

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on February 7, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ in fourth grade at his DCPS local elementary school (“School A”). He has attended School A since kindergarten. The student was retained in third grade at the end of school year (“SY”) 2011-2012. The student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) in April 2012. In October 2012 DCPS evaluated him and on December 12, 2012, held an eligibility meeting at which DCPS determined the student was not eligible for special education services.

In June 2013 DCPS authorized the following independent evaluations: psychological, speech/language and occupational therapy (“OT”). The speech/language evaluation recommended an auditory processing evaluation. On October 16, 2013, DCPS convened a meeting at which the evaluations were reviewed. Again DCPS found the student ineligible.

On December 27, 2013, Petitioner filed the due process complaint asserting DCPS denied the student a free and appropriate public education (“FAPE”) by failing to find the student eligible. Petitioner asserts the independent evaluations supported a finding that the student is eligible under other health impairment (“OHI”) classification and should have been provided both speech/language and OT services. Petitioner also asserted that in August 2013 the parent’s educational advocate requested DCPS conduct an auditory processing evaluation. Petitioner seeks as relief that the Hearing Officer find the student eligible for special education services and direct DCPS to develop an individualized educational program (“IEP”) and provide him an appropriate educational placement. Petitioner also seeks granting of an auditory processing and an audiology evaluation and compensatory education.

DCPS filed a response to the complaint on January 2, 2014. DCPS asserted the student was not denied a FAPE and specifically asserted that the student was appropriately found ineligible on both occasions and there was no basis for the requested evaluations, as the team did not determine they were warranted.

The parties agreed to waive resolution on January 9, 2014. The 45-day period began on January 10, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on February 23, 2014. A pre-hearing conference was held on January 28, 2014, and a pre-hearing conference order issued outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to determine the student eligible on December 12, 2012, and/or October 16, 2013.
2. Whether DCPS denied the student a FAPE by failing to conduct an auditory processing evaluation of the student following the August 28, 2013, parental request.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 49 and Respondent's Exhibits 1 through 18) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:³

1. The student is currently in fourth grade at School A where he has attended since kindergarten. The student was retained in third grade at the end of SY 2011-2012. A staff member brought to his parent's attention that the student was having academic difficulties during his first time in third grade. His teachers confirmed that the student was struggling in math and reading and would probably be retained. The student's parent took him to a community health organization that diagnosed him with ADHD in April 2012. He is now on medication. The parent made the School A special education coordinator aware of the student's ADHD diagnosis. (Parent's testimony, Petitioner's Exhibit 6-1, 6-3)
2. In October 2012 DCPS conducted a psychological evaluation of the student that measured his cognitive ability as significantly below average when compared with children his age. While the student's mother reported the student displayed ADHD behaviors his teachers' feedback and the student's self-report did not. Although the student was performing below average to average in all academic subtests, the evaluator concluded that the student did not present with a specific learning disability, other health impairment or emotional disturbance. The evaluator concluded the student would benefit from behavioral intervention within the school setting. (Petitioner's Exhibit 6-1, 6-7, 6-16)

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

3. On October 26, 2012, DCPS administered a Woodcock Johnson III assessment of the student when he was age nine, eleven months (9-11). Generally the student was operating at third grade level and at second grade level in some areas. Although the student was in third grade at the time because he had been retained in the third grade he was operating well below his age level in all areas assessed. The student had the following scores:

Cluster/Test	Standard Score	Age Equiv.	Grade Level
Broad Reading	92	8-11	3.6
Broad Math	81	8-4	3.0
Broad Written Expression	93	9-1	3.7
Academic Skills	95	9-3	3.9
Academic Fluency	94	9-3	3.8
Academic Applications	79	7-11	2.6
Reading Fluency	90	8-8	3.3
Math Fluency	90	8-9	3.4
Passage Comprehension	81	7-7	2.3
Applied Problems	83	8-1	2.8
Writing Samples	89	8-2	2.8

(Petitioner’s Exhibit 15-1, 15-2)

4. The student’s teachers noted to the DCPS psychologist evaluating the student during interviews conducted October 6, 2012, that the student’s behavior and academic performance had improved since the previous school year and he was able to follow classroom routines. The student appeared on task when the evaluator observed him in the classroom on October 10, 2012. (Petitioner’s Exhibit 6-4, 6-5)
5. On November 13, 2012, DCPS conducted a functional behavior assessment (“FBA”) of the student to take a look at his impulsivity, difficulty sitting in his chair, blurting out answers to questions and engaging in attention seeking behaviors. The assessor, based on observations and interviews of the student, determined the concerns about his behaviors fell in the mild range and did not suggest the need for behavioral health services. However, the assessor stated in his report the student would still benefit from the services. (Respondent’s Exhibit 3-1, 3-2, 3-3)
6. On December 12, 2012, DCPS held an eligibility meeting that the student’s parent attended. The other teams members included the student’s outside therapist, two of his regular education teachers, the school social worker who conducted the FBA and the DCPS psychologist who conducted the psychological evaluation. The team noted the student’s inattention and impulsive behaviors. However, the team also noted the student was making academic progress and determined the student’s behaviors were not significantly interfering with his academic performance in school and thus determined he was not eligible for special education. The parent agreed with the team’s determination. (Parent’s testimony, Petitioner’s Exhibits 2-2, 3-1, 3-3, 4-1, 4-3, Respondent’s Exhibit 6-3, 6-4)

7. DCPS completed disability worksheets for specific learning disability (“SLD”) and OHI on December 12, 2012. The worksheet for SLD noted the student’s inattentiveness and impulsive behaviors but indicated the student did not meet the requirements for eligibility under this classification. The OHI worksheet also indicated the student did not meet the criteria for that disability classification. DCPS completed a final report and a prior written notice citing the student’s ineligibility. The report stated that the student would continue community based therapy and the parent would consider medication for the student’s ADHD. (Respondent’s Exhibits 4, 5, 6, 7)

8. In June 2013 DCPS authorized the following independent evaluations: psychological, speech/language and OT. The psychological evaluation was conducted in July 2013 when the student was attending summer school and was age ten, seven months (10-7). The evaluator measured the student’s cognitive functioning as being in the low to low-average range and his academic functioning at low average to average. The evaluator interviewed the student’s summer school teachers. Those teachers had only known the student three weeks but indicated the student was attentive and demonstrated no behavior problems in the classroom. The evaluator noted the student had clinically significant scores for internalizing problems and that the student sometimes felt depressed and disappointed with his grades and wanted to do better but found it difficult to do so. Due to the ADHD diagnosis and the parent’s rating for the student’s inattention the evaluator recommended the student be found eligible for special education under OHI for ADHD and that be provided interventions so he can make gains academically and behaviorally. (Witness 2’s testimony, Petitioner’s Exhibit 7-1, 7-5, 7-6, 7-7, 7-8, 7-10, 7-11, 7-12, 7-13, 7-14)

9. The student had the following scores in the July 2013 evaluation:

Cluster/Test	Standard Score	Age Equiv.	Grade Level
Broad Reading	89	9-2	3.8
Broad Math	81	8-9	3.4
Broad Written Expression	90	9-4	4.0
Academic Skills	92	9-7	4.2
Academic Fluency	89	9-4	3.9
Academic Applications	80	8-3	2.9
Reading Fluency	92	9-5	4.1
Math Fluency	91	9-5	4.0
Passage Comprehension	83	8-1	2.7
Applied Problems	82	8-4	3.0
Writing Samples	80	8-6	3.2

Petitioner’s Exhibit 7-16)

10. The speech language evaluation was conducted in July 2013. The evaluator recommended a the student undergo an auditory processing evaluation along with an audiology evaluation. The evaluator noted the student better educationally than his cognitive abilities would suggest he perform. In view of the fact that there may be some underlying language processing problems contributing to the psychologist test findings as

well as academic achievement problems for the student. The student had articulation deficits and deficits in receptive and phonological processing and language knowledge and recommended the student be provided speech/language remediation. The student has deficits in expressive vocabulary, syntax and inferences and difficulties in receptive language. The evaluator recommended the student be provided speech and language services but before they are provided he recommends the student be evaluated for auditory processing problems. An audiology evaluation is necessary first to rule out hearing problems before the auditory processing evaluation. (Witness 4's testimony, Petitioner's Exhibit 8-8, 8-9, 8-10, 8-11)

11. On July 17, 2013, an occupational therapy evaluation was conducted of the student. The student's visual motor integration abilities were below average with a standard score of 88. The student is able to negotiate the school environment without difficulty but demonstrated concerns with sensor motor functioning. The evaluator determined the student's overall manual control and coordination was below average. His visual motor integration, visual perceptual and motor skills were determined to be not commensurate with his peers. The evaluator recommended, based on the student's below average scores on all assessments, that he be provided individualized OT services to improve fine motor, visual motor integration and visual perceptual skills. (Witness 1's testimony, Petitioner's Exhibit 9-6, 9-7)
12. DCPS conducted a review of the OT evaluation. Although the student had below average performance in the areas of fine motor control and manual control and visual perceptual motor integration the DCPS reviewer determined that the it did not appear to impact his ability complete his academic program. Thus, the DCPS occupational therapist concluded the student does require OT to access his general education curriculum. The DCPS therapist relied principally upon her observation of the student in the classroom and his teachers' reports that they did have concerns with the student's fine motor and visual perceptual motor integration skills. (Petitioner's Exhibit 12-1, 12-2)
13. On October 16, 2013, DCPS convened a meeting at which the independent evaluations were reviewed. Again DCPS found the student ineligible. The team determined the student did not meet the criteria for OHI disability. (Petitioner's Exhibits 30, 31-12, 32, 33, Respondent's Exhibits 6, 7, 12, 13, 14, 15)
14. DCPS completed a disability worksheets for speech/language impairment ("SLI") and OHI on October 16, 2013. The worksheet for SLI noted the student did not meet the requirements for eligibility under this classification. The OHI worksheet also indicated the student did not meet the criteria for that disability classification. DCPS completed a final report and a prior written notice citing the student's ineligibility. The report noted that the student was given three subtests on the Test of Auditory Processing Skills Third Edition (TAPS-3). On the first two subtests, auditory comprehension and phonological blending, the student received an average score. The DCPS speech/language pathologist conducted a classroom observation of the student and teacher interviews. The teachers stated the student participates in class and that he is able to follow oral and written directions and comprehend class assignments without in difficulty and that his speech is

intelligible. The team reached a consensus that the student did not meet the eligibility criteria. (Respondent's Exhibits 12, 13, 14-1, 14-5, 14-6)

15. The parent's educational advocate participated with her in the eligibility meetings for the student and disagreed with the team's finding of ineligibility and pointed to the student's having a F in math and his reading scores being low. The DCPS team members attempted to explain the student's difficulties as having no academic impact and speculated that perhaps the student is just a poor test taker. They did not say that the independent testing was invalid. (Witness 3's testimony, Petitioner's Exhibits 30-1, 45-1)
16. The student's parent is concerned that the student is still reading below average and not focusing and still displaying some behavior problems at school. The parent has to work with the student everyday after school on his homework and it is frustrating to help him. To her the student's handwriting is not proficient and he doesn't want to focus and listen. The parent and student read together three times per week. He struggles and stumbles with words that she thinks a second grader should know. She believes he needs a smaller classroom because of his distractedness. At the October 16, 2013, meeting the parent disagreed with the determination that the student was ineligible. (Parent's testimony, Petitioner's Exhibits 22-2, 22-5, 22-11, 22-12, 22-13, 22-19, 23-1)
17. The student currently has two general education classroom teachers who have taught him since the beginning of SY 2013-2014. One teaches the student fourth grade math and science. In those classes the student follows directions, has a positive attitude, is an active learner and demonstrates proper behavior. He participates, answers questions and asks questions if he doesn't understand. In these two subjects the student is the top ranked student in his class. The student's math and science teacher participated in the October 2013 eligibility meeting and does not believe the student is eligible for special education services because of his proficient academic performance in her classroom. (Witness 5's testimony, Respondent's Exhibit 18)
18. The student's current fourth grade reading writing social studies teacher also participated the October 2013 eligibility meeting. At meeting she shared that the student was making adequate progress and engaging in small group instruction in the classroom. The student is with this teacher everyday for two hours. She noted that the student is well behaved and prompt. He is usually the first student to get started on his work and takes his work seriously. He is attentive in class, paying attention to instruction during whole group and small group discussion. The student currently sits at a table group with two other boys and follows directions right away and rarely needs reminders to get back on tract. He usually knows exactly what to do and rarely asks for directions to be repeated. The student has improved in his reading abilities and if he stays on pace he will be at grade level proficiency by the end of the school year. The student's writing has improved particularly the content of his writing. The teacher never has a problem understanding what he writes. (Witness 6's testimony, Respondent's Exhibit 17)
19. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE. The consultant recommended the

student be provided 60 hours of independent tutoring, the use of laptop to complete writing assignments both at home and at school loaded with appropriate computer software for such a task, 6 hours of OT, 32 hours of speech/language therapy. (Witness 2's testimony, Petitioner's Exhibits 44-5)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to determine student eligible on December 12, 2012, and/or October 16, 2013.

⁴ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

Conclusion: Petitioner's did not sustain the burden of proof by a preponderance of the evidence that the student is a student with and disability under IDEA with OHI classification for ADHD.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).⁵

Petitioner asserted that the student could and should be found eligible under the OHI classification. Although the student has ADHD the evidence did not reflect that his condition is impacting him in his current classroom such that he is in need of special education.

The evidence including testimony interpreting evaluative data clearly demonstrates the student has below average cognitive abilities and has deficits in reading, math and written language and is currently performing two age levels below where he should be.⁶ Although the student has been diagnosed with ADHD and has academic deficits the evidence indicates that he is has made academic progress from the time of his first evaluation in 2012 and his second in 2013.⁷ Based on the testimony of two of the student's current general education teachers the student ADHD condition is not preventing him from accessing the general education curriculum and he is actually focused and attentive in the classroom and performing well academically.⁸

It is true the student had been retained once and when measured with his same age peers he is significantly behind academically. However, the evidence in this instance including that presented by Petitioner and her expert witnesses was not convincing that student is in need of

⁵ 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

⁶ FOF #s 8, 9

⁷ FOF #s 3, 9

⁸ FOF #s 18, 19

special education in order to access the general education curriculum. The evidence demonstrates he is making academic progress. Thus, the Hearing Officer concludes the student does not meet the criteria for eligibility under OHI of being in need of special education. Therefore, the Hearing Officer concludes the student has not been denied a FAPE by being found ineligible both in December 2012 and in October 2013.

Although the student was diagnosed with speech and language deficits in the June 24, 2013, evaluation, the evaluator suggested the student be further assessed and the evaluator noted that the student's language and academic concerns may be related to his language based difficulties.⁹ The October 16, 2013, team found the student ineligible under SLI and the team determined that he was not in need for further evaluation, speech/language or OT services despite the recommendations made in the independent evaluations.

There was no assertion in the complaint and none made at hearing that the student is eligible under the SLI classification. Petitioner only sought to challenge the student's ineligibility under OHI. So, despite the evaluations and testimony that the student is in need of related services there was no indication that because of the conditions that make these services necessary the student is in fact a child with a disability pursuant to IDEA. However, DCPS should consider whether these services can be provided to the student even though he may not be eligible for special education because of the need.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to conduct an auditory processing evaluation of the student following the August 28, 2013, parental request.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS not conducting an auditory processing evaluation.

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that a "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all

⁹ FOF #10

of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

Although the facts indicate a recommendation was made in the July 2013 speech/language evaluation that the student be provided an auditory processing and audiology evaluation, and the expert witness testified that the evaluations are needed, there was no testimony or evidence that a request was made for the evaluation or that the team's decision that the evaluation was not necessary¹⁰ amounted to a denial of a FAPE.

If Petitioner did make such a request either after the evaluation was conducted or at the meeting DCPS would be advised, pursuant to the mandate in IDEA that a student to be evaluated in all areas of suspected disability, to conduct these evaluations. However, based upon the evidence presented Petitioner did not sustain the burden of proof that there was a specific request for the evaluations were made or that the team not following the recommendation made in the evaluation denied the student a FAPE or significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof that DCPS' failure to conduct the evaluation prior to the complaint being filed was a denial of a FAPE to the student.

ORDER:

1. The complaint is hereby dismissed with prejudice.
2. All requested relief is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: February 23, 2014

¹⁰ FOF #16