

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: March 23, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Office of Dispute Resolution,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a Free Appropriate Public Education (FAPE) by failing to find him eligible for special education services.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's due process complaint, filed on December 5, 2014, named DCPS as respondent. The parties

¹ Personal identification information is provided in Appendix A.

met for a resolution session on January 13, 2015 and did not reach an agreement. The original 45-day period for issuance of this decision began on January 5, 2015. On December 22, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on February 10 and March 11, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner and FATHER appeared in person, and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. On the first day of the hearing, DCPS requested that the hearing be held open for a second day to receive the testimony of a DCPS witness who was not available on the first day of the hearing. I granted the unopposed request. On February 11, 2014, the Chief Hearing Officer granted DCPS' unopposed continuance motion, due to the unavailability of the witness, which resulted in the extension of the due date for this decision to March 11, 2015. The second day of the hearing was scheduled for February 17, 2015, but had to be postponed due to a weather closing. On February 27, 2015, the Chief Hearing Officer granted DCPS' second unopposed continuance request, due to the weather closing, and the due date for this decision was further extended to March 27, 2015.

On March 11, 2015, the respective parties' counsel appeared for the second day of the due process hearing. DCPS' witness, who had been unavailable on the original hearing date, was again unavailable on March 11, 2015. DCPS elected to rest without offering additional evidence and counsel for both parties made closing arguments.

On February 10, 2015, Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE, Father, and IEE PSYCHOLOGIST 2. DCPS called DCPS SCHOOL PSYCHOLOGIST as its only witness. Petitioner's Exhibits P-1 through P-18 and DCPS' Exhibits R-1 through R-15 were all admitted into evidence without objection. Counsel for Petitioner made an opening statement. On March 11, 2015, counsel for both parties made closing arguments. Neither party requested leave to file post hearing written argument.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

The following issue for determination was certified in the December 2, 2014 Prehearing Order:

– Whether DCPS has denied Student a FAPE by determining at a meeting on October 29, 2014 that Student was not a child with a qualifying disability in need of special education and related services.

For relief, Petitioner requests that the Hearing Officer determine that Student is a child with a disability and order DCPS to ensure that an appropriate IEP is developed for him. In addition, Petitioner seeks compensatory education for alleged denial of FAPE from August 2014 until initial IEP services are implemented and requests that the Hearing Officer order DCPS to fund an evaluation to determine what amount of compensatory education is appropriate.

PRIOR HEARING OFFICER DETERMINATION

The present case is the latest of several due process complaints brought by the parents on behalf of Student, seeking to have the child determined eligible for special

education and related services. The last case, Case No. 2013-0658, proceeded to a two-day due process hearing in February 2014, following which Hearing Officer Coles B. Ruff issued a Hearing Officer Determination (the March 6, 2014 HOD), in which he concluded that Petitioner's evidence did not establish that Student was a child with a disability in need of special education and related services. However, Hearing Officer Ruff did find sufficient evidence that DCPS had not fully evaluated Student in all areas of suspected disabilities. Hearing Officer Ruff ordered DCPS to convene a student evaluation plan (SEP) meeting "to determine the areas that should be evaluated regarding the student's cognitive functioning including his working memory along with evaluating his current academic achievement," and upon completion of the evaluations to convene an eligibility team meeting to determine whether Student qualified as a child with a disability under the IDEA. Exhibit P-11. Counsel for the parties have agreed that I may adopt relevant findings of fact from the March 6, 2014 HOD.

FINDINGS OF FACT

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

1. Student resides with Petitioner and Father in the District of Columbia. Testimony of Mother, Father. Student has never been determined eligible for special education and related services. Testimony of Educational Advocate. Student is in his third year at CITY ELEMENTARY SCHOOL where he is currently in GRADE.

Testimony of Mother.

2. The parents have long been concerned that Student is struggling in reading and in math. They are also concerned about his behavior in school. Testimony of Father, Testimony of Mother. The parents and Student's siblings help Student with

his homework. Father observed that Student cannot do the work, becomes frustrated and shuts down. Testimony of Father. Mother is concerned that Student is struggling academically with reading and math, and does not really understand what he reads.

Testimony of Mother.

3. DCPS School Psychologist conducted an initial psychological evaluation of Student in May 2013. In educational achievement testing, using the Woodcock-Johnson III Tests of Achievement (WJ-III), Student's Functioning Level was High Average for Letter-Word Identification, Average for Passage Comprehension, Average for Math Calculation and Average for Applied Problems. In cognitive testing, using the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III), Student's general cognitive abilities tested within the Average range as measured by the full scale IQ. His verbal reasoning abilities were in the Average range. His nonverbal reasoning abilities were in the Low Average range. Student scored in the Average range on processing speed tests. To assess concerns about Student's focus and attention in the classroom and home environments, Student's teacher and father completed the Behavior Assessment System for Children (BASC-2) rating scales. Based upon Father's response, Student's scores fell into the Average/Typical Range, except for Adaptive Skills where his score fell in the At Risk classification range. The teacher's response endorsed the Average/Typical range in all areas except for Adaptive Skills where Student's score fell into the At Risk classification range. DCPS School Psychologist concluded in her May 8, 2013 written report that Student was not experiencing significant learning difficulties and did not meet IDEA eligibility criteria as a student with a learning disability. DCPS School Psychologist noted that there was information that while Student exhibited off-task behaviors, some fidgetiness and inattention to

tasks in school, his level of impairment did not rise to the clinically significant range. She reported that Student appeared to be performing within expected parameters for his age and grade. DCPS School Psychologist concluded that Student did not appear to require specialized instruction or related services to access the general education curriculum and did not appear to meet the criteria for a learning disability, attention deficit-hyperactivity disorder (ADHD) or an emotional disability. Exhibit P-16.

4. DCPS convened an MDT eligibility committee meeting on May 24, 2013 and the MDT team determined that Student was not eligible for special education services. The parents disagreed with the DCPS psychological evaluation. In settlement of a due process complaint filed by the parents, DCPS agreed to fund an Independent Educational Evaluation (IEE) psychological evaluation. March 6, 2014 HOD.

5. IEE PSYCHOLOGIST 1 conducted a comprehensive psychological evaluation of Student in September 2013. He tested Student's cognitive abilities using the Wechsler Intelligence Scale for Children, Fourth Edition (WISC IV). IEE Psychologist 1 found that Student's Working Memory was 30 IQ points lower than his Average abilities in other areas. From that inconsistent score, IEE Psychologist 1 concluded that there was an indication that Student had a learning disability that was likely to disturb his education. IEE Psychologist 1 administered the Wide Range Achievement Test, Third Edition (WRAT-3) to measure Student's educational achievement. Student's WRAT-3 scores were in the Borderline (Reading) to Average (Math Computation) range. IEE Psychologist 1 had Mother and two of Student's teachers complete the BASC 2 behavioral rating scales. While Mother perceived clinically significant conduct problems, aggression, attention problems and depression, and felt Student was At Risk for hyperactivity and withdrawal, the two teachers reported

seeing At Risk attention problems, but no other behavior problems. IEE Psychologist 1 inferred that Student's behavior at school was not requiring significant behavior management or environmental control for safety. In the summary section of his October 9, 2013 report, IEE Psychologist 1 concluded that Student appeared to have an intellectual disability, when he has to remember and repeat combinations of numbers and geometric shapes (Working Memory). He concluded that Student appeared to have a mild learning disability related to language processing, auditory memory, below average perceptual reasoning ability and borderline verbal relationships. IEE Psychologist 1 diagnosed Student with Attention-Deficit/Hyperactivity Disorder (Predominantly Inattentive), and Disruptive Mood Dysregulation Disorder. Throughout his October 9, 2013 report, IEE Psychologist 1 used an incorrect birth date for Student, stating his age to be 10 months older than his actual age when he was tested. Exhibit P-15.

6. DCPS reconvened Student's eligibility team on November 13, 2013. The team considered whether Student was eligible under the IDEA classifications Specific Learning Disability (SLD), Emotional Disturbance (ED) or Other Health Impaired, based upon Attention Deficit-Hyperactivity Disorder (OHI-ADHD). The team determined that Student did have ADHD, but did not require special education or related services because of the condition. The team again determined that Student was not eligible for special education services. Exhibit P-11.

7. The parents requested a due process hearing on the ineligibility determination by the November 13, 2013 MDT eligibility team. At the due process hearing in February 2014, IEE Psychologist 1 testified that Student did not have an emotional disturbance, but had an emotional reaction to academic difficulties. He

stated that Student would qualify under the IDEA OHI-ADHD disability category, but that Student did not need special education for this condition. Hearing Officer Ruff found IEE Psychologist 1's testimony to be confusing and to some degree contradictory. In the March 6, 2014 HOD, Hearing Officer Ruff concluded that Petitioner had not proven that DCPS had erred in determining that Student was ineligible for special education, but that the ineligibility determination was premature because Student needed to be assessed to determine the impact of his working memory deficits on his cognitive and academic functioning. Hearing Officer Ruff ordered DCPS to convene a student evaluation plan (SEP) meeting "to determine the areas that should be evaluated regarding the student's cognitive functioning including his working memory along with evaluating his current academic achievement," and upon completion of the additional evaluations to convene an eligibility team meeting to determine whether Student qualified as a child with a disability under the IDEA. Exhibit P-11.

8. In response to the March 6, 2014 HOD, DCPS School Psychologist conducted a psychological reevaluation of Student. She conducted a record review, a teacher interview and administered the Wide Range Assessment of Memory and Learning – Second Edition (WRAML2) and the Behavior Rating Inventory of Executive Function (BRIEF). Exhibit R-2. For this reevaluation, a special education teacher at City Elementary School conducted an educational evaluation of Student using the Woodcock-Johnson III Tests of Achievement (WJ-III). Based upon the WJ-III test scores, the special education teacher reported that when compared to others at his grade level, Student's overall level of achievement was Average. His scores were Average in broad reading, mathematics, math calculation skills, written language and written

expression. The examiner reported that Student's handwriting legibility was also Average. Exhibit P-14.

9. In her April 12, 2014 Psychological Re-Evaluation report, DCPS School Psychologist reported that based on the WRAML2 test, Student's scores were General Memory Index – 102, Verbal Memory Index – 91, Visual Memory Index – 109, and Attention/Concentration Index – 106. DCPS School Psychologist reported that each of these scores was within the Average range for children of his age. DCPS School Psychologist requested the parents and a teacher to complete the BRIEF rating scales to further assess Student's memory functioning and his executive functioning. The parents did not return the form. Based upon the teacher's responses, DCPS School Psychologist determined that the scores indicated that Student was not demonstrating memory concerns in the school setting, and that his memory skills and executive functioning fell within the Average range and were comparable to that of other students his age. Exhibit R-2.

10. The teacher reported that academically, Student was on par with the other children in the class, that she did not have any concerns about Student socially-emotionally, and did not have any particular concerns about his behavior. Testimony of DCPS School Psychologist, Exhibit R-2.

11. DCPS convened another MDT team eligibility meeting for Student on April 29, 2014 at City Elementary School. The team reviewed DCPS School Psychologist's April 12, 2014 Psychological Reevaluation report and again determined that Student was not eligible for special education services. Exhibit P-7, Testimony of DCPS School Psychologist. The parents disagreed with the determination and obtained DCPS funding authorization for another IEE psychological evaluation. Exhibit P-7.

12. IEE Psychologist 1 and IEE Psychologist 2 conducted another IEE comprehensive psychological reevaluation of Student in the summer of 2014. For this report, the evaluators combined the results of IEE Psychologist 1's September 6, 2013 testing with additional testing done in July and August 2014. On July 1, 2014, Student's intellectual ability was reassessed, again with the WISC-IV test. The July 1, 2014 WISC-IV scores indicated that Student's Verbal Comprehension, Perceptual Reasoning and Working Memory were in the Average range. His Processing Speed score of 85 was in the low average range. IEE Psychologist 1 reassessed Student's basic academic skills on July 1, 2014, using the Wide Range Achievement Test, Fourth Edition (WRAT4). Student's scores were Low Average for Spelling, Borderline for Reading and Average for Math Computation. On August 21, 2014, IEE Psychologist 2 again assessed Student's academic achievement, on this occasion using the Wechsler Individual Achievement Test, Third Edition (WIAT-III). Student's August 21, 2014 composite scores, based on age-based norms, indicated that he performed in the Below Average range in Total Achievement and in each of the Oral Language, Total Reading, Basic Reading, Written Expression and Mathematics composites. In an August 22, 2014 Comprehensive Psychological Reevaluation Report, co-authored by IEE Psychologist 1 and IEE Psychologist 2, the independent evaluators reported that Student appeared to have a "mild learning disability" related to his difficulties in some areas of learning, including relatively low cognitive ability in language processing, low average auditory memory, and below average perceptual reasoning abilities. They reported that Student's below average perceptual reasoning abilities and his borderline verbal comprehension abilities give him disabilities in learning academic skills. They reported that Student can become avoidant, when tasks become difficult for him, and he seems to shift into moods in

which he can be non-compliant to the teachers' requests or guidance. They reported that Student's non-compliance does not result in dangerous or aggressive behavior, but he does not give his full effort to the teacher requested tasks. In their August 22, 2014 report, the IEE psychologists repeated Student's diagnoses from IEE Psychologist 1's October 9, 2013 report – ADHD, predominantly Inattentive Presentation, Disruptive Mood dysregulation Disorder – and made the additional diagnosis of Specific Learning Disorder with Reading. Exhibit P-5. On September 8, 2014, a legal assistant forwarded the August 22, 2014 IEE evaluation report to DCPS. Exhibit P-6.

13. Portions of the Summary of Findings in the August 22, 2014 IEE report are copied verbatim from the October 9, 2013 IEE report, including the discussion on Student's cognitive abilities, which repeated that Student's Working Memory (WMI = 65) was 30 IQ points lower than his "average" abilities in other areas. This summary omitted the IEE evaluators' July 1, 2014 IQ testing, on which Student scored Average on Working Memory. The August 22, 2014 report also copied the recommendation from the October 9, 2013 report that Student should be provided with full time individualized academic instruction in Reading, Math and Written Expression in a specialized educational setting where there is a low teacher-to-student ratio [*sic*], a small group setting and educational services to promote his educational success. Exhibits P-5, P-15.

14. On September 22, 2014, DCPS School Psychologist issued a written review of the IEE evaluations completed for Student on August 22, 2014. As part of her review, she interviewed Student's 2014-2015 school year general education teacher and observed Student in the classroom. Student's teacher also completed the BASC-2 Teacher Rating scale. The teacher's responses indicated that Student did not exhibit behavioral or attentional problems in school more often than others of his age. The

teacher reported that Student exhibits typical classroom behavior and a level of self-control similar to that of other children his age; that he displays depressive behaviors and complains of health-related problems no more than others his age; that he does not have unusual difficulty comprehending and completing schoolwork; that he does not avoid social situations and appears to be capable of developing and maintaining friendships; and that Student possesses sufficient social skills and generally does not experience debilitating or abnormal social difficulties. For Adaptive Skills, the teacher's rating indicated that Student was in the At-Risk classification range and follow-up may be necessary. The teacher reported that Student had difficulty adapting to changing situations and that he took longer to recover from difficult situations than most others his age. DCPS School Psychologist concluded that Student did not present with a learning disability and that his diagnosed ADHD did not keep him from being able to access the general education curriculum. She concluded that Student did not meet the requirements for identification as a student with a disability who required special education intervention services. Exhibit R-3.

15. At an MDT team meeting at City Elementary School on October 29, 2014, the eligibility team again determined that Student did not meet eligibility criteria as a child with an IDEA disability in need of special education and related services. Educational Advocate, who advocated for the parents at the meeting, did not agree and stated that Student should have been found eligible. Testimony of Educational Advocate, Exhibit P-2.

CONCLUSIONS OF LAW

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

as follows:

Burden of Proof

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

Analysis

– Did DCPS deny Student a FAPE by determining at a meeting on October 29, 2014 that he was not a child with a qualifying disability in need of special education and related services?

On October 29, 2014, DCPS convened an multidisciplinary team (MDT) eligibility meeting to review the reevaluations of Student conducted after the April 29, 2014 MDT team meeting and to determine whether Student qualified for special education services as a child with a disability in need of special education and related services. The October 29, 2014 MDT team again determined that Student was not eligible. Petitioner contends that this determination was erroneous and that Student should have been determined eligible as a child with an SLD, OHI or ED disability. DCPS maintains that the determination of the October 29, 2014 MDT team was correct.

“IDEA identifies a disabled student as ‘a child . . . (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.’ 20 U.S.C. § 1401(3)(A).” *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). In this case, the decision whether Student should have

been found eligible for special education is largely a matter of weighing the credibility of the respective parties' experts. Petitioner's expert, IEE Psychologist 2, opined that Student should have been found eligible for special education because he has SLD and OHI-ADHD disabilities. DCPS School Psychologist opined that Student is not eligible under either category because Student is learning at the rate expected and inattention has not been a major factor for him in the classroom.

i. Specific Learning Disability

The DCMR defines Specific Learning Disability (SLD) as,

[A] disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage.

5E DCMR § 3001.1. *See, also, 34 CFR § 300.8(c)(10).* Under the DCPS SLD Eligibility Criteria, to be eligible under the SLD classification, a student must demonstrate a discrepancy between achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation) of two years below a student's chronological age and/or at least two standard deviations below the student's cognitive abilities as measured by appropriate standardized diagnostic instruments and procedures. *See Exhibit R-12. See, also, W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont., 960 F.2d 1479, 1483 (9th Cir.1992) (State standards not inconsistent with federal standards enforceable in federal court.)*

IEE Psychologist 2 used the two standard deviations discrepancy standard for his opinion. Student's cognitive abilities were assessed by IEE Psychologist 1, using the

WISC-IV, on July 1, 2014. Student's Verbal Comprehension score was 100, in the Average range. IEE Psychologist 2 administered the Wechsler Individual Achievement Test (WIAT-III) to Student on August 21, 2014. On the WIAT-III, Student's Standard Scores for Reading were:

Basic Reading Skill	80	Below Average
Pseudo Word Decoding	82	Below Average
Word Reading	78	Below Average
Reading Comprehension	80	Below Average
Oral Reading Fluency	65	Low
Oral Reading Accuracy	74	Below Average
Total Reading Composite	74	Below Average
Basic Reading Composite	80	Below Average

See Exhibit P-5. IEE Psychologist 2 testified that a standard deviation is about 15 points. By that measure, Student's reported Oral Reading Fluency Standard Score of 65 was more than two standard deviations below his Verbal Comprehension cognitive score of 100. Student's Standard Scores on the other WIAT-III Reading achievement measures were Below Average, but less than 30 points below his tested Verbal Comprehension cognitive ability. Based upon the WIAT-III scores, IEE Psychologist 2 opined that Student has an SLD because there were areas of Reading that came up as deficits.

DCPS School Psychologist opined that Student does not have an SLD in Reading because his achievement test scores in Reading, except for the August 21, 2014 WIAT-III scores, have been solidly average and because Student is performing in the classroom along with his peers and his reading comprehension is pretty much on grade level. DCPS School Psychologist noted that Student received a Standard Score of 79 (Borderline) in Reading Achievement on the WRAT3 administered in September 2013 and a Standard

Score of 98 (Average) on the Broad Reading portion of the WJ III achievement test administered by DCPS in April 2014. Moreover, Student's general education teacher for the 2014-2015 school year indicated that Student is very capable and is in the middle-low group out of four classroom reading groups for Reading. DCPS School Psychologist questioned the validity of the August 21, 2014 WIAT-III results because the scores were not consistent with previous educational testing and the WIAT-III was administered near the end of summer vacation after Student had been out of school for over two months.

Where, as in this case, there are conflicting opinions offered by the respective parties' expert witnesses, a hearing officer must determine which testimony is entitled to more weight. *See, e.g., McAllister v. District of Columbia*, 2014 WL 2115467, 4 (D.D.C. May 21, 2014) (hearing officer entitled to make reasonable credibility determinations.) Here, I found DCPS School Psychologist to be the more credible witness. It was troubling that the August 22, 2014 IEE Comprehensive Psychological assessment, which IEE Psychologist 2 co-authored, repeated verbatim much of the Summary of Findings from the October 9, 2013 IEE psychological assessment, when the examiners had newer data from the summer 2014 IEE evaluation. For example, the co-authors repeated the statement from the October 9, 2013 report that Student's working memory was found to be in the "intellectual disability range" when Student's Working Memory tested in the "Average" range on the WISC IV test administered by IEE Psychologist 1 on July 1, 2014. I was also concerned that the August 22, 2014 IEE report repeated the recommendation from the October 9, 2013 IEE assessment, that Student be placed in a full-time special education setting, even though the IEE examiners reported that Student had only a "mild learning disability." This recommendation appears to disregard the IDEA's least restrictive environment mandate. *See, e.g., Smith v. Dist. of*

Columbia, 846 F.Supp.2d 197, 200 (D.D.C.2012) (“The IDEA requires that children with disabilities be placed in the ‘least restrictive environment’ so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate.” (citation omitted.)) The perception of “overreaching” in the August 22, 2014 IEE report does not engender confidence in the co-authors’ conclusions and recommendations.

I also found DCPS School Psychologist to be more credible because she has seen Student in his classrooms for over two and one-half years, has evaluated him several times, beginning in May 2013, has consulted with his teachers and has formally observed him in the classroom. By contrast, IEE Psychologist 2 only saw Student for two to three hours in August 2014 when he conducted the WIAT-III reassessment. He testified that he has never observed Student in the classroom or spoken with Student’s teachers. In sum, I find the opinion of DCPS School Psychologist that Student does not meet IDEA criteria for an SLD disability to be more credible than the contrary opinion of IEE Psychologist 2.

ii. Other Health Impairment (OHI)

The DCMR defines Other Health Impairment (OHI) as,

having limited strength, vitality, or alertness, including a heightened alertness to environment stimuli, resulting in limited alertness with respect to the educational environment, and adversely affecting a child's educational performance, due to chronic or acute health problems such as:
... (b) Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder

5E DCMR § 3001.1. *See, also*, 34 CFR § 300.8(c)(9).

IEE Psychologist 2 opined in his testimony that Student should qualify as a child with a disability under the OHI classification, due to his Attention Deficit-Hyperactivity

Disorder (ADHD) diagnosis. The ADHD diagnosis was apparently based upon BASC 2 ratings provided by Mother and two teachers for the September 2013 IEE psychological evaluation. These rating scales indicated that Student was At-Risk for hyperactivity and attention problems. In the March 6, 2014 HOD, Hearing Officer Ruff concluded that although Student has ADHD, the evidence was insufficient that this condition was impacting him in the classroom such that he was in need of special education. It does not appear that when the IEE psychologists reevaluated Student in the summer 2014, they obtained updated social-emotional rating scales.

In order to for a child to be eligible with an OHI disability, the child must both have the underlying health problem and “by reason thereof, needs special education and related services.” *See* 34 CFR § 300.8(a)(1). DCPS School Psychologist testified that Student’s 2014-2015 classroom teacher did not indicate that Student’s attention was a major factor in the classroom. She opined that Student did not qualify under the OHI-ADHD disability classification because the ADHD condition does not adversely affect his educational performance. For his part, IEE Psychologist 2 did not testify about how, if at all, Student’s ADHD affects him in the classroom. The IEE evaluators stated in both the October 9, 2013 and the August 22, 2014 psychological evaluation reports that it appeared that Student’s behavior at school was not requiring significant behavior management or environmental control for safety. I find, therefore, that Petitioner has failed to establish that Student needs special education and related services on account of his ADHD condition.

iii. Emotional Disturbance/Disruptive Mood Dysregulation Disorder

In her due process complaint, Petitioner also alleged that Student should have been found eligible for special education under the Emotional Disturbance (ED)

classification. In the IDEA regulations, Emotional Disturbance is defined as,

[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.

See 34 CFR § 300.8(c)(4)(i).

Petitioner's claim for Student's ED eligibility is apparently based upon the diagnosis of Disruptive Mood Dysregulation Disorder made by IEE Psychologist 1 in the October 9, 2013 Comprehensive Psychological Evaluation report. (That diagnosis was repeated in the August 22, 2014 IEE report.) However, IEE Psychologist 1 testified at the February 2014 due process hearing in Case No. 2013-0658 that Student did not have an emotional disturbance, but had an emotional reaction to academic difficulties. *See* March 6, 2014 HOD, p. 10. Neither did IEE Psychologist 2, who testified as Petitioner's expert at the due process hearing in this case, opine that Student should qualify for special education under the ED classification. (It does not appear that the IEE psychologists conducted an updated behavioral-emotional screening for their August 22, 2014 report.)

DCPS School Psychologist testified that when she reevaluated Student in April 2014, she interviewed his classroom teacher. That teacher reported that she did not have

any concerns about Student socially-emotionally, and did not have any particular concerns about his behavior. Student's current classroom teacher completed the BASC-2 Teacher Rating Scales in fall 2014. The teacher's responses on the rating scale did not indicate that Student exhibited IDEA-defined ED characteristics to the extent that his educational performance was adversely affected. I conclude that Petitioner has not established that Student requires special education and related services as result of an Emotional Disability or of his Disruptive Mood Dysregulation Disorder.

Summary

In this case, it was Petitioner's burden of proof to establish that Student requires special education and related services as a result of an IDEA disability. Although Petitioner's expert opined that Student has a qualifying SLD disability in Reading, I found more credible the testimony of DCPS School Psychologist that Student does not meet the SLD eligibility criteria. Petitioner's expert also opined that Student should be eligible based upon his ADHD diagnosis. However, I have found that the evidence does not establish that as a result of the ADHD condition, Student requires special education services. Lastly, Petitioner's counsel argued that Student could also be found eligible based upon his diagnosed Disruptive Mood Dysregulation Disorder. That contention was not endorsed by the testimony of Petitioner's expert and I found persuasive the testimony of DCPS School Psychologist that there were no specific concerns about Student's behavior in his regular education classroom. Accordingly, I find that Petitioner has not demonstrated that the October 29, 2014 MDT team erred in determining that Student was not a child with a qualifying IDEA disability in need of special education and related services.

ORDER

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

ORDERED:

All relief requested by Petitioner herein is denied.

Date: March 23, 2015

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).