School 1, Student was retained in GRADE A. Student transferred to CITY MIDDLE SCHOOL 2 for the 2013-2014 school year. He was given a safety transfer to City Middle School 3 in November 2013. After the 2013-2014 school year, Student was allowed to skip to GRADE C where he was placed for the 2014-2015 school year. Exhibits P-9, R-9.

4. For the 2013-2014 school year at City Middle School 3, Student's final grades were all C's and D's. He had good school attendance. From the first term of the 2014-2015 school year, Student received failing grades in his core subject area courses. His final grades in core subject courses for the 2014-2015 school year were all F's. He also had 9 days of unexcused absences. Exhibit P-14.

5. On the D.C. Comprehensive Assessment System (DC CAS) administered in June 2014, Student received Below Basic scores in reading and math. On a Scholastic Reading Inventory assessment administered in September 2014, Student scored Below Basic. Exhibit R-8.

6. At City Middle School 3, Student has received counseling services from outside, non-governmental, agencies. Testimony of Educational Advocate, Testimony of Dean of Students.

7. Since Student has attended City Middle School 3, Mother had been receiving a lot of phone calls from Student's teachers and school staff about Student's misbehaving, disrupting class, sleeping in class, getting in fights, horseplay, being out of class, messing with other students and disrespecting teachers. By letter of September 18, 2014 to the principal of City Middle School, Mother's attorney requested that Student be evaluated for special education. Mother felt that Student should be evaluated because she had seen his grades drop and she was receiving the telephone calls from the school. Testimony of Mother, Exhibit P-26.

8. A "behavioral contract" for Student was developed by SCHOOL SOCIAL WORKER for Student to earn positive rewards for positive contact sheets signed by his classroom teacher. School staff observed that this intervention was difficult to implement due to Student's school absences. Exhibit R-8.

9. On October 21, 2014, a Multidisciplinary Team (MDT) meeting was convened at City Middle School 3 to obtain Mother's consent for DCPS to assess student. At the meeting, it was decided that a functional behavioral assessment (FBA) would be conducted and a behavior intervention plan (BIP) would be developed. Mother was told at the October 21, 2014 meeting that academic and behavioral interventions should be attempted before Student was determined eligible for special education services. Exhibit R-4.

10. SCHOOL PSYCHOLOGIST conducted a psychological evaluation of Student on November 25, 2014 and December 1, 2014 to determine if Student met IDEA eligibility criteria as a student with an ED or Specific Learning Disability (SLD) disability. In a teacher interview, Student's 2013-2014 English Language Arts (ELA) teacher indicated that she did not have any behavior concerns with Student, but at

times, particularly toward the end of the school year, he appeared to be asleep in the classroom setting. Student's 2014-2015 school year ELA teacher reported that Student did not exhibit major behavioral concerns in the classroom when he attended. The teacher reported that it was difficult to measure Student's potential because he was late to class, cut class and fell asleep during classroom instruction. Student's school year 2014-2015 math teacher reported that Student did not exhibit behavioral concerns and his behaviors in the classroom were similar to his peers. The math teacher reported that Student would be present for only 1 or 2 school days per week and that his absences significantly impacted his grade. The teacher also reported that Student would try to sleep in class if permitted. School Psychologist observed Student in three class settings. Her reports indicated that Student did not exhibit disruptive behaviors in any of the classes. Exhibit R-8.

11. School Psychologist administered cognitive and educational assessments to Student. On the cognitive test, the Reynolds Intellectual Assessment Scales (RIAS), Student's Composite Intelligence Index score of 90 was in the Average range. On the Woodcock-Johnson Tests of Achievement - 3<sup>rd</sup> Edition (WJ-III), Student's overall scores were in the Low Average range for Broad Reading and Broad Written Language, and in the Low range for Mathematics. Exhibit R-8.

12. To assess Student's Social Emotional functioning, School Psychologist administered the Behavior Assessment System for Children, Second Edition (BASC-2) behavior scales to Mother, to Student's 2013-2014 school year ELA teacher and to Student. The teacher's responses indicated that Student did not exhibit behaviors of concern or attention problems more than other students of his age. Mother's responses indicated that Student demonstrated self-control similar to his same-aged peers, but in

the area of aggression, Student sometimes exhibited aggressive behaviors such as being argumentative, defiant, threatening to others and rule breaking. Mother's BASC-2 responses indicated that Student was "Clinically Significant" for Conduct Problems. In his self-report, Student's responses indicated behaviors similar to peers of his age. The ELA teacher's and Student's responses on the BASC-2 rating scales indicated that Student appeared to be capable of developing and maintaining friendships with others. School Psychologist also administered Scales for Assessing Emotional Disturbance - 2<sup>nd</sup> Edition (SAED-2) to Student's 2014-2015 school year math teacher. This teacher's responses indicated that Student did not exhibit behaviors indicative of having an emotional disturbance. Exhibit R-8.

13. School Social Worker conducted an extensive FBA of Student in October and November 2014. She reviewed Student's school records, interviewed Mother, Student, school staff and teachers, and observed Student in the classroom. School Social Worker administered the Ohio Youth Problems, Functioning and Satisfaction Scales (Ohio Scales) to Student, Mother and to one of Student's mental health counselors. She also had two teachers complete the Problem Behavior Questionnaire, a teacher-based instrument to develop functional hypotheses of problem behavior in the school setting. On the Ohio Scales self-rating, Student scored in the Mild range of severity in the Problem section and in the Moderate range of severity in the Functioning scale. Student reported feeling extremely satisfied with his life and having very little stress. He also reported that he was doing very well in getting long with friends, keeping neat, looking good and completing chores. Mother's responses on the Ohio Scale indicated that Student was in the Mild range of severity in the Problem section and in the Severe range in the Functioning section. She reported that Student had extreme

troubles in attending school, getting passing grades and concentrating, paying attention and completing tasks. The mental health counselor's responses indicated that Student was in the Moderate range of severity in the Problem section and in the Severe range in the Functioning section. This counselor reported that Student had extreme troubles being motivated and finishing projects, attending school and getting passing grades and in his ability to express feelings. Exhibit R-9.

14. School Social Worker observed Student in classes on November 14, 2014 and November 20, 2014. In two classes, both in the morning, Student was on task, appropriately engaged and followed the rules for 100 percent of the observation. In an afternoon social studies class, School Social Worker observed that for fifteen minutes, Student was engaged and on task. For the remainder of the class, Student was asleep and could not be roused by the teacher. Exhibit R-9.

15. On January 22, 2015, an MDT team was convened at City Middle School 3 to review the DCPS psychological evaluation and FBA. Mother and Educational Advocate attended the meeting. At the meeting, Student's history teacher reported there were no behavior concerns, but that Student fell asleep often, did not complete his work and had failed his tests and quizzes. The MDT team determined that based upon DCPS' assessments, Student was not eligible for special education and related services. Mother and Educational Advocate disagreed with the determination and requested an IEE psychological evaluation. School Psychologist recommended that Student's behavioral contract be continued, that his vision be examined and that his availability to get rest be monitored. It was also recommended that Student continue to receive counseling to assist with his ability to make decisions. Exhibits P-8, R-3.

16. During the 2014-2015 school year, Student was sanctioned for numerous code of conduct violations. Student's school disciplinary incidents from August 25, 2014 through March 9, 2015 included leaving school without permission (1 incident), unexcused tardies (8 incidents), behaviors that disrupt or interfere with classroom teaching and learning (9 incidents), engaging in reckless behavior (1 incident), unauthorized presence in hallway (4 incidents), fighting (1 incident), other Tier 2 behavior (1 incident), other Tier 3 behavior (2 incidents), leaving classroom without permission (1 incident), inappropriate or disruptive physical contact between students (1 incident), and throwing objects (1 incident). These infractions resulted in parental contacts, numerous detentions, temporary removals from the classroom, in-school disciplinary actions, teacher/student conferences, and one off-site medium term suspension. Exhibit P-22.

17. Student was involved in an after-school incident on March 3, 2015 when he alleged assaulted and robbed another Student off school grounds, in front of a store. The school initially proposed to discipline Student with a 35-day out of school suspension. That proposed discipline was appealed to the D.C. Office of Administrative Hearings, where an administrative hearing was convened on March 20, 2015. At the administrative hearing, Dean of Student testified, erroneously, that Student was a student with a Learning Disability and that he had an Individualized Education Plan (IEP). The Administrative Law Judge found that the proposed disciplinary action was inappropriate because the alleged incident occurred off school grounds and City Middle School 3 lacked the authority to suspend Student in this circumstance. Exhibit P-20, Testimony of Dean of Students.

18. An IEE psychological reevaluation of Student was conducted by EVALUATOR on April 2, 2015. Evaluator administered cognitive and educational assessments, interviewed Student and Mother, conducted a classroom observation and had Student and Mother complete a BASC-2 behavior rating scale. On the cognitive test, the Woodcock-Johnson III Tests of Cognitive Abilities, Student's General Intellectual Ability score of 59 was in the Very Low range. This score was 31 points lower than the Composite Intelligence Score obtained when Student was evaluated by School Psychologist in December 2014. On academic functioning, Student's standard scores were 75 (Low) in Broad Reading, 71 (Low) in Broad Math, and 76 (Low) in Broad Written Expression. Mother's responses on the BASC-2 rating scales indicated Clinically Significant scores for Student in Aggression and Conduct Problems areas. Student's responses indicated At-Risk scores on Attention Problems, Self-Reliance, Relations with Parents, and on the Personal Adjustment Composite and the Inattention/Hyperactivity Composite. Exhibit P-2.

19. In her classroom observation conducted in a morning math class on April 2, 2015, Evaluator observed that Student raised his hand, completed his work and talked to other students sitting near to him. Evaluator did not report observing Student to exhibit any significant behavior issues during the class. Exhibit P-2.

20. Evaluator obtained responses to Questionnaires on Student's progress in the classroom from Student's Social Studies/Academic Intervention and ELA teachers. The Social Studies/Academic Intervention teacher reported that during academic intervention, Student completed his assignments, but during social studies, if he were not being disruptive, he was sleeping. She reported that Student was always very polite and seemingly got along with other students. She reported an extended period of

absences and a history of suspensions. The ELA teacher reported that Student generally engaged in work avoidance behavior such as talking and sleeping in class. She reported that Student was well liked among his classmates, but that he struggled with work and often did not complete it. She also reported that Student had been absent due to multiple suspensions. Exhibit P-2.

21. Evaluator diagnosed Student with Unspecified Disruptive, Impulse-Control and Conduct Disorder. Evaluator recommended that Student met criteria to receive special education services under the ED category. Exhibit P-2. Licensed Psychologist also reviewed Student's records and conferred with Evaluator. She endorsed Evaluator's diagnosis and recommendations. Testimony of Licensed Psychologist.

22. Following receipt of the IEE psychological reevaluation, Student's MDT team was reconvened on June 9, 2015. Mother had notice of the meeting but did not attend. Educational Advocate appeared for the meeting, but was not allowed to attend or participate because the parent was absent. School staff proceeded with the meeting without the participation of Mother or her representative. Testimony of Educational Advocate. Student's Social Studies/Academic Intervention teacher reported to the team that when Student dedicates himself, he does very well, that he completed homework and scored highest in his class on the final exam in Academic Intervention. The teacher reported that Student's biggest obstacle was staying awake in class. The MDT team again determined that Student did not meet criteria for eligibility under SLD or ED disability classifications. Exhibit R-2.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Analysis

Did DCPS deny Student a FAPE and fail to comply with its Child Find obligations by failing to determine that Student had an ED disability and was eligible for special education and related services at initial eligibility meetings on January 22, 2015 and June 9, 2015?

### Emotional Disturbance Disability

The only issue for determination in this case is whether Student should have been determined eligible for special education and related services at MDT meeting in January and June 2015 as a student with an ED disability. The “IDEA identifies a disabled student as ‘a child . . . (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.’ 20 U.S.C. § 1401(3)(A).” *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). An overarching purpose of the IDEA is to provide a FAPE to “children

with disabilities.” 20 U.S.C. § 1400(d)(1)(A); *cf.* § 1412(a)(1)(A) (providing FAPE to all children with disabilities is a condition for federal IDEA funding). Under federal and District of Columbia regulations, an “Emotional disturbance” is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behavior or feelings under normal circumstances;
- (d) A general, pervasive mood of unhappiness or depression; or
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

5E DCMR § 3001.1; 30 CFR 300.8(b)(4). “Emotional disturbance” does not include a child who is socially maladjusted, unless it is determined that the child has an emotional disturbance. *Id.*; *Nguyen v. District of Columbia*, 681 F.Supp.2d 49, 51 (D.D.C.2010). Although “socially maladjusted” is not specifically defined by the statute, the Fourth Circuit’s decision in *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir.1998) is informative. The court defined the term as “continued misbehavior outside acceptable norms” and “a persistent pattern of violating societal norms with lots of truancy, substance abuse, *i.e.*, a perpetual struggle with authority, easily frustrated, impulsive, and manipulative.” *Springer*, 134 F.3d at 664. The court went on to articulate that,

[c]ourts and special education authorities have routinely declined . . . to equate conduct disorders or social maladjustment with serious emotional

disturbance. . . . [T]he regulatory framework under IDEA pointedly carves out “socially maladjusted” behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus, a “bad conduct” definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education. . . . It is not intended to be the duty of special education to force socially maladjusted children to school by residentially placing them if they choose to remain truant. Programs within other political divisions, such as the Juvenile Justice system, must address this serious problem. If they do not, then Congress should act to place this duty clearly.

*Id.* (internal citations & some quotation marks omitted); *H.M. ex rel. J.M. v. Weakley County Bd. of Educ.*, 2015 WL 1179615, 11 (W.D.Tenn. Mar. 13, 2015).

The evidence in this case leave no doubt that Student could be deemed to have conduct disorders and social maladjustment. Since attending City Middle School 3, Student has exhibited attendance problems and an extensive record of discipline issues, including unexcused tardies, disruptive behaviors in the classroom, and hall-walking. Student also often falls asleep in the classroom. Much more seriously, Student allegedly assaulted and robbed another student who was walking home from school. Mother’s responses on the behavior rating scales indicate that she also has concerns about Student’s aggression and conduct problems. In the May 2015 IEE psychological evaluation report, Evaluator diagnosed Student with an Unspecified Disruptive, Impulse-Control and Conduct Disorder.

Beyond Student’s apparent conduct disorders, in the opinion of Petitioner’s Expert, Licensed Psychologist, Student also exhibits four of the five characteristics enumerated in the definition of ED in the IDEA regulations. DCPS’ expert, DCPS

Psychologist, opined that Student did not meet any of the five criteria for eligibility under the ED disability. Therefore, I will review the evidence in support of the ED characteristics allegedly exhibited by Student.

- (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors

I find that the evidence does not establish that Student has an inability to learn. According to Mother, before transferring to City Middle School 3 in November 2013, Student was doing well in school. On academic achievement testing administered in January 2014, Student generally achieved Low Average scores using age-based norms. When retested by the independent Evaluator in April 2015, Student's scores were generally in the Low range. (The reliability of the April 2015 IEE testing is colored by Student's unexplained discrepant score on the IEE cognitive assessment, which was some 30 points lower than his Composite Intelligence Index score when Student was assessed in December 2014.) For the 2013-2014 school year, Student received C's and D's in his core academic courses.

For the 2014-2015 school year, Student's grades were all F's. Reports from Student's teachers indicated that his poor grades in the past school year were due to absences and suspensions, to his falling asleep in class and to his not completing his work. Student's Social Studies/Academic Intervention teacher reported that when he dedicates himself, Student does very well. Only Licensed Psychologist opined that Student has an inability to learn and I accord little weight to that assertion. Licensed Psychologist did not personally meet Student or evaluate him. Nor did she observe Student in School. Even her colleague, Evaluator, observed Student to be completing his work in math class with help from his teacher. Accordingly I find that the reason for

Student's academic failure this past school year appears to stem from a failure to attend class and to apply himself, rather than an inability to learn. *See Jefferson County Bd. of Educ. v. Lolita S.*, 977 F.Supp.2d 1091, 1125 (N.D.Ala.2013).

(b) Inability to Build or Maintain Satisfactory Interpersonal Relationships with Peers and Teachers

Student's ability to maintain satisfactory relationships with his peers and teachers is amply documented by the evidence. For example, when Social Worker observed Student in class in November 2014, Student exhibited sportsmanship in his Physical Education class. He was cooperative and interacted appropriately with peers and teachers in Math class. Student's Social Studies teacher reported that he was always polite and seemingly gets along with all students. His ELA teacher reported that he is well liked among his classmates and generally not disrespectful in class. School Psychologist reported that in her classroom observations, Student was compliant to instructions given by teachers. On his BASC-2 self report, Student reported being outgoing and well liked by others. When Evaluator observed Student in the classroom at City Middle School 3, she noted that Student responded appropriately to his teacher and that he was observed talking to other students seated nearby.

Only Licensed Psychologist asserted that Student has an inability to build or maintain relationships with other students and teachers. Student's self reporting, and the subjective reports of teachers and other adults who observed Student in the classroom, establish exactly the opposite. I find that for Licensed Psychologist to assert otherwise discredited her testimony.

(c) Inappropriate types of behavior or feelings under normal circumstances  
The IDEA provides no guidance for what constitutes inappropriate types of

behavior or feelings under normal circumstances. In a guidance letter, the U.S. Department of Education's Office of Special Education Programs (OSEP) explained that,

"inappropriate behaviors under normal circumstances" as operationally defined by a number of States may include those behaviors which are psychotic or bizarre in nature or are atypical behaviors for which no observable reason exists. For example: Running away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition. This definition might include behavior such as assaulting teachers or students for no *apparent reason*. (emphasis in original). *In re: Sacramento County Office of Education*, 1981-82 EHLR DEC. 503:314, 316. *See also Sequoia Union High School District*, 1985-86 EHLR DEC. 507:495. The essential element appears to be the student's inability to control his/her behavior (*Doe v. Maher*, 793 F.2d 1470, 1480 footnote 8, (9th Cir. 1986)) and conform his/her conduct to socially acceptable norms (*Honig v. Doe*, 108 S.Ct. 592, 595 (1988)).

*Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

Licensed Psychologist pointed to Student's alleged problems with interpersonal relationships, sleeping in classes and aggression toward peers as, apparently, examples of Student's inappropriate types of behaviors or feelings. However these examples of bad conduct do not amount to atypical behaviors for which no observable reason exists. *See, e.g., Springer, supra*. While Student's conduct such as being absent from class, sleeping in class and, especially, allegedly assaulting and robbing another student are real concerns, there was no evidence that Student has an inability to control his behavior or to conform his conduct to socially acceptable norms. I find that Petitioner has not established that Student meets the criterion for inappropriate types of behavior or feelings.

(d) General, pervasive mood of unhappiness or depression;

As Clinical Psychologist acknowledged in her testimony, Student has not been diagnosed with a depressive disorder. Student's BASC-2 rating scales response in

December 2014 were Low for depression. Mother and the teacher's BASC-2 responses were Average for depression. I find that Petitioner has not established that Student suffers from a general, pervasive mood of unhappiness or depression.

- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

Petitioner's expert, Licensed Psychologist, acknowledged in her testimony that Student has not shown a tendency to develop physical symptoms (somatization) or fears associated with personal or school problems.

In summary, although Student exhibits serious conduct disorders which undoubtedly affect his ability to succeed academically, I conclude that Petitioner has not met her burden of proof to show that Student exhibits any of the five enumerated criteria for special education eligibility as student with an emotional disturbance.

#### Child Find Obligation

"Child Find is [the LEA's] affirmative obligation under the IDEA: 'As soon as a child is identified as a potential candidate for services, [the LEA] has the duty to locate that child and complete the evaluation process.' . . . *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008). For both initial evaluations and reevaluations, the IDEA requires the eligibility team to review existing evaluation data for the child suspected of having a disability. Based on the team's review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46641, 46658.

The evidence at the due process hearing established that at the current time, existing data is not sufficient to rule out Student's having a qualifying IDEA disability. DCPS School Psychologist, who was not involved in DCPS' initial eligibility evaluations of Student, testified that based upon the evidence at the due process hearing, including reports of Student's behaviors, his sleeping in class and the discrepancy in his cognitive scores between testings in December 2014 and in April 2015, additional assessments needed to be conducted to fully evaluate Student for potential IDEA disabilities including Intellectual Disability (ID), Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD), ED and SLD. Although Petitioner has not requested additional evaluations as relief in this case, she did assert that DCPS failed to comply with its child-find obligations. The IDEA authorizes the hearing officer to request an independent educational evaluation as part of a hearing on a due process complaint. *See* 30 CFR § 300.502(d). Here, I will order DCPS to obtain another independent comprehensive psychological evaluation of Student and to ensure that Student's MDT team is promptly convened to review the additional data and to reconsider Student's eligibility for special education and related services.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Petitioner's request that the hearing officer determine that Student is a child with a disability in need of special education and related services is denied without prejudice;
2. DCPS is ordered, subject to obtaining consent from the parent, to obtain a new comprehensive psychoeducational evaluation of Student, conducted at public expense by a qualified, independent, psychologist, who is neither an employee of DCPS nor regularly engaged as an expert witness for parents in due process proceedings. Said evaluation shall be conducted

within 30 days of this issuance of this order. Upon receipt of the completed evaluation, DCPS shall promptly convene an MDT team to determine, based upon the new evaluation and any other relevant data, whether Student is a student with a disability in need of special education and related services. DCPS shall not be held responsible for any reasonable delay in complying with this evaluation requirement to the extent that it has not been able to obtain consent from the parent for the evaluation or cooperation from the parent or student in scheduling the evaluation; and

3. All other relief requested by the Petitioner herein is denied.

Date: August 17, 2015

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

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 U.S.C. § 1415(I).

cc: Counsel of Record  
Office of Dispute Resolution  
Chief Hearing Officer  
OSSE - SPED  
DCPS Resolution Team