

DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

CONFIDENTIAL

<p>[REDACTED]</p> <p>Petitioners,</p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS</p> <p>Respondent.</p>	<p>Case Number 2009-1428</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>December 23, 2009</p> <p><u>Representatives:</u></p> <p>Roberta Gambale, Esq. James E. Brown & Associates, PLLC For Petitioners</p> <p>Daniel Kim, Esq. Assistant Attorney General For Respondent</p> <p><u>Impartial Hearing Officer:</u> Peter B. Vaden</p>
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I. PROCEDURAL BACKGROUND

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner [REDACTED] ("the Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. §1400 et seq., and Title 5, Chapter 30 of the District of Columbia Municipal Regulations ("D.C. Regs."). This due process complaint arises out of the alleged failure on the part of Respondent District of Columbia Public Schools ("DCPS") to conduct triennial reevaluations of [REDACTED] [REDACTED] ("Student") and DCPS's alleged failure to address the Student's need for transitional services and/or conduct age appropriate assessments. The Parent seeks an order requiring that DCPS conduct a vocational assessment and an adaptive behavior assessment¹ on the Student. In addition the Parent seeks an order to require DCPS to provide for appropriate transitional services. The requirements of notice to the Parent have been satisfied.

The due process hearing was held before the undersigned impartial hearing officer on December 16, 2009 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an audio electronic recording device. The Parent appeared for part of the hearing and was represented by counsel. DCPS was represented by counsel. Counsel for both sides made opening and closing statements.

¹ In her due process complaint Petitioner also requested that DCPS be ordered to provide a psychological evaluation and a speech and language evaluation. The speech and language evaluation has been completed to the Parent's satisfaction. After the hearing, the Parent requested and DCPS agreed to fund an independent psychological evaluation for the Student.

II. ISSUES

- Whether the Student was denied a Free Appropriate Public Education (“FAPE”) by Respondent’s failure to complete a timely triennial evaluation; and
- Whether the Respondent failed to provide a required post-secondary transition planning and services.

III. BURDEN OF PROOF

The burden of proof in this matter is the responsibility of the Parent, as the party seeking relief. *See* D.C. Regs. § 5-3030.3.

IV. FINDINGS OF FACT

The Parent called herself as her only witness. DCPS called as its only witness [REDACTED] Special Education Coordinator at [REDACTED] High School. Both parties offered school records and other documents which were admitted into evidence. The record was held open until December 18, 2009 to allow the Parent to review and address Speech/Language and psychological reevaluations of the Student, which were completed before the hearing, but not disclosed to the Parent.² I make the following findings of fact based upon the preponderance of the evidence.

1. The Student, [REDACTED] years old, is in her [REDACTED] year at [REDACTED] Senior High School, a District of Columbia Public School.

² These reevaluations were not offered into evidence.

2. The Student was found eligible for special education and related services in 2001 by the DCPS Individualized Education Program ("IEP") Team, based upon the disability Speech and Language Impaired.
3. In her special education reevaluation in November 2005, the Student was again found eligible for special education services based upon the disability criteria for Speech or Language Impairment ("SL").
4. In her last IEP dated December 9, 2008, to which the Parent consented, the Student's primary disability was reported as SL. The IEP provided for specialized instruction (General Education) for 7.5 hours per week, specialized instruction (Outside General Education) for 7.5 hours per week, Speech-Language Pathology for 30 minutes per week and Behavioral Support Services for 30 minutes per week.
5. The Student's Post-Secondary Transition Plan, also completed by the IEP Team on December 9, 2008, provided for the Student to attend a career fair two times per year and to attend career exploration seminars two times per month. The end date for both programs was December 9, 2009.
6. On December 9, 2008, the Parent executed a Consent to Evaluate form giving permission to DCPS to reevaluate the Student for special education eligibility and to conduct assessments in the areas of Academic-Mathematics, Academic-Reading, Communication/Speech and Language and Emotional, Social and Behavioral Development. A vocational evaluation was not included on the Consent to Evaluate form. DCPS did not conduct the assessments at that time.

7. On June 23, 2009, counsel for the Parent wrote to the Principal of [REDACTED] Senior High School to request that the Student receive a comprehensive reevaluation for special education services, including comprehensive psychological, functional behavioral, audiological, social history and vocational assessments, to include, if warranted, psychiatric, neuropsychological, occupational therapy, physical therapy and medical assessments.
8. The Special Education Coordinator at [REDACTED] High School, who took over this position at the beginning of the 2009-10 school year, became aware of the Parent's request for the Student's reevaluation in September 2009. The Special Education Coordinator understood that Parent's request for reevaluation included vocational, SL and psychological components.
9. Although the SL reevaluation was completed on August 11, 2009 and the psychological reevaluation was completed on September 28, 2009, the Special Education Coordinator had not been aware that these evaluations had been completed until shortly before the hearing. Copies of these reevaluation reports were not furnished to the Parent until after the evidentiary hearing in this case.
10. No vocational evaluation of the Student has been completed. DCPS blames the Student's attendance problems for not conducting the vocational evaluation, but there was no evidence that DCPS had attempted to schedule a vocational evaluation before the hearing. DCPS has offered to conduct the vocational evaluation if the Student will attend.

11. By an email dated December 16, 2009, counsel for the parent acknowledged receipt of the psychological and SL reevaluations. Counsel indicated satisfaction with the SL evaluation. Counsel was not satisfied with the psychological evaluation and requested that DCPS fund an independent comprehensive psychological evaluation. On December 16, 2009, DCPS authorized funds for the Parent to obtain, independently, a comprehensive psychological evaluation of the Student.
12. The Student has a record of extreme school truancy going back at least to 2005. The principal of [REDACTED] Senior High School, at the request of the Parent, made a court truancy referral on March 17, 2008. According to the truancy referral form, the Student had been truant for 75 days between September 10, 2007 and March 17, 2008. The Student's attendance problems continued through the 2008-09 school year. As of November 12, 2009, for the first 53 school days of the 2009-10 school year, the Student had 49 absences from Algebra, 48 absences from Citizenship, 3 absences from English, 43 absences from French, 3 absences from Gen. Music, 41 absences from Geometry, and 4 absences from Physical Education.
13. According to the Parent, the Student has earned only one-half academic credit toward meeting her requirements for high school graduation.
14. The Student's IEP Team met to revise her IEP in December 2009. The Parent failed to attend the meeting. A DCPS case worker took the proposed new IEP to the Parent to review at her home, but the Parent

refused to give her consent until the IEP could be reviewed by her attorney.

V. CONCLUSIONS OF LAW

The principal issue raised by the Parent in this due process proceeding is that DCPS failed to conduct the Student's triennial reevaluation for special education when required in December 2008. DCPS did conduct an SL reevaluation in August 2009 and a psychological reevaluation in September 2009, following the Parent's June 23, 2009 written request for a comprehensive reevaluation. There was no evidence that the Student's IEP Team ever reviewed the reevaluations, which were only furnished to the Parent after the December 16, 2009 evidentiary hearing. The IDEA and the D.C. Regs. require that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. See 34 CFR 300.303; 20 U.S.C. 1414(a)(2); D.C. Regs. § 5-3005.7. DCPS concedes, and I find, that the Student's triennial reevaluation, due in December 2008, was not completed on time, and as of the hearing date, had not been reviewed by the IEP Team.

The Parent, citing *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C. 2008), argues that DCPS's failure to conduct timely reevaluations of the Student was a substantive violation of the IDEA and that the Student has been denied FAPE as a result. DCPS argues, to the contrary, that the delay in completing the triennial re-evaluation was only a procedural violation, which did not result in loss of FAPE. While DCPS clearly violated the IDEA requirement to conduct the special education reevaluation within three years after the December 2005 reevaluation, I find that this failure was a procedural

violation of the IDEA, not a substantive violation. In *Hawkins ex rel D.C. v. District of Columbia*, 539 F.Supp.2d 108 (D.D.C. 2008), the Court held that the school division's failure to complete a child's initial eligibility evaluation was a procedural violation. Similarly, in *Parker v. Friendship Edison Public Charter School*, 577 F.Supp. 2d 68 (D.D.C. 2008), the Court held that failure to complete an occupational therapy evaluation and classroom observation as part of an initial evaluation would have constituted a procedural violation. Just as failure to complete initial eligibility evaluations is only a procedural violation under the IDEA, the failure timely to complete a child's reevaluation is likewise a procedural violation. *Cf. Hanson ex rel. Hanson v. Smith*, 212 F.Supp. 2d 474 (D.Md. 2002) (Whether a procedural violation occurred when a psychological re-evaluation was not undertaken as a part of triennial review.)

I find that the Parent's reliance on *Harris, supra* is misplaced. In *Harris*, the Court found that the school division had failed to act on the parents' request for an independent functional behavioral assessment for over two years and that as a result, for that period, the child had languished with an IEP that may not have been sufficiently tailored to her special needs. "[F]ailure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA." *Id.*, 561 F.Supp. at 69. The facts in this case are very different from the *Harris* case. First, the Parent never requested an independent evaluation. In June 2009, the Parent requested DCPS itself to complete the triennial re-evaluations. Further, while DCPS's reevaluation reports to the Parent and the IEP Team was unreasonably delayed, DCPS did in fact conduct both SL and psychological reevaluations within three months of the Parent's written request. At the

time of the evidentiary hearing, DCPS affirmed that it was willing to conduct a vocational assessment and agreed to fund the Parent's newly requested independent comprehensive psychological evaluation.

The D.C. Circuit has held that procedural violations of the IDEA are actionable only if they affect the student's substantive rights. *See, e.g., Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006) and cases cited therein; *See, also, Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 79 (D.D.C. 2004). DCPS argues that in this case, due to the Student's severe truancy record, her substantive rights under the IDEA were not affected by the delay in conducting the triennial reevaluation.

The Student in this case has a long history of severe truancy. According to the Parent, for the past three years, the Student has exhibited the same pattern. She goes to school, but skips most classes and does not remain at the school building. In March 2008, the school made a court referral of the Student for truancy at the Parent's request. The Student was placed on an attendance plan in the fall of 2008, which she did not follow, and had continuous truancy problems during the 2008-09 school year. During the fall 2009 semester the Student's school attendance did not improve. She regularly missed her SL services and psycho-social counseling and she skipped almost all general education classes, except for English, music and physical education.

In *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007), a decision cited by DCPS, the Court addressed the problem of a high school student who, like the Student in this case, had a pattern of extreme truancy. The Court found that the "IDEA does not provide a remedy for this kind of case – where the access to a free and appropriate public education is wide open, but the student refuses to attend school and

refuses the numerous and extensive educational opportunities afforded to her.” *Id.* In the present case, I find that the Student’s unrelenting pattern of severe truancy made it extremely unlikely that even if DCPS had timely conducted the triennial evaluation, and the IEP Team had used the data to update the Student’s educational needs, the Student would have gone to class and accessed the educational opportunities afforded to her. The Parent has not demonstrated that the Student’s education was affected in any way by DCPS’s delay and it would be purely speculation to conclude that the Student lost any educational opportunity as a result. *See Lesesne, supra, quoting C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) (“[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.”) Therefore DCPS prevails on this issue.

The Parent also alleges that DCPS failed to address the Student’s need for transitional services or to conduct age appropriate assessments. The IDEA and the D.C. Regs. require that, beginning no later than the first IEP to be in effect when a child turns sixteen, the IEP must include appropriate measurable post secondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services needed to assist the child in reaching those goals. *See* 34 CFR § 300.320(b); D.C. Regs. § 5-3009.3. It is up to each child’s IEP Team to determine the transition services that are needed to meet the unique transition needs of the child. *See* 71 Fed. Reg. 46668 (2006). The Student’s December 9, 2008 IEP, which took effect several months after the Student’s sixteenth birthday included a Transition Plan, based upon recent “Teacher made” assessments. The Transition Plan included as transition activities attending the DCPS career fair and

attending regular career exploration seminars. The Parent did not offer any competent evidence at the hearing to show that the Transition Plan in the Student's IEP was not adequate or what additional transition goals or services this Student needs to receive FAPE. The Parent therefore failed to meet her burden of proof on this issue.

VI. DECISION

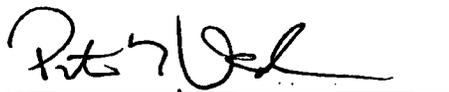
For the foregoing reasons, I find that the Parent has failed to establish that the Student was denied a FAPE as a result of DCPS's delay in completing the triennial evaluations and has failed to establish that the Transition Plan goal and activities in the Student's December 9, 2008 IEP were not sufficient to meet the transition needs of this Student.

VII. ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the Petitioner, Judyann Hansen, herein is denied in its entirety.
2. The Respondent District of Columbia Public Schools is the prevailing party in this due process hearing.

Dated this 23rd day of December, 2009.



Peter B. Vaden
Hearing Officer