

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through
her Parent¹

Petitioner,

v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

2011 APR 18 AM 9:52
SSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

DECISION

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STATEMENT OF THE CASE

On February 18, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,² requesting a hearing to review the identification, evaluation, or placement of or provision of a free, appropriate public education

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 4) on February 28, 2011. A resolution meeting was held on March 2, 2011. The parties were not able to reach an agreement. HO 7 (email of 3/4/11). As a result, the 45 day timeline began to run on March 3, 2011, and my Hearing Officer Determination is due on April 15, 2011.

At all times relevant to these proceedings Petitioner was represented by Alana Hecht, Esq., and Victoria Fetterman, Assistant Attorney General, represented DCPS. I held a telephone prehearing conference on March 14, 2011. HO 8. By agreement of the parties, the hearing was scheduled for March 18, 2011. A second Prehearing Conference to address whether the hearing would be extended to a second day to allow Respondent to present the testimony of its expert witness, Dr. Carlos Phillip, was held on March 16, 2011. I ordered the record held open to allow Dr. Phillip's testimony on March 25, 2011. I requested and received pre-hearing briefs on the eligibility of students for programs and services under the Individuals with Disabilities Education Act ("IDEA") under the category of Specific Learning Disability. The hearing was held as scheduled.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2010); 34 C.F.R. § 300.511(a)(2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE(S)

The issue is:

Whether DCPS denied Student a free appropriate public education ("FAPE") by failing to find him eligible for special education under IDEA as a student with a specific learning disability.

1. Student is _____ years old. He is in the _____ grade at a large DCPS public high school. HO 1. He is well-mannered and gets along well with others. Testimony of

Petitioner requested Student be evaluated for eligibility for special education services under IDEA in May 2010. P 19. The eligibility determination did not take place, and on October 1, 2010, P 18, following the filing a due process complaint Respondent issued an authorization letter for a Comprehensive Psychological Evaluation with a clinical component and a Psycho-Educational Evaluation on October 21, 2010. P 16. Copies of these evaluations were forwarded to DCPS on November 4, 2011. P 15. On November 23, 2011 the parties entered into a Settlement Agreement, P 14, that provided for convening a meeting to review student's evaluations and determine his eligibility for special education, and, if eligible, develop an IEP.⁵ P 14.

2. Student's eligibility meeting was held on February 9, 2011. Student was not found eligible for special education services under IDEA. Petitioner and her Educational Advocate disagreed with the determination indicating they believed he should be found eligible as a student with a specific learning disability. The multidisciplinary team as an alternative, ("MDT") agreed to refer Student to the SST for review. The SST process involves six to eight weeks of intervention. Testimony of Cole; P 4; P 5; P. 6; R 2.

3. Student was not found eligible as a student with specific learning disabilities under IDEA because there is no discrepancy between his IQ score and achievement. P 6, p.2; P 5, p.4. The MDT also determined he was having academic difficulties because of attendance issues and because of stress at home. They deemed these cultural and environmental factors that precluded finding Student had a learning disability under IDEA. The MDT

⁵ Student also was to be provided 65 hours of compensatory specialized instruction. P 12.

also considered classifying Student as Emotionally Disabled or as Other Health Impaired.

He was found not eligible in each of these categories as well. Testimony of

4. Student has difficulty learning in large classes of 20 to 27 students. He has difficulty staying on task. Student does not complete his homework because he does not understand it. Student is not getting good grades. Student does better in smaller classes with more direct help from the teacher such as he received in physics or summer school. He does best in a quiet environment with assistance from someone to go over the work with him. Testimony of Petitioner; Testimony of Student; Testimony of Testimony of

5. Student has earned 18 credits toward graduation, including nine Ds. He also received five Fs. One of the Fs was in Spanish I. He took the class a second time in summer school and received an A-. He also took Geometry a second time in summer school, after getting two Fs, and received one B.⁶ P 9.

6. Student's attendance records are not in agreement. His transcript indicates he has missed 25 days of school in from the start of school through February 11 during the 2010-2011 school year. P 9. His daily attendance indicates he has been absent 19 days and has been tardy 42 times between the start of school and February 8 in the 2010-2011 school year. P 11. The attendance summary shows Student as absent from specific classes 129 times though March 14, 2011 and late to specific classes 16 times in the same time period. Fifty-two of these absences and late arrivals were to first period classes. Twelve absences were due to medical appointments. R 4. When he is tardy Student is required to stay in tardy hall for first period. This happens two or three times each week. Testimony of Petitioner; Testimony of Student.

⁶ It is not clear whether the B replaces both Fs he received in geometry or whether it replaces only one of the Fs.

7. Student is concerned about his mother's health and about his grandmother's health.

Testimony of Petitioner. These concerns are having some impact on his focus in school, but they are not the primary basis for his educational difficulties. Testimony of Petitioner; Testimony of Testimony of

8. Student functions in the low average range of intellectual ability. His General Ability Index score of 78 on the Woodcock Johnson III, Normative Update, Test of Cognitive Abilities is in the Low range of functioning. He has particular difficulties in visual auditory learning. He earned a standard score of 54 in this area on the Woodcock Johnson III, Normative Update, Tests of Achievement, Form A ("W-J") with a grade equivalency of 1.0. This score suggests difficulty with Student's memory. Student's standard scores in Broad Reading (87) and Broad Math (85) on the W-J also fall in the low average range while his Broad Written Language (91) score falls in the average range. Student obtained standard scores primarily in the low average range and grade equivalency scores primarily at the sixth grade level on the cluster test scores on the W-J. He achieved higher scores in Reading Fluency (91) and in Writing Fluency (101). The difference between Student's achievement scores and his IQ score do not demonstrate he is achieving above his tested ability range at a clinically significant level. Testimony of P 7.

9. A student with equivalent cognitive and achievement levels can be deemed to have learning disabilities based on an evaluation of standard scores, grade equivalency and anecdotal information. Testimony of

10. Student will have difficulty accessing information presented at his grade level, and he has gaps in underlying basic concepts that would not allow him to learn new material.

Testimony of P7 Student has difficulty with long division, addition of mixed

fractions, multiplying decimals, subtracting negative integers, and reading and comprehending words in context. R 2.

11. Student has low self-esteem. He is likely to quit easily and is not likely to persist at a task he perceives to be difficult. Testimony of P 8.

12. The tutoring Student is receiving as a result of the November 23, 2010 Settlement Agreement will assist him in learning the basic fundamentals of math, reading and written language. Testimony of

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

To determine initial eligibility of a child for special education and related services under the IDEA, the local education agency must conduct a complete, individualized evaluation, *See* 34 C.F.R. §§ 300.305 and 300.306, to determine whether the child is a child with a disability as defined under 34 C.F.R. §300.8 and to determine the educational needs of the child. 34 C.F.R. §§300.301(a) and (c). A child who has one of the disabilities defined in 34 C.F.R. §300.8 must need special education and related services as a result of the disability to be found eligible. In order to find a child eligible for special education and related services under IDEA the IEP team, including the parent, is to review evaluation data including information provided by the parent, current assessments, classroom observations made by teachers and related service providers, as relevant, and determine whether additional data, if any are needed. 34 C.F.R. §300.305. The

team is to draw from a variety of sources and ensure the information from these sources is documented and carefully considered. 34 C.F.R. 300.306(c).

Specific learning disability is defined as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. . .” 34 C.F.R. §300.8(c)(10). The IDEA establishes specific, additional procedures for identifying children with specific learning disabilities. 34 C.F.R. §§300.307 through 300.311. While the determination of specific learning disability cannot be required to be based on the use of a severe discrepancy between intellectual ability and achievement, discrepancy can be considered. Other criteria can also be the basis for finding a student is eligible for special education and related services under IDEA. 34 C.F.R. §§300.307 and 34 C.F.R. §300.309.

In the instant matter, assessments of Student reveal he is not functioning on the same intellectual level as his peers. It is likely he will have difficulty accessing information presented at his grade level, and he has gaps in underlying basic concepts that would not allow him to learn new material. Student, himself, testified he does not understand the material, that he asks for assistance and sometimes does not receive it, and that he does not complete assignments (including homework) because of his inability to understand what he has been taught or instructed to do. Testimony from Student and others revealed that he is able to comprehend at a higher level when he has individual assistance to help him with the assigned work. Everyone agrees Student is able to learn.

Respondent’s repeated reference in meeting minutes to the lack of a discrepancy between Student’s IQ score and his achievement support Petitioner’s contention that Student was found

ineligible due to this lack of discrepancy. While there is a passing reference to cultural and economic factors, specifically to his concern regarding his mother's and grandmothers' illnesses and his attendance issues, these references appear to be added to the determination in an effort to camouflage the real basis for the decision being the lack of discrepancy. The Eligibility Determination Report completed by DCPS notes Student has difficulty with long division, addition of mixed fractions, multiplying decimals, subtracting negative integers, and reading and comprehending words in context. None of this appears to be work at an eleventh grade level. Significant discrepancy is no longer the *sine qua non* of learning disability. Other approaches are accepted and supported.

Respondent's expert witness' testimony is problematic. It was fraught with analyses that did not appear to be based in IDEA requirements. For example, Dr. Phillip indicated that Student could not be eligible for special education and related services as a student with learning disabilities because Student had disabilities in more than one area, that is reading, mathematics and written language. He also stated students with low average IQs generally cannot be found to have learning disabilities. Dr. Phillip's position is akin to arguing Student was too disabled to be found disabled. It also appears to fly in the face of the IDEA definition which states the disorder may manifest itself in the imperfect ability to, among other abilities, listen, think, read write spell or do calculations. Student's assessments demonstrate he has difficulties in these areas. 34 C.F.R. § 300.8 (c)(10). IDEA does not establish an IQ level as a prerequisite for finding a student has learning disabilities.

Dr. Phillip also testified that having learning difficulties in reading math and written language would preclude finding Student eligible as a student with a specific learning disability. Significantly, 34 C.F.R. § 300.309(a)(1) which addresses the determination of a specific learning

disability states that a child who “does not achieve adequately for the child’s age or to meet grade level standards in *one or more* of the following areas . . . oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics comprehension or mathematical problem solving” (emphasis added) may be found to be a child with a specific learning disability. The regulation directly states the child may have difficulties in multiple areas including the areas identified as problem areas for Student. Unlike Dr. Phillip, the regulation does not exclude children who show difficulties in multiple areas. Instead it specifically includes them.

Respondent places great emphasis on the team’s consideration of cultural and environmental factors as a basis for finding Student ineligible. Yet in so doing they do not define what the cultural factors are. At best the team references Student’s concern about his mother’s and grandmother’s health. These concerns are not cultural factors as individuals from all cultures would be concerned about seriously ill parents and grandparents. The team also references his absences and tardiness which is a new issue for him this year suggesting a need to develop supports to help him arrive at school on time, not a basis for denying him special education services. A large number of his class absences and tardies have occurred during first period, and Student acknowledges he has not been arriving on time consistently.

Respondent relies on *Hung Hah Thi Nguyen v. District of Columbia*, 681 F.Supp. 2d 49 (D.D.C 2010) as demonstrating a student may be found ineligible based on a lack of a severe discrepancy. That case is distinguishable, however, in that it relied on a case from 2004 when the IDEA regulations relied on the use of a severe discrepancy model for determining a student had a specific learning disability. The IDEA regulations were revised following the 2004 reauthorization of the IDEA. This revision eliminated the requirement to use the severe

discrepancy model for determining specific learning disability. *See*, Federal Register, Vol. 71, No.156, p.46647.

In contrast, Petitioner's expert found Student had limited verbal knowledge, low cognitive efficiency and determined that Student's scores indicate he will have difficulty in keeping up with his peers of a wide variety of cognitive reasoning tasks. concluded Student needed support as a student with a learning disability.

I find Student's scores satisfy the requirements to find him eligible as a student with a specific learning disability under IDEA.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

DCPS denied Student a free appropriate public education ("FAPE") by failing to find him eligible for special education and related services under IDEA as a student with a specific learning disability.

ORDER

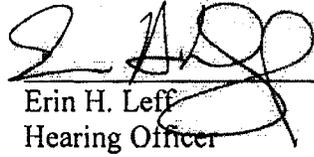
Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

Within 10 school days of the issuance of this Hearing Officer Determination, DCPS is to convene a meeting to develop an IEP to address Student's needs as a student with a Specific Learning Disability. The meeting is to be scheduled at a time that will allow Petitioner and her advocate to attend. The IEP developed at this meeting shall include goals in reading, mathematics and written language. The IEP shall provide Student with in class support in each of these subject areas in each of his classes. This support shall be provided directly to Student as

well as through consultation with Student's teachers. The IEP team shall assure the IEP goals and the implementation of these goals are coordinated with Student's current tutoring program.

IT IS SO ORDERED:

March 15, 2011
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).