

**District of Columbia
Office of the State Superintendent of Education**

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

OSSE
Student Hearing Office
June 27, 2013

<p>STUDENT¹, By and through PARENT,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS,</p> <p style="text-align: center;"><i>Respondent.</i></p>	<p>Case No.</p> <p>Impartial Hearing Officer: Charles M. Carron</p> <p>Date Issued:</p> <p>June 27, 2013</p> <p>Representatives:</p> <p>Miguel A. Hull, Esq. for Petitioner</p> <p>Maya L. Washington, Esq. for Respondent</p>
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HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed May 10, 2013, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student’s Parent, against Respondent, District of Columbia Public Schools (“DCPS”).

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

On May 10, 2013, the undersigned was appointed as the Impartial Hearing Officer.

On May 20, 2013, Respondent filed its Response, stating, *inter alia*, that the Student is not eligible for special education and related services and that Respondent has not denied the Student a free appropriate public education (“FAPE”).

A Resolution Meeting was held on May 31, 2013 but it failed to resolve the Complaint. The statutory 30-day resolution period ended on June 9, 2013. The 45-day timeline for the Hearing Officer’s Determination (“HOD”) started to run on June 10, 2013, and will conclude on July 24, 2013.

The undersigned held a Prehearing Conference (“PHC”) by telephone on June 3, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by 7:00 p.m. on June 12, 2013 and that the Due Process Hearing (“DPH”) would be held on June 19, 2013.

No motions were filed by either party and the DPH was held on June 19, 2013, at the Student Hearing Office, 810 First Street, NE, Room 2004, Washington, DC 20002. Petitioner elected for the hearing to be closed. At the DPH, the following documentary exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-9

Respondent’s Exhibits: R-1 through R-11

Impartial Hearing Officer’s Exhibits: HO-1 through HO-7

Petitioner’s proposed Exhibit P-10 was not admitted because the subject of that exhibit—compensatory education—was withdrawn from this proceeding by Petitioner’s counsel at the PHC. *See Section V infra.*

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Independent Psychologist, who was qualified, over Respondent’s objection, as an expert in eligibility determination for children suspected of Severe Emotional Disturbance and/or Other Health Impairment;

- (b) Parent (Petitioner); and
- (c) Educational Advocate, employed by Petitioner's Counsel, who testified as a fact witness.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) DCPS School Psychologist #2, who was qualified, over Petitioner's objection, as an expert in recommendations regarding children's IDEA eligibility;
- (b) Attending School Special Education Coordinator (the "SEC"); and
- (c) Attending School Teacher (the "Teacher").

The parties did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the HOD pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the "Attending School").

Respondent, at a meeting on or about November 20, 2012, determined that the Student is not eligible under the IDEA, and therefore not entitled to an Individualized Education Program (an "IEP") providing him with specialized instruction and related services.

On May 10, 2013, Petitioner filed the DPC requesting this hearing, asserting that the Student is eligible under IDEA and is entitled to an IEP. Respondent maintains that the Student is not eligible under IDEA.

IV. ISSUE

As confirmed at the PHC and in opening statements at the DPH, the following issue was presented for determination at the DPH:

Did Respondent violate IDEA by finding the Student ineligible for special education on or about November 20, 2012 and therefore not entitled to an Individualized Education Program (“IEP”)?

V. RELIEF REQUESTED

Petitioner requests the following relief that the undersigned has the authority to award:

- (a) a finding that the Student is eligible for special education and related services;
 - (b) that Respondent be ordered to convene a Multidisciplinary Team (“MDT”) within five days of the HOD to develop an IEP consistent with the allegations in the DPC and to determine placement;
 - (c) an Order that all meetings be scheduled through Petitioner’s counsel;
- and
- (d) any other relief that the Hearing Officer finds appropriate.

Petitioner requested the following additional relief that the undersigned struck as inappropriate for the reasons described below:

(a) attorney's fees and cost, which the undersigned lacks the authority to award;

(b) an order that Respondent provide counsel for the Parent copies, pursuant to DCMR § 5-3021.8, of all evaluation reports and all educational records, including class schedules, on the student no later than 16 business hours prior to the convening of any meeting, which the undersigned struck because there is no such DCMR section and Petitioner has no legal right to copies;²

(c) an order that Respondent file a Response within 10 calendar days of the filing of the DPC, which is moot because Respondent filed a timely response;

(d) an order that if Respondent failed to file a timely Response, the arguments and facts averred by the Parent be deemed true and accurate and act as a waiver, on the part of Respondent, of the desire to have a Resolution Session Meeting, and that the timeline of the DPH be accelerated accordingly, which is moot because Respondent filed a timely response;

(e) an order that Respondent, within 15 calendar days of receiving the DPC, file any Notice of Insufficiency, which is not ripe because Respondent has not filed a Notice of Insufficiency; and

(f) an order that if Respondent failed to file a Notice of Insufficiency within 15 calendar days of receiving the DPC, that this constitute a waiver on the part of Respondent to make such an argument subsequently, which is not ripe because Respondent has not filed a Notice of Insufficiency.

² The undersigned has brought the inaccuracy of this citation to the attention of attorneys in Petitioner's counsel's firm on several prior occasions. Petitioner's counsel is subject to sanctions or referral for disciplinary action if he misrepresents the same legal authority in a future case.

In the DPC, Petitioner had requested that Respondent be ordered to convene a meeting of the Student's MDT to determine compensatory education. However, a Hearing Officer cannot defer the determination of compensatory education to Respondent or to a committee or team that includes representatives of Respondent. In the alternative, Petitioner had requested an award of compensatory education. In the Notice of Prehearing Conference that the undersigned issued on May 18, 2013, Petitioner was ordered Petitioner to file, no later than May 24, 2013, its Compensatory Education Plan. That Notice stated that failure to file such a Plan timely would "constitute a waiver of compensatory education as a remedy." At the PHC, the undersigned permitted Petitioner to withdraw the request for compensatory education from the instant DPC proceeding without prejudice to bringing a new DPC in the event the Student were determined to have been eligible as of November 20, 2012 and Respondent failed to offer compensatory education for the period of delay. Respondent objected to the undersigned allowing Petitioner to withdraw this request for relief without prejudice, as inconsistent with the above-quoted language in the Notice of Prehearing Conference. Upon reviewing the quoted language, the undersigned determined that it was not sufficiently clear to put Petitioner on notice that a failure to file a Compensatory Education Plan by May 24, 2013 would constitute a waiver of a compensatory education remedy not only in the instant case, but in a new DPC based on a future event, *i.e.*, Respondent failing to offer compensatory education if and when the Student was found to have been eligible for special education and related services for a prior period of time. Accordingly, over Respondent's objection, Petitioner was deemed to have withdrawn the request for

compensatory education without prejudice, *i.e.*, as if no request for compensatory education had been made in the instant DPC.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a male, Current Age. P-4-1.³
2. The Student resides in the District of Columbia. R-2.
3. The Student has been determined by Respondent not to be eligible for special education and related services under the IDEA. R-7.

Stipulated Facts

4. At the DPH, counsel for the parties stipulated that the Student has Attention Deficit Hyperactivity Disorder (“ADHD”).
5. At the DPH, counsel for the parties stipulated that the Student does not have any of the following: mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an orthopedic impairment, autism, a traumatic brain injury or deaf-blindness.

September 2010 Psychiatric Evaluation

6. In September 2010, the Student was evaluated by Psychiatrist.
7. Psychiatrist diagnosed the Student with ADHD and prescribed medication for that condition. P-4-1, P-6-5.

³ When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

November 2010 Comprehensive Psychological Evaluation

8. In November 2010, the Student was evaluated by DCPS School Psychologist #1, to assist the Student's MDT determine his eligibility for specialized instruction and related services under IDEA (a) as a child with an Other Health Impairment ("OHI") based on his ADHD or (b) as a child with a Specific Learning Disability ("SLD"). P-4-1.

9. DCPS School Psychologist #1 agreed with the Parent and the Student's then-current teacher that the Student exhibited symptoms of ADHD, specifically inattentiveness and short attention span, that appeared to have an impact upon his academic achievement in the areas of reading comprehension, reading fluency, spelling, writing and math calculations. P-4-13 and -14.

10. However, given the Student's achievement test scores placing him in the average range on academic knowledge/abilities, DCPS School Psychologist #1 concluded that the Student's academic skills were "not impaired to the extent that special education services are needed." P-4-14.

11. DCPS School Psychologist #1 noted that the Student's eligibility under IDEA would depend upon the MDT's determination of whether his behavior had a significant impact on his educational performance. P-4-13.

12. DCPS School Psychologist #1 recommended strategies for the Student's teachers. P-4-15 and -16.

2010-2011 School Year Response to Intervention

13. During the 2010-2011 school year, the Student participated in Respondent's "Burst® Reading," an Early Literacy Intervention ("ELI") program (P-4-3, P-6-4) under which his reading improved, but his written expression and behavior did not (P-6-4).

January 31, 2011 Eligibility Determination

14. On January 31, 2011, the Student's "IEP Team" determined that he was not eligible for specialized education and related services.⁴ R-7.

June 2012 Psychological Evaluation

15. In June 2012, the Student was evaluated by Independent Psychologist. P-6.

16. All of Independent Psychologist's evaluation referrals are from parents' attorneys. Testimony of Independent Psychologist.

17. In every evaluation of a child, Independent Psychologist has found the child to have a disability that makes the child eligible for specialized instruction and related services under IDEA. *Id.*

18. In every evaluation of a child, Independent Psychologist has recommended that the child be placed in a therapeutic day school, *i.e.*, a full-time out of general education placement. *Id.*

19. Independent Psychologist maintains that every child who is performing "a couple of grade levels" below his or her current grade should receive special education. *Id.*

⁴ That determination was upheld by the Impartial Hearing Officer in an earlier DPC proceeding.

20. Independent Psychologist maintains that every child with ADHD needs special education, whether or not the child's ADHD is controlled by medication. *Id.*

21. Independent Psychologist incorrectly assumed that the Student was a "special education student" (P-6-13) with an IEP (P-6-11), and that he attended a different school from the Attending School (P-6).

22. Independent Psychologist did not observe the Student or communicate with any of the Student's teachers. Testimony of Independent Psychologist.

23. Independent Psychologist's testing and prior testing established that the Student's cognitive abilities are in the Average to Low Average range. P-6-13, testimony of Independent Psychologist.

24. Independent Psychologist administered the Woodcock-Johnson III Tests of Academic Achievement ("WJ III"), the results of which indicated that the Student was performing approximately one and a half grade levels below his current grade⁵ (P-6-9), which is less than two standard deviations below the norm (Testimony of Independent Psychologist).

⁵ In colloquy at the DPH, Respondent's counsel asserted that the Student was only one grade level behind when this testing was conducted. However, as noted by Petitioner's counsel, the WJ III was administered after the Student had completed the grade prior to the Current Grade. Accordingly, if the Student had been performing at grade level, his scores on the WJ III would have placed him in the ninth month of the grade prior to the Current Grade. In fact, his grade equivalency on the various WJ III subtests averaged 1.6 grade levels below the ninth month of the grade prior to the Current Grade. Respondent's counsel, in colloquy and in questioning witnesses, brought out the fact that many students at the Attending School and in DCPS schools generally are performing below grade level, which is supported by the Paced Interim Assessments ("PIA"s) in Exhibit P-5. However, the academic failure of the Student's schoolmates is not material to deciding the issue in this case. Accordingly, the undersigned has not summarized in this HOD the evidence of poor academic achievement of other students at the Attending School.

25. The Student had made a year's progress in the year since the testing by DCPS School Psychologist #1. Testimony of Independent Psychologist.

26. Independent Psychologist concluded that although the Student's cognitive abilities are in the Average to Low Average range, his academic skill set had gaps and was below grade level and deteriorating. P-6-13.

27. The Student had not been suspended from school, nor engaged in any major behavior issues. Testimony of Independent Psychologist.

28. Based solely upon Conners 3 [Conners' Rating Scales-Revised (CRS-R™)] forms completed by the Parent and the Student's counselor at the Attending School, Independent Psychologist found that the Student had "challenges in sustaining his attention and ... can be described as hyperactive and impulsive. He is experiencing barriers to learning and with his ability to be organized and solve problems (Executive Functioning)." P-6-10.

29. Independent Psychologist concurred in the diagnosis of ADHD, Combined Type (P-6-14) , "coupled with a co-morbidity of Depression and Anxiety." P-6-15.

30. Independent Psychologist concluded that the Student's ADHD interfered with his ability to seek out and maintain relationships with teachers and peers appropriately, causing him anxiety, and leading him to "self-isolate through defensive and self-protective behaviors that have been interpreted as defiance and her (sic his) being oppositional." *Id.*

31. Independent Psychologist's recommendations included placing the Student in a specialized therapeutic day school setting⁶ where he would learn in a small classroom and receive tutoring, social skills training, and individual and group therapy. P-6-16, testimony of Independent Psychologist.

First Term of 2012-2013 School Year

32. The Student advanced to the Current Grade for the 2012-2013 school year without needing to attend summer school. Testimony of Parent.

33. The Student's academic performance in the first term of the 2012-2013 school year was below grade level and his attitude and effort were inconsistent. P-7-4.

34. During the first term of the 2012-2013 school year the Student performed academically two or three grade levels below Current Grade and engaged in inappropriate behavior approximately once per month. Testimony of Teacher.

35. The Student had difficulty doing independent work. *Id.*

November 2012 Review of Independent Educational Evaluation

36. In November 2012, DCPS School Psychologist #2 reviewed Independent Psychologist's evaluation. R-6.

37. On November 11, 2012, DCPS School Psychologist #2 observed the Student in his math classroom, during which the Student was slow to follow teacher directions,

⁶ In response to a question from the undersigned, Independent Psychologist testified that she would recommend a therapeutic day school for any child who scored 70 or above on multiple areas of the Conners 3. This is not surprising because, as previously noted (*see*, Finding of Fact 19 *supra*), Independent Psychologist has recommended a therapeutic day school for every child she has evaluated.

did not comply until directions were repeated several times, and stood and talked to his peers while they were sitting.⁷ R-6-5.

38. In her report, DCPS School Psychologist #2 made the following findings:

When [the Student] may need help with his academics, he may exhibit feelings of frustration, anxiousness or sadness. When feeling these characteristics, he may have challenges with expressing his emotions. This may manifest itself in the classroom as [the Student] becoming withdrawn and angry, thus not being motivated to participate in class activities or class work.

He may display activities that will be impulsive and may lead to poor decision making and conflict with peers or teachers. In turn, a result may manifest itself in combative or aggressive behaviors that can impede his ability to have and sustain positive relationships. The lack of positive relationships can, indeed, foster negative perceptions of self, of one's relationships, and of school.

It appears, based on the Independent Evaluations, that [the Student] is performing in the low average to average range of functioning in his academics. He also is exhibiting characteristics of ADHD with additional areas of concern of anxiety and depression. [The Student] also has deficits in socialization and adaptive skills.

R-6-5 and -6.

39. In her report, DCPS School Psychologist #2 concluded that the Student was not eligible under IDEA as a child with an SLD because he did not have a disorder in one or more of the basic psychological processes involved in understanding or using language that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. R-6-6.

40. In her report, DCPS School Psychologist #2 also concluded that the Student was not eligible under IDEA as a child with an OHI, specifically ADHD, although her

⁷ Inexplicably, DCPS School Psychologist #2 testified that despite these behaviors, the Student remained "on task."

Report does not state which OHI criterion (*see*, Section IX *infra*) the Student failed to meet or in what way he failed to meet that criterion. R-6-6.

41. In her testimony, School Psychologist #2 described the Student as having some difficulty staying seated and focused, spending 30 to 40 percent of the time walking around to peers and talking to them, and also getting into conflicts with students and staff. Testimony of School Psychologist #2.

42. School Psychologist #2 testified that the Student is often inattentive and unfocused, which holds him back in his academic subjects. *Id.*

43. School Psychologist #2 testified that the Student is impulsive and gets into arguments with his teachers, and that he has conflicts in and out of class time “once every couple of weeks.” *Id.*

44. At least a dozen times when the Student got into conflicts, School Psychologist #2 intervened and assisted the Student, removing him from his classroom for 10 to 15 minutes, returning him to his classroom, and staying with him through his transition back into that classroom. *Id.*

45. Sometimes the Student could not successfully return to his classroom and on one occasion was taken to another classroom and given some work to do in that classroom. *Id.*

46. Sometimes the Student could not “let go” of feelings that he was being singled out to be punished or reprimanded. *Id.*

47. School Psychologist #2 did not see any improvement in the Student’s behavior from 2010 to 2012. *Id.*

48. School Psychologist #2 believes the Student would benefit from counseling to deal with conflict in and out of the classroom, but that counseling is not required for him to access his education. *Id.*

49. School Psychologist #2 believes the Student would benefit from instruction in organization skills and study skills because he does not use his time wisely. *Id.*

50. School Psychiatrist #2 believes the Student's academic proficiency levels are "not where we'd like to see him" due to a combination of his inability to focus and "what he's missing" as a result of his ADHD. *Id.*

51. In her testimony, School Psychologist #2 agreed with the findings in Independent Psychologist's evaluation report regarding the Student's disability and its impact on his academics and behavior; however, because the Student's academic scores were less than two standard deviations below the norm,⁸ School Psychologist #2 disagreed with Independent Psychologist's conclusion that the Student required specialized instruction. *Id.*

52. Upon questioning by the undersigned, School Psychologist #2 testified that the Student needs his teachers to adapt the content, instructional methodology and/or delivery of instruction due to his ADHD in order to meet DCPS' educational standards to the fullest. *Id.*

November 21, 2012 MDT Meeting

53. On November 21, 2012, the Student's MDT met to determine his eligibility for specialized instruction and related services under IDEA. R-5.

⁸ The IDEA and its implementing regulations have no such criterion for eligibility under the OHI classification. *See* Section IX *infra*.

54. The MDT reviewed the Student's scores on Paced Interim Assessments ("PIAs"), Dynamic Indicators of Basic Early Literacy Skills ("DIBELS"), and Burst® Reading; the Independent Psychologist's Evaluation; and School Psychologist #2's report. Testimony of SEC.

55. The Teacher stated that the Student was progressing very well in math. R-5-2.

56. The Student's other teacher stated that the Student's "attitude" held him back in social studies and English at the beginning of the school year, but he was "getting better." *Id.*

57. The MDT discussed the Student's failure to complete his homework and how to address that in his after-care program using color-coded folders and incentives. Testimony of SEC.

58. The MDT did not discuss the Student's behavior or the impact of his behavior on his academics. *Id.*

59. The MDT did not discuss the Student's need for specialized instruction. *Id.*

60. The MDT found the Student not eligible under IDEA because of his scores on PIAs, DIBELS, and Burst® Reading. *Id.*

61. Petitioner's counsel stated his opinion that the Student was eligible, but Respondent's members of the MDT disagreed. *Id.*

Second and Third Terms of 2012-2013 School Year

62. The Student's academic performance in the second and third terms of the 2012-2013 school year was below grade level and his attitude and effort were inconsistent. P-7-4.

63. Academically, although he has made some progress during the 2012-2013 school year, the Student still is performing at two or three grade levels below Current Grade. Testimony of Teacher.

64. The Student has difficulty with written expression and spelling and made little progress during the 2012-2013 school year. *Id.*

65. The nurse at the Attending School, with whom the Parent has rapport, called the Parent to advise her that another student had “attacked” the Student with a “pencil to his throat,” which led to an altercation the next day. Testimony of Parent.

66. The nurse also called the Parent to tell her that the Student had fought in the classroom when another student took his colored pencils. *Id.*

67. Despite the Parent reading with the Student daily, he can only read books intended for students three or more grades below Current Grade. *Id.*

68. Most of the time the Student can listen in class, follow directions and follow school rules. *Id.*

69. The Student’s medication helps him regulate his behavior. *Id.*

70. The Student was not suspended or subject to a disciplinary referral during the 2012-2013 school year. *Id.*

71. The Student often shows disruptive behavior in the classroom. Testimony of Teacher.

72. When the Student is disruptive, sometimes he can be redirected but often he cannot sit and complete a task, and he has loud outbursts. *Id.*

73. The Student demonstrates lack of focus, hyperactivity, and excessive talking to other students while the Teacher is attempting to teach the class. *Id.*

74. The Student's disruptive behavior and inability to focus often prevent him from accessing the general education curriculum. *Id.*

75. The Student has difficulty doing independent work, which slows his academic progress. *Id.*

76. Often the Student does not complete his work. *Id.*

77. The Student is not able to access the Current Grade curriculum. *Id.*

78. The Teacher provides differentiated instruction, including one-on-one instruction, to all of her students. *Id.*

79. Despite the Student's difficulties, the Teacher does not believe the Student requires modifications or accommodations to access the general education curriculum (*Id.*).⁹

80. The SEC acknowledges that the Student is very impulsive, very argumentative, overly talkative, and has frequent conflicts—some major—with peers and adults. Testimony of SEC.

81. The SEC acknowledges that the Student's behavior requires his teacher to allow him five to ten-minute out-of-classroom breaks. *Id.*

82. The SEC testified that the Student's impulsiveness, argumentativeness, talkativeness, and proneness to conflict have no impact on him academically and do not interfere with his accessing the general education curriculum). *Id.*

⁹ Although the undersigned found the Teacher's testimony to be entirely credible, the undersigned discounts the Teacher's opinion on this point due to her lack of training in special education.

83. The SEC testified that the Student can be redirected, and after engaging in misbehavior he can “tell you exactly what happened” and he is apologetic, therefore he does not require specialized instruction.¹⁰ *Id.*

84. The SEC testified that she “has no concerns” about the Student except his tardiness. *Id.*

85. For the reasons discussed in Section VIII *infra*, the undersigned rejects the SEC’s testimony summarized in Findings of Fact 82-84, *supra*, as not credible.

The Student’s Attendance and Punctuality

86. The Student has been absent 11 times during the 2012-2013 school year.
Testimony of Teacher.

87. The Student has been tardy 34 times during the 2012-2013 school year. *Id.*

The Hearing Officer’s Findings of Fact Regarding the Student’s Suspected Disabilities

88. Based on the entire record, the undersigned finds that Petitioner has not established by a preponderance of the evidence that the Student has any of the following conditions exhibiting any characteristics over a long period of time and to a marked degree that adversely affects his educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behaviors or feelings under normal circumstances;

¹⁰ The SEC did not explain this *non sequitur*.

(d) a general pervasive mood of unhappiness or depression; (e) a tendency to develop physical symptoms or fears associated with personal or school problems; or
(f) schizophrenia.

89. Based on the entire record, the undersigned finds that Petitioner has introduced no evidence that the Student has a disorder in any of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

90. Based on the entire record, the undersigned finds that that Petitioner has introduced no evidence that the Student has perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, or developmental aphasia.

91. Based on the entire record, the undersigned finds that the Student's ADHD causes him to have a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment.

92. Based on the entire record, the undersigned finds that the Student's ADHD adversely affects his educational performance.

93. Based on the entire record, the undersigned finds that due to his ADHD, the Student requires adaptations to the methodology and delivery of his instruction as well as behavioral support services to address his unique needs and to ensure his access to the general curriculum so that he can meet DCPS' educational standards that apply to all children.

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR § 5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR § 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VIII. CREDIBILITY

The undersigned found the witnesses to be credible, to the extent of their first hand knowledge or professional expertise, with the following exceptions:

Independent Psychologist was not credible. All of her evaluations are on referrals from parents' attorneys seeking findings of eligibility for their children. She always finds them eligible. She always recommends the same restrictive placement for the children. She considers any child with ADHD to require specialized instruction, despite the fact that IDEA imposes additional criteria. *See*, Section IX *infra*. It was apparent from Independent Psychologist's evaluation report and her defensiveness on cross-examination that she had predetermined her recommendations, rendering her rationale for those recommendations a *post hoc* rationalization.¹¹

The SEC was not credible. Despite acknowledging the Student's many problems at school, she claimed to have no concerns about him other than his eleven days of absence during the past school year and his more frequent tardiness—even though he

¹¹ However, the undersigned accepts the results of the tests administered by Independent Psychologist, which were consistent with prior testing of the Student and were accepted as valid and accurate by School Psychologist #2. R-6-1.

demonstrated academic and behavioral problems at school in the afternoons when absence and tardiness were not issues. The SEC's defensiveness on cross-examination, bordering on flippancy, further undercut her credibility.

The undersigned therefore has disregarded the testimony of both the Independent Psychologist and the SEC except to the extent each made admissions against the interest of the party that called her as a witness.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR § 5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a FAPE, *i.e.*:
special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR § 5-E3001.1.

Eligibility Determination

3. Once a child has been evaluated,

a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child

34 C.F.R. §300.306(a)(1).

4. The IDEA defines a child with a disability as a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

5. “Child with a disability” is further defined in 34 C.F.R. § 300.8(a) as a child evaluated

(1) ... as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “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.

(2)(i) ... [I]f it is determined, through an appropriate evaluation ... that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

6. The parties stipulated that the Student does not have mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an orthopedic impairment, autism, a traumatic brain injury or deaf-blindness (Finding of Fact 5), so the undersigned concludes that the Student is ineligible under any of those disability classifications.

7. “Emotional disturbance” is defined in 34 C.F.R. § 300.8(c)(4) as

(i) ... a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behaviors or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Accord, DCMR 5-E3001.1.

8. Based on the entire record (*see*, Finding of Fact 88), the undersigned concludes that the Student does not have an emotional disturbance.

9. “Specific learning disability” (“SLD”) is defined in 20 U.S.C. § 1401(30) as follows:

(A) In general

The term “specific learning disability” means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

Accord, 34 C.F.R. § 300.8(c)(10).

10. Based on the entire record (*see*, Findings of Fact 89 and 90), the undersigned concludes that the Student does not have an SLD.

11. “Other health impairment” (“OHI”) is defined in 34 C.F.R. § 300.8(c)(9) as

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to ... attention deficit hyperactivity disorder ... and

(ii) Adversely affects a child’s educational performance.

12. Based on the entire record (*see*, Findings of Fact 91 and 92), the undersigned concludes that the Student has an OHI, based on his ADHD.

13. The IDEA defines “special education” as

specially designed instruction ... to meet the unique needs of a child with a disability....

20 U.S.C. § 1401(29).

14. “Specially designed instruction” means

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

15. Based on the entire record (*see*, Finding of Fact 93), the undersigned concludes that the Student requires specially designed instruction to address his unique needs.

16. Based on the entire record (*see, id.*), the undersigned concludes that the Student requires specially designed instruction to ensure his access to the general curriculum so that he can meet DCPS’ educational standards that apply to all children.

17. Based on the entire record (*see, id.*), the undersigned concludes that the Student requires behavioral support services to access the general curriculum.

18. Based on Conclusions of Law 12-17, *supra*, the undersigned concludes that the Student requires special education and therefore is eligible under IDEA.

IEP

19. The “primary vehicle” for implementing the goals of the IDEA is the IEP which the IDEA “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

20. The requirement of an IEP applies once “a determination is made that a child has a disability and needs special education and related services” 34 C.F.R. §300.306(c)(2). *See also*, DCMR 5-E3007.1 (“The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.”)

21. In the instant case, no IEP was developed because Respondent determined that the Student was not eligible under IDEA.

22. Because the Student’s MDT should have found him eligible at its meeting on November 21, 2012, Respondent should have developed an IEP for the Student no later than December 21, 2012. The failure to develop an IEP necessarily caused a failure to provide a FAPE to the Student.

X. ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. No later than July 19, 2013, Respondent shall convene an Individualized Education Program Team (IEPT) or Multidisciplinary Team (“MDT”) meeting to develop an initial Individualized Education Program (“IEP”) for the Student and to determine his placement.

2. The initial IEP shall state the Student’s primary disability classification as Other Health Impairment, and include the following elements:

- (a) specialized instruction to address the Student’s hyperactivity, inability to focus and/or concentrate and difficulty working alone; and

(b) behavioral support services to address the Student's impulsivity, excessive talkativeness, aggressiveness and argumentativeness.

3. No later than August 2, 2013, Respondent shall inform Petitioner of the Student's location of services for the 2013-2014 school year.

4. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

5. Any delay caused by Petitioner or Petitioner's representatives (e.g., absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

6. Petitioner's other requests for relief are DENIED.

Dated this 27th day of June, 2013.



Charles M. Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).