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<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: August 10, 2010</p> <p>Date of Complaint: June 7, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento C.R. Hill, Esq. 1220 L Street, NW #700 Washington, DC 20005</p> <p>Counsel for DCPS: Daniel McCall, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

A Due Process Hearing was convened August 10, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 5B.² The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed on June 7, 2010, alleging the issue(s) outlined below. A pre-hearing conference was conducted on July 26, 2010, and a pre-hearing order was issued on July 29, 2010.

Petitioner alleges the student was involved in a car accident a few years ago and was, according to the parent, hospitalized with injuries. Petitioner alleges the psychologist at the student's current school raised concern at a recent IEP meeting the student has apparently failed to make any academic progress and as a result she believes that a neuropsychological evaluation is warranted and in light of possible brain injury sustained in the alleged car accident a neurological evaluation should be conducted prior to the neuropsychological.

Petitioner filed a previous complaint that was withdrawn so that Petitioner's counsel could conduct further research to determine if a neurological evaluation had ever been conducted at the time of the alleged car accident. Petitioner's counsel represents that after research no such records have been found. Consequently, the complaint was re-filed to obtain the requested relief of DCPS funding of a neurological evaluation. No compensatory education is sought.

At the resolution session for this complaint DCPS requested written consent from the parent to conduct a neuropsychological evaluation; the parent granted consent.

DCPS' position is that the neurological evaluation is medical in nature and there is no indication that such an evaluation is warranted to determine and provide for the educational needs of the student. Nonetheless, DCPS will consider any and all medical records the parent provides in identifying and providing for the educational needs of the student.

² Counsel for Petitioner was present; counsel for DCPS was not. Counsel for DCPS called the Hearing Officer the day before the hearing and stated he had sent a motion for continuance; however, Petitioner on the day of the hearing had not been served with the motion and the Hearing Officer had not been presented with such a motion upon checking. The Hearing Officer attempted to contact DCPS counsel by phone, both office and mobile, and was unable to reach him and left messages. The Hearing Officer proceeded with the hearing on the record.

ISSUE(S): ³

The issue adjudicated is: Whether DCPS denied the student a FAPE by refusing to conduct or agreeing to fund a neurological evaluation of the student?

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the testimony of the witness and the documents submitted in the Petitioner's disclosures (Petitioner's Exhibits 1-18) all of which were admitted into the record. Following the hearing at the request of the Hearing Officer Petitioner's counsel submitted documentation as to the anticipated cost of the requested evaluation. That correspondence is included in the record of the proceeding.⁴

FINDINGS OF FACT ⁵:

1. The student is a _____ year-old resident of the District of Columbia and attends "School A" a private full time, separate, special education program located in Washington DC. The student's tuition at School A is funded by DCPS. The student has been determined to be a child with a disability pursuant to IDEA. He has disability classifications of Emotional Disturbance ("ED") and Other Health Impairment ("OHI"). (Petitioner's Exhibit 9)
2. A multidisciplinary team ("MDT") meeting was held for the student on March 16, 2010. The purpose of the meeting was to, inter alia, review several evaluations recently conducted of the student and to review and revise the student's individualized educational program ("IEP") as necessary. (Petitioner's Exhibit 10)
3. At the March 16, 2010, IEP/MDT meeting the parent's educational advocate attended the meeting on the parent's behalf. Members of the team included the student's teachers, related service providers, the school's psychologist and the DCPS representative. During the meeting the team reviewed the student's recent psychological evaluation. The evaluation recommended that an adaptive assessment and a neuropsychological evaluation be conducted. The school's psychologist suggested to the team that a neurological be conducted prior to the neuropsychological because the student's IQ had dropped significantly, he was regressing academically and because there was history of possible brain injury. The DCPS representative agreed to the evaluations save the neurological evaluation as it was considered a medical evaluation. _____ testimony, Petitioner's Exhibits 10 & 13)

³ The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

⁴ This document was admitted post hearing as Hearing Officer Exhibit 1

⁵ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

4. DCPS informed the parent, through his educational advocate, that the parent should obtain the neurological assessment. The team prepared a student evaluation plan to conduct the other recommended evaluations (neuropsychological and adaptive). (Petitioner's Exhibits 10, 11 & 12)
5. On or about March 17, 2010, the parent, by and through counsel, wrote to DCPS requesting DCPS administer the neurological assessment. As a result of no response to the request Petitioner filed the current due process complaint. (Petitioner's Exhibits 17 & 2)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁶ *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.

Issue: Whether DCPS denied the student a FAPE by refusing to conduct or agreeing to fund a neurological evaluation of the student? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The Individuals with Disabilities Education Act requires all states and the District of Columbia to provide resident children with disabilities a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(a)(1). A FAPE consists of "special education and related services" that, among other things, "include an appropriate ... education" and "are provided in conformity with the individualized education program required" by the statute. 20 U.S.C. §§ 1401(9)(C)-(D)

IDEA attempts to guarantee children with disabilities a FAPE by requiring states and the District of Columbia to institute a variety of detailed procedures. "[T]he primary vehicle for

⁶ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

implementing" the goals of the statute "is the individualized education program, which the IDEA mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The individualized education program, or IEP, is a written document that describes the impact of the child's disabilities, annual "academic and functional" goals for the child, and the forms of individualized education and support that will be provided to the child in view of his disabilities and in order to aid his developmental and academic progress. See 20 U.S.C. § 1414(d)(1)(A). Because the IEP must be "tailored to the unique needs" of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities. See 20 U.S.C. §§ 1414(b)-(c). Furthermore, the school district must take care to generate that new information as needed, through assessments and observations of the child. See 20 U.S.C. §§ 1414(c)(1)-(2).

Pursuant to 34 C.F.R. § 300.304(b):

DCPS shall, in conducting evaluation of students:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--
 - (i) Whether the child is a child with a disability under Sec. 300.8; and
 - (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Pursuant to 34 C.F.R. § 300.304 (c)(4) and (6):

DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...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."

Pursuant to 34 CFR 300.305:

Upon completion of the administration of assessments and other evaluation measures--

- (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in Sec. 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

- (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.
- (b) Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part--
 - (1) If the determinant factor for that determination is--
 - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
 - (ii) Lack of appropriate instruction in math; or
 - (iii) Limited English proficiency; and
 - (2) If the child does not otherwise meet the eligibility criteria under Sec. 300.8(a).
- (c) Procedures for determining eligibility and educational need.
 - (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must-- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered.
 - (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1414(b)(4) and (5))

In this case, staff of the student's current school recommended a neurological assessment be conducted prior to a neuropsychological assessment in order to determine possible brain injury from a car accident in which the student was involved. At the MDT meeting, DCPS advised the parent to get the assessment done at his own expense as this was not an evaluation DCPS would consider conducting. However, the rest of the IEP team was in agreement the neurological assessment was warranted to determine whether the student's cognitive and academic regression was caused by possible brain injury and what impact this might have on the student's educational functioning. There was no evidence presented contradicting the documentation of the needed evaluation and the credible testimony of the educational advocate. Thus, Petitioner sustained the burden or proof by a preponderance of the evidence. The Hearing Officer concludes that DCPS' refusal and failure to conduct or approve funding of the evaluation denied the student a free and appropriate public education pursuant the requirements of IDEA and case law cited above.

ORDER:

1. DCPS shall fund and the parent shall obtain an independent neurological assessment at a cost not to exceed
2. DCPS shall, within thirty (30) calendar days its receipt of the completed neurological evaluation report and the neuropsychological evaluation report, reconvene the student's MDT/IEP meeting to review the new assessment data and revise/update the student's IEP as necessary.

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: August 16, 2010