DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0444

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
2012 SEP -1 AM 9:49

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a -year old male, who attends a DCPS school. On June 20, 2012, Petitioner filed a Complaint against DCPS, alleging that (1) DCPS failed to comply with 34 C.F.R. § 300.303(b)(2) by failing to conduct updated psychoeducational and Vineland assessments, (2) failing to provide Student an appropriate IEP due to the lack of updated psychoeducational and Vineland assessments, and (3) failing to provide Student with appropriate services because the services being provided are not based upon updated psychoeducational and Vineland assessments. As relief for these alleged denials of FAPE, Petitioner requested funding for independent psychoeducational/comprehensive psychological and Vineland assessments, and a meeting within 10 days of receipt of the assessment reports to review the assessments, and to review and revise the IEP to reflect the updated information from the assessments.

On July 10, 2012, DCPS filed its Response, which asserted that (1) Student was assessed in November 2010 using work samples, observations, response to intervention information with tracker sheet information, (2) Student was assessed in math and reading during school year ("SY") 2010/11 using the Brigance informal assessment and continues to be assessed in his classroom, and (3) Student is exceedingly absent, which plays a significant role in his lack of appropriate progress.

The parties concluded the Resolution Meeting process by participating in a resolution session on July 3, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day

resolution period.[1] Therefore, the 45-day timeline began on July 21, 2012 and will end on September 3, 2012, which is the HOD deadline.

On August 9, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on August 9, 2012.

By their respective letters dated August 21, 2012, Petitioner disclosed seventeen documents (Petitioner's Exhibits 1-17), and DCPS disclosed twelve documents (Respondent's Exhibits 1 – 12).

The hearing officer convened the due process hearing on August 28, 2012, as scheduled.[2] Both parties' exhibits were admitted without objection. The hearing officer then received opening statements, testimonial evidence, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 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.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS deny Student a FAPE under 34 C.F.R. § 300.303(b)(2) by failing to conduct Vineland and updated psychoeducational assessments?

2. Did DCPS deny Student a FAPE by failing to provide Student with an appropriate IEP due to the lack of Vineland and updated psychoeducational assessments?

3. Did DCPS deny Student a FAPE by failing to provide Student with appropriate services because the services being provided are not based upon Vineland and updated psychoeducational assessments?

FINDINGS OF FACT[3]

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

[1] The parties did not submit a DPC disposition form, but both counsel represented the RSM was held on the date indicated and Petitioner's counsel represented there was no agreement and no change to the timeline.
[2] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[3] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

1. Student is a year old male, who currently attends a DCPS school.[4]

2. Student's most recent psychoeducational evaluation was conducted more than 8 years ago on February 4, 2004, with an addendum from April 30, 2004. Student was 6 years old and in the 1st grade at the time the psychoeducational evaluation was conducted. The evaluation included the administration of the following tests: Woodcock Johnson Test of Cognitive Abilities, Woodcock Johnson Test of Academic Abilities, Developmental Test of Visual Motor Integration, and Conners' Parent Rating Scale-Revised. Student's performance on the tests revealed that his overall intellectual ability, verbal ability, thinking ability, cognitive efficiency, and academic skills were in the very low range, while his oral language skills, math calculation skills, and written language and written expression skills were in the low range. The evaluator recommended, *inter alia*, the administration of a Vineland to rule out mild mental retardation if cognitive delays persisted.[5]

3. A review of Student's administrative case file reveals that Student never received a Vineland assessment. Nevertheless, Student's current IEP dated June 20, 2012, as well as his previous IEPs issued in 2011, 2010, 2008, 2007, and 2006 list Student's disability as mental retardation/intellectually disability ("ID").[6]

4. A psychoeducational evaluation is a comprehensive evaluation that includes cognitive, academic and social/emotional testing. A Vineland assessment is an adaptive measure that determines the student's functioning in various domains, including socialization and personal care. A Vineland is often used when a cognitive test reveals that a student's cognitive scores are in the deficient range to determine whether the student is ID because the cognitive test alone does not determine ID.[7]

5. Since Student was initially diagnosed with ID (formerly called mental retardation) at or about the age of 6, a current Vineland assessment is needed to confirm the diagnosis and its appropriateness moving forward.[8]

6. Prior to the start of SY 2012/13, DCPS determined to move Student from the DCPS school he was attending to his neighborhood school primarily due to behavior issues, as well as due to poor attendance and failing grades.[9] Given Student's behavioral and academic issues in his previous DCPS school, an updated comprehensive psychological evaluation would have been useful because it would have provided insight into Student's social emotional issues and may have resulted in a recommendation for a behavior intervention plan to address Student's behavior issues.[10]

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[4] *See* Complaint at 1; testimony of Parent.
[5] Petitioner's Exhibits 2 and 3; testimony of psychologist.
[6] Petitioner's Exhibits 4 – 9 and 11; testimony of psychologist.
[7] Testimony of psychologist.
[8] Testimony of psychologist.
[9] Testimony of Parent; testimony of SEC; *see* Respondent's Exhibit 12 at 6.
[10] Testimony of psychologist.

7. Student's Progress Reports for SY 2011/12 indicate that Student received passing grades in Physical Education and "From Bach to Rap," but otherwise earned primarily Fs and Ds.[11]

8. Student's current IEP is dated May 10, 2012. The IEP requires Student to receive 25 hours per week of specialized instruction and 30 minutes per week of behavioral support services. The IEP indicates that the present level of educational performance and baseline data for Student in the academic area of mathematics were derived from a May 7, 2012 administration of the Woodcock Johnson Test of Achievement Form A; the present level of educational performance and baseline data for Student in the academic area of reading were derived from April 30, 2012 and May 2, 2012 administrations of the Woodcock Johnson Test of Achievement Form A; and the baseline data for Student in the academic area of written expression was derived from a May 1, 2012 administration of the Woodcock Johnson Test, while the present level of educational performance for written expression states that Student can write simple sentences using one syllable words at a kindergarten level. The IEP contains a detailed report of Student's present educational level of performance in the area of emotional, social and behavioral development based on the writer's actual experience with Student and reports frequently provided to the writer by other school personnel; however, the baseline data in that section states that Student's baseline for the targeted behaviors will be his documented level of behavior throughout the first half of the school year.[12]

9. Although Petitioner's counsel sent DCPS a detailed letter on June 5, 2012 requesting copies of Student's academic records, including his standardized test scores for the last 2-3 school years, DCPS has not provided Petitioner with a copy of the Woodcock Johnson test results referenced in the current IEP.[13]

10. Student's March 8, 2011 and July 6, 2011 IEPs relied upon a Brigance CIBS2 informal assessment to determine Student's present level of educational performance in the academic areas of mathematics and reading. However, the date of the informal assessment is not stated in the IEP, and the administrative record does not include a copy of the assessment results.[14]

11. DCPS's failure to provide Parent with updated evaluative data for Student has prevented Parent from making appropriate decisions about Student's education because she lacks information regarding Student's current level of performance.[15]

12. The Brigance is an informal assessment that tests basic skills in academic areas such as reading, writing and math. The Brigance is less comprehensive than the Woodcock Johnson or Wechsler Individual Achievement Tests. As a result, the Brigance is

[11] Respondent's Exhibit 6; Petitioner's Exhibits 13-15.
[12] Respondent's Exhibit 6; Petitioner's Exhibit 5.
[13] *See* Petitioner's Exhibit 16.
[14] *See* Respondent's Exhibits 1-2; Petitioner's Exhibit 5.
[15] Testimony of Parent.

normally used for students in the general population, while the Woodcock Johnson and Wechsler are normally used for children with disabilities.[16]

13. DCPS convened an IEP meeting for Student on May 10, 2012, which Parent did not attend because she wanted her counsel to be in attendance at any IEP meeting conducted for Student.[17] During the meeting, the IEP team did not discuss the possibility of conducting additional evaluations for Student because there was no change in his disability and the behaviors he was exhibiting were the same as his historical behaviors.[18]

14. Petitioner failed to present any evidence at all about the appropriateness of the services Student is receiving pursuant to his current IEP.

CONCLUSIONS OF LAW

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

1. Failure to Conduct Updated Psychoeducational and Vineland Assessments

Under IDEA, a public agency must ensure that a reevaluation of each child with a disability is conducted at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). In conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 C.F.R. § 300.304(b)(1). The public agency must also ensure 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).

IDEA further provides that, as part of any reevaluation, the IEP team must review existing evaluation data on the child, including classroom-based assessments and observations, and identify what additional data, if any, are needed to determine, *inter alia*, whether the child continues to have the disability, whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed. 34 C.F.R. § 300.305(b)(2). The public agency must administer the assessments and other evaluation measures needed to produce the necessary data. 34 C.F.R. § 300.305(c). Alternatively, if the IEP team determines that no additional data are needed, the public agency must notify the child's parents of the determination and the reason for it, and of the parents' right 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. 34 C.F.R. § 300.305(d)(1).

[16] Testimony of psychologist.
[17] Testimony of Parent; testimony of SEC; *see* Respondent's Exhibit 12 at 16.
[18] Testimony of SEC.

In the instant case, Petitioner essentially argues that DCPS committed a *per se* violation of IDEA by failing to update Student's psychoeducational evaluation since 2004. Petitioner further asserts that DCPS denied Student a FAPE by failing to complete a Vineland assessment and an updated psychoeducational evaluation, because the achievement test DCPS allegedly recently completed only addresses the level of academic functioning and does not address other areas that must be assessed, such as cognitive status, developmental progress, adaptive functioning, and social emotional functioning. Petitioner maintains that, in particular, updated information regarding Student's cognitive and adaptive functioning is necessary to determine whether Student's ID classification continues to be appropriate, and Petitioner points to the fact that Student has failed many of his classes and experienced behavior issues significant enough to result in his being moved to another school as evidence of the need for updated testing. Finally, Petitioner asserts that DCPS's failure to conduct updated assessments deprived Parent of an opportunity to make appropriate decisions about Student because she lacked updated information.

In response to these arguments, DCPS argues that it conducted a reevaluation within the last three years for Student by conducting informal assessments and by utilizing teacher observations, parental input, and classroom based data and information. DCPS maintains that these methods are the very methods IDEA requires a public agency to use when reevaluating a student. DCPS also questions whether updated cognitive information is even required for Student, asserting that cognitive information goes to the "form and shape of the disability," as opposed to what is required to properly program for a disabled student. Ultimately, however, DCPS maintains that it fulfilled its obligation under IDEA to conduct a reevaluation of Student by utilizing informal assessments, teacher observations, and classroom based data.

Upon careful consideration of the evidence, arguments of the parties and governing law, the hearing officer is persuaded that DCPS has denied Student a FAPE by failing to conduct an updated psychoeducational evaluation and a Vineland assessment of Student. As an initial matter, IDEA requires that a reevaluation of each disabled child must occur at least once every three years, unless the parent and public agency agree otherwise. Here, there is no contention that Parent agreed that a triennial reevaluation was not required for Student. Instead, DCPS contends that it complied with its obligation to reevaluate Student; however, the evidence is clear that the assessment tools and strategies DCPS utilized failed to provide data in all areas related to Student's disability. Hence, DCPS's assessment methods yielded no data concerning Student's cognitive, adaptive and social emotional functioning, with the result that DCPS has not even conducted the assessments necessary to produce sufficient data to definitively determine whether Student's ID classification continues to be appropriate, which is a clear violation of the governing regulations. *See* 34 C.F.R. §§ 300.304 – 300.305, *supra*. Moreover, to the extent that DCPS asserts that no additional data were required in connection with the reevaluation it maintains it conducted for Student, DCPS failed to comply with its obligations under 34 C.F.R. § 300.305(d)(1) because it failed to notify Parent of such determination and the reason for it, and of Parent's right to request an assessment to determine whether Student continues to be a child with a disability and to his educational needs.

The hearing officer notes that it is questionable whether DCPS's violations of IDEA in the instant case may properly be considered mere procedural violations. *Compare Harris v. District*

of Columbia, 561 F.Supp.2d 63, 69 (D.D.C. 2008) (stating that DCPS's failure to act on a parental request for an independent evaluation was "*certainly not*" a mere procedural inadequacy, as such inaction jeopardized the whole of Congress' objective in enacting IDEA) (emphasis added). In any event, to the extent that DCPS's violations of IDEA properly can be classified as procedural violations, the hearing officer is persuaded that those violations constituted a denial of FAPE because they resulted in a violation of Student's substantive rights. *See Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) (IDEA claim is viable where procedural violations affect student's substantive rights). Hence, Student has failed most of his classes, and he has experienced academic and behavior problems significant enough to result in a DCPS determination to move him from the school he previously attended to his neighborhood school. Moreover, Parent has been unable to make appropriate decisions about Student's education because she lacks current information regarding his level of performance. As a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim. *See* 34 C.F.R. § 300.513(a) (hearing officer may find denial of FAPE where procedural inadequacies impede child's right to FAPE, significantly impede parent's right to participate, or cause deprivation of educational benefit). The hearing officer will, therefore, award Petitioner the independent Vineland assessment and updated comprehensive psychological evaluation she has requested as relief.

2. **Alleged Failure to Provide an Appropriate IEP**

Under IDEA, an IEP is a written statement for each child with a disability that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general educational curriculum; a statement of measurable annual goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and to meet each of the child's other educational needs resulting from the disability; and a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or personnel supports that will provided to enable the child to advance appropriately, to be involved in and make progress with in the general education curriculum and participate in nonacademic activities, and to be educated and participate with other disabled and nondisabled children. 34 C.F.R. § 300.320(a).

In the instant case, Petitioner argues that Student's IEP is inappropriate because it is not based upon updated psychoeducational and Vineland assessments. However, the evidence in this case reveals that Student's present levels of educational performance and baseline data in the academic areas of reading and math, as well as his baseline data in the academic area of written expression, are based on recent administrations of the Woodcock Johnson. Student's present level of educational performance in the academic area of written expression is documented, even though it does not appear to be based upon assessment data, and Petitioner has not presented any evidence proving that the statement is inaccurate. Similarly, Student's present level of educational performance in the area of emotional, social and behavioral development is set forth in detail based upon the behaviors Student habitually exhibited at school. On the other hand, the IEP fails to list appropriate baseline data for Student's annual goal in the area of emotional, social and behavioral development, and the hearing officer will order DCPS to revise that section

of the IEP based on the results of the independent assessments Petitioner is being awarded herein. Nevertheless, the hearing officer concludes that under the circumstances of this case, where the remaining sections of the IEP contain appropriate baseline data and present educational levels of performance, this deficiency is a *de minimis* one that does not constitute a denial of FAPE. *See* 34 C.F.R. § 300.513(a), *supra*; *Lesesne v. District of Columbia*, *supra*.

To the extent that Petitioner argues that the IEP is otherwise inappropriate, the hearing officer is not persuaded. Petitioner failed to present any evidence whatsoever purporting to establish the inappropriateness of specific IEP goals or of the number of hours of specialized instruction and related services provided in the IEP. Instead, Petitioner argued at the due process hearing that DCPS's failure to provide Student with an IEP based on information obtained from updated psychoeducational and Vineland assessments constituted a denial of FAPE. However, as there is no way to determine in advance what the updated assessments for Student will reveal and whether they will necessitate changes to Student's IEP, the hearing officer concludes that this claim cannot be decided without reference to the actual updated assessment results. Since Petitioner has not and cannot supply updated assessment results until the assessments have actually been conducted, the hearing officer further concludes that Petitioner failed to meet its burden of proof on this claim.

3. Alleged Failure to Provide Appropriate Services

Petitioner failed to provide any documentary or testimonial evidence in support of this claim but argued at the due process hearing that DCPS's failure to provide Student with services based on information obtained from updated psychoeducational and Vineland assessments constituted a denial of FAPE. However, as there is no way to determine in advance what the updated assessments for Student will reveal and whether they will necessitate changes to Student's educational programming, the hearing officer concludes that this claim cannot be decided without reference to the actual updated assessment results. Since Petitioner has not and cannot supply updated assessment results until the assessments have actually been conducted, the hearing officer further concludes that Petitioner failed to meet its burden of proof on this claim.

ORDER

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

1. DCPS shall provide funding at the market rate for an independent Vineland assessment for Student, and for an independent updated comprehensive psychological evaluation for Student. DCPS shall be allowed 5 school days from the issuance of this Order to provide Petitioner with the results of Student's 2012 educational achievement testing. If DCPS does so, then the independent updated comprehensive psychological evaluation awarded herein shall not include academic achievement testing; however, if DCPS fails to do so, then the independent updated comprehensive psychological evaluation awarded herein shall include academic achievement testing for Student.

2. Within 15 school days of receipt of the reports for the assessments ordered in Paragraph 1, above, DCPS shall convene an IEP meeting to review the assessment results, review and revise Student's IEP as appropriate based upon the results of the assessments, and revise Student's IEP to include appropriate baseline information for Student's annual goal in the area of emotional, social and behavioral development.

3. All remaining claims in Petitioner's June 20, 2012 Complaint are denied and **DISMISSED WITH PREJUDICE.**

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).

Date: 9/3/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer