DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

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through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: May 3, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: April 14 and 23, 2010
Room: 5A, and 7A (respectively)

2010 MAY -4 AM 7:47

HEARING OFFICER DETERMINATION

BACKGROUND

Student is an year-old girl, who attends grade at her neighborhood DCPS school. Student does not presently have a disability classification or an IEP, as DCPS recently determined her ineligible for special education and related services.

On February 18, 2010, Petitioner filed a Complaint against DCPS, alleging that DCPS (1) failed to timely conduct and review evaluations following Parent's request, (2) failed to determine a qualified child's eligibility for special education services, and (3) faile dto provide an appropriate placement.

On March 2, 2010, DCPS filed its Response to the Complaint, in which it asserted, *inter alia*, that DCPS was attempting to schedule a meeting to review Petitioner's independent evaluation.

On March 19, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, DCPS stipulated that it had received Student's independent comprehensive psychological evaluation and had not reviewed it as of the date of the prehearing conference. The parties also advised the hearing officer that an MDT meeting was scheduled for March 23, 2010. The hearing officer instructed Petitioner's counsel to provide a status update upon the

conclusion of the meeting. The hearing officer also added a second hearing to the schedule so as to allow Petitioner ample time to attempt to prove both Student's eligibility and the contents of an appropriate IEP for Student.

By email dated March 24, 2010, Petitioner's counsel advised the hearing officer that the planned eligibility meeting did not go forward.

By their respective cover letters dated April 7, 2010, Petitioner disclosed 15 documents (Petitioner's Exhibits 1 through 15), and DCPS disclosed 12 documents (DCPS-1 through DCPS-12).

The due process hearings for this case were held on April 14 and 23, 2010.[1] All of the documents disclosed by the parties were admitted into the record without objection. Petitioner's counsel informed the hearing officer that an eligibility meeting had been held the week before, at which DCPS determined Student ineligible for special education and related services. Petitioner disagreed with DCPS's determination and was seeking a ruling from the hearing officer that Student was eligible with an OHI classification, as well as a private placement at
DCPS maintained that its determination of ineligibility was correct. After Petitioner presented testimony of its witnesses and concluded its case, DCPS made a motion for directed verdict. The hearing officer received argument of counsel prior to granting in part and denying in part DCPS's motion. Thereafter, DCPS chose to present the testimony of one witness prior to withdrawing its motion for directed verdict and resting its case.

The due process hearings were convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to conduct and review evaluations and determine Student's eligibility within the 120-day timeline?

2. Did DCPS fail to provide an appropriate placement?

FINDINGS OF FACT

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

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

1. Student has attended her current DCPS school since kindergarten. She was retained in

2. Student was first diagnosed with ADHD in 2003. She briefly took medication for the condition, but Parent stopped administering the medications because they made Student sluggish.[3]

3. Student's May 31, 2007 DCPS comprehensive psychoeducational reevaluation report reveals that she received a Full Scale IQ score of 107, which is in the Average range of cognitive functioning, on the Wechsler Intelligence Scale for Children-4th edition. Student also earned scores in the Average range on the Woodcock Johnson III test of achievement in the broad reading, broad math, and broad written language areas, as well as scores in the Average range on the Developmental Test of Visual Motor Integration and the Behavior Assessment System for Children. Based on Student's performance, the evaluator concluded that Student did not qualify as a learning disabled student or an emotionally disturbed student. However, the evaluator recommended counseling for Student and recommended strategies to address inattentive concerns, and Student's ability to concentrate, her organizational skills, and the completion of tasks.[4]

4. At an August 6, 2007 MDT meeting, Student was determined ineligible for special education services. The Meeting Notes indicate that Student had also been determined ineligible in 2004. The Meeting Notes also state that Student has a history of excessive absences, and that she was absent 62 days in SY 2003/04, 51 days in 2004/05, 52 days in 2005/06, and 65 days in 2006/07.[5]

5. Student's December 18, 2009 independent comprehensive psychological evaluation report reveals that she received a Full Scale IQ score of 86, which is in the Low Average range. Hence, Student's Full Scale IQ declined by 21 points over the 2½- year period from May 2007 to December 2009. Student once again earned scores in the Average range for her overall reading skills and math abilities. However, Student's written expression abilities fell in the Low Average range. Overall, the evaluator concluded that Student was functioning on grade level when compared to her same aged peers, and that there was no evidence of a learning disability. The evaluator noted that Student's teacher reported that Student was academically behind, but the evaluator opined that Student's poor academic performance was likely due to her frequent school absences and tardiness.

   Based on the results of social/emotional testing administered during the evaluation, the evaluator concluded that Student was experiencing social deficits that were impacting her academic and social functioning, and that Student was experiencing disturbances in her thought processes. The evaluator noted that Student could be experiencing executive function weaknesses inherent in those with ADHD, and that Student's diagnosed medical condition of sleep apnea could be causing cognitive disturbances, attentional difficulties and hyperactivity, behavioral disturbances, anxiety

[2] *See* Petitioner's Exhibit 10 at 3; testimony of Parent.
[3] *See* Petitioner's Exhibit 7 at 1; Petitioner's Exhibit 10 at 2.
[4] Petitioner's Exhibit 9.
[5] DCPS-12.

and depressive symptomatology, and disturbances in thought processes. Ultimately, the evaluator listed Pervasive Developmental Disorder, Not Otherwise Specified ("PDD – NOS"), and Psychotic Disorder as diagnoses to be ruled out. The evaluator also opined that Student met the criteria for special education services under the classification of multiply disabled to encompass autism (PDD - NOS), and Other Health Impairment (ADHD, Combined type by history, and Sleep Apnea). The evaluator recommended, *inter alia*, specialized instruction and psychological services for Student, a dedicated aide, ESY, a full neuropsychological examination to determine the ways Student's sleep apnea have impacted her cognitive and emotional functioning, and an occupational therapy screening to rule out pervasive fine motor coordination and other difficulties.[6]

6. A 21-point decline in intellectual functioning over a 3-year period, which is a significant decline, is not normal because intellectual abilities are generally stable over time. It is possible that Student's lack of ADHD medication during her 2009 evaluation versus her use of medication during the 2007 evaluation contributed to the decline. It is also possible that Student's ADHD, her social deficits and/or her sleep apnea are affecting her intellectual performance. The purpose of providing a neuropsychological evaluation to Student would be to assess her overall strengths and weaknesses and determine how the sleep apnea impacts Student's functioning in class, while the purpose of a consultation with a neurologist would be to educate Parent about the sleep apnea. The evaluator from Student's 2009 evaluation is not familiar enough with sleep apnea to determine whether specialized instruction would treat the condition or its effects in the classroom. However, the evaluator recommended specialized instruction for Student because of the decline in her intellectual functioning and because of her ADHD, which can require additional supports to access the curriculum.[7]

7. Psychological testing takes place in a controlled environment where there are not a lot of distractions. Therefore, it is possible that a student with attention issues may perform better on such a test than in the classroom, where lots of distractions and other students are present.[8]

8. On April 6, 2010, DCPS convened an MDT/Eligibility meeting for Student. After the team reviewed Student's December 2009 independent comprehensive psychological evaluation, Student's general education teacher stated that Student's absenteeism is more of an overall difficulty for her than anything related to lack of academic capabilities. The teacher pointed out that Student's reading skills are close to grade level despite her attendance, and although her math skills are not adequate because of her absences and gaps in learning she is able to catch up and make progress when given one-on-one assistance. Nevertheless, the teacher acknowledged that Student has problems with attentiveness and with sleeping during class, and Student can also be fidgety or a doodler during class. The team ultimately concluded that Student does not meet the criteria for special education under DCPS guidelines. After the meeting, the DCPS school psychologist gave Student some literature about bullying and a T-shirt that stays "Peace"

[6] Petitioner's Exhibit 10.
[7] Testimony of independent clinical evaluator.
[8] Testimony of DCPS school psychologist.

on the back and "No Violence" on the front. However, Student cannot wear the T-shirt to class because she must wear a uniform.[9]

9. On December 4, 2009, Student's educational advocate conducted a classroom observation of Student in her DCPS school. At the time of the observation, Student and her classmates were taking a quiz or assessment. The teacher had to give many prompts to the class and also to Student specifically. Indeed, the teacher had to go stand next to Student and tap on Student's paper to get her to focus. Even then, however, Student did not complete most of the work.[10]

10. A DCPS Attendance Summary covering the period from August 17, 2009 through April 6, 2010 reveals that Student missed a total of 60 days out of 129 days of instruction and was late 13 times. Thirty of the absences were excused absences due primarily to medical appointments. Moreover, Student's Attendance Record Card for the 2008/09 school year reveals that she was absent approximately 58 days that school year.[11]

11. Student's excessive absenteeism and tardiness are adversely affecting Student's academic performance in class. The fact that Student falls asleep every day she attends class is also adversely affecting her performance in class.[12]

12. Sleep apnea has been an issue for Student for approximately three years now. Upon receiving the diagnosis of sleep apnea, Parent gave the information to two of the office staff at Student's DCPS school and discussed the issue with the SEC and the principal; however, DCPS has never held a meeting to discuss the sleep apnea diagnosis. The sleep apnea causes Student to fall asleep anywhere and anytime. Student falls asleep in school daily, and while she is sleep, her classmates will put glue on her, pull her hair, hide her papers and coat, and engage in other similar actions. Student is often harassed in school by her classmates, and she often arrives home in tears. She also cries in the mornings sometimes because she does not want to go to school. The teachers have told Parent that if Student would come to school more and stay awake in class when she's there, she would be able to keep up with her assignments. Unfortunately, Student has not been able to stay awake when in school. Student is not presently being treated for sleep apnea, but she has an upcoming appointment at a clinic to address her sleep apnea.[13]

13. Student's final Grade Report Card for the 2008/09 school year reveals that she received grades of primarily 2s in reading/English language arts, mathematics, science, and music, and grades of primarily 1s in social studies. A grade of 2 means the student approaches the standard (basic), which a grade of 1 means the student does not meet the standard (below basic). The Teacher Comments for the third advisory indicate that Student was sleeping in class for more hours than she was awake, and she was not completing any written assignments or participating in group activities. The Teacher

[9] Petitioner's Exhibit 13; DCPS-4; testimony of Parent.
[10] Testimony of advocate.
[11] DCPS-10; DCPS-11.
[12] Testimony of independent clinical evaluator; testimony of DCPS school psychologist; Petitioner's Exhibit 5.
[13] Testimony of Parent.

Comments for the fourth advisory indicate that Student continued to experience "great difficulty" staying awake in class.[14]

14. Student's Grade Report Card indicates that for the first two advisories of the 2009/10 school year, Student earned 1s in all of her classes for both advisories, with the exception of a 0 she earned in music for second advisory.[15]

15. The nonpublic special education school Petitioner would like Student to attend services children between the ages of 6 and 22 with the following disability classifications: emotional disturbance, learning disability, attention deficit hyperactivity disorder, and speech/language impairment. However, the school does not treat sleep apnea and does not have any experience with sleep apnea. The school has an attendance program that involves monthly home visits to determine what at home is affecting school attendance.[16]

16. A student with behavior problems, who is performing academically on grade level, may nevertheless require specialized instruction.[17]

CONCLUSIONS OF LAW

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

1. Alleged failure to timely conduct and review evaluations and determine Student's eligibility for special education services.

Applicable law requires DCPS to conduct an initial evaluation of a child who has been referred for special education services within 120 days, and said initial evaluation must include procedures to determine if the child is a child with a disability within the meaning of IDEIA. *See* 34 C.F.R. § 300.301(c); D.C. Code § 38-2561.02(a); 5 D.C.M.R. § 3005.2. In this case, although there is no dispute that DCPS failed to complete Student's initial evaluation within the 120-day timeline, the hearing officer concludes that this procedural violation did not result in any harm to Student because DCPS ultimately determined Student ineligible for special education services, and the evidence Petitioner presented in connection with the instant case fell short of persuading the hearing officer that Student is, in fact, eligible. *See* 34 C.F.R. § 300.513 (hearing officer's determination must be based on substantive grounds; if based on procedural violation, procedural inadequacies must have impeded child's right to FAPE, significantly impeded parent's opportunity to participate in decision-making process, or caused a deprivation of educational benefit).

On the other hand, the hearing officer concludes that Petitioner has presented sufficient evidence to raise the strong possibility that Student is eligible for special education and related services as

[14] Petitioner's Exhibit 5.
[15] Petitioner's Exhibit 6.
[16] Testimony of Admissions Director.
[17] Testimony of Admissions Director.

a child with an other health impairment as a result of her sleep apnea condition. *See* 34 C.F.R. § 300.8(a) (child with disability is one evaluated as having, *inter alia*, other health impairment, and who, by reason thereof, needs special education and related services); 34 C.F.R. § 300.8(c)(9) ("other health impairment" means having limited strength, vitality, or alertness that is due to chronic or acute health problems and adversely affects the child's educational performance). The hearing officer acknowledges the possibility that Student may only require one or more related services to address the adverse effect her sleep apnea is having on her educational performance, which would disqualify her from being determined a child with a disability under IDEIA. *See* 34 C.F.R. § 300.8(a)(2)(i). However, under the facts of this case, where neither party's expert psychologist had any knowledge of sleep apnea or its effects on academic performance, if any, and the record is devoid of any information concerning the condition, the hearing officer concludes that it would be appropriate to order DCPS to either conduct or fund a neuropsychological evaluation of Student to determine whether and how her sleep apnea may be impacting her performance in the academic setting. *See* 34 C.F.R. § 300.304(b)(1) (public agency must use variety of assessment tools and strategies to gather information to determine whether child is eligible); 34 C.F.R. § 300.304(c)(4) (child must be assessed in all areas related to suspected disability, including health if appropriate). In connection with this ruling, the hearing officer will also order DCPS to convene a meeting upon the completion of the evaluation to review same and, if appropriate, make another eligibility determination.

2. Alleged failure to provide an appropriate placement

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this case, however, Petitioner has failed to prove that Student qualifies as a child with a disability under IDEIA. Therefore, DCPS has no obligation under IDEIA to provide Student with an appropriate educational placement.

3. Other Matters

Given the facts of this case, where the record is replete with evidence that Student's excessive absences and tardiness are having an adverse effect on her educational performance, the hearing officer would be remiss in failing to address that situation. Therefore, the hearing officer strongly encourages Parent to take whatever steps are necessary to ensure that Student attends school regularly and on time.

In addition, as the hearing officer intends to order DCPS to conduct another MDT/Eligibility meeting for Student, if appropriate, and in light of DCPS's stance at the most recent eligibility meeting, the hearing officer wishes to point out the danger of relying upon standardized assessments as the sole measure for determining whether or not a condition is affecting a Student's academic performance. Hence, for example, in this case where Student's report card for the current school year is filled with "below basic" grades, the hearing officer strongly suggests that those grades be taken into account, together with the standardized assessment results, in determining whether or not Student's diagnosed conditions are impacting her educational performance.

ORDER

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

1. Within 20 calendar days of this Order, DCPS shall either conduct or fund a neuropsychological evaluation of Student to determine whether and how her sleep apnea may be impacting her performance in the academic setting.

2. Within a reasonable time after receipt of Student's neuropsychological evaluation report, DCPS shall convene an MDT meeting to review the evaluation report and, if appropriate, make another eligibility determination for Student. In determining what constitutes "a reasonable time," all relevant circumstances and the behavior of both parties shall be taken into consideration.

3. Petitioner's February 18, 2010 Complaint is **DISMISSED**, and all requests for relief therein not granted in this Order are **DENIED**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: _____5/3/2010_____ ___/s/ *Kimm Massey*_____
Kimm Massey, Esq.
Hearing Officer