

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,¹ on behalf of,
Student,*

Petitioner,

Date Issued: October 14, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,

Respondent.

Hearing Date: October 3, 2013

Room: 2004

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a nine (9) year old female, who is currently a 3rd grade student attending School A. The student is currently a general education student and has not been identified as a student with disabilities eligible for special education and related services.

On July 31, 2013, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to determine the student eligible for special education, failing to develop an individualized education program (IEP) and failing to determine placement for the student. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that the student be determined as eligible for special education services as a student with a specific learning disability (SLD) and a speech-language impairment; within ten days of the date of the Order for DCPS convene a meeting to develop an IEP and determine placement; for the IEP to incorporate the goals developed by the Petitioner's educational consultant and independent evaluators; and compensatory education.

The Respondent did not file a Response to the Complaint.² However, during the prehearing conference, the Respondent asserted that multiple prior written notices (PWNs) were

sent to the Petitioner; DCPS determined that additional evaluative assessments are needed in the area of speech-language in order to determine if the student is eligible under the category of speech-language impairment; the independent speech-language evaluation was deficient in that the evaluation did not contain a validity statement, did not include the student's vocal and fluency skills, did not include an assessment of the student's hearing and did not include environmental issues; the comprehensive psychological evaluation conducted was not sufficient to find the student eligible under the category of SLD; the independent comprehensive psychological evaluation did not include data pursuant to 34 CFR §300.310; and the student cannot be found eligible for special education and related services based on one report.

The parties did not hold a Resolution Meeting however the parties agreed that the 45-day timeline started to run on August 31, 2013, following the conclusion of the 30-day resolution period, and ends on October 14, 2013. The Hearing Officer Determination (HOD) is due on October 14, 2013.

On September 4, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. A Prehearing Order was issued on September 4, 2013. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On September 26, 2013, Petitioner filed Disclosures including twenty (20) exhibits and four (4) witnesses.³ On September 26, 2013, Respondent filed Disclosures including fourteen (14) exhibits and six (6) witnesses.

The due process hearing commenced at approximately 9:15 a.m. on October 3, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. The Hearing Officer did not admit Petitioner's Exhibits 1, 2, 13 and 14 because the exhibits were duplicative of documents already in the record. Petitioner's Exhibits 3-12 and 15-20 were admitted without objection. Respondent's exhibits 1-14 were admitted without objection.

The hearing concluded at approximately 3:20 p.m. on October 3, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

² While the Respondent did not file a Response in the present matter, the case was previously filed as case #2013-0271, which was withdrawn without prejudice on July 15, 2013. The Respondent filed a Response to case #2013-0271 on June 5, 2013.

³ A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS denied the student a FAPE by failing to find the student eligible for special education and related services as a student with a SLD and/or a speech-language impairment on April 23, 2013?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. From pre-kindergarten through 2nd grade, the student attended three different schools. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
2. During the 2011-2012 school year, the student was absent ten school days and tardy thirteen school days. (Respondent's Exhibit 5; School Psychologist's Testimony)
3. For a period of time during the 2011-2012 school year, the student was homeless and placed in temporary housing. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
4. During the time period that the student's family was homeless, the student was often tired, did not have adequate time to complete her homework and did not receive much attention from her mother. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
5. Prior to the student's family experiencing homelessness, the student experienced the death of her father. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
6. On February 2, 2012, a multidisciplinary team (MDT) met to discuss concerns regarding the student's academic progress. (Petitioner's Exhibit 4)
7. On February 2, 2012, the student's general education teacher agreed to begin documenting interventions utilized with the student. (Petitioner's Exhibit 4)
8. During the 2012-2013 school year, the student was absent eleven school days and tardy twelve school days. (Petitioner's Exhibit 12; Respondent's Exhibits 5 and 8; School Psychologist's Testimony)
9. During the 2012-2013 school year, the student struggled in all academic areas. (Petitioner's Exhibit 9; Respondent's Exhibit 3; Parent's Testimony; Advocate's Testimony)
10. On January 25, 2013, Hearing Officer Kimm Massey issued an HOD ordering DCPS to fund independent comprehensive psychological and speech-language evaluations for the student. (Petitioner's Exhibit 6; Parent's Testimony)
11. On March 4, 2013, the Independent Psychologist conducted assessments of the student. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony)
12. The Independent Psychologist observed the student in a computer class at School B for 30 minutes on March 4, 2013. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony)

13. The student did not exhibit any behavior problems in the school environment during the Independent Psychologist's March 4, 2013 observation of the student. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony)
14. On March 4, 2013, the student's teachers reported that the student had average oral expression skills. (Petitioner's Exhibit 8; Respondent's Exhibit 14)
15. On March 4, 2013, the student was functioning below grade level in basic reading, reading comprehension, math calculation, math reasoning, basic writing and written expression. (Petitioner's Exhibits 8 and 9; Respondent's Exhibits 3 and 14; Parent's Testimony; Independent Psychologist's Testimony; Advocate's Testimony)
16. The student is functioning in Broad Reading at the 1.6 grade level, in Broad Math at the 1.2 grade level and in Broad Written Language at the 1.3 grade level. (Petitioner's Exhibits 8 and 9; Respondent's Exhibits 3 and 14)
17. On March 4, 2013, the student had difficulty sustaining attention and exhibited distractibility. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony; School Psychologist's Testimony)
18. The Independent Psychologist administered the Wechler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Woodcock Johnson-III Test of Achievement (WJ-III), the Berry-Bukktenica Test of Visual Motor Integration, 5th Edition (VMI), Three Wishes, Revised Children's Manifest Anxiety Scale-Second Edition (RCMAS-2) and the Behavior Assessment System for Children-Second Edition (BASC-2) Child Self-Report to the student on March 4, 2013. (Petitioner's Exhibit 8; Respondent's Exhibit 14)
19. The student's full-scale IQ score is not the best estimate of her overall cognitive ability. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony; School Psychologist's Testimony)
20. The student has strengths in working memory and cognitive processing speed. (Petitioner's Exhibit 8; Respondent's Exhibit 14; Independent Psychologist's Testimony)
21. The Independent Psychologist did not conduct an observation of the student in her regular education classroom, did not interview the student's teachers, did not review the student educational records including her grades and attendance and did not consider environmental or cultural factors which could significantly impact the student's academic performance. (Petitioner's Exhibits 8 and 9; Respondent's Exhibits 3 and 14; School Psychologist's Testimony)
22. On March 4, 2013, the student's ratings for Total Anxiety, Physiological Anxiety, Worry and Social Anxiety were in the nonclinical range. (Petitioner's Exhibits 8 and 9; Respondent's Exhibits 3 and 14; Independent Psychologist's Testimony)
23. The Independent Speech Language Pathologist conducted speech-language assessments of the student on March 19, 2013. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony)
24. The Independent Speech Language Pathologist observed the student in her classroom at School B for 45 minutes. (Petitioner's Exhibit 7; Respondent's Exhibit 2)
25. With the exception of some off-task behaviors, the student did not exhibit any behavior problems in the school environment during the Independent Speech

- Language Pathologist's March 19, 2013 observation of the student. (Petitioner's Exhibit 7; Respondent's Exhibit 2)
26. The Independent Speech Language Pathologist administered the Peabody Picture Vocabulary Test – 4A (PPVT-4A), the Expressive Vocabulary Test (EVT-2) and the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) to the student on March 19, 2013. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech-Language Pathologist's Testimony; DCPS Speech-Language Pathologist's Testimony)
 27. Overall, the student's expressive and receptive vocabulary skills are one standard deviation below the average range. (Petitioner's Exhibit 7; Respondent's Exhibit 2)
 28. The student does not have deficiencies in the areas of voice, fluency and articulation. (Petitioner's Exhibits 7 and 8; Respondent's Exhibit 2 and 14; Parent's Testimony; Independent Speech Language Pathologist's Testimony)
 29. The student has weaknesses in vocabulary skills, sentence formulation, auditory comprehension of paragraphs, higher level reasoning, understanding and expressing associations between words and defining words. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony)
 30. The student's phonological awareness skills are well below age level expectations. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony)
 31. The student has relative strengths in receptive language skills and working memory. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony)
 32. The Independent Speech Language Pathologist concluded that the student has a language disorder. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony; DCPS Speech-Language Pathologist's Testimony)
 33. The March 19, 2013 Speech and Language Evaluation outlines the conditions of the testing, the student's willingness to complete the assessment and the student's completion the assessment and request for repetition as needed. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony)
 34. On March 19, 2013, the Independent Speech-Language Pathologist used informal measures to assess the student's voice, fluency and articulation skills in conversational speech. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech-Language Pathologist's Testimony)
 35. On March 19, 2013, the Independent Speech-Language Pathologist did not take into account the student's attendance history and environmental factors during the student's assessment. (Petitioner's Exhibit 7; Respondent's Exhibit 2; Independent Speech Language Pathologist's Testimony; DCPS Speech-Language Pathologist's Testimony)
 36. The signature page on the March 19, 2013 Speech Language Evaluation is not signed in the Respondent's exhibit but is signed in the Petitioner's exhibit. (Petitioner's Exhibit 7; Respondent's Exhibits 2, 4 and 6)
 37. The signature page on the March 19, 2013 Speech Language Evaluation in the Petitioner's exhibit includes the evaluator's DC license number and the evaluator's

- American Speech-Language-Hearing Association (ASHA) certification number. (Petitioner's Exhibit 7; Independent Speech Language Pathologist's Testimony)
38. The signature page on the March 19, 2013 Speech Language Evaluation in the Respondent's exhibit does include the evaluator's DC license number and the evaluator's ASHA certification number. (Respondent's Exhibits 2 and 6)
 39. The signature page on the March 19, 2013 Speech Language Evaluation in the Petitioner's exhibit is of different clarity than the preceding pages and includes a border that is absent on the preceding pages. (Petitioner's Exhibit 7)
 40. In March 2013, DCPS conducted a classroom observation of the student in her general education classroom. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
 41. During DCPS' observation of the student in March 2013, the student made attempts to complete her classwork, did not present with behavioral concerns however exhibited a lack of focus on the lesson. (Petitioner's Exhibit 9; Respondent's Exhibit 3)
 42. On April 17, 2013, a DCPS evaluator concluded that the student did not meet the criteria for SLD because the student was performing at "levels that which she is capable" and because the Independent Psychologist did not consider environmental and economic disadvantages that contributed to the student's current academic achievement and did not review intervention strategies used with the student. (Petitioner's Exhibit 9; Respondent's Exhibits 3 and 4)
 43. On April 23, 2013, an MDT met to review the independent psychological and speech-language assessments and to determine the student's eligibility for special education and related services. (Petitioner's Exhibits 10, 11 and 12; Respondent's Exhibits 4, 6, 7, 8, 9 and 10; Advocate's Testimony)
 44. The student's April 23, 2013 MDT included the School A principal, the School A assistant principal, a DCPS compliance officer, the DCPS psychologist, the student's mother, the parent's advocate, the parent's attorney, the school social worker and the School A speech-language pathologist. (Petitioner's Exhibit 11; Respondent's Exhibit 4; Parent's Testimony; Advocate's Testimony)
 45. On April 23, 2013, the MDT concluded that the student's lack of academic progress was not the result of a lack of appropriate instruction in reading, math or writing; intellectual disability or emotional disturbance; cultural, economic or environmental disadvantage; or limited English proficiency. (Respondent's Exhibit 9)
 46. The April 23, 2013 MDT was aware of the student's attendance record and briefly discussed the student's attendance during the April 23, 2013 meeting. (Respondent's Exhibit 4; Advocate's Testimony)
 47. The April 23, 2013 MDT did not determine that the determinant factor for the student's lack of progress in expressive and receptive language was a result of a lack of instruction in reading and math or the result of cultural factors, economic or environmental disadvantage. (Petitioner's Exhibit 10; Respondent's Exhibits 4, 6, 8, 9 and 10)
 48. On April 23, 2013, the MDT determined that the student did not meet the criteria for SLD because there was not a severe discrepancy between the student's achievement and ability however the MDT only completed one question on the SLD Disability Worksheet. (Petitioner's Exhibits 9 and 12; Respondent's Exhibits 3, 7, 8, 9 and 10; School Psychologist's Testimony)

49. On April 23, 2013, the MDT used the Discrepancy Model to determine the student's eligibility for SLD. (Respondent's Exhibit 9; School Psychologist's Testimony)
50. On April 23, 2013, DCPS recommended that the student receive additional speech-language assessments because of deficiencies in the student's independent speech-language evaluation. (Petitioner's Exhibit 10; Respondent's Exhibits 2, 4, 6 and 10; Independent Speech Language Pathologist's Testimony; DCPS Speech-Language Pathologist's Testimony)
51. On April 23, 2013, the parent would not consent for DCPS to conduct additional speech-language assessments for the student. (Respondent's Exhibits 4 and 10; Parent's Testimony; DCPS Speech-Language Pathologist's Testimony)
52. On September 27, 2013, the student's teacher called the parent to inform the parent that the student hid under her desk during instruction that day. (Parent's Testimony)
53. The student has difficulty retrieving information previously learned. (Petitioner's Exhibit 9; Respondent's Exhibit 3; Parent's Testimony; Advocate's Testimony)
54. The DCPS Discrepancy Model instructs an MDT to find a student's eligible for SLD if there is a discrepancy between the student's achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation) of two years below a child's chronological age or at least two standard deviations below the child's cognitive ability as measured by appropriate standardized diagnostic instruments and procedures. (Respondent's Exhibit 9)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

Under the IDEA, a state must provide a "free appropriate public education" to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). A state must, *inter alia*, identify and evaluate children with disabilities, and develop an "individual education program" for each child with a disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 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.” 34 CFR §300.8(a).

On January 25, 2013, _____ issued an HOD ordering DCPS to fund independent comprehensive psychological and speech-language evaluations for the student. On March 4, 2013, the Independent Psychologist conducted assessments of the student and on March 19, 2013, the Independent Speech Language Pathologist conducted speech-language assessments of the student. During March 2013, DCPS conducted a classroom observation of the student.

On April 23, 2013, an MDT met to review the independent psychological and speech-language assessments and to determine the student’s eligibility for special education and related services. The MDT determined that the student did not meet the criteria for SLD and that additional speech-language assessments of the student were necessary in order to determine if the student met the eligibility criteria for speech or language impairment. The Petitioner alleged that DCPS denied the student a FAPE by failing to find the student eligible for special education and related services as a student with a SLD and/or a speech-language impairment on April 23, 2013.

Specific Learning Disability

Specific learning disability means “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.” 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010).

IDEA regulations further provide that an MDT Team “may determine” that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child “does not achieve adequately for the child’s age or to meet State-approved grade-level standards” in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child “does not make sufficient progress to meet age or State-approved” standards “when using a process based in the child’s response to scientific, research-based intervention” or the child “exhibits a pattern of strengths and weaknesses in performance, achievement, or both” relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

Each State must adopt criteria, consistent with 34 CFR §300.309, for determining whether a child has a SLD as defined in §300.8(c)(10). Local educational agencies (LEAs) must use the State criteria in determining whether a child has a SLD. *See* 34 CFR §300.307. The criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement; must permit the use of a process based on the child’s response to scientific, research-based intervention; and may permit the use of other alternative research-based procedures for determining if a child has a SLD. *See* 34 CFR §300.307(a). The District of

Columbia Office of the State Superintendent (OSSE) has adopted criteria by implementing the rules in 5 DCMR §E-3006.

These rules provide that the “IEP team shall determine that a child has a SLD if: a disorder is manifested in one 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 learn, think, speak, read, write, or do mathematical calculations.” 5 DCMR §E-3006.4(a). The rules also provide that LEAs “may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedure.” 5 DCMR §E-3006.4(d). In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a “statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services.” 5 DCMR §§E-3006.5(g)(2), (6). Finally, OSSE states that the “IEP team may not determine that a child is a child with a disability if it determines that the determinant factor for the child’s eligibility determination is: (a) lack of instruction in reading or mathematics; or limited English proficiency; and (b) the child does not otherwise meet the eligibility criteria.” 5 DCMR §E-3006.6; *see also* 34 CFR §300.306(b). The determination of a child’s eligibility for special education under the SLD classification is a primarily fact-based inquiry. *See Michael P. v. Dept. of Educ. State of Hawaii*, 656 F.3d 1057 (9th Cir. 2011).

Disorder Manifested in One or More Process

In this case, it is uncontested that the student is significantly below age and grade level expectations in her ability to learn, read, write, and do mathematical calculations. Although the student is nine years old and should be in the 4th grade, the student is functioning in Broad Reading at the 1.6 grade level, in Broad Math at the 1.2 grade level and in Broad Written Language at the 1.3 grade level. During the 2012-2013 school year, the student struggled in all academic areas. The Parent testified that the student is unable to correctly complete her homework, even with significant assistance and has only demonstrated improvement when she is able to receive one-on-one instruction from a tutor. The Advocate testified that the student is able to understand an academic concept only when given “constant repetition” and that the student has not mastered writing a complete sentence, adding and subtracting or spelling her birth month.

Research-based Intervention

DCPS had the option of using a process to determine if the child responded to scientific, research-based intervention. On February 2, 2012, the student’s general education teacher agreed to begin documenting interventions utilized with the student however in the April 23, 2013 MDT meeting, DCPS did not present or review these data. The record is not clear whether or not the student’s general education teacher actually documented the interventions utilized with the student. DCPS argued that the independent March 26, 2013 Confidential Comprehensive Psychoeducational and Clinical Evaluation did not include the student’s response to interventions and was therefore insufficient on this point. However, DCPS did not provide this information for the independent evaluator to review. Therefore, the Hearing Officer concludes that DCPS did not choose to use a process to determine if the child responded to scientific, research-based intervention as a part of the evaluation procedure and instead opted to use the discrepancy model in its determination.

Written Evaluation Report - Discrepancy

LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, including a “statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services.” 5 DCMR §§E-3006.5(g)(2), (6). On April 19, 2013, DCPS prepared a report reviewing the student’s March 4, 2013 Confidential Comprehensive Psychoeducational and Clinical Evaluation. On April 23, 2013, DCPS “completed” the SLD Disability Worksheet for the student, an Analysis of Existing Data and a Final Eligibility Determination Report. On May 6, 2013, DCPS issued a Prior Written Notice regarding the April 23, 2013 IEP Team’s decision regarding the student’s eligibility. Taken together, these reports indicate that DCPS did not determine that the student was a student with SLD because the student “is performing at levels which she is capable and is not likely to perform on levels that are commensurate with her age and grade level expectations.” In other words, the student’s IEP Team determined that there was not a severe discrepancy between the student’s achievement and ability. The Hearing Officer notes that while DCPS “completed” the LEA’s worksheet for SLD, the only mark on the disability worksheet is the check indicating that the student did not meet all of the required criteria for SLD. None of the required areas for the criteria are completed and no statement related to documentation is included.

The School Psychologist and the Independent Psychologist discussed the scatter in the student’s “ability” scores. Both psychologists agreed that the student’s FSIQ was not the best indicator of her cognitive ability because of the “scatter” in her index scores. The student has strengths in working memory and cognitive processing speed and significant weaknesses in visual motor integration, nonverbal reasoning, reading, writing and math. Additionally, the student’s independent March 19, 2013 Speech and Language Evaluation determined that the student had weaknesses in both expressive and receptive language skills. As testified by the Independent Speech-Language Pathologist, poor language skills may decrease a student’s scores on ability testing. Therefore, the Hearing Officer concludes that DCPS should not have merely concluded the evaluation of the student after reviewing her FSIQ and achievement.

According to Criterion 2 on DCPS’ SLD Disability Worksheet for the Discrepancy Model, that in addition to a discrepancy of two standard deviations between a student’s achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation), DCPS should also determine if the student has a discrepancy of two year’s below a student’s chronological age in relation to the student’s achievement (as measured by the academic evaluation) and measured ability (as measured by the intellectual evaluation). In the present matter, while the psychologist did not include the age equivalencies on the student’s achievement scores, it can be concluded that the student’s achievement is more than two years below her chronological age given the discrepancy of at least three grade levels between the grade in which the student should be and the grade level of the student’s achievement. Likewise, since DCPS determined that the student’s ability matched her achievement, it can be concluded that the student’s ability level is also more than two years below her chronological age. Therefore, DCPS should have found a discrepancy for this student.

Determinant Factor for Eligibility Determination

An IEP Team may not determine that a child is a child with a disability if it determines that the determinant factor for the child's eligibility determination is a lack of instruction in reading or mathematics. *See* 34 CFR §300.306(b). DCPS argued that the student's absences from school were significant and therefore prohibited the student from benefitting from instruction. During the 2012-2013 school year, the student was absent eleven school days and tardy twelve school days. While not a stellar attendance record, and certainly a factor to be considered by an IEP Team, the April 23, 2013 IEP Team determined that a lack of instruction in reading or math was not a determinant factor for the student's lack of academic progress. The IEP Team was aware of the student's attendance record and briefly discussed the student's attendance during the April 23, 2013 meeting. Therefore, the Hearing Officer finds no reason to disagree with the April 23, 2013 IEP Team's decision that the determinant factor for the child's eligibility determination was not a lack of instruction in reading or mathematics.

Additionally, while DCPS argued that the evaluator failed to consider cultural factors or environmental or economic disadvantage while could have impacted the student's academic performance, the April 23, 2013 MDT concluded that the student's lack of academic progress was not the result of a lack of appropriate instruction in reading, math or writing; intellectual disability or emotional disturbance; cultural, economic or environmental disadvantage; or limited English proficiency. The IEP Team was aware of the economic and environmental disadvantages of the student, as indicated in the April 19, 2013 Review of Independent Educational Evaluation, and had the opportunity to determine that the student's lack of progress was the result of these factors in the student's life. Therefore, the Hearing Officer finds no reason to disagree with the April 23, 2013 IEP Team's decision that the determinant factor for the child's eligibility determination was not cultural factors, economic or environmental disadvantage on April 23, 2013. The Hearing Officer notes that, given the student's life circumstances during the 2011-2012 school year, an earlier IEP Team may have concluded that the determinant factor for the child's eligibility determination was cultural factors, economic or environmental disadvantage.

Finally, DCPS noted that independent evaluator did not conduct an observation of the student in her regular education classroom, did not interview the student's teachers, did not review the student educational records including her grades and attendance and did not consider environmental or cultural factors which could significantly impact the student's academic performance. As a part of an initial evaluation (if appropriate), the IEP Team and other qualified professionals must- (1) review existing evaluation data on the child including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine- (i)(A) Whether the child is a child with a disability and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii) Whether the child needs special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed. *See* 34 CFR 300.305.

The IDEA requires the LEA use a variety of assessment tools and strategies to gather relevant functional and developmental information for initial evaluations, including information provided by the parents, that may assist in determining whether the child is a child with a disability; not use any single procedure as the sole criterion for determining whether a child is a child with a disability; and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2); *see also* 34 CFR §§300.531-532.

The IDEA requires that the LEA, as a part of the evaluation process, review classroom based data and observations and other data relevant to the student's functioning. The IDEA does not require that an evaluator utilize all of the data listed by DCPS. The student's April 23, 2013 IEP Team was made up of DCPS personnel who had opportunities to observe the student in her regular education classroom, had interviewed the student's teachers, had reviewed the student educational records including her grades and attendance and had considered environmental or cultural factors which could significantly impact the student's academic performance. It was the responsibility of the IEP Team to use all of the data during the evaluation process. The evaluator's failure to include all of the listed data was a factor to be considered by the IEP Team but not a reason to discredit the results of the assessments that were used by the evaluator.

In the April 19, 2013 Review of Independent Educational Evaluation, DCPS noted that a specific disability category was not identified for the initial evaluation process however it was assumed that the Petitioner was seeking a determination as to whether the student has a SLD. Given the parent's insistence that the student is a student with a SLD, this was a fair assumption however, despite the parent's position, DCPS had the responsibility to assess the student in all areas of suspected disability. *See* 34 CFR §300.304(c)(4). The record contains ample evidence that the student has difficulty sustaining attention and focus. The student's teacher, in the WJ-III Teacher's Checklist; the Independent Psychologist, during her assessment of the student; and the Independent Speech-Language Pathologist, during her assessment of the student, all noted behaviors consistent with ADHD. Therefore, during the April 23, 2013 IEP Team meeting, the IEP Team should have also discussed whether there was enough data to conclude that the student had ADHD, and if so, whether the student qualified for special education and related services under the category of Other Health Impaired (OHI).

Speech or Language Impairment

A Speech or Language Impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 CFR §300.8(c)(11). It is uncontested that the student does not stutter, does not have impaired articulation and does not have a voice impairment. However, the Independent Speech Language Pathologist concluded that the student does have a language impairment based on her weaknesses in vocabulary skills, sentence formulation, auditory comprehension of paragraphs, higher level reasoning, understanding and expressing associations between words and defining words.

During the April 23, 2013 IEP Team meeting, DCPS did not disagree that the student has a speech or language impairment but concluded that additional assessments were needed in order to make that determination. DCPS noted several deficiencies in the student's independent March

19, 2013 Speech and Language Evaluation. First, the evaluation was not signed and dated by the evaluator. Next, the evaluation did not include information to confirm that the independent evaluator was licensed. Also, DCPS reasoned that the evaluation did not include a validity statement and did not include findings regarding the student's voice skills, fluency skills and hearing. Finally, the evaluation did not include data as to whether the assessment results were a true estimate of the student's skillset given her attendance history and environmental factors. The Petitioner sought to refute each of DCPS' reasons for failing to fully accept the independent March 19, 2013 Speech and Language Evaluation.

The IDEA regulations at 34 CFR §300.502(c)(1) require that an independent educational evaluation must be considered by a public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. 34 CFR §300.502(e)(1).

While the Petitioner provided a signed and dated copy of the evaluation in the Disclosures, the evaluation possessed by DCPS did not have these elements. Likewise, while the Petitioner's copy of the March 19, 2013 Speech and Language Evaluation contains the evaluator's DC license number and the evaluator's ASHA certification number, the evaluation possessed by DCPS did not have these elements. The signature page on the March 19, 2013 Speech Language Evaluation in the Petitioner's exhibit is of different clarity than the preceding pages and includes a border that is absent on the preceding pages. Therefore the Hearing Officer concludes that the last page of the independent March 19, 2013 Speech and Language Evaluation was altered after being provided to DCPS and DCPS did not have the necessary information on April 23, 2013 to conclude that the independent March 19, 2013 Speech and Language Evaluation met agency criteria.

DCPS also reasoned that the evaluation did not include a validity statement and did not include findings regarding the student's voice skills, fluency skills and hearing. The Hearing Officer does not agree with this position. While the independent March 19, 2013 Speech and Language Evaluation does not have a clearly marked validity statement, the report does outline the conditions of the testing, the student's willingness to complete the assessment and the student's completion the assessment and request for repetition as needed. Likewise, the independent March 19, 2013 Speech and Language Evaluation includes information that informal measures were used to assess the student's voice, fluency and articulation skills in conversational speech. Additionally, as discussed in above in the section regarding the student's SLD eligibility, while the evaluation did not include data as to whether the assessment results were a true estimate of the student's skillset given her attendance history and environmental factors, it was the responsibility of the IEP Team to analyze all of these data during the evaluation process.

The Hearing Officer concludes that pursuant to 34 CFR §§300.502(c)(1) and (e)(1), DCPS was justified in not accepting the results of the independent March 19, 2013 Speech and

Language Evaluation because on April 23, 2013, the report did not meet agency criteria. Specifically, the report did not contain the evaluator's signature, DC license number and ASHA certification number. Additionally, contrary to the IEP Team's determination that the determinant factor for the student's lack of academic progress related to eligibility for SLD was neither a lack of instruction in reading and math nor the result of cultural factors, economic or environmental disadvantage, the IEP Team did not make such a determination related to the student's speech-language functioning.

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. Here, the Petitioner is the party seeking relief therefore has the burden of proof. The record contains the opinion of the Independent Speech Language Evaluator that the student has a language disability however the fact that a child may have a qualifying disability does not necessarily make her "a child with a disability" eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007); *see also S. v. Wissahickon Sch. Dist.*, No. 05-1284, 2008 WL 2876567 (E.D. Pa. July 24, 2008) *aff'd sub nom. Richard S. v. Wissahickon Sch. Dist.*, 334 F. App'x 508 (3d Cir. 2009) (finding that even a medical diagnosis of ADHD would not automatically qualify a student for special education where there was an absence of evidence that the student was eligible for special education).

The Hearing Officer concludes that the Petitioner did not meet its burden in proving that DCPS denied the student a FAPE by failing to find the student eligible for special education and related services as a student with a speech-language impairment on April 23, 2013. However, the Hearing Officer concludes that DCPS denied the student a FAPE by failing to identify the student as a student with SLD on April 23, 2013, and failing to develop an IEP for the student. By failing to identify the student as a child with a disability and develop an IEP for the student, the student did not have access to specialized instruction and related services designed to provide educational benefit.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

Here, Petitioner has established that the student was denied a FAPE when DCPS failed to identify the student as a child with a disability on April 23, 2013, and failed to develop an IEP for the student. As relief, the Petitioner has requested 150 hours of tutoring at market rate to "ameliorate the deficits that [the student] has acquired due to her inability to adequately access the educational curriculum" and 50 hours of counseling at market rate to "address [the student's] sense of self-esteem, frustration due to her cognitive challenges and need for support due to

inadequacy.” The Petitioner also requested that the Hearing Officer order that the goals provided by the Petitioner be included in the student’s IEP.

The Hearing Officer must first establish the period of the denial. During closing arguments the Petitioner argued that the period of the denial was “several years” and “more than two years” because the parent allegedly requested an evaluation more than three years ago. In the January 25, 2013 HOD, _____ concluded that by the beginning of the 2011-2012 school year, DCPS had sufficient knowledge to suspect that the student may be a child with a disability. While this fact constitutes a violation of DCPS’ Child Find duty, which was the issue in the prior matter, this fact does not necessarily identify the date for compensatory education purposes. During the 2011-2012 school year, the student had made her third school transition since pre-kindergarten, was homeless and placed in temporary housing, was often tired, did not have adequate time to complete her homework, did not receive much attention from her mother and had recently experienced the death of her father. It is probable that had DCPS evaluated the student during the 2011-2012 school year, the student would not have been found eligible for special education and related services based on the cultural, economic and environmental disadvantages present in the student’s life at that time. It is also likely, given the student’s ability and achievement scores, that the student would not have shown a significant discrepancy during the 2011-2012 school year. Nonetheless, it is equitable for the Hearing Officer to consider this time period when calculating the denial of a FAPE.

Since DCPS should have found the student eligible for special education and related services on April 23, 2013, DCPS should have developed and implemented an IEP for the student by May 23, 2013. *See* 5 DCMR §E-3007.1. Therefore, DCPS should have provided the student with special education services from at least May 23, 2013 during the 2012-2013 school year and from the beginning of the 2013-2014 school year through present.

One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a group setting within the school environment. Therefore, the Hearing Officer concludes that it is equitable for the student to receive two hours per week of independent tutoring to provide the educational benefits that likely would have accrued from special education services the student would have received from May 23, 2013 through present and 30 minutes per week of independent tutoring to provide for the educational benefits that may have accrued from special education services from the beginning of the 2011-2012 school year. Although the Petitioner requested that compensatory education be ordered at market rate, the Petitioner presented no evidence of why the Office of the State Superintendent’s (OSSE’s) established rate for this service is inadequate.

Although on September 27, 2013 the student’s teacher called the student’s parent regarding the student’s behavior, the record does not support the contention that the student needed counseling services during the period of the denial of a FAPE. The student did not exhibit any behavior problems in the school environment during the Independent Psychologist’s March 4, 2013 observation of the student. Additionally, during the March 4, 2013 evaluation, the student’s ratings for Total Anxiety, Physiological Anxiety, Worry and Social Anxiety were in the nonclinical range. With the exception of some off-task behaviors, the student did not exhibit any behavior problems in the school environment during the Independent Speech

Language Pathologist's March 19, 2013 observation of the student. While the Independent Psychologist concluded in her March 4, 2013 report that the student is at risk for developing low self-esteem, low mood, anxiety and/or behavioral difficulties if she is not presented with instruction that is appropriate to her skill level, this conclusion is a forward-looking concern not a circumstance present during the denial of a FAPE.

The Petitioner also presented goals for the Hearing Officer to order to be included on the student's IEP however the Hearing Officer does not believe that this is an appropriate remedy. The content of an IEP is a team decision 34 CFR §§300.320, 300.323, *see also*, D.C. Code §§ 30.3007.1 & 3008.1. Although the Advocate drafted the goals, the Advocate acknowledged that IEP goals should be written by the student's IEP Team. Additionally, the record does not contain adequate data regarding the student's present levels of performance within the school environment and specific data regarding the student's unique needs – both of which would be necessary to justify including the requested goals as a remedy.

Additionally, based on DCPS' failure to assess the student's potential ADHD, given the specific facts of this case, the Hearing Officer concludes that it is equitable to order DCPS to address all areas of suspected disability for the student.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 10 school days, or on a date mutually agreed upon by both parties, that DCPS hold an IEP Team meeting to draft an IEP for the student.
2. Within 45 calendar days of the date of this Order, DCPS complete assessments required to determine if the student has ADHD.
3. Within 60 calendar days of the date of this Order, DCPS convene an IEP Team meeting to review the assessments related to ADHD, determine if OHI is a more appropriate primary disability category for the student and revise the student's IEP, if necessary, to include accommodations and modifications to address the student's inattention and lack of focus.
4. DCPS fund 65 hours of independent tutoring for the student, at a rate not to exceed OSSE's established rate for this service, to be completed by June 18, 2014.
5. All other relief sought herein by Petitioner herein is **denied**.

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 USC §1415(i).

Date: October 14, 2013


Hearing Officer