

Hearing Officer Determination

Case No. 2016-0065

Procedural History

Following the filing of the due process complaint on 3/17/16, the case was assigned to the undersigned on 3/18/16. DCPS timely filed its response on 3/21/16 and did not challenge jurisdiction. The due process complaint alleged disciplinary matters and sought an expedited hearing, which DCPS opposed in its response; the matter was expedited by the undersigned's Order to Expedite on 3/28/16.

The resolution session meeting took place on 3/28/16, but the parties did not resolve the case. Pursuant to 34 C.F.R. 300.532(c), the due process hearing on disciplinary matters must be completed within 20 school days from filing, which required the hearing to be completed by 4/22/16.² Based on the hearing date of 4/12/16, and the requirement in the above-cited section that a determination must be made within 10 school days after the hearing, the Hearing Officer Determination ("HOD") is due by 4/27/16.

The due process hearing took place on 4/12/16 and was closed to the public. Petitioner was represented by *Petitioner's counsel*. DCPS was represented by *Respondent's counsel*. Counsel briefly discussed settlement near the beginning of the hearing without success. Petitioner was present for the entire hearing.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner's Disclosure statement and a revised Disclosure letter, both submitted on 4/5/16, consisted of a witness list of four witnesses and documents P1 through P15, which were admitted into evidence without objection.

Respondent's Disclosure statement, submitted on 4/1/16, consisted of a witness list of four witnesses and documents R1 through R16, which were admitted into evidence without objection.

Petitioner's counsel presented three witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. *Clinical Psychologist*, who was qualified without objection as an expert in Clinical Psychology
2. *Educational Advocate*, who was qualified without objection as an expert in Special Education and IEP Development
3. Parent

² While all issues in the due process complaint did not involve disciplinary matters, there was no request to bifurcate the non-disciplinary issues and all issues were addressed on an expedited timeline and are resolved herein.

Hearing Officer Determination

Case No. 2016-0065

Respondent's counsel presented three witnesses in Respondent's case (*see* Appendix A):

1. *School Psychologist*, who was qualified without objection as an expert in School Psychology
2. *School Social Worker*
3. *Special Education Teacher*

Petitioner's counsel did not call any rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by refusing to evaluate him (a) when requested by Parent or required for a triennial review, and/or (b) in all areas of suspected disabilities, where Student has not been evaluated since 2009 or 2010, has increasingly serious behavioral issues, and is four to five years below grade level academically despite average intelligence.

Issue 2: Whether DCPS denied Student a FAPE by failing to (a) carry out a Manifestation Determination Review, (b) provide appropriate educational services, and/or (c) update Student's Functional Behavioral Assessment and a Behavioral Intervention Plan, when Student was excluded from class several times a week for about two hours at a time since the beginning of the 2015/16 school year, with at least 28 intervention reports through 11/10/15, which resulted in classroom exclusions totaling more than 10 days.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. DCPS shall fund the following independent evaluations³ at market rates: (a) comprehensive psychological, (b) occupational therapy, (c) neuropsychological, if recommended by the psychologist,⁴ and (d) any other evaluations recommended in the reports of the evaluations listed in (a) through (c).
3. Within 10 school days after completing the evaluations in the previous paragraph, DCPS shall convene an IEP team meeting to review the results, update Student's IEP, and determine an appropriate placement/location of services.

³ Petitioner expressly withdrew his request for a speech/language evaluation at the due process hearing.

⁴ The qualification that a neuropsychological evaluation depended on the recommendation of a psychologist was added by Petitioner at the due process hearing. Previously that qualification had been part of the request for a speech/language evaluation, which Petitioner's counsel stated at the due process hearing had been in error.

Hearing Officer Determination

Case No. 2016-0065

4. Compensatory education for any denial of FAPE is reserved until completion of Student's evaluations, with compensatory education to be discussed at the IEP team meeting mentioned in the previous paragraph.

Brief oral opening statements and oral closing statements were made by both Petitioner's counsel and Respondent's counsel.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age* and in *Grade*.⁷ Student began at *Day School* in October 2010, a level 5, separate, special education day school.⁸ Student is classified as having Emotional Disturbance ("ED"), which leads to frequent emotional dysregulation so he is not available for learning; his ongoing eligibility for special education was confirmed by his IEP team on 1/14/16.⁹

2. Student's 11/23/15 IEP provides for 30 hours/week of specialized instruction outside general education, four hours/month of Behavioral Support Services outside general education, and one hour/month of Occupational Therapy ("OT") outside general education.¹⁰ The 11/23/15 IEP also provides that when Student is a danger to himself or others, Crisis Management is to be implemented by trained staff and consist of "exclusion, seclusion and restraint."¹¹ The 11/23/15 IEP notes that Student "still benefits from Occupational Therapy services at this time."¹²

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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, 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.

⁶ Parent; R3-5; R10-3.

⁷ Parent; P9-7.

⁸ R10-3; R3-5; P9-16.

⁹ P11-1; R2-2; R10-8; Clinical Psychologist; School Psychologist.

¹⁰ P9-15.

¹¹ P9-15; School Social Worker.

¹² P9-14.

Hearing Officer Determination

Case No. 2016-0065

3. Student is having more serious problems this school year.¹³ Student's IEP team on 11/23/15 noted that Student had regressed behaviorally in 2015/16,¹⁴ which may relate to his regression in academics.¹⁵ His 11/23/15 IEP states that Student "is having difficulties transitioning this school year."¹⁶

4. Student's problem behaviors include "fighting, physical aggression, inappropriate language, disruption, defiance/disrespect, and being out of location."¹⁷ These result in Student being removed from his classroom and taken to the Multi-Sensory De-escalation Room ("MSDR").¹⁸ Student is sometimes violent, such as punching a staffer in the stomach who was trying to calm him in the MSDR room.¹⁹ The MSDR room is a therapeutic space that is used for students in crisis to calm down.²⁰ Often students are given an opportunity to calm down without staff speaking to them.²¹

5. Student is demonstrating increasing sexualized behavior and makes inappropriate sexual comments toward staff, "grinds" with stuffed animals, and has made inappropriate gestures toward peers.²² Student has displayed sexually inappropriate and aggressive behaviors since he was [REDACTED] years old, and seems unable to regulate his sexual impulses.²³

6. Day School provides therapeutic intervention in place of discipline in most circumstances; however, intervention reports were referred to as a "Discipline Record" in the 1/14/16 Evaluation Summary Report.²⁴ Intervention reports are not about discipline, but are completed by the staff member working with the student in crisis to explain what led up to the crisis, what happened during the crisis, and what was done.²⁵

7. Student received at least 28 intervention reports from the beginning of 2015/16 through 11/10/15.²⁶ Student received more than three intervention reports a week through

¹³ Parent.

¹⁴ All dates in the format "2015/16" refer to school years.

¹⁵ R3-2.

¹⁶ P9-14.

¹⁷ R3-4.

¹⁸ R3-4; R10-3.

¹⁹ R7-1.

²⁰ School Social Worker.

²¹ *Id.*

²² R3-3; R11-4.

²³ R10-3; P7-11; Clinical Psychologist.

²⁴ P11-11; School Social Worker.

²⁵ School Social Worker; P14; R4 through R9.

²⁶ R3-4; R10-3; R13-5.

Hearing Officer Determination

Case No. 2016-0065

November 2015, and even more per week after that.²⁷ Discipline can still occur if misbehavior is not a manifestation of the child's disability.²⁸

8. Parent regularly drops by Day School unannounced and often finds Student out of his classroom on a walk to calm down or in the separate MSDR room where Student's aide is rarely with him.²⁹ Student may occasionally spend two hours out of the classroom in a day due to his disruptive behavior if he is in crisis, but not routinely.³⁰

9. Student is being put in the time-out room first thing every morning before school starts to prevent him from getting out of line, which began after the January 2016 IEP meeting.³¹ Student going to the MSDR room when he first gets to school is a "structured break" that averages about 10 minutes a day to address his initial high level of energy.³²

10. An FBA was conducted in late November 2015 in which Student's many behaviors of concern, including defiance, moodiness, physical aggression and many more, were described as happening "continuously" and "in all settings," with more severity in the morning than the afternoon.³³ Student's BIP was updated on 11/30/15 to include strategies addressing his current classroom.³⁴ When Student demonstrates unsafe or physically aggressive behaviors, staffers are to "utilize exclusion, seclusion, or physical restraint in order to maintain safety."³⁵

11. DCPS reported that "Math continues to be an area of strength" for Student; his Math iReady score in the Fall of 2015 was ■■■■, which was four years below his grade, while his Reading iReady score in September 2015 was ■■■■, which is five years below his grade.³⁶

12. If Student is excluded from class, staffers try to end the crisis and return him to class, but if that doesn't work then there are attempts made to give him instruction out of the classroom.³⁷ Student may get instruction from his therapeutic behavior aide, but if Student is unwilling then classroom staff may find an alternate time to make up his instruction.³⁸

²⁷ School Social Worker; R13-5.

²⁸ School Social Worker.

²⁹ Parent.

³⁰ School Social Worker; R13-5.

³¹ Parent.

³² School Social Worker; R3-3.

³³ R11-2.

³⁴ R3-5; R12.

³⁵ R12-2; School Social Worker.

³⁶ P11-6; R3-2; R10-6.

³⁷ School Social Worker.

³⁸ *Id.*

Hearing Officer Determination

Case No. 2016-0065

13. Evaluations. A comprehensive developmental evaluation dated 3/12/09 found Student to be Average cognitively.³⁹ A psychological evaluation dated 3/19/09 found Student to be Average in Full Scale IQ, Verbal IQ and Performance IQ based on a Behavior Assessment for Children – Second Edition (BASC-2).⁴⁰ An education evaluation on 5/14/12 found Student was Low Average in Broad Reading and Average in both Broad Math and Broad Written Language using the Woodcock-Johnson III (W-J III).⁴¹

14. A neurology evaluation was conducted on 7/14/10, which noted that Student was exposed to “at least” marijuana prior to birth and that he has been “at least” physically abused and exposed to “explicit events.”⁴² An OT evaluation was conducted on 8/2/10, which among other conclusions recommended that Student be reevaluated about six months later.⁴³ A psychosexual evaluation dated 1/8/11 found clinically significant elevations in the area of Sexual Concerns which suggested sexual distress and sexual preoccupation, based on the Trauma Symptom Checklist for Young Children.⁴⁴

15. 11/23/15 Meeting. At the IEP team meeting on 11/23/15, Parent and Student’s guardian ad litem stated a need for updated evaluations in light of “recent information regarding family mental health” and “evidence of some emotional issues” with Student.⁴⁵ However, Parent did not trust Day School to conduct the evaluations and was clear at that meeting that he would pursue evaluations on his own.⁴⁶

16. At the 11/23/15 meeting, the IEP team did not identify any additional information needed.⁴⁷ School Psychologist didn’t refuse to conduct a comprehensive psychological evaluation at the meeting.⁴⁸

17. Psychological Triennial Reevaluation. School Psychologist conducted a “Psychological Triennial Reevaluation” with a report on 1/7/16 and an amended report on 2/4/16 to include information from the 1/14/16 IEP team meeting and a call to Parent.⁴⁹ The Psychological Triennial Reevaluation was primarily a review of records and summary of prior evaluations and did not include a current psychological or al evaluation.⁵⁰ The results of interviews of Parent, Teacher, Aide, School Counselor and Student in the Reevaluation comprised in total just over one page, with much of the information coming

³⁹ P3-1,4.

⁴⁰ R10-3; P4-1,3.

⁴¹ R10-4.

⁴² R15-2.

⁴³ P6-9.

⁴⁴ R10-4; P7-1.

⁴⁵ R3-1.

⁴⁶ R3-1; Educational Advocate.

⁴⁷ School Psychologist.

⁴⁸ *Id.*

⁴⁹ R10-1.

⁵⁰ Educational Advocate.

Hearing Officer Determination

Case No. 2016-0065

from statements at the IEP team meeting.⁵¹ A classroom observation of Student for the Reevaluation totaled 15 minutes and resulted in one paragraph in the report.⁵²

18. Parent didn't think that School Psychologist ever interviewed him for her Psychological Triennial Reevaluation, but this Hearing Officer found School Psychologist's testimony more credible that she obtained most of her information from Parent at the 1/14/16 IEP meeting and followed up with a short telephone call to Parent.⁵³

19. The only Educational Implications listed by School Psychologist in her Psychological Triennial Reevaluation was "to determine whether [Student] continued to be eligible for special education as a student with an Emotional Disturbance (ED)."⁵⁴

20. 1/14/16 Meeting and Information. Student's guardian ad litem and a representative from Health Services for Children with Special Needs ("HSCSN") participated in the 1/14/16 IEP team meeting on behalf of Student and, along with Parent, urged Day School to reevaluate Student.⁵⁵ The HSCSN representative was particularly adamant about the need for evaluations, but was told at the 1/14/16 meeting that Day School would not conduct any further evaluations.⁵⁶ Educational Advocate had spoken with the guardian ad litem and HSCSN representative about their involvement in this matter because they could not testify due to their work for the District of Columbia government.⁵⁷

21. At the IEP team meeting on 1/14/16, in response to inquiries about Day School conducting a psychological evaluation, School Psychologist stated that "there was not any additional data needed to determine whether or not [Student] remained a student who is classified ED."⁵⁸ Parent was getting a psychiatric evaluation of Student in February 2016 to determine if he is bipolar, but it was appropriate to finalize Student's IEP and placement before receiving the psychiatric report, since Student would continue to be classified as ED even if he were found to be bipolar.⁵⁹

22. School Psychologist testified that new evaluations would not have shed new light on Student's situation, as Student has had lots of challenges over long periods of time with little that is new.⁶⁰ In particular, School Psychologist stated that a new comprehensive

⁵¹ R10-5,6.

⁵² R10-6.

⁵³ Parent; School Psychologist.

⁵⁴ R10-7.

⁵⁵ Educational Advocate; Parent.

⁵⁶ Educational Advocate.

⁵⁷ *Id.*

⁵⁸ R2-2.

⁵⁹ School Psychologist.

⁶⁰ *Id.*

Hearing Officer Determination

Case No. 2016-0065

psychological evaluation would not show anything new about Student's behaviors compared to the Psychological Triennial Reevaluation.⁶¹

23. The Evaluation Summary Report dated 1/14/16 reported, among other things, that Student has "made some gains" in adaptive skills because certain issues noted in an August 2008 evaluation were not reported in a March 2009 evaluation.⁶²

24. The 1/14/16 Evaluation Summary Report briefly summarized the cognitive/psychological assessments completed in 2008 and 2009 and the 8/2/10 educational assessment, and noted "no specific concerns" regarding the findings.⁶³

25. In addition to summarizing the 8/2/10 OT evaluation, the 1/14/16 Evaluation Summary Report found that Student demonstrated progress in OT, relying on observations and logs from therapy sessions.⁶⁴

26. Need for Evaluations. Student should have been reevaluated before now.⁶⁵ Current evaluations of Student are needed to obtain recommendations about how best to educate him and prepare an appropriate IEP.⁶⁶ Updated psychological and educational evaluations are needed to properly develop a current IEP for Student.⁶⁷ To develop an IEP current evaluations are desirable; evaluations up to one year old may be acceptable, but no older.⁶⁸ Even if a school knows a student, it is important to conduct formal evaluations so that the information is standards-based rather than teacher-based and not skewed by existing views about a student.⁶⁹

27. Student's psychiatrist recommended in a 3/3/16 letter that a neuropsychological evaluation be completed to assess for a potential learning disorder and to provide "specific, more extensive, and individualized recommendations for school behavioral and academic interventions."⁷⁰

28. The iReady scores give an accurate depiction of current academic levels of a student; they are often incorporated into the current level of functioning in an IEP.⁷¹ The

⁶¹ *Id.*

⁶² P11-4.

⁶³ P11-16.

⁶⁴ P11-14,15.

⁶⁵ Clinical Psychologist.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ P13-1.

⁷¹ School Psychologist.

Hearing Officer Determination

Case No. 2016-0065

iReady assessment is a school tool to see where students are functioning and does not take the place of an evaluation like the Woodcock-Johnson, which is used by psychologists.⁷²

29. The market rate for Clinical Psychologist's evaluations is \$200/hour, based on payment at that rate by the D.C. Superior Court, private clients and others.⁷³ A comprehensive psychological evaluation typically takes 10-15 hours; with the complexity of this case and challenges of working with Student, it would take 15 hours.⁷⁴

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). See *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty

⁷² Clinical Psychologist; Educational Advocate.

⁷³ Clinical Psychologist.

⁷⁴ *Id.*

Hearing Officer Determination

Case No. 2016-0065

under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights.

“Based solely upon 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 a FAPE.” 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether DCPS denied Student a FAPE by refusing to evaluate him (a) when requested by Parent or required for a triennial review, and/or (b) in all areas of suspected disabilities, where Student has not been evaluated since 2009 or 2010, has increasingly serious behavioral issues, and is four to five years below grade level academically despite average intelligence.*

Petitioner carried his burden of demonstrating that Student has not received the evaluations that he should have at Day School. The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if Student’s parent or teacher requests a reevaluation, or if the Local Educational Agency (“LEA”) determines that the needs of the student warrant a reevaluation. 34 C.F.R. 300.303. Here, the evidence is that there were both requests for evaluations of Student, and substantial need for updated evaluations of Student, given the growing severity of his behavior and his poor functioning in school of which the LEA was aware.

Student is having more serious problems this school year, with fighting, physical aggression, defiance, disrespect, and disruption, among other things. These problems are not occasional: Student’s November 2015 FBA stated that they happen “continuously” and “in all settings.” Student is also demonstrating increasingly sexualized behavior and seems unable to regulate his sexual impulses. Student’s IEP team on 11/23/15 noted that Student had regressed behaviorally in 2015/16, which the team explained may relate to his regression in academics. While not many years into school, his Math iReady score in the Fall of 2015 was four years below his grade, while his Reading iReady score in September 2015 was five years below his grade.

Hearing Officer Determination

Case No. 2016-0065

In considering reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with 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. 34 C.F.R. 300.305(a). The 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." 34 C.F.R. 300.304(c)(4). The IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993).

Day School is still relying on data and assessments of Student from many years ago. The Evaluation Summary Report in January of this year found that Student has made some gains because certain issues noted in his August 2008 evaluation were not reported in his March 2009 evaluation. The 2016 Report further noted no specific concerns about the findings of assessments of Student conducted in 2008, 2009, and 2010, when Student was less than half the age he is now. The expert in Clinical Psychology and the expert in Special Education and IEP Development each credibly testified that Student should have been reevaluated before now because current evaluations of Student are needed to obtain recommendations about how best to educate him and prepare an appropriate IEP.

School Psychologist did prepare a so-called Psychological Triennial Reevaluation on 1/7/16 (amended 2/4/16), which was primarily a review of records and summary of prior evaluations and did not include a current psychological or educational evaluation. Interviews of Parent, Teacher, Aide, School Counselor and Student were reported in just over one page in total, with much of the information coming from the IEP team meeting on 1/14/16; classroom observation of Student totaled 15 minutes and yielded only one paragraph in the report.

Day School viewed the need for new evaluations as being only about the issue of ongoing eligibility of Student for special education. The only Educational Implications listed in the Psychological Triennial Reevaluation was to determine eligibility. Similarly, at the 1/14/16 IEP team meeting, in response to inquiries about Day School conducting a psychological evaluation, School Psychologist stated that it was not needed to determine that Student continued to be classified as ED.

However, the purpose of an evaluation, under the IDEA, is not only to determine whether a child has a disability, but also the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46644 (8/14/06) ("one of the purposes of a reevaluation is to determine the educational needs of the child, including whether any additions or modifications to the special education and related services are needed to enable the child to meet the child's IEP goals and to participate in the general education curriculum"). School Psychologist took the view that

Hearing Officer Determination

Case No. 2016-0065

new evaluations would not have been helpful to shed new light on Student's situation, as Student has had lots of challenges over long periods of time with little that is new. In particular, School Psychologist testified that a new comprehensive psychological evaluation would not show anything new about Student's behaviors compared to her limited Psychological Triennial Reevaluation, which this Hearing Officer did not find persuasive.

Parent and Student's guardian ad litem on 11/23/15 both raised the need for updated evaluations in light of recent information about family mental health and emotional issues with Student. But Parent did not trust Day School to conduct the evaluations and was clear at the 11/23/15 meeting that he would pursue evaluations on his own. At that meeting, the IEP team did not identify any additional information needed, rather than determining that updated evaluations were needed and relying on Parent to provide them as he intended at that time. The IEP team deciding that a child doesn't need updated evaluations might be reasonable if the child were doing well and making good progress. But here Student was worsening behaviorally and academically, and within 2015/16 was doing worse since November than he was prior to November, when he had accumulated some 28 intervention reports.

By the 1/14/16 IEP team meeting, Parent realized that he could not afford independent evaluations. Student's guardian ad litem, a representative from HSCSN, and Parent urged Day School to further evaluate Student. The 1/14/16 meeting was apparently quite contentious, as the HSCSN representative was adamant about the need for evaluations and Day School refused to conduct any further evaluations. School Psychologist testified that she never refused any request of Parent for evaluation because she did not know who the HSCSN woman was representing, but this Hearing Officer finds that defense disingenuous. There were only two sides to the controversy over evaluations and the HSCSN representative was not there for the school, so it should have been clear that she was there on behalf of Student and Parent. Moreover, as a key participant in the meeting for Day School, School Psychologist could have inquired at any point about why the HSCSN representative was participating and her authority to speak for Parent and Student.

This Hearing Officer thus concludes from the evidence that, in addition to the need to evaluate Student that has arisen over many years and which is highlighted by how poorly he is doing, there were also requests for evaluation from, and on behalf of, Parent at the 1/14/16 IEP team meeting, which were inappropriately refused.

The evaluations Petitioner is seeking in this case are an independent comprehensive psychological evaluation, a neuropsychological evaluation (if recommended by the comprehensive psychological evaluation) and an OT evaluation (whether or not independent). Given the circumstances, these are entirely reasonable in the view of this Hearing Officer. Student last had a psychological evaluation on 3/19/09, a neurology evaluation on 7/14/10, and an OT evaluation on 8/2/10. As Petitioner's expert testified, updated evaluations are needed to properly develop a current IEP for Student, and while evaluations up to one year old may be acceptable, they should be no older.

Hearing Officer Determination

Case No. 2016-0065

As for the possible need for a neuropsychological evaluation, Student's psychiatrist recommended in a 3/3/16 letter that a neuropsychological evaluation should be completed to assess for a potential learning disorder and to provide recommendations for school behavioral and academic interventions. Thus, this Hearing Officer will require a neuropsychological evaluation if the comprehensive psychological evaluator also recommends it.

A failure to timely reevaluate is a procedural violation of IDEA. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, *3 (D.D.C. 2010). Procedural violations do not, in themselves, mean a student was denied a FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). Student must demonstrate an "educational harm" in order to establish denial of FAPE based on a procedural violation. *See, e.g., Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109-110 (D.D.C. 2011). Here, there can be no doubt that the refusal to properly reevaluate Student "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child," which is sufficient for a denial of FAPE. 34 C.F.R. 300.513(a). Petitioner prevails on Issue 1.

Issue 2: *Whether DCPS denied Student a FAPE by failing to (a) carry out a Manifestation Determination Review, (b) provide appropriate educational services, and/or (c) update Student's Functional Behavioral Assessment and a Behavioral Intervention Plan, when Student was excluded from class several times a week for about two hours at a time since the beginning of the 2015/16 school year, with at least 28 intervention reports through 11/10/15, which resulted in classroom exclusions totaling more than 10 days.*

Petitioner failed to carry his burden on the second issue relating to disciplinary proceedings. The requirements of 34 C.F.R. 300.530 only apply to violations of a code of student conduct where there is a change in placement for more than 10 school days. But Petitioner did not demonstrate that Day School was excluding Student from the classroom for disciplinary reasons, or that the exclusions were so frequent and lengthy that they totaled more than 10 school days, even if the exclusions are assumed to be a change in Student's placement.

The evidence in this case demonstrated to the undersigned that Student was not being excluded from his classroom for disciplinary purposes because of a particular violation of a student conduct code, but because he was in crisis and Day School was carrying out Student's IEP and BIP. His 11/23/15 IEP expressly provided that when Student is a danger to himself or others, crisis management is to be implemented by trained staff and consist of exclusion, seclusion and restraint. Similarly, Student's 11/30/15 BIP plainly stated that if Student demonstrates unsafe or physically aggressive behaviors, staffers are to utilize exclusion, seclusion, or physical restraint in order to maintain safety. Student was generally removed from his classroom and taken to the MS DR room, the therapeutic space used for students in crisis to calm down. Often students were given an opportunity to calm down in the MS DR space without staff speaking to them, which may explain why Parent sometimes found Student in the MS DR room without his aide.

Hearing Officer Determination

Case No. 2016-0065

This Hearing Officer found credible School Social Worker's testimony that Day School provides therapeutic intervention in place of discipline in most circumstances, notwithstanding intervention reports being referred to as a Discipline Record in the 1/14/16 Evaluation Summary Report. Intervention reports are not focused on discipline, but are completed by the staff member working with the student in crisis to explain what led up to the crisis, what happened during the crisis, and what was done. Indeed, if Student were being disciplined for his actions, he likely would have been often suspended for things like punching a staffer in the stomach. This Hearing Officer is persuaded that Student was removed from his classroom because he could not receive educational benefit in the classroom when he was severely dysregulated and in crisis, so it was reasonable for Day School to utilize exclusion of Student, as both his IEP and BIP provide.

The lack of discipline by Day School is dispositive of Issue 2, but there was also disagreement about how much time Student was being removed from class. This Hearing Officer found the testimony of the Day School witnesses more credible than the generalized and seemingly exaggerated statements of Parent about the frequency and duration of removal. Further, Day School's documentation in the incident reports indicates the amounts of time that Student was out of class during exclusion or seclusion, which was considerably less than Parent claimed and less than 10 school days.

Finally, it is worth noting that even if Student had been entitled to the disciplinary protections of the IDEA, he would have simply received what Day School is attempting to do for him anyway: treating his negative behaviors as manifestations of his disability, returning him to his classroom as quickly as possible after a crisis in which Student must be removed, attempting to provide instruction if he cannot promptly return to the classroom, and updating his FBA and BIP. Specifically, the IDEA requires that an MDR must be conducted within 10 school days after any decision to change the placement for more than 10 school days of a child with a disability for a violation of a code of student conduct. 34 C.F.R. 300.530(b),(e)(1). Here, Day School in effect is treating all of Student's negative behaviors as manifestations of his disability by not suspending or otherwise disciplining him, but simply removing him from the classroom to give him a chance to calm down and return in a way that is more productive, both for him and the other children in his class.

In an MDR, if the behavior is found to be a manifestation of the child's disability, the child's BIP (if already developed) must be reviewed and modified as necessary to address the behavior, pursuant to 34 C.F.R. 300.530(f)(1)(ii), and the child must be returned to his placement, pursuant to 34 C.F.R. 300.530(f)(2), unless certain exceptions are met which are not applicable here. Here, Day School updated Student's FBA and BIP in late November 2015; it would not be practicable to update it after every incident. Day School further seeks to return Student to his classroom promptly after removal.

In sum, this Hearing Officer concludes that there was no violation of the IDEA or denial of a FAPE on the second issue relating to discipline and that Day School is taking appropriate steps to work with Student in a very challenging situation.

Hearing Officer Determination

Case No. 2016-0065

ORDER

Petitioner has met his burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall fund within 10 business days at market rate an independent comprehensive psychological evaluation of Student (including clinical, cognitive, educational/achievement, and social history components).
- (2) DCPS shall, at its option, fund (within 10 business days) or complete (within 45 days) an occupational therapy evaluation of Student.
- (3) DCPS shall, at its option, fund (within 10 business days) or complete (within 45 days) an neuropsychological evaluation of Student, if recommended by the psychologist conducting the comprehensive psychological evaluation.
- (4) Within 10 business days after completing the evaluations as required in the previous paragraphs, DCPS shall convene an IEP team meeting to review the results, update and revise Student's IEP as needed, and consider placement as appropriate.
- (5) All claims for compensatory education for the denial of FAPE found herein are reserved until completion of Student's evaluations, with compensatory education to be discussed at the IEP team meeting required in the previous paragraph.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
Contact.resolution@dc.gov
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