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OSSE
Office of Dispute Resolution
September 19, 2023

Confidential

Parent on Behalf of Student,	CORRECTED ¹ HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates: August 1, 2023 August 29, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency "LEA")	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2023-0089	
Date Issued: September 7, 2023	

¹ This Corrected HOD corrects typographical errors and removes personal identifiable information. No substantive changes have been made. The HOD issuance date of September 7, 2023, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student attended a DCPS school ("School A") from at least school year ("SY") 2015-2016 through SY 2022-2023.

DCPS and Student's mother ("Petitioner") entered into a settlement agreement in February 2023, in which DCPS agreed, among other things, to conduct a comprehensive psychological evaluation of Student. DCPS conducted a speech-language reevaluation, in February 2023, a comprehensive psychological evaluation in March 2023, and an occupational therapy screening report in May 2023.

On April 14, 2023, DCPS convened an eligibility meeting at which the evaluations and other data were reviewed. DCPS determined that Student was not eligible for special education. A team concluded that Student did not meet the criteria for the disability classification of specific learning disability ("SLD"). Petitioner disagreed with that determination and filed the current due process complaint to challenge DCPS's ineligibility determination. Petitioner asserts the DCPS denied Student a free appropriate public education ("FAPE") by not finding Student eligible under the specific learning disability ("SLD") classification and because DCPS did not conduct an occupational therapy ("OT") evaluation.

Relief Sought: Petitioner seeks a finding that DCPS denied Student a FAPE and that the undersigned independent hearing officer ("IHO") order DCPS to find Student eligible and immediately convene a team meeting to develop an individualized educational program ("IEP"), issue authorization for an independent education evaluation ("IEE") for an occupational therapy evaluation, reconvene a team meeting upon completion of the evaluation to review and revise Student's IEP. Petitioner also seeks compensatory education and seeks to reserve the right to request additional compensatory education upon completion of the OT evaluation.

DCPS's Response to the Complaint:

DCPS filed a response to the complaint on May 26, 2023. In its response, DCPS stated, *inter alia*, the following:

Student is enrolled at School A for the SY 2022-2023. Student is not identified as a student with a disability. Following the March 2023 comprehensive psychological evaluation and the occupational therapy screening, the multidisciplinary team ("MDT") determined that Student was not eligible for special education services. DCPS has attempted to set a meeting to discuss

the OT screening report, but the Petitioner has refused. DCPS maintains that Student is not eligible for special education services based on the current data. DCPS did not fail to provide Student a FAPE.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on May 30, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on May 16, 2023. The 45-day period began on June 16, 2022, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on July 30, 2023. One party was unavailable on the hearing dates offered by the Hearing Officer. DCPS filed a motion to continue the hearing and extend the HOD due date. The HOD is now due September 7, 2023.

The IHO conducted a pre-hearing conference on June 9, 2023, and issued a pre-hearing order (“PHO”) on June 15, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUE: ²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to identify Student as eligible for special education services under the classification of SLD based on the data that was available at the eligibility meeting held on April 14, 2023, and/or to timely develop an IEP for Student.
2. Did DCPS deny Student a FAPE by failing to comprehensively evaluate Student by failing to conduct or agreeing to conduct an OT evaluation considering the results of Student's comprehensive psychological evaluation?

DUE PROCESS HEARING:

The Due Process Hearing was convened on August 1, 2023, and August 29, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 39 and Respondent’s Exhibits 1 through 50) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

² At the outset of the due process hearing, the IHO reviewed the issues to be adjudicated from the PHO. The parties agreed to the two issues as stated herein as the issues to be adjudicated.

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁴ Petitioners presented four witnesses: (1) Petitioner and three other witnesses, all of whom testified as experts; (2) an independent occupational therapist, (3) an educational advocate, and (4) an independent psychologist. Respondent

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on both issues adjudicated.⁵ Based on the evidence adduced, the IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student was denied a FAPE for failure to determine Student eligible for special education based upon the data that was reviewed and for failure to conduct an OT evaluation. However, the IHO did not conclude that Student is eligible under the SLD classification. Rather, the IHO directs in the order below that DCPS provide Petitioner authorization to obtain an independent psychoeducational evaluation and an occupational therapy evaluation and to convene a meeting to review those evaluations and other available updated data and reconsider Student's eligibility for special education. Because Student is still not eligible for special education, the IHO did not grant any other requested relief.

FINDINGS OF FACT:⁶

1. Student resides with Petitioner, Student's parent, in the District of Columbia. DCPS is Student's LEA. Student attended School A, a DCPS school, from at least school year SY 2015-2016 through SY 2022-2023. (Petitioner's testimony)
2. In 2016, Student was initially determined eligible for special education and related services pursuant to IDEA with a disability classification of speech-language impairment ("SLI").

presented three witnesses, all of whom testified as experts: (1) a DCPS occupational therapist, (2) a DCPS psychologist, and (3) the DCPS School A LEA representative and special education teacher. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁵ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 USC § 1415(f) and 20 USC § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

Petitioner consented to the initial provision of special education services on June 6, 2016. (Petitioner's Exhibit 29)

3. In May 2019, DCPS reconfirmed Student's eligibility. DCPS convened an annual IEP review meeting on December 3, 2020. Student's December 3, 2020, IEP prescribed 15 minutes per month of speech-language pathology outside general education. (Respondent's Exhibit 3)
4. On December 3, 2020, DCPS issued a prior written notice ("PWN") informing that Student would receive 15 minutes per month of consultative services to monitor articulation skills in the classroom until reevaluation when in-person school resumed during the COVID-19 pandemic. (Respondent's Exhibit 4)
5. School A convened an annual IEP review meeting on December 2, 2021. Student's December 2, 2021, IEP prescribed 15 minutes per month of speech-language pathology outside general education. (Respondent's Exhibit 12)
6. On December 22, 2021, DCPS issued a PWN stating that the MDT proposed to conduct a formal assessment to determine Student's eligibility. (Respondent's Exhibit 15)
7. DCPS conducted a speech and language reevaluation on January 20, 2022. The evaluating speech-language pathologist ("SLP") compared the reevaluation with Student's previous evaluations from 2016. The SLP noted that Student's speech skills had improved. During Student's initial assessment Student's speech skills were moderately delayed. In January 2022 Student's speech skills were within age expectations. Based on the data, the SLP concluded that Student's communication skills did not have a significant negative impact on Student's educational performance and academic achievement. (Respondent's Exhibit 16)
8. On May 13, 2022, DCPS issued an evaluation summary report that concluded that Student no longer met all the required criteria for SLI. (Respondent's Exhibit 19)
9. On May 23, 2022, DCPS issued a PWN that stated that based upon the reevaluation, the team proposed to not move forward with SLI as a disability as Student had mastered speech goals and had completed service.⁷ (Respondent's Exhibit 22)
10. On May 30, 2022, DCPS acknowledged a referral letter from Student's parent requesting that Student be evaluated for special education. (Respondent's Exhibit 24)
11. On June 21, 2022, DCPS prepared an analysis of existing data ("AED") report that noted Student's i-Ready scores from May 20, 2022, which placed Student on grade level overall

⁷ The May 23, 2022, DCPS eligibility determination report was contradictory. On the one hand Student performed within the average range on the reevaluation assessments, but it also stated that Student qualified for special education as a student with SLI (articulation). DCPS later issued a PWN dated January 3, 2023, correcting the discrepancy and stating that Student did not qualify for special education.

in numbers and operations, and algebra and one grade level below in geometry. (Respondent's Exhibit 26)

12. On June 29, 2022, DCPS issued a PWN stating that the MDT proposed to not move forward with formal assessments. (Respondent's Exhibit 26)
13. DCPS held an eligibility meeting and issued a final eligibility report dated June 29, 2022, concluding that Student did not have a disability. Petitioner and her attorney participated in the eligibility meeting. (Respondent's Exhibit 27)
14. On October 20, 2022, DCPS acknowledged another referral from Petitioner that Student be evaluated for special education. (Respondent's Exhibit 30)
15. DCPS completed an AED report for Student dated November 17, 2022. The AED cited Student's classroom-based I-Ready assessments for SY 2021-2022. The AED report noted the following: Grade Level Scoring Band in I-Ready for Student's grade for SY 2021-2022 was listed as (465-526). In math, Student's beginning of year ("BOY") score from September 13, 2021, was 425, which placed Student overall at two years below grade in the sub-areas of Number and Operations, Algebra and Algebraic Thinking, and Geometry. In the sub-area of measurement and data Student was one grade level below. (Respondent's Exhibit 31)
16. Student's middle of year ("MOY") math score from January 20, 2022, was 430, placing Student overall two grade levels below with sub-scoring in Numbers and Operations. In Algebra and Algebraic Thinking and Geometry at one grade level below, and with Measurement and Data scoring at three grade levels below. (Respondent's Exhibit 31)
17. Student's end-of-year ("EOY") I-Ready math score from May 20, 2022, was 486, which placed Student overall on grade level. In the sub-areas of Numbers and Operations, Algebra and Algebraic Thinking, and Measurement and Data Student placed at mid-grade level. Student scored one grade level below in Geometry. (Respondent's Exhibit 31)
18. Student's BOY reading I-Ready score was 500, which placed Student overall one grade level below. Student was able to test out of Phonological Awareness and High-Frequency Words. Student scored two grade levels below in Phonics and Comprehension-Informational Text. Student scored on grade level below in Vocabulary and Comprehension-Literature. (Respondent's Exhibit 31)
19. Student's MOY reading score from January 21, 2022, was 488, which placed Student overall two grade levels below. Student scored one grade level below in Vocabulary and Comprehension Literature and scored at three grade levels below in comprehension-informational text. (Respondent's Exhibit 31)
20. Student EOY reading score, from May 26, 2022, was 532, which placed Student overall on grade level. Student tested out of Phonics and scored at one grade level below in

comprehension-literature/informational text as well as vocabulary. (Respondent's Exhibit 31)

21. On November 18, 2022, DCPS issued a PWN stating that the MDT proposed to not move forward with formal assessments following the AED. (Respondent's Exhibits 32, 33)
22. DCPS held an eligibility meeting and issued a final eligibility report dated November 17, 2022, citing among other things, the data from the AED report. (Respondent's Exhibit 34)
23. On February 13, 2023, Petitioner provided DCPS consent to evaluate Student. On February 13, 2023, DCPS acknowledged the referral for Student to be evaluated. (Respondent's Exhibits 36, 37)
24. On February 26, 2023, DCPS issued an AED report that noted a settlement agreement between Petitioner and DCPS. (Respondent's Exhibit 38)
25. DCPS issued a PWN to proceed with the evaluation process after referral. The PWN stated that the MDT settled to provide assessments for Student. (Respondent's Exhibit 39)
26. A DCPS School psychologist conducted a comprehensive psychological evaluation in March 2023. The evaluation consisted of the following assessments: Woodcock-Johnson, 4th Edition (WJ-IV), Wechsler Intelligence Scale for Children, 5th Edition (WISC-V), Conners-4, Behavior Assessment System for Children, 3rd Edition (BASC-3), Vineland-3. The psychologist also conducted a Classroom Observation, Record Review, Teacher, Student, and Parent Interview, and reviewed Student's Report Cards. (Respondent's Exhibit 40)
27. The DCPS psychologist reviewed Student's report cards, i-Ready scores Anet scores, work samples, and talked to Student and Student's teachers to get an overall view of how Student was doing and whether there were any environmental factors preventing Student from being on grade level. She noted that there were no concerns with Student's in-school behavior, except for some concern about Student's maturity level due to Student's tendency to play with younger children rather than Student's peer group. The psychologist observed Student in math and ELA classes. Student's teacher noted that Student is well organized and performs as well as others in Student's class. (Witness 5's testimony)
28. The psychologist noted Student's report card grades during SY 2021-2022:

*1= Below Basic, 2= Basic, 3= Proficient, 4=

Advanced

Subject	Term 1	Term 2	Term 3	Term 4
Reading	3	3	3	3
Writing and Language	3	3	2	2
Speaking and Listening	3	3	3	2
Math	2	2	2	3

Social Studies	3	3	3	2
Science	3	3	3	3
Teacher Comments	It has been a pleasure working with [Student] this school year! [Student] has shown growth this school year.			

(Respondent's Exhibit 40)

29. The psychologist noted Student's I-Ready Scores in the evaluation:

i-Ready Scores-Math

Grade	BOY	MOY	EOY	Grade Goal
Grade	425 (2 nd grade)	430 (2 nd grade)	486 (4 th grade)	465-526
Grade	421 (2 nd grade)	N/A	N/A	449-516
Grade	394 (1 st grade)	425 (1 st grade)	N/A	489-560

i-Ready Scores-Reading

Grade	BOY	MOY	EOY	Grade Goal
Grade	500 (3 rd grade)	488 (2 nd grade)	532 (3 rd grade)	557-629
Grade	484 (2 nd grade)	N/A	N/A	511-602

30. On the WISC-V Student had the following scores:

Scale/Index	Index Score	95% Confidence Interval	Percent ile Rank	Qualitative Description
<i>Verbal</i>	100	92-108	50	Average
<i>Non-Verbal</i>	72	67-81	3	Low
<i>Memory</i>	82	76-91	12	Low Average
<i>Processing</i>	98	89-107	45	Average
Full Scale (FSIQ)	79	74-85	8	Low

(Respondent's Exhibit 40)

31. On the WJ-IV Student had the following scores:

Cluster/ Subtests	Standard Score	Percentile Rank	Age Equivalent Norms	Qualitative Description
Broad Reading 1.	99	97-102	10-5	Average
Reading	93	90-95	9-4	Average
Letter-Word* Identification	93	90-96	9-5	Average
Reading Fluency	105	101-109	11-4	Average
Passage Comprehension*	93	89-98	9-3	Average
Word Attack	93	88-98	8-11	Average
Sentence Reading Fluency*	108	103-113	12-0	High Average
Oral Reading	98	95-102	10-3	Average
Broad Math	89	86-92	9-3	Low Average
Mathematics	81	77-84	8-6	Low Average
Applied Problems*	71	66-76	7-6	Low
Calculation*	91	87-95	9-6	Average
Math Facts Fluency*	104	99-108	11-1	Average
Broad Written Language	104	100-108	11-2	Average
Spelling*	94	91-97	9-9	Average
Writing Samples*	124	117-131	>30	Superior
Sentence Writing *Fluency	93	87-99	9-7	Average
Academic Fluency	104	100-107	11-2	Average

Academic Application	94	90-97	9-7	Average
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32. The psychologist noted the following regarding the Applied Problems subtest: “[This subtest] requires [Student] to solve various math problems such as telling time, counting money, and solving word problems. [Student] was provided scratch paper to solve problems. [Student] scored a 71, Low Category, in the Applied Problems subtest. This means [Student] is not able to perform on the same academic level as same-aged peers when it comes to solving word problems. [Student] was able to solve problems using scratch paper. However, [Student] struggles with fractions and percentages.”

33. On the Conner's 3, Student had the following scores:

Conners 3 Scales	Parent (Ms. Morton)	Teacher (Mr. Kelly)	Teacher (Mrs. Senn)
<i>Inattention</i>	39 (Low)	48 (Average)	42 (Average)
<i>Hyperactivity</i>	38 (Low)	48 (Average)	40 (Low)
<i>Impulsivity</i>	39 (Low)	53 (Average)	40 (Low)
<i>Learning Problems</i>	N/A	48	42
		(Average)	(Average)
<i>Executive Functioning</i>	39 (Low)	48 (Average)	42 (Average)
<i>Emotional Dysregulation</i>	42 (Average)	44 (Average)	44 (Average)
<i>Peer Relations</i>	44 (Average)	48 (Average)	44 (Average)
<i>Schoolwork</i>	43 (Average)	44 (Average)	48 (Average)
<i>ADHD Index</i>	Very Low	Low	Very Low

34. The psychologist noted the following regarding Student's visual-spatial abilities. "The Visual Spatial Index (VSI) measured [Student's] ability to evaluate visual details and understand visual-spatial relationships in order to construct geometric designs from a model. This skill requires visual-spatial reasoning, integration and synthesis of part-whole relationships, attentiveness to visual detail, and visual-motor integration. During this evaluation, visual-spatial processing was one of [Student's] weaknesses, with performance that was significantly lower than other children. [Student's] low scores in this area may occur due to deficits in spatial processing, difficulty with visual discrimination, poor visual attention, visuomotor integration deficits, or generally low reasoning ability. During this evaluation, [Student] appeared to have extreme difficulty assembling block designs and puzzles in [] mind, and [] performance in this area was weak in relation to [Student's] performance on language-based tasks. [Student's] visual-spatial scores were also a relative weakness when compared to [Student's] performance on working memory tasks and tests of processing speed. [Student's] relative weakness on visual-spatial subtests during this evaluation suggests that [Student's] verbal problem-solving may be stronger than [Student's] visual-spatial problem-solving. [Student] may therefore benefit from additional support when presented with visual information." (Respondent's Exhibit 40)
35. The psychologist noted the following in her evaluation report: "[Student] is being referred for a psychological evaluation due to [Student's] mother and educational advocate feeling [that Student] does not meet grade level concepts. [Student's] reported standardized assessments show [Student] is performing on a 3rd and 4th grade level. [Student's mother] stated she feels [Student] would benefit from special education (SPED) services to assist [Student] with learning test-taking strategies." The psychologist noted that on BASC-3 and Vineland-3, Student scored in the Average category. The psychologist noted, "[Student] scored in the Low category on the WISC-V." The psychologist concluded that "based on the data collected [Student] does not meet the criteria for SLD. However, she noted that "the MDT team makes the final determination for a student's eligibility for special education and related services based on the data and evidence presented." (Witness 5's testimony, Respondent's Exhibit 40)
36. The March 2023 psychological evaluation was reviewed by a team at a meeting held on April 14, 2023. Over Petitioner's objections, DCPS concluded that Student was not eligible for special education under the classification of SLD. (Petitioner's testimony, Witness 2's testimony, Respondent's Exhibit 43)
37. The team considered the SLD disability classification using both the discrepancy model and research-based intervention model and considered whether there were any environmental factors that contributed to Student not being able to access the curriculum. The DCPS team members concluded that Student did not meet the discrepancy model because Student was able to achieve on the assessments, and there was no discrepancy between Student's academic and cognitive scores. The DCPS psychologist believed that based on the interventions Student was receiving through the school year, Student was showing progress according to views expressed by Student's teachers and based on Student's I-Ready scores and report cards. Student was earning good report card grades and was slated to pass to the next grade. Student has never been in the School A Student Support Team ("SST") process. At the April 14, 2023, meeting, the DCPS team relied on

Student's broad standardized scores on WJ-IV rather than individual subtests in making their determination of Student's ineligibility for special education. (Witness 5's testimony, Witness 6's testimony)

38. During the April 14, 2023, meeting, Petitioner's representative requested that an OT evaluation be conducted. Student's parent reported concern that Student's handwriting was labored, slow, and not always legible. (Petitioner's Exhibits 24, 25)
39. The School A LEA representative mentioned to the School A occupational therapist that there were concerns raised by Student's parent about Student having difficulty opening and closing doors in school, handwriting, visual perception, and spatial vision concerns. As a result, the School A occupational therapist conducted an OT screening. She told the LEA representative that she would conduct a screening to determine if a formal OT evaluation was necessary to determine if the Student needed OT in the school setting. She conducted the screening on April 26, 2023, and her report is dated May 2, 2023. She used formal and informal assessments to determine how Student is functioning relative to OT in the school setting. (Witness 4's testimony, Respondent's Exhibit 45)
40. The occupational therapist administered VMI-6 - "The Beery" to assess Student's visual perception skills. She interviewed Student's teacher who said there were no visual perception concerns, and Student's handwriting was legible. She asked Student to copy sentences from the board. Student was able to copy the sentences. Student used a thumb wrap grasp and aligned the letter and word spacing. She also observed Student's posture and sitting alignment. Student had no slouching and had good attention. Student's hand endurance was age-appropriate. The evaluator did not formally assess Student's fine motor or gross motor skills. She did not assess for sensory concerns. However, she did observe Student in various environments in the school and Student's ability to ascend and descend stairs, open and close doors, and on the playground during recess. She saw no reason to test for any sensory concerns. She believed that based on her formal and informal screening, there was no need to conduct a full OT evaluation. The occupational therapist did not have conversations with Student's parent about the parent's concerns because that is not the protocol when conducting a screening. However, she would have talked with the parent if she had conducted a full formal OT evaluation. (Witness 4's testimony, Respondent's Exhibit 45)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on both issues adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student FAPE by failing to identify Student as eligible for special education services under the classification of SLD based on the data that was available at the eligibility meeting held on April 14, 2023, and/or to timely develop an IEP for Student.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the data considered by DCPS at the April 14, 2023, eligibility meeting was insufficient and that DCPS denied Student a FAPE by finding Student ineligible for special education based on that data. The IHO directs in the order below that DCPS convene another eligibility meeting once Petitioner provides DCPS with the independent evaluations that the IHO has authorized.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

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).

The term "child with a disability" is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as a child . . . having one or more defined disabilities, "and who, by reason thereof, needs special education and related services." 34 CFR § 300.8(a), (b). It is up to each state to develop criteria to determine whether a child has a 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).

Pursuant to DCMR 5-A § 3011.11, in determining eligibility based on SLD, a team shall consider assessments and child data related to whether the child achieves adequately for the child's age or meets State-approved grade-level standards... and the team shall determine eligibility for specific learning disability using one (1) of the following methods: eligibility using scientific, research-based interventions or eligibility using the discrepancy model.

Petitioner asserts that despite the data available, DCPS failed to determine Student is eligible for special education as a student with an SLD. Petitioner points out that the WJ-IV Applied Problems subtest requires a student to solve various math problems such as telling time, counting money, and solving word problems (i.e., measure mathematics problem-solving skills) and on this subtest Student scored in the Low range with a standard score of 71, performing approximately the same number of items correctly as a 7-year-old. Petitioner argues that in at least one area, Student is performing below the age-approved standards. Petitioner also asserts that Student has also demonstrated areas of weakness on standardized testing in basic reading, reading comprehension, and listening comprehension that will impact all subjects as well as in mathematics.

The evidence demonstrates that on the WJ- IV assessments, Student scored a 71 (Low) in applied math problems, falling into a category of only 3% of the population of same-aged peers. Student's Broad Math score was 89, (Low Average). According to the report, Student has a history of scoring below grade average on standardized testing like IReady for grades second(2nd) through fourth (4th) and Student's most recent IReady scores indicate that Student is performing at least two (2) years below grade level peers in math and reading.

Petitioner's independent psychologist expert witness testified that some of the assessment data of the WISC-V may have been miscalculated and that Student's lowest scores were not highlighted in the psychological evaluation. Petitioner's other expert witness noted that Student performed well in calculations but struggled with word problems. She participated in the eligibility meeting and advocated for Student's need for special education. Both witnesses testified that Student was operating below grade level in both math and reading and met the criteria for and should have been found eligible for special education as a student with an SLD.

On the other hand, DCPS's expert witnesses testified that at the April 14, 2023, eligibility meeting, the team considered both the discrepancy model and the response to intervention model and determined that Student did not qualify under either. However, the DCPS witness alluded to interventions Student received, but there was no testimony as to what specific interventions Student had received. One DCPS witness acknowledged that Student had never been identified for or engaged in the SST process. The evidence clearly reflected based on Student's historical i-Ready scores that Student consistently scored over time below grade level in math and reading.

There was insufficient evidence to demonstrate that Student had received specific interventions to address Student's grade level deficiencies. The IHO cannot conclude that the team legitimately considered Student's eligibility based on the response to intervention model. This factor, combined with Student's below-grade level performance, low scores on some of the sub-tests of the WJ-IV along with the testimony that the team considered Student's broad WJ-IV scores rather than considering individual subtests, is a basis for the IHO to conclude that the data DCPS used to determine Student's ineligibility at the April 14, 2023, meeting was insufficient. This failure by DCPS was a denial of a FAPE.

Consequently, the IHO concludes that Student's eligibility for special education should be reconsidered based upon updated formal assessments, current classroom, and other data and that a team, based on updated data, make a determination of Student's eligibility or ineligibility for special education.

ISSUE 2: Did DCPS deny Student a FAPE by failing to comprehensively evaluate Student by failing to conduct or agreeing to conduct an OT evaluation considering the results of Student's comprehensive psychological evaluation?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct an OT evaluation.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005). Under the Act's child-find requirement, the District must "ensure that [a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated." *Scott v. District 18 of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the student's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Id.* (quoting former D.C. Code § 38-2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279(D.D.C.2013).

The U.S. Department of Education's long-standing position is that a parent's request for an eligibility evaluation does not automatically precipitate the obligation of the LEA to conduct the evaluation. Rather, an LEA must conduct an evaluation without undue delay only if the LEA suspects that the child has a disability and is in need of special education and related services. See *Letter to Anonymous*, 21 IDELR 998 (OSEP 1994). The LEA's duty to conduct an initial evaluation is triggered when the LEA has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. See *Board of Education of Fayette County v. L.M.*, 45 IDELR 95 (E.D.Ky. 2006). "A suspicion connotes a relatively low threshold." *Id.* A state or LEA "shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such

services." *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (citing 20 U.S.C. § 1415(k)(8)(B)(ii)).

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") shall ensure that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

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).

Pursuant to 34 C.F.R. § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general

curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Petitioner asserts that DCPS failed to conduct an OT evaluation despite the fact that on the Visual-Spatial Index administered as part of the WISC-V, Student's standard score was 68, along with handwriting issues (labored, slow, and not always legible) that were reported by the parent and reiterated during the eligibility meeting.

The evidence demonstrates that during the April 14, 2023, meeting, Petitioner's representative requested that an OT evaluation be conducted. Student's parent reported concern that Student's handwriting was labored, slow, and not always legible. The School A LEA representative mentioned to the School A occupational therapist that there were concerns raised by Student's parent about Student having difficulty opening and closing doors in school, handwriting, visual perception, and spatial vision concerns.

The School A occupational therapist conducted an OT screening to determine if a formal OT evaluation was necessary. She used formal and informal assessments. She interviewed Student's teacher, observed Student in class, and observed Student's handwriting. She asked Student to copy sentences from the board and noted that Student's had aligned letter and word spacing. She also observed Student's posture and sitting alignment. The evaluator did not formally assess Student's fine motor or gross motor skills. She did not assess for sensory concerns. She did observe Student's ability to ascend and descend stairs, open and close doors, and on the playground during recess. She believed that based on her formal and informal screening there was no need to conduct a full OT evaluation. The occupational therapist did not, however, have conversations with Student's parent about the parent's concerns because that is not her protocol when conducting a screening. She would have talked with the parent if she had conducted a full formal OT evaluation.

The DCPS occupational therapist may have considered that a screening was sufficient and that because she conducted a screening conferring with Student's parent was not warranted. However, the basis for the possible OT concern derived from the parent's personal observations of Student as well as an interpretation of information from the psychological evaluation. DCPS's failure to conduct a formal evaluation that included input from Student's parent about her concerns significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE.

"Although DCPS's experts might have thought otherwise, informed suspicions of parents, who may have consulted outside experts, trigger the requirement to assess, even if the school district disagrees with the parent's suspicions." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016) (quoting *Pasatiempo ex rel. Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)); *Kruvant*, 2005 WL 3276300, at *10 ("[T]he regulations make clear that the

[parental] referral to the neighborhood school is the triggering event for the initial evaluation.”).”
Louise DAVIS, et al., Plaintiffs, v. District of Columbia. Civil Action No. 15-1194 (JEB). 2017

ORDER:

1. DCPS shall, within 15 business days of the date of this order, provide Petitioner authorization to obtain an independent psycho-educational evaluation and an independent occupational therapy evaluation.
2. DCPS shall, within 15 business days of its receipt of the two evaluations granted above, convene a meeting to review the evaluations and determine Student’s eligibility or ineligibility for special education based on those evaluations and any other updated data that is available.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: September 7, 2023

Copies to: Counsel for Petitioners
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 ODR [\[hearing.office@dc.gov\]](mailto:hearing.office@dc.gov)