

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
November 23, 2015

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STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>	)	
	)	Case No: 2015-0316
v.	)	
	)	<b>Date Issued:</b> November 23, 2015
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

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**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

**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 on September 25, 2015 by Petitioner (Student’s grandmother/guardian<sup>2</sup>), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On October 13, 2015, Respondent filed its Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). Respondent’s Response had been due on October 5, 2015.

The parties convened a Resolution Session Meeting (“RSM”) in this matter on October 6, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on October 26, 2015, and 45-day period concludes on December 9, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on October 13, 2015, during which the parties discussed and

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<sup>1</sup> Personal identification information is provided in Appendix A.

<sup>2</sup> This decision will refer to Petitioner as “Parent,” as she provides day-to-day care for Student.

clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by October 22, 2015 and that the DPH would be held on October 29, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on October 13, 2015 and amended on October 19, 2015.

The DPH was held on October 29, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2003. Petitioner elected for the hearing to be closed. Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by William Jaffe, Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-19 were admitted without objection. Respondent’s exhibits R-1 through R-9 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Educational Advocate

Respondent did not call witnesses at the DPH, but rested on the evidence.

Petitioner and Respondent gave oral closing arguments.

#### **ISSUE**

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.<sup>3</sup>

- (a) Whether DCPS denied Student a FAPE by failing to identify him as eligible for special education and related services as a student with “Other Health Impairment” (“OHI”) and/or “Specific Learning Disorder” (“SLD”) in reading and writing, during a meeting held on or around September 18, 2015, and by failing to provide Student with an individualized education program (“IEP”) and a behavioral intervention plan (“BIP”).

#### **RELIEF REQUESTED<sup>4</sup>**

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE as to the issue alleged;

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<sup>3</sup> The second issue reflected in the PHO was “Whether DCPS denied Student a FAPE by failing to conduct a comprehensive initial evaluation of the student in that it did not include clinical measures in the initial psychological evaluation, and in that DCPS did not conduct a speech and language and/or occupational therapy evaluation prior to making an eligibility determination.” During the DPH, Petitioner withdrew this issue without prejudice, without objection from Respondent.

<sup>4</sup> The PHO reflected two additional requests for relief – “an Order that DCPS fund a clinical psychological evaluation of the student, as well as a speech and language evaluation and occupational therapy evaluation” and “an Order that DCPS shall reconvene the student’s IEP team after the independent evaluations are completed, in order to review the findings and revise the student’s IEP as appropriate” – which Petitioner withdrew during the DPH, without objection from the Respondent.

- (b) an Order that Student is determined eligible for special education and related services under the disability classifications OHI and/or SLD;
- (c) an Order that DCPS immediately convene an IEP meeting to develop an IEP;
- (d) an Order that DCPS develop a behavioral intervention plan for Student;
- (e) acknowledgement in the HOD that any compensatory education claim is not ripe in this action.

### FINDINGS OF FACT

1. Student is [AGE] years old. During the 2014-2015 school year, he was a [GRADE] student. Student resides with his grandmother and legal guardian (“Petitioner”/”Parent”) in Washington, D.C.<sup>5</sup>
2. On or around September 16, 2014, Petitioner submitted a written request to DCPS that Student be evaluated for eligibility for special education and related services.<sup>6</sup>
3. By April 2015, DCPS had not yet evaluated Student and Petitioner filed a DPC (“earlier DPC”).<sup>7</sup>
4. In April 2015, Petitioner and DCPS reached an agreement that DCPS would evaluate Student, and Petitioner withdrew the earlier DPC.<sup>8</sup>
5. DCPS conducted a comprehensive psychological evaluation of Student, reflected in an evaluation report dated May 16, 2015. The comprehensive psychological evaluation indicated that Student was not finishing his work, had trouble remaining in his seat, that Student’s cognitive scores were in the average range but his academic functioning was three grade levels below his grade at the time in spelling, three grade levels below in reading, and more than three grade levels below in word identification. The evaluation indicated that Student had a learning disability in reading and writing, and recommended that he be determined eligible for special education and related services under the disability classification SLD.<sup>9</sup>
6. The May 16, 2015 psychological evaluation did not include rating scales to determine whether Student had Attention Deficit Hyperactivity Disorder (“ADHD”), though Parent indicated to DCPS prior to the evaluation being conducted (including at an April 22, 2015 resolution session meeting for the earlier DPC) that Student had an ADHD diagnosis and took medication for ADHD.<sup>10</sup> The May 16, 2015 evaluation indicated that Student has a history of possible ADHD, and that the evaluator was awaiting documentation from Parent to confirm his ADHD diagnosis.<sup>11</sup>

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<sup>5</sup> Testimony of Parent; P-13.

<sup>6</sup> P-1.

<sup>7</sup> P-8-4.

<sup>8</sup> Testimony of Educational Advocate.

<sup>9</sup> P-15-4.

<sup>10</sup> P-5-1.

<sup>11</sup> P-15-1.

7. On approximately June 11, 2015, DCPS conducted a functional behavioral assessment (“FBA”) for Student, which indicated that Student withdraws when it is time to complete his written assignments and avoids turning in his work.<sup>12</sup>

8. DCPS provided a copy of the May 16, 2015 psychological evaluation report and the FBA to Petitioner on or around July 17, 2015.<sup>13</sup>

9. Beginning on or around July 17, 2015, Petitioner and Respondent began discussing dates to convene a meeting to review the FBA and the psychological evaluation, and to determine whether Student was eligible for special education and related services. Respondent had proposed July 2015 dates and Petitioner had proposed August 2015 dates, but the earliest mutually agreeable date was September 18, 2015.<sup>14</sup>

10. On September 18, 2015, Student’s multidisciplinary team (“MDT”) convened a meeting to determine Student’s eligibility. The team determined that it needed additional information (such as Conners rating scales administered to Parent and Student’s teachers) to determine whether Student would be eligible as a student with OHI due to ADHD. Educational Advocate was present at the meeting, and while he did not oppose DCPS conducting additional testing to determine if Student was eligible under the classification OHI, he informed the team that he disagreed with deferring a disability determination under the classification of SLD, as he believed the team had sufficient information as of September 18, 2015 to make that determination. The team agreed to reconvene on October 7, 2015.<sup>15</sup>

11. Parent received her portion of the Conners rating scales to complete on October 6, 2015, and returned her completed rating scales to the school on October 7, 2015.<sup>16</sup>

12. On October 6, 2015, Petitioner’s counsel requested that the October 7, 2015 meeting be rescheduled for a different date, because Parent was no longer available on October 7, 2015, and because DCPS had not yet completed the Conners rating scales.<sup>17</sup>

13. The week prior to the DPH, Student’s MDT reconvened and determined Student eligible for special education and related services under the disability classifications OHI and SLD.<sup>18</sup>

14. As of the DPH, Student’s MDT had not yet prepared an IEP or a BIP for Student; however, it was set to reconvene on November 13, 2015 to prepare an IEP and BIP for Student. DCPS intended to provide a draft IEP to Petitioner prior to the meeting.<sup>19</sup>

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<sup>12</sup> P-16-2.

<sup>13</sup> R-4-1.

<sup>14</sup> Testimony of Educational Advocate; R-4.

<sup>15</sup> Testimony of Educational Advocate.

<sup>16</sup> Testimony of Parent; testimony of Educational Advocate; R-6.

<sup>17</sup> Testimony of Educational Advocate; P-18-1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

### CONCLUSIONS OF LAW

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *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).

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

- (a) Whether DCPS denied Student a FAPE by failing to identify him as eligible for special education and related services as a student with “Other Health Impairment” (“OHI”) and/or “Specific Learning Disorder” (“SLD”) in reading and writing, during a meeting held on or around September 18, 2015, and by failing to provide Student with an IEP and a BIP.**

During a September 18, 2015 MDT meeting, Petitioner requested that Student be determined eligible for special education and related services under the disability classification OHI and/or SLD. Pursuant to 34 CFR § 300.8(c)(9), OHI means 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 chronic or acute health problems such as ADHD, and (ii) adversely affects a child’s educational performance. As of the September 2015 MDT, DCPS had available an evaluation it had conducted in May 2015, long after Petitioner had initially requested it September 2014. Not only had there been a significant delay in conducting the evaluation, but there was a delay in providing it to Petitioner, as it was not provided to Petitioner until July 2015. DCPS had information prior to conducting the May 2015 evaluation that Student was suspected of having ADHD, and the evaluation itself acknowledges that Parent and Student’s teacher’s suspected him of having ADHD. Though the evaluation indicates that the evaluator was awaiting confirmation from Parent of Student’s medical diagnosis, even without this information, the Conners or other ADHD rating scales could have been administered as of May 2015 or at any time prior to the September 2015 MDT. When the rating scales were ultimately administered, Student was confirmed to have ADHD, and was determined eligible under the disability classification OHI.

SLD refers to “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 to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” Student’s DCPS-conducted May 2015 psychological evaluation clearly

indicates that Student should be determined eligible for special education and related services under the disability classification SLD. The September 2015 MDT had sufficient information to determine Student eligible for special education and related services under the SLD disability classification. Particularly given that a year had already passed since Petitioner initially requested that Student be evaluated, it was not reasonable to defer the eligibility determination beyond the September 2015 meeting.

Failing to determine Student eligible for special education and related services under the disability classification of OHI and/or SLD as of the September 2015 MDT impeded Student's right to a FAPE and caused him a deprivation of educational benefit. It further delayed the process of providing him a IEP and a BIP, services he had already missed throughout the 2014-2015 school year. As of the DPH, those services were still not available to Student, and much of the first semester of the 2015-2016 school year would have passed before the services were anticipated to be available, as of approximately November 13, 2015. Petitioner met the burden of proving that DCPS denied Student a FAPE by failing to identify him as eligible for special education and related services as a student with OHI and/or SLD during a meeting held on or around September 18, 2015, and by failing to provide him an IEP and a BIP prior to the DPH, which was approximately six weeks after the September 2015 meeting.

**ORDER**

Respondent argued that Petitioner's requests for relief should not be ordered, as DCPS had already agreed to provide them. However, as of the DPH, the requests for relief were pending and not yet finalized or formalized.<sup>20</sup> A few days prior to the DPH, Petitioner offered to agree to a continuance of the DPH, if Respondent wanted to request one, to allow time for the IEP and BIP to be finalized; however, Respondent declined to request a continuance. Accordingly, based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- (a) Student is determined eligible for special education and related services as a student with OHI and SLD;
- (b) within 10 school days of this Order, DCPS shall convene an IEP meeting to develop an IEP for Student, unless the parties mutually agree that Student already has an IEP;
- (c) within 10 school days of this Order, DCPS shall develop a BIP for Student, unless the parties mutually agree that Student already has a BIP.

Any days of delay in fulfilling the requirements of this Order that are attributable to Parents, Student, their advocates and/or their chosen service providers shall not count against DCPS.

All other relief Petitioner requested in the complaint is **DENIED**.

**IT IS SO ORDERED.**

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<sup>20</sup> Compensatory education claim is not ripe in this action, as it is not clear on what date Student's IEP and BIP were/will be finalized.

2015-0316  
Hearing Officer Determination

Date: November 23, 2015

*/s/ NaKeisha Sylver Blount*  
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney: Roberta Gambale, Esq. (electronically)

DCPS' Attorney: William Jaffe, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination, in accordance with 20 U.S.C. §1415(i).