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

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| **STUDENT,**<br>**By and through PARENTS,**[1]<br><br>***Petitioner,***<br>**v.**<br><br>**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,**<br><br>***Respondent.*** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Case No.**<br><br>**Bruce Ryan, Hearing Officer**<br><br>**Issued: July 7, 2011** |

2011 JUL -7 AM 8:50 STUDENT HEARING OFFICE

# HEARING OFFICER DETERMINATION

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

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 April 4, 2011, on behalf of an year old student (the "Student") who resides in the District of Columbia with her parents, the Petitioners. She currently attends a non-public school for children with learning disabilities (the "Private School") located in the District of Columbia.

Petitioners claim that DCPS has denied the Student a free appropriate public education ("FAPE") by: (a) failing to complete the initial evaluation process for IDEA eligibility in a timely manner; and (b) failing to find her eligible for special education and related services, and thus failing to propose an individualized education program ("IEP") or placement for the Student. Petitioners seek reimbursement for their parental placement of the Student at Private School for the 2010-11 school year.

DCPS filed a late Response on May 10, 2011, following the end of the 30-day resolution period. DCPS asserts (*inter alia*) that it complied with the statutory 120-day requirement for

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

evaluating and determining eligibility under the IDEA. DCPS states that it first held an eligibility meeting on October 20, 2010, convened additional meetings thereafter, and ultimately issued a Prior Written Notice denying eligibility on April 4, 2011.

A resolution session was also held on April 14, 2011, which did not resolve the Complaint, and the statutory resolution period ended as of May 4, 2011. A Prehearing Conference ("PHC") was then held on May 12, 2011; the parties filed five-day disclosures on May 27, 2011; and the Due Process Hearing ("DPH") was scheduled for June 6 and 9, 2011. Petitioner elected for the hearing to be closed.

The DPH convened as scheduled on June 6 and 9, but the parties were not able to complete the case in that timeframe. A third hearing session was then scheduled for June 27, the next available date for both parties. A motion for continuance was filed on June 13 requesting an extension of the 45-day HOD timeline to July 7, 2011, in order to accommodate the additional DPH session and allow sufficient time to present arguments and prepare the decision. The motion was granted; the additional hearing session was then held on June 27; and the parties submitted written closing arguments on June 29, 2011.

At the DPH, the following Documentary Exhibits were admitted into evidence:

**Petitioner's Exhibits:** P-1 through P-57.[2]

**Respondent's Exhibits:** R-1 through R-23 (without objection).

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

**Petitioners' Witnesses**: (1) Parents-Petitioners; (2) Speech-Language Pathologist ("Private SLP"); and (3) Curriculum Specialist, Private School.

**Respondent's Witnesses**: (1) Special Education Teacher; (2) Occupational Therapist ("OT"); (3) Special Education Coordinator ("SEC"); (4) School Psychologist; and (5) Speech-Language Pathologist ("DCPS SLP").

[2] Exhibits P-19 through P-24 were admitted over DCPS' objections. Exhibits P-54 through P-57 were admitted without objection as supplemental disclosure documents at the final DPH session on June 27, 2011.

## 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 Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is July 7, 2011.

## 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: [3]

(1) **Timeliness of Initial Evaluation.** — Did DCPS deny the Student a FAPE by failing to complete the initial IDEA evaluation process in a timely manner, *i.e.*, within 120 days from the date that the Student was referred for an evaluation or assessment, pursuant to D.C. Code § 38-2561.02 (a)?

(2) **Eligibility Determination.** — Did DCPS deny the Student a FAPE by failing to find the Student eligible for special education and related services, and thus failing to propose an IEP or placement?

(3) **Parental Private Placement.** — Is Private School a proper placement for the Student?

As relief, the Complaint requested: (a) reimbursement for all costs associated with the parental placement at Private School for the 2010-11 school year, including related costs and services; and (b) prospective placement at Private School for the remainder of the 2010-11 school year and the 2011-12 school year. Since the 2010-11 school year has now been completed, at hearing and in written closing argument, Petitioners clarified that they are now seeking (i) reimbursement of costs for the full 2010-11 school year, and (ii) judicial recognition that Private School is the Student's current educational placement under the IDEA.

[3] Petitioners' counsel represented at the PHC that Petitioners did ***not*** assert any separate claims under Issues B and D on page 10 of the Complaint (alleging that DCPS "predetermined" the Student's eligibility status, and that it failed to follow recommendations and conclusions contained in the evaluations), but rather that such allegations and/or evidence would be subsumed within the other issues specified above. This was confirmed in the Prehearing Order issued May 25, 2011.

## IV. FINDINGS OF FACT

1. The Student is an -year old student who resides in the District of Columbia with her parents, the Petitioners. She currently attends a non-public school for children with learning disabilities (the "Private School") located in the District of Columbia.
2. From kindergarten through 2nd grade, the Student attended another non-public school located in D.C. ("Former School"). She began attending Private School at the beginning of the 2010-11 school year. *P-1; Parents Test.*
3. During kindergarten (2007-08 school year), Petitioners began to observe that the Student struggled with academic work, despite having tested in the very superior range on the Wechsler Preschool and primary Scale of Intelligence-Third Edition (WPPSI-III). *See P-1; P-2; P-3; Parents Test.*
4. In June 2008, the Student received a neuropsychological evaluation. *P-9.* The evaluator diagnosed the Student as having (a) Attention Deficit Hyperactivity Disorder ("ADHD"), with features of inattention, impulsivity, and executive dysfunction; and (b) a Learning Disorder, NOS. *Id., p. 10.* With respect to intellectual functioning, the evaluator found that the Student had a General Ability Index (GAI) of 146 and a Full Scale IQ of 132, both in the 99%+ percentile. *Id., p. 4.* Given the large discrepancies between the Student's various index scores, the evaluator found that the GAI gave a more accurate estimate of her intellectual potential. *Id.*
5. During the remainder of 1st grade (2008-09 school year), the Student received weekly occupational therapy and worked with a tutor focusing on reading issues, using the Wilson Reading System and materials from Linda Mood Bell. *P-1; P-11; Parents Test.*
6. During 2nd grade (2009-10 school year), the Student continued to struggle academically. She was unable to keep up with the writing and math work required of her at school. *P-1; Parents Test.* As a result, Petitioners decided to obtain additional evaluations. *Id.*
7. In April 2010, the Student received a Comprehensive Speech and Language Assessment, which revealed a significant disparity between her auditory comprehension and auditory reasoning, as well as significant word retrieval deficits and linguistic executive functioning limitations. *See P-13; Private SLP Test.*

8. Also in April 2010, the Student received an updated Occupational Therapy Evaluation, which found deficits impacting her current academic performance. *See P-12.*
9. On or about June 22, 2010, Petitioners enrolled the Student as a non-attending student in DCPS and requested that she be evaluated to determine eligibility for special education and related services. Petitioners provided DCPS with copies of all existing evaluation materials and completed a standard DCPS referral package for non-public students. *See P-15; Parents Test.*
10. The DCPS-mandated referral package Petitioners submitted included detailed reporting from the instructional staff at Former School. *P-15, pp. 11-16.* According to the report, the Student was performing Below Average compared to grade-level expectations in Listening Comprehension, Written Expression, Math Calculation, and Math Reasoning. *Id., p. 11.* The report also identified weaknesses in comparison to other students in the same grade in listed areas including Listening Comprehension, Written Expression, Speech, Auditory Discrimination, Memory, Visual Motor Coordination, Social/Emotional, and Attention/Organization/Activity Level. *Id., p. 12.* And all of these deficits were reported in the context of a small, individualized school with special education resource support integrated into the school day. *Id., pp. 11-12; Parents Test.*[4]
11. On or about August 4, 2010, in response to Petitioners' submission and request, DCPS convened a Student Evaluation Planning ("SEP") meeting. Petitioners submitted a Consent for Initial Evaluation, and the team agreed to review the existing evaluations and conduct a classroom observation. *See P-1; P-27; Parents Test.; SEC Test.*
12. On or about August 5, 2010, DCPS completed an Analysis of Existing Data, based largely on information taken from the January 2010 Progress Reports for the 2009-10 school year issued by the Former School. *See R-8; P-56; SEC Test.* On or about August 13, 2010, the Student also received an updated Educational Evaluation, consisting of a WJ-III assessment of her academic achievement. *R-5.*
13. In early October 2010, DCPS completed reviews of the independent OT evaluation and independent psycho-educational assessments. *See R-4; R-6.*

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[4] The report noted that the Student "is a bright student, but needs accommodations and interventions to function in the regular classroom." *P-15, p. 11.* Among the interventions used by Former School as listed in the report were: consultation with specialists; tutoring; adjusted workload; modifying methods, materials, and presentations; and change of text/materials. *Id. See also Parents Test.*

14. On or about October 20, 2010, DCPS convened a meeting of the Student's MDT/IEP Team – without the parents present – to review the evaluations and determine eligibility for special education. No notes of the meeting were submitted into evidence. Following the meeting, DCPS issued a Prior Written Notice ("PWN") – Identification, refusing to identify the Student as a student with a disability under the IDEA. *R-18.* The PWN stated that the "MDT team has determined that [Student] is not eligible for special education based on information gathered from evaluations, observations, and documentation provided." *Id.* DCPS concluded that the Student "did not meet the criteria of OHI or SLD based on her current academic performance and evaluation results." *Id.* It further explained that the Student "functioned at grade level in subject areas which include math, language arts, writing, and PE." *Id.*
15. In response to the 10/20/2010 PWN, Petitioners filed a due process complaint on 10/29/2010 challenging the eligibility determination, but withdrew the complaint without prejudice in an effort to return to the IEP table. *P-41.*
16. On or about December 6, 2010, DCPS convened another meeting of the Student's MDT/IEP Team, this time with the parents present, to review the eligibility determination. *See P-42* (12/06/2010 meeting notes). The IEP team heard reports from Private School instructional staff concerning the Student's progress and difficulties at Private School with special education supports. The team also heard a report from the DCPS School Psychologist who observed the Student there. *Id.* The DCPS SEC expressed frustration concerning the inability to have more classroom observations by all pertinent team members. *Id.* Ultimately, the team confirmed its previous decision that the Student was not eligible for special education. *Id.* At the conclusion of the meeting, DCPS issued a further PWN notifying Petitioners of this determination. *Id., p. 6.*
17. On or about January 6, 2011, and again on February 7, 2011, Petitioners wrote to DCPS informing the school system that they had secured permission for additional IEP team members to observe the Student at Private School. DCPS then conducted OT and SLP observations and forwarded reports to Petitioners on 02/15/2011.
18. On or about April 4, 2011, DCPS held a further meeting of the Student's MDT/IEP Team based on the additional observations and confirmed non-eligibility. *R-13; R-14.*

## 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 determine eligibility. 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

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

As noted, Petitioner claims that DCPS denied the Student a FAPE by: (a) failing to complete the initial evaluation process for IDEA eligibility in a timely manner; and (b) failing to find her eligible for special education and related services, and thus failing to propose an IEP or placement for the Student. Petitioners seek reimbursement for their parental placement of the Student at Private School for the 2010-11 school year.

For the reasons discussed below, Petitioners have met their burden of proving eligibility and entitlement to reimbursement by a preponderance of the evidence. The Hearing Officer agrees with much of the argument, reasoning, and analysis of evidence set forth in Petitioners' Closing Argument.

### 1. Timeliness of Initial Evaluation

At hearing, Petitioners' counsel abandoned the 120-day timeline issue, and does not address this issue in closing argument. Accordingly, this issue will be deemed withdrawn. DCPS' eligibility decision shall be deemed to have been timely issued as of October 20, 2010, which is approximately 120 days from the date the Student was referred for an initial evaluation. *See* D.C. Code § 38-2561.02 (a). As a result, any reimbursement relief for the 2010-11 school year will be limited to the period beginning 10/21/2010.

### 2. Eligibility Determination

Based on the evidence presented in this proceeding and the applicable law, the Hearing Officer concludes that DCPS erred in not finding the Student to be eligible for special education and related services under the IDEA. Petitioners have proved that the Student qualifies as a child with a Specific Learning Disability ("SLD"), as defined in federal and State regulations, who by reason thereof needs special education and related services. The evidence shows many areas of adverse educational impact on the Student as a result of her learning disability. *See Petitioners' Closing Argument, p. 9 & Exhibit A.*

Pursuant to 34 C.F.R. 300.307, and consistent with 34 C.F.R. 300.309, the District of Columbia was required to adopt criteria for determining whether a child has an SLD. The State criteria cannot ***require*** the use of a "severe discrepancy" model, and the criteria must ***permit*** the use of a "response to intervention" model. 34 C.F.R. 300.307 (a) (1), (2). [5] The OSSE has implemented this requirement by adopting the rules contained in DCMR 5-E3006.

The OSSE rule first tracks the basic statutory definition, *i.e.* – "The IEP team shall determine that a child has an SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, or do mathematical calculations." DCMR 5-E3006.4 (a). *See also* 34 C.F.R. 300.8 (c) (10). The

[5] A "severe discrepancy" model generally analyzes whether there is a significant difference between measured cognitive ability and measured academic performance on comparable standardized testing for a particular child. A "response to intervention" model analyzes whether a student has failed to make adequate progress despite being provided with research-based educational interventions. With either model, the ultimate inquiry is whether special education is required in order to narrow the "severe discrepancy," or produce a more beneficial "response to intervention." *Petitioners' Closing Argument, p. 15.*

rule then goes on to provide that LEAs "***may use*** a process that determines if the child responds to scientific, research-based intervention ***as a part of the evaluation procedure***" (*i.e.*, a "response to intervention" model). DCMR 5-E3006.4 (d) (emphasis added). In addition, LEAs must prepare a written evaluation report that for SLD specifically includes "the basis for making the determination," as well as a "statement whether there is a ***severe discrepancy between achievement and ability*** that is not correctable without special education and related services." DCMR 5-E3006.5 (g) (2), (6) (emphasis added).

The Hearing Officer agrees with Petitioners that the regulatory language of this OSSE rule precludes DCPS' reliance on ***only*** a "response to intervention" model in determining whether a child has an SLD. That reading appears to be consistent with court and agency interpretations of the federal provision, Section 300.309. Thus, in addressing comments that "response to intervention (RTI) should be considered ***one component*** of the evaluation process and not the sole component," OSEP made clear that this was the correct interpretation:

> "Consistent with §300.304 (b) and section 614 (b) (2) of the Act, the evaluation of a child suspected of having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services. This requirement applies to all children suspected of having a disability, including those suspected of having an SLD."

71 *Fed. Reg.* 46, 646 (Aug. 14, 2006).

Moreover, according to OSEP, "the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD." 71 *Fed. Reg.* 46, 647. *See also Letter to Lillie/Felton,* 23 IDELR 714 (OSEP 1994) ("each child who is evaluated for a suspected learning disability ***must be measured against his or her own expected performance, and not against some arbitrary general standard.***") (emphasis in original). As Petitioners note, the Student's "discrepancies between her measured ability and her achievement test scores run from about one standard deviation to over four." *Petitioners' Closing Argument, p. 16; P-49* (Chart of Scores). DCPS appears to have disregarded this evidence in determining eligibility, contrary to both OSSE rules and the IDEA.

Even under the "response to intervention" model, which DCPS erroneously suggests is controlling, the Student should be found eligible for special education. That is because the Student still appeared to be falling short of grade-level standards in one or more of the areas

identified in Section 300.309 (a) (1), even with an IQ above the 99th percentile and with the extensive interventions employed at Former School and Private School. *See, e.g., P-15; P-56; Curriculum Spec. Test.* As Petitioners correctly point out (*Closing Argument, pp. 9-11*), evidence of progress at either school does not establish that the Student can function adequately without special education supports. "Were this the standard methodology, disabled students who are making progress in an appropriate program could be automatically disqualified from receiving the very services enabling their success." *N.G. v. District of Columbia,* 556 F. Supp. 2d 11, 35-36 (D.D.C. 2008). [6]

**3. Parental Private Placement**

IDEA provides that "a court or a hearing officer may require the agency to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds [1] that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and [2] that the private placement is appropriate." 34 C.F.R. § 300.148 (c). *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). Moreover, "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. The Hearing Officer therefore "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Carter,* 510 U.S. at 16.

In this case, the Hearing Officer has concluded that DCPS did not make FAPE available to the Student in a timely manner, as of October 20, 2010, when the Student was erroneously determined ineligible for special education. The Hearing Officer further concludes that the parental placement at Private School is proper, as the Student has received educational benefit from this program. She appears to have made significant progress, both academically and behaviorally, with the support of that program. Moreover, the placement aligns very well with the recommendations made by most of the Student's evaluators, as well as her previous school. It also appears to be appropriate for the Student, considering the nature and severity of her

[6] DCPS' 04/04/2011 meeting notes also include the rather strange comment that "The team from [DCPS] believes [Student] does not require special education services, ***except if such services are provided in a DCPS school***"(*R-13;* emphasis added), reflecting apparent confusion between eligibility standards and LRE requirements.

disabilities, her specialized needs, and the link between those needs and the services offered at Private School. *See Branham v. District of Columbia,* 427 F.3d 7, 12 (D.C. Cir. 2005).

The only remaining question is "the appropriate and reasonable level of reimbursement that should be required" based on all relevant factors and equitable considerations. *Carter,* 510 U.S. at 16; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. __, 129 S. Ct. 2484 (2009). Considering all relevant circumstances, including the conduct of the parties and DCPS' opportunity to evaluate the Student, the Hearing Officer concludes that DCPS should reimburse Petitioner for the full cost of the Private School program ***from October 21, 2010*** to the end of the 2010-11 school year. The Order will also reflect that Private School is the Student's current educational placement under the IDEA, pending any further administrative or judicial proceeding. 34 C.F.R. 300.518.

## VI. ORDER

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

1. The Student shall be eligible for special education and related services as a child with a Specific Learning Disability under the IDEA, effective October 21, 2010.

2. Within 30 days of this Order, DCPS shall (a) reimburse Petitioner for the full cost of the Student's enrollment at the **Private School** [7] from October 21, 2010, to the end of the 2010-11 school year; and (b) convene a meeting of the Student's MDT/IEP Team to develop an individualized education program ("IEP") and proposed educational placement for the 2011-12 school year.

3. DCPS shall maintain the Student's current educational placement at Private School unless and until either (a) DCPS is able to provide an appropriate placement for her within the public school system or an alternative private school, following the procedures specified in IDEA, or (b) the parties agree otherwise.

4. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***

Dated: July 7, 2011

Impartial Hearing Officer

[7] **Private School** is identified in the Appendix to this HOD.