

DCPS filed a late Response to the Complaint on July 20, 2011, which denied Petitioner's allegations. DCPS asserted that the Student was properly found to be ineligible under the IDEA based upon her academic performance scores. A prehearing conference ("PHC") was held that same date. Petitioners elected for the hearing to be closed. *See PD-1.*

The parties filed five-day disclosures as required on August 9, 2011; and the Due Process Hearing was held in two sessions on August 16 and 31, 2011. Petitioner's unopposed motion for continuance was granted to extend the HOD timeline from August 31 to September 9, 2011, in order to accommodate the second hearing session and allow sufficient time for closing arguments and issuance of the Hearing Officer's decision.²

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioners' Exhibits: -1 through -19.

Respondent's Exhibits: R-1 through R-10.

In addition, the following Witnesses testified:

Petitioners' Witnesses: (1) Parent-Petitioner; and (2) Educational Advocate.

Respondent's Witnesses: DCPS presented no witnesses and rested on the record.

The parties submitted written closing arguments on September 1, 2011.

² The continuance was agreed to by the parties at the first hearing session on 8/16/2011 in order to cure Petitioner's failure to provide timely disclosure of a substitute expert psychological witness prior to that date. It was agreed and directed at the 8/16/2011 hearing session that Petitioner would either recall her original psychological expert or file any supplemental disclosure for a substitute witness by 8/24/2011, five business days prior to the second hearing session. These circumstances and the parties' agreement constituted good cause for the continuance pursuant to the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP")*, Section 402. However, Petitioner failed to file any supplemental disclosure until 08/29/2011 and failed to present her originally disclosed psychological expert as a witness. DCPS objected to the late disclosure, and the Hearing Officer sustained the objection pursuant to 34 C.F.R. §300.512(a) (3) and *Letter to Steinke*, 18 IDELR 739 (OSEP 1992).

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is September 9, 2011.

III. ISSUES AND REQUESTED RELIEF

It was determined that the following issues would be presented for determination at hearing:

(1) Eligibility — Did DCPS deny the Student a FAPE by failing to determine that she is a student with disabilities under the IDEA and eligible for special education at a June 8, 2011 MDT meeting?

Petitioner claims that the Student satisfies the eligibility criteria for Other Health Impaired ("OHI") and/or Emotional Disturbance ("ED") based on a May 2011 comprehensive psychological evaluation and other relevant information considered at the 06/08/2011 meeting. *See* -1, ¶ 5 (1).

(2) Failure to Provide Independent Evaluation. — Did DCPS deny the Student a FAPE by failing to provide an independent speech and language evaluation upon request by Petitioner at the 06/08/2011 meeting?

Given the issuance of the IEE letter, it was agreed at the PHC that this claim is effectively cut off on 06/23/2011. *See* -1, ¶ 5 (2).

As relief, the Complaint requests appropriate findings, as well as compensatory education services in the form of one-to-one tutoring. *See PD-1*, ¶ 6; *PD-5*, p. 16. Petitioner's request that DCPS fund an independent speech/language evaluation has been mooted by the 06/23/2011 IEE.

IV. FINDINGS OF FACT

1. The Student is a -year old child who resides with Petitioner in the District of Columbia and attends a D.C. Public Charter School (the "School") for which DCPS acts as the LEA.
2. The Student attended her neighborhood DCPS elementary school form Pre-K through 5th grade. She then attended an LEA Charter (*i.e.*, a public charter school acting as its own LEA) for 6th and 7th grades, before transferring to her current School for grade in the 2010-11 school year. *PD-9*.

3. The Student has not been retained and does not have a history of behavioral problems.
-9, p. 2; *Parent Test*. However, since entering middle school, she has struggled more academically, particularly in math, even with after-school tutoring. *Id.* She also experienced some bullying and peer interaction concerns, but since November 2010 “has not had similar issues with her peers.” -9, p. 2. Her teachers have described her as a “very sweet girl who likes to participate in class.” *R-1, p. 2.*
4. During the spring semester of the 2010-11 school year, the Student was referred for evaluation to determine eligibility for special education and related services under the IDEA. On March 30-31, 2011, DCPS completed a Comprehensive Speech and Language Assessment of the Student -10); and in May 2011, DCPS completed a Confidential Psychological Initial Evaluation of the Student. -9.
5. The results of the Comprehensive Speech and Language Assessment generally revealed average performance compared with her similarly-aged peers. The Report states, in relevant part: “Results of this comprehensive assessment suggest that [Student’s] spoken language, vocabulary, articulation, voice and fluency skill levels are sufficient to access the educational curriculum with appropriate accommodations and modifications....[and] suggest that there is not a speech and language impairment impacting on educational performance or socialization.” -10, p.5. *See also* -5, p. 4 (Complaint ¶ 7).
6. The Confidential Psychological Initial Evaluation included an assessment of the Student’s overall cognitive functioning, academic abilities, and social/emotional functioning. The 05/21/2011 Report finds that her cognitive functioning was in the Low Average range of abilities (FSIQ = 88), and that her performance on the WIAT-III ranged from Average to Low Average and is commensurate with her cognitive testing. -9, p. 8. Because the Student’s achievement and cognitive scores were not discrepant, she was found not to meet the criteria for a specific learning disability. *Id.* Although teacher ratings reported some problems with inattention and hyperactivity, the evaluator concluded that these reported behaviors were not associated with ADHD, and the Student has not been diagnosed with ADHD. *Id.* The evaluator noted that the Student’s behaviors likely were related to peer interaction issues or other social anxiety in the classroom. *Id.*; *see also* 7 (06/08/2011 MDT meeting notes), pp. 7-8.

7. On or about June 8, 2011, DCPS convened a meeting of the Student's MDT/IEP team to review the Student's evaluations and determine eligibility for special education. Participants included Petitioner, Educational Advocate, Speech and Language Pathologist, School Psychologist, Counselor, Case Manager, Assistant Principal/SEC, Math Teacher, and Reading Teacher. -7. The MDT/IEP team engaged in a lengthy and thorough discussion of the evaluation results, classroom observations, and other information provided by the Parent and School staff. See -7 (12 pages of School meeting notes); -8 (10 pages of additional advocate notes). Following the discussion, the team agreed that the Student was not eligible for special education and related services. -7, p. 12. The team determined that that the Student did not qualify as a student with a speech and language impairment, learning disability, other health impairment, or emotional disturbance. *Id.*; see also -6 (Eligibility Determination Report; Disability Worksheets).
8. At the 06/08/2011 MDT meeting, the Educational Advocate requested an independent speech and language assessment of the Student before the team ruled out a speech and language impairment. -7, pp. 4, 10-11. The team disagreed and decided that no further assessments were warranted. *Id.*, p. 11.
9. On or about June 23, 2011, after the Complaint was filed and just prior to the resolution meeting, DCPS issued an IEE letter authorizing Petitioner to obtain an independent speech and language evaluation at the expense of DCPS. -17; R-5.
10. The Student's grades at the time of the comprehensive psychological evaluation showed her earning F's in three subjects – Algebra I, Problem Solving 8, and Comprehension 8. -13 (current grades as of 05/23/2011). However, when the Student received her Final Report Card for the 2010-11 school year in late June 2011, she achieved passing grades in all subjects including C- in Algebra I, Problem Solving 8, and Comprehension 8. See R-6.³

³ Teacher comments supporting the year-end passing grades included the following: “[Student] has made improvements in homework completion over the past quarter” (Problem Solving 8); “When she is on task, her work product is good, but many of the assignments that she has turned in have been late and have not shown 100% effort” (Algebra I); and “Showed improvement as a reader throughout the year as measured by Achievement Network and MAP tests” (Comprehension 8). R-6.

V. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof in a special education due process hearing is on the party seeking relief. *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. DCMR 5-E3030.3.

Petitioner claims that DCPS denied the Student a FAPE by failing to identify and determine her to be eligible for special education and related services under the IDEA at the June 8, 2011 MDT/IEP team meeting (Issue 1). Petitioner alleges that the Student should have been found eligible as a student with a disability, under the disability categories of OHI and/or ED. Petitioner also claims that DCPS denied the Student a FAPE by failing to provide an independent speech and language evaluation upon Petitioner's request at the 06/08/2011 meeting (Issue 2).

Based on the record developed in this hearing and the applicable law discussed below, the Hearing Officer concludes that Petitioner did not prove either claim by a preponderance of the evidence. Additionally, Petitioner's second claim has been effectively resolved and/or waived, for the reasons noted below.

Issue 1 - Eligibility

Relevant Statutory Criteria

The IDEA defines "child with a disability" to mean (in relevant part) "a child evaluated in accordance with 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. §1401 (3) (A); 34 C.F.R. §300.8 (a) (emphasis added).

"Other Health Impairment," in turn, "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 ... attention deficit disorder or *attention deficit hyperactivity disorder* [ADHD]...; *and* (ii)

adversely affects a child's educational performance." 34 C.F.R. §300.8 (c) (9) (emphasis added).

"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 C.F.R. §300.8 (c) (4) (i) (emphasis added).⁴

As the above statutory criteria make clear, IDEA does not require a school district to provide special education and related services to every student who may struggle academically. Only certain children with defined disabilities are eligible for IDEA's benefits. *See, e.g., Alvin Indep. School Dist. v. A.D.*, 503 F.3d 378 (5th Cir. 2007). Moreover, 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. §§300.8(c)(4)(i), (c)(9)(ii); *e.g., N.C. v. Bedford Central School District*, 51 IDELR 149 (2d Cir. 2008); *Mowery v. Board of Education of the School District of Springfield*, 56 IDELR 126 (W.D. Mo. 2011); *N.G. v District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

⁴ 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). *Id.* §300.8 (c) (4) (ii).

Analysis

In this case, Petitioner did not present sufficient evidence to overturn the IEP team's non-eligibility determination, based on the information available to the MDT/IEP team at the time of its decision. The team conducted a very careful analysis of relevant eligibility requirements and properly found that the Student did not meet the eligibility criteria for either of the disabilities alleged by Petitioner, OHI/ADHD or ED. *See PD-6; PD-7; PD-8; R-7.*

With respect to OHI, no medical or psychological professional has diagnosed the Student with ADHD or any other chronic or acute health condition resulting in "limited strength, vitality, or alertness ... with respect to the educational environment." 34 C.F.R. §300.8 (c) (9). At most, teachers have reported the Student as sometimes exhibiting behaviors that can be associated with poor concentration, inattentiveness, and/or impulsivity. But the evaluating DCPS psychologist concluded that the reported behaviors likely were related to peer interactions or other social anxiety issues, rather than ADHD, in part because the ratings are not consistent and the behaviors have not been exhibited in multiple settings. *See -9, pp. 5-8; -7, pp. 6-10.* Petitioner presented no evidence either to the IEP team or in this hearing to contradict that conclusion. *See Parker v. Friendship Edison Public Charter School, 577 F. Supp. 2d 68 (D.D.C. 2008).* And Petitioner has never indicated her disagreement with the DCPS evaluation or requested that an independent psychological evaluation be conducted.

With respect to ED, Petitioner has not presented sufficient evidence to show any of the required elements of this IDEA disability category. The only listed characteristics that Petitioner even purports to allege may be involved here relate to subparagraph (B) quoted above, *i.e.*, an "inability to build or maintain satisfactory interpersonal relationships with peers and teachers." *See Petitioner's Closing Argument, p. 3.* However, the psychological evaluation indicates that the Student's behaviors in this area and her overall social/emotional functioning are "within normal limits" and "are not severe enough to warrant intervention." *PD-9, pp. 6-7.* Moreover, Petitioner has not proved or attempted to prove that such behavior characteristics have been exhibited "over a long period of time" and "to a marked degree." *Cf. N.C. v. Bedford Central School District, 51 IDELR 149 (2d Cir. 2008).* In fact, the evidence suggests that such concerns

are relatively mild, and may have been more transitional and reflective of social adjustments to her new school.⁵

Finally, with respect to both OHI and ED, Petitioner has failed to prove any adverse educational impact. Petitioner argues that the Student is “in need of special education and related services as evidenced by her failing grades and poor academic performance.” *Petitioner’s Closing Argument*, p. 2; *see also id.*, p.5. But the Student was able to achieve passing grades in all her courses by the end of the 2010-11 school year, indicating that she can access the general education curriculum. *See R-6*. Moreover, the comprehensive psychological evaluation showed that the Student’s current academic achievement results are consistent with her cognitive abilities. The 05/21/2011 report found that her cognitive functioning is in the Low Average range of abilities (FSIQ = 88), and that her performance on the WIAT-III ranges from Average to Low Average and is commensurate with her cognitive testing (*i.e.*, Basic Reading = 93, Written Expression = 87, Mathematics = 87). *PD-9*, p. 8. *See also Findings*, ¶¶ 6, 10.⁶

In sum, Petitioner has failed to establish on the present record that DCPS wrongfully denied the Student a FAPE based on the June 8, 2011 IEP team’s non-eligibility determination. A “determination as to eligibility of a student for special education is a decision made by a team, including the parent.” *Richardson v. District of Columbia*, 541 F. Supp. 2d 346, 357 (D.D.C. 2008). Based on the record as a whole, the Hearing Officer concludes that the team’s determination in this regard was proper under the IDEA. Of course, as additional educational evaluations and information become available – including the pending independent speech/language evaluation – DCPS will need to review such information, and it may well support a different conclusion at that time.

⁵ *See, e.g.*, 7, p. 8 (homeroom teacher comments that “across the past few months she has been more able to integrate with her peers,” and “behaviors seem to come from a desire for peer attention and acceptance”); *id.*, p. 11 (SEC comment that “our data shows [Student] is making progress and has been able to transition well from her previous school”); -8, p. 9 (psychologist “stated that [Student] does not exhibit characteristics over a long period of time, but just at school”); -9, p. 7 (“Despite her initial experiences with her peers, [Student] has a positive outlook and reports she is currently well liked by her peers”); *Findings*, ¶6.

⁶ Even Petitioner appears to acknowledge the significance of these scores in urging that “[t]his Hearing Officer should give greater weight to the achievement testing scores on the comprehensive psychological evaluation because it was a standardized test with results that had been determined to be valid by DCPS and conducted by DCPS.....” *Petitioner’s Closing Argument*, p. 5.

Issue 2 – Failure to Provide Independent Evaluation

Petitioner's Complaint also alleged that DCPS had denied the Student a FAPE by failing to provide her with an independent speech and language evaluation after parental request at the June 8, 2011 meeting. *See* -5, p. 13. Shortly after the filing of the Complaint, however, DCPS issued an IEE letter authorizing such an evaluation. 17; R-5 (IEE letter dated 06/23/2011). At the PHC, Petitioner's counsel declined to withdraw the independent evaluation claim, apparently on the theory that Petitioner intended to seek retroactive relief in the form of compensatory education services for the brief, 15-day delay in issuing the IEE between June 8 and June 23, 2011. However, Petitioner presented no evidence at hearing to support any finding of harm or award of compensatory education relief, and she did not address Issue 2 at all in her written closing argument. Thus, the Hearing Officer concludes that this claim has been effectively waived and/or resolved. Otherwise, Petitioner has not met her burden of proof.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint filed June 17, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: September 9, 2011



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415 (i) (2).