

District of Columbia
Office of the State Superintendent of Education

OSSE
Student Hearing Office
September 23, 2013

Office of Review and Compliance
Student Hearing Office
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Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v. District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>[REDACTED]</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 9, 2013</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: [REDACTED]</p> <p>Counsel for DCPS: [REDACTED]</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened for one day on September 9, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age six, resides with [REDACTED] parent in the District of Columbia and has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and a receptive language disorder. During school year (“SY”) 2012-2013 the student attended (“School A”) a parochial school located in the District of Columbia. The student’s parent went to the DCPS Private and Religious Office (“PRO”) soon after the start of SY 2012-2013 and requested the student be evaluated.

The parent later obtained counsel who made second written request to DCPS for evaluation(s) including an occupational therapy (OT) evaluation. After 120 days had allegedly passed Petitioner filed a due process complaint alleging DCPS failed to timely evaluate the student and determine [REDACTED] eligibility or ineligibility. A consent order was issued on April 15, 2013, resolving that complaint and requiring DCPS to evaluate the student and determine [REDACTED] eligibility by June 12, 2013.

DCPS conducted the following evaluations of the student: psychological, OT and speech and language and convened an eligibility meeting on June 10, 2013, at which the student was found ineligible. The parent disputed the validity of DCPS’ psychological evaluation and requested an independent evaluation.

Petitioner filed the current due process complaint alleging DCPS failed to provide the requested independent psychological evaluation and challenging the June 10, 2013, finding of ineligibility. After the complaint was filed DCPS granted Petitioner authorization to obtain an independent psychological evaluation. Petitioner ultimately withdrew the allegation regarding the independent evaluation.

DCPS filed a timely response to the complaint on July 8, 2013. DCPS denied any alleged denial of a FAPE and asserted that based upon the data available the team correctly determined the student to be ineligible.

DCPS also filed a motion to dismiss asserting that the claim was premature given the pending independent evaluation. Petitioner filed an opposition to the motion. The Hearing Officer denied the motion and allowed Petitioner to present evidence that the student should have been found eligible on June 10, 2013.

The independent evaluation had been referred but not completed when the Hearing Officer convened a pre-hearing conference (“PHC”) on July 18, 2013. A resolution meeting was held on July 25, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead they expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. The 45-day period began on July 28, 2013, and ended (and the Hearing Officer’s Determination (“HOD”) was originally due) on September 11, 2013.

A second PHC was held August 15, 2013, to determine the status of the pending independent evaluation and any scheduled meeting date for the evaluation to be reviewed and for eligibility to be revisited. The parties agreed to the following hearing date: Friday, August 30, 2013.

The parties agreed thereafter to a brief continuance of the hearing to determine if the evaluation could be completed and reviewed by a team prior to a hearing on the complaint. However, a meeting was not held and Petitioner chose to move forward to hearing to challenge the ineligibility determination² and requested that the Hearing Officer determine the student eligible following presentation of evidence and order DCPS to provide the student compensatory education.³

Petitioner’s motion to continue was granted and the HOD due date was extended for ten (10) calendar days to September 21, 2013. The parties appeared for hearing on September 9, 2013. At the time of the hearing a team had not yet reviewed the independent evaluation. Respondent filed a motion to dismiss along with its disclosed documents based upon (1) the student having been enrolled in another local educational agency (“LEA”) for SY 2013-2014 and (2) the assertion there was no harm to the student because even if ■ were found eligible on June 10, 2013, DCPS would not have been required to develop an individualized educational program (“IEP”) prior to the end of SY 2012-2013. The Hearing Officer denied Respondent’s motion.⁴

² Respondent filed a motion to dismiss the complaint as being pre-mature based on the independent evaluation not being reviewed by a team. The Hearing Officer denied the motion because of Petitioner insistence that irrespective of the independent evaluation there was a sufficient data for the student to have been found eligible on June 10, 2013.

³ At the hearing, Petitioner sought compensatory education back to February 2013, when the due process complaint that resulted in the April 15, 2013, consent order was filed. However, this Hearing Officer concluded that compensatory education was only available in the current case back to June 10, 2013.

⁴ The Hearing Officer concluded in denying the Respondent’s motion to dismiss that ■ had jurisdiction regardless of the student now being in another LEA to determine whether DCPS in finding the student ineligible on June 10, 2013, was correct and that a remedy was still available despite the student being in another LEA.

ISSUE ADJUDICATED: ⁵

Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to find the student eligible at the June 10, 2013, meeting and failing to develop an IEP. ⁶

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-19⁷ and Respondent’s Exhibits 1-10) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁸

1. The student is age six, resides with ■ parent in the District of Columbia and has not been determined eligible for special education services. At the time the due process complaint was filed the student attended School A in first grade. ■ has been diagnosed with ADHD and a receptive language disorder. (Respondent’s Exhibit 2-2)
2. The parent had been told by the student’s former teachers that the student needed to be in a small classroom because of ■ short attention span. At ■ previous school, in kindergarten, the student was provided some one to one instruction as ■ was having problems with academics and getting failing grades and was recommended for summer school to prepare him for the next grade. (Parent’s testimony)
3. During the student’s first advisory of SY 2012-2013 at School A ■ had either satisfactory or above grades in all subjects. ■ report card noted for a number of subjects that the student was easily distracted but the student was also noted for producing excellent work and working consistently. The report card noted ■ needed some improvement in work and study habits in math. (Petitioner’s Exhibit 13)

⁵ The alleged violation(s) and/or issue(s) listed in the complaint do not directly correspond to the issue(s) outlined here. The Hearing Officer restated the issue(s) in the pre-hearing conference order and at the outset of the hearing and the parties agreed that the issue(s) listed herein were the issue(s) to be adjudicated. As noted earlier Petitioner withdrew the claim of regarding the independent evaluation (“IEE”) following DCPS’ IEE authorization on July 5, 2013.

⁶ Petitioner asserts the student should have been found eligible based upon the evaluations available to the team at the meeting with a disability classification of other health impairment (“OHI”) despite Petitioner’s request for an independent psychological evaluation.

⁷ All of Petitioner disclosed documents were admitted into the record except #8. Only the review of records in that document was admitted; nothing else in the report (#8) was admitted. All of Respondent’s disclosed documents were admitted into the record.

⁸ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party’s exhibit.

4. The student's parent went to the DCPS PRO soon after the start of SY 2012-2013 and requested the student be evaluated. Petitioner filed a due process complaint alleging DCPS failed to timely evaluate the student and determine ■ eligibility or ineligibility. DCPS and the parent settled the complaint and the terms were incorporated into a consent order issued on April 15, 2013. The order required DCPS evaluate the student and determine ■ eligibility by June 12, 2013. (Respondent's Exhibit 1)
5. The student's classroom teacher provided a letter to the PRO office in lieu of her attendance and participation an eligibility meeting. The teacher noted in the letter the student's improvement in academics and behavior from the first part of the school year. (Petitioner's Exhibit 10)
6. DCPS conducted psychological, OT and speech and language evaluations all of which made note of the student's inattention and ADHD. (Petitioner's Exhibits 2, 5, 6, 7)
7. The DCPS psychologist who evaluated the student conducted three classroom observations of the student and interviewed the student's teacher. The psychologist noted that interventions were in place to increase the student's on-task behaviors including chunking work, modified assignments and small group instruction. In one instance the student was able to follow instruction and complete the assignment quicker than the rest of ■ class. The psychologist did not notice any inattentiveness by the student during the observations. She reviewed the student's prior evaluations including a neurological report from Georgetown University Hospital, and conducted several assessments of the students.⁹ (Witness 4's testimony, Respondent's Exhibit 2-15, 2-17)
8. The DCPS psychologist concluded based on the assessments that the student cognitive skills were in the upper limits of the low average range and ■ was learning and performing academically within average range in most academic areas. She concluded the student did not fit the profile of a student with ADHD to meet the classification criterion for special education although ■ had displayed difficulty sustaining attention and was easily distracted. (Witness 4's testimony, Respondent's Exhibit 2-15, 2-17)
9. The DCPS psychologist also noted that the student demonstrated that ■ is able to meet grade level standards in math and language arts and this pattern was not indicative of a specific learning disability and the student did not meet the classification of OHI. She recommended the student be referred for a 504 plan. However, she left the final determination to the MDT team. (Witness 4's testimony, Respondent's Exhibit 2-15, 2-17)
10. DCPS convened an eligibility meeting on June 10, 2013, at which DCPS found the student ineligible. (Petitioner's Exhibit 2, Respondent's Exhibit 6)

⁹ The following assessments instruments were used: Conners' 3 parent and teacher version, Behavior assessment System for Children (BASC2) parent and teacher, Wechsler Intelligence Scale for Children (WISC-IV) and Woodcock-Johnson (WJ-III)

11. None of the student's teachers participated in the eligibility meeting; only the PRO staff, the evaluators and the parent and her representative. The team reviewed the evaluations, classroom observations and conversations with the teacher(s) and concluded the student did not qualify as a child with disability under IDEA. Based upon the student's academic scores and ■ overall performance in the classroom ■ was able to access the general education curriculum and the team concluded the student did not meet the criteria for special education services. The team recommended classroom modifications and accommodations for the student that could be provided with a 504 plan. The DCPS team offered to follow up and assist the parent to ensure that the student obtained the recommended 504 plan. (Witness 3's testimony)
12. The parent employed the services of an educational consultant who assisted her in the June 10, 2013, eligibility meeting. The consultant requested that the team find the student eligible based on ■ attention issues. She believed ■ required specialized instruction to address these issues as well as a behavior intervention plan ("BIP"). However, the consultant had never observed the student in the classroom and has not spoken to ■ teachers at School A. (Witness 2's testimony)
13. The student's teacher and staff at School A recommended that the student enroll in a DCPS or charter school because they said they could not provide him 504 services or special education services. (Parent's testimony)
14. For SY 2013-2014 the parent has enrolled the student in ("School B") a District of Columbia public charter school that is its own LEA. The parent has provided School B with the student's evaluations and the school has conducted some informal testing, but not convened an eligibility meeting for the student. (Parent's testimony)
15. Petitioner engaged a clinical psychologist review the data and evaluations that were available to the June 10, 2013, team including the DCPS comprehensive psychological evaluation. In her opinion all the evaluations and data indicated the student was displaying attention difficulties that were negatively impacting ■ academics and classroom performance. She concluded that all the data showed that the student has problems maintaining attention and hyperactivity that gets in the way of ■ academics. She was of the opinion that the data was sufficient to find him eligible and suggested the student needs specialized instruction in reading, math and writing and therapeutic services to help him slow down and do ■ work more thoroughly. However, the clinical psychologist had never assessed the student, never observed the student in the classroom and had not spoken to ■ teachers at School A. (Witness 1's testimony)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the

child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to find the student eligible at the June 10, 2013, meeting and failing to develop an IEP.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of evidence that the student qualifies as a child with a disability under IDEA with a classification of OHI due to ■ ADHD. Although there was evidence the student has a disability of ADHD there was insufficient proof that the student's disability affected him such that ■ is need of special education and related services.

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an **other health impairment**, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008). ¹¹

¹⁰ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

¹¹ 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311

All of the student's assessments and evaluations note the student's ADHD disability. However, the resounding weight of the evidence does not support a finding that the student is a child with a disability in need of special education and related services.

as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

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

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

34 C.F.R. § 300.306 provides:

Determination of eligibility.

(a) General. Upon completion of the administration of assessments and other evaluation measures--

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must--

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324.

The DCPS psychological evaluation clearly reflected that the student has average cognitive abilities and is performing in average range academically. Despite the student's attention issues that are displayed in the classroom the student was able to access the general education curriculum at School A during SY 2012-2013. The student's report card from School A also reflects that ■ was performing satisfactorily academically despite ■ attention issues. The June 10, 2013, team recommended that the student's disability be accommodated with a Section 504 plan and the evidence supports such a recommendation rather than that the student be found eligible for special education.

The Hearing Officer was unconvinced by Petitioner's witnesses, including its expert witness, that the student should have been found eligible for with the OHI disability classification. Unlike the DCPS psychologist, who was also designated as an expert, Petitioner's expert witness had not assessed the student, had not observed him in the classroom or interviewed ■ teachers. The DCPS psychologist had done all of these and concluded that the student's attention issues could best be addressed with a 504 plan given the student's academic scores, grades and classroom performance and the feedback from the student's teacher that the student's performance in the classroom had improved as the school year progressed.

In addition, the fact that there were none of the student teachers present at the eligibility meeting and that the input from the teacher indicated the student's academic performance was improving supports the team's conclusion that the student's attention issues were more appropriately addressed with a 504 plan and the student did not meet the criteria as a child with a disability under IDEA. The Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence.

ORDER:

The claims raised in the due process complaint are hereby dismissed with prejudice and all requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer

Date: September 21, 2013