



undersigned hearing officer was appointed on April 21, 2016. The parties convened for a resolution session on April 27, 2016, which did not result in an agreement. On May 9, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing in this case was convened on June 17, 2016. Following Petitioner's opening statement, DCPS' counsel objected that DCPS had not been provided notice that Petitioner claimed compensatory education was due for failure to determine Student eligible for special education in spring 2014. I decided that the due process hearing would go forward, but that DCPS should be granted additional time to prepare its defense on this issue. A second hearing day was set for July 11, 2016.

Petitioner completed her case-in-chief on June 17, 2016. Counsel for both parties filed supplemental disclosures on July 1, 2016. On July 1, 2016, the Chief Hearing Officer granted DCPS' unopposed request for a 22-day extension of the due date for the final decision, to June 24, 2016, to accommodate the second hearing day and to allow sufficient time for the hearing officer to review the evidence and compose this Hearing Officer Determination.

The due process hearing was held before this Impartial Hearing Officer on June 17 and July 11, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Petitioner's Counsel made an opening statement. DCPS waived opening argument.

Petitioner testified and called as additional witnesses EDUCATIONAL ADVOCATE and INDEPENDENT PSYCHOLOGIST. DCPS called no witnesses.

Petitioner's Exhibits P-1 through P-41 and DCPS' Exhibits R-1 through R-16 were all admitted into evidence without objection. At the conclusion of the hearing, counsel for the respective parties made closing arguments. Neither party requested leave to file a post-hearing brief.

### **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 following issue for determination was certified in the May 9, 2016 Prehearing Order:

Whether DCPS denied the student a FAPE when DCPS failed to comprehensively evaluate the student and/or conduct comprehensive evaluations following the initial referral for evaluations in April/May 2014.

For relief in this case, Petitioner requests that the Hearing Officer order DCPS to complete a Functional Behavioral Assessment (FBA) and an Occupational Therapy (OT) evaluation of Student and for the Student to be awarded compensatory education for not being determined eligible for special education and provided appropriate services beginning in the summer of 2014. (Student was determined eligible for special education and related services, after the complaint in this case was filed, on April 18, 2016.)

### **FINDINGS OF FACT**

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

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

Testimony of Mother. Student is eligible for special education and related services as a student with Multiple Disabilities (MD). Exhibit P-1.

2. For the 2015-2016 school year, Student was in the GRADE at CITY SCHOOL 2. Previously he attended CITY SCHOOL 1. During the 2013-2014 school year, Mother and Student's teacher were concerned about Student's behavior at school, including fighting, arguing, hitting, and screaming. Mother also noticed that Student would forget names of family members and education information he had just been told. Student's teacher recommended that Student be evaluated for special education needs by DCPS' assessment center, Early Stages. Testimony of Mother.

3. Student was referred to Early Stages for his initial evaluation on February 24, 2014. Exhibit R-10. On April 22, 2014, Mother executed a consent form for Student to be evaluated. Exhibit R-13. Mother reported as concerns to Early Stages that Student seemed to have difficulty retaining information, was defiant, and had difficulty focusing his attention. Exhibit R-15. At Early Stages, Student was evaluated for a potential Developmental Delay disability. The Early Stages evaluators used the Ages and Stages Questionnaire (data collected from Mother in October 2013), Young Children's Achievement Test (YCAT), Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV) and the Behavior Assessment System for Children, Second Edition (BASC-2) to assess Student. The Early Stages evaluators also observed the child and conducted an interview with Mother. Exhibit R-16.

4. EARLY STAGES PSYCHOLOGIST conducted a psychological evaluation of Student on April 22, 2014. The IDEA disability classifications, Developmental Delay and Attention Deficit-Hyperactivity Disorder, as an Other Health Impairment, were considered for Student. The psychologist was not able to conduct a classroom

observation or interview Student's teacher. On the WPPSI-IV, Student's Visual Spatial Index (VSI) and Full-Scale IQ scores were in the Average Range. His Verbal Comprehension Index (VCI) and Working Memory Index scores were in the Low Average range. Early Stages Psychologist concluded that Student's cognitive abilities were within the range of expectations for his age. He noted that Student's memory difficulties on this test were significantly influenced by his distractibility. Mother's responses on the BASC-2 rating scales indicated that there were no behavioral concerns that might interfere with Student's ability to learn in a classroom setting. Student's scores on the YCAT were reported to indicate that his educational skills were relatively within range of where expected to be for his age. Early Stages Psychologist concluded that Student did not appear to meet criteria for Developmental Delay. Regarding OHI-ADHD, the Early Stages Psychologist reported that though Student could be distractible and impatient at times, he was mostly easily redirected and this behavior was never a serious problem. Also Student scored in the Average range on the Hyperactivity and Attention Problems scales of the BASC-2 and he scored relatively well on the Working Memory Index of the WPPSI-IV, which can also be used as an indicator of ADHD. Early Stages Psychologist concluded that Student did not appear to meet criteria for OHI-ADHD at that time. Exhibit P-7.

5. At a meeting on May 19, 2014 at Early Stages, the Early Stages evaluators provided Mother the results of their assessments. The Early Stages evaluators reported that Student's scores indicated that as of May 2014, Student's cognitive, behavioral and educational skills were in range of what would be expected for his age. Based upon these data, the observation of Student at Early Stages and the interview with Mother, the Early Stages eligibility team determined that Student did not meet eligibility criteria for

Developmental Delay as defined by the IDEA and that he was not eligible for special education within that category. Exhibits R-15, R-16.

6. The Early Stages team informed Mother that she could obtain an Independent Education Evaluation (IEE) evaluation of Student if she disagreed with the Early Stages evaluation. Mother made several attempts to obtain an IEE through PEDIATRIC HOSPITAL, but when informed that it would take months to get an appointment, Mother did not follow up. Testimony of Mother.

7. At the end of the 2013-2014 school year at City School 1, Student's report card indicated that he met expectations in all areas except Social-Emotional, where he was rated between needing support and meeting expectations. The teacher noted that Student tried very hard to stay on task, but often had trouble focusing on the task at hand and that he still required a lot of supervision and redirection in order for him to try to complete his activities and make transitions. Exhibit P-28.

8. Student returned to City School 1 for the 2014-2015 school year. On September 14, 2014, Student's classroom teacher completed the Vanderbilt Assessment Scale, reporting that Student Very Often or Often engaged in numerous problem behaviors and that he was "Problematic" for Relationships with peers and Disrupting class. Following directions was reported to be "Somewhat of a Problem." Exhibit P-21.

9. Student did not do well academically in the 2014-2015 school year and he continued to have behavior problems. First HomeCare provided therapy to Student. That year, he was not evaluated again for special education eligibility. Testimony of Mother. (Whether Student should have been reevaluated in the 2014-2015 school year is not an issue in this case.)

10. Subsequent to the spring 2014 Early Stages evaluation, Student was

diagnosed with ADHD by a Pediatric Hospital physician and prescribed medication for the condition. Exhibit P-6. In March 2015, First HomeCare diagnosed Student with ADHD and Oppositional Defiant Disorder (ODD) and Student was put on psychiatric medication. Exhibit P-34. Student is not currently taking the medication because it is “too strong.” Testimony of Mother.

11. For the 2015-2016 school year, Mother enrolled Student in City School 2. Student’s classroom teacher told Mother that Student ought to be evaluated again for special education eligibility. CITY SCHOOL 2 SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student beginning December 18, 2015. The evaluation and report were not completed until April 7, 2016. City School 2 School Psychologist reported that Student’s intellectual ability was within the Average range. She reported that based on Text Reading and Comprehension (TRC) data, Student had performed far below the proficient level since the beginning of the 2015-2016 school year and that based on classroom observations, cognitive and academic evaluations, it appeared that Student may require specialized instruction for some aspects of his reading. Mother’s and the classroom teacher’s responses on the BASC-3 rating scales indicated Student had significant difficulty with hyperactivity and displayed atypical behaviors. According to both raters, Student had difficulty listening, paying attention and staying focused. City School 2 School Psychologist recommended that Student appeared to meet the criteria for special education services as a Student with an Specific Learning Disability (SLD) and OHI. Exhibit P-6.

12. At an eligibility meeting on April 18, 2016 at City School 2, Student was determined eligible for special education and related services as a child with Multiple Disabilities – an SLD in reading and OHI-ADHD. Exhibits P-33, P-3, P-4.

13. DCPS proposed an initial IEP for Student on May 9, 2016. The initial IEP would provide Student 5 hours per week of Specialized Instruction in Reading, including 2.5 hours outside general education, and 120 minutes per month of Behavioral Support Services. Exhibit P-1. (The appropriateness of the May 9, 2016 IEP is not at issue in this proceeding.)

14. At the April 18, 2016 eligibility meeting, the parent's representatives requested, *inter alia*, that Student be given an OT assessment and an FBA. Testimony of Educational Advocate. At the July 11, 2016 due process hearing, DCPS' counsel represented that DCPS would complete OT, FBA and memory assessments for Student on or before September 20, 2016.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

The burden of proof in this due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).<sup>2</sup>

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<sup>2</sup> The D.C. Special Education Students' Rights Act of 2014 effected changes to the burden of proof in due process hearings for cases filed after July 1, 2016. *See* D.C. Acts 29-486, § 103(6). This case was filed before the effective date of the new law.

### Analysis

Did DCPS deny the student a FAPE by failing to comprehensively evaluate him and/or conduct comprehensive evaluations following the initial referral for evaluations in April/May 2014?

On April 18, 2016, Student was determined eligible for special education as a Multiply Disabled child, based upon concomitant OHI-ADHD and SLD disabilities. Two years before, on May 19, 2014, Student had been previously evaluated by DCPS and determined not eligible for special education. Petitioner contends that Student has been denied a FAPE because DCPS' 2014 initial eligibility evaluation was not sufficiently comprehensive. Petitioner alleges that if the prior evaluation had been properly conducted, Student would have been determined eligible and provided special education and related services beginning in the summer of 2014. DCPS maintains that even if Student's 2014 evaluation were not sufficiently comprehensive, Petitioner has not established that Student was eligible for special education at the time of the May 19, 2014 eligibility determination.

In order to provide a free appropriate public education to all children with disabilities States must first identify those children and evaluate their disabling conditions. Accordingly, the IDEA requires that every State have procedures in place that are designed to identify children who may need special education services. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 (9th Cir. 2016). The IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed to ensure that the initial evaluation achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child. *Id.*

The IDEA regulations, 34 CFR § 300.305(a), provide that, as part of an initial

evaluation (if appropriate), 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

(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 34 CFR § 300.8, and the educational needs of the child; as part of an initial evaluation, the IEP Team and other qualified professionals, as appropriate, must 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

*See* 34 CFR § 300.305(a).

The regulations further provide that the evaluation conducted by the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability. *See* 34 CFR § 300.304(b)(1). The IDEA does not require that a particular type of evaluation be conducted to establish a child's eligibility; rather, the evaluation requirements in §§ 300.530 through 300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child. *See* Federal Policy and Guidance – OSEP Memorandum, *Analysis of Comments and Changes*, Attachment 1 (May 4,

2000). The Act leaves the selection of testing and evaluation materials and the procedures to be used for evaluations and reevaluations to the individual states, with the understanding that all IDEA requirements must be satisfied. *See Letter to Shaver*, 17 IDELR 356 (OSERS 1990).

Mother referred Student to DCPS Early Stages for evaluation in late February 2014. The Early Stages evaluators assessed Student for possible Developmental Delay and OHI-ADHD disabilities. The Early Stages evaluators reviewed an October 15, 2013 Ages and Stages Questionnaire completed by the parent, interviewed Mother, and conducted educational and psychological evaluations of Student using several instruments, including the Young Children’s Achievement Test (YCAT), the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI–IV) and the Behavior Assessment System for Children, Second Edition (BASC-2) rating scales completed by Mother. However, the Early Stages evaluators did not conduct a classroom observation or interview Student’s teacher.

In his May 15, 2014 Psychological Evaluation Report, Early Stages Psychologist explained that he attempted to telephone City School 1 several times (on the date of his report), but got no answer. The psychologist reported that he “was not given enough time in his schedule” to conduct a classroom observation and he could not obtain information regarding intervention strategies attempted at school because an interview with the teacher could not be conducted. Petitioner’s expert, Independent Psychologist, testified that this was a “big problem” with the Early Stages evaluation, because how a child behaves in the “classroom world” is different from how he may behave in a 1:1 setting with the evaluator. She further opined that to evaluate Student for ADHD, it would have been highly important to

interview the classroom teacher in order to compare what the teacher sees with what the parent sees. In the following school year, medical doctors diagnosed Student with both ADHD and ODD. Independent Psychologist explained in her testimony that ADHD is a developmental disorder that “doesn’t just happen” and asserted that Student should have been diagnosed before.

Classroom observations and teacher interviews are not necessarily required for initial eligibility evaluations because observation data will generally be a part of the existing data reviewed for any child suspected of having a disability. *See* 34 CFR § 300.305(a), *supra*; U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46660 (August 14, 2006). However, in this case, the only existing data for Student the Early Stages evaluators reported having reviewed was the Ages and Stages Questionnaire, which contained no classroom observation information or teacher input. Because of this omission in the Early Stages evaluation, I find that Petitioner has established that the initial May 2014 special education eligibility evaluation of Student was not sufficiently comprehensive to meet the evaluation requirements of the IDEA. This was a procedural violation of the Act. *See Timothy O., supra.*

Whether a violation of the IDEA’s evaluation procedures constitutes a denial of FAPE depends upon whether there was a resulting loss of educational opportunity. *See, e.g., Leggett v. District of Columbia*, 793 F.3d 59, (D.C.Cir.2015) (“[A] procedural violation of the IDEA constitutes a denial of a FAPE only if it “results in loss of educational opportunity’ for the student.” *Id. at 67*, citing *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006)). Whether Student was denied a FAPE by the deficiency in the spring 2014 Early Stages

evaluation depends upon whether he was then a “child with a disability” as defined by the IDEA. *See DL v. District of Columbia*, No. CV 05-1437, 2016 WL 3460306 (D.D.C. June 21, 2016) (A child with a disability is clearly denied educational opportunity if the District fails to identify him at the outset.)

It is undisputed that as of April 18, 2016, Student has been identified as a child with OHI-ADHD and SLD disabilities. The Petitioner’s burden in this case was to establish that Student met IDEA criteria as a child with a disability two years earlier when he was first evaluated. The only probative evidence at the due process hearing that in May 2014 Student had a qualifying IDEA disability was the testimony of Independent Psychologist, based upon her records review, that she would have diagnosed Student with ADHD. ADHD may be considered an Other Health Impairment (OHI) disability classification under the IDEA. An OHI classification is given to a student who has “limited strength, vitality, or alertness, including a heightened alertness with respect to environmental stimuli . . . that . . . [is] due to chronic or acute health problems,” which in turn, “results in a limited alertness with respect to the educational environment[ ] that . . . adversely affects a child's educational performance.” *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 243 (D.D.C. 2010), citing 34 C.F.R. § 300.8(c)(9)-(9)(ii) (2007).

In his May 15, 2014 psychological evaluation, Early Stages Psychologist reported that though Student could be distractible and impatient at times, he was mostly easily redirected and this behavior was never a serious problem. Also Student scored in the Average range on the Hyperactivity and Attention Problems scales of the BASC-2 and he scored relatively well on the Working Memory Index of the WPPSI-IV, which can also be used as an indicator of ADHD. Early Stages

Psychologist concluded at the time that Student did not appear to meet criteria for OHI-ADHD. However, as noted, Early Stages Psychologist did not observe Student at school or obtain input from the teacher. Considering that Student was diagnosed with ADHD by his medical doctors in the following, 2014-2015, school year, I find persuasive Independent Psychologist's opinion that Student likely had ADHD as early as the spring of 2014.

Not every child with an ADHD diagnosis is eligible for special education. To show that Student's ADHD was a qualifying OHI disability, Petitioner was required to prove that the condition to adversely affected Student's academic performance. *See* 34 CFR § 300.8(c)(9) (definition of Other Health Impairment). In addition, for Student be considered a "child with a disability," Petitioner's burden was to prove that in spring 2014, by reason of his ADHD, Student needed special education services. *See* 34 CFR § 300.8(a)(1). "Specifically, to qualify for special education services a student must both: (1) have a qualifying disability and (2) 'by reason thereof, need [ ] special education and related services.' 20 U.S.C. § 1401(3)(A)." *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 382 (5th Cir. 2007).

DCPS argues that Petitioner did not meet her burden of proving that when Student was evaluated in spring 2014, his alleged ADHD condition adversely affected his academic performance or resulted in a need for special education and related services. I agree. As Petitioner's expert, Independent Psychologist, pointed out in her testimony, Student was "normal achievement wise" at the end of the 2013-2014 school year. Student's scores on the YCAT educational achievement test, administered on April 22, 2014, were all in the Below Average or Average range. His end-of-year report card stated that he was meeting expectations in all areas, except

social emotional, where he needed support to resolve social problems. Based on this record, I find that Petitioner has not met her burden of proof that at the time of the initial eligibility determination, Student's ADHD adversely affected his educational performance or that "by reason thereof, [Student] need[ed] special education and related services." Therefore, I conclude that Petitioner has not shown that the failure of the Early Stages evaluators to conduct a classroom observation or obtain teacher input resulted in a loss of educational opportunity for Student constituting a denial of FAPE. Petitioner is not entitled to relief for this procedural violation.

**ORDER**

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

ORDERED:

All relief requested by the Petitioner herein is denied, without prejudice to Student's right to have OT and FBA evaluations completed, as represented by DCPS' counsel at the beginning of the due process hearing, on June 17, 2016.

Date: July 20, 2016

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  
Chief Hearing Officer  
OSSE - SPED  
DCPS Resolution Team**