

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>June 25, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq.</p> <p>Counsel for DCPS: Laura George, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

II. PROCEDURAL BACKGROUND

On May 13, 2009, Petitioner filed an Administrative Due Process Complaint Notice (“Complaint”) against the District of Columbia Public Schools (“DCPS”), alleging that DCPS denied Student a free appropriate public education by failing to identify and determine Student eligible for special education services.

The Student Hearing Office (“SHO”) issued a Due Process Hearing Notice that set a prehearing conference date and provisionally scheduled a due process hearing. However, after the SHO’s May 15, 2009 receipt of DCPS’s waiver of the resolution session for this case, the hearing officer placed the case on a 45-day timeline and rescheduled the prehearing conference and due process hearing dates to June 3, 2009 at 9:30 am and June 15, 2009 at 11:00 am, respectively.

On May 22, 2009, DCPS filed District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint Notice. In its Response, DCPS asserted that Student had been given authorization to obtain the independent evaluations listed on his November 21, 2008 Student Evaluation Plan, and that the multidisciplinary team (“MDT”) would reconvene to review the evaluations, discuss and determine Student’s eligibility for special education services, and, if appropriate, develop an individualized educational program (“IEP”).

On May 27, 2009, the hearing officer issued a Prehearing Conference Letter, that confirmed the date and time of the June 3, 2009 prehearing conference and set forth the agenda for the conference.

On June 3, 2009, the hearing officer convened the prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the course of the hearing, the party representatives and the hearing officer agreed that the only issue to be addressed at the due processing hearing was whether or not Student requires a neuropsychological evaluation. To that end, the hearing officer instructed Petitioner’s counsel to ensure that Student’s independent psychological evaluator would be available to testify, either in person or by telephone, at the due process hearing for this case. On June 10, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

On June 8, 2009, Petitioner disclosed nine potential witnesses and twenty-one documents (hereinafter Petitioner’s Exhibits 1 – 21). On June 9, 2009, DCPS disclosed a list of three potential witnesses.

The hearing officer convened the due process hearing on June 15, 2009. Opening statements were delayed, and ultimately combined with closing arguments, to accommodate the schedule of HO Decision/Case

Student's independent evaluator. Petitioner's documents and DCPS's witness list were admitted into the record without objection, Petitioner presented the testimony of Student's independent psychological evaluator and Parent, and then, with Petitioner's agreement, DCPS was allowed to present testimony from an undisclosed DCPS school psychologist, who testified solely as a fact witness. After the parties made their closing arguments, the hearing officer brought the proceeding to a close.

III. ISSUE(S)

1. Does Student require a neuropsychological evaluation?

IV. FINDINGS OF FACT

1. Student is _____ years old, and he completed _____ grade at his current placement, which is a charter school, during the 2008/09 school year.²
2. On November 17, 2008, Parent submitted a written request for evaluations to the grade lead teacher/math teacher at Student's school. In the letter, Parent stated that she was concerned about Student's educational progress, and Parent requested "a comprehensive assessment" followed by an IEP meeting for Student.³
3. On November 21, 2008, Student's school convened a multidisciplinary team ("MDT") meeting to review Student's progress, discuss any concerns, and develop a Student Evaluation Plan ("SEP"). Parent's primary concern was that Student struggles to retain information, to attend to tasks, to complete homework, and to study for assessments. Parent also stated that Student suffered a concussion when he was hit by a motorcycle in third grade, and since that time, he has struggled with his academics and with retaining information.

Student's general education teacher was also concerned that Student struggles to retain information, even though he is able to comprehend the information. The teacher indicated that Student works very hard in class, but he struggles with independent work, transitions, and remaining attentive.

The MDT developed an SEP that called for a psychological evaluation to rule out ADHD, a request for the psychological evaluator to make a recommendation as to whether a speech/language evaluation was indicated, and an educational evaluation. Parent signed a Consent form authorizing DCPS to conduct the initial evaluation of Student.⁴

4. On December 10, 2008, Student's school administered the Woodcock-Johnson III Tests of Achievement ("WJ-III") to him. Based on his performance on the assessment, Student

² See Complaint.

³ Petitioner's Exhibit 4.

⁴ Petitioner's Exhibits 5-7.

scored at the following grade equivalencies (“GE”): broad reading – 5.8 GE; broad math – 6.3 GE; broad written language – 7.0 GE; math calculation skills – 8.7 GE; written expression – 7.6 GE; academic skills – 6.7 GE; academic fluency – 7.7 GE; and academic applications – 4.0.⁵

5. By letters from Student’s school dated February 20, 2009 and April 9, 2009, Parent was advised that Student was performing below his school’s expectations, with the result that he was in danger of failing some of his classes and being retained.⁶

6. A social worker produced an undated and unsigned Social History report for Student based on evaluations/interviews conducted in January and April of 2009. In addition to interviewing Parent and Student, this social worker also interviewed Student’s social studies, science, and math teachers.

Student’s social studies teacher reported that Student works hard and is eager to perform well, but he struggles with recalling information, replicating ideas and manipulating information. This teacher also noted that Student does not always know when he does not understand some of the academic material.

Student’s science teacher reported that Student is very motivated to learn and diligently attempts to perform well; however, Student struggles with comprehending grade level text and with working on independent assignments with accuracy. Moreover, Student’s attention declines during group work.

Student’s math teacher reported that Student struggles in math but strives to be a good student and participates in class. He is easily distracted, has difficulty with multiple-step problems, has difficulty with retention of information, and struggles to show mastery of a skill shortly after it has been taught, even if he was able to show complete mastery at the time of the lesson.

The evaluator noted that in addition to the academic concerns about Student, Student had also begun to exhibit unacceptable behaviors. The evaluator recommended continued small group instruction, peer-to-peer tutoring, a male mentor, and community-based counseling.⁷

7. On May 13, 2009, Petitioner filed the Complaint that initiated this action.⁸
8. On May 14, 2009, DCPS issued a letter authorizing Parent to obtain “an independent comprehensive cognitive, educational, clinical, social history, BIP and FBA at the expense of DCPS.”⁹
9. By letter dated May 15, 2009, Petitioner’s counsel advised DCPS that Parent would proceed with the authorized independent evaluations, even though DCPS’s authorization

⁵ Petitioner’s Exhibit 18.

⁶ Petitioner’s Exhibits 15, 16.

⁷ Petitioner’s Exhibit 20.

⁸ See Complaint.

⁹ Petitioner’s Exhibit 8.

letter failed to address several additional evaluations Parent requested in the Complaint.¹⁰

10. By letter dated June 9, 2009, Petitioner's counsel forwarded to DCPS copies of Student's independent social history, comprehensive psychological, and educational evaluation reports. The social history evaluation took place on June 2, 2009 and consisted solely of an interview with Parent and a record review.

The comprehensive psychological evaluation took place on June 1, 2009 and utilized the following evaluation methods and data collection tools: records review; Wechsler Intelligence Scale for Children, Fourth Edition ("WISC-IV"); Behavior Assessment System for Children, Second Edition ("BASC-2"), Parent Report-Adolescent; BASC 2, Teacher Report-Adolescent; BASC 2, Self Report-Adolescent; Children's Depression Inventory, Long; Bender Visual Motor Gestalt Test (emotional indicators); Draw-A-Person Test; Rorschach Inkblot Technique, Exner Scoring System; Clinical Interview; and Observations. Student's performance on the WISC-IV revealed that his general cognitive, verbal reasoning, and nonverbal reasoning abilities are in the Average range, while his working memory abilities are in the Low Average range. Based on the results of all the assessments administered, the evaluator diagnosed, *inter alia*, a Reading Disorder, a Learning Disorder not otherwise specified, and Educational Problems. The evaluator also made 24 specific recommendations for Student, including a neuropsychological evaluation to further explore Student's attention and learning problems.

The educational evaluation took place on May 29, 2009 and utilized the following assessment methods: record review, Student interview; Parent interview; science teacher interview; science classroom observation; behavioral observations during testing; WJ-III, Form B; Key Math III, Form B; Test of Word Reading Efficiency; and Test of Written Language, 4th Edition. The evaluator outlined Student's academic strengths and weaknesses, drafted suggested IEP goals and objectives, and recommended certain modifications, accommodations, and other resources/evaluations, including a speech/language/auditory processing assessment, an occupational therapy evaluation, and an assistive technology evaluation.¹¹

11. The independent psychological evaluator recommended a neuropsychological evaluation for Student because Student performed in the Average range across the board on the assessments administered during his June 1st evaluation, he does not have emotional issues, he has no history of neglect or exposure to drugs in utero, but his teachers indicate that he cannot retain any information and he is failing. Indeed, the teachers indicated that Student will learn something on Monday, but by Wednesday, Student cannot remember the information and it seems as if he never learned it. This suggests a traumatic brain injury, which is consistent with Parent's report that Student was hit by a motorcycle in third grade, and a neuropsychological evaluation would help to determine exactly what are Student's cognitive functioning issues.¹²

¹⁰ Petitioner's Exhibit 9.

¹¹ Petitioner's Exhibit 21.

¹² Testimony of Independent Psychological Evaluator.
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12. During Student's November 2008 SEP meeting, Student's school asked Parent to take Student to see a neurologist. Parent took Student to see a neurologist at Children's Hospital. The neurologist interviewed Parent and Student, but stated that he could not conduct a neuropsychological evaluation for Student because the evaluation was too expensive. The neurologist advised Parent to have Student's school conduct the evaluation. Parent asked her insurance company to pay for the evaluation, but the company would not do so. The insurance company advised Parent that it would cost her \$ 4,900 to have the evaluation conducted.¹³
13. A neuropsychological evaluation examines the relationship between behavior and brain function. The evaluation explores the processes of the brain, including how it receives information, how it processes and acts on information, and how the brain processes affect learning, communication, planning, organization, and other kinds of behavior. There is no "standard" neuropsychological evaluation. The assessments to be administered vary with the questions to be addressed. Although there are certain assessments that are specifically designed for neuropsychological evaluations, there are other assessments that may be used in both comprehensive psychological and neuropsychological evaluations. Indeed, it is possible for a comprehensive psychological evaluation to ultimately turn into a neuropsychological evaluation when the results of the assessments administered during the comprehensive psychological produce such confusing and/or conflicting results that additional assessments are indicated.¹⁴
14. DCPS's official position is that neuropsychological evaluations are not necessary for educational planning purposes because comprehensive psychological evaluations are sufficient to provide the information necessary for educational planning purposes. Even where a student has memory and retention issues, DCPS believes that a comprehensive psychological evaluation can be sufficient if the evaluator knows the Student's issues and uses appropriate instruments to assess those areas.¹⁵
15. In Student's case, where there is a suspicion of traumatic brain injury, the independent psychological evaluator should have utilized assessments that explored planning and executive functioning. Moreover, given Student's memory, retention and attention issues, the evaluator should have also administered assessments that explore short-term memory, long-term memory, retrieval, tactile memory, attention and sequencing.¹⁶ Unfortunately, Student's independent comprehensive psychological evaluation did not explore all of these areas.
16. Student could also benefit from occupational therapy, speech/language, and assistive technology evaluations.¹⁷

¹³ Testimony of Parent.

¹⁴ Testimony of DCPS School Psychologist.

¹⁵ Testimony of DCPS School Psychologist.

¹⁶ Testimony of DCPS School Psychologist.

¹⁷ Testimony of DCPS School Psychologist.

V. CONCLUSIONS OF LAW

The sole issue to be determined in this case is whether a neuropsychological evaluation is indicated for Student. As the party seeking relief in this action, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

IDEIA requires a public agency conducting an evaluation to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child being evaluated. 34 C.F.R. § 300.304(b)(1). The 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. 34 C.F.R. § 300.304(c)(4). The public agency must also ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6).

The evidence in this case proves that Student works very hard in class but is nevertheless struggling academically, primarily because of his severe retention problems. Student has also exhibited problems with attention, comprehension, working independently, and manipulating information. Student's independent psychological evaluator recommended that Student receive a neuropsychological evaluation to determine exactly what are his cognitive functioning issues. Moreover, even DCPS's school psychologist testified that Student's comprehensive psychological evaluation should have included assessments that explore executive functioning, memory, attention and sequencing. As the comprehensive psychological evaluation did not include such assessments and it is still unclear exactly why Student has such severe retention problems and why his academic performance falls so short of what would be expected given his Average general cognitive abilities, the hearing officer concludes that a neuropsychological evaluation is indicated for Student under the facts of this case.¹⁸

Moreover, based on the documented recommendations that have been made for Student, the hearing officer strongly encourages DCPS to consider providing Student with occupational therapy, assistive technology, and speech/language evaluations.

¹⁸ The hearing officer acknowledges DCPS's argument, made at the due process hearing, that any suspicion of traumatic brain injury ("TBI") in this case is due solely to Parent's uncorroborated testimony since Parent has failed to produce medical records supporting her assertion that Student suffered a concussion as a result of being hit by a motorcycle when he was younger. However, because Student's severe retention and attention problems are clearly undermining his academic performance, and the evaluations that have been authorized and conducted to date have failed to fully examine those problems, the outcome of this case does not turn on whether or not Student is suffering from TBI.

VI. SUMMARY OF DECISION

The hearing officer determined that a neuropsychological evaluation is indicated for Student under the facts of this case.

VII. ORDER

1. Within fifteen business days of the issuance of this HOD and Order, DCPS shall conduct a neuropsychological evaluation of Student that consists of assessments designed to explore planning, organization, executive functioning, short-term, long-term and tactile memory, retrieval of information, attention, sequencing, and how Student's brain processes affect learning and communication. To the extent appropriate, the evaluation shall be expanded to include other instruments/assessments indicated by the results of the assessments ordered herein.
2. In the event DCPS fails to conduct the evaluation ordered in Paragraph 1, *supra*, within the timeframe specified therein, Parent shall have the right to obtain said evaluation from an independent neuropsychological evaluator at DCPS's expense.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 25th day of June, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).