

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

OSOE  
Student Hearing Office  
September 23, 2013

Office of Review and Compliance  
Student Hearing Office  
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**Confidential**

<p>Parent on Behalf of Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case # [REDACTED]</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 5, 2013</p> <p><u>Representatives:</u></p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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[REDACTED]

## **BACKGROUND AND PROCEDURAL HISTORY:**

On December 20, 2012, DCPS and Petitioner entered into a settlement agreement in which DCPS agreed to conduct a psychological evaluation of the student. Petitioner challenged DCPS' evaluation once it was conducted and on February 26, 2013, DCPS agreed to fund an independent evaluation that was completed in April 2013.

On June 7, 2013, DCPS convened a meeting to review the independent evaluation and the student's eligibility for special education services. DCPS determined the student was not eligible and on June 12, 2013, sent Petitioner a 504 plan.

On [REDACTED], Petitioner filed the current due process complaint. Petitioner asserted the student should have been found eligible as evidenced, inter alia, by [REDACTED] repeating fourth grade for SY 2013-2014. Petitioner seeks as relief that the Hearing Officer find the student eligible based upon a disability of other health impairment ("OHI") for Attention Deficit Hyperactivity Disorder ("ADHD") and/or emotional disability ("ED") order DCPS to convene and meeting to develop an individualized educational program ("IEP") and determine and appropriate placement for the student.

DCPS filed a timely response to the complaint on July 19, 2013. DCPS denied any denial of a FAPE and specifically asserted that the student's poor attendance negatively impacted [REDACTED] educational performance. DCPS asserted that while the student qualifies for a 504 plan the ineligibility determination is appropriate.

A resolution meeting was convened on June 11, 2013. The resolution meeting was not successful in resolving the disputes. The parties did not agree to waive the remainder of the resolution period. Thus, the 45-day timeline began to run on [REDACTED], and ends, and the Hearing Officer's Determination ("HOD") is due, on [REDACTED]. A pre-hearing conference was held on August 28, 2013, and a pre-hearing conference order was issued August 28, 2013, outlining, inter alia, the issue to be adjudicated.

## **THE ISSUE ADJUDICATED:<sup>2</sup>**

Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to determine the student eligible for special education services at the June 7, 2013, meeting based upon the evaluation data available to the team at that meeting.

## **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-15 and DCPS Exhibit 1-12)

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<sup>2</sup> The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

**FINDINGS OF FACT:**<sup>3</sup>

1. The student is age eleven and resides with [REDACTED] parent in the District of Columbia. [REDACTED] attends a DCPS elementary school (“School A”) and was in fourth grade during school year (“SY”) 2012-2013 and was retained in fourth grade for SY 2013-2014. (Parent’s testimony)
2. The student’s parent had been a victim of domestic violence and for a time lived in a shelter with the student and [REDACTED] other children. As result, the student has missed significant amounts of school and missed instruction. The student has been in three other DCPS elementary schools prior to moving to School A in February 2013. (Witness 1’s testimony)
3. The student began to display academic and behavioral difficulties early. [REDACTED] was promoted to second grade but was put back in first grade because [REDACTED] did not have the required second grade skills. When [REDACTED] was promoted to second grade the following school year [REDACTED] displayed disruptive behaviors in class. (Parent’s testimony)
4. As the student was starting third grade a psychiatrist diagnosed [REDACTED] in August 2011 with ADHD and Dysthymic Disorder. (Petitioner’s Exhibit 3-2)
5. After the parent gave DCPS a letter from the psychiatrist with the student’s diagnosis DCPS developed a 504 plan for the student in December 2011 to address [REDACTED] hyperactivity and inattention. (Parent’s testimony, Petitioner’s Exhibit 4)
6. At the start of SY 2012-2013 the student was attending another DCPS elementary school (“School B”). In February 2013 the parent transferred the student to school A, which was closer to [REDACTED] home because the parent had had difficulty getting the student to school consistently and on time. (Parent’s testimony)
7. The student’s 4<sup>th</sup> grade class at School A had a total of 19 students. The student was reluctant to participate with full class instruction but tended to participate better with small group instruction. [REDACTED] is below grade level and is mid second grade in reading and math. The student was often resistant and stubborn and lacked motivation. [REDACTED] required redirection and prompting and most times could not do the work. [REDACTED] did better with small group instruction but would then

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<sup>3</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party’s exhibit.

frequently forget what ■ learned. The student's classroom teacher was at a loss as to how to address these behaviors and improve the student's academic performance. (Witness 4's testimony)

8. In the student's the third term report card for SY 2012-2013 the student's teacher wrote that the student would be retained in fourth grade pending the outcome of special education evaluation. (Petitioner's Exhibit 13-1,13-2, 13-2, 13-4)
9. The student's end of year report card indicated that student was at beginning level for virtually every area assessed on the report card and noted that during the time the student attended School A ■ was absent 7 days out of 92. The teacher comments note that the student "continued to struggle with grade level skills in reading math and writing ...as a result the student will be retained in the fourth grade next year. I would strongly encourage the student to attend summer school in order to acquire the necessary skills." (Petitioner's Exhibit 13-1,13-2, 13-2, 13-4)
10. In April 2013 an independent clinical psychologist (evaluator) conducted several assessments of the students<sup>4</sup> and conducted a classroom observation at School A. The evaluator observed that the student was on-task only 18% of the time and ■ off task behavior generally consisted of ■ doodling on ■ papers or staring, daydreaming or looking around the classroom. The student's classroom teacher reported to the evaluator that the student's skills related to reading comprehension, listening and oral expression were limited and ■ basic reading writing and written expression skills were negligible. ■ said the student often failed to pay close attention to detail had difficulty sustaining attention in tasks or activities, did not listen when spoken to directly and failed to finish ■ work. (Petitioner's Exhibit 7-2)
11. The evaluator confirmed the student's primary diagnosis of ADHD and also diagnosed the student with a learning disorder, not otherwise specified, and oppositional defiant disorder and anxiety disorder, not otherwise specified. The evaluator concluded based on the assessments that the student cognitive skills were in the borderline to low average range and ■ was performing academically also in the borderline to low average range, approximately two grade levels behind ■ current grade. (Witness 2's testimony, Petitioner's Exhibit 7-3, 7-11)
12. The evaluator concluded the student required immediate and intensive remediation in the areas of basic and advanced reading skills, math computation and written expression and ■ would benefit form a well structured learning environment with limited distractions to help maintain attention and focus in the classroom. The evaluator strongly recommended the student met the criteria as a

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<sup>4</sup> The following assessments instruments were used: Revised children's Manifest Anxiety Scale –Second Education, Behavior assessment System for Children (BASC2) parent and teacher, Wechsler Intelligence Scale for Children (WISC-IV) and Woodcock-Johnson (WJ-III), Adaptive Behavior Assessment for Children 2<sup>nd</sup> Edition.

student with a disability under IDEA with the OHI classification. [REDACTED] also was of the opinion the student met the criteria for ED classification. (Witness 2's testimony)

13. On June 7, 2013, DCPS convened and meeting to review the independent evaluation and the student's eligibility for special education services. The eligibility meeting [REDACTED] and the DCPS members of team concluded the student did not meet the criteria as child with a disability. On June 12, 2013, DCPS sent Petitioner a 504 plan. (Parent's testimony, Petitioner's Exhibits 8, 9)
14. At the eligibility meeting the team reviewed the evaluation, classroom observations and input from the student's teacher. Despite the student's ADHD diagnosis and [REDACTED] poor academic performance the DCPS members of the eligibility team concluded the student did not meet the criteria as a child with disability under IDEA in need of special education services because of [REDACTED] history of poor school attendance. (Witness 3's testimony)
15. A DCPS psychologist conducted a classroom observation of the student prior to the eligibility meeting and participated as a team member. During that observation the student was alert and participatory and was able to get back on tract with the teachers assistance. The DCPS psychologist noted that the student is below grade level and needs helps with [REDACTED] motivation and attendance. The DCPS members of the team determined the student was not eligible primarily because of [REDACTED] attendance and [REDACTED] consequently had not received sufficient academic instruction. The DCPS members of the team reviewed and updated the 504 plan that had already been developed for the student. Because the student's teacher described the student's inattention in class and [REDACTED] inability to complete the work the team recommended counseling for the student and reading remediation with the school reading resource teacher as components of the 504 plan. The team concluded that once the student's attendance improved the eligibility could be revisited. (Witness 3 testimony)

#### **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 a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a 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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>5</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is 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:** Whether DCPS denied the student a FAPE by failing to determine the student eligible for special education services at the June 7, 2013, meeting based upon the evaluation data available to the team at that meeting.

**Conclusion:** Petitioner presented sufficient evidence to sustain the burden of proof by a preponderance of evidence that the student qualifies as a child with a disability under IDEA with a classification of OHI. Although there was evidence the student may also qualify under the ED classification, because the student meets one criteria for eligibility and is entitled to special education services, the Hearing Officer will direct an IEP team develop an IEP and to determine if the student should be qualified under an additional classification and whether [REDACTED] IEP when developed should address concerns related to any additional classification.

Congress passed the IDEA 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." 20 U.S.C. §1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C. §1400(d)(2).

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<sup>5</sup> The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "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)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1.

"The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

To be eligible for special education services a child must be evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an **other health impairment**, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8 (emphasis supplied.) See *Parker v. Friendship Edison Public Charter School*, 577 F.Supp.2d 68, 74 (D.D.C.2008).<sup>6</sup>

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<sup>6</sup> 34 C.F.R. §300.8 provides:

Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with Sec. Sec. 300.304 through 300.311 as having ... [listed disabilities] and who, by reason thereof, needs special education and related services.

(2) (i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under Sec. Sec. 300.304 through 300.311, 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.

(ii) If, consistent with Sec. 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

34 C.F.R. § 300.306 provides:

Determination of eligibility.

Witness 2 presented uncontroverted and credible testimony interpreting evaluative data that clearly demonstrates the student is performing at the 2<sup>nd</sup> to 3<sup>rd</sup> grade level in reading, math and written language, and has been diagnosed with ADHD and other disorders. That evaluator concluded the student's in school behavior negatively impacts [REDACTED] academic progress and [REDACTED] should be identified as a student with OHI.

Although a legitimate basis for not finding a student eligible is the lack of instruction, there was no clear evidence presented by DCPS regarding the student's lack of instruction to sufficiently countered Petitioner's evidence that the student's disability was negatively impacting [REDACTED] educationally and the reason for [REDACTED] academic deficits.

DCPS witnesses pointed to the student's history of poor school attendance as the primary reason for the team concluding the student was ineligible, However, the evidence clearly

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(a) General. Upon completion of the administration of assessments and other evaluation measures-

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(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--

(1) If the determinant factor for that determination is--

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must--

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324.

demonstrated that despite the student's improved attendance at School A during the second half of SY 2012-2013, ■ academic performance did not improve. The student's School A teacher clearly indicated the student refused to participate in whole group instruction and even when ■ benefitted from small group instruction ■ easily forgot what ■ learned. The Hearing Officer was not convinced that the June 10, 2013, eligibility team's determination was appropriate and gave significant weight to Petitioner's expert witness who had also observed the student in the classroom and interviewed the student's teacher. ■ concluded that the student's ADHD was negatively impacting ■ education and the reason for ■ academic deficits and the student met the eligibility criteria as a child with a disability under IDEA primarily with the OHI disability classification. Thus, the Hearing Officer concludes Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS' decision to find the student ineligible was incorrect and denied the student a FAPE.

Consequently, the Hearing Office concludes that the student is eligible as a child with a disability under IDEA with a disability classification of OHI and will direct that DCPS convene meeting to develop an IEP for the student and consider any other disability classification that may be appropriate for the student.

**ORDER:**

1. The student is hereby determined eligible as a child with a disability under IDEA with a classification of OHI.
2. DCPS shall within ten (10) business days of the issuance of this Order convene an IEP meeting to develop an IEP consistent with the findings of this HOD and determine an appropriate educational placement for the student.
3. The IEP team when it meets shall also determine if the student should be qualified under an additional classification and whether ■ IEP when developed should address concerns related to any additional classification.

**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 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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**

**Date: September 22, 2013**