



In her January 31, 2008 complaint, the Parent claimed that DCPS denied the Student a free appropriate public education (“FAPE”) under the IDEA by failing to evaluate him in all areas of suspected disability, and requested independent testing. Specifically, the complaint alleged that DCPS failed to conduct (1) a psychiatric examination, (2) an electroencephalogram (“EEG”), and (3) a magnetic resonance imaging (“MRI”), which the Student’s Multi-disciplinary Team (“MDT”) had decided (on or about 12/11/07) would assist in determining whether the Student had traumatic brain injury and whether that necessitated revision of his individualized education program (“IEP”). *See Opinion* at 4, 12; AR 60-62, 130-33.

The Court’s remand requires the Hearing Officer to undertake two tasks: (1) to supplement the record with certain missing materials, which the Court identifies in its Opinion; and (2) to fully consider and address certain questions discussed in the Opinion. The specific questions identified by the Court all relate to a single determinative issue on remand – *i.e.*, whether Petitioner has shown that DCPS’ actions denied the Student a FAPE by depriving him of educational benefits to which he is entitled. *See Opinion* at 8-9. According to the Court, that determination depends largely on the adequacy of the IEP and “whether, in light of all available information regarding [the Student’s] disabilities, behavior, and academic performance, [the Student’s] IEP is ‘reasonably calculated’ to provide educational benefits.” *Opinion* at 12, *citing Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

As summarized in writing by the Hearing Officer, and as discussed and agreed by the parties at the March 29 status conference, the questions and suggested areas of inquiry identified in the Opinion include:

- “In deciding whether [the Student’s] IEP is reasonably calculated to provide him educational benefits in light of all available information, the Hearing Officer might have considered [1] whether [Student] has made adequate progress under his IEP, [2] whether there is reason to believe that [Student] suffers from undiagnosed traumatic brain injury, and [3] whether there are treatments for traumatic brain injury that would likely resolve some of [Student’s] academic problems.” *Opinion* at 12-13.
- Whether the statements in Dr. Vanterpool’s 2007 neurological assessment report do or do not suffice to establish that [Student] may suffer from traumatic brain injury, and the reasons for that conclusion. *Opinion* at 13.
- Whether the requested psychiatric evaluation would have been duplicative of the prior one performed in 2006, which was missing from the administrative record on appeal. *Opinion* at 14, 15-16.

- Proper consideration of the record evidence (in the form of testimony by the Student's educational advocate) to the effect that his educational program may have been insufficient because it was not adapted to all of his possible disabilities. *Opinion* at 14-15.
- Whether a neuropsychological assessment of [Student] conducted in fall 2008 renders Petitioner's request for a psychiatric examination moot. The Court found that DCPS had submitted as evidence only a "heavily redacted version" of the 2008 report, which was insufficient to determine whether that report serves the functions of the 12/07 MDT decision and thus whether Petitioner "has been given the relief she seeks with regard to the psychiatric exam." *Opinion* at 17-18.

In addition, Petitioner notes that the Hearing Officer may also consider other questions and/or portions of the Opinion in reaching a determination on remand. *See* Email Correspondence from Douglas Tyrka, Esq. (Petitioner's counsel), dated March 28, 2010.

In response to the Hearing Officer's inquiry, both parties agreed that no additional testimony or other evidence beyond the agreed supplemental administrative record described in Section II below was necessary for the Hearing Officer to make a determination on remand. DCPS' counsel also stated that DCPS was not willing to authorize independent evaluations in any of the three areas specified in the Court's Opinion on the basis of the present record.

## **II. SUPPLEMENTAL ADMINISTRATIVE RECORD**

As directed by the Court (*Opinion* at 15-18), and as agreed to by the parties, the administrative record has been supplemented with the following materials:

1. Hearing Officer Determination dated July 17, 2006.
2. Hearing Officer Determination dated September 27, 2007.
3. Psychiatric Evaluation of Student dated July 27, 2006, Interdynamics, Inc.
4. Due Process Complaint Notice dated April 20, 2007.
5. Neurological Evaluation dated November 1, 2008, Maria Zimmitti & Associates.

These materials will be designated as **Supplemental Exhibits 1 through 5**, respectively. <sup>2</sup>

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<sup>2</sup> *See* DCPS' Record Supplementation, filed March 17, 2010; Petitioner's Record Supplementation, filed March 30, 2010. Supplemental Exhibit 4 is the complaint filed by Petitioner that led to the 9/27/07 HOD (Supplemental Exhibit 2); and both Supplemental Exhibits 3 and 4 were filed as part of the disclosures -3, -9) in that case. Supplemental Exhibit 5 was originally filed as part of the disclosures -9) in Case No. another due process complaint proceeding initiated by Petitioner. While neither the March 4, 2008 HOD nor transcript clearly identifies which documents from the 4/20/07 complaint were submitted into evidence, the parties agreed that the above list constitutes all relevant documents for purposes of this remand proceeding. *See generally Opinion* at 16 (referring to documents submitted by Petitioner as part of an earlier due process complaint); 13, 53.

### **III. ISSUE ON REMAND**

As noted above, pursuant to the Court's Opinion and Order, the issue to be addressed on remand is whether DCPS has denied the Student a FAPE by failing to conduct and review evaluations in all areas of suspected disability – specifically (1) a psychiatric examination, (2) electroencephalogram (“EEG”), and (3) magnetic resonance imaging (“MRI”), which the Student's MDT/IEP Team decided would assist in determining whether the Student had traumatic brain injury and whether that condition necessitated revision of his IEP. The primary relief requested is for DCPS to fund independent evaluations in these three areas.

### **IV. SUPPLEMENTAL FINDINGS OF FACT**

1. The Student was \_\_\_\_\_ years old and attending \_\_\_\_\_ at the time of the previous HOD. The parties stipulated that the Student is now almost \_\_\_\_\_ years old and attends \_\_\_\_\_ another private school in the District of Columbia. He attended \_\_\_\_\_ until the summer of 2008. *See Opinion* at 3.

2. The statements in Dr. Vanterpool's 2007 neurological assessment report suffice to establish that the Student *may* suffer from traumatic brain injury (“TBI”).<sup>3</sup> The report states, *inter alia*, that the Student suffered two falls in early childhood, that his “[c]erebral function is delayed in the cognitive areas,” and that his “perception of the people around him and to reality is somewhat negative.” 127-28. The report then recommended “EEG/MRI to determine if there is residual/visible brain damage as a result of the 2 falls in early childhood.” 128. The EEG and MRI tests involve assessments of the physical structure of the brain. *Opinion* at 14.

3. Based on its review of Dr. Vanterpool's report, the Student's MDT/IEP Team determined that TBI was an area of suspected disability and that further evaluations, including psychiatric, EEG and MRI, were warranted to assess this area. *See Opinion* at 14-15; 60, 73, 130-33. According to the educational advocate's testimony quoted by the Court, the Team “needed to make sure that we had the correct disability classification for the student and, in turn, the correct programming and placement for him.” *Opinion* at 15, quoting 73.

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<sup>3</sup> See 34 C.F.R. § 300.8 (c)(12) (TBI “means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance” and “applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition;...[and] sensory, perceptual, and motor abilities....”).

4. The requested psychiatric evaluation would not be duplicative of the July 27, 2006 psychiatric evaluation (*Supp. Ex. 3*), especially at this juncture when it is already more than three years old. *See also* 78, 102 (educational advocate testimony that previous psychiatric did not provide the information that was needed by the team). In addition, the November 2008 neuropsychological evaluation recommended that the Student receive a clinical re-evaluation in one year to monitor his progress. *Supp. Ex. 5*, p. 16.

5. The November 2008 neuropsychological evaluation report does not render Petitioner's request for a psychiatric evaluation moot. As the Court's Opinion notes, the "psychiatric assessment requested by [Parent] and recommended by Dr. Vanterpool was intended to 'assess [the Student's] emotional and psychological state and to determine if medication or other treatment modalities' might aid [the Student] 'in his activities of daily living.'" *Opinion* at 18 (quoting 2007 report, 128). The November 2008 evaluation was a psychological, not psychiatric, assessment, which could not serve those functions. The report of that evaluation thus further recommends that a "comprehensive psychiatric evaluation should be conducted to determine the appropriateness of medication." *Supp. Ex. 5*, p. 16.

6. The evidence shows that the Student has been denied educational benefits as a result of DCPS' failure to conduct the identified evaluations. As the Court found, the educational advocate's testimony indicated that the Student's "educational program may have been insufficient because it was not adapted to all of his possible disabilities." *Opinion* at 15 (citing 60, 73). In addition, the MDT/IEP Team specifically determined that this further testing was needed to establish whether TBI was an area of suspected disability that might warrant additional or different programming. *Id.*; *see also* 130-33.

## V. DISCUSSION AND CONCLUSIONS OF LAW

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *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. *See* DCMR 5-3030.3; *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). In this case, Petitioner has the burden of

proof on whether she is entitled to the relief she seeks with regard to the requested psychiatric, EEG and MRI examinations.

2. Pursuant to its “child find” mandate under IDEA, DCPS has an affirmative duty to identify, locate and evaluate any potentially disabled child attending its school. *See* 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). In carrying out such evaluations, DCPS must (*inter alia*): “[u]se a variety of assessment tools and strategies to gather relevant information,” including information provided by the parent, to 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. 34 C.F.R. § 300.304(b)(1). DCPS must also ensure that the child “is assessed in all areas related to the suspected disability,” 34 C.F.R. §300.304 (c) (4), and that 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 [is] classified.” *Id.* §300.304 (c) (6); DCMR 5-3005.9. Thus, the regulations implementing IDEA “stress the broad scope of evaluations,” which “must take into account a holistic perspective of the child’s needs.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008).<sup>4</sup>

3. The IDEA defines TBI as “an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child’s educational performance.” 34 C.F.R. § 300.8 (c)(12). The regulations further provide that TBI “applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition;...[and] sensory, perceptual, and motor abilities....” *Id.*

4. In this case, the Student’s MDT/IEP Team determined that TBI was an area of suspected disability. The team also determined that a psychiatric evaluation, an EEG, and an MRI would assist in determining whether the Student had TBI and whether any revisions of his IEP would be appropriate as a result. These determinations were based principally on the findings of Dr. Vanterpool’s 2007 neurological assessment, and were consistent with the foregoing IDEA provisions.

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<sup>4</sup> *See also IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *Hawkins v. D.C.*, 539 F. Supp. 2d 108 (D.D.C. 2008); *D.C. v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007).

5. Because DCPS has not conducted these identified evaluations, the nature and effects of the Student's disability have not been adequately monitored, and the Student's IEP may not be reasonably calculated to provide educational benefits. *See Opinion* at 12, citing *Bd. of Educ. v. Rowley*, 458 U.S. at 204, and *Harris v. District of Columbia*, 561 F. Supp. 2d at 68. Accordingly, DCPS' failure to conduct these evaluations has denied the Student a FAPE by depriving him of educational benefits to which he is entitled. *See Opinion* at 8.

6. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In this case, the Hearing Officer has decided the issue presented on remand from the U.S. District Court for the District of Columbia – *i.e.*, whether DCPS' actions have denied the Student a FAPE by depriving him of educational benefits to which he is entitled. The Hearing Officer concludes that they have. Therefore, Parent is entitled to the requested independent evaluations, at the expense of DCPS. DCPS shall also be directed to convene a meeting of the Student's MDT/IEP Team to review the results of the independent evaluations and determine any appropriate IEP revisions.

## VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ORDERED:

1. Petitioner's Due Process Complaint and requests for relief shall be, and hereby are, GRANTED.
2. Petitioner shall be, and hereby is, authorized to obtain an independent comprehensive psychiatric evaluation, an independent electroencephalogram ("EEG") examination, and an independent magnetic resonance imaging ("MRI") examination, at the expense of DCPS.
3. DCPS shall convene a meeting of the Student's MDT/IEP Team within **30 calendar days** of receiving the results of all of the independent evaluations. At such meeting, the Team shall (a) review the results of the independent evaluations, and (b) revise the Student's IEP as appropriate in light of the evaluations and any other updated information. In addition, the Team may (c) elect to discuss and determine whether

any additional, compensatory education services are appropriate to address the unique needs of the Student in light of DCPS' past failure to conduct and review evaluations.

4. This case shall be, and hereby is, CLOSED.

***IT IS SO ORDERED.***

Dated: April 12, 2010



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Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).