

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
Student Hearing Office
February 11, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: January 31, 2014</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* (“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 January 31, 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 attending a DCPS school (“School A”) where he began attending in August 2013. Prior to attending School A the student attended another DCPS school (“School B”) during school year (“SY”) 2012-2013.

The student has disabilities including right hemiparetic cerebral palsy, a ventriculoperitoneal (“VP”) shut, seizure disorder, asthma, developmental delays in communication and fine and gross motor skills, and vision in only one eye. The student was determined eligible under IDEA in August 2010 with a disability classification of other health impairment (“OHI”).

During its initial evaluation of the student in 2010, DCPS conducted a speech -language (“S/L”) evaluation, a physical therapy (“PT”) evaluation, an occupational therapy (“OT”) evaluation and a psychological. Petitioner alleges the psychological evaluation failed to include cognitive testing. In addition, Petitioner alleges DCPS made no accommodations for the student’s visual impairments during its testing and did not conduct vision or assistive technology assessments.

Petitioner asserts DCPS failed to comprehensively evaluate the student at his triennial re-evaluation. Petitioner asserts the student's triennial re-evaluation(s) was due no later than August 18, 2013, and the student’s parent never agreed that re-evaluation was not necessary, nor did DCPS provide the parent any prior written notice regarding her rights during the re-evaluation. In May 2013 DCPS conducted analyses of existing data (“AED”). The AED included the 2010 DCPS evaluations and classroom observation(s). Petitioner alleges DCPS should have conducted comprehensive reevaluations and asserts a full vision assessment should have been completed.

On September 5, 2013, the parent, by and through counsel, sent an email to DCPS disagreeing with the adequacy of DCPS' evaluations, both the initial evaluations and DCPS' triennial re-evaluation(s) and requested independent educational evaluations of the student at public expense. The parent requested the following independent evaluations: neuropsychological, educational, S/L, PT, OT and assistive technology.

In response to the September 5, 2013, email, DCPS convened an IEP meeting on September 24, 2013. At the meeting DCPS stated that it would not authorize

public funding for the independent educational evaluations. Petitioner asserts DCPS has not authorized the public funding for the independent educational evaluations and did not file a due process complaint to defend its evaluations as required pursuant to 34. C.F.R 300.502.

Petitioner asserts at the September 24, 2013, IEP meeting DCPS agreed to conduct all necessary vision evaluations including a cortical vision impairment assessment and an assessment of the student's vision-related equipment needs. Petitioner asserts that at the time the complaint was filed DCPS had not conducted any of these evaluations.

Petitioner seeks as relief an order directing DCPS to fund the following independent evaluations: neuropsychological, educational, S/L, P T , O T and assistive technology and DCPS funding for all necessary evaluations of the student's vision-related disabilities and needs.

DCPS filed a response to the complaint on December 11, 2013. DCPS denied any alleged denial of a free and appropriate public education ("FAPE"). DCPS specifically alleged that it has not refused to provide reevaluations of the student. Rather, reevaluations were premature until the issue of the student's vision was evaluated and the other evaluations would commence working around the winter holidays.² DCPS agreed to conduct a comprehensive psychological, S/L, OT and PT evaluations once parent signs the appropriate consent forms. DCPS asserted independent evaluations are not warranted because DCPS has not refused to re-evaluate the student.³

A resolution meeting was held December 17, 2013, and the issues were not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on December 27, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) on February 10, 2013.

A pre-hearing conference ("PHC") was held on January 8, 2013, and a pre-hearing conference order was issued January 14, 2014, outlining, inter alia, the issues to be adjudicated.

² By the time of the PHC DCPS had conducted and provided to Petitioner's counsel a three page vision assessment report. Petitioner's counsel asserted the report was not consistent with the assessments the parent requested and that DCPS agreed to conduct.

³ After the PHC and in an email DCPS counsel asserted another defense: that the September 5, 2013, email sent by Petitioner's counsel did not constitute a "502 letter" because it is DCPS' position that there was no evaluation for the triennial. Rather, there was an AED and an AED is not an evaluation to be challenged pursuant to 34 C.F.R 300.502.

ISSUES: ⁴

The issues adjudicated are:

(1) Whether DCPS denied the student a FAPE by failing to provide independent educational evaluations at public expense or file a due process complaint to defend its evaluations pursuant to 34 CFR 300.502 following the September 5, 2013, request from Petitioner disagreeing with DCPS' evaluations and requesting independent educational evaluations.

(2) Whether DCPS denied the student a FAPE by failing to comprehensively re-evaluate the student at its triennial re-evaluation during SY 2012-2013 as required by 34 CFR § 300.303(b)(2) (which includes by reference requirements of §§ 300.304-311), by failing to conduct assessments regarding the student's vision and full re-evaluations: S/L, PT, OT, neuropsychological (including cognitive testing), educational, and assistive technology.

(3) Whether DCPS denied the student a FAPE by violating the parent's procedural rights and right to participate in her child's education by failing to provide prior written notice and required 34 CFR § 300.305(d) notice of rights, regarding the student's triennial re-evaluation.

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 27 and Respondent's Exhibits 1 through 9) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁵

1. The student is _____ attending School A where he began attending in August 2013. During SY 2012-2013 the student attended School B. (Parent's testimony)
2. The student has disabilities including right hemiparetic cerebral palsy, a VP shut, seizure disorder, asthma, developmental delays in communication and fine and gross motor skills, and vision in only one eye. (Parent's testimony, Petitioner's Exhibits 7-1, 7-1, 8-5, 16-2, 19-1, 20-1)

⁴ The alleged violation(s) and/or 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 these were the issue(s) to be adjudicated.

⁵ 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.

3. During its initial evaluation of the student in July 2010 when the student was age three, DCPS conducted the following evaluations: PT, OT and a psychological. (Petitioner's Exhibits 6, 7, 8-9)
4. In its psychological evaluation DCPS attempted a cognitive assessment but was unable to complete it due to the student's fatigue. The evaluation report included a review of prior developmental evaluation completed in January 2010 that demonstrated cognitive delays. (Petitioner's Exhibits 6, 7-1, 7-2, 7-3, 7-4, 8)
5. The student was found eligible pursuant to IDEA with a disability classification of OHI on August 18, 2010, and provided an individualized educational program ("IEP") that was updated on August 29, 2011, and March 7, 2012. The student's IEP prescribed all services outside general education. (Petitioner's Exhibit 12-1, 12-10)
6. In June 2011 DCPS conducted an S/L evaluation of the student. The evaluation confirmed the student's receptive and expressive language delays. The evaluator concluded that the student's delay would "adversely impact his ability to acquire vocabulary and new academic concepts and his abilities to follow classroom instruction to complete tasks, ask and answer appropriate questions to gain information in the general education setting." (Petitioner's Exhibit 9-1, 9-4)
7. In February 2013 DCPS convened an eligibility meeting at School B in which the student's parent participated. DCPS personnel participating included a special education teacher, a physical therapist, a speech language pathologist and an occupational therapist. (Petitioner's Exhibits 3, 4)
8. At the February 20, 2013, meeting DCPS informed the parent that the student's evaluations were outdated and needed to be done because they last completed when he was age three. The parent understood that the student needed a new evaluations to update his IEP goals as some were met and some were still in progress. She understood that an OT, S/L and psychological would be completed to update the IEP. At that meeting the parent signed a form consenting to DCPS evaluating the student to determine if he remained eligible. No one during the meeting stated that new evaluations were not necessary. (Parent's testimony, Petitioner's Exhibit 1)
9. During the February 2013 meeting none of the School B staff seemed to know the student was blind in one eye. They asked for documentation from the doctor regarding his vision to help them figure how his needs could be better met. The parent provided them the information from his doctor. The School B staff stated they would conduct an evaluation of the student's vision and if he needed a vision teacher or therapist one would be provided. Assistive technology was not raised as an issue during that meeting. (Parent's testimony)
10. The student's most recent IEP dated February 2013 prescribes the following services: 23.5 hours specialized instruction outside general education per week, and the following related services all outside general education: 1 hour of behavioral

support per week, 4 hours of OT services per month, 4 hours of S/L therapy per month, 2 hours of PT services per month. (Petitioner's Exhibits 3, 4, 11-1, 11-10)

11. In May 2013, DCPS conducted an AED that included observations of the student and cited the evaluations it had performed during the initial evaluations in 2010. DCPS did not comprehensively reevaluate the student. (Petitioner's Exhibit 5)
12. DCPS' May 2013 AED included a Woodcock Johnson Tests of Achievement Third Edition that indicated the student's overall level of achievement was low. The AED noted that several formal evaluations were warranted: the report stated that an updated S/L evaluation was warranted and that evaluations in the area of emotional/social/behavioral and in the area of fine motor were necessary to obtain additional information to determine eligibility. DCPS conducted none of the formal evaluations that the AED noted were warranted. (Respondent's Exhibit 2-1, 2-3, 2-4, 2-7, 2-9)
13. During the May 2013 meeting the parent found out DCPS had not conducted the evaluations they stated they would conduct during the February 2013 meeting. Had she been informed by DCPS of her rights she would have requested formal evaluations. The team was aware that student would be attending a different school for SY 2013-2014 and expressed a desire that the student's evaluations be completed before he left School B. However, the evaluations were never completed and have not been completed since he began attending School A. (Parent's testimony)
14. On September 5, 2013, the parent, by and through counsel emailed DCPS disagreeing with the adequacy of DCPS' evaluations of the student, both the initial evaluations and DCPS' triennial re-evaluations. The parent requested independent educational evaluations of the student at public expense, specifically: neuropsychological, educational, S/L, PT, OT and assistive technology. (Petitioner's Exhibit 13)
15. In response to the September 5, 2013, email DCPS convened an IEP meeting on September 24, 2013, at School A. The parent attended the meeting along with her counsel. DCPS did not authorize public funding for the independent educational evaluations but agreed to conduct its own evaluations of the student. As of the date the due process complaint was filed (November 27, 2013) DCPS had not conducted the requested evaluations and had not initiated a due process hearing to defend its evaluations. (Respondent's Exhibit 3-1, 3-2, 3-3)
16. At the September 24, 2013, meeting DCPS also represented that it would conduct a vision assessment within two weeks. However, that assessment was not completed prior to the due process complaint being filed. (Parent's testimony)

17. The evaluations that were conducted by DCPS in 2010 were insufficient to determine the student's functioning because they lacked standardized cognitive testing. In addition, the academic testing that was completed was not adequate to understand the student's functioning. The student's IEP present levels have not changed over time and that indicates that he has not made gains and formal assessments were warranted in 2013. A neuropsychological evaluation is warranted for this student because of his VP shut, cerebral palsy and his seizure disorder. The student has a number of conditions that suggest an assistive technology evaluation is appropriate and warranted. Thus, the student is in need of the following evaluations: neuropsychology, S/L, PT, OT, assistive technology. (Witness 1's testimony)⁶

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.

⁶ A clinical psychologist designated as expert in conducting evaluations of students with disabilities expressed her opinion of the inadequacy of DCPS' initial evaluations and the need for formal reevaluation that should have been conducted in 2013.

⁷ 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.

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 DCPS denied the student a free and appropriate public education (FAPE) by failing to provide the independent educational evaluations at public expense or file a due process complaint to defend its evaluations pursuant to 34 CFR 300.502 following the September 5, 2013, request from Petitioner disagreeing with DCPS' evaluations and requesting independent educational evaluations.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that Petitioner disagreed with DCPS reevaluation of the student in 2013 and requested public funding of independent evaluations and DCPS did not, without unnecessary delay, authorize the evaluations or file a due process hearing to defend its evaluations. Consequently, Petitioner is entitled to the requested independent evaluations.

34 C.F.R. 300.502 provides in pertinent part:

- (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. 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.

The evidence demonstrates⁸ that on September 5, 2013, Petitioner disagreed with DCPS reevaluation and asserted DCPS should have conducted comprehensive evaluations in 2013 and requested authorization for public funding of evaluations Petitioner believed should have been conducted as a part of the student's triennial evaluations. DCPS convened an IEP meeting following the request, but did not authorize the independent evaluations. Nor did DCPS file a due process complaint to defend its 2013 reevaluation after nearly ninety days. Despite DCPS assertion that the September 5, 2013, email did constitute a request for independent evaluation under 34 C.F.R 300.502, the evidence clearly demonstrates that that email was such a request. Although DCPS timely convened an IEP meeting it failed to take one of the two required actions

⁸ FOF #s 14, 15

under the cited regulation. The Hearing Officer concludes that the nearly 90 days that elapsed from the September 5, 2013, request and the date the complaint was filed was a significant period of delay and DCPS presented no evidence to the contrary. DCPS' failure to act without unnecessary delay to either authorize the independent evaluations or file a due process complaint entitles Petitioner to the requested evaluations.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to comprehensively re-evaluate the student at its triennial re-evaluation during SY 2012-2013 as required by 34 CFR § 300.303(b)(2) (which includes by reference requirements of §§ 300.304-311), by failing to conduct assessments regarding the student's vision and full re-evaluations: Speech/Language, PT, OT, neuropsychological (including cognitive testing), educational, and assistive technology.

Conclusion: Petitioner sustained the burden of proof by preponderance of the evidence that DCPS failed to conduct triennial evaluations of the student in 2013.

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).

34 C.F.R. § 300.303 makes clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years.

Petitioner filed the current complaint challenging the reevaluation and seeking public funding of the independent evaluations. DCPS put forth no evidence that countered Petitioner's credible evidence and expert testimony that DCPS should have conducted formal reevaluations of the student in 2013 rather than the simple AED it conducted. The evidence demonstrates that DCPS has never assessed the student's cognitive functioning and that in 2013 DCPS acknowledged that

it should conduct a formal S/L evaluation and formal assessments of the student's emotional/behavioral and fine motor functioning.⁹ Consequently, the Hearing Officer concludes that the student was denied a FAPE by DCPS failing to conduct formal comprehensive evaluations as a part of the student's triennial evaluation in 2013. Pursuant to the 34 C.F.R. 300.502 the Hearing Officer directs in the Order below that DCPS fund of the requested independent evaluations.¹⁰

ISSUE 3: Whether DCPS denied the student a FAPE by violating the parent's procedural rights and right to participate in her child's education by failing to provide prior written notice and required 34 CFR § 300.305(d) notice of rights, regarding the student's triennial re-evaluation.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to issue a prior notice to the parent when it failed to complete a comprehensive reevaluation of the student in 2013 or otherwise inform her of her rights regarding the evaluation.

34 C.F.R. 300.305 (d) provides:

- (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of--
 - (i) That determination and the reasons for the determination; and
 - (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

There was sufficient evidence that in 2013 DCPS determined that the student was in need of formal evaluations and in February 2013 the parent provided consent for evaluations to be conducted.¹¹ The parent credibly testified that she was never informed that DCPS would not conduct formal evaluations of the student as a part of his triennial evaluations and or her rights to request formal assessments.¹² DCPS presented no evidence to contradict the parent's testimony, or its own documents that indicated formal assessments of the student were warranted. Consequently, the Hearing Officer concludes Petitioner met the burden of proof on this issue.

⁹ FOF # 12

¹⁰ Although DCPS conducted a vision assessment, because that assessment was conducted after the due process complaint was filed and there was and no evidence presented by DCPS to demonstrate that evaluation met the requirements to fully ascertain the student's vision needs, the Hearing Officer is also granting Petitioner the requested vision assessments.

¹¹ FOF # 8, 12

¹² FOF # 13

ORDER:¹³

DCPS shall within ten school days of the issuance of this Order provide Petitioner authorization to obtain the following independent evaluations at public expense at the DCPS/OSSE approved rates or reasonable market rates for any of the listed evaluations for which DCPS/OSSE does not prescribe a rate:

- Neuropsychological Evaluation
- Educational Evaluation
- Speech-Language Evaluation
- Occupational Therapy
- Physical Therapy
- Assistive Technology
- Cortical Vision Impairment
- Vision equipment/Orientation & Mobility

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

Coles B. Ruff, Esq.
Hearing Officer
Date: February 10, 2014

¹³ 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.