

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

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

OSSE  
Student Hearing Office  
April 30, 2013

Parent,<sup>1</sup> on behalf of,  
Student,

Petitioner,

Date Issued: April 30, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,

Respondent.

Case No: 2013-0091

Hearing Date: April 17, 2013

Rooms: 2004

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a \_\_\_\_\_ year old male, who is a \_\_\_\_\_ grade student attending School A. The student's current individualized education program (IEP) provides for the student to receive twenty-four (24) hours per week of specialized instruction outside of the general education setting, one (1) hour per week of occupational therapy (OT) outside of the general education setting, one (1) hour per week of speech-language therapy outside of the general education setting, and one and one half (1 ½) hours per week of behavioral support services outside of the general education setting.

On February 20, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide an appropriate IEP for the student; failing to complete a comprehensive reevaluation of the student; failing to evaluate the student in all areas of suspected disability; and failing to provide appropriate transportation services. As relief for this alleged denial of FAPE, Petitioner requested independent speech-language, OT and neuropsychological evaluations; for DCPS to convene an IEP Team meeting within 20 school days of the last evaluation to revisit the student's IEP and placement; compensatory education; and a dedicated aide on the bus for the student.

On March 1, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: the student's IEP Team met on January 31, 2013 to review

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

and revise the student's IEP and updated the student's goals and current level of performance; the goals and present levels of performance in the student's January 31, 2013 IEP are appropriate; DCPS reevaluated the student on February 27, 2012; the IEP Team, including the parent, reviewed current data on the student and determined no additional assessment were necessary; although the June 1, 2009 Psychological Evaluation recommended a neuropsychological evaluation, the student's IEP Team did not determine that the evaluation needed to be conducted; and the student's parent indicated that she would follow up with the student's neurologist regarding the necessity of an assessment.

On March 4, 2013, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on March 23, 2013, following the conclusion of the 30-day resolution period, and ends on May 6, 2013. The Hearing Officer Determination (HOD) is due on May 6, 2013.

On March 18, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The parties discussed the appropriateness of having the Hearing Officer determine the issue of the student's IEP without first determining whether additional assessments/evaluations were necessary. The Petitioner withdrew the issue regarding the student's IEP based on the discussion. The Hearing Officer issued the Prehearing Order on March 19, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter and indicated that the Petitioner is not prohibited from re-filing the issue regarding the student's IEP or from seeking compensatory education. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On April 9, 2013, Petitioner filed Disclosures including eight (8) exhibits and four (4) witnesses.<sup>2</sup> On April 9, 2013, Respondent filed Disclosures including eleven (11) exhibits and seven (7) witnesses.

The due process hearing commenced at approximately 9:06 a.m.<sup>3</sup> on April 17, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-5 and 7-8 were admitted without objection. Petitioner's Exhibit 6 was admitted over Respondent's objection because one electronic communication contained relevant information. Respondent's Exhibits 2-4 and 6-11 were admitted without objection. Respondent's Exhibit 1 was admitted over Respondent's objection because resolution meeting discussions are not confidential. Respondent's Exhibit 5 was admitted over Respondent's objection because it contains relevant information.

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

<sup>3</sup> At 9:00 a.m., the scheduled time to begin the due process hearing, on the Hearing Officer and the Petitioner were present. Respondent's counsel arrived at 9:01 a.m. and Petitioner's counsel arrived at 9:02 a.m.

The hearing concluded at approximately 12:36 p.m. on April 17, 2013, following closing statements by both parties.

### Jurisdiction

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

### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to reevaluate the student on or before May 2012, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to conduct all evaluations necessary to determine appropriate teaching strategies for the student, specifically a neuropsychological evaluation, and if so, whether this failure constitutes a denial of 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 student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is diagnosed with mild cerebral palsy, epilepsy, asthma and attention deficit hyperactivity disorder (ADHD). (Petitioner's Exhibit 1; Respondent's Exhibit 3; Psychologist's Testimony; Parent's Testimony; School Psychologist's Testimony)
3. The student requires a full-time out of general education setting. (Petitioner's Exhibits 1 and 2; Respondent's Exhibits 2, 3 and 6; Psychologist's Testimony; Parent's Testimony; School Psychologist's Testimony)
4. A psychoeducational evaluation of the student was conducted in June 2009. (Petitioner's Exhibit 1; Psychologist's Testimony; Parent's Testimony; School Psychologist's Testimony)
5. The student's June 2009 Psychoeducational Evaluation recommended that the student receive a neuropsychological evaluation. (Petitioner's Exhibit 1; Psychologist's Testimony; Parent's Testimony; School Psychologist's Testimony)
6. In October 2011, the student was functioning between the kindergarten and 1<sup>st</sup> grade levels in math; between the 1<sup>st</sup> and 2<sup>nd</sup> grade levels in reading and experienced significant difficulty with written expression. (Respondent's Exhibit 6; Psychologist's Testimony)
7. In October 2011, the student, at times inappropriately engaged with his peers; yelled out when he became frustrated; demonstrated impulsive behaviors; had difficulty

- accepting feedback and consequences; at times was demanding, rude, aggressive and apathetic; lacked consistent motivation to complete tasks; had not mastered self-care skills; and required multiple prompts and warnings. (Respondent's Exhibit 6)
8. On February 1, 2012, DCPS notified the student's parent of the reevaluation meeting on February 28, 2012. (Respondent's Exhibit 10)
  9. On February 28, 2012, the student's IEP Team met and engaged in evaluation procedures. (Respondent's Exhibits 5, 6, 7, 8 and 10)
  10. The parent was present at the February 28, 2012 meeting. (Respondent's Exhibits 5 and 8)
  11. During the February 28, 2012 meeting, the student's IEP Team reviewed classroom-based assessments for math from October 26, 2011, classroom-based assessments for reading from October 26, 2011, classroom-based assessments for written expression from October 7, 2011, the student's 2011-2012 Reporting Period 2 progress report for speech-language, related service session notes for speech-language from the 2011-2012 school year, observations for the student's emotional/social/behavioral functioning from October 27, 2011, the student's health records for the student's health/physical functioning, and student work samples from February 21, 2012 for the student's motor skills. (Respondent's Exhibit 6)
  12. On February 28, 2012, the student had made minimal progress toward his emotional/social/behavioral goals during the school year. (Petitioner's Exhibit 4)
  13. During the February 28, 2012 reevaluation, the student's IEP Team determined that a formal speech-language evaluation needed to be completed for the student. (Respondent's Exhibit 6)
  14. The student's February 28, 2012 IEP Team determined the student's primary disability category to be "speech or language impairment." (Petitioner's Exhibit 4; Respondent's Exhibit 5)
  15. The student's January 31, 2013 IEP Team did not have access to psychoeducational, OT, speech or functional behavioral assessments for the student. (Respondent's Exhibit 1; Parent's Testimony; School Psychologist's Testimony)
  16. At the student's January 31, 2013 IEP Team meeting, School A and DCPS staff members requested that that parent provide a copy of past evaluations to School A. (Respondent's Exhibit 2; Parent's Testimony; School Psychologist's Testimony)
  17. The student's January 31, 2013 IEP Team was unable to make appropriate decisions for the student. (School Psychologist's Testimony)
  18. The student's January 31, 2013 IEP Team noted that a neuropsychological evaluation was recommended for the student in June 2009. (Petitioner's Exhibit 3; Respondent's Exhibits 2 and 4; Parent's Testimony; School Psychologist's Testimony)
  19. The student's January 31, 2013 IEP Team did not determine that a neuropsychological evaluation was necessary for the student. (Petitioner's Exhibit 3; Respondent's Exhibits 2 and 4; Parent's Testimony; School Psychologist's Testimony)
  20. DCPS staff members at the student's January 31, 2013 IEP Team requested that the parent obtain information from the student's neurologist. (Petitioner's Exhibit 3; Respondent's Exhibits 2 and 4; Parent's Testimony; School Psychologist's Testimony)

21. Following the January 31, 2013 IEP Team meeting, the parent contacted DCPS to request that DCPS provide the neuropsychological evaluation. (Respondent's Exhibit 1; Parent's Testimony; School Psychologist's Testimony)
22. A comprehensive psychological evaluation which includes cognitive, educational and social-emotional assessments is vital to appropriately planning for the student's education. (School Psychologist's Testimony)
23. A comprehensive psychological evaluation includes identifying a student's cognitive strengths. (School Psychologist's Testimony)
24. With the exception of a conversation with the student's parent in preparation for the hearing, the Psychologist had no information regarding the student's current functioning. (Psychologist's Testimony)

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

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

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

#### **Issue #1**

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 if the public agency

determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b).

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b).

In the present case, the record does not contain specific documents as to the last time DCPS conducted the reevaluation procedures for the student however the record is clear that a psychoeducational assessment of the student was completed in June 2009. Additionally, it was uncontested that a reevaluation for the student needed to occur on or before May 2012.

On February 1, 2012, DCPS notified the student's parent of the reevaluation meeting on February 28, 2012. On February 28, 2012, the student's IEP Team met and engaged in evaluation procedures. The team concluded that the student continued to be a student with disabilities who needed special education and related services. The parent was present at the February 28, 2012 meeting. During the February 28, 2012 meeting, the student's IEP Team reviewed classroom-based assessments for math from October 26, 2011, classroom-based assessments for reading from October 26, 2011, classroom-based assessments for written expression from October 7, 2011, the student's 2011-2012 Reporting Period 2 progress report for speech-language, related service session notes for speech-language from the 2011-2012 school year, observations for the student's emotional/social/behavioral functioning from October 27, 2011, the student's health records for the student's health/physical functioning, and student work samples from February 21, 2012 for the student's motor skills. During the February 28, 2012 reevaluation, the student's IEP Team determined that a formal speech-language evaluation needed to be completed for the student.

All of the academic data used by the student's February 27, 2012 IEP Team to reevaluate the student was collected through classroom-based assessments on October 26, 2011. Likewise, the data related to the student's emotional/social/behavioral functioning was taken from a classroom observation on October 27, 2011 and data for the student's motor skills taken from work samples from February 21, 2012. While it is permissible to use classroom-based assessments in the reevaluation process, the IDEA regulations require that the public agency use "a variety of assessment tools and strategies" to reevaluate the student. DCPS' use of primarily classroom-based assessments does not achieve the standard of "a variety," especially when the student was functioning far below grade level academically and had made minimal progress toward his emotional/social/behavioral goals during the school year. Here, DCPS' reevaluation process focused on form rather than substance. While there was no question as to whether the

child continued to be eligible for special education and related services, the reevaluation process is also to determine the extent of the special education and related services that the child needs and the content of the child's IEP.

As a clear example of the insufficiency of the student's February 27, 2012 reevaluation process, the Parent testified that the student is labeled as a student with OHI; the Psychologist explained the student has significant cognitive and adaptive delays; the School Psychologist indicated that the student has serious behavioral, emotional and academic issues; the student's June 2009 Psychoeducational Evaluation noted that the child's disability classification was OHI based on his medical diagnoses of mild cerebral palsy, epilepsy, asthma and ADHD; and it was uncontested that the student requires a full-time out of general education setting yet the February 27, 2012 IEP Team determined the student's primary disability category to be "speech or language impairment" as indicated on both the Final Eligibility Determination Report and the student's February 27, 2012 IEP.

Further, on January 31, 2013, the student's IEP Team met and requested that the parent forward evaluations for the student because the IEP Team did not have access to a psychoeducational, OT, speech-language or functional behavioral assessments for the student. DCPS' primary witness testified that the student's January 31, 2013 IEP Team was unable to make appropriate decisions for the student because the team did not have updated data and that the student required updated comprehensive psychological, OT and functional behavioral assessments/evaluations and may require an updated speech-language assessment/evaluation as well. Had DCPS conducted a thorough reevaluation of the student in February 2012 and ensured that the evaluation data were available to the student's IEP Team, the student's January 31, 2013 IEP Team would have had current data upon which to program for the student. Additionally, even though the student's February 28, 2012 IEP Team determined that a formal speech-language evaluation be completed for the student, DCPS did not conduct the assessment.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to conduct an appropriate reevaluation of the student on or before May 2012.

The Petitioner met its burden with respect to Issue #1.

#### Issue #2

IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." The Petitioner alleged that DCPS failed to conduct all evaluations necessary to determine appropriate teaching strategies for the student, specifically a neuropsychological evaluation.

The student's June 2009 Psychoeducational Evaluation recommended that the student receive a neuropsychological evaluation based on his "issues at birth and developmental delays." The evaluator reasoned that the neuropsychological evaluation would help to identify the student's strong cognitive areas that could be relied upon to help the student perform better in the classroom. Although the recommendation was made in 2009, there was no evidence presented

which suggested that the student's IEP Team discussed the recommendation prior to January 31, 2013, agreed with the recommendation or was unable to adequately program for the student after the recommendation was made. Likewise, there is no evidence that the parent requested that DCPS conduct the recommended evaluation prior to January 31, 2013.

The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)).

The School Psychologist testified that, based on the lack of data for the student, a comprehensive psychological evaluation which includes cognitive, educational and social-emotional assessments is vital in planning for the student, and that it would be more appropriate for the IEP Team to obtain information from the student's neurologist prior to determining if a neurological or neuropsychological evaluation needed to be conducted. Further, the School Psychologist testified that DCPS has no current data which warrants a neurological or neuropsychological evaluation. Likewise, Petitioner presented no current evidence of why a neuropsychological evaluation is necessary for the student. The Psychologist testified that she agreed with the evaluator's recommendation from 2009 but, with the exception of a conversation with the student's parent in preparation for the hearing, the Psychologist had no current information upon which to base an opinion.

As discussed in Issue #1, DCPS did not use a variety of assessment tools and strategies to gather relevant functional, development and academic information for the student in February 2012 however the Hearing Officer concludes that the Petitioner did not prove that DCPS denied the student a FAPE by failing to conduct a neuropsychological evaluation. The cognitive data needed by the student's IEP Team to identify the student's strong cognitive areas can be garnered from a comprehensive psychological evaluation.

The Petitioner failed to meet its burden with respect to Issue #2.

### Requested Relief

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

In the present matter, the Petitioner has requested independent speech-language, occupational therapy and neuropsychological evaluations; and for DCPS to convene an IEP Team meeting within 20 school days of the date that the final evaluation is completed to review the evaluations and revise the student's IEP and location of services. While DCPS denied the student a FAPE by failing to use a variety of assessment tools and strategies to gather relevant

functional, development and academic information for the student in February 2012 thereby failing to conduct an appropriate reevaluation, DCPS nonetheless engaged in a reevaluation process. Therefore, the Hearing Officer concludes that it is appropriate for DCPS to have the opportunity to conduct the necessary assessments/evaluations prior to funding independent assessments/evaluations with the exception of the speech-language evaluation which was determined necessary by the student's February 28, 2012 IEP Team but never conducted.

### **ORDER**

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

1. Within 60 calendar days of the date of this Order, DCPS conduct comprehensive psychological, occupational therapy and functional behavioral assessments/evaluations of the student.
2. DCPS fund an independent speech-language evaluation for the student, at the Office of the State Superintendent's established rate for this service, to be completed within 60 calendar days of the date of this Order.
3. If DCPS does not complete the comprehensive psychological, occupational therapy and functional behavioral assessments/evaluations within 60 calendar days of the date of this Order, DCPS fund independent comprehensive psychological, occupational therapy and functional behavioral assessments/evaluations, at the Office of the State Superintendent's established rate for these services, to be completed within 105 days of the date of this Order.
4. As a part of the comprehensive psychological evaluation described in #1 or #3, the evaluator contact the student's neurologist to gather a summary of the student's current neurological functioning and any recommendations that neurologist has regarding the student's educational programming.
5. Within 20 school days<sup>4</sup> of the final completed assessment/evaluation, DCPS convene an IEP Team meeting to review the results of the assessments/evaluations and revise the student's IEP, as appropriate, including determining an appropriate disability category.
6. Should the comprehensive psychological, occupational therapy or functional behavioral assessment/evaluation recommend a neurological or neuropsychological evaluation, DCPS conduct the neurological or neuropsychological evaluation within 60 calendar days of the IEP Team meeting described in #5.

### **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

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<sup>4</sup> Pursuant to the student's February 27, 2012 IEP, the student requires ESY. The "school days" indicated in this Order include the student's ESY school days and are not limited to DCPS' standard academic calendar.

controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 30, 2013

Melanie Byrd Chisholm  
Hearing Officer