

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

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

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a girl who is not eligible for services.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 23, 2013 in regard to the Student. This Hearing Officer was appointed to preside over this case on January 2, 2014.

A response was filed by the District denying these contentions on January 3, 2014. This response was timely filed. A resolution meeting was held on January 23, 2014. The resolution period ended on January 23, 2014.

On February 6, 2014, this Hearing Officer held a prehearing conference.

On February 10, 2014, a prehearing conference order issued was issued summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date was scheduled for March 3, 2014. This date was cancelled due to inclement weather. Accordingly, Respondent moved for a 10 day continuance, which was granted by the CHO on March 8, 2014. The decision date was extended from March 9, 2014 to April 15, 2014.

A hearing date was scheduled for April 9, 2014. Testimony and evidence was completed on this date. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-11; Respondent entered into evidence exhibits 1-9. Petitioner presented as witnesses: Petitioner; Witness A, a psychologist; Witness B, an advocate. Respondent presented: Witness C, a Social Worker, and Witness D, a school psychologist.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUE

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Should DCPS have classified the Student as eligible for special education services as a Student with an emotional disturbance, other health impairment and/or specific learning

disability in connection to the IEP meetings held on November 25, 2013 and December 9, 2013?
If so did DCPS deny the Student a FAPE?

2. Did DCPS fail to assess the Student in all areas of suspected disability in connection to the November 25, 2013 and December 9, 2013 IEP meetings? If so, did DCPS deny the Student a FAPE?

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. The Student is a ten year old who is currently attending a private school in the District of Columbia. (P-3-4)

2. The Student was exposed to PCP in utero. (P-3-3)

4. The Student has anxiety problems at home, and is afraid of strangers. (P-3-2-5; Testimony of Petitioner)

5. The Student has been diagnosed with ADHD in the past. (P-3-22)

6. The Student generally has no behavioral problems in school. (P-3-5)

7. From pre-kindergarten to grade 3, the Student received special education services through an IEP. (P-3-5)

9. An IEP was written for the Student in 2010 which indicated that the Student had a developmental delay. The main areas of concern were mathematics, reading, and emotional, social and behavioral functioning. 12.5 hours of specialized instruction was recommended. (P-3-6-7)

10. She then went to School A, a Catholic school because it had smaller classes. (P-3-5)

11. Testing was conducted by Witness D of DCPS on April 13, 2013. On the Woodcock-Johnson III indicated that the Student's overall achievement scores were 89, with a 92 in broad reading and an 84 in broad math. In math fluency, the Student had a 77 standard score (6th percentile). This testing indicated that the Student's overall abilities were in the below average range according to the RIAS test. (P-3-6, P-4-3, P-6-6)

12. In May, 2013, School A staff represented at a meeting that the Student has trouble with some of her classes. It was indicated that she had behavioral problems, and difficulty in math. (Testimony of Witness B)

13. The Student was tested by Witness A on August 24, 2013. On the WISC IV test from August 24, 2013, the Student scored a Full Scale IQ of 85, with a 92 on the verbal comprehension index, 84 in the perceptual reasoning index, 86 in working memory, 91 in processing speed. (P-3-8-9)

14. On the WIAT-III test from August 24, 2013, the Student scored a 85 in oral language (16th percentile), , an 89 in oral expression, a 90 in basic reading, a 90 in written expression, a 77 in math (3.5 grade level equivalent, 6th percentile), and a 75 in math fluency (5th percentile). This means she is two years behind in math. (P-3-10-12; Testimony of Witness A)

15. Math subtests on the WIAT-III indicated that the Student was at the second and third grade level. The Student was at the 2.2 grade level equivalent in math problem solving, 2.3 grade level equivalent in math fluency addition, 2.6 grade level equivalent in math fluency, subtraction, 3.0 grade level equivalent in math fluency, multiplication. (P-3-25)

16. On the BASC-2 (by Teacher A), scores were all in the average range of functioning except Adaptability is in the at-risk category. (P-3-16)
17. On the BASC-2 (by Teacher B), scores were all in the average range of functioning. (P-3-17)
18. On the BASC-2 (by Student), scores were in the average range. (P-3-15)
19. On the BASC-2 (by Petitioner), the Student was deemed to be clinically significant in terms of Internalizing Problems, Externalizing Problems, Behavioral Symptoms, Adaptive Skills. (P3-13-14)
20. ADHD-T checklists filled out by teachers were not clinically significant. (P-3-18)
21. Witness A diagnosed the Student with Adjustment Disorder with Mixed Anxiety and Depressed Mood Learning Disorder NOS. (P-3-22)
22. A Due Process Complaint was brought alleging that the Student should be determined to be eligible for services as a Student with an Other Health Impairment or Emotional Disturbance. This case was assigned to IHO Peter Vaden. (P-8)
23. An HOD issued on October 3, 2013 determining that the IEP reconvene and consider the results of the assessment by Witness A. (P-8)
24. In regard to SLD, a review of the Witness A assessment by Witness D assessed the Student in terms of discrepancy. Witness D determined that the Student was in the low average range in math since the Student's teacher indicated that she was a B student. The evaluator felt the Student was on grade level and therefore was not eligible. (P-4-7-8; Testimony of Witness D)
25. On October 23, 2013, two of the Student's teachers provided BASC information. Teacher C indicated that the Student was Clinically Significant in terms of Externalizing

Problems, but was average in all other areas. Teacher A indicated that the Student was in the average range. (P-4-6)

26. On October 25, 2013, an IEP team met. The parent did not appear. The team agreed to move forward with the meeting. The IEP except for the parent's attorney felt that the Student did not qualify for special education services, but agreed to reconvene so that the parent could be present. (R-7-1-2)

27. At the December 9, 2013 IEP meeting, the school representatives were not invited. The team indicated that the Student did not meet the eligibility criteria. (P-1-1; P-7-3)

28. At School A, teachers call the parent indicating the Student's work is incomplete, that she has some problems retaining information, and that she is defiant. (Testimony of Petitioner)

29. In School A, she receives B and C grades. She follows the norms of the classroom. It is reported that the Student is on grade level in math. No history of suspensions is reported. If she gets off task, she works quickly to get back on task. She is reported to be of average ability in language arts. She gets along with peers. (P-3-6-8; P-4-4)

30. At School A, the Student gets title I assistance, which is a pull-out class 1 or 2 times a week. (Testimony of Petitioner)

31. I found all the witnesses credible in this proceeding.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR Sect. 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

The IDEA defines "child with a disability" as: "a child evaluated in accordance with Sects. 300.304 through 300.311 as having...a serious emotional disturbance, ... an other health impairment, a specific learning disability, ... or multiple disabilities, and who, by reason thereof, needs special education and related services." 20 U.S.C. Sect. 1401 (3) (A); 34 C.F.R. Sect. 300.8 (a).

It is not sufficient for a child merely to be diagnosed with a specified medical or psychological condition. There must also be a demonstrated adverse effect on the child's educational performance, such that the child needs special education and related services to receive an educational benefit. 34 C.F.R. Sects. 300.8(c)(4)(i), (c)(9)(ii); see N.C. v. Bedford Central School District, 51 IDELR 149 (2d Cir. 2008)(behavioral problems stemmed from drug use); N.G. v District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008)(child's depression affected his schoolwork).

The regulations also provide that the "term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined under subparagraph (c) (4) (i). 34 CFR Sect. 300.8 (c) (4) (ii); 5-E DCMR Sect. 3001.1.

1. Emotional Disturbance.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

The record does not establish that the Student has an inability to learn or an inability to maintain satisfactory relationships in school. The Student has passed all of her classes and gets along with adults and peers at her school. There is nothing in the record suggesting "inappropriate" behavior from the Student in school. While there is some testimony to the effect that the Student has a general pervasive mood of unhappiness at home, there is insufficient evidence of this behavior at school to trigger the IDEA classification here.

Moreover, there is nothing in the record to establish that any such condition has been exhibited to a marked degree that adversely affects a child's educational performance. Petitioner points to an observation of the Student by Teacher C (P-4-5), but this observation was not in connection to a typical day for the Student's classroom. Petitioner also references Teacher C's BASC-2 Scales, which indicate that the Student has an issue with externalizing problems.

However, this scale is different from the scales presented by Teachers A and B, both of whom indicated that the Student did not have emotional issues in class. Moreover, Teacher C was not called as a witness in this proceeding. I find that Petitioner did not meet her burden in regard to this issue and I will decline to determine the Student to be eligible as a Student with an emotional disturbance.

2. Specific Learning Disability.

As defined in the DCMR, a Specific Learning Disability (SLD) is:

a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage should have been deemed eligible for services as a Student with a specific learning disability.

5-E DCMR Sect. 3001.1, 3006.4; see also 20 USC Sect. 1401(30).

Under regulations pursuant to IDEA, a specific learning disability may be found if a child "does not achieve adequately for the child's age" in basic language or mathematics skills or if the child fails "to meet age or State-approved grade-level standards" in such skills. 34 CFR Sect. 300.309(a). In forming a determination, a school district should "[d]raw 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." 34 CFR Sect. 300.306(c)(i).

Additionally, the child should "not make sufficient progress" to meet such standards "when using a process based on the child's response to scientific, research-based intervention" or

the child "exhibits a pattern of strengths and weaknesses" in relevant areas. 34 CFR Sect. 300.309 (a)(2).

Also, the team should determine that such findings are not primarily the result of other factors such as a visual or hearing disability, emotional disturbance, or environmental or cultural factors. 34 CFR Sect. 300.309 (a)(3).

Also, to ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider 1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and 2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. 34 CFR Sect. 300.309(b).

In addition, LEAs must prepare a written evaluation report that includes the basis for making the determination regarding SLD, as well as a "statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services." 5-E DCMR Sect. 3006.5 (g) (2), (6).

The report by Witness A reveals that the Student has some low scores in regard to math skills. In terms of the Student's math on the WIAT-III, the Student's standard score was a 77, which is in the 6th percentile of functioning. The Student scored a 75 standard score on the WIAT-III, which is in the 5th percentile. In math problem solving, the Student scored a 72, which is a 7.4 age equivalent and a 2.2 grade level equivalent. The grade equivalents for all these math scores correspond to the 2nd and 3rd grade level.

Earlier testing by Witness D showed slightly better results with an 84 standard score in math according to the Woodcock-Johnson III. Still, in math fluency, the Student scored a 77, which is in the 6th percentile.

Considering both the testing by Witness A and Witness D, it appears that this Student is not “achieving adequately” for this child’s age. It is noted that the Student should currently be in the 5th grade. Yet in math problem solving, the Student was on a second grade level.

Nevertheless, the report by Witness D rejected the Specific Learning Disability classification because of teacher reports that the Student was performing on a 4th grade level and is a solid B student.

Witness D did not attempt to harmonize reports of the Student’s good schoolwork with the testing that was conducted. To this IHO, it is hard to understand how a Student with some second grade math skills could get a B in fourth grade math unless the math class was in effect modified instruction. Witness D also did not consider that this is a Student who was retained in the third grade. It is noted that a Student may be deemed in need for special education services even if a Student is doing well in a private school. N.G., 556 F.Supp.2d at 34-35 (Student did well in small private school that provided small classes and individualized attention but would have needed services were the Student attending a DC Public School with larger class size and less support).

Witness D’s assessment of the Student in regard to Specific Learning Disability is insufficient in other areas as well. There is no assessment of whether the Student was subject to a process based on the Student’s response to scientific, research-based interventions. The record before me is bare on that point. Moreover, the record is bare on whether the Student has been provided with appropriate instruction in math in the past.

In this connection, I will note that the December 9, 2013 IEP meeting did not include any teachers from the Student's classes to discuss whether the Student might have an issue with math. The earlier meeting did not include the Petitioner. For there to be a productive and thoughtful discussion of these issues at the meeting, it is important to include both the Petitioner and a current teacher of the Student.

In sum, there is not enough information in this record for this IHO to determine whether the Student should be determined eligible as a Student with a specific learning disability. Accordingly, I will remand this matter to the IEP team for further proceedings to determine if the Student should be determined to be eligible for services as a Student with a specific learning disability in math¹.

3. Other Health Impairment.

“Other health impairment” is an appropriate classification if a Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. This classification requires identification of chronic or acute health problems such as: Asthma; Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1

The Student was identified as having ADHD earlier in her history according to Witness A. However, there is no evidence of any recent diagnosis of ADHD in the record. There is also no mention of who diagnosed the Student with ADHD or when that was. Moreover, testing by Witness A indicated that the Student is not displaying any symptoms of ADHD in class. This

¹ I find that there is insufficient evidence in the record to establish that the Student should be classified as eligible with a specific learning disability because of issues with English Language Arts. The WIAT-III testing results from Witness A show some scatter, but overall the Student's scores are in the average range.

is consistent with the reports of the Student's teachers, who have not indicated that the Student is hyperactive or lacking in alertness. To this IHO, Petitioner has not shown that the Student lacks the kind of "strength, vitality or alertness" that is required in the regulations and is underscored by decisional law in the District of Columbia. Parker v. Friendship Edison Pub. Charter Sch., 577 F. Supp.2d 68 (D.D.C. 2008)(Student not diagnosed with ADHD and actions had minimal connection to alertness); Lyons by Alexander v. Smith, 829 F. Supp.2d 414 (D.D.C. 1993)(Student with ADHD did not have issues with alertness).

Accordingly, I decline to find this Student eligible because she is Other Health Impaired.

4. Assessments.

An LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 C.F.R. Sect.300.304(b).

The LEA must also ensure that the assessment and evaluation materials that are utilized to assess the child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided and administered in the language and form most likely to yield

accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; are used for purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of such assessments. The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner argues that the Student should have been assessed in terms of occupational therapy, physical therapy, and speech and language therapy.

In regard to an occupational therapy and/or physical therapy assessment, the record does not establish that Respondent was or should have been on notice of any problems in this regard. Witness A's argument, that the Student is in effect clumsy, is not sufficiently supported by reports from the teachers or from Petitioner. In regard to the request for a speech and language therapy assessment, Witness A points to the Student's WIAT-III testing, which indicates that the Student was in the 2.7 grade level equivalent and a 7:10 age equivalent in regard to the listening comprehension subtest. The Student scored an 85 in oral language overall, which is in the "average" range. The reports from the Student's teachers do not indicate that there is any issue with respect to the Student listening in class. There is no clear testimony from Petitioner that the Student has speech and language issues. Under the circumstances, I decline to find that the failure to conduct a speech and language therapy assessment constituted a failure to assess this Student in all areas of suspected disability.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent shall reconvene an IEP team within 15 days of the issuance of this order;
2. Such IEP team shall include the parent and the Student's current math teacher;
3. Such IEP team shall carefully and conscientiously consider:
 - a. Whether the Student's math skills are age appropriate, also considering the fact that this Student has been retained;
 - b. Whether the Student has been subject to scientific, research-based interventions in math in full compliance with applicable law and regulation;
 - c. Whether the Student has been provided with appropriate instruction in math in the past, in full compliance with applicable law and regulation.
4. Petitioner's other claims are hereby denied with prejudice.

Dated: April 15, 2014

Michael Lazan
Impartial Hearing Officer

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: April 15, 2014

Michael Lazan
Impartial Hearing Officer