

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 03, 2022

PARENT on behalf of STUDENT, ¹	Date Issued: December 3, 2022
Petitioner,	Hearing Officer: Peter B. Vaden
v.	Case No: 2022-0187
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	Hearing Dates: November 22, 2022 December 1, 2022
Respondent.	Online Videoconference Hearing

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Parent under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In this administrative due process proceeding, the parent seeks a determination that Respondent District of Columbia Public Schools (DCPS) denied her child a free appropriate public education (FAPE) by failing to find him/her eligible for special education in October 2022.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on October 17, 2022, named DCPS as Respondent. The undersigned hearing officer was appointed on October 18, 2022. On October 31, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. On October 27, 2022, I convened a telephone prehearing conference with Parent and DCPS' counsel to discuss the issues to be determined, the hearing date and other matters. My final decision is due by December 31, 2022.

With the Parent's consent, the due process hearing was held online, and recorded by the hearing officer using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on November 22 and December 1, 2022. MOTHER appeared online for the hearing and represented herself without the assistance of an attorney. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL. DCPS ATTORNEY was also present online for the hearing.

The Parent made an made opening statement. She testified at the hearing and called as additional witnesses LEA Representative, SPEECH-LANGUAGE PATHOLOGIST (SLP) and SCHOOL PSYCHOLOGIST. DCPS re-called School Psychologist as an agency witness and called SCHOOL SOCIAL WORKER, SPECIAL EDUCATION TEACHER, OCCUPATIONAL THERAPIST 1 (OT-1) AND OCCUPATIONAL THERAPIST 2 (OT-2) as additional witnesses.

Petitioner's Exhibits P-1, P-7, P-10 through P-12 and P-16 through P-22 were admitted into evidence, including Exhibits P-7, P-10 and P-12 admitted over DCPS'

objections. I sustained DCPS' objection to Exhibit P-3. DCPS' Exhibits R-1, R-2, R-4. R-8, R-9, R-15, R-18. R-21, R-25 through R-33, and R-35 through R-38, were admitted into evidence, including Exhibits R-1, R-4 and R-30 admitted over the Parent's objections. There was no request to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issue for determination, as certified in the October 27, 2022 Prehearing Order, is:

Whether DCPS denied the student a free appropriate public education (FAPE) by failing to find him/her eligible for special education as a child with a Specific Learning Disability at the City School October 13, 2022 multidisciplinary team meeting.

For relief, the Petitioner seeks a determination by the Hearing Officer that Student is eligible for special education as a child with a learning disability and an order requiring DCPS to develop an appropriate initial IEP, to include, *inter alia*, at least 30 minutes per week of Specialized Instruction Services outside of the general education setting and at least 2 hours per month of Behavioral Support Services, with at least 1 hour per month being outside of the general education setting. The Parent also sought an award of compensatory education for the denial of FAPE alleged in the complaint, including reimbursement for previously approved tutoring services.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of the parties, my findings of fact are as follows:

1. Student, an AGE child, resides in the District of Columbia with the Parent.

Testimony of Mother.

2. Student was previously determined by DCPS to be eligible for special education on the basis of a Speech-Language Impairment (SLI). At a multidisciplinary team (MDT) meeting at City School on July 12, 2022, the MDT team determined that Student no longer met criteria for the SLI disability. Exhibit R-30. Mother did not disagree with that determination. Testimony of Mother.

3. In February 2022, Mother learned from Student's report card that Student had a deficit in writing. In email correspondence with Mother, Student's teacher wrote that Student earned a low grade in Writing because he/she had not shown mastery of newly taught writing skills and strategies. She wrote that Student started off great but by then seemed to be intimidated by the rigor of the writing tasks. Student was often reluctant to try initially and required a lot for clarification of the task. The teacher wrote that Student and other children in the class needed more time and DCPS needed better alignment with the curriculum and assessments. Exhibit P-7.

4. Mother referred Student for a DCPS psychological evaluation due to academic concerns in the area of written expression skills and handwriting. School Psychologist completed a comprehensive psychological evaluation of Student in June

2022. School Psychologist concluded, *inter alia*, that Student had Average writing skills and he/she should not demonstrate difficulty with independently completing grade level writing assignments. Exhibit R-28.

5. Speech-Language Pathologist (SLP) conducted a speech and language evaluation of Student in May and June 2022. In her June 23, 2022 evaluation report, SLP concluded that while Student had challenges in the areas of expressive language, including slightly delayed expressive vocabulary, those areas should not have a negative impact on Student's academic performance as it relates to him/her communicating ideas clearly, following multi-step directions, answering questions about events in text, interpreting sentences with different concepts, rephrasing information that is given to him/her in the classroom, and participating effectively in group discussions. Exhibit R-29.

6. At the July 12, 2022 MDT meeting, the MDT team also determined that based on assessment results, observations, work samples, and teacher and parent reports, Student did not qualify for special education services under any other disability category at that time. The team determined, expressly, that Student did not meet criteria for a Specific Learning Disability (SLD). Exhibits R-31, R-32. The Parent stated at the meeting that DCPS' assessments did not address concerns regarding Student's writing that were discussed in an Analysis of Existing Data (AED) meeting on May 17, 2022 and indicated that she would request an independent educational evaluation (IEE) writing assessment for Student. Mother also stated that she would be asking for

tutoring from DCPS for Student and a referral to the Section 504 team at City School (Section 504 of the Rehabilitation Act of 1973), because Student would need continuation of the accommodation on his/her ended IEP for the SLI disability. Exhibit R-31.

7. On September 5, 2022, Independent Psychologist conducted an IEE dysgraphia evaluation of Student. Independent Psychologist administered the Feifer Assessment of Writing (FAW), described as a comprehensive written language and spelling test designed to examine the underlying cognitive, linguistic, and motor processes that support proficient writing skills. In his September 13, 2022 report, Independent Psychologist reported that Student demonstrated below average motor control and dexterity to execute the physical stroke of writing, with slow motor output speed noted as well; that Student demonstrated adequate general spelling skills, with no significant weaknesses; that Student demonstrated significant working memory deficits hindering his/her overall written language skills as he/she struggled to select, retrieve, and organize information to adequately craft grammatically correct sentences. Independent Psychologist concluded that based upon previous evaluations and the FAW test scores, Student presented the profile of a student with a written language disorder consistent with Executive Dysgraphia. Student demonstrated significant working memory deficits hindering his/her overall written language skills and struggled to select, retrieve, and organize information to adequately craft grammatically correct sentences. In addition, Student's overall motor output speed was slower paced as well.

Independent Psychologist recommended, *inter alia*, that City School may want to consider Student eligible for additional services under a Section 504 plan and/or qualify him/her for special education services under the coding of Learning Disability. Exhibit P-1.

8. On October 20, 2022, Special Education Teacher completed an Evaluation Summary Report looking at Independent Psychologist's September 13, 2022 report and did not indicate any disagreement with Independent Psychologist's findings. Exhibit R-35.

9. On October 13, 2022, an MDT team met at City School to review updated data on Student, to consider Independent Psychologist's IEE dysgraphia evaluation and to determine Student's eligibility for special education. Exhibit R-36. The only IDEA disability classification considered for Student was SLD. Testimony of School Psychologist. To determine Student's eligibility under SLD, the team used the DCPS Office of Special Education Disability Worksheet: Specific Learning Disability, which had been updated on July 1, 2022 (SLD Worksheet). For eligibility criteria, the MDT team used Option B - Discrepancy Model. The Discrepancy Model has 4 criteria, all of which must be met for a student to be eligible for SLD:

Criterion 1: The student does not achieve adequately for the student's age and/or does not meet 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:

Criterion 2: The student demonstrates a discrepancy between achievement (as measured by the educational evaluation) and intellectual functioning (as measured by the intellectual evaluation) of at least one and one half (1.5) standard deviations as measured by appropriate standardized diagnostic instruments and procedures.

Criterion 3: Exclusionary Factors . . .

Criterion 4: The specific learning disability adversely impacts student's educational performance.

Exhibit R-37; Testimony of School Psychologist. The MDT team found that Student met Criterion 1 because Student was not on grade level on written expression and presented with a disability in writing. The MDT Team found that Student did not meet Criterion 2 because School Psychologist believed that the SLD Worksheet required a discrepancy between achievement and intellectual functioning of two standard deviations – not 1.5 standard deviations as provided in the SLD worksheet. Because the MDT team found that Student did not meet Criterion 2, the team did not consider Criterion 3 or Criterion 4. Testimony of School Psychologist.

10. Based on Woodcock-Johnson achievement testing results and Independent Psychologist's FAW testing, as of October 13, 2022, Student demonstrated a discrepancy between achievement (as measured by the educational evaluation) and intellectual functioning (as measured by the intellectual evaluation) of at least one and one half (1.5) standard deviations. Testimony of School Psychologist, Testimony of Special Education Teacher.

11. In the fall of 2022, City School implemented a Section 504 Plan to support

Student's written language skills. Exhibit R-1.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of the parties, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). In this case, the Parent must bear the burden of persuasion.

Analysis

The City School MDT team met on July 12, 2022 and determined that Student did not qualify for special education services under any disability category at that time. The team determined, expressly, that Student did not meet criteria for a Specific Learning Disability (SLD). Mother disagreed with the evaluation and requested an Independent Educational Evaluation (IEE) writing assessment of Student. The IEE

writing assessment was completed in September 2022. In the IEE assessment report, Independent Psychologist concluded that Student presented the profile of a student with a written language disorder consistent with Executive Dysgraphia. Independent Psychologist found that Student demonstrated significant working memory deficits hindering his/her overall written language skills and struggled to select, retrieve, and organize information to adequately craft grammatically correct sentences. In addition, Student's overall motor output speed was slower paced as well.

The City School eligibility team met on October 13, 2022 to consider Independent Psychologist's report and again decided that Student did not meet criteria for the SLD disability. In this proceeding, the Parent challenges the October 13, 2022 decision because she contends that the school eligibility team did not follow DCPS criteria in making that determination. I agree with the Parent.

Under IDEA regulations, the District of Columbia has adopted criteria for determining whether a child has a specific learning disability (SLD). DCPS was required to use the state criteria in determining whether a child has an SLD. *See* 34 C.F.R. § 300.307(a), (b). Pursuant to this requirement, DCPS developed its *Disability Worksheet: Specific Learning Disability*, which was updated on July 1, 2022 (SLD Worksheet).

At the October 13, 2022 eligibility meeting for Student, the City School MDT team used the SLD Worksheet Option B - Discrepancy Model. The Discrepancy Model has 4 criteria, all of which must be met for a student to be found eligible for SLD:

Criterion 1: The student does not achieve adequately for the student's age and/or does not meet 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:

Criterion 2: The student demonstrates a discrepancy between achievement (as measured by the educational evaluation) and intellectual functioning (as measured by the intellectual evaluation) of at least one and one half (1.5) standard deviations as measured by appropriate standardized diagnostic instruments and procedures.

Criterion 3: Exclusionary Factors . . .

Criterion 4: The specific learning disability adversely impacts student's educational performance.

The MDT team found that Student met Criterion 1 because Student was not on grade level for written expression and presented with a disability in writing. However, the team misapplied Criterion 2 and required that Student demonstrate a discrepancy between achievement and intellectual functioning of at least *two* standard deviations, when the state criteria require only *one and one-half* standard deviations. It was undisputed at the due process hearing that Student did demonstrate a discrepancy of at least 1½ standard deviations between achievement and intellectual function in written language. After the eligibility team determined, erroneously, that Student did not meet Criterion 2, the team did not consider whether Student met Criterion 3 or Criterion 4. I conclude that because the October 13, 2022 eligibility team misapplied the discrepancy model and did not use District of Columbia criteria, the team's determination that Student did not have an SLD disability was invalid.

At the due process hearing, DCPS argued that even if the eligibility team did misapply Criterion 2, Criterion 4 would not have been met either because Student's impairment in written language allegedly did not adversely impact his/her educational performance. However, that is a determination which must be made in the first instance by the eligibility team, not by the hearing officer. *See* 34 C.F.R. § 300.306(a)(1). (Eligibility determinations for a suspected SLD impairment be made by "a group of qualified professionals and the parent of the child.") The October 13, 2022 eligibility decision must be remanded to the child's eligibility team to again review all of the applicable data and make a new eligibility determination in accordance with the IDEA, District regulations and, specifically, the DCPS eligibility worksheet for SLD which is currently in effect.

In her due process complaint, the Parent requested that the hearing officer determine that Student is eligible for special education as a child with a learning disability. At the hearing, Parent did not meet her burden of persuasion that Student met all four criteria for the SLD classification. Specifically, the Parent did not establish whether Student's impairment in written language adversely impacts his/her educational performance. For that reason, I do not reach the ultimate question of whether Student has a qualifying SLD disability.

In closing argument, the Parent sought, as additional relief, that the hearing officer order DCPS to comply with an alleged agreement to reimburse her for tutoring expenses she incurred for Student. However, the hearing evidence does not establish

whether the parties reached such an agreement. Moreover, the IDEA does not empower a hearing officer to order enforcement of agreements between local education agencies and parents. *Cf. Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief.)

ORDER

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

ORDERED:

1. Within 30 school days of the date of this decision, DCPS shall ensure that an eligibility team is convened, pursuant to 34 C.F.R. §§ 300.301 *et seq.*, to gather relevant functional, developmental, and academic information about Student and determine whether Student is a child with a disability, using, *inter alia*, the current DCPS worksheet for the SLD disability and
2. All other relief requested by the Petitioner herein is denied without prejudice to the right of the parent to seek, hereafter, compensatory education relief should Student be determined to be a child with a disability.

Date: December 3, 2022

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

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).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov