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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STUDENT HEARING OFFICE
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[redacted], on behalf of
[redacted]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No: 2012-0720

Room No.: 2006

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a [redacted], who presently attends a DCPS middle school. On October 15, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to (1) adequately evaluate, including failing to perform triennial evaluations and/or evaluate in all areas of suspected disabilities; (2) to develop an appropriate IEP; (3) to implement the IEP; (4) to provide an appropriate placement; and (5) to provide for extended school year ("ESY"). As relief for these alleged denials of FAPE, Petitioner requested a finding of a denial of FAPE; funding for independent evaluations to include comprehensive psychological, adaptive behavior, speech/language, occupational therapy, adaptive PE, assistive technology, vision and hearing evaluations; a meeting within 10 days of receipt of the evaluation reports to review all evaluations and develop an IEP; placement in and funding for a private school chosen by Parent; and implementation of Parent's compensatory education plan.

On October 25, 2012, DCPS filed its Response, which asserted the following defenses: (1) the MDT, including Parent, met on 10/26/11 to revaluate Student and after reviewing existing data determined that no additional assessments were necessary; (2) the MDT met on 9/20/12 to review and revise Student's IEP and determined, with Parent's agreement, that Student could be discharged from physical therapy ("PT") since he had met his single PT goal; (3) Student receives specialized instruction and related services as required by his IEP, the related services are documented in DCPS's service trackers, and Student continues to use the computer he brought with him from a previous school; (4) the placement outlined in Student's IEP is

appropriate and Kelly Miller is an appropriate location of service because it can implement the IEP; and (5) the team determined it was too early in the year to make a determination about ESY and agreed to reconvene prior to the end of the school year when more data would be available.

The parties concluded the Resolution Meeting process by participating in a resolution session on November 28, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline began on November 15, 2012 and will end on December 29, 2012, which is now the HOD deadline.

On November 19, 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 November 21, 2012.

By their respective letters dated December 4, 2012, DCPS disclosed eleven documents (Respondent's Exhibits 1-1), and Petitioner disclosed seventeen documents (Petitioner's Exhibits 1-17).

The hearing officer convened the due process hearing on December 11, 2012.[1] All disclosed documents were admitted without objection. As a preliminary matter, Petitioner withdrew claims 3 through 5 and indicated that the only relief being requested was evaluations. Thereafter, the hearing officer received the parties' opening statements, testimonial evidence and closing statements, then the hearing was brought to a close.

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 issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to adequately evaluate Student, including by failing to perform triennial evaluations and/or evaluate in all areas of suspected disability?

2. Did DCPS deny Student a FAPE by failing to develop an appropriate IEP because, *inter alia*, the goals are not individually tailored to meet Student's needs in that they are all above his skill level?

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

FINDINGS OF FACT[2]

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

1. Student is a [redacted] who presently attends 7th grade at a DCPS middle school.[3]

2. Student has muscular dystrophy, which he was diagnosed with at 4 years old.[4]

3. Children with muscular dystrophy experience unpredictable periods of rapid decline that negatively affect range of motion, strength, endurance, cardiopulmonary status, and posture, and may result in scoliosis and asymmetry, which contribute to a decrease in pulmonary function and early death. Muscular dystrophy causes the muscles to fatigue very quickly, and if the muscles are over fatigued through, for example, the overuse of weights and/or a keyboard, the muscles are destroyed and can never recover from the permanent damage. Muscular dystrophy is a motor-cognitive dysfunction. It is a degenerative disease that can also include hearing problems and visual decline.[5]

4. In his current adaptive PE class, Student does pushups and sit ups, and he lifts weights. However, there is evidence of a decline because Student previously could ride a bike but does not now, there has been a decrease in the amount of weight he lifts, and there has been a decline in the number of minutes he can stand and the number of steps he can take.[6]

5. Student's current IEP is dated September 20, 2012. The IEP identifies Student's primary disability as Multiple Disabilities, and it requires Student to receive 25 hours per week of specialized instruction and 120 minutes per month each of adapted physical education ("adaptive PE"), occupational therapy ("OT"), speech-language pathology service, and behavioral support services, with all instruction and services to be provided outside general education.[7]

6. Parent inquired about evaluations at Student's September 20, 2012 IEP meeting, but DCPS advised her that it would proceed on the basis of Student's 2008 and 2009 evaluations because Student was not yet due for evaluations.[8]

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[2] 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.
[3] Testimony of Student; *See* Complaint at ¶ 1.
[4] *Id.*
[5] Testimony of physical therapist; testimony of licensed clinical psychologist.
[6] Testimony of Student; testimony of physical therapist.
[7] Petitioner's Exhibit 6.
[8] Testimony of Parent.

7. DCPS has not administered any formal standardized assessments to Student since SY 2008/09, when it administered an OT evaluation in November 2008 and a psychological evaluation in June 2009. In conducting the psychological evaluation, DCPS did not administer sufficient subtests from the cognitive assessment to determine Student's full scale IQ, DCPS did not administer the timed subtests from the visual motor assessment that would have required Student to use a pencil because of his difficulty holding a pencil and writing, and DCPS did not administer any social/emotional testing. Instead, the evaluation focused only on "more narrow domains of cognitive functioning."[9]

8. Formal standardized assessments of a disabled child are required to determine the child's level of capability and validate provider reports. Classroom observations and/or informal assessments conducted by teachers and service providers are only one component to be considered in determining a student's level of functioning. A disabled child may exhibit a behavior, skill or lack of skill, but there is no way to determine whether it is being impacted by something else, or is truly the level of functioning, or is a strength or weakness without a formal assessment.[10]

9. Student needs a complete cognitive evaluation so that his IEP team can successfully develop programming for him because, based on the incomplete cognitive evaluation that previously was administered, there is no way to determine his cognitive level. Moreover, as his disease is degenerative, he requires monitoring for deterioration. Student needs a comprehensive psychological evaluation, including a clinical component, because his most recent psychological assessment was incomplete, and the IEP team needs a clear understanding of what is underlying the anger and frustration he is experiencing in school. Student also needs an assistive technology evaluation because he has motor and sensory impairment that prevents him from keeping up with his same age peers in the educational environment when using a pencil, and the evaluation data would allow the team to determine what prescribed tools would help him access the academic content without being hindered by his motor issues. Student needs vision and hearing assessments as a first step in the evaluation process, because his degenerative disease causes a decline in muscles and muscle tone and can lead to hearing problems and visual decline.[11]

10. The purpose of Student's October 26, 2011 IEP meeting was to conduct an annual update of Student's IEP and to complete a 3-year evaluation of Student. However, the team did not conduct or review any assessments of Student. Instead, the team reviewed Student's present levels and goals in math, reading, and writing, and the team received reports from Student's adaptive PE teacher, social worker and physical therapist. Student's occupational therapist and speech therapist did not provide reports or attend the meeting. Parent was not advised of her right, pursuant to 34

[9] Petitioner's Exhibits 3-4; testimony of licensed clinical psychologist.
[10] Testimony of educational advocate; testimony of licensed clinical psychologist.
[11] Testimony of licensed clinical psychologist; *see* Petitioner's Exhibit 6 at 12; testimony of occupational therapist/disability analyst.

C.F.R. § 300.305(d)(1)(ii), to request an assessment to determine whether Student continued to be a child with a disability and to determine Student's educational needs.[12]

11. According to DCPS's informal testing, Student is reading at a mid-first grade level. The administrative record does not include informal testing for Student in any other academic areas. However, according to "observations of classroom assignments," DCPS has determined that Student can add and subtract two numbers and add positive four digit numbers, and he is writing on a kindergarten level.[13]

12. According to recent informal testing by Petitioner's educational advocate, Student is functioning on the second grade level in reading and math.[14]

13. Student was discharged from the related service of physical therapy on September 20, 2012 based upon his DCPS PT service provider's determination that he had met his sole PT goal of being able to safely operate his motorized wheel chair in the school environment. However, since Student's initial mobility assessment was conducted by DCPS in 2008, Student has developed peripheral neuropathy, a nerve disorder that initially caused problems with Student's feet and ankles but is now causing problems with his hands. Moreover, to the extent that Student is lifting weights and doing pushups and sit ups in school, it is inappropriate to have those services delivered by an adaptive PE teacher because Student needs to be monitored closely by a trained therapist when engaging in those activities if, indeed, those activities are actually appropriate for him. Student needs a complete PT assessment by a therapist with assistive technology training before it can be determined whether and to what extent he requires PT services.[15]

14. Student has made very minimal progress on his IEP goals in the area of OT. Hence, for the current IEP, Student's OT provider merely copied and pasted all of the information in the motor skills/physical development section from the previous IEP. Although Student has a degenerative disease, one of his OT goals is to increase his handwriting speed so that he can complete his assignments during the day and his OT provider agrees with that goal. The OT provider is not aware of whether Student's wheelchair can fit into the bathroom at school. The OT provider also does not know whether Student requires an assistive technology device, but she could help him with such a device if he had it.[16] Student requires an OT evaluation to determine his level of functioning and the OT programming he requires to help him better access his education.

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[12] Respondent's Exhibit 9; testimony of Parent.
[13] Petitioner's Exhibit 6.
[14] Petitioner's Exhibit 7.
[15] Petitioner's Exhibit 5; testimony of DCPS physical therapist; testimony of physical therapist.
[16] Testimony of DCPS occupational therapist.

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. Alleged Failure to Adequately Evaluate

Under IDEA, a public agency conducting the evaluation of a disabled child must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). The public agency must also 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).

Moreover, IDEA requires a public agency to ensure that a reevaluation of each disabled child occurs if the child's parent or teacher requests one, and at least once every 3 years but not more than once a year unless the public agency and the child's parents agree otherwise. 34 C.F.R. § 300.303(a)(2)-(b).

As part of any reevaluation, the child's IEP team must review existing data on the child and determine what, if any, additional data are needed to determine whether the child continues to have a disability and the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, 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 to enable the child to meet the measurable annual goals set out in the child's IEP and to participate, as appropriate, in the general education curriculum. 34 C.F.R. § 300.305(a). If the team determines that no additional data are needed, the public agency must notify the child's parents of that determination and the reasons for the determination, and of the right of the parents to request an assessment to determine whether the child continues to be a child with a disability and the educational needs of the child. 34 C.F.R. § 300.305(d)(i).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to conduct any formal assessments for Student since the 2008/09 school year, despite IDEA's requirement of a triennial reevaluation and despite Parent's request for evaluations at the September 2012 IEP meeting. Petitioner also argues that DCPS has failed to evaluate Student in all areas of suspected disability. On the other hand, DCPS argues that it conducted a triennial reevaluation of Student in 2011 and determined that no new assessments were required for Student because his needs could be determined based on existing information.

A review of the evidence in this case reveals that DCPS has not administered any formal assessments to Student since it administered an OT evaluation to Student in November 2008 and an incomplete psychological evaluation to Student in June 2009. As a result, Student needs a complete cognitive evaluation because there is no way to determine his cognitive level for programming purposes based on the incomplete cognitive evaluation that previously was administered; Student needs a comprehensive psychological evaluation, including a clinical

component, so that the IEP team can gain a clear understanding for programming purposes of what is underlying the anger and frustration Student is experiencing in school; Student needs an educational evaluation to determine what his actual level of academic functioning is given the variance between informal testing results from DCPS and Petitioner's educational advocate; Student needs an assistive technology evaluation to facilitate the IEP team's determination of what, if any, AT devices would help him access the academic content without being hindered by his motor issues; Student needs a complete PT assessment before it can be determined for programming purposes whether and to what extent he requires PT services; and Student requires an OT evaluation to determine his level of functioning and the OT programming he requires to help him better access his education. Moreover, Student needs vision and hearing assessments as a first step in the evaluation process, because his degenerative disease causes a decline in muscles and muscle tone and can lead to hearing problems and visual decline and there is no indication of whether and/or to what extent Student is suffering from those types of declines. *See* Findings of Fact ("FOFs") 9 and 11-14, *supra.*

The evidence further reveals that Student's speech/language provider failed to attend and provide any information regarding Student's functioning at his 2011 reevaluation meeting, and Student may be experiencing physical declines that make his current adaptive PE programming inappropriate for him. *See* FOFs 4 and 10, *supra.* Finally, the evidence reveals that Parent requested a reevaluation of Student in September 2012 but DCPS failed to conduct one, in violation of 34 C.F.R. § 300.303(a)(2), and that DCPS determined during its October 2011 review of existing data for Student that no new data were needed but failed to advise Parent of her right to request an assessment to determine whether Student continued to be a child with a disability and his educational needs, in violation of 34 C.F.R. § 300.305(d)(1)(ii). *See* FOFs 6 and 10.

Based on the evidence and factual circumstances outlined herein, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to adequately evaluate Student. As a result, the hearing officer will order DCPS to provide Petitioner with funding for the following independent assessments: comprehensive psychological, including cognitive, educational and clinical components; assistive technology; physical therapy; occupational therapy; speech and language; adaptive physical education; vision and hearing. The hearing officer will also order DCPS to convene an IEP meeting to review the independent assessment data and review and revise Student's IEP as appropriate.

2. <u>Alleged Failure to Develop an Appropriate IEP</u>

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 within 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). Moreover, in developing a child's IEP, the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i).

Overall, the requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

In the instant case, Petitioner asserts that Student's IEP is inappropriate because his goals are not individually tailored to meet his needs and the IEP is not based on formal standardized test data, while DCPS argues that there is no law requiring a Student's present levels of performance in the IEP to be based on particular assessments.

The hearing officer has already concluded above that Student requires a comprehensive battery of assessments for programming purposes because it is unclear exactly what his current level of functioning and programming needs are. Hence, the hearing officer further concludes that there is insufficient assessment data in the record to permit a determination of whether and/or to what extent Student's existing IEP may be inappropriate. As the hearing officer has already determined to award Petitioner a full battery of independent assessments and a meeting to review those assessments and revise Student's IEP accordingly, the hearing officer declines to prematurely decide the appropriateness of Student's existing IEP prior to the receipt of current assessment data for Student. Instead, the hearing officer will dismiss the instant claim without prejudice to Petitioner's right to refile the claim, if necessary, after receipt of the independent assessment results.

ORDER

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

1. Within 10 school days of the issuance of this Order, DCPS shall provide Petitioner with funding for the following independent assessments for Student: comprehensive psychological, including cognitive, educational and clinical components; assistive technology; physical therapy; occupational therapy; speech and language; adaptive physical education; vision; and hearing.

2. Within 15 school days of receipt from Petitioner of the independent assessment reports, DCPS shall convene an IEP team meeting to review the assessment reports and review and revise, as appropriate based upon the assessment data, Student's IEP.

3. Petitioner's claim that DCPS denied Student a FAPE by failing to develop an appropriate IEP for him is **DISMISSED WITHOUT 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: 12/28/2012 /s/ *Kimm Massey*

Kimm Massey, Esq.
Hearing Officer