

<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent.</p> <p>Case # 2009-1177</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: October 13, 2009</p> <p>Date of Complaint: August 18, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Christopher Anwah, Esq. 3800 12th Street, N.E. Washington, DC 20017</p> <p>Counsel for DCPS: Nia Fripp, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened October 13, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on August 13, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-22 and DCPS Exhibits 1-20)² which were admitted into the record.

ISSUE(S):³

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP for SY 2009-10? Petitioner alleges the student should have a full-time special education program because of the student's low academic functioning and lack of attending and distractibility.
2. Did DCPS deny the student a free and appropriate public education by failing to evaluate the student in all areas of suspected disability? Petitioner alleges the student was not evaluated for ADHD/OHI classification and no neuropsychological was conducted although recommended by the student's May 2008 psycho-educational evaluation.

² At the outset of the hearing DCPS counsel asserted that Petitioner's Exhibit 21 which contained five (5) letters did not have fax confirmations for all 5 letters. DCPS objected to the two of the letters for which there was no confirmation receipt being used to prove they were received by DCPS. The documents were not used for a finding of fact critical to adjudication of the issues and all 5 letters were admitted into the record despite there being no confirmation receipts for all 5.

³ The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

3. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement? Petitioner alleges the student's current placement at School A is inappropriate because it does not offer him a full time special education program.

FINDINGS OF FACT 4:

1. The student is [REDACTED] and resides with his parent(s) in the District of Columbia. The student has been determined to be eligible under IDEA with a disability classification of Specific Learning Disability ("SLD"). The student attends School A, a District of Columbia Public Elementary School. (Parent's testimony, Petitioner's Exhibit 15)
2. The student started School A in the kindergarten at the age of six (6) at the start of school year ("SY") 2004-05. Prior to attending School A the student did not attend any pre-K or day care where educational instruction was provided. The student was retained in the first grade and, therefore, was in the first grade two school years: SY 2005-06 and SY 2006-07. The student was in the second grade during SY 2007-08, the third grade during SY 2008-09. The student is now age [REDACTED] for SY 2009-10; he will turn [REDACTED] before the school year ends.⁵ (Parent's testimony)
3. As a result of a due process hearing and Hearing Officer's Determination ("HOD") the student was evaluated for special education services in May 2008. The following independent evaluations were conducted: psycho-educational, social history and occupational therapy. On May 12, 2008, the student's psycho-educational evaluation was conducted. At the time of the evaluation the student was ten years and three months old and in the second grade. The evaluation assessed the student's intellectual functioning, educational achievement and attention.⁶ (DCPS Exhibit 3, Petitioner's Exhibit 7)
4. Based on the assessments in the May 2008 evaluation it was determined the student's cognitive functioning fell in the borderline range with a full scale IQ of 73, "which indicated limitations in his intellectual functioning such as difficulty comprehending complex ideas, learn[ing] quickly and from experience." However, the evaluator also noted the student performed particularly well on tasks involving oral expression, and

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an exhibit that has been presented by both parties separately, for efficiency the Hearing Officer may cite only one party's exhibit rather than both as the source of the finding of fact.

⁵ As a result of starting kindergarten a year late and being retained in the first grade the student is two years older than most of the students in his current grade.

⁶ The evaluation consisted of the following assessments: clinical interview of the parent, Wechsler Intelligence Scale for Children 4th Edition (WISC-IV), Wechsler Individual Achievement Test 2nd Edition (WIAT-II), Behavior Assessment System for Children, 2nd Edition, Parent Rating Scale-Child (BASC-PRS), Attention Deficit Hyperactivity Disorder Test (ADHDT), The Berry-Buktenica Developmental Test of Visual-Motor Integration (VMI), Graphic Projective Drawings.

he demonstrated strength in verbal reasoning skills particularly for tasks that required recalling and reasoning. (Petitioner's Exhibit 7)

5. The achievement assessment revealed the student was far below appropriate age levels in reading and math. The student's achievement scores rated him as operating at an age equivalency of approximately 6.3 years in reading and 7.5 in math respectively and a grade equivalency of approximately 1.2 in reading and 2.3 in math respectively. The student's oral expression was rated at the 4.9 grade level. At the time of the evaluation the student was in the second grade. The assessment also rated the student as being in the above average range for core symptoms of Attention Deficit Hyperactivity Disorder ("ADHD"). The assessments were based on input from the parent but not the student's teachers or other school staff. The evaluator recommended the student have a psychological evaluation "to assess for the presence of mental and emotional issues that might be influencing his ability to be effective in the classroom and in interpersonal relationships. Based on the results of the Psychological Evaluation, a Neuropsychological might be necessary to address possible brain dysfunction as a result of premature birth, failure to thrive treatment and nicotine exposure in utero." (Petitioner's Exhibit 7)
6. The independent evaluations were reviewed by DCPS and the student was first found ineligible on August 5, 2008. The parent filed another due process complaint which resulted in an October 27, 2008, HOD which found DCPS had failed to evaluate the student in all areas of suspected disability to rule out emotional disturbance and ADHD. The HOD concluded DCPS had denied the student a FAPE as a result and ordered DCPS to conduct a psychological evaluation and review the evaluation and reconsider the student's eligibility. (DCPS Exhibit 5)
7. In October 2008 DCPS conducted a psychological evaluation. The evaluation assessed the student's cognitive ability, educational achievement and included assessments for emotional disturbance and the Conner's Rating Scale.⁷ The evaluator determined the student demonstrated below average non-verbal intelligence. The educational achievement assessment demonstrated the student was operating on an age equivalency on approximately 7.5 in reading and math and operating at a grade equivalency of approximately the beginning of second grade.⁸ The behavioral assessments conducted revealed the student had clinically significant scores for attention problems. The evaluator noted "[the student's] teacher does report concern with the fact that he is easily distractible especially in attempting to complete class work but asserts that he is also easily re-directed and is more focused on the task when the work presented to him becomes less challenging and more accomplishable ... Based on the three questionnaires completed by his primary teacher as well as by

⁷ The evaluation consisted of the following assessments: Comprehensive Test of Nonverbal Intelligence (C-TONI), Woodcock Johnson III Tests of Achievement, BASC-2 (Teacher), Conner's (Teacher) Rating Scale-Revised, Scale for Assessing Emotional Disturbance (SAED), Teacher Interview and Record Review.

⁸ At the time of the testing the student was beginning the third grade and was to turn eleven years four months later.

teacher report, it appears that [the student's] social emotional well being is in an appropriate range and will improve as he becomes a more successful learner with support services in place at school." (Petitioner's Exhibit 6)

8. On December 15, 2008, a multidisciplinary team ("MDT") found the student eligible. The MDT developed the student's initial Individualized Educational Program ("IEP") which prescribes the following weekly services: 10 hours of specialized instruction in a "outside of general education" setting and 60 minutes of occupational therapy. The specialized instruction hours are to be divided upon as follows: 3 hours in reading, 3 hours in written expression and 2 hours in math. The MDT determined that the student should first be provided part time specialized instruction then see if the hours need increasing in order for him to benefit for the services. (Petitioner's Exhibit 15, Ms. Woolery's testimony)
9. Although the student was first found eligible in December 15, 2008, the parent did not approve the IEP or consent to special education services being provided. Consequently, the student was not provided any special education services during the remainder of SY 2008-09. In addition, during SY 2008-09 the student was absent from school approximately thirty school days. (Ms. Woolery's testimony, DCPS Exhibit 18)
10. The parent consented to special education services being provided to the student at an August 2009 meeting at which the parent signed a consent form. Thus the student has only received specialized instruction and related services for approximately two months. Consequently, there has not yet been a thorough assessment to determine how the student has benefited from the special education services being provided. (Ms. Woolery's testimony)
11. During the current school year the parent has visited the student's classroom. In the student's general education fourth grade classroom there are approximately twenty-five (25) students. The student's special education classroom has five or six total students. The student often needs individual attention from his teacher in order to complete his work in class. The parent has noted the student has problems with reading and in math and cannot count money. (Parent's testimony)
12. The student is with general education students for social studies, physical education and Music and/or Art and Library. The student is being pulled out of the classroom for specialized instruction in small group with the special education teacher. The special education teacher is also consulting with the student's general education teacher as to the student's curriculum needs. There have been no concerns noted by the student's teachers that the student has had inattention or any behavior difficulties in the classroom during the current school year. But it is clear the student needs significant help academically. (Ms. [REDACTED] testimony)
13. The psychological evaluations conducted of the student make clear the student has significant academic deficits in reading, math and written expression. The psychologist who supervised the student's May 2008 psycho-educational evaluation

reviewed the student's evaluations and educational records. He was of the opinion that because the student has significant academic deficits and is much older than his classroom peers that he would benefit from a full time special education program rather than a part time program where the student is pulled out of general education classes for special education classes for part of the day. He also explained that the psycho-educational mentioned the possible need for a neuropsychological evaluation because of the student's medical history of ear infection, in utero exposure to nicotine and other concerns that were noted by the parent. However, the psychologist did not personally observe the student during the assessments and has not observed the student in his classroom or spoken to his teachers. The psychologist also noted of the May 2008 evaluation that there were no other assessments for evaluating for ADHD that would have been conducted and the assessments conducted would have been sufficient to diagnose the student with ADHD. The fact that the student wears glasses and does not use them in the classroom may be impacting his academic performance. (Dr. [REDACTED]'s testimony)⁹

14. The student has been interviewed by and accepted to High Road School. High Road is a full time special education school that only has disabled students. The school has certified special education teachers and certified related service providers. The High Road staff has reviewed the student's evaluations and IEP and determined that it can provide the student specialized instruction and related services. (Mr. [REDACTED] testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.¹⁰ In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

⁹ The witness supervised the student's May 2008 psycho-educational evaluation and was qualified as an expert in neuropsychology and educational assessments. He was allowed to render an opinion on the appropriateness of the student's educational program and placement.

¹⁰ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP for SY 2009-10? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The essence of Petitioner's assertion that the student's IEP is inappropriate is based on the claim that the student's academic deficits are so severe and he is so behind his age peers that he is in need of a full time special education program. However, the evidence demonstrates the student began school late and was retained in the first grade. Consequently, he is significantly behind his aged peers. The academic assessments of the student are over a year old and there are no recent assessments that demonstrate where the student is currently operating and what level of progress he has made in the last academic year. Although the student was found eligible over a year ago, the student has only been receiving special education services for approximately two months.

The evidence demonstrates that the MDT determined the student should be first provided services in a less restrictive setting to first assess the effectiveness of the services. This does not seem an unreasonable decision by the MDT and there was insufficient evidence to prove the MDT's decision in this regard to the student's IEP, at least at this juncture, is inappropriate or does not meet the requirements of 34 CFR 300.320 and 34 CFR 300.114.

Although Dr. [REDACTED] is a well respected and experienced psychologist his testimony was insufficient to demonstrate and convince the Hearing Officer that the student is in need of full time services. He has not personally observed the student or conferred with his teachers either when the 2008 evaluation was conducted or more recently. In addition, the parent's testimony although sincere was not sufficient to demonstrate that the educational program the student is currently being provided is inappropriate.

After an assessment has been made of whether the student is deriving benefit from the special education services that are now being provided it may be determined that more services and a more restrictive setting is truly required for this student. However, with the evidence provided, both documentary and the testimonial by Dr. [REDACTED] and the parent, the burden of persuasion on this issue was not met.

2. Did DCPS deny the student a free and appropriate public education by failing to evaluate the student in all areas of suspected disability? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Based upon Dr. [REDACTED] testimony the May 2008 psychological evaluation was sufficient to determine that the student had ADHD. However, that assessment did not include information from the student's teachers. The psychological conducted by DCPS in October 2008 again included assessments for ADHD and included information from the student's teachers. Although the evaluations demonstrate the student may very well have ADHD the MDT concluded after reviewing all these assessments that the condition did not impact the student in the classroom sufficient to warrant a disability classification based on the ADHD or any other services or accommodations to specifically address the condition. Consequently, the evidence clearly demonstrates that the student has in fact been assessed as required by IDEA (34 CFR 300.304(c)) in this area.

Although Dr. [REDACTED] addressed the issue of a neuropsychological, there was insufficient evidence that the student in need of a neuropsychological. The evaluation that first recommended the neuropsychological put a contingency on whether a recommended psychological would in turn recommend the neuropsychological. The subsequent psychological evaluation that was conducted, although conducted by DCPS, did not recommend the neuropsychological and there was no new information derived since the May 2008 evaluation that would have demonstrated this evaluation was necessary. In addition, there was no first hand evidence that any behavioral concerns were showing up in the student's classroom. The parent may still request the evaluation at any upcoming MDT meeting but there was insufficient proof that DCPS, in not conducting the evaluation thus far, has denied the student a FAPE. Consequently, the burden of persuasion on this issue was not met.

3. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Petitioner alleged the student's placement was inappropriate because he is in need of a full time special education placement. Based on the conclusions in issue # 1 addressed above the Hearing Officer concludes the student is not in need of a full time placement. Ms. [REDACTED] credibly testified the student's IEP is being implemented at School A since the parent's consent was granted. There was no other evidence presented than was not addressed in issue #1 above that would prove that the student's current placement is inappropriate. Consequently, the Hearing Officer concludes the student's current placement meets the requirements of 34 CFR 300.116 and the burden of persuasion on this issue was not met.

ORDER:

The due process complaint in this matter is dismissed with prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer

Date: October 23, 2009