

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

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DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Petitioner,

v.

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Respondent.

Date Issued: March 15, 2018

Hearing Officer: Peter B. Vaden

Case No: 2018-0005

Hearing Dates: March 8 and 13, 2018

Office of Dispute Resolution, Room 112  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by District of Columbia Public Schools (DCPS) against the Parent, 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 (“D.C. Regs.”). In its due process complaint, DCPS seeks a ruling that its April 8, 2017 auditory processing evaluation of Student is appropriate and, therefore, that the Parent is not entitled to a public funded Independent Educational Evaluation (IEE).

Student, an AGE youth, is a resident of the District of Columbia. DCPS’ Due Process Complaint, filed on January 9, 2018, named Parent as respondent. The undersigned Hearing Officer was appointed on January 11, 2018. My final decision in this case was originally due by February 23, 2018. On February 6, 2018, I granted

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<sup>1</sup> Personal identification information is provided in Appendix A.

DCPS' consent continuance request to extend the due date to March 27, 2018. On January 29, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On January 11, 2018, the Parent, by counsel, filed a separate due process complaint against DCPS (Case No. 2018-0006), alleging that DCPS had failed to provide an appropriate Individualized Education Program (IEP) for Student during the 2017-2018 school year and that DCPS had failed to comprehensively evaluate Student with a psychiatric evaluation. The Parent, by counsel, filed a motion to consolidate, the two cases, which was opposed by DCPS. By order issued on January 23, 2018, I denied the motion to consolidate.

The due process hearing in Case No. 2018-0005 was convened on March 8, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing was not completed that day and was carried over until March 13, 2018. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Parent appeared in person and was represented by PARENT'S COUNSEL. Petitioner DCPS was represented by DCPS AUDIOLOGIST and by DCPS' COUNSEL.

DCPS called as witnesses DCPS Audiologist and SPEECH LANGUAGE PATHOLOGIST. The parent testified and called INDEPENDENT AUDIOLOGIST and FORMER ATTORNEY as witnesses. DCPS' exhibits, marked R-1 through R-26, were all admitted into evidence without objection. Parent's exhibits, marked P-1 through P-42, were admitted into evidence without objection, except for Exhibits P-13, P-14, P-37 and P-38, to which I upheld DCPS' objections, and Exhibit P-17, which was withdrawn. Counsel for the respective parties made opening statements and closing arguments.

There was no request to file post-hearing briefs.

### **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 January 29, 2018

Prehearing Order:

Whether the auditory processing evaluation of Student, completed by DCPS on April 8, 2017 is appropriate and, if so, that the Parent is not entitled to a public funded IEE auditory processing evaluation.

For relief, DCPS requests that the hearing officer determine that the Parent is not entitled to a DCPS-funded IEE auditory processing evaluation.

### **FINDINGS OF FACT**

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

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education, as a student with an Other Health Impairment (Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder) (OHI-ADHD). Exhibit P-16. Student currently attends DCPS' CITY SCHOOL, where Student is in the GRADE.
2. Student has been repeatedly determined eligible for special education, beginning in March 2012. Student's initial eligibility classification was Developmental Delay. Exhibit P-8. In 2015, Student was determined eligible under the OHI-ADHD classification. Exhibit P-10.

3. DCPS Audiologist has worked as an Educational Audiologist for DCPS since 1999. She holds a masters degree in Audiology from Gallaudet University and Doctor of Audiology degree from the University of Florida. Exhibit R-24. DCPS Audiologist is a Certified Member of the American Speech-Language-Hearing Association (ASHA). She has conducted thousands of hearing assessments, including numerous auditory processing evaluations, and she considers auditory processing disorders as one of her specialty areas. Testimony of DCPS Audiologist.

4. Beginning on March 22, 2017, DCPS Audiologist conducted an auditory processing disorder (APD) evaluation of Student on the referral of the City School Multidisciplinary Team (MDT), done at the request of Mother and EDUCATIONAL ADVOCATE. DCPS Audiologist first met with Student's IEP team to hear the team members' concerns and discuss whether Student was an appropriate candidate for the APD evaluation. DCPS Audiologist conducted a classroom observation, interviewed Student's classroom teacher and administered an audiological evaluation and an APD evaluation. For the audiological evaluation, DCPS Audiologist administered an Otoscopy, Pure-tone testing, Speech Audiometry and a Tympanometry. For the APD evaluation, DCPS Audiologist administered the SCAN-3 Tests for Auditory Processing Disorders for Children (SCAN-3), including the Gap Detection Screening Test, the Auditory Figure-Ground Test +8dB (AFG+8), the Filtered Words (FW) Test, the Competing Words-Directed Ear (CW-DE) Test, the Competing Sentences (CS) Test. DCPS Audiologist also administered, as a supplemental auditory processing test, the Competing Words - Free Recall (CW-FR) Test. To assess auditory attention and vigilance, DCPS Audiologist administered to Student the Auditory Continuance

Performance Test (ACPT). Exhibit R-7. These SCAN-3 and ACPD testing instruments have been recognized as valid and reliable by the Task Force on Auditory Processing, originally facilitated by the Colorado Department of Education. Testimony of DCPS Audiologist, Exhibit R-17. DCPS Audiologist administered these tests in accordance with the instructions provided by the developers. Testimony of DCPS Audiologist.

5. DCPS Audiologist's findings, reported in her Initial Hearing Screening & Auditory Processing Disorder (APD) Evaluation Report dated March 31, 2017 (the APD Report), were that Student had normal hearing acuity in both ears except for a mild loss at 4kHz in the right ear only. DCPS Audiologist reported that Student should not have any hearing problems assessing the general education curriculum via audition (hearing) alone, even with the confined hearing loss at one frequency in the right ear, and concluded that hearing loss was not contributing to Student's difficulties. Exhibit R-7.

6. For the APD assessment, DCPS Audiologist reported that Student scored "within normal limits" for Student's age on all tests of auditory processing with the exception of binaural integration tests (CW-DE, CW-FR) and the ACPT. Student's scores on the CW-DE and CW-FR tests, both of which assess the same auditory processing skill, fell within two standard deviations of the mean for Student's age and were considered borderline, not disordered. Student's score on the ACPT was a "19" which suggests Student is performing significantly below Student's peers in the area of auditory attention, which is supported by Student's diagnosis of ADHD. Student's overall diagnostic summary on the SCAN-3 indicated an Auditory Processing Composite score of 84 which falls in the "Borderline" range for Student's age. Given the quantitative assessment data and taking into consideration parent/teacher input,

observation, and other educational data, DCPS Audiologist concluded that no specific deficits were found that indicated a definitive Auditory Processing Disorder based on the American Speech-Language-Hearing Association's (ASHA) criteria. Exhibit R-7.

7. On September 28, 2017, DCPS Audiologist presented her findings and recommendations to Student's IEP team at City School. Mother, Mother's former attorney (FORMER ATTORNEY), and Educational Advocate attended the meeting. Exhibit R-1, Testimony of DCPS Audiologist. At the meeting, Former Attorney told the team that she wanted to have the APD Report reviewed by an independent expert and, on behalf of the Parent, she reserved the right to request an IEE APD evaluation at a later date. Testimony of Former Attorney.

8. At an IEP team meeting for Student in November 2017, Former Attorney informed the school representatives that the Parent requested DCPS funding for an IEE APD evaluation. Testimony of Former Attorney. On November 15, 2017, DCPS' Counsel wrote Former Attorney by email that DCPS was considering whether DCPS would file a due process complaint to defend its APD evaluation of Student and that the DCPS would have an answer after the Thanksgiving break. Exhibit P-42.

9. On January 9, 2018, DCPS filed its due process complaint against the parent in this case, to request a hearing under 34 CFR § 300.502(b)(2)(i) to show that its APD evaluation of Student is appropriate. Parent filed her response to the due process complaint on January 11, 2018, in which she alleges that she believes the DCPS APD Evaluation was not comprehensive enough to address or clarify Student's auditory processing difficulties and how they are impacting Student in the classroom setting.

## **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**

As provided in the D.C. Special Education Students Rights Act of 2014, except where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by DCPS, the party who filed for the due process hearing, DCPS in this case, bears the burden of production and the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### **Analysis**

Was the Auditory Processing Evaluation of Student completed by DCPS on March 31, 2017<sup>2</sup> appropriate?

DCPS Audiologist completed an auditory processing disorder (APD) evaluation of Student in March 2017. She presented her report to Student's IEP team in September 2017. At an IEP team meeting in November 2017, the Parent's attorney requested an Independent Educational Evaluation (IEE) auditory processing reevaluation of Student at DCPS' expense. Rather than grant the IEE request, DCPS elected to request a due process hearing to show that DCPS Audiologist's APD evaluation of Student was appropriate. The sole issue in this case is whether DCPS Audiologist's March 2017 APD evaluation of Student was appropriate. DCPS holds the burden of persuasion on this

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<sup>2</sup> The APD report is dated March 31, 2017. DCPS Audiologist apparently transmitted the report by facsimile to DCPS on April 8, 2017. *See* Exhibit R-7.

issue.

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. An independent evaluation is one “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 C.F.R. § 300.502(a)(3)(i). The limited right arises only after the agency has procured an evaluation with which the parent “disagrees.” 34 C.F.R. § 300.502(b). The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must either provide or, as DCPS has done in this case, file a due process complaint to establish that its evaluation is “appropriate.” *See* 34 CFR § 300.502(b)(2). If the agency’s evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. 34 C.F.R. § 300.502(b)(3). *See South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014)

Generally, when a child has been evaluated for special education eligibility and the appropriateness of the agency’s evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child’s needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child’s needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. § 300.304(b)(1–3), (c)(4, 6). Special education eligibility is not disputed for this student, who had been receiving special education services since 2012. Student’s current

disability classification, OHI-ADHD, was determined in 2015. The issue in this case is whether DCPS' supplemental evaluation, to assess whether Student also has an auditory processing impairment, was appropriate.

When a student is evaluated for a specific disability, IDEA regulations require the following of the education agency: 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; Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; Use technically sound instruments which are selected and administered so as not to be discriminatory on a racial or cultural basis; and Use the instruments for the purposes for which the assessments or measures are valid and reliable, administered in accordance with any instructions provided by the producer of the assessments. The agency must also ensure that the assessments are administered by trained and knowledgeable personnel. *See* 34 CFR § 300.304(b), (c).

Importantly, the “appropriateness” of an evaluation depends upon the methodology, not its outcome. “The key to an educational evaluation is the methodology employed. *See L.S. v. Abington Sch. Dist.*, Civ. A. No. 06–5172, 2007 WL 2851268 (E.D.Pa. Sept. 28, 2007) (“The parents here simply cannot argue that the evaluation is inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate, because that is the only provision in the law.”) Moreover, IDEA evaluations depend upon the exercise of professional judgment, which is entitled

to a reasonable degree of deference. *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005) ('We recognize, of course, that at all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.')

*Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D. Pa. Sept. 16, 2015), report and recommendation adopted sub nom. *Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015).

I find that DCPS has met its burden of persuasion that its March 2017 APD evaluation of Student was appropriate. First the APD evaluation was administered by a trained and knowledgeable professional. DCPS Audiologist is a Certified Member of the American Speech-Language-Hearing Association (ASHA). She has worked as an Educational Audiologist for DCPS since 1999. She holds a Masters in Science degree in Audiology from Gallaudet University and a Doctor of Audiology degree from the University of Florida. Exhibit R-24. DCPS Audiologist has conducted 1000's of hearing assessments, including numerous auditory processing evaluations and she considers APD as one of her specialty areas.

For the APD evaluation of Student, DCPS Audiologist met with Student's IEP team to hear their concerns, conducted a classroom observation, interviewed Student's classroom teacher and obtained information from Student's older sister who accompanied Student to the evaluation. In her formal testing, DCPS Audiologist used a battery of tests including an audiologic (hearing) evaluation, the SCAN-3 battery for auditory processing disorders and the Auditory Continuous Performance Test (ACPT) for auditory attention and vigilance. These testing instruments have been recognized as valid and reliable by the Task Force on Auditory Processing, originally facilitated by the

Colorado Department of Education. DCPS Audiologist administered the tests in accordance with the instructions provided by the developers. In sum, DCPS Audiologist's methodology met the requirements of the IDEA regulations.

The Parent's expert, Independent Audiologist, reviewed DCPS Audiologist's APD evaluation of Student in the fall of 2017. Independent Audiologist opined that DCPS Audiologist conducted an appropriate evaluation of Student, but he testified that the evaluation had the following shortcomings:

- Student's "Noise" score on the Speech Audiometry (Word Recognition Ability) audiological test was invalid because DCPS Audiologist used a 80 dBHL presentation level for word recognition.
- To assess for APD, DCPS Audiologist administered only the SCAN-3 battery of tests and left out the SCAN-3 Time-Compressed Sentences Subtest;
- DCPS Audiologist conducted a temporal resolution screening, the SCAN-3 Gap Detection Screening subtest, which used tonal (nonverbal) stimuli and did not use verbal stimuli;
- DCPS Audiologist conducted a listening attention screening, the ACPD, which did not include a "Vigilance" measure;
- DCPS Audiologist's testing did not include measures for "Auditory Organization," "Auditory Oversensitivity" or "Auditory Overload" and
- DCPS Audiologist did not address Student's Reading concerns.

Independent Audiologist recommended that Student should have another auditory processing evaluation that looks further than the SCAN-3 and the other tests administered by DCPS Audiologist.

DCPS Audiologist persuasively rebutted Independent Audiologist's opinion. With regard to the Word Recognition test, DCPS Audiologist explained that she used the "uncomfortable" 80 dBHL presentation for word presentation to assess whether Student could handle louder speech, because a lot of people have auditory deficits that do not

show in quiet settings. She reported that Student did not have a problem understanding speech in quiet, in noise or with auditory Figure-Ground (messages in the presence of background noise). With regard to the SCAN-3 auditory processing battery, DCPS Audiologist stated that the Time-Compressed Sentence measure is an optional subtest and not part of the SCAN-3 standard battery. She did not deem that this optional subtest was warranted to assess Student for APD. Independent Audiologist explained that the SCAN-3 Gap Detection Screening measures the ability to perceive sounds with temporal separation and that spoken words are not needed for that subtest – but that verbal stimuli were used in other parts of her APD evaluation of Student. For the ACPT attention screening test, which Student failed, DCPS Audiologist testified that Student’s reported “Prevalence” result, 5% Percentage of Sample, indicated a Vigilance Decrement score of 4, which confirmed that Student’s auditory attention got worse over time.

DCPS Audiologist characterized Independent Audiologist as having a very broad view of what constitutes an auditory processing disorder. She testified that she has reviewed more than 50 IEE Auditory Processing evaluations conducted by Independent Audiologist and that she did not recall a single case where Independent Audiologist did not find that the child had an auditory processing disorder. DCPS Audiologist testified that the terms “Auditory Organization,” “Auditory Oversensitivity” and “Auditory Overload,” used by Independent Audiologist, are considered by ASHA to be higher order cognitive-communication and/or language-related functions and are not included in the ASHA definition of Central Auditory Processing. DCPS Audiologist also asserted that a reading disorder should be associated with a speech and language deficit or learning disability, separate from the auditory processing realm. Independent Audiologist

agreed that his definition of auditory processing is broader than the definition recognized by ASHA<sup>3</sup> and encompasses those things that the entire central nervous system does.

The approaches of these two experts to testing for APD clearly differ and it is not up to this hearing officer to determine which methodology is superior. What matters for my analysis is whether DCPS established that DCPS Audiologist followed the evaluation requirements of the IDEA Regulations, 34 CFR § 300.304(b) and (c), and, specifically, that DCPS' Audiologist's methodology was adequate. I find that DCPS has met that burden and I conclude that DCPS' March 2017 auditory processing evaluation of Student was appropriate. Therefore, the Parent does not have the right to an IEE auditory processing disorder evaluation of Student at DCPS' expense. *See* 34 CFR § 300.502(b)(2).

### **ORDER**

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

ORDERED:

1. The Parent does not have the right to an IEE auditory processing disorder evaluation of Student at DCPS' expense and
2. All other relief requested by the parties herein is denied.

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<sup>3</sup> “(Central) auditory processing disorder [(C)APD] refers to difficulties in the processing of auditory information in the central nervous system (CNS) as demonstrated by poor performance in one or more of the following skills: sound localization and lateralization; auditory discrimination; auditory pattern recognition; temporal aspects of audition, including temporal integration, temporal discrimination (e.g., temporal gap detection), temporal ordering, and temporal masking; auditory performance in competing acoustic signals (including dichotic listening); and auditory performance with degraded acoustic signals.” American Speech-Language-Hearing Association, *(Central) Auditory Processing Disorder—The Role of the Audiologist* [Position Statement] (2005).

Date: March 15, 2018

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  
OSSE Division of Specialized Education  
DCPS Resolution Team