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Office of the State Superintendent of Education
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Confidential

<p>Parents on Behalf of Student¹,</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0326</p> <p>Date Issued: January 3, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Dates: December 9, 2015 December 10, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Michael J. Eig, Esq. Paula Rosenstock, Esq. Michael J. Eig & Associates, P.C. 5454 Wisconsin Avenue, Suite 760 Washington, D.C. 20815</p> <p>Counsel for Respondent: Steven Rubenstein, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</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

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 on December 9, 2015, and concluded on December 10, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003 and Hearing Room 2006 respectively.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age __ and in grade __² and at the time this due process complaint was filed. The student resides with his parents in the District of Columbia and during school year (“SY”) 2013-2014 the student attended his neighborhood District of Columbia Public Schools (“DCPS”) elementary school (“School A”). The student currently attends a private full time special education school in located in Washington, D.C. (“School B”) where he has attended since the start of SY 2014-2015.

The student’s parents (“Petitioners”) allege that at School A the student had concerns regarding his handwriting skills, written communication, and defiance and aggression issues. On November 6, 2013, DCPS convened a student’s support team (“SST”) to discuss the parent’s concerns regarding the student and his classroom progress.

In December 2013 and early January 2014 Petitioners had the student evaluated by an independent psychologist who found that the student demonstrated weaknesses in areas of attention and executive functioning, increased levels of depression, weaknesses in spelling, written language, phonological processing and fine motor skills.

DCPS had a follow up SST meeting January 15, 2014. Although the final independent psychologist’s evaluation report was not yet available DCPS determined at the SST meeting it would refer the student to determine is eligibility for special education. Petitioners provided DCPS with the student’s completed independent evaluation on February 18, 2014, and on February 27, 2014 DCPS requested that the Petitioners sign a consent form for DCPS to conduct evaluation(s).

The independent psychologist diagnosed the student with Attention Deficit Hyperactivity Disorder (“ADHD”), combined type, a disorder of written language, developmental coordination disorder, and listed the need to rule out reading and expressive language disorders. The psychologist recommended that student be provided an individualized education program (“IEP”) as well as targeted remediation, and classroom and testing accommodations.

² See Appendix B for student’s age and current grade.

On May 6, 2014, DCPS convened an eligibility meeting. DCPS provided the Petitioners with a copy of its review of the student's independent evaluation. DCPS did not find the student eligible for special education services but proposed that student be provided a 504 plan. Petitioners were not in agreement and declined the development of a 504 plan

On May 19, 2014, Petitioners filed a due process complaint challenging the ineligibility determination. Petitioners later notified DCPS that they intended to seek public funding for the student to attend a private school. Petitioners placed the student in School B for SY 2014-2015.

DCPS agreed to restart the student's eligibility process and on October 23, 2014, convened a multidisciplinary team ("MDT") meeting. DCPS agreed to review all School B documentation and obtained a second consent form from Petitioners to evaluate the student.

On October 29, 2014 DCPS and Petitioner settled the May 19, 2014, due process complaint by DCPS agreeing to fund the student at School B for SY 2014-2015 and to reconvene an eligibility meeting on or before April 30, 2015, and to include School B staff.

On January 21, 2015, DCPS convened a meeting to determine the student's eligibility for special education and related services. This meeting included staff from School A and School B and the student's neighborhood DCPS middle school ("School C") that the student would have attended if he returned to DCPS in SY 2015-2016.

This second eligibility meeting was held at School C and the team reviewed documentation from School A and School B. DCPS again determined the student was not eligible but proposed a 504 plan. On October 2, 2015, Petitioners filed the current due process complaint alleging DCPS inappropriately found the student ineligible for special education and related services and failed to develop an IEP for the student for SY 2015-2016.

Petitioners seek as relief that the Hearing Officer find that DCPS denied the student a free appropriate public education ("FAPE") and order DCPS to find the student eligible for special education and related services with the classification of specific learning disability ("SLD") and/or other health impairment ("OHI"). Petitioners also seek reimburse for the student's placement at School B and funding for the student at School B with all related cost for the remainder of SY 2015-2016.

On October 9, 2015, DCPS filed a timely response to Petitioners' complaint in which it denied that it failed to provide the student with a FAPE. DCPS asserted that on January 21, 2015, the MDT correctly determined the student is ineligible for special education and related services as a child with a disability. DCPS asserted that it issued a prior written notice ("PWN") documenting its refusal and the basis for the refusal. DCPS further maintained that because the student is not a child with a disability pursuant to the IDEA it is under no obligation to develop an IEP for SY 2015-2016.

A resolution meeting was held on November 13, 2015. The complaint was not resolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on November 28, 2015, and originally ended [and the Hearing Officer's Determination ("HOD") was due] on December 16, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on October 26, 2015, and issued a pre-hearing order (“PHO”) on October 29, 2015, outlining, inter alia, the issues to be adjudicated. Both Parties requested specific hearing dates that were too close the December 16, 2015, HOD due date and requested the HOD due date be extended to allow for the desired hearing dates. Their request was granted and the HOD due date was extended to December 26, 2015.

The hearing convened on December 9, 2015. At the conclusion of the hearing on December 10, 2015, the parties requested additional time to submit written closing arguments and submitted a motion to extend the HOD due date an additional eight calendar days to January 3, 2016. The motion was granted and the record for the hearing was closed with the parties’ simulatenously submitted written closing arguments on December 18, 2015.

ISSUES:³

1. Whether DCPS denied the student a FAPE by failing to find the student eligible for special education and related services on January 21, 2015.
2. Whether DCPS denied the student a FAPE by failing to develop an IEP for the student for SY 2015-2016.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1 through 83 and Respondent’s Exhibits 1 through 35) that were admitted into the record and are listed in Appendix A).⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student resides with his parents in the District of Columbia and attended School A until the end of SY 2013-2014. While the student attended School A his parents had concerns regarding his handwriting skills, written communication, defiance and aggression. (Petitioners’ Exhibits 2, 4)
2. In December 2012 a SST convened at School A and DCPS agreed to complete a screening process that included Slingerland Screening Tests, an observation, academic

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the PHO may not directly correspond to the issues outlined here. The Hearing Officer restated the issues at the outset of the hearing and the parties agreed these were the issues to be adjudicated.

⁴ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

achievement testing and Conner's rating. The screening was completed in August 2013. (Petitioners' Exhibit 6, 8, 10-2, 11)

3. On February 12, 2013, a DCPS School A psychologist conducted an academic and behavioral "screener" assessment of the student. The psychologist conducted the Kaufman Tests of Educational Achievement Second Edition (KTEA-II) in math and Woodcock Johnson for writing samples and the student obtained average scores in both areas. On the Connors rating scales the student's teacher rated him as average in the area of attention and hyperactivity and elevated in defiance aggression and learning programs and executive functioning. The student's parents also both rated him as elevated in defiance and aggression and learning problems. (Witness 5's testimony, Petitioner's Exhibits 11-2, 11-3, 30-3, Respondent's Exhibit 2)
4. In April 2013, when the student was in [REDACTED] grade, DCPS administered the student the DC CAS measuring the student's academic proficiency relative to DCPS standards. The student scored "Advanced" in composition and "Proficient" in reading and math. (Witness 7's testimony, Respondent's Exhibit 4)
5. The student [REDACTED] grade report card for SY 2012-2013 indicated that by year-end he was proficient in the areas of overall English Language Arts ("ELA") and in math and science. With regard to his work habits and personal and social development the student was operating independently in most areas. However, in the following areas the student required limited prompting: following directions, completing homework, following playground and school rules, listening while others speak and practicing self-control. (Witness 7's testimony, Respondent's Exhibit 7)
6. While the student was attending School A the School A principal had conversations with the student's teacher regarding the student's behavior and attitude and willingness to do work during his fourth grade year. The student's academic performance improved across the fourth grade year. (Witness 7's testimony)
7. In August 2013 Petitioners had the student evaluated by an occupational therapist at Georgetown University Hospital. The results of the occupational therapy ("OT") assessment revealed the student has poor fine and visual motor skills that he required OT services once per week. The evaluator recommended that the student's parents pursue psychological-educational evaluation to further assess the student's academic strengths and weaknesses. (Petitioners' Exhibit 17-14)
8. On November 6, 2013, DCPS reconvened the SST to discuss the parent's concerns regarding the student. (Petitioner's Exhibit 20)
9. The student was struggling during the fall of [REDACTED] grade more than his [REDACTED] grade year as reflected in his report card. His work habits in the [REDACTED] grade report card had a lot of frequent and limited prompting notes. There were high levels of expectation from the student's classroom teacher who demanded a tremendous amount from her students. The School A principal had conversation during that year with the student's teacher and his

parent regarding the student's behavior and academics. (Witness 7's testimony, Respondent's Exhibits 7-1, 8)

10. In December 2013 and early January 2014 Petitioners had the student evaluated by an independent psychologist who found that the student demonstrated weaknesses in areas of attention and executive functioning, increased levels of depression, weaknesses in spelling, written language, phonological processing and fine motor skills. (Petitioner's Exhibit 22-1, 22-10, 22-11, 22-12)
11. DCPS had a follow up SST meeting January 15, 2014. Although the final independent psychologist's report was not available DCPS determined at the SST meeting it would refer the student to determine is eligibility for special education. (Petitioner's Exhibit 23)
12. Petitioners provided DCPS with the student's completed independent neuropsychological evaluation on February 18, 2014, and on February 27, 2014 DCPS requested that the Petitioners sign a consent form for the student to be evaluated. (Petitioner's Exhibits 28, 29)
13. The independent psychologist evaluated the student on December 23, 2013, December 30, 2013, and January 2, 2014.⁵ The psychologist observed that during the testing the student was distractable, impulsive, anxious and perfectionistic. The student responded well to reassurance and the psychologist concluded the testing results were valid. The student was assessed as having above average verbal intelligence and his general ability index score was 113 at the 81st percentile. However, the student's processing speed was at 2nd percentile and his working memory working memory index was at the 55th percentile. (Witness 1's testimony, Petitioner's Exhibit 22-1, 22-4, 22-19, 22-20)
14. The student academic scores on the independent evaluation indicated he was at approximately the 50th percentile in reading in the average range. The psychologist concluded the student's was mastering the basic skills necessary for competent reading. She concluded that the student's attention issue might be a reason his academic achievement in reading is only average compared to his high intellectual ability. The student's writing composite score was low average at the 10th percentile. His spelling was at the 23rd percentile and his sentence composition at the 18th percentile. The student's essay composition was at the 7th percentile and his writing fluency was at the 7th percentile. The evaluator determined that the student did not use full sentences and transition words and as a result of the testing concluded the student had written language disorder. The student's math composite score was at 9th percentile and his numerical operations at 1st percentile. In math problem solving he was measured at the 47th percentile and math fluency at 8th percentile. She suggested the student also be closely monitored in math. (Witness 1's testimony, Petitioner's Exhibit 22-21, 22-22)
15. The evaluating psychologist reviewed forms completed by the student's parent and his School A [REDACTED] grade teacher. His teacher estimated that the student was somewhat below

⁵ The evaluated conducted several assessment tools including the Wechsler Intelligence Scales for Children –Fourth Edition (WISC-IV) and the Wechsler Individual Achievement Test Third Edition (WIAT-III).

grade level in English and language arts and well below grade level in math. The parent and the student's teacher completed a behavior rating from which the psychologist concluded the student had significantly elevated scales associated with attention problems, anxious/depressed behavior and aggressive behavior and difficulty in with focus, planning /organization and self-regulation. (Petitioner's Exhibit 22-2, 22-3)

16. The psychologist reviewed the student's previous educational screening done by School A and noted that the student demonstrated no significant weaknesses and earned average range scores for math and written sentences completion. She also reviewed some of the student's school records including his first advisory report card for [REDACTED] grade that indicated the student was below basic in writing and language and math and at basic in reading. She did not review the student's [REDACTED] grade report cards or his DC CAS scores from [REDACTED] grade. (Witness 1's testimony, Petitioner's Exhibits 21-5, 22-3)
17. As a part of her evaluation of the student the independent psychologist did not observe the student in his general education classroom at School A nor did she talk with any of his School A teachers. However, the evaluator reviewed reports the evaluator obtained from the student's teacher. (Witness 1's testimony, Petitioner's Exhibits, 22-2)
18. The independent psychologist diagnosed the student with ADHD and a Disorder of Written Language and Developmental Coordination Disorder because his writing was illegible. The psychologist noted a rule out diagnosis for reading disorder, dyslexia and expressive language disorder. The psychologist recommended that student be provided an IEP as well as targeted remediation, and classroom and testing accommodations. The psychologist concluded that the student would not be successful in a challenging academic program, making him unable to learn in a general education classroom without special education because his attention disorder and disorder of written language. (Witness 1's testimony, Petitioner's Exhibit 22-12, 22-13)
19. The student's [REDACTED] grade report card for SY 2013-2014 indicated that by year-end the student was "proficient" in the areas of Writing and Language Arts, Speaking and Listening and "basic" or approaching the grade level expectations in reading and math. With regard to his work habits and social skills the student was operating "independently" in only a few areas: participating in class discussion, making effort and listening while others were speaking. He required "frequent prompting" in following directions, completing classwork on time, working with others, using time wisely and completing homework. (Respondent's Exhibit 8)
20. In [REDACTED] grade the student scored "Proficient" in reading, math and science on the DC CAS. (Witness 7's testimony, Respondent's Exhibit 5)
21. On April 3, 2014, a DCPS psychologist completed a review of the student's independent neuropsychological evaluation and conducted her own record review, student and teacher interviews and classroom observations of the student. She also spoke with the student's psychiatrist regarding the student's prescribed medication and ADHD diagnosis. This DCPS psychologist had conducted the February 2013 screening assessments of the

student. The April 2014 evaluation review considered the student's qualification under the LSD and OHI (for ADHD) disability classifications and concluded that despite the independent evaluation assessment that indicated the student had below average scores in writing and math he would not qualify with a SLD disability classification. The DCPS psychologist concluded that she could not ethically agree that there was imperical data and consistent below grade level performance by the student to support the independent pscyologist's conclusions that the student qualified with a learning disability or that his ADHD adversely impacted him educationally. (Witness 5's testimony, Petitioner's Exhibit 30-7)

22. The DCPS psychologist also noted in her evaluation review that the student's August 2013 OT evaluation recommended the student be seen by a certified development ophthalmologist in order to determine if an underlying ocular-motor issue might be responsible for or exacerbating the student difficulites with producing written work. Because such an evaluation had not yet been done the DCPS psychologist felt even more strongly that student did not meet the IDEA defiintion of SLD given that he had historically proven he was able to attain on grade level in all areas and it was unlikely that a learning disability would only impact one element of the student writing production e.g. essay composition. (Witness 5's testimony, Petitioner's Exhibit 30-7, Petitioner's Exhibit 22-9)
23. On May 6, 2014, DCPS convened its eligibility meeting. During the meeting DCPS provided the Petitioners with a copy of its review of the student's independent evaluation. DCPS did not find eligible for special education services but proposed that student be provided a 504 plan. Petitioners were not in agreement and declined the development of a 504 plan. The student graduated from School A to middle school at the end of SY 2013-2014. (Witness 7's testimony, Petitioner's Exhibits 30, 36, 39, 41-2, 45, Respondent's Exhibit 15)
24. On May 19, 2014, Petitioners filed a due process complaint. (Petitioner's Exhibit 37)
25. On August 11, 2014, Petitioners notified DCPS that they intended to place the student at School B for SY 2014-2015 and requested that DCPS fund the student's attendance at School B. On August 15, 2014, DCPS declined to the parent's request to fund the student at School B and reinterated DCPS' position that the student did not qualify for special education services and that informed the parents the student could be enrolled in a DCPS middle school. (Petitioner's Exhibits 47, 49)
26. The School B speech language pathologist ("SLP") conducted a speech and language evaluation of the student on August 4, 2014, by just prior to the student attending School B. The evaluation assessed the student's language processing and working memory. The student had the ability to recall detail from oral information presented and understand questions and answer them accurately, the ability to comprehend what he is reading. He was good at formalating grammatically correct sentence structure and good at conversation. An area of weakness was the student's ability to follow oral directions. His oral narrative ability was weak. Because the student's oral reading index was in the poor

range the School B speech pathologist gave the student a reading disorder diagnosis. She believes the student requires a lot of structure and she has seen the progress he has made since attending School B and expressed her opinion that the student requires special education and he has progressed in his current small class setting of no more than nine students. (Witness 2's testimony, Petitioner's Exhibit 46-1, 46-20, Respondent's Exhibit 22)

27. On September 10, 2014, Petitioners' counsel provided DCPS a copy of a speech and language report completed by School B SLP. (Petitioner's Exhibit 46, 50)
28. On October 14, 2014, School B developed an IEP that provided the student with 35 hours of specialized instruction with integrated speech/language and OT services in the classroom as well as individual speech/language services. The student's School B IEP included goals and objectives for OT, speech/language, social behavior, academic behavior, executive functioning, math, reading and written language. The IEP indicated the student was operating on instructional level at grade six for reading and at grade four for written language and math. (Petitioner's Exhibit 53)
29. DCPS agreed to restart the student's eligibility process and on October 23, 2014, convened an MDT meeting. DCPS agreed to review all School B documentation and obtained a second consent form for evaluation from Petitioners. (Petitioner's Exhibit 56)
30. On October 29, 2014 DCPS and Petitioner settled the May 19, 2014, due process complaint by DCPS agreeing to fund the student at School B for SY 2014-2015 and to reconvene an eligibility meeting on or before April 30, 2015, and to include School B staff. (Petitioner's Exhibit 57)
31. On December 15, 2014, a DCPS special education compliance case manager conducted a classroom observation of the student at School B. A DCPS resolution specialist on the DCPS compliance team who is a special education teacher observed the student in December 2014 at School B. She observed him for 40 minutes in ELA class. The student was working on a visualization objective. He had some symptoms of ADHD and needed some prompting he was participating and appeared to get the concepts more quickly than the other students in the classroom. The student was initially geared-up from coming from his physical education class but was calmer as the class progressed. (Witness 8's testimony, Petitioner's Exhibit 63)
32. On December 30, 2014, a DCPS SLP completed a review of the student's the September 10, 2014, speech and language evaluation. In her review of the School B speech language evaluation the DCPS SLP observed that the student's strengths were in expressive and receptive vocabulary skills, metalinguistic skills, auditory reasoning as it related to his ability to follow multi-step directions, auditory comprehension and social conversation skills. The student had relative weakness in oral reading and narrative language. The DCPS SLP concluded that a speech language pathologist would not typically work with a student on these areas. Rather, a reading specialist would work on these areas in consultation with a SLP. (Witness 6's testimony, Respondent's Exhibit 22)

33. The DCPS SLP also conducted an observation of the student at School B and conferred with the evaluator about the services the student has received and is currently receiving at School B and discussed the student's strengths and weaknesses. At the time the student was not receiving direct speech and language services at School B. The DCPS SLP observed the student for two class sessions for a total of 90 minutes. The student was working with the classroom teacher on phonemic awareness skills. He was engaged and able to answer questions accurately and was familiar with the content. The student was on task and did not require any redirection and was able to articulate and explain what going on in the class. He had a mild lateral lisp but was intelligible. There were no weaknesses in the student's speech fluency and his pitch and resonance of voice was in normal limits. His pragmatic language skills were average and he was able to communicate with the teacher(s) and peers. The student's had some off topic conversation but was easily redirected by the teacher. He was able to follow directions and stayed on topic and had no difficulty with word retrieval. (Witness 6's testimony, Respondent's Exhibit 22)
34. Based upon her review of the School B speech and language evaluation, conferring with the School B SLP and observing the student at School B, the DCPS SLP concluded the student did not meet the DCPS criteria for a speech language disability. Using check list of guidelines for language disability in articulation or fluency or voice disability the student did not fall in the domain of being two standard deviations below in his the overall language, articulation, vocabulary or phonemic awareness skills that were assessed. The DCPS SLP concluded the student did not qualify for SLI disability and disagreed with the diagnosis made by the School B SLP. (Witness 6's testimony, Respondent's Exhibit 26)
35. On January 8, 2015, a DCPS occupational therapist conducted a review of the OT evaluation conducted August 23, 2013, and agreed with the recommendation that the student be provided individual or small group direct occupational therapy, the services the student is receiving now at School B. (Witness 4's testimony, Petitioner's Exhibits 65-5)
36. On January 21, 2015, DCPS convened a meeting to determine the student's eligibility for special education and related services. This meeting included staff from School A and School B and School C, the student's neighborhood DCPS middle school that the student would have attended if he returned to DCPS in SY 2015-2016. (Respondent's Exhibits 24-1, 28)
37. This second eligibility meeting was held at School C and the team reviewed the documentation from School A and School B. The eligibility team considered the student for the following disability classifications: SLD, OHI for ADHD and for SLI. The team considered the student for both models of SLD eligibility. The DCPS psychologist concluded that the student did not show any areas in academics where he was not achieving grade and age level standards and there was no discrepancy between what he could be able to achieve based on his cognitive ability and what he was actually achieving. Although the DCPS psychologist noted although there was a spread in the

student's cognitive subtests there was no significant impact on his academic achievement. (Witness 5's testimony, Respondent's Exhibit 24-5)

38. At the eligibility meeting the DCPS psychologist concluded because the student did not need any interventions and had met or exceeded age and state standards throughout elementary school and showed no deficits in reading and oral expression, or significant deficits math skills or writing skills he did not meet the intervention model for SLD. The DCPS team members did not believe that the School B SLP was qualified to diagnose the student with SLD. Additionally, the DCPS psychologist did not conclude the student met the criteria for OHI because the data she reviewed did not sufficiently reflect that the student's ADHD was impacting his educational performance: the student had met or exceeded age and state standards throughout elementary school and showed no deficits in reading and oral expression, or significant deficits in math skills or writing skills. DCPS determined the student was not eligible under any of the disability criteria considered and found the student ineligible for special education. Petitioners disagreed with this finding. (Witness 5's testimony, Respondent's Exhibits 24-5, 25, 26, 27)
39. There was no disagreement during the eligibility meeting that the student has ADHD but the DCPS members of the team did not agree that that student's ADHD had an adverse impact on the student's academic performance because he is able to meet grade level standards and did proficient on DC CAS. The DCPS team agreed that student clearly in needed accommodations but not special education and he can receive related services without qualifying for special education. A 504 plan was offered including accommodations such as token reward system, movement breaks and related services. However, the parents were not interested in a 504 plan. (Witness 8's testimony, Respondent's Exhibit 23)
40. As a part of her reasoning for concluding the student was ineligible the DCPS psychologist noted several problems with the independent neuropsychological evaluation that led her to question the evaluations validity. The DCPS psychologist noted that the independent psychologist who conducted the student's evaluation did not use sufficient assess the student's executive functioning. She opined that executive functioning measures were lacking score reporting and data sharing. She also opined that best practices require an evaluator to obtain a classroom observation and an interview with a student's teacher to determine a student's need for special education, neither of which the independent psychologist did. The DCPS psychologist also stressed the importance in best practices of an evaluator fully reviewing a student's educational records in making a determination of the student's need for special education. The DCPS psychologist concluded the independent evaluator had not reviewed the student's prior report cards or his DC CAS scores. (Witness 5's testimony, Petitioner's Exhibit 30, Respondent's Exhibit 2)
41. In addition, the DCPS psychologist noted that the independent neuropsychological contained no validity statement to say that the circumstances of the testing were diagnostically valid and no confidence intervals. The DCPS psychologist opined that "tie-breaker" subtests should have been administered to determine the student's true

processing speed and to fully assess the student's cognitive functioning two additional areas needed to be assessed: auditory processing and long term retrieval which were not assessed. (Witness 5's testimony)

42. The DCPS psychologist would like to have seen some qualitative descriptors and believed the independent evaluation report was missing an explanation of the educational implications to support the diagnostic conclusions in the evaluation. There would have been some additional assessments and measures that the DCPS psychologist believed would have been critical in making the diagnoses that the independent psychologist made and she found the fact that the assessments were not conducted quite alarming. DCPS typically does not conduct assessments that are administered in a neuropsychological evaluation and the type of assessment the DCPS psychologist would have wanted conducted. However, the DCPS psychologist did not seek to conduct the assessments she thought should have been conducted prior to concluding the student was ineligible for special education. (Witness 5's testimony, Petitioner's Exhibit 30)
43. On October 2, 2015, Petitioners filed the current due process complaint alleging DCPS inappropriately found the student ineligible for special education and related services and failed to develop an IEP for the student for SY 2015-2016. (Petitioner's Exhibit 1)
44. The student's School B SLP has observed that at School B the student continues to have difficulty with verbal reasoning, expressing root cause of things and answering why questions. He has a weakness in phonological awareness. He continues to have some of difficulty in applying these skills to decoding longer unknown words and in his linguistic executive functioning - the ability to organize and use language to organize novel tasks. His attentional deficits are also apparent as he has trouble inhibiting his responses and staying on topic. The student has trouble getting information from teacher and getting direction and organizing materials, settling in and following the expected structure and has trouble keeping up with grade level reading and writing tasks and difficulty expressing what he wants to say and his reasoning. (Witness 2's testimony, Petitioner's Exhibit 46-1, 46-20)
45. At School B the student needs a lot of structure constant feedback and to help him stay focused. His School B teachers have figured out methods to work with his attention deficits. He has been successful at School B because of the small classes and structure. (Witness 2's testimony, Petitioner's Exhibit 46-1, 46-20, Respondent's Exhibit 22)
46. School B has 300 students and 75 students in its junior high program: [REDACTED] and [REDACTED] grades. School B provides the student specialized instruction and related services pursuant to an IEP. School B is approved by OSSE. The head of School B's junior high program believes the student is well placed at School B as he is one of the most distracted students in the program, but he is well behaved. In comparison with the other students in his class now he needs 8 to 10 prompts with a class period and needs more time than other students to complete assignments. He is typically in a class of no more than 10 students. The School B teachers create a comfortable environment and structure the student's instruction so he can be successful. (Witness 3's testimony, Petitioner's Exhibit 71-6)

47. School B the student is provided OT twice per week individually and OT is provided as an integrated service that is provided to all students in the classroom. The OT therapist works with the student on the executive functioning skills. The student has difficulties with ocular motor skills, executive functioning, fine motor skills, and visual-motor skills: eye hand coordination. He struggles with legibility of handwriting and letter formation and has difficulty tracking objects. He has difficulty with close work reading and often skips lines of print and mixes up letters. As result he uses strategies in the classroom such as enlarged fonts. The student has eyeglasses but usually requires verbal cues to remember to bring his glasses and wear them. He did not have glasses prior to June 1, 2015. (Witness 4's testimony)
48. The independent psychologist who conducted the January 2014 neuropsychological evaluation conducted an observation of the student at School B on April 17, 2015. She wanted to observe him in classes that required writing. The psychologist observed the student in his Humanities and Language Arts classes and she talked with his classroom teachers. The student participated in the discussion and read the article but when he was asked to do the last piece of writing on an incident in his life that was similar he did not have a clue and couldn't get started even with teacher prompting. The independent psychologist thinks School B is an appropriate placement for the student and she believes he is getting a high level of teacher support so that he can acquire the skills he is lacking. (Witness 1's testimony, Petitioner's Exhibit 68)
49. During [REDACTED] grade the student and his parent had nightly fights about homework with tantrums and meltdowns. Now that he is attending School B the student does his homework willingly but still has to be reminded. He uses the planner to know what homework he has and generally he does it. He still does not like reading class but is far more willing to read and his reading ability has improved. The student hated going to school while at School A. In contrast, now at School B he goes to school willingly. The student is doing better in math and is for more engaged in school. The student does not take medication now for his attention issues. He was taking medication in [REDACTED] grade. A psychiatrist prescribed the medication but the student was not taking it regularly because he had trouble falling asleep with the medication. The student's parent believes School B is the correct placement for the student, where he is happy, has a good group of friends, does not feel judged and the staff understands his and the other student's issues and struggles. (Parent's testimony)
50. Should the Hearing Officer find a denial of FAPE the parties stipulate that School B is proper and appropriate for reimbursement purposes under *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. Cir. 2015)

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. *7 Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. 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 1: Whether DCPS denied the student a FAPE by failing to find the student eligible for special education and related services on January 21, 2015.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS inappropriately determined the student ineligible for special education on January 21, 2015, without first conducting additional assessments to confirm or not whether the student's was in fact a child with a disability in need of special education.

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). ⁶

⁶ 34 C.F.R. §300.8 provides:

Child with a disability.

The IDEA requires that the school system complete a full and initial evaluation of a student when determining eligibility. 34 C.F.R. § 300.301. The very specific requirements that a team must consider when making such a determination must, 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 then, ensure that information obtained from all of these sources is documented and *carefully considered*. 34 C.F.R. ' 300.306(c)(1) (emphasis added).

20 U.S.C. §1414(b)(3)(B) and 34 C.F.R. § 300.304(c)(4) make clear that an “LEA *shall ensure* that a child is assessed in all areas of suspected disability, including, if appropriate, health, vision, *hearing, social and emotional status...and motor abilities.*” (emphasis added).

Although Petitioner points out that the staff at School B and the independent evaluator who also observed the student at School B assert the student’s qualifies for special education there was no current evaluative data and the nueropysholgocial that was the basis for the student’s ADHD and learning disability diagnoses according to the DCPS psychologist was flawed. Yet, DCPS did not take action to assess the student’s cognitive and educational functioning on it own other than an educational and behavior screening conducted in two years prior to the most recent eligibility determination. ⁷

Petitioners aptly pointed out in it case that DCPS failed to fully execute its obligation to evaluate the student in all areas of suspected disability and identify whether the student needs special education for SY 2015-2016. There was no follow up psychological or educational testing by DCPS although the key evaluation that was the basis of the student’s alleged disability was, according to DCPSm inadequate to base an eligibility determination.

Although Petitioners asserts there is sufficient evidence to conclude that the student should be found eligible under the disability classifications DCPS considered, the Hearing Officer concludes that the evidence in that regard is not sufficiently persuasive.

(a) General.

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

⁷ FOF #s 40, 41, 42

First as DCPS psychologist points out the independent neuropsychological did not include a classroom observation of the student in the general education setting while he was attending School A nor did the evaluator directly confer with the student's teacher or review anything other than the student's most recent first advisory report card to determine whether or to what extent the student was functioning adequately in the classroom and his ability to access the general education curriculum.

The DCPS psychologist was persuasive and credible in describing the best practices of evaluating a student's cognitive abilities, executive functioning and even writing abilities prior to making a determination that student has a learning disability or is so impacted by his ADHD in the classroom so as to qualify for the OHI classification. Although the School B witness attested the student's inattention that was documented, the observations by DCPS staff, albeit brief, indicated that the student was easily redirected on the occasions he was off task in the classroom.

The DCPS psychologist credibly testified to the various deficiencies in independent neuropsychological evaluation report and its conclusions, including those regarding the student's executive functioning skills and any resultant adverse educational impact caused by the student's ADHD. To the extent that they came to different conclusions pertaining to eligibility under OHI, and or SLD the Hearing Officer credits the DCPS psychologist's testimony because she considered an array of sources of educationally relevant information in reaching her conclusion. For example, she had firsthand interactions with the student's general education teachers, she observed the student in the general education classroom, and she reviewed and considered more of the student's historical educational records. Her testimony was forceful and well-reasoned and supported DCPS' determination that the student was not a child with an other health impairment on January 21, 2015.

Petitioners did not establish by a preponderance of the evidence that as of January 21, 2015, the student's ADHD adversely affected his educational performance and that he should qualify as a child with OHI.

On January 21, 2015, DCPS also determined that the student was not a child with a specific learning disability. A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. It does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 34 C.F.R. § 300.8(c)(10); DCMR § 5-E3001.1.

DCPS considered both a discrepancy model and a research-based intervention model and determined Student did not qualify under either model. Under the DCMR, a "severe" discrepancy requires a difference of at least two standard deviations. 5-E DCMR § 3001; *See also Krivant v. D.C.*, 99 F. App'x 232 (D.C. Cir. 2004)

Here, the overwhelming evidence establishes that the student successfully accessed the general curriculum and met state educational standards for the three straight school years prior to the January 21, 2015 eligibility determination and that he did so without the provision of any special education services. Work samples, test scores and report cards in the record all document the student's continued ability to access the general curriculum and meet or exceed state educational standards.

Consequently, the Hearing Officer does not conclude that the evidence demonstrates that the student yet qualifies as a student's with an OHI for ADHD of SLD disability. In addition the rationale cited above the independent evaluation that was the primary basis for the alleged SLD classification was flawed and without and until more comprehensive evaluations are conducted.

Likewise as the SLI classification that was considered by DCPS at the January 2015, eligibility meeting the School B SLP asserted that the student would qualify for the SLI disability; however testimony in that regard was not more convincing than that of the DCPS SLP who disagreed with the recommendation and pointed out that that the student's weaknesses in the areas of narrative are not areas that are addressed by a SLP but rather addressed by a reading specialist with SLP consultation. The DCPS SLP did not disagree with the School B evaluation results but disagreed with the conclusion in that evaluation that the student had a speech language impairment.⁸ Based upon the DCPS SLP's clear and adamant testimony, coupled with her observation of the student at School B, her conferring with the School B SLP and her cogent explanation of the student's strengths and weakness in language, the Hearing Officer was convinced based on her testimony that the student did not qualify as a student with a SLI disability,

As Petitioners aptly point out if the DCPS psychologist believed the assessment was incomplete or insufficient, she had a legal responsibility to do her own testing.

IDEA requires:

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must

(1) Review existing evaluation data on the child, including--

(I) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

⁸ FOF #s 32, 33, 34

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--

(i)(A) Whether the child is a child with a disability, as defined in ' 300.8, and the educational needs of the child; or

34 C.F.R. ' 300.305 (emphasis added). In other words, the school system's obligation does not end once the team reviews the information that the parent has provided. The process only *starts* at that point. The team must identify what additional data is necessary to make a determination of whether the student is eligible for special education.

Accordingly, the Hearing Officer directs in the order below that DCPS conduct evaluations and determine the student's eligibility or ineligibility based on valid and current evaluations.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop an IEP for SY 2015-2016.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

Under the IDEA, only eligible children with disabilities, as defined by the Act, are entitled to a FAPE. 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.101. FAPE is defined as "special education and related services" that are "provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Thus, only a "child with a disability" is entitled to an IEP.

Because the student was not properly found to be ineligible but has not yet been determined eligible unless and until DCPS conducts the required evaluations and reconsiders the student's eligibility for special education it has no obligation to yet develop and IEP for the student for SY 2015-2016.

However as stated, in the order below the Hearing Officer directs that DCPS reimburse the parent for the student tuition for SY 2015-2016 up until it complies with the order and reevaluates the student and determines his eligibility for special education.

The Hearing Officer urges that despite the fact that the student is considered parently placed while his tuition at School B is being funded by reimbursement through this HOD that DCPS proceed in a manner in monitoring and evaluating the student that it would any other student for which DCPS funds the student's at School B up until DCPS fulfills the obligations under the order below regarding the student evaluation and eligibility and that the parents are considered to have consented to DCPS monitoring and evaluation as it is footing the bill for the student at School B, albeit through reimbursement.

ORDER: ¹⁰

1. Petitioners are hereby directed, if they have not already done so for SY 2015-2016, to provide DCPS, within ten (10) calendar days of the issuance of this order, the required proof of residency pursuant to D.C. Code §38-308.
2. DCPS shall, within sixty calendar (60) days of Petitioners providing DCPS appropriate proof of payment, reimburse Petitioners the cost of the student's tuition and costs for the student attending School B during SY 2015-2016 up until the date that DCPS completes the evaluation, eligibility, IEP and placement requirements that are further described in the provisions below.
3. DCPS shall conduct, and the parent shall consent to as a condition of continued reimbursement of the student's tuition and costs at School B beyond the date of this order, full and comprehensive evaluations of the student in all areas of suspected disability to determine whether the student is a child with a disability pursuant to IDEA in need of special education.
4. DCPS shall convene and Petitioners shall attend, within ten (10) school days of the issuance of this order, a MDT meeting to review the student's available educational and behavioral data and to determine in detail the nature and specific assessments that DCPS will conduct to assess the student's eligibility for special education.
5. Within seventy-five (75) calendar days of the issuance of this order the evaluations that are to be conducted pursuant to the provision above shall be completed by DCPS and DCPS shall within that same time frame convene a MDT meeting to review the evaluations and consider and determine the student's eligibility or ineligibility for special education.
6. DCPS may at its option allow any or all of the assessments and/or evaluations determined will be conducted pursuant to this order to be conducted independently at DCPS/OSSE prescribed rates.
7. If the student is found eligible DCPS shall within thirty (30) calendar days of the eligibility determination develop an IEP and determine an educational placement and a location of services for the student where the student's IEP will be implemented for the remainder of SY 2015-2016.
8. DCPS shall issue a prior written notice ("PWN") and/or a location of service ("LOS") letter within five (5) calendar days of the MDT meeting described above indicating the

¹⁰ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

student's educational placement and location of services where the student's IEP will be implemented for the remainder of SY 2015-2016.

9. Until the evaluations conducted pursuant to this order are completed and the student's eligibility or ineligibility determination is made (and if the student is found eligible and an IEP is developed and a placement and location is determined) DCPS shall be obligated to continue to reimburse Petitioners for the tuition and costs up until that date for the student to attend School B for SY 2015-2016.
10. All other 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).

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: January 3, 2016