

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

STUDENT,¹)
By and through PARENT,)
)
 Petitioner,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
 Respondent.)

Case No.
Bruce Ryan, Hearing Officer
Issued: February 2, 2011

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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools (“DCPS”). The Complaint was filed November 8, 2010, on behalf of a -year old student (the “Student”) who resides in the District of Columbia and attends a non-public day school (the “Private School”) located in suburban Maryland. Petitioner is the Student’s parent. As of the date of the Complaint, the Student had not yet been determined to be eligible for special education and related services as a child with a disability under the IDEA.

In her Complaint, Petitioner alleged that DCPS denied the Student a free appropriate public education (“FAPE”) by: (a) failing to provide access to educational records; (b) failing to identify the Student as eligible for special education services at a 01/23/2009 team meeting; (c) failing to identify the Student as eligible as a result of his speech/language impairment prior to commencement of the 2010-11 school year; (d) failing to conduct a speech/language evaluation as of January 2009; (e) failing to conduct certain evaluations requested by the parent (*e.g.*, comprehensive psychological and OT) in April-May 2010; and (f) failing to include a speech/language pathologist on the MDT/IEP team on 09/23/2010.

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

DCPS filed its Response on November 24, 2010, asserting that DCPS has not denied a FAPE to the Student. DCPS responded (*inter alia*) that: (a) Petitioner has not been denied access to education records; (b) DCPS completed child find for this Student by referring her for evaluation and determining at the January 2009 IEP team meeting that she did not qualify for special education; and (c) DCPS is in the process of completing and reviewing further evaluations (including OT and auditory processing) pursuant to a 09/23/2010 parental consent.

The statutory 30-day resolution period ended early, by written agreement of the parties, on November 23, 2010. A prehearing conference (“PHC”) was then held on December 7, 2010, which discussed and clarified the issues and requested relief. *See Prehearing Order* (issued December 10, 2010), ¶ 6. At the PHC, the parties agreed to schedule the due process hearing for January 19, 2011, which appeared to be the earliest date that the parties and witnesses could be made available.² Petitioner elected for the hearing to be closed.

In order to accommodate the parties’ agreed hearing schedule, and allow sufficient time for closing statements and the HOD, Petitioner filed an unopposed motion for a continuance of the 45-day HOD timeline to January 28, 2011 (a total of 21 calendar days). The motion was granted and approved by the Chief Hearing Officer. Five-day disclosures were filed by both parties, as directed, by January 11, 2011.

The Due Process Hearing convened as scheduled in Room 2006 on January 19, 2011. The hearing was preceded by extended discussion and argument regarding a significant new development – *i.e.*, that the parties had agreed to schedule a meeting of the Student’s MDT/IEP team for the very next day (January 20, 2011) to review evaluations and determine eligibility. The Hearing Officer decided that the case would proceed on January 19, on the issues specified in the December 10 Prehearing Order, and that an additional hearing session would be scheduled for a date following the 1/20/11 eligibility meeting.

The parties agreed to schedule a further hearing session for January 25, 2011. A second hearing session was then held on that date, but the case could not be completed within the time allotted, as Petitioner did not rest and DCPS thus was not able to begin its case until the afternoon of January 25. Accordingly, a third hearing session was held on January 28, 2011. At

² In light of the early ending of the resolution period, the Hearing Officer made multiple attempts to schedule the PHC earlier than December 7, as well as to schedule the Due Process Hearing on various dates in December or early January, but those efforts were not successful.

the third hearing session, Petitioner moved for a further continuance of three business days to allow for completion of the Hearing Officer's Determination ("HOD") by February 2, 2011. The motion was granted.

During the three days of hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: P-1 through P-34.³

Respondent's Exhibits: DCPS-1 through DCPS-9.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Educational Advocate ("EA"); (3) Audiologist; and (4) Private School Learning Specialist.⁴

Respondent's Witnesses: (1) Audiologist; (2) Teacher; (3) Special Education Coordinator ("SEC"), DCPS Neighborhood
(4) SEC, DCPS (5) DCPS
Compliance Specialist; and (6) DCPS Program Manager.

Oral closing statements were submitted on the record at the conclusion of evidence.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the HOD pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures* ("SOP"). With approved continuances, the HOD deadline is February 2, 2011.

³ Exhibits P-33 (one-page audiology report dated 1/11/2011) and P-34 (1/20/2011 MDT meeting notes) were not included in Petitioner's five-day disclosures, but were presented at the January 25 hearing session. The Hearing Officer overruled DCPS' objections to these Exhibits, for the reasons stated on the hearing record.

⁴ The Hearing Officer overruled DCPS' objection to the testimony of the EA, whose name appeared to have been added to an amended disclosure letter filed after 1/11/2011, for the reasons stated on the hearing record.

III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

- (1) **Access to Educational Records** — Did DCPS fail to provide the parent with access to educational records pursuant to the IDEA and DCMR 5-E3021?
- (2) **Jan. 2009 Eligibility Determination** — Did DCPS deny the Student a FAPE by failing to identify and determine him to be eligible for special education and related services at the 01/23/2009 eligibility meeting? Petitioner alleges that the Student met the criteria for eligibility as a child with an Other Health Impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”).
- (3) **2010-11 SY Eligibility Determination** — Did DCPS deny the Student a FAPE by failing to identify and determine him to be eligible for special education and related services as a result of a diagnosed speech/language impairment prior to commencement of the 2010-11 school year?
- (4) **Failure to Conduct Speech/Language Evaluation** — Did DCPS deny the Student a FAPE by failing to conduct a speech and language evaluation during the 2008-09 SY, in light of cognitive evaluation findings and other information reviewed at the 01/23/2009 MDT meeting? *See Complaint*, p. 4, ¶¶ 12-13 & p. 13, Issue 4.
- (5) **Failure to Conduct Other Evaluations Requested by Parent** — Did DCPS deny the Student a FAPE by failing to conduct certain evaluations requested by Parent in April-May 2010, e.g., comprehensive psychological and OT evaluations? *See Complaint*, p. 5 ¶¶ 17-18 & pp. 14-15, Issue 5.
- (6) **Failure to Convene a Complete MDT/IEP Team at 09/23/2010 Meeting** — Did DCPS commit a procedural violation and/or deny the Student a FAPE by failing to include a speech/language pathologist on the MDT/IEP team that met on or about 09/23/2010? Petitioner alleges that, as a result, his speech/language evaluation was never reviewed by an individual who could interpret the instructional implications of the evaluation results and no services were offered.

As relief for the alleged denials of FAPE, Petitioner requested at the PHC that the Hearing Officer: (a) find that DCPS denied FAPE to the Student as set forth above; (b) reimburse tuition expenditures by the parent for the 2009-10 and 2010-11 School Years; (c) order DCPS to convene an MDT/IEP meeting to identify the Student as eligible for services and develop an IEP; and (d) award compensatory education relief. However, Petitioner withdrew her request for compensatory education at the hearing; and DCPS convened an MDT/IEP team meeting that found the Student eligible for special education services on January 20, 2011.

IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. As of the date of the Complaint, he had not been determined to be eligible for special education and related services under the IDEA. *See Parent Testimony.*
2. The Student has attended the Private School during the 2009-10 and 2010-11 School Years. *See Parent Testimony.* Prior to that, the Student attended his neighborhood DCPS (the for Kindergarten through grade, ending in June 2009. *Id.*
3. In late November 2008, when the Student was in the grade, he was referred to the Student Support Team (“SST”) based on concerns raised by Petitioner and the Student’s teachers regarding academic difficulties. *See Testimony of Parent, SEC; P-19; P-24.* Among other things, the Student’s performance on a November 17, 2008 diagnostic (STAR) math test indicated a grade equivalent (GE) score of 2.5, comparable to that of an average second grader after the fifth month of the school year. *P-26; Parent Testimony.*
4. In early December 2008, DCPS held an SST meeting, at which Petitioner gave consent to evaluate the Student to determine eligibility for special education. *Id.* At this meeting, Petitioner also provided DCPS with copies of a cognitive evaluation completed December 2006 and a psycho-educational evaluation completed October 2007. *See P-17; Parent Testimony.*⁵
5. On or about January 21, 2009, DCPS completed an educational evaluation of the Student, consisting of the Woodcock-Johnson III Tests of Achievement. *P-18.* The evaluation found that the Student’s academic skills were within the high average range of others at his grade level; and his fluency on academic tasks and his ability to apply academic skills were both within the average range. *Id.*, p. 2. When compared to others at his grade level, the Student’s performance was average in Broad Reading (GE 4.9) and Mathematics (GE 6.2), high

⁵ The December 2006 testing found (*inter alia*) that the Student’s general cognitive ability appeared to be in the average range (full-scale IQ of 94), and that his verbal and non-verbal skills seemed evenly developed. However, the testing suggested the need for further assessment due to significant differences between certain subtest scores that are not typical. *P-17*, p. 14. The October 2007 evaluation by the same examiner administered additional subtests as part of a more comprehensive psycho-educational assessment. *P-17, pp 1-2.* The October 2007 evaluation also included an Achenbach Child Behavior Check List (“CBCL”), which suggested difficulties with attention and concentration. *Id.*, p. 7 (“The results from this evaluation along with reports from his parents combine to suggest a diagnosis of Attention-Deficit Hyperactivity Disorder, Predominately Inattentive Type.”).

average in Written Language (GE 7.8), and superior in Math Calculation Skills (GE 8.6). *Id.*, pp. 2-3.

6. On or about January 23, 2009, DCPS convened a meeting of the Student's MDT/IEP team (with the parents in attendance) to review the evaluations and determine his eligibility for special education. The IEP team determined that the Student was not eligible for services at that time. *See DCPS-1; P-16; SEC Testimony.*
7. Petitioner did not file a due process complaint or otherwise contest DCPS' refusal to identify the Student as a child with a disability at the January 23, 2009 meeting, until the present Complaint was filed in November 2010.
8. In June 2009, the Student completed the _____ grade at _____ and was ready to progress to the _____ grade at his neighborhood DCPS _____ (the "Neighborhood _____"). *See Parent Testimony; SEC Testimony.*
9. During the 2009 summer, Petitioner continued to be concerned with the Student's educational progress and decided to explore other _____ options. She first met with the 6th grade team at an alternative DCPS _____ (the "Alternative _____" that was smaller than Neighborhood _____ and appeared to offer smaller class sizes. *Parent Testimony.* Petitioner was told that the Student could attend Alternative _____ However, after further discussions with school staff, Petitioner was not satisfied that the Student would receive the services he needed at Alternative _____ *Id.* Petitioner then visited the Private School. *Id.*
10. In August 2009, Petitioner decided to enroll the Student at Private School for the start of the 2009-10 School Year. *Parent Testimony.* Petitioner did not notify DCPS of this enrollment at that time.
11. In November 2009, Private School completed a speech and language evaluation of the Student. *P-2.* The evaluation was conducted after the Student failed a September 2009 screening test administered to all incoming students at Private School. *Id.*, p. 1; *Testimony of Private School Learning Specialist.* The results of the evaluation indicated that the Student "demonstrates a mild to moderate language disorder characterized by deficits in abstract and pragmatic language, as well as certain aspects of phonological processing." *P-2*, p. 5. The evaluator recommended speech and language therapy to improve the Student's receptive and expressive language. *Id.*

12. On or about April 28, 2010, Petitioner provided a copy of the November 2009 speech/language evaluation to DCPS' Private & Religious School Office ("PRO") and requested that DCPS evaluate the Student for special education and related services. *See P-4; P-6; Parent Testimony*. Petitioner also requested access to the Student's educational records. *P-5*.
13. On or about July 30, 2010, Petitioner followed up on her request that the Student be evaluated for special education and related services. *P-8*. At this time, Petitioner specifically requested a comprehensive evaluation to include a comprehensive psychological, social history, and occupational therapy evaluation, as well as a formal classroom observation. *Id*.
14. Also on July 30, 2010, Petitioner provided DCPS a "Notice of Unilateral Placement" letter. The letter stated that Petitioner "intends to enroll her child, [the Student], in the [Private] School of Maryland for the 2010-11 school year in the event the evaluation process has not been completed for her child, an eligibility meeting held, and if eligible a suitable program is developed and an appropriate placement identified." *P-9*. The letter indicated that as of 07/30/2010, no further action had been taken by DCPS in response to Petitioner's April 2010 requests. *Id*.
15. By August 2010, Petitioner had re-enrolled the Student at Private School for the 2010-11 School Year. *See Parent Testimony*.⁶ The evidence establishes that Petitioner has paid and/or incurred approximately _____ in tuition expenditures for the 2010-11 School Year at Private School. *See P-28, p. 2; Parent Testimony*.
16. On or about August 30, 2010, DCPS sent a Letter of Invitation for an MDT/IEP team meeting to be held on September 23, 2010, to discuss the educational needs of the Student. *See DCPS-2*.
17. On or about September 24, 2010, DCPS convened a meeting of the Student's MDT/IEP team at Neighborhood _____ (with Petitioner in attendance). The team discussed (*inter alia*) Petitioner's concerns regarding the Student, his present educational program at Private School, prior evaluations, and the additional evaluations she had requested. *See DCPS-3 (9/24/2010 MDT meeting notes)*. The team noted that "some parts of evaluations [were] missing" and that Petitioner "will try to find and submit to us." *Id*. An auditory processing

⁶ Petitioner actually appears to have executed a re-enrollment contract and incurred tuition expenses for the new school year sometime during July 2010. *See Parent Testimony; P-28*.

evaluation was also requested by the Student's educational advocate due to alleged discrepancies in certain cognitive scores, concerns raised in the speech/language evaluation, and other factors. *See EA Testimony.*

18. On or about October 7, 2010, DCPS completed a Comprehensive Psychological Evaluation of the Student. *DCPS-7.* The DCPS School Psychologist administered additional testing, which found that the Student presents with high average to superior cognitive skills overall, but with areas of concern in cognitive fluency (SS=66) and processing speed (SS=79) that fall well below average. *Id.*, pp. DCPS-000031-32. According to the evaluator, both areas of concern "impact classroom participation and performance in that the student may not appear to 'get things' at first and his productivity [is] impacted overall. This may account for the need for accommodations at his current setting." *Id.*, p. DCPS-000031.
19. On or about October 21, 2010, DCPS completed a Social Work Assessment of the Student. *DCPS-5.*
20. On or about November 19, 2010, DCPS completed an Occupational Therapy Evaluation of the Student. *DCPS-6.*
21. On or about November 23, 2010, DCPS convened a resolution meeting on the instant Complaint. DCPS offered to hold an MDT meeting to review all evaluations and determine eligibility. Petitioner agreed to the commencement of an MDT meeting on a mutually agreeable date if DCPS provided copies of all evaluations to Petitioner by December 3, 2010. *See P-8* (resolution meeting notes).
22. On or about November 24, 2010, DCPS completed a Summary of Audiological Evaluation of the Student. *See P-13.* The report was based on an evaluation conducted on 11/17/2010 by a DCPS Educational Audiologist, as part of a test battery to determine if an Auditory Processing Disorder ("APD") evaluation is warranted. *Id.* Test results indicated normal hearing acuity in both ears, but also found abnormal negative pressure in both ears that precluded further assessments for APD at that time. *Id.* The evaluator recommended a medical referral for bilateral middle ear pathology. *Id.*
23. On or about December 3, 2010, DCPS provided Petitioner with copies of the audiological evaluation, the social work assessment, and the OT evaluation. *See DCPS-9*, p. DCPS-000039. And on or about December 6, 2010, DCPS provided Petitioner with a copy of the comprehensive psychological evaluation. *Id.*, p. DCPS-000038.

24. On or about December 7, 2010, DCPS sent a Letter of Invitation proposing three alternative dates in January for an MDT/IEP team meeting to review the Student's evaluations and determine eligibility. *See DCPS-9*, p. DCPS-000037. Petitioner's counsel responded on January 6, 2011, stating that Petitioner was available on January 20, 2011, the day after the due process hearing was scheduled to be held. *Id.*
25. On January 20, 2011, DCPS convened the meeting of the Student's MDT/IEP team to review the Student's evaluations and determine eligibility. *See P-34* (1/20/11 MDT meeting notes). The team reviewed all completed evaluations, including: (a) the previous 2007 psycho-educational evaluation; (b) the October 2010 psychological evaluation; (c) the November 2010 audiological evaluation; (d) the November 2010 OT evaluation; (e) the November 2010 social work assessment; and (f) the November 2009 speech/language evaluation. *Id.* The team also received an oral report from Petitioner and advocate regarding accommodations that the Student is currently receiving at Private School. *Id.*, p. 2.
26. At the January 20, 2011 MDT/IEP team meeting, DCPS determined that the Student qualified for special education as a student with an Other Health Impairment ("OHI") based on his medical condition of ADHD-Inattentive Type. *See P-34*, p. 4. According to the DCPS School Psychologist, the Student's ADHD condition is his primary disability, and his educational performance deficits are very likely related to ADHD. *Id.* The DCPS Audiologist believes that the Student does not qualify as having a hearing problem. *Id.*
27. Also at the January 20, 2011 MDT/IEP team meeting, the MDT/IEP team discussed the need to review current accommodations at Private School and to invite Private School to a further MDT meeting to develop an individualized education program ("IEP"). *See P-34*, p. 4. DCPS requested Petitioner to provide certain additional information and documents needed for that purpose, including: (a) the "accommodations list" and "learning profile" documents generated by Private School; and (b) documents from the speech therapist who has provided services to the Student at Private School. *Id.*, p. 5. DCPS has also requested copies of any reports from the Student's audiologist and ear/nose/throat physician in so far as they may bear on the need for further APD testing. *Id.* Finally, DCPS requested Petitioner to submit a proposal for compensatory education before the next meeting to develop the IEP. *Id.*, p. 4.
28. At the time the due process hearing was concluded, the further MDT/IEP team meeting to develop an IEP for the Student had been scheduled, but had not yet taken place.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP. 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-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on Issues 1 through 4, but that Petitioner has met her burden of proof in part on Issues 5 and 6.⁷

1. Access to Records

The IDEA provides that “[t]he parents of a child with a disability must be afforded ... an opportunity to inspect and review all education records with respect to – (1) the identification, evaluation, and educational placement of the child; and (2) the provision of FAPE to the child.” 34 C.F.R. 300.501 (a). Further, the agency must comply with a parental request “without unnecessary delay and before any meeting regarding an IEP, or any hearing....” 34 C.F.R. 300.613 (a). The right to inspect and review education records also includes the “right to a response from the participating agency to reasonable requests for explanations and interpretations of the records.” *Id.*, 300.613 (b) (1).

⁷ As the Hearing Officer made clear on the record, the subject matter of the due process hearing is limited to the six issues and requested relief specified in the December 10, 2010 Prehearing Order. *See* 34 C.F.R. 300.511 (d) (“The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 300.508(b), unless the other party agrees otherwise.”). Thus, evidence concerning the January 20, 2011 eligibility meeting was presented at hearing in so far as it may bear on these issues and requested relief, but not to give rise to any new issues separate from the complaint already filed. If Petitioner chooses, she may now file a separate due process complaint on any additional issue arising from any new DCPS action or refusal to act at such meeting. *See id.*, 300.513 (c).

In this case, Petitioner claims that she unsuccessfully attempted to obtain records from the 2008-09 SY from both the Student's neighborhood and another DCPS to which she was directed in response to her written request. *See Parent Testimony; Complaint* ¶¶ 19-20. However, it appears that the relevant time period for the alleged denial of access predates determination of the Student's eligibility as a child with a disability. Thus, Petitioner would not have been entitled to access under the IDEA at that time. Moreover, even assuming *arguendo* that the Student should have been found eligible earlier, Petitioner has not presented sufficient evidence to establish that DCPS denied access to available records and/or unreasonably delayed complying with the parent's request. Finally, at most such denial would constitute a procedural violation, which Petitioner has not shown to have (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 Student, or (iii) caused a deprivation of educational benefit. *See* 34 C.F.R. 300.513 (a) (2).

2. Jan. 2009 Eligibility Determination (OHI/ADHD)

Petitioner claims that DCPS denied the Student a FAPE by failing to identify and determine him to be eligible for special education and related services at the January 23, 2009 eligibility meeting. Petitioner alleges that the Student met the criteria for eligibility as a child with an Other Health Impairment ("OHI") at that time based on an October 2007 diagnosed condition of ADHD, Inattentive Type, and the negative impact Petitioner claims it was having on his education. *See Complaint*, pp. 10-11; *Prehearing Order*, ¶ 6.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue. Petitioner has not presented sufficient evidence to prevail on the claim that, *as of January 23, 2009*, the Student was entitled to special education and related services as a child with an attention deficit disorder that adversely affected his educational performance and who, by reason thereof, needed special education and related services. *See* 34 C.F.R. 300.8 (a) (1), (c) (9). The IEP team considered not only the ADHD evaluation, but also the Student's performance in school, teacher progress reports, the Student's W-J III academic achievement scores, and DC-BAS standardized test results – all of which appeared to indicate the absence of adverse educational impact at that time. *See SEC Testimony; DCPS-1; P-18; P-27*. Of course, DCPS' actions can only be judged on the basis of the information available to the MDT/IEP

team at the time of this non-eligibility determination, and not on the basis of the additional evaluations and information available at the 1/20/2011 team meeting held some two years later.

To the extent Petitioner relies on the 2007 cognitive testing results (*P-17*, p. 11), the Hearing Officer cannot conclude that the January 2009 team was wrong in assessing this data. Petitioner did not present any testimony by the 2007 independent evaluator (Dr. Brooks), and the testimony of Petitioner's own expert audiologist (Dr. Lucker) on this subject was wholly unpersuasive – and ultimately was stricken, in part – because cross examination established that the expert witness had based his opinions on the *wrong* data.⁸ In short, Petitioner did not prove that the Student's then-diagnosed ADHD condition had an adverse impact on his educational performance, and created a need for special education services, as of January 2009.

3. 2010-11 SY Eligibility Determination (Speech/Language)

Petitioner next claims that DCPS denied the Student a FAPE by failing to identify and determine him to be eligible for special education and related services, *as a result of a speech/language impairment*, prior to commencement of the 2010-11 school year. The Hearing Officer concludes that Petitioner has also failed to meet her burden of proof on this issue. Petitioner has not presented sufficient evidence to prevail on the claim that, *as of August 2010*, the Student was entitled to special education and related services as a child with a speech or language impairment that adversely affected his educational performance and who, by reason thereof, needed special education and related services. *See* 34 C.F.R. 300.8 (a) (1), (c) (11).

Petitioner relies principally on a November 2009 speech/language evaluation report prepared by the Private School that was given to DCPS at the end of April 2010. As noted above, the November 2009 evaluation found that the Student “demonstrates a mild to moderate language disorder characterized by deficits in abstract and pragmatic language, as well as certain aspects of phonological processing,” and the evaluator recommended speech and language therapy to improve the Student's receptive and expressive language. *P-2*, p. 5. As noted under Issue 6 below, DCPS also failed to convene a complete MDT/IEP team at the 9/23/2010 meeting because it did not include a speech/language pathologist to review the evaluation. However, such

⁸ Apparently due to receiving the wrong evaluation report from Petitioner's counsel, Petitioner's expert audiologist testified that he reviewed 2007 cognitive testing results for the Student's sibling, rather than for the Student. The Student's sibling had materially different WISC-IV test scores on the verbal comprehension (VCI) subtests that the audiologist referenced as the most significant. *See Audiologist Testimony* (cross examination).

procedural inadequacy does not necessarily result in a denial of FAPE. *See* 34 C.F.R. 300.513 (a); discussion under Issue 6, *infra*.

As it turns out, when DCPS ultimately reviewed the November 2009 speech/language evaluation at the January 2011 MDT/IEP team meeting, the DCPS speech & language pathologist (“SLP”) concluded that she would *not* recommend the Student for speech/language therapy based on this evaluation. *See P-34*, p. 3. The SLP did not believe it was appropriate for the evaluator to use only one subtest of the Clinical Evaluation of Language Fundamentals (“CELF”). *Id.* She believed that where the Student failed a CELF screening, the evaluator should then use a full CELF diagnostic evaluation, rather than the different Comprehensive Assessment of Spoken Language (“CASL”) test; and that this “discrepancy makes the evaluation questionable.” *Id.* The SLP also found that the Private School’s evaluation was inconclusive with respect to the existence of a language processing disorder. *Id.*

While this January 2011 determination is not directly at issue in this case, it illustrates the fact that the November 2009 evaluation – standing alone – does not necessarily establish the Student’s special education eligibility as a child with a speech or language impairment and/or his need for speech/language services, as of August 2010. The Hearing Officer also notes that Petitioner has presented no testimony from the Private School evaluator or other expert SLP to contradict DCPS’ position regarding the November 2009 evaluation. Petitioner therefore has not proved that, based on the information available in August 2010, DCPS should have determined the Student to be eligible for special education based on a speech or language impairment or in need of speech/language therapy services at that time.

4. **Failure to Conduct Speech/Language Evaluation in 2008-09 SY**

Petitioner claims that DCPS denied the Student a FAPE by failing to conduct a speech and language evaluation *during the 2008-09 School Year*, in light of cognitive evaluation findings and other information reviewed at the 01/23/2009 MDT meeting. Petitioner alleges that had such an evaluation been completed, DCPS would have uncovered deficits in this area almost two years ago. *See Complaint*, p. 4, ¶ 12 & p. 13, Issue 4.

The Hearing Officer concludes that Petitioner has presented insufficient evidence to prevail on this issue. Petitioner did not ask DCPS to conduct a speech/language evaluation during the 2008-09 School Year. Nor has Petitioner shown that any information then available to

DCPS pointed out the need for such evaluation at that time. In fact, Petitioner claims that the Student's suspected disability in early 2009 was ADHD, not a speech or language impairment. It was not until over a year later – *i.e.*, at the beginning of the 2010-11 School Year – that Petitioner claims DCPS failed to identify and determine the Student to be eligible for special education and related services as a result of his diagnosed speech/language impairment. *See* Issue 3 above.

5. Failure to Conduct Other Evaluations Requested by Parent in April 2010

Petitioner next claims that DCPS denied the Student a FAPE by failing to conduct certain evaluations she requested, *e.g.*, comprehensive psychological and OT evaluations. *See Complaint, p. 5 ¶¶ 17-18 & pp. 14-15, Issue 5.* Parents have a right to request particular assessments to determine whether their child is a child with a disability and to determine the child's educational needs. *See, e.g.,* 34 C.F.R. 300.305 (d); *Herbin v. District of Columbia*, 362 F. Supp. 254 (D.D.C. 2005). Under its “child find” mandate, DCPS also has an affirmative duty to “identify, locate, and evaluate” a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §§300.111(a); DCMR 5-E3002.1(d). Child find “must include” all children “who are *suspected* of being a child with a disability in need of special education, even though they are advancing from grade to grade....” 34 C.F.R. 300.111(c). *See also* 34 C.F.R. §300.301(a); DCMR §5-E3005.2; *IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008).

In this case, Petitioner requested these evaluations at the end of April 2010, and the Hearing Officer concludes that they were not completed within a reasonable period of time. The psychological evaluation was not completed until October 7, 2010, and the OT evaluation was not completed until October 19, 2010. Both dates are almost *six months* after the parent's request. Courts have held that a delay in completing required evaluations is not a “mere procedural inadequacy”; rather, “such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA.” *Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008). As in *Harris*, the “intransigence of DCPS as exhibited in its failure to respond quickly to [parent's] simple request has certainly compromised the effectiveness of the IDEA as applied to [the Student].” 561 F. Supp. 2d at 69. Thus, the Hearing Officer concludes that DCPS has denied a FAPE to the Student in this respect.

Alternatively, to the extent such a pre-eligibility delay is viewed as a procedural violation, the Hearing Officer concludes that such violation impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and/or caused a deprivation of educational benefit. *See* 34 C.F.R. §300.513(a). Had DCPS completed these evaluations in a timely manner, the MDT/IEP team would likely have been able to determine the Student's educational needs and develop a program to meet those needs by the start of the 2010-11 School Year. Thus, the Student has likely been harmed by not having the benefit of an appropriate IEP designed to address his unique educational needs between September 2010 and the present.⁹

6. Failure to Convene a Complete MDT/IEP Team at 09/23/2010 Meeting

Finally, Petitioner claims that DCPS failed to include a speech/language pathologist on the 09/23/2010 MDT/IEP team and that, as a result, the Student's speech/language evaluation could not be reviewed at that time by an individual who could interpret the instructional implications of the evaluation results. The Hearing Officer agrees that DCPS committed a procedural violation in this respect, *see* 34 C.F.R. 300.321 (a) (5), and that such violation may have significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student. *Id.*, 300.513 (a) (2) (ii). This procedural inadequacy was not corrected until the full MDT/IEP team met in January 2011.

⁹ Since these evaluations were part of an initial evaluation and eligibility process, D.C. law also required DCPS to complete that process and make an initial determination of eligibility within 120 days of the April 28, 2010 referral. *See* D.C. Code §38-2561.02 (a). The evidence shows that DCPS took no action on the referral until convening an MDT/IEP team meeting on September 24, 2010 (about 150 days after the referral), and that DCPS then took several months to complete the evaluations and determine eligibility. However, Petitioner did not specifically allege a violation of the 120-day timeline requirement either in her Complaint or at the PHC. In addition, when the MDT/IEP team belatedly met in September, it noted that some parts of the evaluations provided by Petitioner were missing, and Petitioner told the team that she would try to locate and submit the missing material. *See DCPS-4 (9/24/2010 meeting notes); SEC Testimony.* At the September meeting, Petitioner also requested that DCPS conduct an auditory processing evaluation, which may have contributed to the delay in completing the initial eligibility process until after the instant complaint was filed.

C. Appropriate Equitable Relief

Having found certain violations and/or denials of FAPE as discussed above, the IDEA authorizes the Hearing Officer to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The Hearing Officer exercises his discretion to grant appropriate equitable relief as set forth in the Order below.

In this case, Petitioner requests only the following relief: (1) reimbursement of tuition expenditures by the parent for the 2009-10 and 2010-11 School Years; and (2) an order requiring DCPS to convene an MDT/IEP meeting to identify the Student as eligible for services and to develop an IEP. Petitioner withdrew her request for compensatory education at the due process hearing; and she does not seek reimbursement for any other educational expenses (*e.g.*, private tutoring). Nor does Petitioner request any prospective placement relief in this proceeding.

1. Tuition Reimbursement

Parents who choose unilaterally to place their disabled child in a private school without the agreement of the school district do so at their own financial risk. They are generally entitled to reimbursement *only* if a court or hearing officer concludes *both* that (a) the school district did not make FAPE available to the child in a timely manner prior to that enrollment *and* (b) the private school placement was proper under the IDEA. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-13 (1993); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Roark v. District of Columbia*, 460 F. Supp. 2d 32 (D.D.C. 2006); *see also* 34 C.F.R. § 300.148 (c).

In addition, “equitable considerations are relevant in fashioning relief,” *Burlington*, 471 U.S. at 374; and courts and hearing officers have “broad discretion” in the matter. *Id.* at 369. As the Supreme Court made clear in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009), slip op. at 16-17: “When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for *some or all of the cost* of the child’s private

education is warranted” (emphasis added). *See also Carter*, 510 U.S. at 16 (courts and hearing officers “must consider all relevant factors, including the *appropriate and reasonable level of reimbursement* that should be required.”) (emphasis added).¹⁰

In this case, the Hearing Officer has concluded that DCPS did not make a FAPE available to the Student in a timely manner, primarily by failing to complete psychological and OT evaluations requested by the parent within a reasonable period of time (*i.e.*, by approximately the start of the 2010-11 School Year). As a result, DCPS was not able to determine the Student’s eligibility and develop an appropriate program in a timely manner. Accordingly, the Hearing Officer concludes that Petitioner has met the first prong of the *Carter/Burlington* test, at least with respect to the Student’s enrollment at Private School for the 2010-11 SY. However, since the Hearing Officer has concluded that DCPS did not deny the Student a FAPE during the 2009-10 School Year, Petitioner is not entitled to reimbursement for any 2009-10 tuition expenditures.¹¹

The second prong of the test requires the Hearing Officer to determine if the Private School placement chosen by the parents was “proper under the Act.” *Carter*, 510 U.S. at 15; *Burlington*, 471 U.S. at 370. The placement need not meet all statutory requirements of FAPE (*e.g.*, state certification), but the education provided by the private school must still be “reasonably calculated to enable the child to receive educational benefits.” *Carter, supra*. This generally means that the private school “at a minimum, provide some element of special education services in which the public school placement was deficient.” *Berger v. Medina City School Dist.*, 348 F.3d 513, 523 (6th Cir. 2003); *accord Mr. I v. Maine School Admin. Dist.*, 480 F.3d 1 (1st Cir. 2007); *Indianapolis Public Schools v. M.B.*, 111 LRP 6150 (S.D. Ind. Jan. 25, 2011). “[E]vidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA.” *Berger*, 348 F.3d at 522. To meet Petitioner’s burden, “the IDEA requires an identification of the special

¹⁰ Moreover, where the child previously received special education under the authority of a public agency, IDEA provides that the cost of reimbursement may be reduced or denied upon a “finding of unreasonableness with respect to the actions taken by the parents.” 34 C.F.R. §300.148 (d) (3).

¹¹ Moreover, even assuming *arguendo* that DCPS had denied a FAPE during the 2009-10 SY, the Hearing Officer would deny reimbursement for such expenses for the separate and independent reason that Petitioner failed to provide notice to DCPS before enrolling the Student at Private School for that school year. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ___, 129 S. Ct. 2484 (2009), slip op. at 16-17; 34 C.F.R. §300.148 (d) (1).

education services that were lacking in the disabled student's public school and a demonstration that at least some of those services are being provided by the private school". *Indianapolis Public Schools, supra*, slip op. at 4.

The Hearing Officer concludes that the present administrative record is inadequate to support a finding that Petitioner's unilateral private placement is appropriate for the Student. Petitioner has offered only scant evidence regarding the Student's need for particular specialized instruction or other special education services and how the Private School's program is structured to meet those special education needs.¹² Because this case does not involve a post-eligibility unilateral placement, and no IEP has yet been developed, one cannot refer to the IEP to define the required special education services and determine if the Private School can provide them adequately. *Cf. Roark, supra*. In lieu of that, Petitioner and the Private School Learning Specialist testified generally that the Student has experienced difficulties in reading comprehension and math; that the learning specialist provided the Student with a reading support class last semester (but not currently); and that the school offers various accommodations including repeating classroom directions and reading test questions aloud. *See Parent Testimony; Learning Specialist Testimony*. However, Petitioner has not presented (either at hearing or at the IEP team meetings) any of the key documents generated by Private School that appear to constitute the Student's written educational program – e.g., the "accommodations list" and "learning profile" – which were referenced in the testimony of Petitioner and the Private School Learning Specialist. *Id.* The testimony also indicated that Private School has not delivered any speech/language services since the 2010 summer due to parental cost concerns. *Id.*

The evidence indicates that at least some of these issues will likely soon be clarified through the ongoing MDT process. Following its January 2011 eligibility determination, the IEP team has requested copies of the Private School's program documents, as well as documents from the Private School speech therapist who provided services to the Student last school year. Based on this and other relevant information, DCPS will develop an IEP for the Student, which

¹² *Cf. Indianapolis Public Schools v. M.B.*, 111 LRP 6150 (S.D. Ind. Jan. 25, 2011) (court could not find private school program appropriate where there was no evidence that the school was providing special education services); *Roark v. District of Columbia, supra*, 460 F. Supp. 2d 32 (D.D.C. 2006 (affirming denial of reimbursement for same Private School, which does not offer a traditional special education program): Court noted that administrative record did not establish that school could provide special education services that IEP required; and conclusory statements that student was receiving significant educational benefits "without providing any details of the program" were held insufficient to support reimbursement.

may include a proposal for compensatory education, as well as a proposed placement. *See P-34*, pp. 4-5. Under the circumstances, and in the exercise of the Hearing Officer's broad discretion to manage the conduct of this due process proceeding,¹³ the Hearing Officer concludes it would be inappropriate to reach a final decision on reimbursement of current (2010-11) school year tuition without the benefit of these facts.

In sum, considering all relevant factors and equitable considerations – including DCPS' expected development of an IEP for the Student based (in part) on Private School's written educational program – the Hearing Officer will dismiss, *without prejudice*, Petitioner's request for reimbursement of 2010-11 tuition expenses at this time. To the extent appropriate and not otherwise resolved by DCPS' forthcoming IEP/placement decisions, Petitioner may reassert such request in any separate due process complaint that Petitioner may decide to file on any new issue arising out of DCPS' actions and/or refusals to act in light of the January 2011 eligibility determination (*see note 7 supra*).

2. Request for MDT/IEP Team Meeting

A meeting to determine eligibility has already been conducted on January 20, 2011, and the Student has been determined to be eligible as a child with an Other Health Impairment (OHI) based on his ADHD condition. *See P-34*. Thus, that aspect of the requested relief is now moot. However, DCPS still needs to hold a meeting to develop an appropriate IEP for the Student. An appropriate directive is therefore included in the Order below.

¹³ *See generally Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995) ("Apart from the hearing rights set out at § 300.508, decisions regarding the conduct of Part B due process hearings are left to the discretion of the hearing officer."); *see also Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP")*, Section 700.4 ("The hearing is not governed by formal rules of procedure or evidence.").

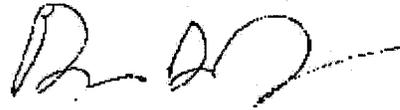
VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. By **March 2, 2011**, DCPS shall convene a meeting of the Student's MDT/IEP Team, with all necessary members including the Parent participating. The purposes of the meeting shall include: (a) to develop an Individualized Education Program (IEP) based on all relevant updated information; (b) to discuss and determine educational placement and/or an appropriate location of services to implement the IEP; and (c) to discuss and determine whether to authorize and fund an independent auditory processing evaluation of the Student.
2. Petitioner's request for reimbursement of tuition expenditures for the 2010-2011 School Year shall be **DISMISSED, Without Prejudice**;
3. All other requests for relief in Petitioner's November 8, 2010 Due Process Complaint shall be, and hereby are, **DENIED**.
4. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: February 2, 2011



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).