

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

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

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Student Hearing Office
February 03, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: February 1, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not reevaluating him in all areas of suspected disabilities and by failing to provide Student an appropriate Individualized Education Program (IEP) in October 2012.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Revised Due Process Complaint, filed on November 25, 2013, named DCPS as respondent. The parties met for a resolution session on December 16, 2013 and were unable to reach an agreement. The 45-day time period for issuance of my Hearing Officer Determination began on December 26, 2013. On December 17, 2013, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on January 28, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Petitioner testified, and called as witnesses, AUNT and OCCUPATIONAL THERAPIST. DCPS called as its only witness SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-2 and P-6 were admitted into evidence without objection. Pages 1, 2 and 5 of Exhibit P-5 were admitted without objection. DCPS' objection to the remainder of Exhibit P-5 was sustained. Exhibits P-1, P-3, P-8 and P-9 were admitted over DCPS' objections. DCPS' objections to Exhibits P-4 and P-7 were sustained. DCPS' Exhibits R-1 through R-10 were all admitted over Petitioner's objection. (Petitioner's counsel objected that DCPS' 5-Day disclosure was not timely filed, which I found not to the case.) Counsel for both parties made opening statements. Counsel for DCPS made a closing statement. At the request of counsel for Petitioner, the parties were granted leave until January 29, 2013 to file post-hearing memoranda. Only Petitioner's Counsel filed a post-hearing brief.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether DCPS denied Student a FAPE by failing to reevaluate him in all areas of suspected disabilities by not completing a comprehensive psychological evaluation (with a clinical component), speech/language, occupational therapy, and social history assessments to determine Student’s special education needs; and
- Whether DCPS denied Student a FAPE by failing to provide him with an appropriate IEP following an October 2012 IEP meeting, with measurable goals and objectives, appropriate specialized instruction and related services and a suitable placement to implement the IEP.

For relief, Petitioner seeks an order (i) for DCPS funding for Independent Educational Evaluation (IEE) assessments, including a comprehensive psychological (to include the clinical component), occupational therapy, speech/language, and social history assessments; (ii) for DCPS to convene an MDT meeting within ten (10) days of receipt of the independent evaluations to review the assessments and to determine Student’s current need for specialized instruction and related services; (iii) for DCPS to convene Student’s IEP team, including the parent, to revise his IEP, as appropriate to provide measurable goals and objectives, appropriate specialized instruction and related services, and a suitable placement. Parent also seeks an award of compensatory education to compensate Student for alleged denial of FAPE since the October 2012 IEP meeting.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student, an AGE youth, resides with Petitioner in the District of Columbia.

Testimony of Mother.

2. Since the 2012-2013 school year, Student has been enrolled in CITY MIDDLE SCHOOL, where he is in the GRADE. Previously, he attended CITY ELEMENTARY SCHOOL. Testimony of Mother.

3. Student is a child with a disability in need of special education and related services. His Primary Disability classification is Specific Learning Disability (SLD). Exhibit R-6. Student was first found eligible for special education services when he was in the fifth grade at City Elementary School. Exhibits R-7, R-8.

4. SPECIAL EDUCATION TEACHER conducted an educational evaluation of Student on November 4, 2011. Exhibit R-9. DCPS SCHOOL PSYCHOLOGIST conducted a psychological evaluation of Student on December 1, 2011. Exhibit R-8. Based upon those assessments and other data, Student was found eligible for special education services on December 13, 2011. Exhibit R-6. Student's initial IEP began on April 10, 2012. Exhibit R-4.

5. A Multidisciplinary Team (MDT) was convened at City Middle School on October 9, 2012 to update Student's IEP. Exhibit R-3. Mother and Student attended the meeting. Exhibit R-3. Only the first two pages of the October 9, 2012 IEP were offered into evidence by Petitioner's Counsel. These pages were included among other partial documents dating from 2011 and 2012, all combined as Petitioner's Exhibit P-7. I sustained DCPS' objection to the admission of P-7, because it contained incomplete and unrelated documents with missing pages, including the two pages from the October 9, 2012 IEP. Consequently, the October 9, 2012 IEP is not in evidence.

6. Student's 2011 IEP provide five hours per week of special education

services. That was increased to ten hours per week in the October 9, 2012 IEP.

Testimony of Mother.

7. Mother testified that at the October 9, 2012 IEP meeting, she asked for more testing of Student. Special Education Coordinator, who was present for the October 9, 2012 meeting, denied that there was a request for more assessments or evaluations of Student. No request for additional testing was reflected in the very brief October 9, 2012 MDT team meeting notes. Exhibit R-3. In general, Mother's testimony was confused regarding dates and the nature of meetings. For example, Mother mis-recalled the school year when Student was initially found eligible for special education and Mother did not recall that the October 9, 2012 meeting was an IEP review meeting, even though Student's IEP services hour were increased from five to ten hours per week at the meeting. On balance, I find that Mother has not established, by the preponderance of the evidence, that she requested additional evaluations or assessments of Student at the October 9, 2012 IEP meeting.

8. Mother filed a prior due process complaint against DCPS on August 2, 2013. In that complaint, she alleged, *inter alia*, that DCPS had denied Student a FAPE by failing to update evaluations of the Student for all suspected disabilities. At an August 16, 2013 Resolution Session Meeting (RSM), DCPS agreed to reevaluate Student with comprehensive psychological, speech/language (S/L) and Occupational Therapy (OT) assessments. Exhibit R-1. Mother refused her consent for the evaluations because she always wanted outside (IEE) evaluations. Testimony of Mother. The August 2, 2013 due process complaint was withdrawn in September 2013. Hearing Officer Notice. A couple of weeks before the due process hearing in the present case, Mother signed off on DCPS paperwork for outside evaluations. Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. Did DCPS deny Student a FAPE by failing to reevaluate him in all areas of suspected disabilities by not completing a comprehensive psychological evaluation (with a clinical component), speech/language, occupational therapy, and social history assessments to determine the Student's special education needs?

Student was initially found eligible for special education services in December 2011. For that determination, DCPS conducted an educational assessment and a psychological evaluation. Petitioner claims that DCPS has denied Student a FAPE by failing to conduct reevaluations, including a more comprehensive psychological assessment, and S/L, OT and Social History assessments. The IDEA requires that a public agency must ensure that a reevaluation of each child with a disability is conducted at least once every three years, or sooner when, *inter alia*, the child's parent or teacher requests a reevaluation, subject to the limitation that a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Student was last evaluated by DCPS in December 2011 – less than two years before the complaint in this case was filed. Although Mother claimed in her testimony that she had requested "more testing" after

Student's initial IEP was developed in April 2012, that claim was not proven. The evidence does establish that on August 2, 2013, Mother filed a due process complaint alleging that DCPS failed to reevaluate Student. To resolve the complaint, DCPS agreed to conduct additional assessments. However, Mother refused her consent because she only would accept IEE evaluations. DCPS may not conduct reevaluation assessments of a child without the parent's consent. *See* 34 CFR § 300.300(c). I conclude therefore that DCPS did not deny Student a FAPE by failing to conduct a special education reevaluation requested by the parent.

In her post hearing memorandum, Petitioner's Counsel argues that Mother was entitled to a DCPS-funded IEE reevaluation of Student, because she disagreed with the psychological evaluation conducted by DCPS in December 2011. Under 34 CFR § 300.502(b), subject to certain limitations, 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. DCPS' failure to fund IEE evaluations for Student is not identified as an issue in this case. Petitioner's failure-to-evaluate claim concerns only the allegation that DCPS "failed to reevaluate" Student in all areas of suspected disabilities. In any event, I find that Petitioner has not met her burden of proof on this issue. DCPS was not obligated to fund IEE evaluations of Student in the absence of notice from Mother that she disagreed with DCPS' 2011 educational or psychological evaluations. Although Mother requested additional testing of Student in her August 2, 2013 due process complaint, there was no evidence that she notified DCPS that she had any disagreement with the agency's evaluations.

2. Did DCPS deny Student a FAPE by failing to provide him with an appropriate IEP following an October 2012 IEP meeting, with measurable goals and objectives, appropriate specialized instruction and related services and a suitable placement to implement the IEP?

Petitioner alleges in her due process complaint that DCPS denied Student a FAPE by failing to provide the student with an appropriate IEP,

- with measurable goals and objectives to assist the Student to benefit from his specialized instructions and related services;
- with appropriate related services;
- with appropriate placements to address Student’s suspected learning and related services disability; and
- With services for all suspected disabilities as requested by the parent.

Revised Due Process Complaint, November 25, 2013. At the prehearing conference, Petitioner’s Counsel clarified that the alleged inappropriate IEP was the October 2012 document.

The IDEA requires that to provide a FAPE, “[t]he IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). At the due process hearing, Petitioner offered no evidence at all concerning whether the October 9, 2012 IEP was, or was not, appropriate. Neither did Petitioner offer the IEP into evidence (except for the first two pages). Petitioner has failed to establish the content of the IEP, much less that it was not reasonably calculated for Student to receive educational benefits. *See Pinto v. District of Columbia*, 938 F.Supp.2d 25, 30 (D.D.C.2013) (“An IEP must be ‘reasonably calculated to enable the child to receive educational benefits’ in order to adequately confer a FAPE upon a given child.” (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982))).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

All relief requested by Petitioner herein is denied.

Date: February 1, 2014

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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