

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

OSSE
Office of Dispute Resolution
October 20, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2015-0265
v.)	
)	Date Issued: October 20, 2015
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The Due Process Complaint (“DPC”) was filed on August 6, 2015. There was a disagreement between the parties over when the full DPC was served on Respondent. Based on a review of the information provided by the parties, on August 19, 2015 the IHO indicated to the parties that DPC was deemed to have been served as of August 6, 2015. On August 20, 2015, the IHO indicated to the parties that Respondent’s Response to the DPC would be due by August 29, 2015, and it was filed on August 26, 2015.

The parties convened a Resolution Session Meeting (“RSM”) in this matter on September 2, 2015. The parties did not reach a full agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on September 6, 2015, and 45-day period concludes on October 20, 2015.

¹ Personal identification information is provided in Appendix A.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on September 1, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that disclosures would be filed five business days prior to the DPH. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on September 1, 2015.

The DPH was originally scheduled for September 24, 2015, but was rescheduled by mutual agreement of the parties, and held on October 8, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2006. Petitioner elected for the hearing to be closed. Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Tanya Chor, Esq.

Petitioner’s and Respondent’s disclosures were timely filed on October 1, 2015. At the DPH, Petitioner’s exhibits P-1 through P-6; P-8 through P-9; P-11 through P-36 were admitted without objection. Petitioner’s exhibit P-7 was admitted over Respondent’s objection. Petitioner’s exhibit P-10 was not admitted, as it was notes taken by counsel for the Petitioner. Respondent’s exhibits R-1 through R-17 and R-19 were admitted without objection. Respondent’s exhibit R-18 was not offered or admitted into evidence.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Eligibility Expert²
- (c) Independent School Psychologist

Respondent called the following witness at the DPH:

- (a) DCPS School Psychologist³

Petitioner and Respondent gave oral closing arguments.

ISSUE

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to identify Student as eligible for special education, as a student with an Other Health Impairment (“OHI”) and/or an Emotional Disturbance (“ED”), at meetings held on or around December 4, 2014 and/or June 11, 2015.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE as to the issue alleged;

² Qualified as an expert in special education, with respect to eligibility determinations over Respondent’s objection.

³ Qualified as an expert in school psychology and evaluations for students with special needs, without objection.

- (b) an Order that Student is eligible for special education services under the classification of OHI and/or ED;
- (c) an Order that DCPS immediately convene an IEP team to develop an IEP that provides Student with individualized academic instruction, individual and small group counseling, and one-on-one tutoring to address executive functioning deficits.

FINDINGS OF FACT

1. Student is a [AGE] year old student in the [GRADE] grade. Student resides with his mother (“Parent”/“Petitioner”) in Washington, D.C. Student’s parents reside separately, but Student spends considerable time in his father’s home as well.⁴

2. From May 2014 through the present time, Student has been enrolled at District Elementary School (however, Student was hospitalized for most of May 2014).⁵ Prior to attending District Elementary School, Student attended City Elementary School (a District of Columbia public charter school).⁶

3. Student has not been determined eligible for special education and related services, though at Parent’s request Student’s multidisciplinary team (“MDT”) at District Elementary School met twice to consider his eligibility.⁷

4. Parent had also requested that Student be determined eligible while he was at City Elementary School. He had not been determined eligible for special education and related services while at City Elementary School, rather the school had referred Student for services through the “Student and Staff Support Team” (“SST”) in the 2012-2013 school year.⁸ Notwithstanding any services Student received through the SST team, he was recommended for retention in the 2012-2013 school year.⁹

5. Student is diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”).¹⁰ Student is prescribed medication to manage his ADHD symptoms. When Student is with his mother, he consistently takes his ADHD medication. However, when Student is at his father’s home, Student does not take the medication because his father does not believe in giving him the medication.¹¹

6. Student has been a victim of sexual assault, perhaps on more than one occasion.¹²

⁴ Testimony of Parent; P-3-2.

⁵ Testimony of Parent.

⁶ Testimony of Parent.

⁷ P-7; P-8; R-9; R-13; R-14.

⁸ P-19.

⁹ P-21; testimony of DCPS School Psychology.

¹⁰ Testimony of Parent; P-2-4; R-5-4. Student’s initial ADHD diagnosis came at some point prior to November 2014.

¹¹ Testimony of Parent; P-2-4.

¹² Testimony of Parent; P-1-1.

Student's Attention, Behavior & Psychiatric Hospitalizations

7. Student's behavioral difficulties in the educational setting go back as far as daycare, where he had difficulty following directions and engaged in aggressive behaviors and tantrums.¹³

8. Student continued to have behavioral problems while at City Elementary School, even prior to his diagnosis of ADHD. City Elementary School would frequently call Parent and write letters to her, and the mother and father would have to frequently go up to the school, including to pick Student up early from school. Parent has also received frequent calls about Student's behavior from District Elementary School.¹⁴

9. Student's behavior in school includes things like throwing chairs, pencils and other items; yelling during instructional time; singing at inappropriate times in the classroom; inappropriately accessing the computers; breaking things; cursing; engaging in verbal and physical aggression; having temper tantrums, including very violent temper tantrums; taunting classmates; refusing to remain seated; standing in chairs; escalating when he is asked to cease behaviors. Student frequently uses profane/sexually explicit/vulgar language; and acts out in sexually inappropriate ways.¹⁵

10. Student is "like two different people," depending on whether he has or has not taken his medication.¹⁶ When Student comes to school without taking his medication, his "behavior can be uncontrollable and he struggles to make it through the school day without experiencing extreme difficulty focusing on his classwork, sustaining meaningful relationships with his peers and the adults in the classroom and completing necessary classwork without exhibiting disruptive behaviors which may include refusal to follow directions, yelling, hitting others, use of profanity/vulgarity and sometimes physical and verbal aggression."¹⁷

11. Student does not really have any friends at school. "During recess he tends to walk around aimlessly by himself."¹⁸

12. Student has had two psychiatric hospitalizations - one in January 2014 and one in May 2014.¹⁹

13. Student's behavioral problems in the school setting are severe, and present themselves on a daily basis.²⁰ His behavior is "damaging and destructive."²¹

¹³ P-3-3.

¹⁴ Testimony of Parent.

¹⁵ P-2; testimony of Parent.

¹⁶ P-2-3; P-1-2.

¹⁷ P-3-2 and P-3-3; R-12-14 and R-12-15.

¹⁸ P-2-3.

¹⁹ Testimony of Parent; P-2-4; R-5-4.

²⁰ P-2-1.

²¹ P-2-3.

14. Student's behaviors "impact his ability to benefit from instruction."²² It can be difficult for Student to "recall a lot of information [and] pay attention to details requiring focus and attention."²³

Attempted Interventions at District Elementary School

15. Student requires constant redirection and monitoring to remain focused on a task and to remain seated during instruction or for any sustained period of time.²⁴

16. District Elementary School put in place a Section 504 Plan for Student on December 18, 2014.²⁵ District Elementary School put in place a Behavioral Intervention Plan for Student on September 25, 2015.²⁶

17. District Elementary School has attempted a number of interventions with Student, including providing Student with access to calming areas and frequent "movement"/"brain" breaks, counseling and mentoring at school, regular "check-ins" (at least three per day) with Student, regularly redirecting Student, providing Student support from the school social worker when the social worker is in Student's classroom, and utilizing a "point system" of positive reinforcement. Student is not responsive to the point system because he "does not care about points."²⁷

18. The interventions District Elementary School has tried have not been consistently effective, and at times have been "futile." The interventions work better on days when Student has not come to school already agitated. Isolating Student from the classroom has been what the school has found to be most effective in controlling Student's behaviors; however, his disruptive behaviors return as soon as he returns to the classroom.²⁸

November 2014 Functional Behavioral Assessment

19. DCPS conducted a functional behavioral assessment ("FBA") for Student, described in a report dated November 7, 2014, which notes Student's challenging and often unmanageable behaviors, particularly when he is not taking his medication; notes a number of the interventions District Elementary School had been trying and their relative ineffectiveness; states that Student's behaviors "impact his ability to benefit from instruction;" and notes that Student requires constant redirection and monitoring to remain focused on a task and to remain seated during instruction.²⁹

²² P-2-1; P-2-6; R-5-1; R-5-6.

²³ P-11-2.

²⁴ P-2-3; P-11-2.

²⁵ P-11.

²⁶ P-12.

²⁷ P-2-1; P-11-2 and P-11-3; testimony of DCPS School Psychologist.

²⁸ P-2-1; P-11-2 and P-11-3 testimony of DCPS School Psychologist.

²⁹ P-2-1; P-2-6; R-5-1; R-5-6.

Student's Cognitive/Academic Functioning & Academic Progress

20. DCPS conducted a confidential psychological evaluation (“DCPS psychoeducational”) for Student, described in a report dated November 13, 2014.³⁰

21. Parent obtained an independent confidential psychological evaluation (“independent psychoeducation”) for Student, described in a report dated May 9, 2015, which parent provided to the school prior to June 11, 2015.³¹

22. According to the DCPS School Psychologist and Independent School Psychologist, Student’s cognitive and academic functioning, as measured by the Reynolds Intellectual Assessment Scales and the Woodcock Johnson Tests of Achievement, are generally in the average range.³²

22. Both DCPS School Psychologist and Independent School Psychologist note that Student engages in noncompliant, aggressive, impulsive behaviors in school, and struggles with easy distractibility.³³

23. According to both DCPS School Psychologist and Independent School Psychologist, Student works better in small groups.³⁴

24. While acknowledging that Student has ADHD,³⁵ DCPS School Psychologist is of the opinion that Student does not qualify for special education and related services, largely because Student’s cognitive and academic testing scores fall in the average range, and because DCPS School Psychologist believes Student is accessing/could access the general education curriculum.³⁶

25. Independent School Psychologist diagnosed Student with ADHD, Oppositional Defiant Disorder and Sibling relational problem, and is of the opinion that Student qualifies for special education and related services.³⁷

26. As of June 12, 2015, three terms worth of report card grades were available for Student for the 2014-2015 school year. Student’s report card reflected that he was “approaching expectations” in reading, mathematics, social student and science (“core classes”). “Approaching expectations” or the “basic” level is the second lowest of four possible grading levels Student could have received. Student remained at this level for his core classes throughout

³⁰ P-3.

³¹ P-1; R-12.

³² P-1-3; R-12-3 through R-12-5.

³³ P-3-10 and P-3-11; R-12-14.

³⁴ Testimony of DCPS school psychologist; R-12-16. DCPS school psychologist testified that the reason Student performs better in small groups is so that he can be “a leader.” Based on the totality of the evidence, the Hearing Officer does not credit that proffered rationale.

³⁵ P-3-11.

³⁶ Testimony of DCPS School Psychologist; P-3-15.

³⁷ Testimony of Independent School Psychologist; R-12-16.

the first three terms of the school year, except that his science grade dipped down to the “below basic” level for the second term.³⁸

27. Though he slightly improved at one point during the year, Student performed below the school and class average on the mClass mathematics assessment throughout the 2014-2015 school year.³⁹

28. Student’s DIBELS reading scores reflect some progress throughout the school year from below grade level at the beginning of the year and middle of the year to proficient at the end of the year.⁴⁰ Reading is a relative strength for Student.⁴¹

December 4, 2014 Eligibility Meeting

29. On December 4, 2014, Student’s MDT at District Elementary School met and considered Student’s eligibility under the classifications of ED and OHI.⁴²

30. The MDT did not determine that Student met the criteria for ED or OHI because the school-based members of the team did not conclude that there was any adverse impact on Student’s educational performance. Parent and her representative disagreed that Student was not experiencing an adverse educational impact.⁴³

June 11, 2015 Eligibility Meeting

31. On June 11, 2015, Student’s MDT at District Elementary School met and considered Student’s eligibility under the classifications of ED and OHI.⁴⁴

32. The MDT did not determine that Student met the criteria for ED or OHI because the school-based members of the team did not conclude that there was any adverse impact on Student’s educational performance. Parent and her representative disagreed that Student was not experiencing an adverse educational impact.⁴⁵

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade

³⁸ P-13-1.

³⁹ P-14-1 through P-14-4.

⁴⁰ P-16-1; P-3-3.

⁴¹ P-3-3.

⁴² R-7 and R-8.

⁴³ R-7 and R-8.

⁴⁴ P-8 and P-9.

⁴⁵ P-9.

the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

(a) Whether DCPS denied Student a FAPE by failing to identify Student as eligible for special education, as a student with "OHI" and/or ED, at meetings held on or around December 4, 2014 and/or June 11, 2015.

Pursuant to 34 C.F.R. § 300.8(c)(9), a student is eligible for special education and related services under the disability classification OHI when the student has "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 . . . attention deficit disorder or attention deficit hyperactivity disorder . . . and (ii) Adversely affects a child's educational performance."

Pursuant to 34 C.F.R. § 300.8(c)(4), a student is eligible under the disability classification ED when the student exhibits "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. 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."

All parties acknowledge that Student meets the first prong of the test for OHI – he has been diagnosed with the chronic health problem ADHD. Additionally, the consistent evidence, as reflected in the "Findings of Fact" above, is that Student exhibits extremely inappropriate behavior in school under normal circumstances, and that these problematic behaviors have persisted for years – since daycare – and have been present at both City Elementary School and District Elementary School. The parties disagree, however, as to whether Student's educational performance is adversely impacted by his ADHD and/or extremely inappropriate behaviors. In large part because Student is of average cognitive ability, the District Elementary School members of Student's MDT concluded in December 2014 and June 2015 that Student was not experiencing an adverse educational impact. Parent and her representatives believe Student has experienced an adverse educational impact.

Among the data the December 2014 MDT had to consider was the psychoeducational evaluation DCPS School Psychologist conducted, the DCPS functional behavioral assessment,

Student's behavioral performance and responses to interventions, and Student grades and test scores to that point. By the June 2015 meeting, the MDT also had Independent School Psychologist's evaluation report and additional grades and test scores. The Hearing Officer concludes that at both the December 2014 MDT and the June 2015 MDT, the data demonstrated that Student was experiencing an adverse educational impact.

Student is unable to remain seated for or focused on instruction, he is constantly taken out of the classroom for interventions to include movement/brain breaks, counseling, mentoring, to calm himself, in order for staff to help him de-escalate, and for various other reasons. Student must receive a steady stream of "check-ins" and redirection throughout the school day, and even with all of the many interventions District Elementary School has attempted, his adverse behaviors persist. Even when he is momentarily calmed, his behaviors return as soon as he returns to the classroom. These extreme behaviors are not new, as they date back to daycare. They are not unique to his current academic setting, as Student had the same types of struggles at City Elementary School, and was recommended for retention even with the City Elementary School interventions. Given his academic and cognitive abilities as measured by the testing DCPS School Psychologist conducted, Student's academic performance during the 2014-2015 school year did not reflect significant progress overall. His report card grades were largely stagnant, his mClass math scores reflected only minimal progress but remained below his school and class average, though he did make incremental progress with respect to his DIBELS reading scores.

The Hearing Officer credits the testimony and evaluation report of Independent School Psychologist over those of DCPS School Psychologist, because the Hearing Officer concludes that the documentary evidence and testimony demonstrate that Student is experiencing adverse educational impact. The Hearing Officer does not credit the view of DCPS School Psychologist that Student's average academic and cognitive ability and incremental (at best) academic progress render him ineligible, because natural intellect and the need for special education and related services in order to access one's education are not necessarily mutually exclusive. Moreover, "'there is nothing in IDEA or its legislative history that supports the conclusion that... 'educational performance' is limited only to performance that is graded.'" *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007). Student misses a great deal of class and/or instructional time for the various interventions that are necessary to try to help him make it through a given school day.

Student received some services through a "504 plan" pursuant to the Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). However, even where a student qualifies for services under Section 504, an LEA is not relieved of its obligations under the IDEA, and must provide the student the services to which he is eligible. *See District of Columbia*, 2006 U.S. Dist. LEXIS 14900 (D.D.C. 2006) (Rejecting the LEA's contention that a "parent's acceptance of the use of alternative strategies relieves a school district of the obligation to comply with the child find provisions of the Act.) *See also, N.G. v. District of Columbia*, 556 F.Supp.2d 1 (D.D.C. 2008) (Providing accommodations under a 504 plan does not alleviate an LEA's requirement to comply with Child Find); *see also, Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996) ("Although an individual who is eligible for services under IDEA may also qualify for assistance under the Rehabilitation Act of 1973, the school district must comply with both statutes").

Further, while it is clear that Student's behavior and academic experience improve when he takes his prescribed ADHD medication, the school cannot require the parents to medicate Student as a condition for providing him special education and related services. 34 C.F.R. § 300.174.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In this instance, the failure to determine Student eligible in December 2014 and June 2015 impeded Student's right to a FAPE and caused him a deprivation of educational benefit during the 2014-2015 school year and the first part of the 2015-2016 school year. Petitioner meets her burden of proving that DCPS denied Student a FAPE by failing to determine Student eligible as a student with OHI and ED, at meetings held on December 4, 2014 and June 11, 2015.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. Student is currently eligible for special education and related services as a student with "Other Health Impairment;"
- B. Student is currently eligible for special education and related services as a student with "Emotional Disturbance;"
- C. Within 15 school days of this Order, DCPS shall convene an IEP team meeting to develop an IEP providing Student with appropriate levels of special education and related services.

Any days of delay in fulfilling the requirements of this Order that are attributable to Parents, Student, their advocates and/or their chosen service providers shall not count against DCPS.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: October 20, 2015

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney: Roberta Gambale, Esq. (electronically)

DCPS' Attorney: Tanya Chor, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).