



## **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 on April 6, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is child with disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”) and specific learning disability (“SLD”). The student currently attends a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”).

On February 12, 2016, the student’s parent (“Petitioner”) filed this due process complaint that alleges DCPS denied the student a free appropriate public education (“FAPE”) by failing to comprehensively evaluate the student at his triennial review pursuant to 34 C.F.R. §300.303.

Petitioner seeks as relief that the Hearing Officer find DCPS denied the student a FAPE and order DCPS to fund a comprehensive psychological assessment with testing components including, but not limited to, achievement testing, cognitive testing, social emotional/executive functioning questionnaires and direct behavioral measures.

On February 17, 2016, DCPS filed a timely response to Petitioner’s complaint in which it denies that it failed to provide the student with a FAPE. DCPS contends that it has made a FAPE available to the student and that the student had been properly assessed and evaluated in order to determine eligibility, his least restrictive environment (“LRE”) and appropriate programming. DCPS contends the student was assessed in December 2012, during school year (“SY”) 2013-2014, and again in SY 2014-2015. DCPS contends student’s current individualized educational program (“IEP”) is dated January 12, 2016, and on that date the team agreed to evaluate the student, as they had done in previous years. The student’s most recent IEP meeting was February 17, 2016, and on that date the team reviewed the student’s progress.

The parties participated in a resolution meeting on February 24, 2016. The parties did not resolve the complaint and did not mutually agree to proceed directly to hearing. Thus, the 45-day period began on March 13, 2016, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on April 27, 2016.

The Hearing Officer convened a pre-hearing conference (“PHC”) on the complaint on March 1, 2016, and issued a pre-hearing order (“PHO”) on March 4, 2016, outlining, inter alia, the issue to be adjudicated.

## ISSUE:

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student at his triennial review pursuant to 34 C.F.R. §300.303 by failing to conduct appropriate evaluation(s)<sup>2</sup>, at latest by the November 4, 2015, meeting.

## 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 22 and Respondent's Exhibits 1 through 12) that were admitted into the record and are listed in Appendix A).<sup>3</sup> Witnesses are listed in Appendix B.

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

1. The student is age \_\_\_\_\_, in grade \_\_\_\_\_,<sup>5</sup> and is a child with disability pursuant to IDEA with a MD disability classification that includes SLD and OHI for ADHD. The student currently attends School A, a DCPS [REDACTED] school. (Petitioner's Exhibit 3-1)
2. DCPS conducted a psychological reevaluation of the student in February 2012 when the student was in [REDACTED] grade and age [REDACTED] years and [REDACTED] months. The evaluator assessed the student's cognitive functioning using the Reynolds Intellectual Assessment Scales (RIAS) and assessed the student's behavioral functioning using the Behavior Rating of Inventory Executive Functioning (BRIEF) and the Conners 3.<sup>6</sup> (Petitioner's Exhibit 5-1, 5-6, 5-15)

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<sup>2</sup> Petitioner is asserting that the DCPS should have conducted the evaluations that were requested at the November 4, 2015, meeting and/or that are being requested as a remedy herein, as a part of the student's triennial evaluation(s). Petitioner acknowledged that DCPS recently conducted a speech and language evaluation and acknowledged that the speech and language evaluation is not one of the evaluations Petitioner is claiming should have been conducted by DCPS as part of the student's triennial evaluation(s).

<sup>3</sup> Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

<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 the 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.

<sup>5</sup> The student's current age and grade are listed in Appendix B.

<sup>6</sup> The evaluation did not include academic achievement testing because the result of the testing were not available at the time of the evaluation but the evaluator noted the student's reading and math skills but it was not clear how that information had been obtained. (Petitioner's Exhibit 5-12)

3. In February 2012 the student's cognitive functioning was determined to be significantly below average and exceeded the performance of 1% of individuals his age. However, the evaluator cautioned that the student's cognitive scores were significantly lower than his previous scores from 2010 (which were average) and concluded that the previous scores were more likely an accurate depiction of this cognitive functioning. Based upon the BRIEF and Conners 3 results the evaluator concluded the student presents a child with ADHD and Executive Functioning Disorder. (Petitioner's Exhibit 5-1, 5-6, 5-15)
4. The student's IEP was updated at School A on February 25, 2015, and the IEP indicates that his eligibility determination was made on the same date. The IEP prescribed the following services: 10 hours per week of specialized instruction outside of general education, 120 minutes per month of speech/language pathology, 120 minutes per month of behavior support services, both outside general education and 30 minutes per month of consultation services for occupational therapy ("OT"). (Petitioner's Exhibit 4-1, 4-12)
5. The student's February 25, 2015, IEP indicates that DCPS administered the North West Education Association (NWEA) assessment in Reading and the student's scores placed him on a Lexile level of a "Beginning Reader". The student's IEP indicates that with regard to assessing the student's emotional, social and behavioral development and the impact of the student's ADHD on his classroom performance, DCPS administered the Ohio Scales Youth Version on September 2, 2014, and Ohio Scales Worker Version on September 25, 2014, and conducted a classroom observation. (Petitioner's Exhibit 4-4, 4-9)
6. On February 25, 2015, DCPS prepared an evaluation summary report that summarized classroom based assessments that had been conducted in academic and related services areas. The evaluation summary report noted the student's strengths and concerns in each area. (Petitioner's Exhibit 10)
7. On February 25, 2015, DCPS issued a prior written notice indicating the student's eligibility had been re-determined and that he continued to meet the eligibility criteria for MD. The notice states the following under the section entitled "Description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action": "A-Net, Progress Reports, Report Cards, Parent Input, Student work samples." (Petitioner's Exhibit 9-1)
8. School A assessed the student's math and reading achievement (with the Partnership for Assessment Readiness for College and Careers) in Spring 2015. The student was assessed as being on level one in the area of math, at the 11<sup>th</sup> percentile of students in his school, at the 5<sup>th</sup> percentile within DCPS and at the 10<sup>th</sup> percentile of all of students in the District of Columbia. (Petitioner's Exhibit 12-1, 12-2)
9. The student received passing grades in all his classes during SY 2014-2015 and was promoted to [REDACTED] grade. (Petitioner's Exhibit 15)

10. The student was failing a number of his classes in the first advisory of SY 2015-2016. (Petitioner's Exhibit 16)
11. On November 4, 2015, Petitioner and her educational advocate met with School A staff regarding her concern about the student's lack of progress and poor grades. Prior to attending the November 4, 2015, meeting the parent's educational advocate reviewed the student's education records including the student's February 2012 psychological evaluation. (Witness 1's testimony)
12. During the November 5, 2015, meeting the student's teachers reviewed the student's classroom performance and the student's scores and grades were discussed. There was discussion during the meeting as to what action could be taken to assist the student in getting his grades up. It was noted the student was attending school regularly and was staying after school to make up work. (Witness 1's testimony, Petitioner's Exhibit 11, 12, 13, 14, 15, 16)
13. The advocate stated that the student's triennial evaluation was due and the School A special education coordinator ("SEC") stated in response that the student triennial evaluation was reflected in the student's last IEP and was done in the form of "NWEA" testing. (Witness 1's testimony, Petitioner's Exhibit 1)
14. During the November 4, 2015, meeting the advocate expressed her concern that the student's 2012 psychological evaluation did not include academic achievement testing and the cognitive assessments that were conducted were inclusive. (Witness 1's testimony)
15. Because of concern that student had made limited progress, the advocate, on Petitioner's behalf, requested more comprehensive evaluations, at least a comprehensive psychological evaluation and stated that a neuropsychological evaluation was warranted. The advocate gave some examples of the types of assessment tools that could be administered to the student to better assess his cognitive functioning, social emotional and behavioral concerns mentioned during the meeting and in the student's prior evaluations. (Witness 1's testimony)
16. A DCPS psychologist was called into the meeting following the advocate's request and the psychologist reviewed the results of the student's 2012 psychological evaluation. The DCPS psychologist was not familiar with the student and asked the teachers present at the meeting to express their concerns about the student. They said the areas of concern were the student's impulsivity, distractibility, not completing classwork and his emotional regulation of getting excited. Those were the extent of the areas of concerns. The DCPS psychologist pointed out that the symptoms mentioned seemed related to the student's ADHD. She asked if the team members thought that the student's disability would change and the team members did not think so. There is no dispute among the team that the student has ADHD and it affected him in the educational setting. (Witness 3's testimony)

17. The DCPS psychologist stated that she was willing to conduct a BRIEF, BASC<sup>7</sup> and a Woodcock-Johnson. The advocate responded that the assessments offered were not as comprehensive as she thought were needed to address all areas of concern but she was willing to have DCPS conduct those assessments. (Witness 1's testimony)
18. Although the DCPS psychologist offered to conduct the assessments, the members of the team, other than the advocate and the parent, did not think the student needed additional evaluations despite the DCPS psychologist's willingness to conduct the evaluations. The DCPS psychologist said there was no need for further testing as the student's disability classification had already been determined. (Witness 1's testimony)
19. During the November 4, 2015, meeting it was the DCPS psychologist's impression that the student's triennial evaluation had not yet been conducted and was coming due. It was her sense that because there was no agreement as to the assessments that would be conducted the team would reconvene and address the issue at a later date. (Witness 3's testimony)
20. During the November 4, 2015, meeting the advocate stated that the parent would be requesting an independent educational evaluation ("IEE"). However, the advocate did not make the request for the IEE at the meeting or after the meeting and the parent did not sign a consent form for the evaluations DCPS offered to conduct. To date, the evaluations that the DCPS psychologist offered to perform have not been conducted. (Witness 1's testimony, Petitioner's Exhibit 1)
21. At the November 2015 meeting the team agreed to address the student's work avoidance with an incentive plan and the team agreed to reconvene in January 2016 when the student's IEP would be reviewed and updated. (Witness 1's testimony, Petitioner's Exhibit 1)
22. DCPS completed an analysis of existing data for the January 2016 IEP meeting that was a summary of the student's current functioning in academic and related services areas. (Respondent's Exhibit 4)
23. On January 12, 2016, School A convened an IEP meeting for the student. The student's parent and another educational advocate from the parent's law firm attended the meeting. The advocate asked about the evaluations brought up at the November 2015 meeting by the other advocate. The advocate was advised that the multi-disciplinary team ("MDT") determined that the testing was unwarranted because they did not believe the student's disability category would change. The speech and language pathologist present at the meeting agreed that a speech and language evaluation was warranted and agreed to conduct that evaluation. The student's parent signed consent for that evaluation to be conducted. (Witness 2's testimony, Petitioner's Exhibit 2-1)

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<sup>7</sup> Behavior Assessment System for Children

24. The consent form the parent signed on January 12, 2016, was sufficient for the DCPS psychologist to move forward and complete the assessments she offered to complete at the November 4, 2015, meeting. (Witness 3's testimony)
25. The student's most recent IEP was developed at the January 12, 2016, meeting and prescribes the following services: 15 hours per week of specialized instruction outside of general education, 120 minutes per month of speech/language pathology, 120 minutes per month of behavior support services, both outside general education and 30 minutes per month of consultation services for occupational therapy ("OT"). (Petitioner's Exhibit 3-1, 3-10)
26. The student's second quarter grades during SY 2015-2016 were the following: Math: C, English: B+, Science: C, Social Studies: D. (Petitioner's Exhibit 13-2)
27. The advocate who attended the November 4, 2015, meeting testified as an expert witness<sup>8</sup> opined that the NWEA that DCPS conducted in 2015 was insufficient to assess the student's academic functioning and the assessments that the DCPS psychologist offered to conduct at the November 4, 2015, meeting would not be sufficient because they would not fully assess the student's memory, social emotional functioning and how his ADHD affected him in the classroom. (Witness 1's testimony)
28. The DCPS psychologist who participated in the November 4, 2015, meeting also testified as an expert witness.<sup>9</sup> She opined that the student's 2012 psychological evaluation was thorough and she pointed out that the psychologist is not always responsible for conducting the academic testing but the student's teacher most often conducts the academic testing of a student. When the DCPS psychologist reviewed the student's records she noticed the student had a comprehensive psychological evaluation conducted twice and after speaking with the team member's at the November 4, 2015, meeting she did not believe a full psychological evaluation like the one conducted in February 2012 was necessary. (Witness 3's testimony)
29. The DCPS psychologist pointed out that when conducting evaluations of a special education student the areas of concern raised by a teacher or members of a team will inform what assessments an evaluator will perform. As the School A psychologist, she is usually not aware of when any student's triennial evaluation is due, unless and until, she is informed it is due by the School A SEC. However, normally a full psychological evaluation is not conducted unless there is an anticipated or possible change in a student's disability classification. (Witness 3's testimony)

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<sup>8</sup> This witness holds a Master of Arts in Psychology and is a candidate for a Ph.D. degree expected to be granted in 2017. Most recently prior to becoming an educational advocate in 2015, she was a research analyst and organizational psychologist.

<sup>9</sup> This witness has a Ph.D. in School Psychology granted in 1994 and has practiced as a school psychologist with DCPS since 1992.

## CONCLUSIONS OF LAW:

Pursuant to IDEA §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 IDEA §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 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. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *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.

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:** Whether DCPS denied the student a FAPE by failing to comprehensively evaluate the student at his triennial review pursuant to 34 C.F.R. §300.303 by failing to conduct appropriate evaluation(s), at latest by the November 4, 2015, meeting.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

Pursuant to 34 C.F.R. § 300.303 (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311— (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child’s parent or teacher requests a reevaluation. (b) Limitation. A reevaluation conducted under paragraph (a) of this section— (1) May occur not more than once a year, unless the parent and

the public agency agree otherwise; and (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Pursuant to 34 C.F.R. § 300.304 (c)(4): Each public agency must ensure that 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.

Pursuant to 34 C.F.R. § 300.306 a school district must ensure that after a student has been appropriately evaluated for special education and that a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8. D.C. law requires that a "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).

The evidence demonstrates that during the November 4, 2015, meeting the parent's educational advocate inquired about the student's triennial evaluation with the impression that the student's triennial evaluation was due. However, the School A SEC pointed out that the student's triennial evaluation had been conducted as a part of the student's last eligibility determination that had been made in February 2015.<sup>10</sup> In February 2015 DCPS developed an evaluation report, issued a prior written notice and noted in the student's February 2015 IEP that the student had been assessed academically and in the areas of social, emotional and behavior development.<sup>11</sup> Based upon this evidence, the Hearing Officer concludes that the student's triennial evaluation was conducted in February 2015.

Petitioner asserted that the DCPS should have conducted the evaluations that were requested at the November 4, 2015, and/or that are being requested as a remedy, as a part of the student's triennial evaluation(s). Petitioner's presented the advocate as an expert witness who opined that

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<sup>10</sup> FOF # 13

<sup>11</sup> FOF #s 4, 5, 6, 7

the student's February 2012 psychological evaluation did not fully evaluate the student and the assessments DCPS conducted in February 2015 were insufficient. However, the DCPS psychologist, who also testified as an expert witness, was of the opinion the student's February 2012 psychological evaluation was comprehensive. The Hearing Officer found the DCPS psychologist's testimony, particularly regarding the February 2012 evaluation, more convincing based upon the psychologist's superior level of expertise and years of experience as a DCPS psychologist.

The Hearing Officer was also not convinced by the advocate's testimony that the student's February 2015 assessments were insufficient. The advocate simply stated that "NWEA" testing the SEC cited as having been conducted for the student's triennial evaluation was insufficient to assess the student's academic functioning. She did not provide testimony about the other assessments DCPS conducted of the student in February 2015 as a part of the student's eligibility determination and IEP development that the Hearing Officer has concluded were also a part of the student's triennial evaluation. As result, the Hearing Officer does not conclude based on the advocate's testimony that the student's triennial evaluation was insufficient or that the assessment tools that the advocate requested at the November 4, 2015, meeting should have been conducted as a part of the student's triennial evaluation. IDEA does not require any specific evaluation be conducted as a part of a student's triennial evaluation.

The evidence demonstrates that the DCPS psychologist was called into the November 4, 2015, meeting in response to the advocate's request for additional assessments of the student. The DCPS psychologist was under the mistaken impression that the student's triennial evaluation was coming due. In response to the advocate's requests and the feedback from the rest of the team she offered to conduct additional assessments. The DCPS psychologist was of the opinion that the evaluations she offered to conduct were not necessary based upon the feedback of the student's teachers at the meeting regarding their concerns about the student. She was, nonetheless, willing to conduct them. However, there was a disagreement by the advocate about the specific assessment tools that would be used and there was no consent from the parent to conduct the assessments the psychologist offered to conduct. The student's parent did not provide written consent until the student's January 2016 IEP meeting.

The Hearing Officer concludes based on the expert testimony of the DCPS psychologist, that it was not necessary to conduct the assessments that the advocate requested or even the assessment tools the psychologist offered to conduct, either as a part of the student's triennial evaluation or as result of the concerns raised by the student's team at the November 4, 2015, meeting.

The advocate stated at the November 4, 2015, meeting that the parent would be requesting an IEE. However, the evidence does not demonstrate Petitioner ever made such a request and/or ever asserted a formal challenge to the validity of the DCPS evaluation(s) and/or requested an IEE pursuant to 34 C.F.R. § 300.502.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS either not conducting his triennial evaluation or because the triennial evaluation DCPS conducted was inappropriate.

**ORDER:**

Based upon the findings of fact and conclusions of law determined herein, the Hearing Officer concludes that Petitioner's due process complaint should be and is hereby dismissed with prejudice. All requested relief 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 27, 2016**