



## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened and concluded on March 14, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is \_\_\_\_\_ a District of Columbia public charter school (“School A” and or “Petitioner”) that is its own local educational agency (“LEA”) for special education purposes. The student began attending School A at the start of school year (“SY”) 2013-2014. Prior to attending School A the student attended a District of Columbia Public Schools (“DCPS”) elementary school (“School B”).

At School B the student had a individualized educational program (“IEP”) and a disability classification of specific learning disability (“SLD”). On September 27, 2013, School A updated the student’s IEP.

In December 2013 School A completed evaluations of the student, specifically a psychological evaluation and a speech and language evaluation. On January 10, 2014, School A convened an eligibility meeting and reviewed the student’s recent evaluations. After a review of the evaluations the team determined the student was no longer eligible as a child with a disability. The parent disagreed with the ineligibility determination.

On January 22, 2014, the student’s parent (“the parent” or “Respondent”), through counsel disagreed with School A’s psychological and speech/language evaluations conducted in December 2013 and requested that School A fund independent evaluations. School A refused the request and on February 6, 2014, filed the due process complaint in this matter to show that its evaluations are appropriate. School A seeks a ruling that the evaluations are appropriate and that it is not required to authorize and fund independent evaluations as requested by the parent.

The student’s parent through counsel filed a response to the complaint on February 14, 2014. Respondent asserted School A’s psychological, based upon which the student was exited from special education, lacked among other things adaptive testing. In addition, Respondent disagreed with the speech language evaluation and asserted the speech language evaluation noted the student’s language deficits but lacked a reference to educational implications of the deficits.

A resolution meeting was not held. The 45-day period began on February 7, 2014, and ends (and the Hearing Officer’s Determination (“HOD”) was originally due) on March 23, 2014. The Hearing Officer convened pre-hearing conference on February 18, 2014, and issued a pre-hearing conference order on March 6, 2014. The parties appeared for hearing on March 14, 2014. At the conclusion of all testimony Petitioner’s counsel requested an extension of the HOD due

date to allow for written closing arguments. Over Respondent's objection the request for extension of the HOD due date for ten calendar days was granted, thus the HOD is due April 2, 2014.

**ISSUES: <sup>2</sup>**

The issues adjudicated are:

1. Whether the parent has the right to request an independent educational evaluation since the child is no currently a "child with a disability."
2. Whether, the parent has the right to request more than one evaluation and can request both an independent psychological evaluation and an independent speech-language evaluation.
3. Whether the psychological and speech-language evaluations performed by School A were appropriate.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 11 and Respondent's Exhibits 1 through 24) <sup>3</sup> that were admitted into the record and are listed in Appendix A. Witnesses a listed in Appendix B.

**FINDINGS OF FACT: <sup>4</sup>**

1. The student \_\_\_\_\_ attends a School A which is its own LEA for special education purposes. The student began attending School A at the start of SY 2013-2014. Prior to attending School A the student attended a DCPS elementary school, School B. At School B the student had an IEP and her disability classification was SLD. (Respondent's Exhibit 4-1)
2. In February 2011 a comprehensive psychological evaluation was conducted of the student while she was age eight and in third grade at School B. As a part of the

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<sup>2</sup> The issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that this was the issue(s) to be adjudicated.

<sup>3</sup> Respondent objected to admission to some of the documents disclosed by Respondent. The objections were addressed at the outset of the hearing. All documents disclosed by both parties were ultimately admitted into the record.

<sup>4</sup> The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following an exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

evaluation the evaluator reviewed the student's previous evaluations including cognitive and academic achievement testing from 2010. The previous evaluation results were used by the evaluator as a point of comparison with the 2011 results. The evaluation assessed the student's academic, cognitive and emotional functioning through a variety of assessment tools including the Wechsler Intelligence Scale for Children (WISC-IV) and Woodcock Johnson-II Tests of Achievement (WJA-III). The student had full scale IQ score of 85 - her general cognitive ability was in the low average range. The student's academic achievement was in the borderline to low average range (early second grade reading skills and kindergarten to first grade math skills). The evaluator diagnosed the student with following DSM diagnoses: Mixed Receptive-Expressive Language Disorder, Mathematics Disorder and Attention Deficit Disorder. (Respondent's Exhibit 2-1, 2-2, 2-4, 2-5, 2-13, 2-14, 2-19)

3. The student's IEP while she attended School B, dated May 9, 2013, prescribed the following weekly services: 5 hours of specialized instruction inside general education, 10 hours outside general education and 2 hours per month of behavioral support services. (Respondent's Exhibit 4-1, 4-5)
4. In June 2013 the clinical psychologist who conducted the February 2011 comprehensive psychological evaluation completed a written summary of the findings and recommendations made in the February 2011 and recommended a comprehensive reevaluation of the student's educational and psychological functioning to track her progress and get an updated profile of her functioning. (Respondent's Exhibit 5-1, 5-5)
5. In June 2013 as a result of a due process complaint filed by the student's parent against DCPS a HOD issued on June 26, 2013, concluding DCPS had denied the student a free and appropriate public education ("FAPE") and ordered that the student's IEP be revised to reflect at least 20 hours of specialized instruction in the areas of reading, writing and math by a special education teacher in a structured small group setting outside general education. (Respondent's Exhibit 6)
6. On July 25, 2013, DCPS amended the student's IEP to reflect the services ordered by the June 26, 2013, HOD. (Respondent's Exhibits 6-13, 7-1, 7-6)
7. After the student began attending School A, on September 27, 2013, School A updated the student's IEP and prescribed the following weekly services: 5 hours of specialized instruction in general education and 20 hours outside general education. (Respondent's Exhibit 9-1, 9-7)
8. School A was concerned that there was no objective for the behavior support in the student's IEP and School A wanted to conduct new evaluations of the student. School A was provided the student's previous evaluations. (Parent's testimony)
9. In November 2013 School A conducted evaluations of the student, specifically a psychological evaluation (Report dated December 11, 2013) and a speech and language evaluation (Report dated December 1, 2013). (Petitioner's Exhibits 6, 7)
10. School A made the decision which evaluations would be conducted of the student. School A employs evaluators as contractors and left it to the contracted evaluators to determine which assessment tools will be used to conduct the student's December 2013 evaluations. (Witness 1's testimony)

11. The December 2013 psychological evaluation assessed the student's academic, cognitive and emotional functioning through a variety of assessment tools including the Wechsler Intelligence Scale for Children (WISC-IV) and Woodcock Johnson-II Tests of Achievement (WJA-III). The student had full scale IQ score of 70 - her general cognitive ability was in the borderline range. The student's academic achievement was in the low average range and in the evaluator's opinion the student academic functioning was "somewhat stronger than might be predicted from her WISC performance."  
(Respondent's Exhibit 12-1, 12-9, 12-11)
12. The evaluator(s) used a variety of evaluation tools and in Petitioner's expert witnesses opinion were technically sound instruments that complied with the standards of 34 C.F.R. 300.304. (Witness 2's testimony)
13. The evaluator who conducted the December 2013 psychological evaluation was not aware of, and consequently did not review, the student's 2011 psychological evaluation and was not aware the student had been previously diagnosed with DSM conditions set forth in that evaluation. School A never provided the evaluator the student's previous evaluation. As a result, the evaluation report does not indicate whether the evaluator concluded that the student no longer has the conditions that were diagnosed by her previous evaluation. Because of the recent evaluation technically the student no longer has the diagnoses with which she was previously diagnosed. (Witness 2's testimony)
14. Had the evaluator been aware of the student's previous evaluation professional standards would have dictated a review of that evaluation. Had the evaluator known the student's previous cognitive scores were higher than her current scores the evaluator would have requested that the previous evaluator release the raw data so she could conduct further analysis and determine if the student's cognitive functioning as assessed in the evaluation was valid and her evaluation report would have explained differences between the two evaluations' results. (Witness 2's testimony)
15. Although the student's IQ score was 70 (2nd percentile) the 2013 evaluator did not see the need to conduct adaptive testing of the student to determine whether she had an intellectual disability ("ID") because of her high verbal comprehension score and the student's academic achievement scores were higher than would be expected in the case of an ID student. (Witness 2's testimony)
16. The December 2013 speech and language evaluation included three assessments: Comprehensive Assessment of Spoken Language (CASL), Comprehensive Receptive and Expressive Vocabulary Test (CREVT-2) and Informal Assessment of Articulation, Voice Fluency and Oral Peripheral. The evaluator determined the student's overall language abilities fell below average for her chronological age; she had strengths in receptive vocabulary and mild to moderate deficits in expressive vocabulary. The evaluator used a variety of evaluation tools were technically sound instruments and complied with the standards of 34 C.F.R. 300.304. The student's deficits that were noted in the evaluation will be addressed through her increased exposure to vocabulary and the academic recommendations that were contained in the evaluation. (Witness 3's testimony, Respondent's Exhibit 11-3, 11-5)

17. Although the student's language comprehension was not assessed in the School A December 2013 speech and language evaluation, it is a good evaluation of the student's basic language skills. Had Respondent's expert witness assessed the student he would have wanted to conduct more vocabulary testing and her ability to use language to reason and he would have conducted other assessments than were used in the School A evaluation. Nonetheless, in his opinion, School A's evaluation was a good evaluation of the student's basic language skills. (Witness 5's testimony)
18. On January 10, 2014, School A convened an eligibility meeting and reviewed the student's recent evaluations. The student's parent participated in the meeting and was accompanied by her educational advocate. After a review of the evaluations the team determined the student was no longer eligible as a child with a disability. The parent and her advocate disagreed with the determination of ineligibility. (Parent's testimony, Respondent's Exhibits 13, 14, 16, 17, 18)
19. At January 10, 2014, meeting there was no challenge to the nature and quality of the December 2013 evaluations and the issue of conducting an adaptive assessment was not raised or requested by the student's parent or her representative. The IEP team considered the nature, quality or validity of the evaluations and concluded the student was evaluated in all areas of concern. School A administrators thought the evaluations that were conducted were appropriate. School A staff was aware of the student's 2011 psychological evaluation and had seen it. (Witness 1's testimony, Petitioner's Exhibit 10-3)
20. On January 22, 2014, the student's parent, through counsel disagreed with School A's speech/language and psychological evaluations conducted in December 2013 and requested that School A fund independent evaluations. School A refused the request and on February 6, 2014, filed the due process complaint to show that its evaluations are appropriate. (Petitioner's Exhibit 9)
21. In Respondent's expert's opinion in making a decision as significant as eligibility under IDEA it is imperative to have accurate data of the student's functioning. Prior to the School A December 2013 psychological evaluation the student had two previous cognitive assessments in 2010 and 2011 that indicated her cognitive functioning was in the average range. Because of this it would all the more important to have previous data in order to verify the accuracy of the current evaluation scores. In her opinion because two previous cognitive assessments indicate that the student's cognitive scores were average the current evaluation it was not appropriate because it did not consider the previous evaluations and there is more testing that is needed to obtain an accurate and reliable determination of the student's cognitive functioning. (Witness 4's testimony)
22. With the student's IQ being recently measured with a score of 70 Respondent's expert witness would have also recommended that an adaptive assessment be conducted of the student to determine her abilities in communication and navigating her community to determine if she has an adaptive functioning deficit and is ID. (Witness 4's testimony)

## CONCLUSIONS OF LAW:

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>5</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the Petitioner, School A, 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.

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 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether the parent has the right to request an independent educational evaluation since the child is not currently a “child with a disability.”

**Conclusion:** Petitioner did not sustain the burden of proof on this issue.

34 C.F.R. 300.502<sup>6</sup> provides: that parent’s of a child with a disability have the right to obtain an independent education evaluation (“IEE”) if the parent disagrees with the LEA’s evaluation and when such a request is made the LEA must provide the requested evaluation without delay or request a due process hearing to show that its evaluation is appropriate. In this instance School C requested a due process hearing to show that its evaluation(s) are appropriate.

Petitioner asserts that as of January 10, 2013, the student is no longer a child with a disability which is a prerequisite to the ability to assert rights to an independent evaluation pursuant of 34

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<sup>5</sup> The burden of proof shall be the responsibility of the party seeking relief. 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.

<sup>6</sup> 34 C.F.R. 300.502 (a) (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section. (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.(3) For the purposes of this subpart-- (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.103. (b) Parent right to evaluation at public expense. (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section. (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. (5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

C.F.R. 300.502. Petitioner, however has offered no convincing authority<sup>7</sup> that supports the proposition that the protections of 34 C.F.R. 300.502 only apply to a student who has found eligible versus student who was once eligible and now, based upon the subject evaluations, has been determined ineligible. Such student's clearly maintains protections pursuant to IDEA to challenge in a due process hearing the ineligibility determination. There is nothing in IDEA that has been cited and no convincing authority offered that supports the proposition that such a student is entitled to some protections under IDEA and not those pursuant to §300.502. Absent any convincing authority in this regard the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue. The evidence in this case is clear when the evaluations that are being challenged were conducted the student was a child a disability.<sup>8</sup>

**ISSUE 2:** Whether the parent has the right to request more than one evaluation and can request both an independent educational evaluation and an independent speech-language evaluation.

**Conclusion:** Petitioner sustained the burden of proof on this issue.

34 C.F.R. 300.502 (b)(5) clearly states: A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

In 2006, the Department of Education amended the IDEA's regulations to add 34 C.F.R. § 300.502(b)(5) to make clear that parent is "entitled to only one independent evaluation at public expenses each time the public agency conducts an evaluation with which the parent disagrees."

The purpose of that amendment is to ensure "that a school district does not have to bear the cost of multiple IEEs concerning a single disagreement." 71 Fed. Reg. 46690 (August 14, 2006). That is exactly the situation here.

Generally, the purpose of an evaluation under IDEA is to determine whether a student is a child with a disability, and in the case of a reevaluation, whether the child continues to have a disability, and the educational needs of the child. The evaluations School A conducted were principally to determine if the student continued to have a disability. As Petitioner aptly points out in reality there is only a single disagreement here—the parent believes that the child is still eligible for special education. Respondent presented no authority that refutes Petitioner's logical interpretation of this regulation. Accordingly, absent any convincing and contrary authority that the prohibition in § 300.502(b)(5), and the comment included in the regulations for the recent addition of this prohibition, the Hearing Officer determines that in the case of an single disagreement with an ineligibility determination a parent is limited to a single independent evaluation.

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<sup>7</sup> The cases cited by Petitioner (*Alvin Independent School Dist. V. A.D.*, 503 F. 3d 378, 382 (5<sup>th</sup> Cir. 2007) and *D.G. v. Flour Bluff Indep. School Dist.*, 481 Fed. Appx. 887, 891-92 (5<sup>th</sup> Cir. 2012)) were not on point with the facts of this case and can be distinguished because the student here was clearly eligible at the time the subject evaluations were conducted unlike the cases cited where the student had not been found eligible.

<sup>8</sup> FOF # 7

**ISSUE 3:** Whether the psychological and speech-language evaluations performed by School A were appropriate.

**Conclusion:** Petitioner did not sustain the burden of proof that its December 2013 psychological evaluation is appropriate. However, there was sufficient evidence that the December 2013 speech and language evaluation was appropriate.

Petitioner asserts that the appropriateness of an evaluation should be measured on whether the evaluation complies with the requirements of 34 C.F.R. § 300.304. However, Petitioner's assertion that this provision is the sole determinant for the appropriateness of an evaluation is misplaced.

34 C.F.R. §300.15 defines an evaluation 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.

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2006).

Although the Petitioner's expert witness testified that has she known the student's previous cognitive scores were higher than her current scores the evaluator would have requested that the previous evaluator release the raw data so she could conduct further analysis and determine if the student's cognitive functioning as assessed in the evaluation was valid and her evaluation report would have explained differences between the two evaluations' results.

School A's failure to provide its evaluator with the student's prior evaluation and the its evaluator's resulting failure to examine the student's prior records and prior evaluative data as well resulting in a failure to fully evaluated the student's functioning and the meeting requires needed to accurately determine the student's continued eligibility. As

Respondent's expert witness credibly testified because the recent evaluator did not consider the prior evaluations the December 2013 psychological evaluation was inappropriate. Thus, Petitioner did not sustain the burden of proof that is psychological evaluation was appropriate.

On the other hand, there was sufficient evidence, including that of Respondent's expert witness that the Petitioner's speech and language evaluation was a good measure of the student's basic language skills for the Hearing Officer to conclude this evaluation was appropriate.

**ORDER:<sup>9</sup>**

1. City City Public Charter School shall within ten (10) school days of the issuance of this Order provide the student's parent, Respondent, an independent psychological evaluation at the OSSE prescribed rate.
2. All other requested relief from either party is denied.

**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. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: April 2, 2014**

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<sup>9</sup> Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.