

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
April 27, 2015

PETITIONER,
on behalf of STUDENT,¹

Date Issued: April 27, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,

Respondent.

Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her due process complaint, Petitioner alleges that Student was denied a free appropriate public education (FAPE) by respondent District of Columbia Public Schools' (DCPS) failure to develop an appropriate Individualized Education Program (IEP) in November 2013, DCPS' exiting Student from special education in May 2014 and DCPS' not evaluating Student in all areas of suspected disabilities in the current school year.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's due process complaint, filed on February 6, 2015, named DCPS as respondent, as the local education agency (LEA) for PUBLIC CHARTER SCHOOL (PCS). The parties met for a resolution session on February 18, 2015 and did not reach an agreement. On March 9, 2015, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing, originally scheduled to last one day, was extended for a second day, April 14, 2015, to allow DCPS to call additional school witnesses. On April 15, 2015, I granted DCPS' unopposed motion for a 10-day continuance of the final decision due date to afford sufficient time to review the evidence and prepare this decision.

The due process hearing was held before this Impartial Hearing Officer on April 9 and 14, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

At the due process hearing, counsel for the respective parties made opening statements. Petitioner testified and called as witnesses CLINICAL PSYCHOLOGIST and AUDIOLOGIST. DCPS called as witnesses COMPLIANCE MANAGER, SCHOOL PSYCHOLOGIST, and SPEECH LANGUAGE PATHOLOGIST (SLP). Petitioner's Exhibits P-1 through P-54 and DCPS' Exhibits R-1 through R-20 were admitted into evidence without objection. Counsel for both parties made closing arguments. Neither party requested leave to file post-hearing written argument.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the March 9, 2015

Prehearing Order:

- Whether Public Charter School (PCS) denied Student a FAPE by prematurely exiting her from Special Education Services at a meeting held on or about May 15, 2014;
- Whether PCS denied Student a FAPE by failing to develop an appropriate IEP for her on or about November 21, 2013 in that the IEP inappropriately reduced instructional and related services and did not include appropriate speech and language goals; and
- Whether PCS denied Student a FAPE by failing to comprehensively evaluate her in all areas of suspected disabilities in the 2014-2015 school year by failing to conduct auditory processing or occupational therapy evaluations.

For relief, Petitioner requests that the Hearing Officer order DCPS to ensure that PCS immediately reinstates Student's Individual Educational Program (IEP) to include revised speech and language goals, counseling services and "push-in" instruction in reading, mathematics and writing; and that DCPS be ordered to conduct, or fund at prevailing market rates, auditory processing and occupational therapy (OT) evaluations of Student. In addition, Petitioner requests compensatory education for the denials of FAPE alleged in her complaint.

During the due process hearing, DCPS, by counsel, undertook to conduct auditory processing and OT evaluations of Student as an accommodation to the parent, but maintained that the additional assessments were not needed to determine whether Student is a child with a disability or to address her educational needs. *See* 34 CFR §

300.305(a), (c).

FINDINGS OF FACT

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

1. Student is an AGE youth. She resides with Petitioner in the District of Columbia. Testimony of Mother.

2. Student was identified as a child with a Developmental Delay disability when she was three years old and attended PRIOR PCS. Exhibit P-24. She was provided IEPs at PRIOR PCS until she enrolled in PCS for the 2013-2014 school year. Testimony of Mother. Her last eligibility reevaluation at Prior PCS was completed on May 18, 2011. Exhibit P-32.

3. Student's IEP at Prior PCS was last revised on May 1, 2013 (the May 1, 2013 IEP). That IEP identified Student's Primary Disability as Specific Learning Disability (SLD). The IEP provided annual goals for Student in Mathematics, Reading, Communications/Speech and Language, and Emotional, Social and Behavioral Development. For Special Education and Related Services, the May 1, 2013 IEP provided Student 10 hours per week of Specialized Instruction, 30 minutes per week of Speech-Language Pathology and 30 minutes per week of Behavioral Support Services, all in the general education setting. Exhibit P-32.

4. In an OT evaluation of Student conducted in May 2011 when Student was attending Prior PCS, the OT evaluator recommended, *inter alia*, that Student be discharged from OT services because she demonstrated average to above average visual motor integration and visual perceptions, except for "Position in Space," which difficulty had not affected Student's ability to write at an age appropriate speed. Exhibit R-15.

5. Student “graduated” from Prior PCS and enrolled in PCS at the beginning of the 2013-2014 school year. When Student changed schools, Mother provided the May 1, 2013 IEP to the staff at PCS. Testimony of Mother.

6. PCS has elected to be treated as a District of Columbia public school for purposes of the IDEA. *See* 5E DCMR § 923.3. Therefore, DCPS is the local education agency (LEA) for PCS. Hearing Officer Notice.

7. For the first quarter of the 2013-2014 school year at PCS, Student’s grades were all B’s and above. She made the school’s honor roll. Exhibit P-50.

8. On Northwest Evaluation Association (NWEA) standardized testing administered in fall 2013, Student’s mathematics goals performance scores ranged from Low Average to High Average, except for Algebraic Thinking which was Low. Her Reading Goals Performance scores ranged from Low Average to High Average. Student’s overall scores were 200 for Mathematics and 199 for Reading. Both scores surpassed the average scores for all students in the same grade in the D.C. school district. Exhibit P-48.

9. Student’s classroom grades for the first two advisories of the 2013-2014 school year were all B+ and higher. Exhibit P-50.

10. Student’s IEP team at PCS convened on November 21, 2013 for an annual IEP review. Mother attended the meeting. The revised IEP included updated present levels of performance and annual goals for Mathematics, Reading, Written Expression, Communication/Speech and Language, and Emotional, Social and Behavioral Development. The IEP specified that Student would be provided 7.5 hours per week of Specialized Instruction in the general education setting, 120 minutes per month of Speech-Language Pathology in the general education setting and 20 minutes per month

of Consultation Behavioral Support Services. Exhibits P-28 and P-27. (P-28, the November 21, 2013 IEP, is an incomplete document and lacks all of the even-numbered pages. Petitioner's Counsel represents that the even-numbered pages in Exhibit P-27, a March 29, 2014 IEP amendment, are unchanged from the original even-numbered pages from the November 21, 2013 IEP.)

11. On the NWEA Measure of Academic Progress administered in spring 2014, Student scored 204 in Mathematics and 205 in Reading. This was an increase of 4 points in Mathematics and 6 points in Reading over the fall 2013 assessment. Exhibits P-12, P-48.

12. Student was reevaluated for special education eligibility in spring 2014. On the DCPS comprehensive psychological evaluation, cognitive testing, Student received an overall Composite Intelligence Score of 82 (Low Average). Overall, Student's cognitive abilities were similarly developed in the Low Average range and an Average working memory. On the Woodcock-Johnson III Tests of Achievement (WJ-III), Student's scores indicated she was performing in the Average range when compared to her same age peers, except for Reading Fluency and Math Fluency, where she attained Low Average scores. Overall, she was reported to be performing within expected ranges sufficient for her age and cognitive abilities. The DCPS evaluator, School Psychologist, concluded that Student did not meet IDEA criteria for a specific learning disability (SLD) because the data suggested that her achievement was adequate based upon her test scores and performance grades, the data suggested that the progress she had made was sufficient according to test scores and collective data, and her intellectual development and her performance were similarly developed without notable strengths or weaknesses. Exhibit P-24.

13. SLP conducted a Speech and Language Reevaluation of Student in May 2014. She found that overall, Student presented with communications scores that ranged from the Borderline to Average range. SLP concluded that Student's oral language and articulation were intact and not a source of academic difficulty and her oral language functioning was within the average range compared to age matched peers. She recommended that Student did not meet DCPS Speech and Language eligibility criteria standards for a student with a speech language impairment and that she met DCPS speech and language dismissal guidelines Exhibit P-23.

14. On the DC Comprehensive Assessment System (DC CAS) administered in spring 2014, Student's measured performance was Proficient for her age and grade level in both Reading and Math. Exhibit R-12.

15. On May 15, 2014, PCS convened a multidisciplinary team (MDT) meeting to reevaluate Student's eligibility for special education and related services. Mother attended the meeting. The eligibility team determined that Student met DCPS Criterion 1 for an SLD disability, based upon Student's difficulties in Listening Comprehension, Written Expression, Reading Comprehension and Mathematics Problem Solving. The team determined that Student did not meet Criterion 2 for an SLD because Student did not demonstrate a discrepancy between achievement and measured ability of two years below her chronological age or at least two standard deviations below her measured cognitive ability. Under DCPS standards a Student must meet both criteria. Exhibit P-22. Although not qualifying for special education, Student was determined to require general education intervention in reading, math and speech and language. All of the team members, except Mother, agreed with this determination. Exhibit P-22. Mother was not ready to agree or disagree at that time. Exhibit P-39. It appears that on May 19,

2014, PCS adopted the MDT team determination that Student no longer was eligible for special education services. Exhibit P-39.

16. On or about November 13, 2014, Petitioner's Counsel wrote PCS to request funding for an Independent Educational Evaluation (IEE) psychological evaluation of Student, stating that Mother disagreed with the May 7, 2014 psychological evaluation conducted by DCPS. Exhibit P-20.

17. On December 12, 2014, a Student Evaluation Plan meeting was convened at PCS. Mother and Petitioner's Counsel attended the meeting. PCS' representatives stated that Student was making slow but steady progress. Mother reported that Student was coming home every day with headaches and that Student complained of anxiety. Mother was concerned that Student still needed special education services. Petitioner's Counsel requested that special education services be reinstated on an interim basis. The PCS representatives declined the request because they felt that the interventions, outside of special education, which PCS was implementing were working for Student. Exhibit P-10.

18. On December 16, 2014, Student was evaluated by Audiologist for an IEE speech-language assessment. Audiologist reported that no deficits in speech/articulation were found for Student and that significant deficits were found for Student in her basic language knowledge, which suggested the possibility of underlying language processing deficits. Audiologist recommended that Student should undergo a comprehensive auditory processing assessment and that her IEP should contain goals to address language knowledge problems. Exhibit P-2.

19. On December 11, 2014, PSYCHOLOGY RESIDENT conducted an IEE Comprehensive Psychological Evaluation of Student. She administered a battery of tests

to assess Student's cognitive, academic and social-emotional functioning. Student's scores on the December 2014 Woodcock-Johnson III Tests of Cognitive Abilities indicated that Student's general intellectual ability was in the Low Average range when compared to others in her age range. On the Woodcock Johnson III Tests of Achievement, Student's Standard Score for Broad Reading was Low Average, for Broad Math was Low Average and for Broad Written Language was Average. On Behavioral Rating Scales administered to Student, to Mother and to two teachers, the teachers reported At-Risk scores on the Learning Problems domain, but all other scores fell in the normal range. Mother Reported At-Risk or Clinically Significant scores in numerous emotional/behavioral areas. On Student's self report, Student also reported At-Risk or Clinically Significant scores in numerous areas. Both teachers' ratings on the Attention-Deficit-Hyperactivity Disorder Test (ADHDT) were in the subclinical range. Mother's ADHDT responses indicated a Clinically Significant rating. Based upon Psychology Resident's report, Clinical Psychologist diagnosed Student with Unspecified Anxiety Disorder, Specific Learning Disorder with Moderate impairment in reading, Mild impairment in written expression and Mild impairment in mathematics. Clinical Psychologist's diagnoses also included Posttraumatic Stress Disorder (Rule Out) and Attention Deficit-Hyperactivity Disorder (Previously Diagnosed). Exhibit P-1.

20. On March 12, 2015, PCS convened an MDT meeting to review the IEE evaluations of Student. Mother and Petitioner's Counsel attended the meeting. The team members considered a request by Petitioner's Counsel to conduct an OT assessment and auditory processing assessment of Student and determined that the additional assessments were not needed. The MDT team, over the disagreement of Mother and Petitioner's Counsel, determined that Student did not meet DCPS special

education eligibility criteria for a Speech-Language Disorder or for a Specific Learning Disability. Exhibits R-6, R-7, R-8, R-9.

21. At the due process hearing in this case, DCPS, by counsel, undertook to conduct a Auditory Processing and an Occupational Therapy evaluation of Student, with the reservation that it would perform the assessments as an accommodation to the parent – not because the additional data was needed to determine Student’s eligibility for special education services. Representation of DCPS’ Counsel.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. Did PCS deny Student a FAPE by failing to develop an appropriate IEP for her on or about November 21, 2013 in that the revised IEP inappropriately reduced instructional and related services and did not include appropriate speech and language goals?

When Student enrolled in PCS at the beginning of the 2013-2014 school year, the parent provided PCS Student’s May 1, 2013 IEP from Prior PCS. The May 1, 2013 IEP provided that Student would receive 10 hours per week of Specialized Instruction in the

general education setting, 30 minutes per week of Speech-Language Pathology and 30 minutes per week of Behavioral Support Services. At an IEP review meeting on November 21, 2013, the PCS IEP team reduced Student's Specialized Instruction to 7.5 hours per week and curtailed direct Behavioral Support Services. Petitioner contends that these reductions in services denied Student a FAPE. DCPS maintains that the reductions in services were warranted based upon Student's progress and that the IEP was appropriate.

An IEP is the vehicle used by an IEP team to assess a student's needs and assign a commensurate learning environment. *See, e.g., Gill v. District of Columbia*, 751 F.Supp.2d 104, 108 (D.D.C.2010). To determine whether a FAPE has been provided, a hearing officer must determine “[f]irst, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 2013 WL 1248999, 11 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Petitioner has not raised an IDEA procedural issue with respect to the development of the November 21, 2013 revised IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the November 21, 2013 IEP reasonably calculated to enable Student to receive educational benefits?

There was little evidence offered by either party on Student's need for special education and related services in the fall of 2013. Her classroom grades for the first two advisories of the 2013-2014 school year were all were all A's and B's. On the NWEA,

Student's mathematics goals performance scores ranged from Low Average to High Average, except for Algebraic Thinking which was Low. Her Reading Goals Performance scores ranged from Low Average to High Average. Her NWEA Overall Scores were 200 for Mathematics and 199 for Reading. Both scores exceeded the average scores for all students in the same grade in the D.C. school district.

Notwithstanding Student's apparent progress in the general education curriculum and on standardized testing, Petitioner's Counsel argues that the reductions of services in Student's November 21, 2013 were not appropriate because Student had only recently transferred from Prior PCS and PCS had not conducted its own special education reevaluation of Student. The IDEA provides that a reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Student had been evaluated in May 2011 and was not due for a reevaluation in fall 2013. Petitioner offered no evidence from an education expert or otherwise that at the time the November 21, 2013 IEP was offered, it was not reasonably calculated to enable Student to receive educational benefits. Moreover, although the appropriateness of an IEP is judged prospectively, not by the effectiveness of the program in hindsight, *see, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008), it is also noteworthy that as of spring 2014, after the reduction in her IEP services, Student still attained all A's and B's in her courses and was reported to be progressing very well in math class and was making favorable progress in her large group literacy class.

The decision to eliminate direct Behavioral Support Services from Student's November 21, 2013 IEP was made because the IEP team determined that Student no longer had a need for the services. At the due process hearing, School Psychologist

testified that Student no longer needed behavioral support services and had not needed the services for quite some time. Petitioner offered no evidence to the contrary.

Petitioner also contends that the speech-language annual goals in the November 21, 2013 IEP were not appropriate. Petitioner's expert, Audiologist, opined that the speech-language goals were inadequate because of a lack of grammar goals, omission to appropriately address Student's overall language knowledge deficiency and the inclusion of a goal for Student to be able to describe things, when her lack of skills in the other language areas should have been addressed before working on descriptive language. While the IDEA requires that a child's IEP must include annual goals to enable the child to be involved in and make progress in the general education curriculum, *see* 34 CFR § 300.320(a)(2), the Act does not require goals to be written for each specific discipline. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46662 (August 14, 2006). Assuming that Audiologist were correct that the speech-language goals in the November 21, 2013 IEP should have been more comprehensive, that does not mean that the IEP annual goals did not suffice to enable Student to be involved in and make progress in the general education curriculum, which is all that the IDEA requires. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208 (4th Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child "the basic floor of opportunity that access to special education and related services provides." (quoting, *Rowley, supra* 458 U.S. at 201)). Moreover, Audiologist's opinion was based upon his December 18, 2014 IEE speech-language assessment, which was not available when the IEP team met 13 months before. The measure and adequacy of an IEP can only be determined as of

the time it is offered to the student. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66-67. (D.D.C. 2008). In sum, I conclude that Petitioner has not shown that the November 21, 2013 IEP was inappropriate, either because the IEP team reduced Student's specialized instruction and related services or because the annual goals were inadequate.

2. Did Public Charter School deny Student a FAPE by prematurely exiting her from Special Education Services at a meeting held on or about May 15, 2014?

Until May 2014, Student had received special education and related services as a child with an SLD disability. Petitioner alleges that PCS denied Student a FAPE by exiting her from special education in May 2014. The IDEA provides that before determining that a child receiving special education services is no longer a child with a disability, the local educational agency must first reevaluate the child. *See* 20 U.S.C. § 1414(c)(5)(A). The evaluation required is "a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals. 20 U.S.C. § 1414(c)(5)(B)(ii); 34 C.F.R. § 300.305(e)." *District of Columbia v. West*, 699 F.Supp.2d 273, 279 (D.D.C.2010).

In this case, PCS exited Student from special education near the end of the 2013-2014 school year. In her most recent IEP, developed at PCS in November 2013, Student had been provided 7.5 hours per week of specialized instruction and 120 minutes per month of speech-language pathology, both in the general education setting. Student was due for her triennial eligibility reevaluation in May 2014. In preparation for the reevaluation, PCS ordered psychological and speech and language reassessments of Student. Based upon the results of these reassessments and other data on Student, the

PCS eligibility team determined on May 15, 2014 that Student no longer met special education eligibility criteria as a student with an SLD disability. Petitioner maintains that determination was erroneous.

The term “child with a disability” is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as having one or more defined disabilities, including, *inter alia*, a specific learning disability “and who, by reason thereof, needs special education and related services.” See 34 CFR § 300.8(a). It is up to each state to develop criteria to determine whether a child has a disability, including whether a particular child has an SLD. See *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46648. In the District, DCPS has developed special education eligibility criteria for the IDEA SLD disability.

Specific Learning Disability

DCPS’ definition for SLD, used by PCS in this case, requires, *inter alia*, that a student meet *both* of the following two criteria:

Criterion 1: The student does not achieve adequately and/or does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the student’s age or State-approved grade-level standards: Oral expression, Listening comprehension, Written expression, Basic reading skill, Reading fluency skills, Reading comprehension, Mathematics calculation Mathematics problem solving . . .

Criterion 2: The student demonstrates a discrepancy between achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation) of two years below a student’s chronological age and/or at least two standard deviations below the student’s cognitive ability as measured by appropriate standardized diagnostic instruments and procedures.

Exhibit P-22.

In her May 14, 2014 Psychological Reevaluation report, School Psychologist reported that in May 2014, Student did not meet either of the DCPS SLD criteria

because data suggested that Student's achievement and progress were adequate based on test scores and performance grades and her intellectual development and her performance were similarly developed without notable strengths and weaknesses. The May 15, 2014 PCS eligibility team determined, to the contrary, that Student met Criterion 1, based upon Student's difficulties in Listening Comprehension, Written Expression, Reading Comprehension and Mathematics Problem Solving. However, the eligibility team determined that Student did not meet Criterion 2 because her achievement and ability were neither two years below her chronological age nor two standard deviations below her cognitive ability.

At the due process hearing, Petitioner attempted to show that Student continued to meet both required criteria for the SLD disability. Petitioner's expert, Clinical Psychologist, reviewed the results of the December 2014 IEE psychological evaluation conducted by Psychology Resident, specifically the Woodcock Johnson III Tests of Achievement (WJ-III ACH). Based on the December 2014 test scores, Clinical Psychologist opined that Student met Criterion 2 for SLD because she tested at "two grade levels" below her actual grade level on specific subtest areas of the WJ-III ACH, namely Calculation, Passage Comprehension and Writing Samples.

I discount Clinical Psychologist's opinion for several reasons. First, Clinical Psychologist based her opinion on the scores from the WJ-III ACH administered in December 2014, instead of Student's April 23, 2014 WJ-III ACH scores which were considered by the May 15, 2014 eligibility team.² In her testimony, Clinical Psychologist

² On March 23, 2015, the PCS MDT team met to review the IEE evaluations obtained by the parent and to determine whether Student was eligible for special education. The team again determined that Student was not eligible for special education and related services. The correctness of that determination, made after the due process complaint in this matter was filed, is not at issue in the present case.

did not dispute the validity of the scores on the earlier test. Obviously the December 2014 IEE test scores were not available when the eligibility team met on May 15, 2014. Next, Clinical Psychologist based her opinion on the alleged discrepancy between Student's achievement and her school grade level – not on whether there was a discrepancy between Student's achievement and her chronological age, which is the DCPS standard for Criterion 2. (Clinical Psychologist noted that Student's Calculation, Passage Comprehension and Writing Sample subtest scores put her at Grade Equivalents for 3, 2.5 and 2.9 respectively.) Also, to support her opinion, Clinical Psychologist picked three subtests from the WJ-III ACH administered in December 2014, on which Student received lower scores. However, Student's grade equivalent scores on the WJ-III ACH broad subject areas – Broad Reading, Broad Math and Broad Written Language – were all within two years of her grade in school. Nor were Student's achievement scores at least two standard deviations below her measured cognitive ability.

Finally, even if Student had met the DCPS discrepancy analysis criteria for the SLD disability, in order to find Student eligible for special education, the eligibility team also had to consider whether Student needed special education and related services “by reason” of the alleged SLD disability. *See* 34 CFR § 300.8(a); 20 U.S.C. § 1401(3)(A). In her May 13, 2014 Psychological Reevaluation report, School Psychologist reported that Student was passing all of her classes and completing work in large group settings within expectations. Her grades through the 3rd Advisory were all B's and higher. On the DC Comprehensive Assessment System (DC CAS) administered in spring 2014, Student's measured performance was Proficient for her age and grade level in both Reading and Math. School Psychologist opined in her testimony that the data available

in spring 2014 showed that Student's achievement was adequate, that she was making progress similar to her same aged peers and that her educational needs could be met with general education interventions. This opinion was not rebutted by the Petitioner. In sum, I conclude that Petitioner has not met her burden of proof to establish that at the time the PCS eligibility team exited Student from special education in May 2014, Student met DCPS criteria for an SLD disability or that she continued to need special education and related services as a result of the alleged disability.

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Petitioner's claim in her February 6, 2015 due process complaint, was that in May 2014 Student still had a qualifying SLD disability and PCS should not have been exited her from special education. At the due process hearing, Petitioner offered evidence on whether Student might also have been determined eligible based upon a speech-language impairment (SLI) or other disability.

Speech-Language Impairment

The DCPS eligibility criteria for a Speech or Language Impairment require that a child have one of more of the following impairments: Articulation Impairment, Fluency Impairment, Language Impairment or Voice/Resonance Impairment. In addition, the identified Speech or Language Impairment(s) must also impact the student's educational performance to the extent that she requires specially designed instruction. *See Exhibit R-8.* SLP conducted a speech and language reevaluation of Student in May 2014. She reported that Student presented with communication scores that ranged from borderline to the average range and that she did not demonstrate a disabling communication disorder that would prevent her from accessing or gaining benefit from the general education curriculum. In her testimony at the due process hearing, Speech

Language Pathologist opined that while Student has speech-language weaknesses, these weaknesses do not have an impact on her academic performance.

Petitioner's expert, Audiologist, conducted an IEE speech-language evaluation of Student in December 2014. Audiologist agreed that Student does not have impairments in Articulation, Fluency or Voice/Resonance, but he opined that Student does have a Language Impairment which was reflected in deficient language knowledge, figurative language and inference and Attributes (ability to describe things). While Audiologist found Student to have a language impairment, he testified he was unable to opine on whether that impairment adversely impacted Student's educational performance.

On the issue of whether in May 2014, Student met the criteria for an SLI disability, the experts' respective testimony was not substantively in conflict. SLP and Audiologist agreed that Student has a language impairment, but neither expert opined that the impairment impacted Student's educational performance such that she required special education and related services. To the extent that Petitioner contends that in May 2014, Student was eligible for special education based upon a language impairment, I find that Petitioner has not established that Student met DCPS criteria for the SLI disability.

Other Health Impairment

In argument, Petitioner's Counsel posited that PCS' reevaluation of Student in spring 2014 was not sufficiently comprehensive because Student was not assessed for Attention Deficit-Hyperactivity Disorder (ADHD) or for an anxiety disorder based upon Post Traumatic Stress Disorder (PTSD). Petitioner's expert, Clinical Psychologist, testified that, although Student had been clinically diagnosed with Unspecified Anxiety Disorder, PTSD and ADHD, the expert had no opinion on whether Student qualified for

special education based upon any disability besides SLD. I find that the hearing evidence does not establish that at the May 21, 2014 eligibility meeting, Student should have been determined eligible for special education based upon her past diagnoses of Anxiety Disorder, PTSD or ADHD. (Whether DCPS failed to evaluate Student in all areas of suspected disabilities before the May 21, 2014 eligibility meeting is not an issue in this case. See Prehearing Order, Mar. 9, 2015.)

3. Did PCS deny Student a FAPE by failing to comprehensively evaluate her in all areas of suspected disabilities in the 2014-2015 school year by failing to conduct auditory processing or occupational therapy evaluations?

Petitioner contends that DCPS also denied Student a FAPE by not conducting auditory processing and occupational therapy (OT) evaluations requested by Petitioner in 2015. Procedurally, this claim arises from Petitioner's requests for evaluations beginning in November 2014, and is independent of Petitioner's claim that PCS inappropriately exited Student from special education in May 2014.

On November 13, 2014, Petitioner's Counsel made a written request to PCS to fund an IEE psychological evaluation of Student. Following this request, it appears that PCS agreed to fund both an independent psychological evaluation and an independent speech-language assessment. In his December 18, 2014 IEE Speech-Language Assessment, Audiologist recommended, *inter alia*, that Student receive an auditory processing evaluation. In the January 15, 2015 IEE psychological evaluation report, Psychology Resident recommended that Student should be evaluated by an occupational therapist because her score on the test of visual-motor integration was poorly developed. Subsequently, by letter of January 7, 2015, Petitioner's Counsel requested that DCPS conduct an auditory processing evaluation of Student. On February 24, 2015, Petitioner's Counsel requested PCS to evaluate Student for special education, to include

an OT evaluation.

Because the PCS eligibility team determined in May 2014 that Student no longer met criteria for special education eligibility, the attorney's January and February 2015 evaluation requests, including for auditory processing and OT assessments, triggered the LEA's Child Find obligation.³ "Child Find is [the LEA's] affirmative obligation under the IDEA: 'As soon as a child is identified as a potential candidate for services, [the LEA] has the duty to locate that child and complete the evaluation process.' . . . *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008). [The LEA] must conduct initial evaluations to determine a child's eligibility for special education services 'within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.' D.C. Code § 38–2561.02(a)." *Long v. District of Columbia* 780 F.Supp.2d 49, 56 (D.D.C.2011). For both initial evaluations and reevaluations, the IDEA requires the eligibility team to review existing evaluation data for the child suspected of having a disability. Based on the team's review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46641, 46658.

On March 12, 2015, PCS convened an MDT meeting for the stated purposes, *inter*

³ For purposes of the IDEA's evaluation requirements, after a child has been exited from special education, a subsequent evaluation request is considered a request for an initial evaluation, not a reevaluation. *Cf. Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46682. (The evaluation conducted by the new public agency would be to determine if the child is a child with a disability and to determine the educational needs of the child. Therefore, the evaluation would not be a reevaluation, but would be an initial evaluation by the new public agency, which would require parental consent.)

alia, of reviewing recent evaluations of Student and determining whether she was eligible for special education services. The MDT team reviewed an OT evaluation of Student conducted in May 2011, in which the evaluator recommended that Student be discharged from OT services because she demonstrated average to above average visual motor integration and visual perceptions, except for “Position in Space,” which difficulty had not affected Student’s ability to write at an age appropriate speed. Student’s current classroom teacher stated at the meeting that there were no OT impacts on Student in the classroom, and that Student writes legibly and copies slowly which did not impact her ability to complete assignments. The MDT team decided that it did not need another OT assessment of Student to determine whether she was a student with a disability. At the due process hearing, Petitioner offered no evidence that Student exhibited visual-motor issues which had an impact on her classroom performance. Therefore, I find that Petitioner did not establish that a new OT assessment was needed for Student.

At the March 12, 2015 MDT meeting, Petitioner’s Counsel again requested that DCPS conduct an auditory processing assessment of Student. Speech Language Pathologist, who conducted the Speech and Language Reevaluation of Student in May 2014, stated that Student did not have key indicators for a Central Auditory Processing Disorder. The MDT team decided that an auditory processing evaluation was not needed to determine whether Student was a student with a disability. At the April 9, 2015 due process hearing, Petitioner’s speech-language expert, Audiologist, testified that an auditory processing evaluation was needed because he had found that Student’s receptive/comprehension abilities were significantly below her expressive ability – which could indicate an auditory processing problem. Audiologist’s opinion was countered by Speech Language Pathologist, who had stated that Student did not have

key indicators for an auditory processing disorder. She noted that Student's scores on the language processing test administered by Audiologist were all in the Average range, except for the "Attributes" subtest, which she considered unreliable because the score was an "outlier," vastly below Student's other scores. Here, both experts have years of experience in the speech-language field. In this "battle of the experts" over whether Student needed an auditory processing assessment, and I did not find one witness more credible than the other. Therefore, I must decide this issue against the Petitioner, who had the burden of proof.⁴

ORDER

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

ORDERED:

All relief requested by Petitioner herein is denied, without prejudice to Petitioner's rights, if any, to seek relief hereafter for any matter relating to DCPS' completion of OT and auditory processing assessments of Student, per the representations of DCPS' Counsel made at the April 9 and 14, 2015 due process hearing.

Date: April 27, 2015

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

⁴ Although I find that Petitioner has not met her burden of proof to establish that the March 12, 2015 MDT team needed either an OT reevaluation or an auditory processing assessment to determine whether Student is a student with a disability, assuming a contrary finding that the additional assessments were needed, the failure to conduct a component assessment as part of an initial evaluation would be a procedural violation of the IDEA. *Cf.*, *e.g.*, *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 738 (3rd. Cir.2009) (Unduly long time to complete evaluation was a procedural violation.) An IDEA claim is viable only if the alleged procedural violation affected the student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). DCPS' Counsel represented at the due process hearing that, as an accommodation to the parent, DCPS would conduct both an OT reevaluation and an auditory processing assessment of Student. When these assessments are completed, they must be reviewed and considered by Student's MDT team. *See* 34 CFR § 300.306. DCPS' commitment to conduct the additional assessments appears to preclude the possibility of substantive harm to Student from the recent PCS MDT team decision that the requested assessments were not needed.

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 U.S.C. § 1415(i).