District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
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Confidential

STUDENT[1], by and through her Parent Petitioners, v. Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: June 22, 2011 Representatives: Counsel for Petitioner: Shahida Hamlett, Esq. 3208 G Street S.E. Washington, DC 20019 Counsel for SAIL PCS: Lauren Baum, Esq. 3573 Warder Street, NW Washington, DC 20010 Hearing Officer: Coles B. Ruff, Esq.

[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* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened June 22, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2004.

BACKGROUND:

Student or "the student" is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of emotional disturbance ("ED"). The student is enrolled at a District of Columbia charter school that is its own local educational agency ("LEA"), hereinafter to as "School A."

The parent Petitioner filed a due process complaint on March 30, 2011, alleging, inter alia, that School A had failed to conduct triennial evaluations of the student, specifically a psychiatric evaluation and had failed to provide the student an appropriate placement. Petitioner initially alleged claims against both School A and DCPS; however, DCPS was eventually dismissed as a respondent based on the fact that period for which the violations were alleged the student attended School A.[2]

A pre-hearing conference in this matter was held on May 3, 2011, at which the issues alleged in the complaint were discussed. The parties agreed for the full 30-day resolution period to run in hopes that their continued discussions would result in a settlement of all issues. A pre-hearing order was issued on May 6, 2011. A second pre-hearing conference was held on May 12, 2011, and second pre-haring order was issued on May 17, 2011.[3] On June 1, 2011, the parties submitted a joint motion to continue the hearing and extend the decision date so that there settlement negotiations could continue and so a meeting could be convened to review recent evaluations of the student. An interim order of continuance was issued on June 13, 2011, continuing the hearing and final HOD due date.

After the complaint was filed School A conducted evaluations of student, including a psychological that included behavioral assessments. School A also conducted a functional behavioral assessment "FBA". On June 15, 2011, an IEP meeting was convened at School A at which the student's recent behavioral assessments and other records were reviewed. The student's individualized educational program was revised and behavior intervention plan ("BIP") was developed. As a result of the meeting Petitioner agreed to withdraw all but one issue and

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[2] An additional claim was alleged against DCPS for failure to provide the student transportation services. Petitioner withdrew that claim with the expressed intention of filing the claim against the SEA.

[3] The second pre-hearing conference was to obtain an update on the parties' negotiations and to hear oral argument on DCPS' motion to be dismissed as a party. Prior to the second pre-hearing conference Petitioner's counsel expressed an intention to withdraw all claims against DCPS. The Hearing Officer eventually issued an order dismissing all claims against DCPS without prejudice.

claim for relief in the complaint against School A. The parent reiterated her request to School A for a psychiatric evaluation to be conducted. School A did not agree and maintained that the student's current psychiatric records and treating documents available to the team along with the behavioral assessments were sufficient to determine the student's continued eligibility and to effectively program for the student. Thus, School A did not agree to have the psychiatric conducted or agree to authorize an independent evaluation. Petitioner seeks as relief an independent psychiatric evaluation. Petitioner's counsel represented at the hearing that the cost of an independent psychiatric evaluation was approximately

ISSUE: [4]

The issue adjudicated is:

Whether School A failed to provide the student a FAPE by failing to conduct a timely triennial evaluation, i.e. a psychiatric evaluation, which was last, conducted on March 20, 2008?

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-11 and Respondent's Exhibit 1-22) that were all admitted into the record and are listed in Appendix A. [5] Witnesses are listed in Appendix B.

FINDINGS OF FACT: [6]

1. The student is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of ED. The student is enrolled at a District of Columbia charter school that is its own LEA, School A. (Respondent's Exhibit 22)

2. In January 2008, while the student was attending a private school, DC Public Schools conducted a psychological evaluation of the student. The evaluation assessed the student's cognitive abilities, her educational achievement and included a behavior assessment. The evaluation determined the student had average cognitive and academic abilities. The evaluation recommended further psychological assessment of the student's depression and a psychiatric evaluation to further examine her inappropriate and problematic behavior. (Petitioner's Exhibit 11)

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[4] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order dated March 14, 2011, are the issue(s) to be adjudicated.

[5] The Hearing Officer also reviewed and considered the motion to dismiss filed by DCPS and briefs filed by the parties regarding the transportation issue.

[6] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

3. On February 28, 2008, an independent psychiatric evaluation was conducted as a part of evaluations conducted to determine an appropriate educational placement for the student. (Petitioner's Exhibit 11)

4. The independent psychiatric evaluator reviewed the student's educational and medical and family history. The evaluation report included a brief paragraph entitled: "Mental Status Evaluation." In this section the evaluator summarized the student's affect and behavior during a student interview. The evaluation report included the following diagnosis for the student: Bipolar Disorder NOS, Attention Deficit/Hyperactivity Disorder ("ADHD") NOS, Posttraumatic Stress Disorder and Generalized Anxiety. The evaluator recommended maintenance of the student's then current medication regiment under another medical doctor, and recommended that the student was in need of a full time placement in a small therapeutic setting with a low teacher to student ratio to facilitate specialized instruction. The evaluator also recommended the student receive individual psychotherapy and group counseling. (Petitioner's Exhibit 7)

5. Despite the recommendation in the psychiatric evaluation the parent was hopeful the student could continue in a general education setting and the student has remained in a general education setting. The student has attended School A and received special education services in a general education setting at School A. (Parent's testimony, Respondent's Exhibit 13)

6. During the 2009-2010 school year the student attended School A and an individualized educational program ("IEP") was developed for the student that included the following weekly services: 7.5 hours of specialized instruction in the general education setting and 2 hours of behavioral support services outside the general education setting. School A also maintained a BIP for the student. (Respondent's Exhibit 1, Respondent's Exhibit 2)

7. The student has continuously received out of school psychotherapy and medication management with a psychiatrist for the past few years. Early in 2011 the student was briefly hospitalized for suicidal actions and later returned to school. The student's diagnosis has not changed and remains as it was diagnosed in the student's 2008 psychiatric evaluation. However, some of the student's current therapeutic providers are of the opinion the student's diagnosis may need updating. However, no final determination has been made. The parent is concerned about an accurate diagnosis for the student and how that will impact the student in her next education setting and seeks an independent psychiatric reevaluation to assist in that process. The student will not be returning to School A for the 2011-2012 school year because the school is closing. The parent has applied to several other charter schools and has received a provisional acceptance to one school but is awaiting other acceptances. The parent is hopeful the student will be accepted to a charter school that has not yet provided an acceptance decision. (Parent's testimony)

8. In February 2011, School A conducted a psychological reevaluation of the student. The evaluation included cognitive, educational and behavioral assessments. The student's cognitive and educational abilities were determined to be in the average range. The evaluator noted the student demonstrated significant inattention, anxiety and depression

and difficulty in dealing with peer relationships. The evaluator recommended continued behavioral support services and outside therapy to help the student manage her behaviors at home. (Petitioner's Exhibit 10)

9. In May or June of 2011 School A also conducted a functional behavioral assessment "FBA". On June 15, 2011, an IEP meeting was convened at School A at which the student's recent behavioral assessments and other records were reviewed. The student's IEP was revised and BIP was updated. The parent reiterated her request to School A for a psychiatric evaluation to be conducted. School A did not agree and maintained that the student's current psychiatric records and treating documents available to the team along with the behavioral assessments were sufficient to determine the student's continued eligibility and to effectively program for the student. Thus, School A did not agree to have the psychiatric conducted or agree to authorize an independent evaluation. School A's special education coordinator attempted to have the student current treating therapist participate in the IEP meeting and development but the therapist declined. (Ms. James' testimony, Respondent's Exhibits 21 & 22)

10. The student's IEP developed at the June 15, 2011, meeting provides for the following weekly services: 7.5 hours of specialized instruction in the general education setting, 60 minutes of behavioral support services outside the general education setting and 30 minutes per month of behavior support consultation services. (Petitioner's Exhibit 22)

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 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [7] *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.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements

[7] The burden of proof shall be the responsibility of the party seeking relief. 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.

of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Issue: Whether School A failed to provide the student a FAPE by failing to conduct a timely triennial evaluation, i.e. a psychiatric evaluation, which was last, conducted on March 20, 2008?

Conclusion: School B did not conduct all necessary reevaluations of the student and should conduct a psychiatric evaluation.

34 C.F.R. § 300.303 provides:

> (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> (2) If the child's parent or teacher requests a reevaluation.
> (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
> (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
> (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.304 titled "Reevaluations" provides in pertinent part:

> (b) In conducting the evaluation, the public agency must--
> (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.
> (c) Other evaluation procedures. Each public agency must ensure that--...
> (4) 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; ...

(6) In evaluating each child with a disability under Sec. Sec. 300.304 through 300.306, 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.

Although School A maintains that it had conducted all the warranted assessment and reevaluation required to determine the student's education needs, the Hearing Officer is not convinced. Although School A conducted behavior assessments and a FBA the psychological evaluation noted the student continue to exhibit significant inattention, anxiety and depression and difficulty in dealing with peer relationships. In addition, within the most recent school semester the student has been hospitalized for suicidal actions. Although School A staff has attempted to have the student's current outside therapeutic providers participate in her IEP review and develop they have been unable to do so. The previous psychiatric evaluation recommended the student be placed in a full time therapeutic setting. Although the parent is hopeful that the student can continue to be in a general education setting, she remains uncertain as to the student's accurate diagnosis and it is reasonable to her to insist in that in the school assessment of the student the evaluation is sufficiently comprehensive to identify all of the student'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 C.F.R. § 300.304 provides:

> Each public agency must 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; ...and ensure that in evaluating each child with a disability under Sec. Sec. 300.304 through 300.306, 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.

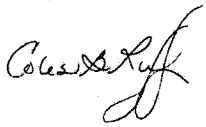
The Hearing Officer concludes that under the facts of this case with a prior psychiatric evaluation recommending a full time therapeutic setting and a student who has recently been hospitalized for suicidal actions it is appropriate for School A to conduct a psychiatric reevaluation and the failure to do so deprived the parent and the IEP team of vital evaluative data and significantly impeded the parent's opportunity to meaningfully participate in the decision making process regarding provision of FAPE.

ORDER:

School A shall within thirty calendar days of the date of this order fund an independent psychiatric evaluation of the student at a cost not to exceed

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. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: June 29, 2011