

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

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	Date Issued: May 16, 2015
	)	
Petitioner,	)	Hearing Officer: John Straus
	)	
v.	)	
	)	
District of Columbia Public Schools	)	Room 2006
	)	Room 2004
Respondent.	)	Room 2006
	)	

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**HEARING OFFICER DETERMINATION AMENDED<sup>2</sup>**

**Background**

The Petitioner, who are the parents of the Student, filed a due process complaint notice on March 2, 2015, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that DCPS had failed to evaluate the Student to determine whether the Student is a student with a disability when the Student exhibited anxiety at school, failed to evaluate the Student within 120 days of the Petitioner’s October 11, 2013 request to evaluate the Student to determine whether the Student is a student with a disability, and failure to determine the Student is a student with either an Emotional Disturbance (“ED”), Other Health Impairment (“OHI”), and a Specific Learning Disability (“SLD”) under the IDEA at the June 26, 2014 meeting.

DCPS denies that any verbal or written requests were made by the parents to have the Student evaluated for special education services. DCPS asserts the Student was not eligible for special education because the Student did not meet the eligibility criteria for a student with an ED, OHI or SLD because although the student did meet the disability criteria for ED, she did not meet the second prong for eligibility under the IDEA, i.e., she does not require specialized instruction and related services.

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

<sup>2</sup> The only change is the case number on the front and back pages.

### **Subject Matter Jurisdiction**

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

### **Procedural History**

The due process complaint was filed on March 2, 2015. This Hearing Officer was assigned to the case on March 3, 2015. DCPS timely filed a response to the complaint on March 12, 2015 and made no challenges to jurisdiction. A prehearing conference took place on March 24, 2015 and a Prehearing Order was issued the same day. A second prehearing conference was convened on April 13, 2015 and a Record of Prehearing Conference was issued on April 14, 2015.

Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on March 20, 2015. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on April 2, 2015, the 45-day timeline to issue a final decision began on April 3, 2015 and the final decision is due by May 16, 2015.

The due process hearing was a closed hearing that took place from May 4, 2015 to May 6, 2015. The Petitioner was represented by Maria Mendoza, Esq. DCPS was represented by Linda Smalls, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in the hearing in person.

DCPS filed a Motion to Dismiss on April 14, 2015, arguing that the Petitioner lacked standing because the Student turned 18 years old. The Petitioner provided a Power of Attorney Executed by the Student and the Hearing Officer denied the Motion to Dismiss on April 22, 2015. The Hearing Officer ordered that the Student be present at the outset of the due process hearing to verify executing the Power of Attorney because it was not notarized. DCPS filed a Renewed Motion to Dismiss on April 27, 2015. The Hearing Officer allowed DCPS to assert this motion even though it was past the deadline set in the Prehearing Order for prehearing because DCPS was not able to file the motion prior to the deadline. The Petitioner filed an opposition to the motion on May 1, 2015. The Student verified execution of the Power of Attorney and the Hearing Officer denied the Motion to Dismiss on the record.

The Petitioner’s Disclosure Statement, dated April 27, 2015, consisted of a witness list of eleven witnesses and documents P-1 through P-34. On April 30, 2015, DCPS filed Respondent’s Objections to Petitioner’s Disclosure.<sup>3</sup> DCPS’ objections were addressed at the due process hearing. DCPS reserved its objections to the witness testimony and did not assert its objections when the witness testified. The Petitioner agreed to strike exhibit P-5. DCPS’ objections to

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<sup>3</sup> Pursuant to the Prehearing Order issued on March 24, 2015, failure to note objections to the opposing party’s disclosures would result in the disclosures being admitted without objection.

## Hearing Officer Determination

Petitioner's exhibits P-21 and P-22 were overruled and DCPS withdrew its objection to exhibit P-29 and asked for clarification regarding the exhibit. The Respondent's Disclosure Statement, dated April 27, 2015 consisted of a witness list of fifteen witnesses and documents R-1 through R-17 and were admitted into evidence without objection.

The Petitioner presented the following witnesses in their case in chief: (1) Student; (2) Mother; (3) Step Father ("Father"); (4) Educational Advocate ("Advocate") who was certified as an expert in special education with a focus on identification of students with ED and SLD, development of IEPs, and placement determination; Private School Vice Principal ("VP"); (5) Clinical Psychologist who was certified as an expert in Clinical Psychology, specifically in the eligibility and IEP placement for students with ED, OHI and SLD and (6) Psychiatrist who was certified as an expert in Clinical Psychiatry with an emphasis on treatment of anxiety disorder and major depressive disorder. DCPS presented two witness in its case in chief: (1) Social Worker ("SW") who was certified as an expert in special education and clinical social work with an emphasis in educational programing and the provision of therapy services for children with disabilities and (2) School Psychologist who was certified as an expert in School Psychology with an emphasis on IDEA eligibility determination and educational programing for children with disabilities.

DCPS made a Motion for Directed Finding at the conclusion of the Petitioner's case in chief. The motion was overruled due to the fact that the Petitioner's exhibits were entered into the record at the outset of the hearing and the hearing officer had not reviewed all of the evidence and the Petitioner did not stipulate to any of the facts.

The issues to be determined in this Hearing Officer Determination are as follows:

1. Whether Respondent denied Student a FAPE by failing to timely evaluate the student within 120 days of October 2013 when the Student was not accessing the curriculum.
2. Whether Respondent denied Student a FAPE by failing to timely evaluate the student within 120 days of the Petitioner's October 11, 2013 request for evaluations to determine whether the student is a student with a disability under the IDEA.
3. Whether DCPS denied Student a FAPE by failing to determine the student is a student with an ED, OHI and a SLD under the IDEA at the June 26, 2014 meeting.

The relief requested by Petitioner is as follows:

- (1) A finding of a denial of a FAPE;
- (2) The Hearing Officer to determine the student is a student with an ED, OHI and SLD under the IDEA;
- (3) Respondent to convene a meeting to develop an Individualized Education Program ("IEP");
- (4) DCPS to fund an independent vocational assessment and functional behavioral assessment;
- (5) The Hearing Officer to order DCPS to reimburse the Petitioner, for the cost of the independent psychoeducational assessment;

## Hearing Officer Determination

- (6) The Hearing Officer to order DCPS to reimburse the Petitioner, for the cost of tuition at Private School; and
- (7) The Hearing Officer to order compensatory services to redress the lack of special education and related services as a result of DCPS failure to evaluate the Student 120 days from October 2013 and determine the Student eligible and develop an IEP for the Student.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact<sup>4</sup> are as follows:

1. The Student currently resides with her mother and stepfather in the District of Columbia where she attends Private School. The Student attended another High School in a previous Local Education Agency ("LEA") during the 2012-2013 school year.<sup>5</sup>
2. On December 5, 2012, the Student received a psychiatric assessment. The evaluator diagnosed the Student with Attention Deficit Hyperactivity Disorder ("ADHD") and recommended the Student receive a 504 plan.<sup>6</sup>
3. On January 9, 2013, the previous LEA determined the Student was a student with ADHD under section 504 of the Rehabilitation Act of 1973 and developed a 504 plan.<sup>7</sup>
4. The Student enrolled in High School at the beginning of the 2013-2014 school year.<sup>8</sup>
5. On March 13, 2013, the Student received another psychiatric assessment. The evaluator stated the Student is suffering from depression and anxiety which prevents her from completing her class assignments.<sup>9</sup>
6. On September 18, 2013, the Student received a psychiatric assessment that states the Student has mood disorder with major depressive episodes and panic disorder. The evaluator noted the Student has recurrent headaches and has a previous diagnosis of attention deficit hyperactivity disorder. The psychiatrist recommended the Student receive

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<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Mother, Father, Student

<sup>6</sup> P-8

<sup>7</sup> R-3, SW

<sup>8</sup> Student, Mother

<sup>9</sup> P-7

## Hearing Officer Determination

extra time and frequent breaks during academic tests and that her workload in school be adjusted to avoid excessive stress.<sup>10</sup>

7. On October 11, 2013, the Petitioners met with school staff at High School. The staff reviewed documentation from the Petitioners that stated the Student was diagnosed with depression and anxiety disorder. The Student was determined eligible under section 504 of the Rehabilitation Act.<sup>11</sup>
8. On October 25, 2013, the Student received a psychiatric assessment. The evaluator noted the Student has a history of depression and anxiety. The evaluator further noted the Student transferred to High School where she initially did better with her anxiety but now in the same cycle of depression, ADHD and anxiety. As a result, the Student is not functioning and missing assignments. The evaluator noted the Student stayed home from school several days because she was too depressed and stressed out. Her truancy often follows a night of not sleeping and waking up feeling anxious and is worried about something about school such as a project or talking to a teacher. The Student was attending school only half the time during this period.<sup>12</sup>
9. On November 5, 2013, the SW notified the science teacher that the Student had a panic attack in her first period class and requested the science teacher to allow the Student to make up a quiz the following day.<sup>13</sup>
10. On November 18, 2103, the Petitioners notified the Student's teachers that the Student missed school due to intense depressive episodes. The Petitioner expressed concern that the Student feels behind in class which creates anxiety and causes insomnia and then causes the Student to miss more school.<sup>14</sup>
11. On December 18, 2013, the Petitioners notified the counselor that the Student had a "meltdown" as a result of feeling unprepared to complete a presentation. The Student refused to get out of bed the following morning. The Petitioner notified the SW that she was considering placing the Student in a residential program.<sup>15</sup>
12. On February 3, 2014, the Petitioners informed the SW that the Student was hospitalized for a panic attack.<sup>16</sup>
13. The Student's physicians developed a transition for the Student to help her transition from the hospital back to High School. On February 14, 2014, the Petitioner informed the SW about a transition plan for the Student's return to school from the hospital and shared her concern about the Student's anxiety in returning to school.<sup>17</sup>

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<sup>10</sup> R-4

<sup>11</sup> P-18, R-5, R-6, R-7

<sup>12</sup> P-24, Mother, Father

<sup>13</sup> P-10, Mother

<sup>14</sup> P-11, Mother

<sup>15</sup> P-11, Mother

<sup>16</sup> P-12, Mother, Father

<sup>17</sup> P-13, P-14, Student, Mother

## Hearing Officer Determination

14. The Student returned to school and met with the SW who informed the Student that she was not aware of the transition plan. The Student called her mother and was picked up from school. She did not return for the rest of the 2014-2015 school year.<sup>18</sup>
15. On February 19, 2014, the Petitioner informed her educational advocate that she would like to begin the special education process.<sup>19</sup>
16. On February 27, 2014, the Student received a psychiatric assessment. The evaluator advised the Petitioners to seek an IEP for the Student.<sup>20</sup>
17. On February 27, 2014, the Petitioners met with school staff to develop a plan for the Student's transition back to school. The Petitioner requested that the Student be evaluated to determine whether the Student is a student with a disability under the IDEA. The Petitioners were notified that they needed to sign a release before the school staff communicate with the hospital staff. The school staff reviewed the plan to transition the Student back to school and the meeting concluded.<sup>21</sup>
18. On March 20, 2014, the Student began to receive Home Instructional Program ("HIP") services. HIP was provided to the Student via online instruction.<sup>22</sup>
19. On March 20, 2014, the Student received a psychiatric assessment. The evaluator noted the Student cut her arms and legs superficially with an Exacto knife during the past weekend.<sup>23</sup>
20. On April 10, 2014, the Student received another psychiatric assessment. The evaluator noted the Student has decreased anxiety since being out of school although there was increased anxiety with starting online classes which has subsided as she became used to the online classes.<sup>24</sup>
21. On April 29 and May 6, 2014, the Student received a comprehensive psychoeducational assessment from the clinical psychologist. The assessment yielded variable cognitive scores, with very superior scores in verbal comprehension and average to low average scores in other areas. The assessment also included an academic achievement assessment yielded superior scores in word reading, reading fluency, spelling and writing samples and the Student performed in the average range on passage comprehension, math calculation, and writing fluency. The Student performed within the low range in Math Fluency. The clinical psychologist noted the Student has not been in school since February 2014 due to anxiety and depressive symptoms which were too severe to manage at school. The clinical psychologist reported the Student has another panic attack in school when she returned

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<sup>18</sup> Student

<sup>19</sup> P-20

<sup>20</sup> P-25

<sup>21</sup> R-8, SW

<sup>22</sup> R-10, Student

<sup>23</sup> P-26

<sup>24</sup> P-27

## Hearing Officer Determination

from the hospital and was placed in online classes through a home based instruction program. This arrangement was also too stressful for the Student. The clinical psychologist noted the Student continues to present with symptoms of major depression, generalized anxiety and panic disorder. The clinical psychologist stated the Student is a student with ADHD, Major Depressive Disorder, Generalized Anxiety Disorder and SLD. The clinical psychologist stated the Student requires an IEP to address the Student's learning, executive functioning and psychiatric issues. The clinical psychologist recommended the Student enroll in a private day school program that has small classes, provide individualized programming for gifted students and teachers that have experience working with students with anxiety and panic attack symptoms such as Private School. The clinical psychologist provided a list of accommodations that she believes the Student should have at school.<sup>25</sup>

22. On June 5, 2014, the psychiatrist wrote a letter stating the Student has major depression and generalized anxiety disorder. The letter states that the Student's decreased concentration and energy and lack of pleasure and interest have impacted the Student's academic work during the 2013-2014 school year. The psychiatrist noted that the symptoms cause difficulty on its own with completing assignments, sitting through classes and studying. The psychiatrist also stated the Student has ADHD that impacts the Student's ability to get work done.<sup>26</sup>
23. On June 5, 2014, the Student's individual therapist wrote a letter stating the Student suffers from Major Depression and Anxiety.<sup>27</sup>
24. The School Psychologist interviewed the Student's parent and teachers, the SW, and the Student. The parent stated the Student's emotional disorder is negatively impacting the Student's education. She picks the Student up from school due to panic attacks. The Student is not able to do her homework and write things down; instead she doodles. The student has insomnia and "meltdowns" due to her school work load. The Student reported that her anxiety and depression makes it difficult to read and write. She feels overwhelmed by her school work so as the work assignments pile up she get more discouraged. The SW stated the Student went to her office when she felt too much stress but she did not observe panic attacks. Her teacher noted that the Student's poor attendance impacted the Student's performance in school. The teacher further noted that, prior to her hospitalization the Student became overwhelmed after she did not turn in assignments and would show signs of anxiety in class. The teacher implemented the supports and modifications in the 504 plan, such as excusing the Student from completing small assignments. However, the Student did not turn in her work and did not come to class and then become overwhelmed. The Student had only one friend in school and she did not participate in class discussion or make presentations to the class.<sup>28</sup>

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<sup>25</sup> P-2, R-14, R-15, Clinical Psychologist, School Psychologist

<sup>26</sup> P-2, Psychiatrist

<sup>27</sup> P-3

<sup>28</sup> R-14, School Psychologist

## Hearing Officer Determination

25. On June 26, 2014, the IEP team convened to determine whether the Student is a student with a disability under the IDEA. The Father provided additional psychiatric assessment reports and letters from services providers. The team noted the Student was diagnosed with ADHD, depression and anxiety and has received treatment. The team noted the Student was hospitalized in February 2014. Her physician stated the Student would be overwhelmed if she were to return to school and the Student left after one day of school. Thereafter, the Student received HIP services. The School Psychologist stated that she does not meet the eligibility criteria as a student with a disability because she does not require special education services due, to her high grades and academic achievement. The Advocate stated the Student's attendance had an impact on the Student's education. The Petitioners challenged the reports that the Student did not exhibit panic attacks in school. The Petitioners further pointed out that the Student's 504 plan does not work. The team determined the Student is not a Student with ED, OHI, or SLD under the IDEA. The Petitioners disagreed with the IEP team's determination because the Student's absences resulted from the Student's anxiety and depression.<sup>29</sup>
26. The Student received an M for Medical Leave for her Latin III, AP World History, and Internship classes. She received an Incomplete for her Pre-Calculus class. The Student's remaining grades were a B- in Physics, D in English & Humanities Step III, and an A in D.C. History and Government.<sup>30</sup>
27. The Clinical Psychologist recommended the Student enroll in Private School. The Petitioners enrolled the Student in Private School for the 2014-2015 school year without notifying DCPS of the Student's enrollment or request tuition reimbursement. Private School is a small, quiet school with 50 students that has no more than twelve students per class making it beneficial for students who are uncomfortable in large schools. The school has a pleasant, calm environment where the Student has the opportunity to stabilize. The school does not have teachers who are certified in special education; however, 25% of the school population have anxiety and depression. Private School offers flexible schedules to reduce the student's stress. The Student began taking only two classes at Private School and now she is taking three classes. The Student may leave her class anytime to take a break. She contributes to class but her teachers do not "put her on the spot." The Petitioners report that the Student's attendance has improved at Private School and the Student is doing better. The Student was hospitalized with a panic attack on March 11, 2015; however, she has transitioned back to Private School successfully. The Clinical Psychologist opined that the Student may be suicidal if she is taken out of the Private School.<sup>31</sup>
28. The Petitioner requests 105 hours of therapy services, 42 hours of executive functioning coaching and 42 hours of academic tutoring to redress the lack of special education and related services as a result of DCPS' failure to conduct an initial evaluation, determine eligibility under the IDEA and develop and implement an IEP. The Advocate stated the

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<sup>29</sup> R-10, R-11, R-12, R-19, Mother, Father, SW, School Psychologist

<sup>30</sup> R-16, R-17

<sup>31</sup> P-21, Student, Mother, Father, VP, Clinical Psychologist

## Hearing Officer Determination

student requires nurturing and support, structure for long term assignments and a reduced class load.<sup>32</sup>

### **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:

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

#### **DCPS denied the Student a FAPE by failing to timely evaluate the student within 120 days of October 2013 when the Student was not accessing the curriculum.**

DCPS must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111, 5 D.C.M.R. E-3002.1(d).

The Student was diagnosed with depression and anxiety prior to her enrollment at High School. As a result, her previous LEA developed a 504 plan for her that was shared by the Petitioners with the High School staff and a new 504 plan was developed. Initially, the Student did better with her anxiety but she quickly reverted to the same cycle of depression and anxiety. By October 25, 2013, the depression and anxiety prevented the Student from completing her class assignments. She began to have panic attacks in school. As a result, the Student was not functioning and missing assignments. Prior to her hospitalization, the Student stayed home from school several days at a time because she was too depressed and stressed out. Her truancy often followed a night of not sleeping and waking up feeling anxious and is worried about something about school such as a project or talking to a teacher. As a result, the Student was attending school only half the time. Finally, the Student was hospitalized as a result of a panic attack in February 2014 and did not return to school the rest of the school year.

DCPS should have suspected the Student was a student with an ED by the end of October 2013 and should have begun the evaluation process no later than November 1, 2014. Although the Student is intelligent and has a lot of potential to perform well academically, her teachers should have noticed her dramatic decline in academic performance culminating in her hospitalization in February 2014. DCPS should have completed the evaluation process no later

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<sup>32</sup> P-30, Advocate

## Hearing Officer Determination

than the end of February 2014 and developed an IEP no later than the end of March 2014. *See* 34 C.F.R. § 300.323(c)(1).

### **DCPS did not deny the Student a FAPE by failing to timely evaluate the student within 120 days of the Petitioner's October 11, 2013 request for evaluations to determine whether the student is a student with a disability under the IDEA.**

Pursuant to 34 C.F.R. § 300.301(b), either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. The evidence does not support the Petitioner's contention that they made a request on October 11, 2013. The evidence supports that the Petitioners made a referral for special education on February 27, 2014. The referral placed DCPS on notice that the Student may be a student with a disability under the IDEA. Additionally, pursuant to D.C. Mun. Regs. tit. 5, § 3005.2 (2003), "the IEP team shall conduct an initial evaluation of a child within a reasonable time of receiving a written referral and parental consent to proceed and within timelines consistent with Federal law and D.C. Code § 38-2501(a)." Under the D.C. Code, DCPS and "shall assess or evaluate a student, who may have a disability and who may require special education services, within 120 days from the date that the student was referred for an evaluation or assessment." (D.C. Code § 38-2501(a)).

DCPS should have completed the evaluation process within 120 days of the Petitioner's request on February 27, 2014. Therefore, the evaluation should have been completed no later than June 27, 2014. DCPS completed the evaluation on June 26, 2014. Therefore, DCPS did not deny the Student a FAPE by failing to evaluate the Student within 120 days of the Petitioner's request.

### **DCPS denied Student a FAPE by failing to determine the student is a student with an ED, OHI, and a SLD under the IDEA at the June 26, 2014 meeting.**

The overall purpose of the IDEA is to ensure that all children with disabilities<sup>33</sup> have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

ADHD is not a specific disabling condition under the IDEA, although a student with ADHD may be eligible as OHI. 34 C.F.R. § 300.8(c)(9). The classification of ADHD depends on the particular presentation of the disorder in an individual student and must be determined on a case-by-case basis. In other instances, a student with ADHD may be eligible for services under the classification of an ED. It is important to note that a student with ADHD will not qualify for a classification of ED unless she meets the specific eligibility criteria for ED. A student diagnosed as having ADHD may be eligible under the IDEA based on an SLD, provided the impact of the ADHD on the student's academic performance meets the criteria set out in the IDEA. *See, e.g.,*

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<sup>33</sup> Child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a). Disability includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other Health Impairment.

## Hearing Officer Determination

*Norton v. Orinda Union Sch. Dist.*, 29 IDELR 1068 (9th Cir. 1999), *cert. denied*, 528 U.S. 825, 112 LRP 15134 (1999) (a student with ADD will be eligible on the basis of an SLD if she has a processing disorder and a severe discrepancy between ability and achievement and needs special education as a result). The Hearing Officer will first consider whether the Student is a student with ED, then OHI, and finally SLD under the IDEA.

### **The Student is a student with ED**

A student needs to exhibit one of the five criteria of the definition of ED listed in 34 C.F.R. § 300.8(c)(4) over a long period of time<sup>34</sup> and to a marked degree<sup>35</sup> to be so classified, provided that her educational performance is thereby adversely affected. *See, e.g. Lapidus v. Coto*, 559 IDELR 387 (N.D. Cal. 1988). The five criteria are 1) An inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) Inappropriate types of behavior or feelings under normal circumstances; 4) A general pervasive mood of unhappiness or depression; 5) A tendency to develop physical symptoms or fears associated with personal or school problems.

The Student's teachers reported the Student has only one friend at High School. The Student has a mood disorder which manifest in major depressive episodes and a panic disorder in school. The Student has suffered from depression and anxiety since at least March 13, 2013. Finally, the Student has panic attacks and recurrent headaches as a result of anxiety regarding her school work. This information qualifies the Student under criteria two through five above. The Student has a general pervasive mood of unhappiness for a long time to a marked degree. The June 26, 2014 IEP team was aware of this information.

However, regardless of the existence of an ED, it is only a qualifying disability under the IDEA if the student needs special education and related services. 34 C.F.R. § 300.8(a)(1). Special education means specially designed instruction, to meet the unique needs of the child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

As the Student's anxiety and depression worsened, DCPS adapted methodology and delivery of the Student's instruction. Unfortunately, the 504 plan did not work. The modifications that the Student required were more than mere accommodations required by the Student 504 plan. The student required structuring long term assignments to prevent her from experiencing panic attacks in school and a reduced load of classes to reduce the Student's anxiety. The Student still requires at least a portion of her instruction in special classes to be successful in school. Moreover,

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<sup>34</sup> According to OSEP, a generally acceptable definition of a long period of time is a range of time from two to nine months, preliminary interventions have been implemented and proven ineffective during that period. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

<sup>35</sup> OSEP takes the position that "to a marked degree" generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

## Hearing Officer Determination

the Student requires related services. She should have access to counseling services at school to enable her to deal with her anxiety and access the general education. 34 C.F.R § 300.34(c)(2). The Student does require special education and related services; therefore, the Petitioners met their burden of proof by a preponderance of the evidence that the IEP team erred in not determining the Student is a student with an ED under the IDEA.

### **The Student is not a student with OHI**

A student could have a qualifying OHI by reason of ADHD if the disorder limits the student's ability to attend to a specific academic task by causing her to be overly alert to her environment in general. In other words, if the student's disability-related distractibility adversely affects her educational performance, she has limited alertness. *See e.g. Letter to Cohen*, 20 IDELR 73 (OSEP 1993) (Limited alertness must be viewed in terms of its effect on educational performance.) The regulations at 34 C.F.R. 300.8(c)(9) define an OHI as including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment. Although the Student has a long standing diagnosis of ADHD; there is no in the record that indicates the Student's distractibility adversely affects her educational performance. Therefore, the Petitioners did not meet their burden of proof that the IEP team erred in determining the Student is not a student with OHI.

### **The Student is not a student with SLD**

The Student has superior cognitive scores; however, a categorical exclusion from SLD eligibility based on identification as gifted under state law violates the IDEA. In *Letter to Ulissi*, 18 IDELR 683 (OSEP 1992), OSEP made it clear that a student classified as mentally gifted may nonetheless meet IDEA eligibility criteria. OSEP observed that a child who meets the eligibility requirements set forth at 34 C.F.R. 300.309 is a child with an SLD, regardless of her IQ, unless she comes within one of the exceptions identified at 34 C.F.R. § 300.309(a)(3).

However, pursuant to 34 C.F.R. § 300.309(a)(3)(iii), the IEP team may not determine that a child has a SLD if her inadequate achievement or is due to an ED. The Student is a student with an ED; therefore, she is not a student with SLD under the IDEA. The Petitioners failed to meet their burden of proof that the Student is a student with SLD under the IDEA.

### **Relief**

The Student is a student with an ED under the IDEA and requires an IEP. Therefore, the Hearing Officer will order DCPS convene an IEP team meeting to develop an IEP for the Student. In addition, the Petitioner requests the Hearing Officer order DCPS to fund an independent vocational assessment and functional behavioral assessment. the Petitioner also requests the Hearing Officer to order DCPS to reimburse the Petitioner for the independent psychoeducational assessment and for the cost of tuition at Private School and the Hearing Officer to order the Student receive compensatory services.

There is nothing in record regarding a need to conduct an independent vocational assessment and functional behavioral assessment. Therefore, the Hearing Officer will deny the

## Hearing Officer Determination

Petitioner's request for an independent vocational assessment and functional behavioral assessment without prejudice so that Petitioner may request the assessments at the IEP team meeting.<sup>36</sup> Additionally, there is nothing in the record that indicates that the Petitioner's requested DCPS to provide an Independent Educational Evaluation.<sup>37</sup> Therefore, the Hearing Officer will deny the Petitioner's request for reimbursement for the independent psychoeducational assessment.

Parents are entitled to private school tuition reimbursement where the child's public placement violated the IDEA and the subsequent private placement was proper. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993). See also *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 556 IDELR 389 (U.S. 1985). The parents of a child with a disability need only have requested the provision of special education and related services in order to qualify for tuition reimbursement. *Frank G. v. Board of Educ. of Hyde Park Cent. Sch. Dist.*, 46 IDELR 33 (2d Cir. 2006), cert. denied, 552 U.S. 985, 109 LRP 29770 (2007). See *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

Private School has proven to be an appropriate program for the Student, due to its small size and low student-teacher ratio. The school's calm and pleasant environment has provided an opportunity for the Student to stabilize. The flexible schedule has allowed the Student to increase her class load from two to three. While the placement must be appropriate, to receive tuition reimbursement, parents need not show that the private placement furnishes every special service necessary to maximize potential. *Frank G. v. Board of Educ. of Hyde Park Cent. Sch. Dist.*, 46 IDELR 33 (2d Cir. 2006), cert. denied, 109 LRP 29770, 552 U.S. 985 (2007). See also *C.B. v. Garden Grove Unified Sch. Dist.*, 56 IDELR 121 (9th Cir. 2011), cert. denied, 132 S. Ct. 500, 111 LRP 68912 (2011). The Student did have a recent relapse when she was hospitalized three weeks ago. However, the fact that she is now back in Private School is an improvement from her hospitalization in February 2014.

The school does not have teachers who are certified in special education. However, the private placement does not need to meet state educational standards in order for the placement to be proper. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993). The private placement does not need to meet the IDEA's LRE requirement in order to be proper. Once a district fails to develop an IEP that makes FAPE available, the proper private placement need only confer some educational benefit to the student. *C.B. v. Special Sch. Dist. No. 1*, 56 IDELR 187 (8th Cir. 2011); and *Warren G. v. Cumberland County Sch. Dist.*, 31 IDELR 27 (3d Cir. 1999). A student's

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<sup>36</sup> The parents of a child with a disability have the right to obtain an IEE of the child at public expense if the parent disagrees with an evaluation obtained by the public agency. Pursuant to 34 C.F.R. § 300.502(b), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.

<sup>37</sup> Pursuant to 34 C.F.R. § 300.502(b), a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense.

## Hearing Officer Determination

placement is appropriate where the student is making reasonable and adequate gains. *L.G. and K.G. v. School Bd. of Palm Beach County*, 48 IDELR 271 (11th Cir. 2007, unpublished).

Courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. See *Florence County*, 510 U.S. at 16. Among the most important of these is "whether the parents have cooperated with the [District] throughout the process to ensure their child receive a FAPE." *Bettinger v. N.Y.C. Bd. of Educ.*, 2007 WL 4208560, at \*6 (S.D.N.Y. Nov. 20, 2007). In this case, the IEP team determined the Student ineligible for special education services after reviewing the same assessment that includes the recommendation for the Student's placement at Private School. It is reasonable for the Petitioners not to request reimbursement for tuition until filing this instant complaint, given DCPS' stance at the IEP team meeting. The Petitioners were prudent to enroll the Student in Private School and the Student has received educational benefit at Private School. Therefore, the Hearing Officer will order tuition reimbursement.

Finally, the Hearing Officer finds that DCPS failed to begin the evaluation process in a timely manner. Therefore, equity requires the Student receive compensatory services.

### **ORDER**

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

1. DCPS shall convene an IEP team meeting at Private School within 10 school days of issuance of this Hearing Officer's Determination to determine any additional assessment required for the Student and develop an IEP for the Student;
2. DCPS shall reimburse the Petitioners for tuition at Private School for the 2014-2015 school year; and
3. DCPS shall fund 20 hours of independent tutoring services and 50 hours of independent counseling services to be completed by the end of the 2015-2016 school year.

**IT IS SO ORDERED.**

### **NOTICE OF RIGHT TO APPEAL**

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

Date: May 16, 2015

*/s/John Straus*

Hearing Officer

Copies to:

Petitioners' Representative: Maria Mendoza, Esq.

Respondent's Representative: Linda Smalls, Esq.

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Hearing Officer Determination

DCPS resolution team

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