

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
April 29, 2013

[Parent], on behalf of
[Student],¹

Date Issued: April 29, 2013

Petitioner,

Hearing Officer: Jim Mortenson

Case No: 2013-0182

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 25, 2013. A response to the complaint was filed on April 5, 2013. A prehearing conference was held on April 5, 2013, and a prehearing order was issued on that date. A resolution meeting was convened on April 10, 2013, and resulted in no agreements. The Petitioner filed a motion for summary judgment on April 12, 2013. The Respondent filed a reply to the motion on April 18, 2013, seeking dismissal of the matter. Based on the rationale provided herein, the Petitioner's motion is granted, the Respondent's motion is denied, and this Hearing Officer Determination (HOD) ensues.

¹ Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

There are no rules dealing with summary judgment for special education hearings under the IDEA or the District of Columbia Municipal Regulations. Hearing Officers do have the authority and responsibility to “take actions necessary to complete the hearing in an efficient and expeditious manner[.]” Student Hearing Office Standard Operating Procedure (SOP) § 600.1. Thus, to ensure the efficient and expeditious use of time and resources, this Independent Hearing Officer (IHO) adopts, by analogy, Federal Rule of Civil Procedure 56(c)(2) with regard to considering this motion for summary judgment. Generally, summary judgment should be rendered for a movant if the pleadings and any affidavits or disclosed material show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See*, FRCP 56(c)(2). Neither party has argued that there is a need for an evidentiary hearing in this case, and the Respondent’s reply seeks dismissal of this matter, and so is treated as a cross motion for summary judgment.

III. ISSUE, RELIEF SOUGHT, and ARGUMENTS

The issue is dispute is: Whether following the Petitioner’s request for a reevaluation (including: a comprehensive psychological assessment; a speech and language assessment; a functional behavioral assessment; and a psychiatric assessment) on February 7, 2013, the Respondent failed to propose a reevaluation sufficiently comprehensive to identify all of the Student’s special education and related service needs, whether or not commonly linked to the

disability category in which he has been classified, when it proposed a reevaluation consisting only of a comprehensive psychological assessment with an academic achievement component?²

The Petitioner is seeking an independent educational evaluation (IEE) consisting of: a comprehensive psychological assessment; a functional behavioral assessment (FBA); a speech and language assessment; and a psychiatric assessment.

The Petitioner argues that the Petitioner requested four assessments as part of a request for a reevaluation on February 7, 2013, and that the Respondent refused three of these assessments without any explanation, either at the IEP team meeting subsequently held on February 28, 2013, or in a prior written notice. The Petitioner argues that the Respondent must conduct a requested evaluation. The Petitioner further argues that these assessments are required in order to: 1) determine the Student's cognitive, clinical, and educational functioning, to determine the Student's progress or lack thereof, and to aid in the development of his individualized education program (IEP); 2) to determine the Student's current communication needs and functioning and to aid in the development of the IEP with respects to his goals and objectives; 3) to look at the Student's progress or regression concerning his psychiatric diagnosis and to determine his current need; and 4) to address concerns raised by staff about the Student's threats to kill other

² The Respondent asserted that this issue was an amendment to the complaint rather than a clarification of the issue. The issue was framed in the complaint as a failure to timely evaluate the Student. During the prehearing the Undersigned asked questions about the alleged facts in the case in order to determine precisely the dispute between the parties. The issue as framed in the prehearing, and stated here, not only reflects the true dispute between the parties (They disagree whether the Respondent must conduct all of the assessments requested by the Petitioner and they agree the Petitioner requested the listed assessments and they agree the Petitioner provided consent for a proposal to reevaluate that included only the comprehensive psychological with the academic achievement component) it also reflects what is not in dispute. While the fact that consent was provided for a portion of the requested reevaluation was not included in the complaint, it is not a fact in dispute. The Respondent is familiar with the actions it has taken. Thus, merely because the issue has been reframed from the Petitioner's stated issue, it is clear to the parties and it was made clear to the Undersigned. The reframing of the issue did not prejudice the Respondent because the Respondent was intimately involved in the determinations made and disputed. The Respondent had the opportunity to address the issue as stated herein at the resolution meeting that was to include at least some of the IEP team members that were at the February 28, 2013 IEP team meeting, but did not (Neither of the Respondent's participants at the resolution meeting were IEP team members or present at the IEP team meeting on February 28, 2013.) Furthermore, the Respondent has presented no reasons the requested assessments were refused, and there is no prior written notice of its refusal in the record.

students at school and off-task behavior and to develop an updated behavior intervention plan (BIP). Finally, the Petitioner argues that the team must have all of this updated information to determine whether the Student is prepared for a change in placement to a less restrictive environment since the Respondent had alerted her to this possibility for the Student in the near future.

The Respondent did not address the issue as framed in the prehearing order, and merely argues that it has 120 days to complete a requested reevaluation and that this time period has not lapsed and therefore there is no ripe claim. The Respondent further argues that it has authorized three of the four requested assessments to be conducted independently, and therefore there is no ripe claim, and that the matter, thus, must be dismissed.

Because there is no dispute of material facts in this case, and because the law requires students to be evaluated sufficiently comprehensively to identify all of a student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified, the Petitioner's motion is granted and the Student will be evaluated in accordance with the request of the Petitioner. The Respondent's motion to dismiss is denied.

IV. EVIDENCE

In addition to the pleadings and other filings in this matter, the evidence in this case includes the eleven exhibits filed with the Petitioner's motion, listed in Appendix A, and the one exhibit filed with the Respondent's reply to the motion, listed in Appendix B. The Respondent did not dispute any of the Petitioner's proposed findings of fact.

V. FINDINGS OF FACT

At prehearing, the parties agreed upon four undisputed facts. The Petitioner's motion included 17 findings of fact, based on exhibits filed with the motion, which were not disputed by the Respondent in its reply to the motion. Thus, this Hearing Officer's Findings of Fact are as follows:

1. Student is ten years of age and currently attends the non-public _____ in _____, _____ where he was placed by the Respondent³ He is in the fourth grade and is currently receiving special education and related services as a result of eligibility under the definition of Other Health Impaired (OHI).⁴
2. The Respondent is the local education agency responsible for ensuring the Student's special education and related service needs are met.⁵ The Petitioner is the Student's parent and they both reside in the District of Columbia.⁶
3. The Student's IEP, dated February 1, 2013, requires the Student to receive, on a weekly basis, 26.5 hours of specialized instruction, 30 minutes of speech and language pathology, and 60 minutes of behavioral support services.⁷ The least restrictive environment (LRE) justification in the IEP is that the Student requires services in an educational setting that has a small class size, low student to teacher ratio, and integrated behavioral and therapeutic supports.⁸
4. The Student's most recent speech and language evaluation was performed on May 5, 2008, and a report prepared on or about May 6, 2008.⁹ The report states the Student, who was five

³ P 1, Undisputed Fact (UF).

⁴ P 1.

⁵ P 1.

⁶ P 1.

⁷ P 1.

⁸ P 1.

⁹ P 2.

years of age at the time of testing, had a moderate receptive communication delay which transfers to a mild overall communication delay when compared to typically developing peers of the same chronological age with average abilities.¹⁰ The report notes that the Student's weaknesses may impact his ability to access the general education curriculum, and that the Student's varying skills across testing is significant and indicative of an ability to learn, retain, and use verbal skills.¹¹

5. The Student's most recent functional behavioral assessment was last conducted on May 8, 2008.¹² The Student's behavior included defiance and an inability to follow directions as well as being disruptive.¹³ The evaluator recommended the Student receive, among other things, a detailed behavior intervention plan.¹⁴
6. The Student's most recent educational assessment was performed on May 9, 2008, and a report prepared May 12, 2008.¹⁵ The Student was performing at a less than kindergarten grade level at the time, despite being in kindergarten.¹⁶
7. The Student's most recent social history assessment was conducted May 21, 2008.¹⁷ The evaluator noted that the Student would benefit from placement in a small, structured environment, with a low student to teacher ratio to facilitate individualized instruction, among other things.¹⁸

¹⁰ P 2.

¹¹ P 2.

¹² P 3.

¹³ P 3.

¹⁴ P 3.

¹⁵ P 4.

¹⁶ P 4.

¹⁷ P 5.

¹⁸ P 5.

8. The Student's most recent cognitive/psychological assessment was performed on May 28, 2008.¹⁹ The evaluator noted that the Student suffered from attention deficit hyperactivity disorder (ADHD), and was recommended for a rule-out for expressive language disorder.²⁰ The evaluator also noted that the Student, per teacher report, was highly disruptive and that his attention and related difficulties and hyperactivity impacted his ability to excel.²¹
9. The Student's most recent psychiatric assessment was performed on July 10, 2008.²² The report notes the Student suffers from ADHD, has a significant history of difficulty complying with authority in class, staying in his seat, fighting with peers, and hitting staff.²³ It was recommended that the Student be provided family therapy, physical activities of interest, individual therapy to the parent, and medication.²⁴
10. The Petitioner, through her Counsel, requested a reevaluation on February 7, 2013, including: a comprehensive psychological assessment; a speech and language assessment; a functional behavioral assessment; and a psychiatric assessment.²⁵ This request was made in response to notice from the Respondent that the Student was being considered for a change to a less restrictive educational setting and the Petitioner wanted data to, among other things: determine the Student's current level of functioning in his special education and related service areas; update his BIP; and gather the necessary information to determine whether the Student is ready for transition to a less restrictive educational setting.²⁶ The Petitioner also

¹⁹ P 6.

²⁰ P 6.

²¹ P 6.

²² P 7.

²³ P 7.

²⁴ P 7.

²⁵ UF, P 8.

²⁶ P 8.

requested that the Respondent forward any consent form or other paperwork in order to facilitate the request for reevaluation.²⁷

11. An IEP team meeting was convened on February 28, 2013.²⁸ At the meeting, the Student's teacher reported that the Student continues to need adults in close proximity to him to control his social interactions and that the Student displays inappropriate behaviors such as breaking the rules with games and toys and lots of disruptive whispering.²⁹ The social worker stated that when the Student perceives an injustice being done to him, he will shut-down, cry, and become too overwhelmed to talk about it.³⁰ His teacher reported the Student has mentioned killing himself or threatening to kill other students when he believes they have wronged him.³¹

12. The Respondent did not respond to the Petitioner's request for reevaluation until on or about February 28, 2013.³² At the IEP team meeting on that date, the Respondent advised that the only reevaluation it would be willing to perform was a comprehensive psychological assessment, and provided no prior written notice of its proposal and refusal.³³ The Petitioner provided consent for a reevaluation which included only a comprehensive psychological with an academic achievement component, on February 28, 2013.³⁴

²⁷ P 8.

²⁸ P 9.

²⁹ P 9.

³⁰ P 9.

³¹ P 9.

³² UF.

³³ P 9. (No written notice has been submitted by either party, and P 9 shows no prior written notice was provided to the Parent.)

³⁴ UF, P 10.

13. At the February 28, 2013, IEP team meeting the Respondent advised the IEP team that a “LRE meeting” would take place for the Student in May to advise the team which programs are in place for the Student in order for him to complete his transition.³⁵
14. Following the February 28, 2013, meeting, the Petitioner’s advocate wrote to the Respondent with her concerns about the meeting.³⁶
15. The non-public school has reported that they are meeting the Student’s needs.³⁷
16. As of April 12, 2013, the Respondent had not conducted any of the requested assessments, nor agreed to perform the assessments requested, other than the comprehensive psychological.³⁸ On April 15, 2013, the Respondent authorized the Petitioner to obtain, at public expense, the requested comprehensive psychological assessment, a speech and language assessment, and a psychiatric assessment.³⁹

V. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “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.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008);

³⁵ P 10.

³⁶ P 11.

³⁷ UF.

³⁸ UF. P 10.

³⁹ R 1.

Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. Students with disabilities must be reevaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311 if the Respondent determines a student's educational or related service needs, including improved academic achievement and functional performance, of the student warrant a reevaluation. 34 C.F.R. § 300.303(a)(1). A reevaluation must also occur if the student's teacher or parent requests it. 34 C.F.R. § 300.303(a)(2). A reevaluation may not occur more than once per year, unless the Respondent and parent agree otherwise. 34 C.F.R. § 300.303(b)(1). A reevaluation must occur at least once every three years, unless the Respondent and parent agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2).

See also, D.C. Mun. Regs. 5-E3005.7. 34 C.F.R. § 300.304 requires, in relevant part:

(b) In conducting the evaluation, the public agency must—

(1) 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—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is 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; . . .

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

See also D.C. Mun. Regs. 5-E3005.9.

3. When proposing or refusing an evaluation, the Respondent must provide a parent with prior written notice that includes:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency’s proposal or refusal.

34 C.F.R. § 300.503, D.C. Mun. Regs. 5-E3024 & 5-E3025.

4. No prior written notice was provided to the Petitioner, when the Respondent responded to her request for a comprehensive reevaluation of the Student, which explained its reasons for proposing only a part of her requested reevaluation and why it was rejecting the rest. Further, the Respondent has offered no explanations in either its response to the complaint or its reply to the Petitioner’s motion.⁴⁰ Further, the Respondent never properly proposed a comprehensive reevaluation sufficient to identify all of the Student’s special education and related service needs in order to develop the content of his IEP, including information related

⁴⁰ Peculiarly, the only explanation the Respondent presents in both situations is that 120 days has not yet run. The reason this is so peculiar is that the 120 day maximum deadline from D.C. Code § 38-2561.02(a) applies only to initial evaluations, not reevaluations, as the Respondent was reminded by the Federal District Court for the District of Columbia in Smith v. Dist. of Columbia, CIV.A. 08-2216 RWR, 2010 WL 4861757 (D.D.C. Nov. 30, 2010) (“The [120 day] provision does not apply explicitly to reevaluations, and interpreting ‘evaluation’ to encompass reevaluations may not be consistent with the structure of IDEA[.]”)

to enabling him to be involved in and progress in the general education curriculum. Thus, the evidence shows that because the most recent assessments as part of an evaluation took place in 2008, and the Petitioner made a request for a comprehensive reevaluation which the Respondent never properly responded to, and the currently authorized independent education evaluation does not include the requested FBA, the Petitioner's request for said reevaluation, including all of the specific assessments requested, will be respected.

5. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). While this case concerns a question of evaluation, evaluation results are necessary to ensure a FAPE. Thus, it is within the authority of this hearing officer to enforce the Petitioner's request for a reevaluation, including all of the specific assessments requested. This will aid the parties in ensuring the provision of FAPE to the Student when they plan for the next school year.

VII. DECISION

The Respondent failed to propose a reevaluation of the Student sufficiently comprehensive to identify all of the Student's special education and related service needs following the Petitioner's February 7, 2013, request for a comprehensive psychological assessment; a speech and language assessment; a functional behavioral assessment; and a psychiatric assessment.

VIII. ORDER

1. The Respondent must, in addition to the authorized comprehensive psychological assessment, speech and language assessment, and psychiatric assessments, provide the Student with a functional behavioral assessment.
2. An IEP team meeting must be convened to review the assessment reports and develop an evaluation report within five business days of the completion of the last of the assessments to be completed. The FBA must be completed no later than May 17, 2013.

IT IS SO ORDERED.

Date: April 29, 2013



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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