

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
March 19, 2017

<i>Student</i> , ¹)	Case No.: 2017-0002
through his <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/19/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/13/17
("DCPS"),)	ODR Hearing Room: 2006
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because ■ was not found to be eligible for special education and related services at specified times and provided an appropriate Individualized Education Program (“IEP”). DCPS responded that Student was not eligible for special education as claimed, but may be assisted in other ways.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 1/3/17, the case was assigned to the undersigned on 1/4/17. DCPS filed a response on 1/13/17 and did not challenge jurisdiction. The resolution session meeting took place on 1/17/17, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 2/2/17. A final

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 3/19/17.

The due process hearing took place on 3/13/17 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present during much of the hearing.

Petitioner’s Disclosures, submitted on 3/6/17, contained documents P1 through P22, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 3/6/17, contained documents R1 through R9, which were admitted into evidence without objection. A joint exhibit, J1, was admitted without objection at the due process hearing.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. Parent
2. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
3. *Compensatory Education Advocate* (qualified over objection as an expert in Compensatory Education Plan Development and Implementation)

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see Appendix A*):

1. *Special Education Coordinator* (qualified over objection as an expert in Eligibility, Programming and Placement)
2. *LEA/SEC* (qualified without objection as an expert in Eligibility, Programming and Placement)
3. *School Psychologist* (qualified over objection as an expert in Clinical and School Psychology)

The issue to be determined in this Hearing Officer Determination is²:

Issue: Whether DCPS denied Student a FAPE by failing to find ■■■ eligible for special education and related services in: (a) September 2015, after a 6/6/15 Psycho-Educational Evaluation found that ■■■ met the criteria for both Attention Deficit Hyperactivity Disorder (“ADHD”) and Specific Learning Disorder (“SLD”), but DCPS only

² A second issue was withdrawn without prejudice by Petitioner in her 3/6/17 Notice of Withdrawal of Issue Two, as confirmed on the record at the due process hearing. The withdrawn second issue was: “Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, specifically by not conducting a Speech Language Evaluation, as recommended by the 6/6/15 Psycho-Educational Evaluation.”

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sought further assessments; (b) October 2015, after a finding of ineligibility due to inaccuracies about the level of Student's performance and failure to consider ADHD or SLD; and/or (c) December 2016, after a 9/23/16 Psycho-Educational Evaluation which again diagnosed ADHD and SLD, but DCPS again sought further assessments, to which Parent promptly agreed. (*Petitioner has the burden of persuasion.*)

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 15 school days, DCPS shall (a) find the Student eligible for special education and related services due to ■ Other Health Impairment and/or Specific Learning Disability, and (b) convene an IEP team meeting to develop and implement an appropriate IEP for Student.
3. *Withdrawn.*³
4. DCPS shall fund compensatory education services, including tutoring in math and reading comprehension, and fund any technology supports needed to implement the compensatory education services, for any denial of FAPE from September 2015 to the present.⁴

The parties were permitted to submit case citations, which Petitioner did on 3/14/17. A pending Motion to Continue was unneeded for the completion of this matter and is hereby denied.

³ Along with withdrawing the second issue above, Petitioner also withdrew an element of relief, as confirmed on the record at the due process hearing. The withdrawn relief was set forth in paragraph 3 in the Prehearing Order at 3 and was: "DCPS shall fund an independent Speech Language Evaluation and, within 15 school days after receiving the report, shall convene an IEP team meeting to review the report and revise Student's IEP as needed."

⁴ Petitioner's counsel had been put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

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Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is Age and in Grade at Public School, where ■ is attending for the third school year.⁷ Student is not currently classified as having a disability under the IDEA.⁸ Student was exited from receiving special education services for Speech and Language Impairment in January 2011.⁹

2. Psycho-educational evaluations of Student were conducted in 2015 and 2016 pursuant to court orders, with reports issued on 7/15/15 and 9/23/16.¹⁰ The 7/15/15 evaluation recommended that the results be presented to the MDT/IEP team of Public School for classification and development of an IEP for Student.¹¹ The 9/23/16 evaluation referenced a 9/25/15 Review of Independent Educational Evaluation ("IEE") which concluded that Student did not warrant special education services; the evaluation recommended an educational advocate for Student.¹²

3. Student's intellectual functioning was found to be Borderline, with a Full Scale IQ score of 75 on the Wechsler Adult Intelligence Scale – Fourth Edition ("WAIS-IV") on 9/23/16 and 78 on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") on 7/15/15, a difference which is not clinically significant.¹³

4. Academically, Student was below grade equivalency on nearly every subtest of the Woodcock-Johnson IV ("WJ-IV"): in Broad Reading ■ was about 5 years behind in 2015 and 4 years in 2016; in Broad Math ■ was about 4 years behind in 2015 and 7 years in 2016; and in Broad Written Language, ■ was 3 years behind in both 2015 and 2016.¹⁴ The

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

⁸ Parent; J1.

⁹ P3-1.

¹⁰ P2; P4.

¹¹ P2-14.

¹² P4-17.

¹³ P2-6,7; J1-2; Clinical Psychologist.

¹⁴ P4-11,12,13; J1-2.

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scores in court-ordered evaluations are generally depressed, as such evaluations are prepared on tight deadlines, often conduct testing in a single session even with many subtests, and are frequently carried out by interns.¹⁵

5. Student was particularly low on reading comprehension in the 2015 WJ-IV, so School Psychologist administered the reading comprehension subtest of the Diagnostic Assessments of Reading (“DAR”); Student demonstrated an increase of 2 standard deviations, improving over 4 grade levels and showing average reading comprehension.¹⁶ Student’s SRI reading score from 6/1/15 indicated that ■ was 5 years below grade level at that time.¹⁷ Student’s performance levels on PARCC tests in 2014/15¹⁸ and 2015/16 were “1s” in English (ELA) and a “1” and a “2” in Math.¹⁹ Student received “Fs” in several courses in recent years, but managed to make up and pass needed classes in summer school and continue advancing from grade to grade.²⁰

6. On the subtest “Word Attack,” Student reportedly increased by 50 points on ■ standard score on 9/23/16, a gain of over 13 grades from 2015.²¹ Unlike School Psychologist and Compensatory Education Advocate, Clinical Psychologist testified that she did not view that increase on Word Attack as being anomalous or raising a question of validity, which caused Clinical Psychologist to lose credibility in the view of the undersigned.²²

7. Evaluations received by Public School from the courts (and elsewhere) are reviewed to, among other things, ensure that the evaluations are reliable and valid, check that the evaluator has knowledge of the IDEA, and determine the evaluations’ relevance to special education eligibility.²³

8. The 7/15/15 Evaluation used the DSM-V to diagnose Student with ADHD and SLDs in both Reading and Math, among other diagnoses.²⁴ The DSM does not require educational impact for ADHD, so schools do not rely on the DSM, but on IDEA standards.²⁵ For determination of ADHD under the IDEA, it is necessary to see if the characteristics of the

¹⁵ School Psychologist.

¹⁶ School Psychologist; P2-10; P3-6.

¹⁷ P13-4.

¹⁸ All dates in the format “2014/15” refer to school years.

¹⁹ P16-1.

²⁰ J1-3,4; P4-15 (Student stated that summer school was necessary to be promoted to the next grade); P12-1.

²¹ J1-2.

²² Clinical Psychologist.

²³ School Psychologist; R9-1,2.

²⁴ P2-13; Clinical Psychologist.

²⁵ School Psychologist.

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child's ADHD also occur in the school setting.²⁶ The evaluators for the court did not contact Public School to gain any information about Student.²⁷

9. A 9/25/15 IEE Review of the 7/15/15 psycho-educational evaluation was conducted by School Psychologist for DCPS.²⁸ School Psychologist obtained teacher observations and administered Conner rating scales to 2 of Student's teachers to determine if they saw the same indications of ADHD in the classroom as the evaluation noted elsewhere, but the scores were not elevated; Student did not meet the criteria for ADHD in the school setting and there was no adverse impact seen on ■■■ educational performance.²⁹

10. As for SLD, the 9/25/15 IEE Review found that Student did not demonstrate a discrepancy between ■■■ achievement on the WJ-IV and ■■■ intellectual assessment.³⁰ Student's teachers indicated that when provided tier-1 interventions, Student's academic achievement was adequate for age and grade-level standards.³¹ Student can access the general education curriculum with tier-1 or tier-2 interventions.³² Student's pattern of academic strengths and weaknesses did not appear consistent with characteristics of an SLD.³³

11. A Public School IEP team for Student reviewed available information and circumstances and concluded on 10/15/15 that Student did not meet criteria to be identified as a child with an educational disability.³⁴ On 10/15/15, the IEP team completed the OHI Disability Worksheet, concluding that Student did not have a chronic or acute health problem from ADHD, or an adverse impact from a health problem.³⁵ Considering all factors and possible adverse impacts from ADHD, Special Education Coordinator was confident that the team decision was appropriate and correct.³⁶

12. On 10/15/15, the IEP team determined that Student did not have an SLD, not only based on his formal assessment, but also from "informal assessments, teacher observations, teacher reports, [and] student examples."³⁷ The IEP team found no discrepancy between Student's achievement (on the WJ-IV) and measured ability (intellectual evaluation).³⁸ The IEP team did not find any problem with Student's responses to interventions, but found that

²⁶ *Id.*

²⁷ *Id.*

²⁸ School Psychologist; P3.

²⁹ P3-4,5,6,7.

³⁰ P3-9; School Psychologist.

³¹ *Id.*

³² School Psychologist.

³³ P3-9; School Psychologist.

³⁴ P6-1 (no disability); P6-2 (no adverse effects); P6-3,4,5; J1-1.

³⁵ P9-1; Special Education Coordinator; Parent.

³⁶ Special Education Coordinator.

³⁷ P10-2.

³⁸ *Id.*

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■ was making sufficient progress when using interventions; Student did not exhibit a pattern of strengths and weaknesses that was relevant to identifying an SLD, nor did ■ exhibit characteristics of an SLD.³⁹ The IEP team concluded that Student “is able to perform comparable to ■ peers when ■ is motivated to do so.”⁴⁰ The IEP team completed the SLD Disability Worksheet with its conclusions.⁴¹

13. The 9/23/16 psycho-educational evaluation used the DSM-V to diagnose Student with ADHD, SLDs in both Reading and Math, and Unspecified Anxiety Disorder, among other things.⁴² Anxiety was new from the psycho-educational evaluation in 2015 and seemed to have “seeped” from Parent into Student’s experience.⁴³

14. DCPS required additional data in late 2016 to conduct an IEE Review of the 9/23/16 psycho-educational evaluation; additional assessments were eventually ordered and completed.⁴⁴ Following a 12/14/16 meeting on the evaluation, Parent signed the consent form for assessments on 12/18/16, but Student forgot to deliver the form and it remained in ■ backpack until January.⁴⁵

15. The IEE Review by School Psychologist of the 9/23/16 evaluation was completed on 2/24/17 and stated that Student does not meet the criteria for an SLD.⁴⁶ However, Student’s teachers did determine elevated scores on the Conner-3 in assessing evidence of ADHD, along with adverse educational impact.⁴⁷ The 2/24/17 IEE Review stated that Student does meet the eligibility criteria to receive special education services due to OHI, based on ■ ADHD.⁴⁸ The parties were exchanging dates prior to the due process hearing to schedule an eligibility meeting to consider the IEE Review and determine Student’s eligibility as a child with a disability.⁴⁹

16. Teachers indicated that Student is very capable and able to do ■ work when motivated, but often cuts class and is selective about doing classwork.⁵⁰ The special education teacher, who was Student’s case manager and co-taught ■ in the classroom, reported that she does not see any concerns in the classroom and that Student appears able to do the work but lacks motivation.⁵¹ Other teacher comments on Student’s grades included

³⁹ P10-3.

⁴⁰ P10-5.

⁴¹ P10.

⁴² P4-16; J1-1.

⁴³ P4-15.

⁴⁴ School Psychologist; Parent; LEA/SEC.

⁴⁵ Parent; School Psychologist; P18-1; R8-9.

⁴⁶ J1-9,10,11.

⁴⁷ J1-5,6,7,8.

⁴⁸ J1-9,10,11.

⁴⁹ P17-1,2,3; Parent.

⁵⁰ P3-3; School Psychologist.

⁵¹ P7-3.

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“excessive absences,” “does not complete class assignments,” “does not do homework,” “lacks initiative” (along with “excellent initiative”), “needs to study more,” and “does not participate.”⁵²

17. In 2014/15, Student was absent 27 days.⁵³ Public School sought to address Student’s attendance issues with a Student Attendance Support Plan that Student signed on 1/20/16, at a point when Student had 26 absences in 2015/16.⁵⁴ In 2016/17, Student was absent 24 days through 2/24/17.⁵⁵ Teachers viewed Student as being gregarious and a “social butterfly,” more interested in socializing with ■ friends in the hallways than in going to class and learning.⁵⁶

18. The 9/25/15 IEE Review included lengthy recommendations on how to assist in motivating Student.⁵⁷ The 2/24/17 IEE Review called for an attendance plan to improve Student’s attendance and included numerous recommendations to address ■ ADHD.⁵⁸ All teachers at Public School provide tutoring, from which Student could benefit; some teachers are paid to stay late and provide additional assistance after school.⁵⁹

19. Even apart from determination of special education eligibility and an IEP, Student could obtain support from the special education teacher who co-teaches Student; pull out services can also occur without an IEP.⁶⁰ Special Education Coordinator referred Parent and her counsel to the 504 Coordinator to see about obtaining assistance there.⁶¹ Social workers can provide services even to students who are not in special education.⁶² Student was referred to an outside clinical agency for wraparound support services in the school, along with male mentoring.⁶³

⁵² J1-5; P3-3.

⁵³ P3-3.

⁵⁴ P11-1; Parent.

⁵⁵ J1-5.

⁵⁶ School Psychologist.

⁵⁷ P3-9,10,11.

⁵⁸ J1-11.

⁵⁹ School Psychologist.

⁶⁰ School Psychologist; R7-3; P11-2 (Student “will work with” special education teacher to improve ■ grade).

⁶¹ Special Education Coordinator; P7-3; School Psychologist.

⁶² School Psychologist.

⁶³ School Psychologist; P11-3.

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Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

The Court explained in *DL v. Dist. of Columbia*, 302 F.R.D. 1, 6-7 (D.D.C. 2013):

[T]he IDEA imposes an affirmative obligation on school systems to "ensure that all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* [*Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)] at 519 (internal quotations omitted); [20 U.S.C.] § 1412(a)(3)(A). The District's laws implementing the IDEA require that once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner shall carry the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent shall have the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5E D.C.M.R. § 3030.3.

Issue : *Whether DCPS denied Student a FAPE by failing to find [REDACTED] eligible for special education and related services in: (a) September 2015, after a 6/6/15 Psycho-Educational Evaluation found that [REDACTED] met the criteria for both ADHD and SLD, but DCPS*

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only sought further assessments; (b) October 2015, after a finding of ineligibility due to inaccuracies about the level of Student's performance and failure to consider ADHD or SLD; and/or (c) December 2016, after a 9/23/16 Psycho-Educational Evaluation which again diagnosed ADHD and SLD, but DCPS again sought further assessments, to which Parent promptly agreed. (Petitioner has the burden of persuasion.)

Petitioner contends that Student should have been found eligible by DCPS for special education and related services based on the court-ordered evaluations ■ received in 2015 and 2016 diagnosing ■ as suffering from ADHD and SLDs, or at an eligibility meeting in October 2015. For the reasons set forth below, Petitioner has not met her burden of proof on this issue. *See, e.g., N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 30 (D.D.C. 2008) (compliance with IDEA procedures is first reviewed, followed by inquiry into “whether the ineligibility determination was proper under the Act,” *quoting Kroot By & Through Kroot v. Dist. of Columbia*, 800 F. Supp. 976, 981 (D.D.C. 1992)).

As an initial matter, the process for determining eligibility for special education is set forth in 34 C.F.R. 300.306, which requires a group of qualified professionals and the parent to determine whether the child has a disability by carefully considering not only the student's assessments, but significant additional information, drawing on a variety of sources and including parental input, teacher recommendations and other information. To qualify as a child with a disability under the IDEA, Student must have both a listed concern, such as OHI or SLD, and as a result, be in need of special education and related services. *See* 34 C.F.R. 300.8; *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 (D.D.C. 2008).

Here, the single psycho-educational evaluation of Student in 2015 and again in 2016 was not sufficient by itself to prove that Student was eligible for special education. The evaluator did not reach out to Student's school, nor incorporate any information about Student's experience at school. The process did not reflect the conclusions of a team of professionals, along with the child's parent, as required. Nor did analysis go beyond the evaluation to consider other information from a variety of sources, including parental input, teacher recommendations and other information, which 34 C.F.R. 300.306(c)(ii) expressly requires be documented and carefully considered.

As a general matter, DCPS implements the requirement of 34 C.F.R. 300.306 by conducting a review of evaluations received from the courts (and other independent sources) to ensure that the evaluations are reliable and valid, check that the evaluator has knowledge of the IDEA, and determine the evaluations' relevance to special education eligibility, among other things. Here, DCPS conducted IEE Reviews of each psycho-educational evaluation, analyzing the evaluations as well as conducting additional assessments and obtaining other information as part of the review. The IEE Reviews reached initial conclusions in order to provide input to an IEP team making the formal eligibility determination pursuant to 34 C.F.R. 300.306. As School Psychologist correctly emphasized in her testimony, eligibility for special education is not a matter of one evaluator's opinion,

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but a team approach which needs multiple confirming data points and assessments. The IEP team convened and made a determination in October 2015, but the team had not come together (as of the due process hearing) to make a further determination following the second IEE Review on 2/24/17. Accordingly, in the view of this Hearing Officer, DCPS's failure to find Student eligible in either September 2015 or December 2016 prior to the eligibility determinations of the IEP team, as challenged in subparts (a) and (c) of the Issue above, was not a denial of a FAPE. Petitioner failed to meet her burden of persuading this Hearing Officer otherwise.

The remaining portion of the Issue to be resolved is subpart (b), which focuses on the conclusion of the IEP team that convened on 10/15/15. The IEP team for Student conducted an eligibility determination by considering the 9/25/15 IEE Review and the 7/15/15 psycho-educational evaluation, along with related information and circumstances, in order to determine whether Student was a child with a disability pursuant to 34 C.F.R. 300.8. The IEP team concluded on 10/15/15 that Student was not eligible for special education services, focusing on OHI/ADHD and SLD, which are considered below in turn.

Considering ADHD first, in appropriate circumstances it is indisputable that ADHD may be considered an OHI disability classification under the IDEA. *See* 34 C.F.R. 300.8(c)(9)(i). But not every child with an ADHD diagnosis is eligible for special education, for Petitioner must prove that the condition adversely affected Student's academic performance. *See* 34 C.F.R. 300.8(c)(9)(ii). Here, the IEE Review included the results of Conner rating scales from 2 of Student's teachers, which concluded that they did not see the indications of ADHD in the classroom that the psycho-educational evaluation had noted in a different setting,⁶⁴ and did not see an adverse impact on Student's educational performance. Thus, the IEP team completed an OHI Disability Worksheet, concluding that Student did not have even a chronic or acute health problem from ADHD, much less an adverse impact on his educational performance.

Turning next to SLD as defined in 34 C.F.R. 300.8(c)(10), a student has an SLD under the IDEA if he has "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20 U.S.C. § 1401(30). An SLD may be found if a student "does not achieve adequately for the child's age" in basic reading skill or reading comprehension (both of which are at issue here) or if the child fails "to meet State-approved grade-level standards" in such skills. 34 C.F.R. 300.309(a). However, SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or cultural, environmental or economic disadvantage. 34 C.F.R. 300.309(a)(3); 5E D.C.M.R. § 3001.1. Further, before

⁶⁴ Among other criteria for ADHD, several symptoms of ADHD must be present in 2 or more settings, such as home, school, work, etc. *DSM-V Criteria*, R9-5.

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an IEP team may confirm a student's eligibility based on an SLD, the team must rule out that the student's underachievement was a result of a lack of appropriate instruction. 34 C.F.R. 300.309(b); *see also* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46656 (August 14, 2006).

Given these requirements, the IEP team determined on 10/15/15 that Student did not have an SLD, based not only on the formal evaluation, but also from informal assessments, teacher observations, teacher reports and student examples. The IEP team concluded that Student was not failing to achieve adequately, as there was no discrepancy between ■■■ achievement as shown by the WJ-IV and ■■■ measured abilities from ■■■ cognitive assessment. Further, the IEP team did not find any problem with Student's responses to interventions and found that ■■■ was making sufficient progress when using interventions. Nor did Student exhibit a pattern of strengths and weaknesses that was relevant to identifying an SLD or exhibiting characteristics of an SLD. *See* 34 C.F.R. 300.309(a)(2)(ii).

The IEP team concluded that Student was able to perform comparable to peers when motivated to do so. This was in line with input from Student's teachers who considered ■■■ to be very capable and able to do ■■■ work when motivated, but that ■■■ often cut class and was selective about doing classwork. In particular, the special education teacher, who was Student's case manager and co-taught ■■■ in the classroom, did not see any concerns with Student in the classroom and reported that Student appeared able to do the work, but simply lacked motivation. Teachers viewed Student as being gregarious and a "social butterfly," more interested in socializing with ■■■ friends in the hallways than in going to class and learning, which further explains ■■■ poor performance and supports the denial of eligibility.

From a thorough review of the documentation and testimony presented, this Hearing Officer does not see any basis on which to override the conclusions of the 10/15/15 IEP team concerning eligibility. Petitioner failed to convince this Hearing Officer that the IEP team denied Student a FAPE by concluding ■■■ was ineligible.

Summary

In summary, Petitioner does not prevail on subparts (a) and (c) of the single Issue in this case because the court-ordered psycho-educational evaluations in 2015 and 2016 are not a sufficient basis on their own by which to determine eligibility of Student. A needed eligibility meeting by the IEP team was held on 10/15/15, which was challenged in subpart (b), but the IEP team did not deny Student a FAPE by denying eligibility in accordance with the IEE Review of the 2015 evaluation.

At the time of the due process hearing (on 3/13/17), however, an eligibility meeting had not yet been held to consider the 2016 evaluation and recent IEE Review. The new IEE Review has shifted, based on new teacher assessments, to conclude that Student does meet eligibility criteria for OHI, which may well impact the IEP team's pending eligibility determination. As noted below, this HOD does not impact Parent's rights to challenge the

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pending eligibility determination (which was being scheduled at the time of the hearing) or other actions or inactions not at issue herein.

ORDER

Petitioner did not prevail on the Issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**. This Order is without prejudice to Parent's remedies under the IDEA if she disagrees with the outcome of the eligibility determination which had not been held at the time of the due process hearing.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
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).

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPECIAL EDUCATION (due.process@dc.gov)
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