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<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: March 31, 2010</p> <p>Date of Complaint: February 1, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Marlon Charles, Esq. 716 Rhode Island Ave, NW Washington, DC 20001</p> <p>Counsel for DCPS: Tanya Chor, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

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

BACKGROUND:

A Due Process Hearing was convened March 31, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 1. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed on February 1, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted on March 4, 2010, and a pre-hearing order was issued on March 9, 2010.

The complaint alleged that in 2009 Petitioner reached a settlement agreement with DCPS on a previous due process complaint. Pursuant to the agreement DCPS granted Petitioner independent evaluations. Petitioner alleges in the current complaint that the independent comprehensive psychological conducted pursuant to the settlement agreement recommended a neuropsychological evaluation be conducted to further assess the student's needs. Petitioner alleges that at the January 29, 2010, Multidisciplinary Team ("MDT") meeting the parent requested DCPS conduct the recommended neuropsychological evaluation because of, among other factors, the student's birth history and cranial abnormalities and the recommendation made in the independent comprehensive psychological evaluation. Petitioner alleged DCPS refused to conduct the evaluation and the refusal is a denial of a Free and Appropriate Public Education ("FAPE").

DCPS, in its response to the complaint asserted there was no denial of a FAPE to the student and stated that the MDT agreed that a physical therapy ("PT"), physical education screening, visual perception assessment and an adaptive assessment (Vineland) would be conducted and that a follow up MDT meeting would occur on or about February 25, 2010.

ISSUE(S):²

The issue to be adjudicated is whether DCPS denied the student a FAPE by failing evaluate the student in all areas of suspected disability? Specifically, Petitioner alleges DCPS's refusal to conduct the requested and recommended neuropsychological evaluation is a denial of a FAPE.

Petitioner seeks as relief for the alleged denial(s) of FAPE that DCPS fund an independent neuropsychological evaluation. As noted during the pre-hearing conference and resulting order

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. At the pre-hearing conference Petitioner's counsel withdrew the claim for compensatory education.

Petitioner does not seek any compensatory education although the language of the complaint mentions this relief.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 5³ and DCPS Exhibits 1-6) which were admitted into the record.

FINDINGS OF FACT ⁴:

1. The student is a year-old resident of the District of Columbia and attends "School A" a DCPS public elementary school. The student has attended School A since the start of the 2008-09 School Year ("SY"). (Parent's Testimony, DCPS Exhibit 2)
2. On September 11, 2009, Petitioner and DCPS executed a settlement agreement for a due process complaint filed on or about August 4, 2009. Pursuant to the agreement DCPS funded several independent evaluations, including a comprehensive psychological evaluation. (DCPS Exhibit 5)
3. On November 2, 2009, Eboni Young, Psy.D. conducted the independent comprehensive psychological evaluation of the student. Dr. Young administered the following assessments as a part of the evaluation: Clinical Interview, WISC-IV, Woodcock Johnson "WJ-III", Berry VMI, Parent Interview, BASC-Parent and Teacher Forms, Behavior Rating Inventory of Executive Functioning ("BRIEF") – Parent and Teacher Forms, Conner's – Parent and Teacher forms, Children's Depression Inventory ("CDI"), Robert's Apperception Test for Children ("RATC"). (DCPS Exhibit 2)
4. Dr. Young ("the evaluator") determined that student is a fraternal twin who experienced prenatal distress and birth complications and was born at 32 weeks gestation weighing 3 pounds and 11 ounces. The student was hospitalized for two months post birth until she reached a healthy weight. Upon birth, the student suffered substantial deformities including cranial defects. At age two the physician informed the parent that the student was likely to experience developmental delays as a consequence of the abnormality in head growth. (Parent's testimony, DCPS Exhibit 2)
5. The parent reported to the evaluator the student experiences tremors, which cause her to drop objects from her hands. Due to poor motor skills she tends to be clumsy and often spills food and liquids on her clothes. The student is currently experiencing significant academic deficits. The student has had a history of disruptive behavior in school,

³ Petitioner's Exhibits 2, 3, 4, 6 & 7 were objected to as irrelevant by DCPS counsel and were not admitted.

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

academic underachievement, learning difficulties and school suspensions. (Parent's testimony, DCPS Exhibit 2)

6. Prior to attending School A, the student attended another DCPS public school where she displayed significant deficits in reading and spelling. The parent removed the student and placed her in a District of Columbia public charter school where she completed the first and second grade. The student was transferred to School A during School SY 2008-09 in the third grade and is now in the fourth grade at School A. (Parent's testimony, DCPS Exhibit 2)
7. The student has continued to engage in verbal disputes with peers at school, initiate conflict with others, fight with students and disrespect authority. She has received in-school suspension as result of fighting with others and being disrespectful to teachers. The student has not been diagnosed with any mental health problem and has previously attended outpatient family therapy to address her display of temper tantrums. The therapy has since ceased. (DCPS Exhibit 2)
8. As to cognitive functioning Dr. Young's examination revealed the student's general cognitive ability is with the Extremely Low Range of intellectual functioning as measured by the Full Scale IQ score of 53, which is at the .1 percentile rank. (DCPS Exhibit 2, Page 6)
9. The student's academic skills are severely limited. As measured by the Woodcock Johnson Achievement Tests the student's is operating at 1.7 grade equivalency in Broad Reading, Kindergarten - .7 equivalency in Broad Math, 1st grade equivalency in spelling and below kindergarten in writing fluency. (DCPS Exhibit 2, page 9)
10. The evaluation also revealed the student has significant deficits in fine motor and visual motor integration skills. The student's assessment scores demonstrated the student had a marked difficulty sustaining attention and she appears to be easily distracted and experiences problems with planning and organization. According to the evaluator, the clinical assessments demonstrated marked deficits in the realm of executive functioning that are comparable to that of someone with a diagnosis of Attention Deficit Hyper Activity Disorder ("ADHD"). (DCPS Exhibit 2, Page 10)
11. The evaluator noted that the student's defiant behavior in school is perceived as stemming from probable neuropsychological deficits and emotional distress that result from her academic difficulties. The evaluator concluded the student's behavioral difficulties are secondary to her learning problems. Her hyperactive behaviors appear to be manifestation of her emotional distress that is associated with her poor academic achievement. She seems to feel negatively about her learning difficulties and therefore demonstrates poor motivation towards academic tasks. (DCPS Exhibit 2)
12. The evaluator noted that in view of the student's history of prenatal distress premature birth and cranial abnormalities it should not be overlooked that the student's ADHD symptoms and academic under achievement are likely attribute to possible

neuropsychological impairment, as indicated by clinically significant elevations on multiple scales of the parent and teacher forms of the BRIEF. (DCPS Exhibit 2)

13. The evaluator determined based on the assessments that the student meets classification for special education services as a student who is Other Health Impaired (“OHI”) and Learning Disabled (“LD”). In addition, the evaluator noted that the student’s executive functioning deficits, problems with motor coordination limits in expressive and receptive language and academic difficulties may also be related to a developmental disability i.e. mental retardation (“MR”). The evaluator also noted that while the student’s behavior problems may reduce in severity as she begins to excel academically suspected neuropsychological impairment may be the source of her mood swings and oppositional behavior. Therefore, emotional disturbance classification does not appear to be warranted at this time. She noted that the special education classification might be modified following completion of recommended assessments. (DCPS Exhibit 2, Page 19)
14. The evaluator diagnosed the student with ADHD Combined Type, Developmental Coordination Disorder, Mixed Receptive Expressive Language Disorder Reading Disorder of Written Expression Mathematics Disorder and Oppositional Defiant Disorder. (DCPS Exhibit 2 Page 17)
15. The evaluator recommended that an adaptive assessment be conducted to determine if the student’s cognitive abilities are consistent with that of MR. The evaluator also recommended, among other things, based on the student’s history of prenatal distress premature birth and low birth weight and cranial abnormalities and developmental delay that a neuropsychological evaluation be conducted to rule out any organic explanation of this vulnerability. The evaluator stated: “A neurological evaluation and review of medical records is strongly recommended to determine if her academic and learning problems are better accounted for by neurological problems.” The evaluator also recommended an occupational evaluation and speech language (Petitioner’s Exhibit 2, Page 20)
16. On January 29, 2010, DCPS convened an eligibility meeting. The multidisciplinary team (“MDT”) included, among others, the student’s classroom teacher, a DCPS psychologist and DCPS special education teacher and the school’s special education coordinator. The parent and her educational advocate were also members of the MDT. The MDT reviewed student’s evaluations.⁵ (Mr. Root’s Testimony, DCPS Exhibit 3B)
17. The MDT did not, however, complete the student’s eligibility determination at that meeting, but agreed to conduct additional evaluations including a physical therapy evaluation and an adapted physical education screening to determine if those services were warranted. The parent and her advocate requested that DCPS also conduct the neuropsychological evaluation recommended in the comprehensive psychological evaluation. The DCPS representatives declined the request and stated the evaluation was

⁵ In addition to the independent comprehensive psychological evaluation the MDT reviewed the independent speech and language evaluation, occupational therapy evaluations.

not necessary. The MDT agreed to reconvene on February 25, 2010, to review the functional behavior ("FBA"), the adaptive scale and the screenings including a vision screening to address the visual perceptual concerns that were apparent with the student and to determine eligibility, develop an individualized educational program ("IEP") and discuss the issue of compensatory education. (Mr. Root's Testimony, DCPS Exhibit 3B)

18. On February 1, 2010, Petitioner filed a Due Process Complaint Notice alleging failed to provide a free and appropriate public education ("FAPE") to the student by failing to conduct the neuropsychological evaluation. (DCPS Exhibit 1)
19. DCPS reconvened a meeting with the MDT team. However, the meeting was a resolution session on the complaint filed. The student has yet to have all evaluations reviewed and an IEP developed. (DPCS Exhibit 3A)
20. Petitioner engaged a neuropsychologist, Johnathan Vital, PhD, to review the student's evaluations and offer an opinion as to what information could be provided regarding the student by conducting a neuropsychological evaluation and whether the evaluation was warranted. (Dr. Vital's Testimony)⁶
21. Dr. Vital reviewed the student's comprehensive psychological and other independent evaluations particularly the student's history, testing data, scores on the cognitive assessments as well as the her BRIEF scores. Dr. Vital noted the student's history of cranial abnormalities and the student's demonstrated tremors and stated that the existence of tremors indicate some form of neurological condition and or brain abnormality that may be contributing to the student's deficits and behaviors. In addition to concern with the student's tremors Dr. Vital expressed concern about the student's grasp and fine motor coordination. Dr. Vital stated that some of the problems, the deficits and behaviors the student is displaying may be of organic nature. (Dr. Vital's Testimony)
22. As an example Dr. Vital noted that the evaluator concluded the student has ADHD and such a diagnosis might indicate that psychotropic treatment could address the condition. However, if the student's inattentiveness and other behaviors are of organic nature such treatment would not likely address the concerns. (Dr. Vital's Testimony)
23. Dr. Vital stated that he would have interpreted the testing data in the comprehensive psychological differently and made different conclusions than the evaluator given his neuropsychological background and perspective. For instance Dr. Vital would have recommended a neuropsychological evaluation rather than a Vineland to determine if the student would be classified with MR because of the indication of neurological and/or neuropsychological issues. Dr. Vital was of the opinion that the presence of organic issues that are not accounted for except through a neuropsychological might result in misclassification of the student as MR. (Dr. Vital's Testimony)

⁶ The witness was offered and designated as an expert in neuropsychology to offer opinion testimony. However, the witness had no personal experience with or knowledge of the student in the case and was not a member of the MDT/IEP team.

24. Dr. Vital is of the opinion that assessments of the student's working memory and verbal comprehension would be better explained and more relevant conclusions garnered with a neuropsychological evaluation. Dr. Vital acknowledged that in conducting a neuropsychological he would conduct most of the same assessments that were conducted in the comprehensive psychological. In addition to those assessments Dr. Vital he would further evaluate the student's memory and conduct the California Verbal Learning Test, and that he would analyze the data from a neurological perspective. Dr. Vital also noted that he would conduct an assessment of the student's cognitive shift in several different domains to tease out the student's deficits. He suggested the Children's Category Test to assess her overall cognitive ability and the Stroop to assess the her inhibitions which could help determine if the student is truly impulsive or whether there is an organic basis to her behaviors. (Dr. Vital's Testimony)
25. However, Dr. Vital noted that it is not as critical in a factor what measure or assessment that is conducted for this student as is the individual conducting the assessment and the interpretation of the data and the additional assessments that might be recommended to further explain and remediate the student's deficits. (Dr. Vital's Testimony)
26. DCPS School Psychologist, La Tanya Randolph, PhD., also reviewed the student's evaluations and offered an opinion whether the existing evaluations were sufficient to determine the student's eligibility and develop an appropriate education program. According to Dr. Randolph the comprehensive psychological evaluation sufficiently assessed and addressed the student's cognitive abilities, executive functioning and her academic abilities and performance. In her opinion the determination of whether the student's deficits or behaviors are organic in nature would not likely change the student's education programming. The assessments that have been conducted and recommended and ordered by the MDT have, in Dr. Randolph's opinion, sufficiently assessed the student abilities and behaviors and were sufficient to determine the student's eligibility, programming and placement. Dr. Randolph is familiar with and has reviewed neuropsychological evaluations in the past and based on the review of the student's existing evaluations believes a neuropsychological is not necessary to effectively address the student's education needs. (Dr. Randolph's Testimony)⁷

CONCLUSIONS OF LAW:

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

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the

⁷ The witness offered and designated as an expert witness as a DCPS school psychologist. However, the witness had no personal experience with or knowledge of the student in the case and was not a member of the MDT/IEP team.

child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Issue: Did DCPS deny the student a free and appropriate public education by failing to evaluate the student with the parent requested and evaluator recommended neuropsychological evaluation? **Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Under the law of the D.C. Circuit, a procedural violation of the IDEA is actionable only if it "affected the student's *substantive* rights" -- that is, only if the procedural violation led to a substantive violation. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original); see also *Kingsmore ex rel. Lutz v. District of Columbia*, 466 F.3d 118, 120 (D.C. Cir. 2006).

As a result, regardless of whether the failure to conduct the assessment in question is denominated substantive or procedural, Petitioner must prove to that the District's actions did or will deny the student a FAPE by depriving her of educational benefits to which she is entitled.

The Individuals with Disabilities Education Act requires all states and the District of Columbia to provide resident children with disabilities a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(a)(1). A FAPE consists of "special education and related services" that, among other things, "include an appropriate ... education" and "are provided in conformity with the individualized education program required" by the statute. 20 U.S.C. §§ 1401(9)(C)-(D)

IDEA attempts to guarantee children with disabilities a FAPE by requiring states and the District of Columbia to institute a variety of detailed procedures. "[T]he primary vehicle for implementing" the goals of the statute "is the individualized education program, which the IDEA mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The individualized education program, or IEP, is a written document that describes the impact of the child's disabilities, annual "academic and functional" goals for the child, and the forms of individualized education and support that will be provided to the child in view of his disabilities and in order to aid his developmental and academic progress. See 20 U.S.C. § 1414(d)(1)(A). Because the IEP must be "tailored to the unique needs" of each child, *Bd. of*

⁸ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Educ. v. Rowley, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities. See 20 U.S.C. §§ 1414(b)-(c). Furthermore, the school district must take care to generate that new information as needed, through assessments and observations of the child. See 20 U.S.C. §§ 1414(c)(1)-(2). To be sufficient to confer a FAPE upon a given child, an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. at 176.

Pursuant to 34 C.F.R. § 300.304(b):

DCPS shall, in conducting evaluation of students:

- (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 Sec. 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.

Pursuant to 34 C.F.R. § 300.304 (c)(4) and (6):

DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...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."

Pursuant to 34 CFR 300.305:

Upon completion of the administration of assessments and other evaluation measures--

- (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and
 - (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.
- (b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--
- (1) If the determinant factor for that determination is--

- (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
 - (ii) Lack of appropriate instruction in math; or
 - (iii) Limited English proficiency; and
- (2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).
- (c) Procedures for determining eligibility and educational need.
- (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must-- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered.
- (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1414(b)(4) and (5))

The Hearing Officer found Dr. Vital's testimony forceful as to his desire for additional assessments that would determine, inter alia, if there is an organic basis for the student's diminished abilities and behavior and his desire to interpret the data from a neuropsychological perspective so as to make relevant and effective recommendations for the student. However, the Hearing Officer was also struck by Dr. Vital's statement that he would have conducted most of the same assessments that have been conducted. Although Dr. Vital suggested a number of additional assessments he personally might conduct he also noted that it is not as critical a factor in assessing the student what measure is used but what individual is conducting the analysis.

The Hearing Officer finds some credence in Dr. Vital's testimony that additional assessments might make a difference in determining if the student has a disability classification other than the OHI and LD classifications mentioned in the comprehensive psychological evaluation. Although the classification does not determine the programming, it might have some relevance to and affect on the programming.

DCPS asserted that determining whether the student's deficits and behaviors are organically based would make no difference in the educational programming and related services that would be provided to the student. The Hearing Officer finds some concern with the argument that the cause of a student's disability would not matter. The cause of a condition conceivably might make some difference in whether the assistance designed to address the condition would ever be effective.

The recommendation made in the comprehensive psychological that a neuropsychological be conducted seems a legitimate recommendation particularly coupled with Dr. Vital's

testimony. However, DCPS's school psychologist was equally credible and she had reviewed neuropsychological evaluations as part of her duties in the past. This school psychologist although not a member of the student's MDT disagreed that a neuropsychological evaluation was needed and was likely to shed light on appropriate educational interventions.

The recommendation in the comprehensive psychological evaluation for the neuropsychological to be conducted and the testimony of Dr. Vital was not sufficient to supplant the conclusions of the MDT team particularly given the fact that the student has still not been found eligible. Because the student's eligibility has not yet been determined and no IEP has been developed there can be no effective determination of whether DCPS has denied the student a FAPE. Consequently, the Hearing Officer does not conclude the student has been denied a FAPE.

However, the Hearing Officer encourages the MDT when it reconvenes and makes the eligibility determination and develops the IEP to consider whether additional assessments such as those noted by Dr. Vital are warranted in order to effectively and appropriately program for the student. The MDT did not have the benefit of a neuropsychologist as a part of the team to determine if additional evaluations as necessary.

Based upon this evidence, the hearing officer concludes that Petitioner has failed to demonstrate that a neuropsychological evaluation is warranted for the student, and therefore, Petitioner has failed to meet its burden of demonstrating that DCPS denied the student a FAPE by refusing to conduct a neuropsychological evaluation pursuant to the requests of the parent and her advocate at the January 29, 2010, MDT meeting.

ORDER:

The complaint in this matter is hereby dismissed.

APPEAL PROCESS:

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



Coles B. Ruff, Esq.
Hearing Officer
Date: April 10, 2010