

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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Student Hearing Office
January 22, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: January 21, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on October 17, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS erred in determining that Student was ineligible for special education services in March 2012. Petitioner specifically alleged that although DCPS considered whether or not Student was eligible for special education services under the disability classification of Specific Learning Disability, DCPS failed to consider whether or not Student was eligible under the disability classifications of Other Health Impaired (“OHI”) and Emotional Disturbance (“ED”). Petitioner argues that if DCPS had considered these other possibilities, Student would have been found eligible. In support of her position, Petitioner points to the diagnoses of Attention Deficit Hyperactivity Disorder (“ADHD”) and Depressive Disorder NOS with recommendations that the IEP Team consider whether Student meets the criteria for OHI and ED found in a court ordered psychoeducational evaluation completed in January 2012. Petitioner argues that procedurally, DCPS should have at least ruled out the disability classifications of OHI and ED at the eligibility determination meeting in March 2012.

¹ Personal identification information is provided in Appendix A.

DCPS took the position that the school system followed the correct eligibility determination procedures. DCPS argued that the eligibility determination was a team decision and the team correctly determined that Student was ineligible for special education services.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations.

Procedural History

The due process complaint was filed on 10/17/13. This Hearing Officer was assigned to the case on 12/18/13, replacing the initial hearing officer who had been assigned to the case on 10/20/13. DCPS filed a response to the complaint on 10/28/13 and made no challenges to jurisdiction.

Petitioner waived the resolution meeting, but DCPS did not. The resolution meeting took place on 10/30/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 11/16/13, the 45-day timeline to issue a final decision began on 11/17/13 and the final decision was due by 12/31/13.

A prehearing conference took place on 11/04/13. A Prehearing Order was issued on 11/04/13 by the initial hearing officer.

On 11/05/13, Petitioner filed a motion to amend the complaint. The motion was accompanied by Petitioner’s First Amended Due Process Complaint Notice. On 11/12/13, DCPS filed an opposition to Petitioner’s motion to amend the complaint. Petitioner’s motion to amend the complaint was granted on 11/12/13. The granting of Petitioner’s motion restarted the IDEA timelines pursuant to 34 C.F.R. 300.508(d)(4). Per the Order on Petitioner’s Motion to Amend, the complaint was effectively filed on 11/12/13, the 30-day resolution period ended on 12/12/13, the 45-day timeline to issue a final decision began on 12/13/13 and the final decision was due by 01/26/14.

DCPS filed a response to the amended complaint on 11/14/13 and made no challenges to jurisdiction. A second prehearing conference was held on 11/25/13. A Second Prehearing Order was issued on 11/26/13 by the hearing officer initially assigned to the case.

The undersigned Hearing Officer issued a Third Prehearing Order on 12/19/13 based on review of the file. The Third Prehearing Order provided for different procedural requirements. An Amended Third Prehearing Order was issued on 01/02/14.

The due process hearing was a closed hearing that took place on 01/09/14. Petitioner was represented by Alana Hecht, Esq. DCPS was represented by Daniel McCall, Esq. Neither

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party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. DCPS' local education agency ("LEA") representative participated in the hearing in person.

Petitioner's Five-Day Disclosures, dated 01/02/14, contained a list of four (4) witnesses and documents P-1 through P-13. Petitioner's disclosures were admitted into evidence without objection.

DCPS' Disclosure Statement, dated 01/02/14, contained a witness list of four (4) witnesses and documents DCPS-1 through DCPS-2. DCPS' Supplemental Disclosure Statement, also dated 01/02/14, added document DCPS-3. DCPS' disclosures and supplemental disclosures were admitted into evidence without objection.

Parties declined to engage in settlement discussions at the beginning of the due process hearing.

Petitioner presented three witnesses in her case in chief: Petitioner; paralegal; and an educational advocate who qualified as an expert in special education ("expert").

DCPS elected not to present any witnesses.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Issue #1² – Whether DCPS made an incorrect ineligibility determination in March 2012; specifically, should Student have been found eligible for special education services under the disability classifications of Other Health Impaired ("OHI") and/or Emotional Disturbance ("ED")?

For relief, Petitioner sought: a finding that Student was eligible for special education services since March 2012; DCPS to convene an Individualized Education Program ("IEP") Team to develop an IEP for Student; and compensatory education consisting of tutoring and counseling to address Student's out of control behaviors and failing grades since March 2012.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

² The initial hearing officer stated the issue as follows: Whether the Student was eligible for special education and related services as a result of meeting the definition of emotional disturbance or other health impairment since March 2012? At the due process hearing, Petitioner clarified the issue to mean that Student should have been found eligible for special education services in March 2012 and should have received special education services since that time. Petitioner clarified that she did not mean that DCPS had a duty to identify and evaluate and determine eligibility since March 2012, pursuant to DCPS' Child Find obligations under 34 C.F.R. 300.111.

Findings of Fact

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

#1. Student is _____ a resident of the District of Columbia. During the 2011/12 school year ("SY"), Student attended Public Charter School ("PCS"). DCPS is the local education agency ("LEA") for PCS.

#2. In November 2011, Petitioner asked PCS to evaluate Student to determine his eligibility for special education services.³ PCS agreed, but before the school evaluation process could be completed, a court ordered psychoeducational evaluation was completed on January 18, 2012. The January 2012 court ordered psychoeducational evaluation was sufficient to determine Student's eligibility for special education services.⁴

#3. The findings and conclusions in the psychoeducational evaluation were derived from academic and cognitive testing results, information provided by Petitioner and Student, and review of court records. The psychoeducational evaluation was not based on review of any school records or interviews with teachers or other administrative school personnel.⁵

#4. At the time that the psychoeducational evaluation was conducted, Petitioner provided the following educational information to the evaluating psychologist: that Student had difficulty with reading and language arts since second grade; that Petitioner had difficulty with helping Student with his homework because Student has difficulty sustaining his attention for long periods of time; in the 2nd grade Student was observed to be sitting in a trash can during recess; that Student punched a girl in the face in 5th grade; that over a period of three years, Student had incurred four in-school suspensions; that it consistently had been reported to Petitioner that Student had difficulty staying in his seat in school; and that Student currently had grades that ranged from "As" through "Cs". Student reported to the clinician that he had never been retained or received special education services.⁶

#5. The evaluating psychologist diagnosed Student with Attention Deficit Hyperactivity Disorder ("ADHD") and Depressive Disorder NOS.⁷ The ADHD diagnosis was derived from data that measured Student's personal and social skills from birth to adulthood, and included information about Student's adaptive functioning at home, in the community and at school; as perceived by Petitioner. The Depressive Disorder NOS diagnosis was derived from Student's negative affective state fueled by poor self-concept and absence of a parental figure. Despite the multiple stressors in Student's life that derived from his family life, Student had not been traumatized nor unduly angered.⁸

³ Petitioner.

⁴ Petitioner, DCPS-1 @ 000016.

⁵ DCPS-1 @ 000002.

⁶ DCPS-1 @ 000004.

⁷ DCPS-1 @000013.

⁸ DCPS-1 @ 000010 – 000012.

#6. The psychoeducational evaluation also revealed that Student had Average cognitive abilities⁹ and Average academic achievement levels in reading, math and written language. Student's overall performance in academic areas indicated that Student would have no difficulty completing appropriate age and grade level work.¹⁰

#7. The psychoeducational evaluation recommended that: academically, the educational team should review the psychoeducational evaluation and determine whether Student qualifies for academic services under the criteria of OHI or ED; a functional behavioral analysis be conducted to better understand Student's classroom behavior and an incentive plan be developed if necessary; Student be provided with accommodations consisting of more time and a quiet work space to complete tests, assignments and quizzes to help Student with his processing speed that was in the Low Average range; Student receive weekly individual therapy and a social skills group to focus on Student's academic issues.¹¹

#8. An eligibility determination meeting took place on 03/21/12. Present at the eligibility determination meeting were Petitioner, the special education coordinator at PCS, and two psychologists. (DCPS-1). Petitioner participated in the eligibility determination meeting by telephone, but due to technical difficulties on her end, she couldn't hear 50-60% of the eligibility determination discussion. Petitioner offered no verbal input into the eligibility determination discussion; she just listened to what she could hear and accepted the team's conclusion that Student was not eligible for special education services.

#9. The eligibility determination team reviewed the 01/18/12 psychoeducational evaluation completed by the court, the definitions in IDEA 300.8, 5 D.C.M.R. 3001.1 and the state policies around specific eligibility criteria.¹² There were no reported relevant behaviors observed by the school that affected Student's academic functioning.¹³ The findings of the psychoeducational evaluation revealed that Student did not meet the criteria of a student with a disability.¹⁴ The eligibility determination team determined that Student did not meet all of the required criteria for Specific Learning Disability.¹⁵

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

⁹ DCPS-1 @ 000006.

¹⁰ DCPS-1 @ 000008.

¹¹ DCPS-1 @ 000013, 000014.

¹² DCPS-1 @ 000018.

¹³ DCPS-1 @ 000020.

¹⁴ DCPS-1 @ 000024.

¹⁵ DCPS-1 @ 000017.

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS made an incorrect ineligibility determination in March 2012; specifically, should Student have been found eligible for special education services under the disability classifications of Other Health Impaired (“OHI”) and/or Emotional Disturbance (“ED”)?

A child with a disability means a child who has been evaluated in accordance with the requirements of the IDEA as having a ...serious emotional disturbance...an other health impairment, a specific learning disability..., and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8(a)(1), 5 D.C.M.R. E-3001.1.

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. 300.8(c)(4), 5 D.C.M.R. E-3001.1.

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (1) is due to chronic or acute health problems such as...attention deficit disorder or attention deficit hyperactivity disorder...; and (2) adversely affects a child’s educational performance. 34 C.F.R. 300.308(c)(9), 5 D.C.M.R. E-3001.1.

Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in 34 C.F.R. 300.308. 34 C.F.R. 300.306(a)(1). The IEP team considers all assessment reports in completing any evaluation of a child suspected of having a disability, or, in the case of reevaluation, any child identified as having a disability. As the result of its consideration, the IEP team determines whether the child is a child with a disability and

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whether the child needs special education and related services. 5 D.C.M.R. E-3006.3 In interpreting evaluation data, the public agency must draw upon information from a variety of sources and ensure that all information is documented and carefully considered; and 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. 34 C.F.R. 300.306(c).

There simply was no evidence in record that Student's ADHD or Depressive Disorder adversely affected Student's educational performance at the time the eligibility determination was made on March 21, 2012. The objective evidence in the record, i.e., the psychoeducational evaluation which was not challenged on the basis of validity, determined that Student had no difficulty with performing grade level work in reading, mathematics and written language. Student's Average cognitive ability was in line with his demonstrated Average academic achievement performance.

Student's overall performance in academic areas indicated that Student would have no difficulty completing appropriate age and grade level work. The school had not observed any behaviors that impacted Student's educational performance. As reported by Petitioner, Student's then current grades ranged from "As" through "Cs". The record did not contain any report cards to refute Petitioner's assertions that Student was receiving poor grades.¹⁶ The record did not contain any behavioral incident reports that were dated prior to the March 21, 2012 eligibility determination meeting.¹⁷ Petitioner offered no input at all during the eligibility determination meeting.

An ADHD diagnosis, in and of itself does not qualify Student to receive services as a child with a disability. Per the IDEA, there has to be an adverse impact on education. The record was bereft of any such evidence. Petitioner failed to meet her burden of proof that on March 21, 2012, Student met the IDEA disability criteria of a child with a disability due to ADHD and should have received special education services as a result thereof.

Likewise, Petitioner failed to meet her burden of proof that at the eligibility determination meeting on March 21, 2012, Student met the criteria under the IDEA for a child with an Emotional Disturbance. There was not a scintilla of evidence in the record that Student exhibited any of the criteria necessary for the classification of an Emotional Disturbance under the IDEA. There was no evidence that Student exhibited an inability to learn; that Student was unable to build or maintain satisfactory interpersonal relationships with peers and teachers; that Student had a general pervasive mood of unhappiness,¹⁸ or that Student had a tendency to develop physical symptoms or fears associated with personal or school problems. None of these behaviors were reported as being observed in the school setting.

¹⁶ P-10, Student's report card for the 2012/13 school year, reflected grades beginning in September 2012; well after the March 2012 eligibility determination meeting occurred.

¹⁷ Although P-9 consisted of behavioral incidents reports, none of the reports predated 03/21/12. Therefore, they were not relevant to the eligibility determination that took place on 03/21/12.

¹⁸ The psychoeducational evaluation revealed that although Student had multiple stressors in his life that derived from his family life, the stressors had not traumatized nor unduly angered Student.

The Hearing Officer determines that the eligibility determination team made the correct decision on March 21, 2012 when it determined that Student was ineligible for special education services. Student had Average cognitive abilities, Average academic achievement performance, no difficulties with completing grade level work, grades of "As" through "Cs" at the time that the eligibility determination was made and no behaviors that negatively impacted Student's academic performance. Student did not require special education services because Student's diagnoses of ADHD and Depressive Disorder NOS did not adversely affect his academic performance.

Petitioner failed to meet her burden of proof on the issue presented. All requested relief is DENIED.

ORDER

The complaint is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

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).

Date: January 21, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Alana Hecht, Esq. (electronically)

DCPS' Attorney: Daniel McCall, Esq. (electronically)

DCPS (electronically)

SHO (electronically)