

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

OSSE
Office of Dispute Resolution
March 05, 2019

PARENT,
on behalf of STUDENT,¹

Date Issued: March 5, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0295

PUBLIC CHARTER SCHOOL,

Hearing Dates: February 11 and 28, 2019

Respondent.

Office of Dispute Resolution
Rooms 423, 111
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 (FATHER), 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 his due process complaint, Petitioner alleges that Respondent PUBLIC CHARTER SCHOOL (PCS) denied Student a free appropriate public education (FAPE) by exiting Student from special education in fall 2018.

Petitioner’s Due Process Complaint, filed on November 13, 2018, named PCS as Respondent. The undersigned hearing officer was appointed on November 14, 2018. The parties met for a resolution session meeting on November 30, 2018 but did not

¹ Personal identification information is provided in Appendix A.

reach an agreed resolution to the dispute. On January 2, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was set for February 11 and 28, 2019, the first dates mutually available to counsel and the parties. In order to accommodate these hearing dates, I granted PCS' unopposed motion to extend the final decision due date from January 27, 2019 to March 15, 2019.

The due process hearing was held before the undersigned impartial hearing officer on February 11 and February 28, 2019 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 appeared in person and was represented by PETITIONER'S COUNSEL. Respondent PCS was represented by DIRECTOR and by PCS' COUNSEL.

Counsel for the respective parties made opening statements. Father testified and called INDEPENDENT SLP, GRANDMOTHER and PROGRAM SPECIALIST as witnesses. PCS call as witnesses PCS SLP, Director and SCHOOL PSYCHOLOGIST. Petitioner's Exhibits P-1 through P-10 were admitted into evidence without objection. PCS' Exhibits R-1 through R-28 were admitted into evidence without objection. Exhibit R-29 was not offered. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written 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 issue for determination, as certified in the January 3, 2019 Prehearing Order, is:

Whether in fall 2018, PCS' eligibility team made an erroneous determination that Student was not a child with a disability eligible for special education and related services.

For relief, the parent requests that the hearing officer order the PCS eligibility team to reconvene and determine that Student is eligible for special education and related speech and language services. In his opening statement, Petitioner's Counsel withdrew the parent's request for compensatory education because PCS has continued to provide Student speech and language services since the contested eligibility determination.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child is a resident of the District of Columbia, where Student resides with MOTHER. Testimony of Father.
2. PCS is a charter school local education agency in the District of Columbia. Hearing Officer Notice. Student has attended PCS since the 2015-2016 school year. Student is currently in Grade X at PCS. Testimony of Director of Student Support.
3. In December 2015, the PCS eligibility team initially found Student eligible for special education services on the basis of a Speech or Language Impairment (SLI) disability. Exhibit R-2. In the 2015-2016 school year, Student received speech-language therapy for 30 minutes per week. Exhibit P-2.
4. PCS SLP provided speech-language services to Student after Student's first

year of therapy. Student was doing well and showing quick progress. Testimony of PCS SLP. In the 2017-2018 school year, Student's speech-language therapy services were reduced to 30 minutes every other week. Exhibit P-2.

5. Student's March 7, 2018 PCS Individualized Education Program (IEP) identified only Communication/Speech and Language as an IEP area of concern and provided for Student to receive one hour per month of Speech-Language Pathology, as special education services. Exhibit P-1.

6. At the beginning of the 2018-2019 school year, Mother telephoned Father to inform him that Student was being retained in Grade X by PCS. Father contacted Grandmother, who is a special education teacher for another charter school. Upon learning that Student had been retained, Grandmother called for a multidisciplinary team (MDT) meeting at PCS. The MDT meeting was convened on September 4, 2018 to discuss Student's academic progress and determine areas for which Student should have special education reevaluations. Director stated at the meeting that Student's Math was on track, but that Student's retention in Grade X was centered around Reading and that the areas holding Student back were reading accuracy and word segmentation. Exhibit P-2.

7. Over three days in September and October 2018, SLP ASSESSOR conducted a speech-language reevaluation of Student. In her October 15, 2018 report, SLP Assessor reported that Student's pragmatic (social) language appeared appropriate. Student's speech articulation was age and dialect appropriate, and Student was considered intelligible by adults. Student's expressive vocabulary skills had maintained or improved in comparison to peers, from the 39th percentile to the 50th percentile. On the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), it appeared

that Student had also made gains in expressive language skills, from the 7th percentile to the 23rd percentile. In formal language testing, many of Student's standard scores fell in the Average range indicating performance to be similar to same age/gender peers. Student demonstrated the most difficulty on tasks requiring verbal memory with no repetitions, little context, and no picture supports and, compared to peers, Student may have some difficulty retaining information and following classroom directions. Overall, Student's language skills were judged to be within the borderline to low average range. Student demonstrated difficulty with some features (pronouns, conjunctions) in conversational speech that would be age-appropriate. Student's classroom weaknesses were seen during guided reading. Student's teacher reported that segmenting words was a challenge and that Student had a hard time sustaining attention during reading, spelling and writing time. Student's biggest challenge in the classroom was ignoring distractions and maintaining focus. SLP Assessor concluded that Student presented with overall borderline to average language skills, with mild weaknesses in receptive language. Exhibit R-12.

8. In October 2018, School Psychologist administered a psychoeducational assessment of Student. The assessment included standardized cognitive and achievement testing, behavioral rating scales, interviews with Father, teachers and Student and classroom observations. Student's scores on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), a test of intellectual ability, were notable for an Extremely Low score for Processing Speed and a Very Low score for Working Memory. Other WISC-IV scores were Low Average to Average. School Psychologist reported that Student's rote memory skills were less developed and that Student presented with significantly underdeveloped processing speed skills. On the Wechsler

Individual Achievement Test – Third Edition (WIAT-III), a standardized achievement test, Student’s foundational reading, writing, and mathematics skills appeared to be intact. However, difficulty with correctly identifying some letter sounds likely impacted Student’s ability to achieve a higher score on spelling tasks. Student’s listening comprehension skills appeared to be slightly underdeveloped in comparison to same age peers. School Psychologist reported that more than likely, slower processing speed and difficulty with quickly storing and recalling information also contributed to performance issues on the listening comprehension tasks and that underdeveloped processing and working memory skills likely impacted Student’s performance on the oral expression tasks. School Psychologist concluded that Student did not present with significant learning deficits. Based on behavior rating scales responses provided by Father and two teachers, Student did not appear to present with significant behaviors outside the school setting, but Student appeared to struggle with coping with negative emotion in the classroom, which resulted in acting-out behaviors. School Psychologist recommended that Student would benefit from school-based counseling services to help strengthen the ability to cope and self-regulate. Exhibit R-13.

9. PCS engaged an occupational therapist to conduct an occupational therapy evaluation of Student in September 2018. The occupational therapist concluded that based on her assessment, occupational therapy services were not recommended for Student. Exhibit R-11.

10. On November 7, 2018, PCS convened an eligibility team meeting to consider Student’s continued eligibility for special education services. Mother, Grandmother and Program Specialist participated in the meeting. The team discussed the results of PCS’ recent occupational therapy, speech and language and psychological

assessments of Student. PCS SLP went through the eligibility criteria for Speech or Language Impairment (SLI) and the team determined that Student was not eligible for special education under the SLI disability category. School Psychologist went through the disability worksheet for Other Health Impairment (OHI) and noted that Student did not meet OHI criteria. School Psychologist led a discussion of criteria for Specific Learning Disability (SLD) and stated that Student did not meet criteria based on the discrepancy model. Program Specialist recommended that the team consider the Response-to-Intervention (RTI) model. The team discussed that Student showed stalled growth in the second half of the 2017-2018 school year, but had shown growth in the 2018-2019 school year. The school members of the eligibility team decided that Student did not meet criteria under the SLD-RTI model and that Student was not eligible for special education services. The parents and their representatives did not agree that Student should not be found eligible for special education based on the SLD-RTI model. Exhibit R-14. On November 7, 2018, PCS issued a prior written notice to Mother that the school-based members of Student's eligibility team determined that Student was ineligible for special education under the SLD category. Exhibit R-17. By a dissent letter of November 13, 2018, Program Specialist wrote PCS that the parents and their representatives believed that Student required specialized instruction and related services for communication and social/emotional/behavioral support. Exhibit R-18.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. Petitioner must bear the burden of persuasion in this case. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

Did PCS' eligibility team made an erroneous determination in fall 2018 that Student was not a child with a disability eligible for special education and related services?

Student was initially determined eligible for special education services in December 2015 on the basis of a Speech or Language Impairment (SLI) disability. For the 2018-2019 school year, PCS retained Student in Grade X due to inadequate process in Reading, specifically with reading accuracy and word segmentation. The parents were concerned that Student was retained and that PCS had not put supports in place so that Student would not have to repeat Grade X. At the beginning of the 2018-2019 school year, the parents requested an MDT meeting to review Student's academic progress and to consider special education reevaluations. Following a meeting on September 4, 2018, PCS had Student reevaluated with psycho-educational, speech-language and occupational therapy assessments. After these assessments were completed, at a meeting

on November 7, 2018, the PCS eligibility team determined that Student was no longer eligible for special education. The parents and their representatives disagreed with this determination, leading to Father's bringing his due process complaint in this case.

To be eligible for special education services, a child must be evaluated as having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8. *See Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). The IDEA requires that before making a change in eligibility, the student be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 CFR §§ 300.304(b)(4), 300.305(e). It is up to each state to develop criteria to determine whether a child has an IDEA disability. *See U.S. Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006).

At the November 7, 2018 eligibility meeting for Student, the team members considered whether Student met criteria for SLI, SLD or OHI disabilities. The school members of the team determined that Student did not meet eligibility criteria for any of these disabilities. The parents disagreed, and their advocate, Program Specialist, submitted a letter of dissent. At the due process hearing, Petitioner's experts, Program Specialist and Independent SLP, both opined that Student has an SLI disability for which Student needs specialized instruction and/related services.

PCS' worksheet for the SLI disability, based upon federal and District of Columbia regulations,² sets forth the following eligibility criteria:

1. The Speech-Language Pathologist determines the presence or absence of speech and language impairment based on DC rules and regulations for special education in at least one of the following areas:

Articulation Impairment: The student's speech has atypical production of speech sounds characterized by substitutions, omissions, additions or distortions that interferes with intelligibility in conversational speech and obstructs learning successful verbal communication in the educational setting. The term may include the atypical production of speech sounds resulting from phonology, motor or other issues.

Fluency Impairment: Interruption in the flow of speech characterized by an atypical rate, or rhythm, and/or repetitions in sounds, syllables, words and phrases that significantly reduces the speaker's ability to participate within the learning environment. Excessive tension, struggling behaviors, and secondary characteristics may accompany fluency impairments. Secondary characteristics are defined as ritualistic behaviors or movements that accompany dysfluencies. Ritualistic behaviors may include avoidance of specific sounds in words. Fluency impairment includes disorders such as stuttering and cluttering. It does not include dysfluencies evident in only one setting or reported by one observer.

Language Impairment: Impaired comprehension and/or use of spoken language which may also impair written and/or other symbol systems and is negatively impacting the student's ability to participate in the classroom environment. The impairment may involve, in any combination, the form of language (phonology, morphology, and syntax), the content of language (semantics), and/or the use of language in communication (pragmatics) that is adversely affecting the student's educational performance.

Voice/Resonance Impairment: Interruption in one or more processes of pitch, quality, intensity, or resonance resonance that significantly reduces the speaker's ability to communicate effectively. Voice/resonance impairment includes aphonia, or the abnormal production of vocal quality, pitch, loudness, resonance, and/or duration, which is inappropriate for an individual's age and/or gender.

² At the due process hearing, Petitioner did not challenge the validity of the eligibility criteria used by PCS to determine whether Student has an IDEA disability.

and

2. [The impairment adversely] impacts the student's educational performance to the extent that the student requires specially designed instruction.
3. The team determines that the student is a student with a disability and is eligible for special education and appropriate specialized Instruction needed to access the student's curriculum.
4. The team has reviewed documented results of at least two or more measures or procedures, administered in the area of impairment and documentation of adverse effect.

Exhibit R-15.

At the November 7, 2018 eligibility meeting, the PCS eligibility team concluded that in Student's case, the speech-language pathologist had not determined the presence of a speech and language impairment in any of the four speech and language impairment areas, that is, in Articulation Impairment, Fluency Impairment, Language Impairment or Word/Resonance Impairment. The eligibility team, with the parents' representatives dissenting, determined, therefore, that Student did not meet SLI eligibility criteria.

PCS' speech and language expert, PCS SLP, testified at the due process hearing that she was the clinical supervisor for the speech-language pathologist who conducted Student's October 2018 Speech-Language reevaluation. PCS SLP had conducted Student's 2015 speech and language evaluation and was previously Student's speech-language pathology services provider. PCS SLP explained that the October 2018 evaluation results showed that Student's Articulation was in the Average range based on the Goldman-Fristoe Test of Articulation (GFTA-3). Although Student demonstrated mild weakness in sound production, it did not interfere with intelligibility. For Fluency, she reported that Student did not show signs of stuttering or other fluency impairment. With regard to a possible Language Impairment, Student's scores on the CELF-5 fell

within the Low Average to Borderline range, but the respective scores were all above the cut-off score of 80 recommended by the CELF developers to determine if a child has a language impairment. PCS SLP also asserted that these language deficits were not affecting Student's ability to participate in the classroom environment. Finally, PCS SLP reported that Student had no concerns in the Voice/Resonance area. Based on these data, PCS SLP opined that Student did not meet criteria for an IDEA SLI disability and that Student did not need speech-language services at school in order to access the general education curriculum.

Petitioner's speech expert, Independent SLP, relied upon the same October 2018 PCS Speech-Language Evaluation report. This expert opined that based on her review of the evaluation, notably Student's scores on the CELF-5, Student is a child with an SLI disability and that speech-language services ought to have been provided. She opined that Student's CELF-5 subtest component scores for Following Directions (Scaled Score - 6), Recalling Sentences (Scaled Score - 5) and Understanding Spoken Paragraphs (Scaled Score - 6) definitely indicated that Student needed attention.

As between these two speech experts, I found PCS SLP to be the more credible witness because of her greater familiarity with Student's speech and language profile. She had previously provided speech-language services to Student and had observed Student's "quick progress" in this area. PCS SLP had also supervised Student's most recent speech and language assessment and had participated in the eligibility team's deliberations. For her part, Independent SLP has not observed Student in the classroom or obtained input from Student's teachers. Nor did she rebut PCS SLP's opinion that Student's language weaknesses do not negatively impact Student's ability to participate in the classroom environment.

Program Manager, called by Petitioner as an expert in special education programming and placement, also opined that Student required an IEP, focusing on a language impairment, to address receptive and expressive language challenges, word retrieval and word segmentation. She further opined that Student required behavioral support related services in line with the recommendation of School Psychologist that Student would benefit from school-based counseling services to help strengthen the ability to cope and self-regulate in the classroom. As concerns Student's continued eligibility as a child with an SLI disability, I discount Program Manager's opinion because communications/speech-language is outside the scope of her area of expertise.

With regard to Student's possible eligibility under the OHI or SLD disability classifications, the eligibility team ruled out OHI based on Attention Deficit-Hyperactivity Disorder (ADHD) because the parents had not observed inattention behaviors at home. PCS' expert, School Psychologist, opined that her October 2018 psychological evaluation of Student did not indicate Student had an SLD under discrepancy model or Response-to-Intervention (RTI) model criteria. Neither of Petitioner's experts opined that Student met eligibility criteria under either the OHI or SLD disability classification.

In summary, after weighing the credibility of the respective witnesses in this case and according some deference to Student's educators at PCS, *see County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005) (opinions of the professional educators are entitled to respect), I conclude that Petitioner has not met his burden of persuasion that the PCS eligibility team's November 7, 2018 determination that Student was no longer eligible for special education and related services was erroneous. Therefore, Petitioner is not entitled to the requested relief.

ORDER

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

ORDERED:

All relief requested by the Petitioner herein is denied.

Date: March 5, 2019

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 - SPED
PCS Resolution Team