

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Hearing Officer: Peter B. Vaden

v.

PUBLIC CHARTER SCHOOL,

Respondent.

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 (“DCMR”). In her Due Process Complaint, Petitioner alleges that Respondent Public Charter School (“PCS”) has denied Student a free appropriate public education (“FAPE”) by finding she is not eligible for special education, as a child with a disability, within the meaning of the IDEA.

¹ Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed _____ named PCS as respondent. The parties met for a resolution session _____ and were unable to reach an agreement. the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on _____ 2013 at the Student Hearing Office 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. PCS was represented by its SPECIAL EDUCATION COORDINATOR ("SEC") and by PCS' COUNSEL.

Petitioner testified and called as witnesses, INDEPENDENT PSYCHOLOGIST and SPECIAL EDUCATION ADVOCATE. PCS called as witnesses SCHOOL PSYCHOLOGIST, SPEECH-LANGUAGE PATHOLOGIST and CLINICAL PSYCHOLOGIST. The Parties' Joint Exhibits J-1 through J-26, as well as Petitioner's Exhibits P-1 through P-10 and PCS' Exhibits R-2 through R-5 were admitted into evidence without objection. Exhibit R-1 was not offered. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The issue to be determined in this case is:

- Whether Respondent PCS determined incorrectly that Student is not a child with a disability eligible for special education and related services and has denied her a

FAPE.

For relief, Petitioner seeks a determination by the Hearing Officer that Student is a child with a disability and an order for PCS' IEP team to develop and implement an appropriate IEP for her. In addition, Petitioner has requested a compensatory education award to compensate Student for PCS' failure to provide her special education and related services since the end of the 2010-2011 school year.

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, an AGE adolescent, resides with Mother in the District of Columbia.

Testimony of Mother.

2. PCS is a public charter school located in the District of Columbia. It serves as its own local education agency ("LEA") within the meaning of the IDEA. Hearing Officer Notice.

3. Student has attended PCS since the 2010-2011 school year. After receiving failing grades that year in English, Math and Geography, she repeated the grade for the 2011-2012 school year. During the 2012-2013 school year, Student was in the GRADE at PCS.

Testimony of Mother, Exhibit J-14.

4. In the spring of 2010, prior to Student's enrolling in PCS, Petitioner entered into a settlement agreement with District of Columbia Public Schools ("DCPS"), which provided, *inter alia*, for DCPS funded Independent Educational Evaluation ("IEE") Comprehensive Psychological and Speech and Language evaluations of Student. Exhibit J-1.

5. Independent Psychologist conducted a Comprehensive Psychological Evaluation of Student in July 2010. In her report. Independent Psychologist reported that

Student's General Intellectual Ability score was in the average range (96), on the Woodcock-Johnson III Normative Update Tests of Cognitive Abilities ("WJ-III Cog."). However, Student attained a Low Average score on the WJ-III Cog. Sound Blending subtest and a Very Low score on the Visual-Auditory subtest. On the Woodcock-Johnson III Normative Update ("WJ-III Ach.") Tests of Achievement, Student scored in the Average range in the Broad Reading domain, however, her score on the Passage Comprehension subtest was lower, suggesting difficulties in comprehending reading passages. In the Broad Math domain, Student attained a Low standard score (77) driven by a low score (72) on the Applied Problems subtest. This score suggested that Student experienced difficulty reading the mathematics word problems, realizing the operation that needed to be used, and formulating the proper answer. In the Broad Written Language domain, Student earned an Average composite score. However, she attained a Low Average (81) score on the Writing Samples subtest, suggesting that her overall written language ability was limited. Independent Psychologist concluded from this data that Student exhibited difficulties in reading comprehension, written language and mathematics word problems which suggested the need for specialized instruction in these areas. Exhibit J-3.

6. Independent Psychologist also reported that Student had a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") in her medical history and was receiving medications which may have been mediating her behavior in the classroom. On the ADHD rating scale completed by one of Student's teachers, Student's rating indicated there was a Low possibility that Student met the criteria for ADHD. The parent rating scale completed by Mother indicated that Student was in the Average probability range for children diagnosed with ADHD. Exhibit J-3.

7. The PCS Multidisciplinary Team ("MDT") met in September 2010 to review the

IEE evaluations of Student conducted over the preceding summer. On the question of eligibility for special education services, the MDT team noted that Student was responding well to her ADHD medication. The MDT team also concluded it did not have enough information to determine that Student was experiencing a Specific Learning Disability (“SLD”). The MDT team decided that Student was not eligible for special education services at that time. Petitioner was in agreement with that decision. Exhibit J-5.

8. The September 2010 MDT team recommended that Student have a 504 Plan (Section 504 of the Rehabilitation Act of 1973), including the following accommodations: Extended time on assignments, projects assessments; preferential seating; counseling 30 minutes per week (group preferred); small group setting for testing; and multiplication chart and calculator when computation was not being assessed. Exhibit J-5.

9. Student’s 504 Plan was reviewed by the PCS MDT team on _____ The team concluded that Student remained eligible for a Section 504 Plan because her diagnosis of ADHD, at times, had a negative impact on her academic performance – but that Student no longer needed the multiplication chart/calculator accommodation. Exhibits J-8, J-9.

10. In _____ 2012, Student’s physician took her off of ADHD medication because it did not appear that Student had ADHD. Testimony of Mother.

11. Student’s MDT team at PCS met on _____ to discuss Mother’s concerns over Student’s performance in school. At the meeting, Mother requested that Student be reevaluated for special education services. The team agreed that Student would have special education reevaluations, including a psycho-educational evaluation and a clinical psychological evaluation, to include attention screening. Exhibit J-10.

12. On _____ Clinical Psychologist conducted a clinical psychological

evaluation of Student. Exhibit J-13. Clinical Psychologist administered the IVA+Plus continuous performance test, a 13-minute combined auditory and visual test taken on a computer, designed to measure objectively for the symptoms of ADHD. The pattern of Student's results on this test did not fall within the range for ADHD. On the Behavior Assessment Scales for Children (BASC-2) questionnaires completed by Student's science and language arts teachers, both teachers rated Student's ability to listen and refrain from calling out in class as somewhat less efficient than her peers, but their responses were not suggestive of ADHD. Clinical Psychologist noted that Student no longer was being medicated for ADHD. Clinical Psychologist concluded that while there was some evidence of Student's experiencing negative emotional effects from her academic struggles, there were no indications of a serious mental disorder and further that Student did not meet the criteria for ADHD. Exhibit J-13, Testimony of Clinical Psychologist.

13. School Psychologist conducted a psycho-educational reevaluation of Student in April 2013. School Psychologist administered the Wechsler Intelligence Scale for Children to measure Student's general cognitive and intellectual abilities. Measured by the WISC-IV, Student's Full Scale IQ ("FSIQ") score was 84. There was a great deal of variability between the index scores comprising the FSIQ, from which School Psychologist concluded that the FSIQ was not a valid and reliable indicator of Student's cognitive ability and that each index score should be interpreted separately. On the Verbal Comprehension Index, Student obtained a standard score of 75, in the Borderline range, indicating that her acquisition of verbal concepts and knowledge is significantly less developed compared to most others her age. On the Perceptual Reasoning Index, Student's score of 90, in the Average range, indicated that her ability to solve nonverbal, perceptual reasoning problems matches that of her same-age peers.

Student's standard score of 107 on the Working Memory Index, in the Average range, indicated that her auditory working memory skills are adequately developed. Student's standard score on the Processing Speed Index, 84, fell within the Low Average range, with substantial variability within the sub-measures. School Psychologist concluded from the cognitive testing that Student would likely struggle with language-based instruction and academic skills and would benefit from language based instruction to be accompanied with non-verbal instructional strategies, as well from as extended time for completing classroom assignments and tests. Exhibit J-14, Testimony of School Psychologist.

14. To measure Student's academic achievement, School Psychologist administered the Gray Oral Reading Tests – Fifth Edition (GORT-5), the WJ-III Ach., and the Test of Written Language - Fourth Edition (TOWL-4). On the GORT-5, Student obtained a score of 89, Below Average. On the Broad Written Language part of the WJ-III Ach., Student obtained a score of 97 in the Average range. The Spontaneous Writing portion of the TOWL-4 was administered to Student. Student obtained a standard score of 115, in the Above Average range. On the Broad Math part of the WJ-III Ach., Student obtained a score of 77 in the Below Average range. Her score on the Applied Problems subtest was considerably lower than her scores for Calculation and Math Fluency, indicating to the School Psychologist that Student's performance is affected by her significantly below average verbal reasoning ability. Testimony of School Psychologist, Exhibit J-14.

15. PCS uses the “severe discrepancy” model to evaluate students for specific learning disabilities. School Psychologist concluded that Student does not meet the IDEA criteria for having an SLD because her testing did not show at least a 30 point discrepancy (two

standard deviations) in her achievement scores in reading, writing and math below her abilities as tested on the WISC-IV and Testimony of School Psychologist, Exhibit J-14.

16. Student's MDT team convened at PCS on _____ to review the psycho-educational and psychological reevaluations. At the meeting, School Psychologist explained her finding that Student did not meet the IDEA criteria for an SLD and Clinical Psychologist reported that she ruled out ADHD. The MDT team decided that Student should have a speech-language evaluation. Exhibit J-16.

17. Speech-Language Pathologist conducted a Speech and Language Evaluation of Student on _____. Her evaluation indicated that Student had only very mild speech-language deficits which did not significantly impact her educational performance. Testimony of Speech-Language Pathologist, Exhibit J-17.

18. Student's MDT team at PCS reconvened on _____. The team reviewed the Speech and Language Evaluation. The PCS team members decided that Student was not eligible for special education and related services, but recommended that she receive additional services under her Section 504 Plan. Petitioner and Petitioner's Counsel expressed their disagreement with this decision. Exhibit J-18.

19. Student received failing or near-failing grades in all classes for the last quarter of the 2012-2013 school year at PCS. She attended PCS summer school, and, after passing Pre-Algebra, Environmental Science and English, she was promoted to the next grade. Exhibits J-18, J-25.

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* DCMR 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 RESPONDENT PCS DETERMINE INCORRECTLY THAT STUDENT IS NOT A CHILD WITH A DISABILITY ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES?

Under the IDEA, a child is eligible for special education if (1) she has been evaluated as having one or more of the conditions identified in the Act, and (2) by reason thereof, needs special education and related services. *See* 34 CFR § 300.8(a) (definition of “Child with a disability”); *Kruvant v. District of Columbia*, 99 Fed.Appx. 232 (D.C.Cir. 2004). Petitioner contends that PCS has denied Student a FAPE by failing to find her eligible, since the end of the 2010-2011 school year, under the disability classifications SLD and/or OHI-ADHD. PCS maintains, to the contrary, that Student does not meet the IDEA or DCMR definition requirements for either impairment.

a. Specific Learning Disability

The disability, Specific Learning Disability, is defined in the IDEA regulations as,

[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.

34 CFR § 300.8(b)(10). For many years, federal regulations required parents to demonstrate a child’s need for special education under the SLD classification by showing a “severe

discrepancy” between actual achievement and intellectual ability. See *Michael P. v. Department of Educ.*, 656 F.3d 1057, 1060 (9th Cir.2011). After enactment of the 2004 amendments to the IDEA, federal regulations were revised to allow LEAs the option of using an identification process that determines if a child responds to research-based interventions or of using a severe discrepancy model. See Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46647 (Daniel P. v. Downingtown Area School Dist., 2011 WL 4572024, 3 (E.D.Pa., Oct. 3, 2011) (Revised IDEA forbids a state from mandating a severe discrepancy model, but still allows the use the severe discrepancy model in addition to permitting the use of a Response to Intervention model.) Under requirements promulgated by the DC Office of the State Superintendent of Education (“OSSE”) in 2010, an LEA in the District may use SLD identification procedures that are based on scientific research-based interventions or on the severe discrepancy model. See *Memorandum Re: Part B Initial Evaluation/Reevaluation Policy*, p. 28 (OSSE, (“Evaluation Policy”). The LEA in this case, PCS, uses the severe discrepancy model.

“The ‘severe discrepancy model’ is based on the premise that underperforming students with relatively high IQs must have a learning disability, whereas underperforming students with low IQs are just ‘slow.’” *Michael P. v. Department of Educ.*, 656 F.3d 1057, 1061 (9th Cir. 2011) (quoting Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & Educ. 217 (2003).) Under the OSSE’s Evaluation Policy, in order to find SLD eligibility using the severe discrepancy model, all of the following three criteria must be met:

Criterion 1: The child does not achieve adequately for his or her age or meet the District of Columbia Learning Standards in at least one of the following areas, when the child has been provided with learning experiences and instruction appropriate for the child’s age and grade level:

1. Oral expression;
2. Listening comprehension;
3. Written expression;
4. Basic reading skill;
5. Reading fluency skills;
6. Reading comprehension;
7. Mathematics calculation; or
8. Mathematics problem solving.

Criterion 2: A discrepancy is demonstrated between achievement (as measured by the educational evaluation) and measured ability (as measured by the intellectual evaluation) of two years below a child's chronological age and/or at least two standard deviations below the child's cognitive ability as measured by appropriate standardized diagnostic instruments and procedures.

Criterion 3 (*exclusionary factors*): The team's findings under Criteria 1 and 2 are NOT primarily the result of:

1. Lack of appropriate instruction in reading, to include the essential components of reading instruction (phonemic awareness, phonics, fluency, vocabulary, and comprehension);
2. Lack of appropriate instruction in math;
3. Lack of appropriate instruction in writing;
4. A visual, hearing or motor disability;
5. Intellectual Disability;
6. Emotional Disturbance;
7. Cultural Factors;
8. Environmental or economic disadvantages; or
9. Limited English proficiency;

Evaluation Policy, pp. 30-31.

On _____ the PCS MDT team determined that Student was not eligible for an SLD classification because Criterion 2 was not met. Student's academic achievement – as measured by GORT-5 (Reading), TOWL-4 (Spontaneous Writing) and WJ-III Ach. (Math and Written Language) – was not discrepant by at least two standard deviations below her cognitive ability, as measured by the WISC-IV. The two standard deviations criterion used by OSSE and PCS is supported by District regulations and judicial precedent. *See* DCMR tit. 5-E, § 3001.1 (Definition of Severe Discrepancy); *Kruvant, supra* at 1 (Reasonable for the hearing officer, on

the DCPS psychologist's recommendation, to use two standard deviations as the definition.)

According to School Psychologist, two standard deviations requires at least a 30-point discrepancy between academic achievement and cognitive ability. School Psychologist testified that on her April 2013 psycho-educational reevaluation, Student's full scale IQ was 84, according to the WISC-IV, and that none of Student's achievement test scores was at least 30 points below her WISC-IV cognitive ability. School Psychologist opined that Student does not have an SLD, because the testing did not show at least a 30-point discrepancy between Student's achievement and her ability.

Petitioner's expert, Independent Psychologist, testified that she believed that Student's current scores would qualify her for an SLD disability using the severe discrepancy model, apparently based upon an assumption that Student's academic achievement is at least two years below expectations for her chronological age. *See OSSE Evaluation Policy, supra.*² However Independent Psychologist has not evaluated Student since 2010³ and Petitioner did not offer educational testing evidence which showed Student's current academic achievement relative to her chronological age. I found School Psychologist's opinion to be more persuasive because it was based upon Student's current academic achievement testing. Therefore, I find that

² OSSE's Evaluation Policy, Criterion 2, states that a severe discrepancy may be "demonstrated between achievement ... and measured ability ... of two years below a child's chronological age and/or at least two standard deviations below the child's cognitive ability" Criterion 2 is not a model of clarity. This Hearing Officer understands OSSE's Criterion 2 to mean that a severe discrepancy may be shown either by deficits in a child's academic achievement of at least two years below expectations for the child's age or by achievement tested to be at least two standard deviations below the child's cognitive ability.

³ Independent Psychologist diagnosed Student in 2010 with a Learning Disorder – Not Otherwise Specified, based upon Student's experiencing difficulties with all academic subjects, which impacted her functioning in the classroom. At the due process hearing for this case, Independent Psychologist acknowledged that her 2010 diagnosis was based upon the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (DSM-IV) and not the IDEA definition for SLD.

Petitioner has failed to prove by a preponderance of the evidence that Student is eligible as a child with an SLD disability.

2. Other Health Impairment-ADHD

Petitioner also contends that Student should have been found eligible for special education under the OHI-ADHD disability. Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as *inter alia*, attention deficit disorder or attention deficit hyperactivity disorder, and (ii) adversely affects a child's educational performance. *See* 34 CFR § 300.8(c)(9). Student was diagnosed with ADHD prior to 2010 and took medication for the condition until December 2012. In December 2012, Student's physician stopped her ADHD medications after deciding it did not appear likely that Student had the disorder. Clinical Psychologist evaluated Student for ADHD in April 2013. She administered the IVA+Plus continuous performance test, a combined auditory and visual test taken on a computer, designed to measure, objectively, the symptoms of ADHD. Clinical Psychologist also obtained current BASC-2 teacher ratings from two of Student's teachers at PCS. Based upon this data, Clinical Psychologist concluded, consistent with the physician's December 2012 "non-diagnosis," that it is highly improbable that Student has ADHD.

In 2010, Petitioner's expert, Independent Psychologist, diagnosed Student with ADHD-Combined Type, based upon the parent's 2010 BASC-2 responses and anecdotal information from one of Student's teachers. Mother's BASC-2 responses were in the Average range for those children diagnosed with ADHD. However, the teacher's rating yielded results that were in the Low probability for ADHD. Considering the December 2012 non-diagnosis of ADHD by

