

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
January 10, 2016

STUDENT, ¹)	
through PARENTS,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioners,</i>)	
)	Case No: 2015-0352
v.)	
)	Date Issued: January 10, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on October 27, 2015 by Petitioners (Student’s parents), residents of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On November 13, 2015, Respondent filed its Response (which had been due on November 6, 2015), denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on November 19, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on November 27, 2015, and the 45-day period concludes on January 10, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on November 20, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by December 2, 2015 and that the DPH would be held on December

¹ Personal identification information is provided in Appendix A.

9, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on November 20, 2015.

The DPH was held on December 9, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioners elected for the hearing to be closed. Petitioners were represented by Domiento Hill, Esq. and DCPS was represented by Daniel McCall, Esq.

Petitioners’ and Respondent’s disclosures were timely filed. At the DPH, Petitioners’ exhibits P-1 through P-20 were admitted without objection. Respondent’s exhibits R-1 through R-7 were admitted without objection.

Petitioners called the following witness at the DPH:

- (a) Educational Advocate

Respondent called the following witness at the DPH:

- (a) Progress Monitor/LEA Representative

Petitioners and Respondent gave oral closing arguments.

ISSUE

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to reevaluate Student at Parents’ request from September 29, 2015 to the present time.

RELIEF REQUESTED

Petitioners requested the following relief:

- (a) an Order that DCPS provide, within 10 days of a decision in this matter, a copy of any neuropsychological evaluation of Student it has conducted since October 2015, or be ordered to fund Parents’ independent neuropsychological and vocational level III assessments at the prevailing market rate;
- (b) an Order the DCPS reconvene Student’s MDT/IEP team within ten school or business days upon receipt of the last of the evaluations, whichever occurs first, to review the assessments, review and revise Student’s IEP as appropriate;
- (c) an Order awarding compensatory education for the period of time from October 1, 2015 until an appropriate IEP and placement are determined for Student.

FINDINGS OF FACT

1. Student is [AGE] years old. Though Student is an adult, Parents are his legal guardians and educational decision makers.² Student is currently a [GRADE] grade student at Nonpublic School, and resides with Parents in Washington, D.C.

² Testimony of Educational Advocate; P-15-6.

2. Student is eligible for special education and related services under the disability classification traumatic brain injury (“TBI”). Student has been eligible since at least October 2010.³

3. Student had a vocational level II evaluation in August 2012,⁴ and a neuropsychological evaluation in June 2012.⁵

4. Student’s IEP team convened an annual IEP review meeting on May 26, 2015.⁶

5. On September 29, 2015, Student’s IEP team convened an eligibility meeting, during which it reviewed a written report DCPS had prepared titled “Evaluation Summary Report” which included the following language: “Upon completion of the initial evaluation or reevaluation process and the determination of eligibility we must prepare a comprehensive written report to be provided at no cost to you. Because the intent of this report is to summarize the information from a variety of sources gathered during the evaluation process and used to determine if your child is a child with a disability and the educational needs of your, it is important that you carefully review this information. If you feel valuable information is missing or incorrect, please contact [LEA Representative].”

6. Among the numerous formal and informal data sources the Evaluation Summary Report detailed, it indicated Student had been administered the Woodcock-Johnson Tests of Achievement on April 21, 2015, the Word Identification and Spelling Tests on April 22, 2015, an occupational therapy assessment on April 11, 2014, and a physical therapy assessment on June 28, 2015.⁷

7. Student’s most current IEP is dated October 5, 2015, and calls for Student to receive 26 hours of specialized instruction per week outside the general education setting, 240 minutes per month of speech-language pathology services outside the general education setting in an explicit, multisensory, small learning environment; 360 minutes per month of behavioral support services outside the general education setting, and 360 minutes per month occupational therapy outside the general education setting.⁸

8. On September 29, 2015, Student’s IEP team unanimously⁹ determined that Student remained eligible for special education and related services under the disability classification TBI.¹⁰

³ P-7-3.

⁴ Stipulation of the parties; P-8.

⁵ P-7.

⁶ P-14-1.

⁷ P-14.

⁸ P-13-6 and P-13-7. The IEP indicates that Student would receive behavioral support and occupational therapy services inside the general education setting; however, the inside the general education setting designations were erroneous. See P-18-2.

⁹ P-14-3.

¹⁰ P-13-1.

9. At the end of the September 29, 2015 meeting, after Student had been determined to remain eligible, Parents and Educational Advocate verbally requested a comprehensive reevaluation of Student, to include a neuropsychological evaluation (to examine Student's current level of cognitive and executive functioning and to determine whether Student is regressing or progressing as a result of his TBI) and a vocational level III evaluation (in order to provide information regarding transition planning for Student, with Parents citing Student's complex range of educational needs and challenges as a result of his TBI). On or around September 30, 2015, Petitioners reiterated this reevaluation request to DCPS in writing.¹¹

10. Nonpublic School routinely conducts WAIS and WISC assessments for students in Student's grade level, and was in the process of scheduling Student for these assessments as of the September 29, 2015 meeting. However, Nonpublic School staff, including its transition coordinator who works with Student, did not feel it required information beyond what it already had as of September 29, 2015 in order to appropriately program for Student, including transition planning.¹²

11. DCPS did not initially agree to conduct the neuropsychological or vocational level III evaluations Petitioners requested. DCPS indicated that it no longer conducts neuropsychological or vocational level III evaluations, and referred Parents to a non-school based agency that provides vocational and other services to young people and their families before and after they leave high school as a potential source for having the evaluations conducted.¹³ Other than in the meeting notes it provided to Parents, DCPS did not provide written notice to Parents that it was refusing to conduct the requested evaluations.

12. DCPS agreed to do a neuropsychological evaluation and a vocational level II evaluation, and Parents provided signed consent to have these evaluations conducted, on or around November 19, 2015.¹⁴ Parents continued to request a vocational level III assessment (in addition to the vocational level II the parties agreed DCPS would conduct), and Parents expressed their view that they would consider the issue of the neuropsychological evaluation resolved only if the evaluation were conducted prior to the December 9, 2015 DPH.¹⁵

13. The transition plan included in Student's current IEP spans over five pages, and includes detailed information regarding Student's interest in becoming a music producer, air force cadet, chef, physical therapist or wrestler, including concrete details such as the type of education and training that will be necessary to achieve such goals, and the specific types of jobs that would fit well with Student's interests and abilities, the type of work ethic required to attain success in these jobs, the type of working hours that would be expected of him and the potential impact on his personal life. Student's expressed interests and insights are reflected throughout the transition plan, as well as feedback from observations of Student. Additionally, for purposes

¹¹ P-9.

¹² Testimony of LEA Representative.

¹³ Testimony of Educational Advocate; testimony of LEA Representative; P-11-4.

¹⁴ Stipulation of the parties; R-7.

¹⁵ P-20-2.

of preparing the transition plan, Student was assessed with the Live Career's Career Directions Inventory, and the Brigance Transition Skills Inventory. Student's transition plan includes measurable transition goals.¹⁶

14. Student is making progress on his IEP goals, including on his transition goals. Student has, for example, already worked on a college application.¹⁷

15. To the extent that it uses the vocational level III assessment, which is rarely if ever, DCPS typically uses it to assess students who do not have the ability to express their needs or interests.¹⁸

16. As of the DPH on December 9, 2015, the neuropsychological and vocational level II evaluations DCPS agreed on November 19, 2015 to conduct had not yet been conducted.¹⁹

CONCLUSIONS OF LAW

“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 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student'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).

(a) Whether DCPS denied Student a FAPE by failing to reevaluate Student at Parents' request from September 29, 2015 to the present time.

Petitioners' September 29, 2015/September 30, 2015 request for a neuropsychological and a vocation level III evaluation for Student was a request for a reevaluation. *See, e.g., Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010); Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46640 (August 14, 2006) (Once a child has been fully evaluated [the “initial evaluation”], a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a “reevaluation.”) A public

¹⁶ P-13-21 through P-13-26.

¹⁷ Testimony of LEA Representative.

¹⁸ *Id.*

¹⁹ *Id.*

agency must ensure that reevaluations occur when the child's parent or teacher requests a reevaluation and, as Petitioners point out, a parent is not required to provide a reason for requesting a reevaluation (though in this case, Petitioners did provide a rationale for their request). It does not in all cases necessarily follow, however, that a parent is entitled to the precise assessments s/he requests at any given time.²⁰ A reevaluation may occur not more than once per year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303.

In the instant case, Student had a reevaluation process that included consideration of his recent Woodcock-Johnson Tests of Achievement, Word Identification and Spelling Tests, occupational therapy assessment, and physical therapy assessment, and other data sources. Student's reevaluation process culminated in a unanimous determination by Student's IEP team on September 29, 2015 that Student remains eligible for special education and related services under the classification TBI. As reflected by the detailed Evaluation Summary Report, the September 29, 2015 eligibility determination was based on a reevaluation process that had concluded as of the point of that eligibility determination.²¹ Petitioners' request for a reevaluation at the end of the September 29, 2015 meeting, after the eligibility determination had been made, constituted a request for a new reevaluation. A reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Other than Parents and their advocates, Student's team did not feel it needed to undertake an additional reevaluation process of Student immediately following the reevaluation process that had just concluded, in order to program for Student's educational needs, including his transition planning.

When a parent requests more than one reevaluation in a year and the LEA does not believe an additional reevaluation is needed, the LEA must provide the parents with written notice of the agency's refusal to conduct the additional reevaluation, consistent with 34 C.F.R. § 300.503. While DCPS eventually (on November 19, 2015, after the DPC was filed) agreed to conduct a portion of the reevaluation Petitioners requested on September 29, 2015 and September 30, 2015, DCPS did not believe an additional reevaluation was needed when Parents

²⁰ Petitioners cite *Cartwright v. District of Columbia*, 267 F. Supp. 2d 83 (D.D.C. 2003) for the opposite proposition; however, *Cartwright* relies on a predecessor to the IDEA. The statutory language applicable to *Cartwright* is different than the statutory language that is currently in place and that applies to this action. When *Cartwright* was decided in 2003, then 34 C.F.R. § 300.536 read "[e]ach public agency shall ensure (a) [t]hat the IEP of each child with a disability is reviewed in accordance with §§ 300.340-300.350; and (b) [t]hat a reevaluation of each child, in accordance with §§ 300.532-300.535, is conducted if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years." This language differs in significant respects from the current reevaluation-requirement language in the IDEA.

²¹ The September 29, 2015 Evaluation Summary Report further indicates that Student was undergoing a reevaluation that would culminate in an eligibility determination, stating that "Upon completion of the initial evaluation or reevaluation process and the determination of eligibility we must prepare a comprehensive written report to be provided at no cost to you. Because the intent of this report is to summarize the information from a variety of sources gathered during the evaluation process and used to determine if your child is a child with a disability and the educational needs of your, it is important that you carefully review this information. If you fee valuable information is missing or incorrect, please contact [LEA Representative]."

first made the request, and DCPS did not initially agree to conduct the reevaluation. Accordingly, DCPS should have provided written notice to Parents consistent with 34 C.F.R. § 300.503 (including, among other components, a description of the proposed action the LEA was refusing to take and the reasons for the refusal, a description of the data the LEA used as a basis for its decision, and information about the parents' procedural safeguards). DCPS' failure to provide Parents the requisite written notice violated the IDEA. A finding of a denial of FAPE, however, must be based on substantive grounds. Procedural violations of the IDEA do not, in themselves, mean a student was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Here, while DCPS did not provide the required formal written notice, it did provide some of the required information in writing to Parents via the Evaluation Summary Report and September 29, 2015 meeting notes. The Hearing Officer does not find that DCPS' failure to provide the required written notice impeded Student's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student; or caused a deprivation of educational benefit.

Student has a detailed transition plan that meets the requirements set out in 34 CFR § 300.320(b). Transition services must include, "if appropriate," the provision of a functional vocational evaluation. 34 CFR §§ 300.320(b), 300.43. Student's IEP team, with the exception of Parents and their advocates, did not believe an additional vocational assessment was necessary in order to provide transition planning for Student. Given the extensive transition plan Student had in place as of September 29, 2015 and the varied data sources from which it drew (including observations of Student and Student input), this conclusion was reasonable.²² Even though Parents expressed concerns and questions about Student's level of functioning, including his executive functioning, no evidence was offered at the DPH to show that Student is not receiving meaningful educational benefit with his current IEP and placement. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (in order to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'"), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In fact, the evidence indicates Student is making progress on his IEP goals, including his transition goals. Through the neuropsychological evaluation and vocation level II DCPS has agreed to conduct, as well as the WAIS and WISC Nonpublic School routinely administers to its students and will administer to Student, Student's IEP team will have the benefit of even more information than would be required to provide Student a FAPE. The Hearing Officer does not find that DCPS denied Student a FAPE in refusing to conduct the new reevaluation Parents requested on September 29, 2015/September 30, 2015, to include a neuropsychological and vocational level III evaluation.

²² Neither party disputes that, overall, Student's IEP confers educational benefit to him. This factor would have weighed against a finding that Student had been denied a FAPE, even if his transition plan had been deficient. *See Patterson v. District of Columbia*, 2013 WL 4736233, 3-4 (D.D.C. Sept. 4, 2013) (where the IEP as a whole confers an educational benefit, an inadequate transition plan does not amount to denial of a FAPE).

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ORDER

As no denial of FAPE is found, all relief Petitioners requested in the complaint is **DENIED**, and the DPC is dismissed with prejudice.

IT IS SO ORDERED.

Date: January 10, 2016

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:

Petitioners (by U.S. mail)

Petitioners' Attorney: Domiento Hill, Esq. (electronically)

DCPS' Attorney: Daniel McCall, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

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).