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Student Hearing Office
June 27, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 27, 2013

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: May June 26, 2013

Student Hearing Office, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "MOTHER"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools ("DCPS") has denied Student a Free Appropriate Public Education ("FAPE") by failing to conduct comprehensive special education re-evaluations requested by Mother in February 2013.

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[1] Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 26, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on April 30, 2013. The parties met for a resolution session on May 14, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on May 27, 2013. On May 20, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 26, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION COORDINATOR ("SEC") and DCPS COUNSEL.

Petitioner testified and called as witness SPECIAL EDUCATION ADVOCATE. DCPS called as witnesses SCHOOL PSYCHOLOGIST and SEC. Petitioner's Exhibits P-1 through P-21 were admitted into evidence without objection, with the exception of Exhibit P-7, which was withdrawn. Petitioner objected to admission of all of DCPS' exhibits on the grounds that DCPS' prehearing disclosure was late. Finding no prejudice to Petitioner from DCPS' untimely disclosure – which was late by less than 9 hours due to an email address mistake – I overruled the objection. Exhibits R-1 through R-20 were admitted without further objection, with the exception of Exhibits R-3 and R-4, which were admitted over Petitioner's specific objections. Counsel for the respective parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

– Whether DCPS has denied Student a FAPE by failing to conduct comprehensive special education re-evaluations requested by Parent in February 2013.

For relief, Petitioner seeks an order for DCPS to fund a comprehensive psychological evaluation and speech-language reevaluation of Student and to conduct a functional behavioral assessment, and upon completion of the assessments, to convene Student's IEP team to consider the results, revise Student's IEP as appropriate and discuss educational placement.

FINDINGS OF FACT

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

1. Student an AGE female, resides with Mother in the District of Columbia. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Emotional Disturbance ("ED"). Exhibit P-14.

3. Student's last special education eligibility meeting date was February 17, 2011. Exhibit P-14. Student was administered a comprehensive psychological evaluation by DCPS on November 30 and December 3, 2010. Exhibit R-16.

4. Student was hospitalized at a psychiatric hospital in Washington, DC from June 29, 2012 until August 12, 2012, after pouring hot water on her younger sister and threatening to harm herself and others. Student was reported to present with symptoms of depression, psychosis, substance use and attention deficit hyperactivity disorder. Her discharge diagnoses

were Mood disorder, not otherwise specified, and Psychotic disorder. Exhibit P-4.

5. Student was discharged from the Washington, D.C. hospital to a residential treatment center in southside Virginia, to provide a structured, therapeutic environment in order to return her back to the community. Exhibit P-5. Student was discharged from the Virginia treatment center on October 19, 2012. Her discharge diagnoses were then Psychotic disorder, not otherwise specified, Rule out posttraumatic stress disorder, Bipolar disorder with psychotic features, and History of pervasive developmental disorder, NOS. Exhibit R-7.

6. During the course of her hospitalizations at the Washington, D.C. and Virginia mental health facilities, Student was administered physical and psychiatric evaluations and provided mental health therapy. *See, e.g.*, Exhibits R-7 through R-15. Most of the resulting data was provided to DCPS in January 2013. Testimony of Mother.

7. For the 2011-2012 school year, Student attended City Middle School. After her discharge from the Virginia facility in October 2012, Student returned to City Middle School. Testimony of Mother.

8. Student's most recent Individualized Education Program ("IEP"), developed on December 4, 2012, contains academic goals for mathematics and reading, and goals for Emotional, Social and Behavioral Development. Exhibit P-14.[2] Under her IEP, Student is provided a full-time dedicated aide. Testimony of SEC.

9. On February 11, 2013, Petitioner's Counsel sent a facsimile letter to the principal of City Middle School to request that Student be revaluated for special education and related services. The attorney requested that the evaluations include, but not be limited to, a comprehensive psychological evaluation, a functional behavioral assessment and speech and

[2] This exhibit omits pages 6-7, which, presumably, identify the special education and related services to be provided to Student.

language assessment. Exhibit P-1.

10. On February 14, 2013, SEC wrote Mother, by email, advising that she had received the letter from Petitioner's attorney requesting evaluations for Student. SEC stated that "Attached please find two letters of invitation to review if the evaluations requested are warranted. Let me know what day you are available. The tenative [*sic*] dates for the meetings are March 5th or 7th, 2013 @ 9 a.m." Testimony of SEC, Exhibits P-19, P-18. Mother did not respond to SEC's email. Testimony of SEC. On March 14, 2013, SEC emailed another letter of invitation to Ms. Proctor for a meeting on March 26, 2013 "for [Student] to discuss any concerns you may have." Exhibit R-19. The attached letter of invitation ("LOI") stated that a meeting topic would be "MDT review from attorney requesting testing." Exhibit R-18. Mother did not respond to this email or attend the scheduled meeting. Testimony of SEC. Emails were SEC's customary means of communications with Mother. Testimony of SEC. When SEC did not receive a response from Mother to her email with the LOIs, she attempted, unsuccessfully, to contact Mother by telephone. Testimony of SEC. To date, an MDT reevaluation meeting has not been convened. *Id.*

11. Mother received SEC's February 14, 2013 email. She testified that she did not respond because she had to coordinate with her attorney. Mother believes she did not forward SEC's emails and LOIs to her attorney. Mother does not recall receiving SEC's March 14, 2013 email. Testimony of Mother.

12. On April 24, 2013, Petitioner's counsel wrote SEC by email to follow up on her February 14, 2013 request for a "comprehensive re-evaluation" of Student. Counsel stated in the April 24, 2013 email that no response from the school had been received. Exhibit R-19. SEC replied by email on April 28, 2013 that she had sent three LOIs for MDT meetings to Mother

and Mother had not responded or come in for the MDT team meeting. Exhibit R-19.

13. Petitioner's Counsel filed the due process complaint in this case on April 26, 2013. The parties met for a resolution session on May 14, 2013. At that meeting, Mother requested that DCPS administer a comprehensive psychological examination, an FBA and a speech-language evaluation to Student. DCPS responded that those specific assessment were not warranted and that Student's MDT team needed to review the existing assessment data the school had received for Student. Exhibit R-1.

14. When Student returned to City Middle School in October 2012, her attendance was, at first, "a little rocky." More recently her attendance improved. She had developed a relationship with her dedicated aide and was performing well. Testimony of SEC.

15. Student has made a lot of progress since returning to City Middle School. Although she has disabilities that warrant substantial services, she has not exhibited severe behavior problems. Her grades have been "acceptable." Testimony of School Psychologist.

16. I found all fact witnesses to be credible. I accord little weight to the opinion testimony of Special Education Advocate, because except for reviewing the prehearing exhibit disclosures, she did not undertake the prehearing preparation expected from an expert witness. For example, she has never met the Student or Petitioner, she did not interview Student's teachers, school staff or other service providers, and she has not conducted her own assessments or observations of Student.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

HAS DCPS HAS DENIED STUDENT A FAPE BY FAILING TO CONDUCT COMPREHENSIVE SPECIAL EDUCATION RE-EVALUATIONS REQUESTED BY PARENT IN FEBRUARY 2013.

This case presents a narrow issue – whether DCPS' response to the February 11, 2013 request from Petitioner's counsel for a special education reevaluation of Student met the requirements of the IDEA. The Act requires that a public agency must ensure that a reevaluation of each child with a disability is conducted, *inter alia*, when the child's parent or teacher requests a reevaluation, subject to the limitation that a reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Once a reevaluation has been requested, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006). The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]eevaluations should be conducted in a 'reasonable

period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). Importantly, the reevaluation commences with the review of existing data in accordance with 34 CFR § 300.305(a). *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). After the review of existing evaluation data, additional assessments may be necessary if the IEP Team and other qualified professionals determine that additional data are needed, or the parent requests an assessment, to determine whether the child continues to have a disability and to determine the educational needs of the child. *Id.* The public agency must obtain informed parental consent prior to conducting any additional assessments needed for a reevaluation. *Id.*

In the present case, only three days after receiving the February 11, 2013 reevaluation request from Petitioner's Counsel, the SEC at City Middle School attempted to schedule an MDT meeting, as required by 34 CFR § 300.305(a), to review the existing data on Student and determine what additional data were needed. She issued a letter of invitation to Mother to attend a meeting on March 5 or March 7, 2013. When Mother did not respond to this communication, SEC issued another LOI for March 26, 2013. Mother, again, did not respond. SEC also attempted, unsuccessfully, to contact Mother by telephone regarding the MDT team meeting.

On April 24, 2013, Petitioner's Counsel wrote SEC by email to complain that she had not received a response to her February 11, 2013 reevaluation request and that "the parent [had] not been contacted to obtain background information about her child." Within three work days, on April 28, 2013, SEC replied to the attorney that she had emailed LOIs to Mother about the MDT

meetings and Mother had not responded. On April 26, 2013, without waiting for SEC's response to her April 24, 2013 email, Petitioner counsel filed the present due process complaint.[3]

Petitioner contends, erroneously, that DCPS violated the IDEA by not conducting the specfic assessments requested by Petitioner's counsel on February 11, 2013, namely, a comprehensive psychological evaluation, a functional behavioral assessment and a speech-language assessment. Petitioner misapprehends the requirements of the IDEA's reevaluation process. When Mother requested a reevaluation of Student on February 11, 2013, DCPS was required, prior to conducting additional assessments, to convene Student's IEP team, including the parent, to review existing evaluation data, including the reports from the psychiatric facilities in the District and Virginia where Student has been hospitalized for some 14 weeks before returning to City Middle School. It was the responsibility of the IEP team, on the basis of that review, and input from Mother, to identify what additional data were needed to determine Student's educational needs. I find that by promptly attempting to schedule an MDT meeting to review Student's existing evaluation data – before conducting additional assessments – DCPS complied fully with the IDEA's reevaluation mandate and that the delay in completing Student's reevaluation is due to the parent's failure to cooperate in scheduling a MDT meeting to commence the process.[4] DCPS prevails on this issue.

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[3] Counsel's precipitate filing of the due process complaint in this case, before receiving SEC's response to her April 24, 2013 email, raises a question of whether counsel conducted a reasonable inquiry into the law and facts before requesting a due process hearing.

[4] Even if Petitioner had shown that DCPS was responsible for not reevaluating Student more quickly, she would not necessarily be entitled to relief. A failure to timely reevaluate is at base a procedural violation of IDEA. Procedural violations of IDEA do not, in themselves, inexorably lead a court to find a child was denied FAPE. *Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010) (citations and internal quotations omitted.)

ORDER

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

All relief requested by Petitioner herein is denied.

Date: June 27, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).