

<p>STUDENT<sup>1</sup>, by and through his Parent  Petitioners,  v.  District of Columbia Public Schools  ("DCPS")  Respondent.    Case</p>	<p>HEARING OFFICER'S  DETERMINATION</p> <p>Date of Hearing:  January 28, 2010</p> <p>Date of Complaint:  November 24, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners:  Domiento Hill, Esq.  1220 L Street, NW  Suite 700  Washington, DC 20005</p> <p>Counsel for DCPS:  Tanya Chor, Esq.  Office of General Counsel  825 North Capitol St. NE  Washington, DC 20002</p> <p><u>Hearing Officer:</u>  Coles B. Ruff, Esq.</p>
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<sup>1</sup> 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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

## **PROCEDURAL BACKGROUND:**

A Due Process Hearing was convened January 28, 2010, at the Van Ness School, 1150 5<sup>th</sup> Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed on November 24, 2009, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted on January 6, 2010, and a pre-hearing order was issued on January 11, 2010.

## **RELEVANT EVIDENCE CONSIDERED:**

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-16 and DCPS Exhibits 1-8) which were admitted into the record. The record also included the pre-hearing memoranda submitted by the parties on January 19, 2010, by Petitioner and January 22, 2010, by DCPS counsel.

## **ISSUE(S):<sup>2</sup>**

Did DCPS deny the student a free and appropriate public education by failing to evaluate the student with the parent requested and staff recommended psychiatric assessment?

## **FINDINGS OF FACT<sup>3</sup>:**

1. The student is a \_\_\_\_\_ grader attending School A, a full time private special education program. The student's tuition is funded by the District of Columbia Public Schools ("DCPS"). The student has been determined to be a child with a disability in need of special education and related services with a disability classification of Emotional Disturbance ("ED"). (Petitioner's Exhibit 7)

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<sup>2</sup> The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. At the pre-hearing conference Petitioner's counsel withdrew the claim for compensatory education.

<sup>3</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

2. The student's most recent Individualized Educational Program ("IEP") was developed at an IEP meeting on November 18, 2009, at School A. The IEP prescribes the following weekly services: 27.5 hours of specialized instruction and 1.5 hours of behavioral support services. The IEP also includes a Behavior Intervention Plan ("BIP"). (Petitioner's Exhibit 7, DCPS Exhibit 5)
3. On November 13, 2009, a Functional Behavioral Assessment ("FBA") was developed for the student as a result of the student's behavioral difficulties that "negatively impact his availability for learning." The FBA concluded the student was struggling with increasingly poor impulse control and unsafe physically aggressive behavior. The FBA noted the student missed 75 hours of instruction time during the 2008-09 School Year ("SY") as a result of behavioral difficulties. The assessor determined the student's behavioral difficulties "appear to stem from a combination of biological and social-emotional issues. His moods rapidly vacillate between states of agitation, anxiousness, and depression..." "[The student's] behavioral responses to his emotions result in distraction from his feelings given that the focus turns to his behavior. In addition, behavioral escalation allows for individual attention from peers and adults, allows him to avoid hard or frustrating tasks..." The assessor recommended the student continue to participate in School A's structured behavior management system and be provided a dedicated one-to-one aide to assist in redirection and individual assistance as required. The assessor strongly recommended the student receive a psychiatric evaluation in order to determine what benefit medication might provide in helping the student achieve emotional stabilization." (Petitioner's Exhibit 13, DCPS Exhibit 6)
4. On November 18, 2009, a manifestation determination meeting was convened at School A to address the student's physical contact with a staff member that resulted in the student's out of school suspension. The student and parent attended the meeting along with their educational advocate. There were a total of ten participants in the meeting including the student's teachers and \_\_\_\_\_, a School A psychologist. The DCPS representative participating in the meeting was \_\_\_\_\_. The team determined the incident was a manifestation of the student's disability.
5. At the conclusion of the manifestation determination portion of the meeting the team moved on to discuss the student's services and IEP. The team reviewed the student's recent behavior in the classroom and the effectiveness of the BIP that was being implemented. The student's teacher stated the student was academically capable but has difficulty controlling his impulses in the classroom. \_\_\_\_\_ concluded the student "tends to lose control. Predictability of his control of behavior seems uncertain." As a result \_\_\_\_\_ suggested a psychiatric evaluation and possible medication to see if [the student's] control of behavior can be increased. The parent agreed to seek an outside appointment for a psychiatric evaluation. \_\_\_\_\_ also requested a one-to-one dedicated aide to "allow the student to remain in the classroom for larger amounts of time." (Petitioner's Exhibit 11, DCPS Exhibit 2)
6. \_\_\_\_\_ approved an increase in individual counseling for the student to 90 minutes per week with 30 minutes of that as Art Therapy, and he approved the one-to-one dedicated aide. \_\_\_\_\_ expressed a hope that the one-to-one aide would be "decreased

slowly as [the student] demonstrates behavioral improvement.” The team determined to reconvene in three months to re-evaluate the dedicated aide. also agreed to conduct an occupational therapy evaluation. The parent and her advocate requested DCPS also conduct the psychiatric evaluation. recommended an outside psychiatric services and medication management and concluded that DCPS would not complete a psychiatric evaluation “because student is not taking any medication at this time.” (Petitioner’s Exhibit 11, DCPS Exhibit 2)

7. The team developed a Student Evaluation Plan (“SEP”) to include an updated psychological evaluation – cognitive, clinical and educational. DCPS refused to order the psychiatric evaluation. The DCPS IEP meeting notes state: “At this time other evaluations including psychological (cognitive, clinical and educational) and OT shall be performed. Should data gathered from these evaluations and also the BIP interventions put in place, the team shall revisit any other areas of concern.” (Petitioner’s Exhibit 12, DCPS Exhibit 3)
8. provides individual therapy services to the student pursuant to his IEP. In the current academic year has seen the student for more than the prescribed hour because of his extreme agitation and aggressive behavior. requested evaluations because of the violence the student had been exposed to in the past year. requested a psychiatric in addition to a psychological evaluation to get a full picture of what was causing the student’s extreme behaviors. She noted the student was hospitalized in 2005 for emotional issues and may have previously been on medication, but the data in that regard was not current. also noted that she had requested and been provided psychiatric evaluations at DCPS expense for other student’s at School A in the past. She believed comprehensive psychological alone would not provide her any information not already available to her and the School A staff. ( testimony)
9. Ph.D. is a DCPS clinical psychologist who reviewed the student’s file offered her experience and opinion on the use of psychiatric evaluations. A psychiatric evaluation is generally conducted for diagnosis purposes and to determine medical intervention strategies. However, for school purposes the psychiatric evaluation is generally used for identification and clarification of educational difficulty, impact on education and specific recommendations to guide instruction and to accelerate learning. A psychiatric evaluation may also be used in an educational setting to determine the need for residential treatment or hospitalization. A comprehensive psychological evaluation and a psychiatric evaluation for educational purposes may cover the same areas – assessing whether there is an educational disability, the nature of the disability and what recommendations might be used to guide instruction. What typically determines the components of an evaluation are the referral questions from the IEP team - what is the specific concern where the student is having difficulty? In instances when has requested a psychiatric evaluation the medical doctor was asked what could be expected regarding the child’s availability for instruction. Sometimes when an individual who is need of medication is not using the medication his or her availability for learning may be impacted. In such an instance, suggested interventions from a psychiatrist might

be helpful in making the student more available for learning.  
DCPS Exhibit 8) <sup>4</sup>

testimony,

10. On November 24, 2009, Petitioner (the student's mother) filed a Due Process Complaint Notice alleging failed to provide a free and appropriate public education ("FAPE") to the student by failing to conduct the psychiatric evaluation. (Petitioner's Exhibit 2)

### 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 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. <sup>5</sup> 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.

Did DCPS deny the student a free and appropriate public education by failing to evaluate the student with the parent requested and staff recommended psychiatric assessment? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.304(c)(4) and (6):

DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...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."

Pursuant to 34 C.F.R. § 300.303:

(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--

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<sup>4</sup> The witness was designated as an expert in clinical psychology to offer opinion testimony; however, the witness had no personal experience with or knowledge of the student in the case.

<sup>5</sup> 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

(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. (Authority: 20 U.S.C. 1414(a)(2))

Pursuant to 34 CFR 300.304(c) (c) Other evaluation procedures:

Each public agency must ensure that--

(1) Assessments and other evaluation materials used to assess a child under this part-

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii)

Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer; (iii) Are used for the purposes for which the assessments or measures are valid and reliable; (iv) Are administered by trained and knowledgeable personnel; and (v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(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;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with Sec. 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(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.

Pursuant to 34 CFR 300.305 (a) Review of existing evaluation data.

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--

- (1) Review existing evaluation data on the child, including-
  - (i) Evaluations and information provided by the parents of the child;
  - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
  - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--
  - (i)(A) Whether the child is a child with a disability, as defined in Sec. 300.8, and the educational needs of the child; or
  - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
  - (ii) The present levels of academic achievement and related developmental needs of the child;
  - (iii)(A) Whether the child needs special education and related services; or
  - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
  - (iv) 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 IEP of the child and to participate, as appropriate, in the general education curriculum.

Pursuant to 34 CFR 300.305 (d) Requirements if additional data are not needed.

- (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of--
  - (i) That determination and the reasons for the determination; and
  - (ii) The right of the parents 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.
- (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

The issue of DCPS' obligation to comply with a parent's request for reevaluation is a question that the District Courts in the District of Columbia have routinely decided in the favor of the parent. Cartwright v. District of Columbia 267 F. Supp. 2d 83 (D.D.C. 2003) (the court held that given the plan language of the regulations and the absence of a condition precedent to be met by a parent requesting a reevaluation, (the school's] failure to comply with [that parent's] request clearly violates the language of the regulation. DCPS was subsequently ordered to conduct the reevaluation

Petitioner asserts that DCPS is requiring the parent demonstrate a need for the psychiatric assessment despite School A's staff's clear articulations is an attempt to put a condition precedent on the parent's request for the assessment as a part of the student's reevaluation.

DCPS points out a distinction in the case law Petitioner relies upon to support the proposition that the LEA should have conducted the evaluation. In those instances, DCPS asserts, the LEA had refused to conduct an evaluation, unlike in this instance where DCPS agreed to conduct an evaluation (a comprehensive psychological) but not the specific evaluation the parent requested.

DCPS asserts that the psychiatric evaluation Petitioner seeks is a medical evaluation for medication purposes and is not the part of any educational programming thus it is not the responsibility of the LEA to conduct the evaluation. DCPS further asserts the LEA does not have the authority for prescription and application of medication.

The Hearing Officer is not convinced by DCPS's argument regarding the psychiatric evaluation. First, the IEP meeting notes clearly state that the DCPS representative required the student first be on medication before DCPS would agree to conduct a psychiatric evaluation. This demonstrates that there was a condition under which DCPS would have agreed to conduct the evaluation. In addition, [redacted] testified that in some instances psychiatric evaluations are helpful in determining interventions that can address a student's availability for learning.

The Hearing Officer finds [redacted] testimony credible that she requested the psychiatric evaluation for purposes of assisting in the student's availability for learning and not just for a medication determination. The FBA clearly states that the student behavior difficulties negatively impact his availability for learning and have both a biological and emotional basis. There is clearly a reasonable and justifiable purpose for the requested evaluation beyond a medication determination. Further, the Hearing Officer is not convinced that the LEA is not required to conduct medical evaluations.

34 CFR 300.304(c)(4) requires that a child be 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.

In Doe v. The Board of Public Education of Nashville-Davidson's County, 441 IDELR 206 (July 22, 1988) (the Court held while district is not required to provide medical care, it is required to pay for evaluation and diagnosis by qualified physicians were such diagnosis is necessary to plan appropriate individualized education program. In re: Los Angeles District Unified School 505 IDELR 244 (December 9, 1983);

Part B of *IDEA* does not necessarily require a school district to conduct a medical evaluation for the purpose of determining whether a child has a condition ADHD. If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADHD meets the eligibility criteria of the OHI category, or any other disability category under Part B, the school district must ensure that this evaluation is conducted at no cost to the parents (OSEP Letter to Michel Williams, March 14, 1994, 21 IDELR 73).<sup>6</sup>

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<sup>6</sup> The Hearing Officer notes that there were no facts that this student might have ADHD but only cites this case by analogy with regard to a LEA providing a medical evaluation.

The Hearing Officer concludes DCPS's requirement that the student first be on medication before authorizing the psychiatric evaluation and not agreeing to the conduct the evaluation when the facts clearly demonstrate that such a evaluation would assist in more fully assessing the student's behavioral difficulties which had increasingly made him unavailable for learning impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, and caused the child a deprivation of educational benefits.

**ORDER:**

1. DCPS shall fund and the parent shall obtain an independent psychiatric evaluation at the DCPS prescribed rate.
2. DCPS shall within fifteen (15) business days of its receipt of the independent psychiatric evaluation convene a multidisciplinary team (MDT) meeting to review the student's evaluation(s) and review and revise the student's IEP as appropriate.
3. A copy of any notice to the parent of the scheduled MDT meeting shall be also provided to counsel for the student and parent.
4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

**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. § 415(i)(2).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: February 7, 2010**