STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

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on behalf of,

Student,
(DOB STARS

Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Case No.
Bruce Ryan, Hearing Officer

Hearing: April 3, 2009
Decided: April 13, 2009

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HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 3, 2009, on behalf of a year old student (the "Student") who resides in the District of Columbia and attends the Petitioner was represented by Donovan Anderson, Esq., and Respondent District of Columbia Public Schools ("DCPS") was represented by Daniel Kim, Esq., Assistant Attorney General for the District of Columbia. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations.

The complaint alleges that DCPS denied the Student a free appropriate public education ("FAPE") by failing to complete required triennial evaluations under 34 C.F.R. §300.303, failing to develop an appropriate individualized education program ("IEP") for the Student, and failing to provide an appropriate placement.

DCPS filed a timely response on March 13, 2009, which "generally denies the allegations that DCPS denied the student a free and appropriate public education ('FAPE')." DCPS further asserts that "the student's IEP is being implemented," and "denies it last evaluated the student in 2005." However, DCPS "admits the student's last IEP review was completed without the benefit of an updated psychological evaluation." With respect to that latter issue, DCPS contends that the student "has not been denied a FAPE as a result of this procedural violation." The response asserted that DCPS "is in the process of completing the requisite evaluation and the MDT is prepared to meet upon the availability of the report."

A Prehearing Conference ("PHC") was held on March 24, 2009. At the March 24 PHC, as an update to DCPS' response, DCPS counsel represented that on 3/23/09 DCPS had issued an independent evaluation ("IEE") authorization letter to Petitioner, authorizing an independent comprehensive psychological evaluation of the student at DCPS expense. In light of the IEE letter, Petitioner's counsel proposed to resolve the complaint through an agreed order under which DCPS would hold an MDT meeting within 20 school days of receiving the results of an independent evaluation, with all other issues reserved by Petitioner including compensatory education. DCPS' counsel requested an opportunity to consider this proposed resolution.

A second PHC was then held on March 26, 2009, at which the parties reported that they were unable to reach an agreement that eliminated the need for a due process hearing. A Prehearing Order was issued that same date. The parent elected for the hearing to be closed. Five-day disclosures were filed by both parties on or about March 27, 2009.

The Due Process Hearing convened on April 3, 2009. At the hearing, six (6) documentary exhibits submitted by Petitioner (identified as 1" through 6") and four (4) documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-4") were admitted into evidence.[1] Petitioner was the only witness who testified at hearing. DCPS presented no witnesses and chose to rest on the record.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*").

II. ISSUE(S) AND REQUESTED RELIEF

As summarized in the Prehearing Order, and as discussed and clarified further at the outset of the Due Process Hearing, the following issues were presented for determination:

a. Whether DCPS failed to conduct a comprehensive triennial evaluation of the Student as required by IDEA;

b. Whether DCPS has failed to develop an appropriate IEP for the Student;

c. Whether DCPS has failed to implement the Student's IEP through his current program/placement at and

d. Whether any of the above failures constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA.

As noted in the Prehearing Order, the relief sought in the complaint includes that DCPS (i) "place and fund the student to attend an appropriate program agreed to and identified by the parent," (ii) "provide the student with compensatory education for the period the student has been without appropriate services," and (iii) reimburse the parent's attorney fees for bringing this matter. However, at the hearing, Petitioner withdrew her claim for compensatory education.

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[1] DCPS objected to Petitioner's amended disclosure submitted April 2, 2009, insofar as it added as an exhibit the 4/2/09 comprehensive psychological evaluation report (ML-6) on the day before the hearing. This objection was overruled. The Hearing Officer concluded that DCPS could not claim unfair surprise and prejudice, given that the exhibit was effectively prompted by DCPS' decisions (a) to issue the IEE letter authorizing the evaluation during the pendency of this proceeding, and (b) not to enter into the agreed order proposed by Petitioner which would have allowed the MDT an opportunity to review the report in advance of any hearing.

In light of DCPS' issuance of the IEE letter, Petitioner now requests an MDT/IEP team meeting within 20 school days to review the updated evaluations, complete a comprehensive reevaluation, review/revise the IEP, and determine appropriate placement. Petitioner's counsel also indicated at hearing that the MDT should discuss and determine whether any compensatory education services may be appropriate.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is The Student has attended the for approximately the past six years pursuant to placement and funding by DCPS, and is currently in the grade. See -1; Petitioner Testimony.

2. The Student's current IEP is dated June 10, 2008. -2. The IEP requires 20 hours per week of specialized instruction and one hour per week of related services (social/emotional counseling). -1; -2 (IEP, page 1). The placement setting is designated as "Combination Gen Ed./resource," because the Student "requires a more therapeutic setting to address his academic needs and to access the general education curriculum." -2 (IEP, page 4). He has a disability classification of Other Health Impairment ("OHI"). -2 (IEP, page 1).

3. The Student's prior IEP dated March 30, 2006,[2] required 26 hours per week of specialized instruction and one hour per week of counseling. DCPS-3. Thus, the current IEP effectively reduced the amount of special education and related services provided to the Student. However, the parent testified that she did not recall any real discussion of this issue at the 6/10/08 MDT/IEP meeting. *See* Petitioner Testimony.

4. DCPS' most recent comprehensive psycho-educational evaluation report on the Student is dated April 5, 2005. -3; DCPS-2. Since that date, DCPS has conducted additional educational testing of the Student (*see* DCPS-3; -2, at IEP p. 2), but has not conducted another comprehensive psycho-educational evaluation.

5. On March 23, 2009, subsequent to the filing of the complaint in this case, DCPS issued an independent evaluation ("IEE") authorization letter to Petitioner, authorizing an independent comprehensive psychological evaluation of the student at DCPS expense. The comprehensive psychological evaluation "includes cognitive, educational, and clinical components as well as a social history." DCPS-1.

6. On April 2, 2009, the day before the hearing, a comprehensive psychological evaluation report was prepared and submitted to DCPS pursuant to the 3/23/09 IEE letter. 6. The report by a licensed clinical psychologist found, *inter alia,* that the updated evaluation "revealed clinically significant levels of excessive worry and depressive symptomatology." 6, at p. 8. There were also indications that the Student "tends to be highly distracted and has difficulty concentrating, " which led to the conclusion that "attention issues are negatively impacting his ability to learn." *Id.* The report stated that "more evidence is needed to substantiate with certainty a diagnosis of ADHD." *Id.* Further evaluation by a pediatric psychiatrist was recommended both to assess the Student's ADHD characteristics and "to deal with [the Student's] depressive symptoms." *Id.*

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[2] There appears to be no record of a 2007 IEP for the Student.

7. Petitioner believes that the Student is performing below grade level academically, despite tutoring being provided by the parent as well as a 3d grade teacher at IDEAL on a volunteer basis. *See* Petitioner Testimony. His progress reports for the current school year show C's in Reading, Language Arts, Social Studies, and Science, and a D in math. -4. Teacher comments indicate continued struggles with concepts and skills in math, but some improvements in reading and language arts. 5.

8. Petitioner believes that the Student is benefiting from the services being provided at IDEAL, including the volunteer one-on-one tutoring being provided by the 3d grade teacher. *See* Petitioner Testimony (cross examination).

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

(1) Whether DCPS failed to conduct a comprehensive triennial evaluation of the Student as required by IDEA.

3. Petitioner primarily claims that DCPS failed to complete a comprehensive triennial evaluation of the Student, as required under 20 U.S.C. §1414 and 34 C.F.R. §300.303. The Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

4. IDEA states in plain language that an LEA "shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary." 34 C.F.R. §300.303 (b)(2); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted "in accordance with §§ 300.304 through 300.311." 34 C.F.R. §300.303(a). This includes the requirement that the evaluation be "sufficiently comprehensive to identify all of the child's special education and related services needs...." *Id.* §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation "must be a complete evaluation of the child in all areas of the child's suspected disability....").

5. In this case, it is undisputed that a comprehensive psycho-educational evaluation of the Student was last completed on April 5, 2005, when the Student was in the 2d grade. The

Student is now four years older and in the grade. However, not until issuing the March 23, 2009 IEE letter – three weeks ***after*** the due process complaint was filed in this case – did DCPS purport to undertake and/or authorize an updated comprehensive psychological evaluation. DCPS has not introduced any evidence to dispute the proposition that such an evaluation was necessary to a "sufficiently comprehensive" reevaluation under the IDEA, as described in *Letter of Tinsley* and *Herbin.* Nor is there any indication in the record that DCPS ever conducted any MDT/IEP team meeting which it characterized as a reevaluation under Section 300.303.

6. Thus, it appears from the record that DCPS has been in violation of IDEA's triennial reevaluation requirement since approximately April 5, 2008, three years after the last comprehensive psychological evaluation. Significantly, this date occurred prior to revision of the Student's IEP on June 10, 2008, so DCPS should have conducted a reevaluation before deciding whether to reduce the hours of specialized instruction. *See* discussion below under Issue (2).

(2) Whether DCPS has failed to develop an appropriate IEP for the Student.

7. Petitioner claims that the Student's current IEP is inappropriate because, inter alia (i) the IEP was not developed using current evaluations, and/or (ii) the student requires more services than those identified in the IEP. The Hearing Officer concludes that, to the limited extent set forth below, Petitioner has carried her burden of proving this claim by a preponderance of the evidence. In all other respects, Petitioner has failed to meet that burden.

8. FAPE is not defined as a potential maximizing education. Generally speaking, a school has met its obligation to provide a FAPE if the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. *See Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The MDT is the right entity to make this determination, not a hearing officer, unless a complainant proves that the team got it wrong.

9. In this case, Petitioner has failed to show by a preponderance of the evidence that the June 10, 2008 IEP is not reasonably calculated to enable the Student to receive meaningful educational benefit. However, as noted above, DCPS failed to conduct a mandated triennial reevaluation of the Student prior to the 6/10/08 IEP revision, which reduced the number of hours of specialized instruction. This was like putting the "cart before the horse," since the results of the reevaluation (including the comprehensive psychological evaluation that DCPS recently authorized and obtained) may well inform the MDT's judgment concerning whether such changes are or are not appropriate. The MDT should therefore reevaluate the appropriate level of services in light of the updated psychological.

(3) Whether DCPS has failed to implement the Student's IEP through his current program/placement at IDEAL.

10. Petitioner next claims that DCPS has failed to implement the IEP as written through the current placement/setting at IDEAL. The Hearing Officer concludes that Petitioner has not carried her burden of proof on this issue, as she failed to present any specific evidence that DCPS has not provided the services required under the current IEP.

11. Petitioner testified only generally that some teachers with whom she spoke "did not really know what was going on," and that she was "not sure" if counseling services were

"still happening" on a regular basis. Petitioner Testimony. Moreover, on cross examination, Petitioner conceded that she had never talked with IDEAL's Special Education Coordinator about any concerns she had with the Student's not receiving services, either during the current school year or the 2007-08 school year. *Id.*

(4) Whether any of the above failures constitutes a denial of FAPE or otherwise entitles Petitioner to relief under IDEA.

12. The failure to complete a warranted evaluation may, in appropriate cases, constitute a substantive deprivation of FAPE. *See, e.g., Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008). As the *Harris* court noted, "[t]he IDEA is replete with provisions emphasizing the necessity of monitoring the IEP for revision purposes," and thus "such inaction jeopardizes the whole intent of Congress' objectives in enacting the IDEA." 561 F. Supp. 2d at 68-69. "In view of the centrality of the role of the IEP in affording appropriate education..., Congress explicitly provided the frequent and thorough monitoring and revising of the program." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing* 20 U.S.C. §1414).

13. Under the circumstances of this case, DCPS' failure to conduct a timely triennial evaluation, like the failure to act on a request for an independent evaluation in *Harris*, is not a "mere procedural inadequacy,"561 F. Supp. 2d at 68, but rather may constitute a substantive denial of FAPE. [3]

14. Alternatively, even if DCPS' failure were viewed only as a "procedural violation" under *Lesesne v. DC,* 447 F.3d 828, 834 (D.C. Cir. 2006), such procedural inadequacies in this case have impeded the student's right to a FAPE. The student's MDT team has not had the benefit of an updated comprehensive psychological evaluation when it met to review and revise the current IEP in June 2008. Thus, DCPS' failure to respond more quickly "has certainly compromised the effectiveness of the IDEA as applied to [the student], and it thereby constitutes a deprivation of FAPE." *Harris,* 561 F. Supp. 2d at 69. Moreover, the failure has significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student by effectively frustrating further input from the parent as to how the evaluations may affect the educational needs of the child and/or the development of appropriate programming to address those needs. *See* 20 U.S.C. §1415(f)(E)(ii); 34 C.F.R. §§300.305(a)(2), 300.324(b)(1)(ii)(C), 300.513(a)(2)(i), (ii).

15. Finally, as 34 C.F.R. §300.513(a)(3) and the U.S. Department of Education's discussion of the rules make clear, "Hearing Officers continue to have the discretion to...make rulings on matters *in addition to those concerning the provision of FAPE*, such as the matters mentioned in §300.507(a)(1)," which specifically include matters relating to the evaluation and

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[3] DCPS disagrees, arguing that there is no such thing as a "per se denial of FAPE" under IDEA, and thus Petitioner must show substantive harm to the Student as a result of its failure to conduct a timely triennial reevaluation, which it characterizes as a "procedural violation." DCPS' Closing Argument, p. 4, *citing R.S. v.District of Columbia,* No. 03-1811 (D.D.C. Oct. 1, 2004) (Magistrate Judge). In contrast to the situation in *R.S.*, here the results of the recently completed independent comprehensive psychological evaluation strongly suggest that the violation may be more than "technical in nature"(slip op. at 8) and the MDT does not appear to have conducted any review or made any determination that no additional data was needed (*id.* at 11). In any event, the Hearing Officer finds it unnecessary to resolve this particular question in this case, given his rulings in Paragraphs 14 and 15 above (which fully support the relief granted), and Petitioner's withdrawal of her claim for compensatory education as a remedy for denial of FAPE.

reevaluation of a child with a disability. 71 *Fed. Reg*. 46,707 (Aug. 14, 2006) (emphasis added). This is consistent with the central role of evaluations and reevaluations under IDEA, as recognized in *Harris* and other decisions. Here, the Hearing Officer would exercise his discretion to find a statutory violation of the triennial reevaluation requirements, regardless whether or not such violation constitutes a denial of FAPE.

C. Relief

16. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23.

17. The Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) adjudicated herein. As requested by Petitioner, the relief primarily consists of ordering an MDT/IEP team meeting to review the recently completed independent comprehensive psychological evaluation, and otherwise to complete the required triennial reevaluation process under Section 300.303.[4]

V. ORDER

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

1. Within **20 school days** of this Order, DCPS shall convene a meeting of the Student's MDT/IEP team for the purpose of conducting a comprehensive reevaluation of the Student pursuant to 34 C.F.R. §300.303. At this meeting, the MDT/IEP team shall (a) review the report of comprehensive psychological evaluation dated April 2, 2009, (b) determine whether any additional evaluations or assessments are needed, (c) review and revise the student's IEP as appropriate, and (d) consider any other information or purposes deemed appropriate.
2. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Donovan Anderson, Esq., via facsimile (202-610-1881), or via email (Donovan.Anderson@donovananderson.com).
3. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.

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[4] As part of reviewing and revising the IEP, as appropriate, the MDT may also choose to discuss and determine whether any additional services are required to meet the unique needs of the student in light of any past failures or violations, as suggested by Petitioner. *See, e.g., Gregory-Rivas v. District of Columbia*, 108 LRP 51949 (D.D.C. 2008), slip op. at 2-4

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

Dated: April 13, 2009

/s/

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

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