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OSSE
Office of Dispute Resolution
January 28, 2024

Confidential

District of Columbia Public Schools (Local Education Agency “LEA”) Petitioner, v. Parents of Student, ¹ Respondent. Case # 2023-0226 Date Issued: January 28, 2024	HEARING OFFICER’S DETERMINATION Hearing Date: January 18, 2024 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

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 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student's parents in the District of Columbia, and the District of Columbia Public Schools (“DCPS” or “Petitioner”) is Student's local education agency (“LEA”). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities (“MD”), including autism spectrum disorder (“ASD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”). Student currently attends a DCPS school (“School A”) where Student began attending at the start of school year (“SY”) 2023-2024.

Student’s parents filed a due process complaint on September 8, 2023, alleging that DCPS denied Student a free appropriate public education (“FAPE”) because, inter alia, DCPS failed to have an individualized educational program (“IEP”) in place for Student prior to the start of school year (“SY”) 2023-2024.²

School A convened IEP team meeting on September 11, 2023. Student’s mother participated in the meeting at which the team discussed, among other things, the evaluating Student. Student’s mother agreed to evaluations with some reservations.

Following the September 11, 2023, IEP meeting, in October 2023, School A provided Student’s mother with a prior witness notice (“PWN”) and a consent form for signature. Student’s mother did not sign and return the consent form.

DCPS, filed the current due process complaint (“DPC”) on November 9, 2023, against Student’s parents, (“Parents” or “Respondents”) seeking an order that would allow DCPS to proceed with and complete the evaluation of Student to determine Student’s specific need for special education programming, placement, and related services.

Response to the Complaint:

Parent’s counsel filed a response to the DPC on December 18, 2023. In the response, Respondents generally denied that their consent for DCPS to evaluate Student had been withheld.

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Resolution and Pre-Hearing Conference:

Because the DPC was filed by the LEA, no resolution meeting was required or convened. The due process complaint (“DPC”) was filed on November 9, 2023. The 45-day period began on November 10, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) is originally due on December 24, 2023. The hearing was scheduled for December 20, 2023. Parents were not available for that date and agreed to January 18, 2024, as the hearing date. An unopposed motion was to continue was filed extending the HOD due date to accommodate the agreed upon hearing date. The undersigned impartial hearing officer (“IHO” or “Hearing Officer”) granted the requested continuance, and the HOD is now due on January 28, 2024. The IHO conducted a pre-hearing conference on December 13, 2023, and issued a pre-hearing order (“PHO”) on December 20, 2023, outlining, inter alia, the issue to be adjudicated.

ISSUE:

The issue adjudicated is:

Whether DCPS can pursue and proceed with a reevaluation procedure and appropriate assessment of Student pursuant to 34 C.F.R. §300.301(a) et seq.

DUE PROCESS HEARING:

The Due Process Hearing (“DPH”) was convened on January 18, 2024, The hearing was conducted via video teleconference.

RELEVANT EVIDENCE CONSIDERED:

This IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 12 and Respondent’s Exhibits 1 through 16) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B. ⁴

FINDINGS OF FACT:

1. Student resides with Student's parents, Respondents, in the District of Columbia, and DCPS is Student's LEA. Student is eligible for special education and related services pursuant to IDEA. Student’s disability classification is MD, including ASD and OHI. Student

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁴ Petitioner presented one witness: School A’s Librarian and LEA Representative who testified as an expert educational evaluation procedures. Respondents presented one witness: (1) Student's Mother (Respondent). The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

currently attends School A, a DCPS school where Student began attending at the start of SY 2023-2024. (Witness 1's, Parent's testimony)

2. Parents filed a DPC on September 8, 2023, alleging that DCPS denied Student a FAPE because, inter alia, DCPS failed to have an IEP in place for Student prior to the start of SY 2023-2024. (Case #2023-0176)
3. During the pendency of Parent's DPC, School A convened IEP team meeting on September 11, 2023. Student's mother participated in the meeting at which the team discussed, among other things, the evaluating Student. School A's notes from that meeting state in pertinent part the following:

“[Student] continues to require supports and accommodations to be successful in the school environment. [Student] will continue with the modified school schedule until the completion of [Student] outpatient day treatment program. A consent for evaluation will be provided to the parent for the administration of the Woodcock Johnson IV to update [Student] academic abilities. [Student's mother] stated that she would be highly discerning in the assessment and evaluation of [Student] as [Student] has been evaluated a great deal. The school-based team agreed to the use of the (June 2021) IEE, beginning of the year assessments in Math, Science, and Reading, and the Woodcock Johnson IV for norm referenced standardized academic achievement assessment.” (DCPS Exhibit 7)

4. Although the Woodcock Johnson IV was mentioned at the September 11, 2023, meeting as the academic achievement assessment that would be administered, the School A psychologist later determine that more appropriate assessment tool to measure Student's academic achievement would be the Wechsler Individual Achievement Test – 4th edition. Because the OSSE special education database that DCPS uses to send documentation to parents was recently updated, School A was not able to send Parent documentation and the consent forms to Parents until late October 2023. (Witness 1's testimony)
5. During the September 21, 2023, resolution meeting of Parent's DPC, among other things, there was some discussion of conducting a comprehensive psychological evaluation of Student. (DCPS Exhibit 8)
6. October 24, 2023, while Parent's DPC was still pending, School A sent Student's mother and her attorney an email with consent form along with a PWN and other documents, including an analysis of existing data report and a copy of the procedural safeguards. The PWN stated in pertinent part the following:

“DCPS is proposing an initial evaluation of [Student] using the Wechsler Individual Achievement Test - 4th edition. Additionally, DCPS proposes to obtain authorization, no later than 3 days following receipt of this notice, to obtain pertinent information from [Student] current day treatment facility regarding supports, strategies, accommodations, and modifications to support [Student's] mental, emotional, and behavioral health that can be implemented in the educational setting.”

“Description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action: DCPS proposes to utilize the Wechsler Individual Achievement Test - 4th edition to evaluate [Student] in the areas of listening, speaking, reading, writing, and mathematics in an individual testing environment. DCPS further proposes to utilize classroom-based assessments and District assessments in reading and mathematics. DCPS was informed by the parent that evaluative information along with recommended supports would be shared by the day treatment program and relevant outside providers, as parental consent was conditioned on a detailed explanation of the evaluations to be completed by DCPS during the September 11, 2023 meeting. To date, October 24, 2023, no information has been received. (DCPS Exhibit 9)

7. The Consent form was entitled “Consent for Initial Evaluation/Reevaluation.” The form had a place for Parents to either check that they consented to the evaluation or did not. The form did not note and specific assessment tool or evaluation that would be conducted, although it was accompanied by the PWN that stated assessment tool to be administered and stated pertinent part the following:

“Based on the information provided in the Analysis of Existing Data Report and the Prior Written Notice, the LEA is requesting that you provide consent to conduct an evaluation of your child to determine if he/she has or continues to have a disability that requires special education and related services under the Individuals with Disabilities Education Act (IDEA).” (DCPS Exhibit 10)

8. With the October 24, 2023, email School A also provided Parents with a “Medical Provider – School Information Release” form for signature so that School A could obtain information from Student’s medical providers. (DCPS Exhibit 11)
9. On October 31, 2023, Student’s mother sent an email to School A regarding the requested consent for evaluation. In the email she stated, among other things, that she would provide consent for DCPS to discuss Student with the outpatient program once the form was changed to remove “a medical condition” and that DCPS assume all financial responsibility for its communication with that program because Student was no longer in the program and there would be charges for DCPS’ communication with the program. She also stated there were multiple errors and misleading statements in the PWN. In the email, Student’s mother also stated the following: “I remain willing to consider consent to any evaluation DCPS wishes to perform. Although I gave blanket consent for evaluations verbally and in writing on 9/11, given that DCPS has not acted in good faith since that time I now withdraw that consent and request that DCPS indicate specifically which evaluations DCPS wishes to perform directly on the consent form. If DCPS cannot type the evaluations onto the form, it is acceptable to me if you handwrite them in instead.” (DCPS Exhibit 2)
10. Parents provided Student’s former outpatient program a signed release form allowing DCPS to speak to the program regarding Student. Parents continue to consent to DCPS speaking with that program. However, if there is a expense or charge from that program for that communication, Parents are unwilling to cover that expense. (Mother’s testimony)

11. Parents grant consent for DCPS to conduct the following assessment of Student academic achievement: Wechsler Individual Achievement Test – 4th edition. (Mother’s testimony)

CONCLUSIONS OF LAW:

ISSUE: Whether DCPS can pursue and proceed with a reevaluation procedure and appropriate assessment of Student pursuant to 34 C.F.R. §300.301(a) et seq.

Conclusion: DCPS is authorized to proceed with reevaluation of Student by conducting Wechsler Individual Achievement Test – 4th edition, and to seek information from medical providers from Student’s former outpatient program to the extent that Parents have already granted consent for same to that program

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). DCPS proceed first and held the burden of production and the burden of persuasion.⁵ The burden of persuasion shall be met by a

⁵ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or

preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Regarding initial evaluation for a student's eligibility for special education and related services 34 C.F.R. §300.301 provides: (a) Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part. (b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

Regarding a student's reevaluation for continued eligibility 34 C.F.R. § 300.303 provides: (a) A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 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 provides: (a) Notice. The public agency must provide notice to the parents of a child with a disability, in accordance with § 300.503, that describes any evaluation procedures the agency proposes to conduct. (b) Conduct of evaluation. 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 § 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);

Regarding parental consent for evaluations 34 CFR § 300.300(a)(1)(i), provides: The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504,

of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation.

Regarding an instance where a parent withholds consent for initial evaluations, 34 CFR § 300.300(a) (3)(i) provides: If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent. (ii) The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation.

Regarding parental consent for reevaluations 34 CFR § 300.300(c), provides: (1) Subject to paragraph (c)(2) of this section, each public agency— (i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any reevaluation of a child with a disability. (ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section. (iii) The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation. (2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that— (i) It made reasonable efforts to obtain such consent; and (ii) The child’s parent has failed to respond. (d) Other consent requirements. (1) Parental consent is not required before— (i) Reviewing existing data as part of an evaluation or a reevaluation; or (ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

Pursuant to 34 CFR § 300.9 Consent means that— (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time. (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

The evidence demonstrates that DCPS has requested consent from Parents to reevaluate Student to determine Student’s continued eligibility for special education and Student’s special education programming. Although Student’s mother granted oral consent with some reservations during the September 11, 2023, IEP meeting, she refused to sign the consent form that School A provided because it did not state the specific evaluation that would be conducted. She also did not sign the consent form for DCPS to speak with Student’s outpatient program providers.

Although the consent form did not specifically state the specific evaluation or assessment tool that would be conducted, the PWN that accompanied the consent form clearly stated DCPS proposed

an evaluation of Student using the Wechsler Individual Achievement Test - 4th edition and proposed to obtain authorization to obtain information from Student's day treatment facility. Although the academic achievement testing instrument was different from the one discussed at the September 11, 2023, meeting, the change in this instrument was not the reason for Student's mother's refusal to sign the consent. She was willing to sign both forms only if DCPS made changes to the forms. DCPS was unwilling to make those requested changes. As a result of both parties' refusals, Student has gone unevaluated.

34 CFR § 300.300(a) and (c) grant DCPS the right to pursue evaluation or reevaluation by using the consent override procedures including the mediation procedures under 34 CFR § 300.506 or the due process. DCPS chose to pursue Student's reevaluation through this due process proceeding.

During the hearing, Student's mother testified that she consents to DCPS conducting the academic achievement testing of Student. She also testified that she has already authorized Student's former outpatient program to speak with DCPS regarding Student, but she is unwilling to incur any cost in DCPS doing so.

Based upon the evidence presented, the IHO concludes that DCPS was justified in pursuing consent override. Accordingly, in the order below the IHO grants DCPS authorization to conduct the evaluation as stated in the PWN provided to Parents. Any additional evaluations or assessment instruments that DCPS wishes to conduct or that Parents want conducted should be discussed and determined at an appropriate team meeting.

ORDER:

DCPS is authorized to proceed with reevaluation of Student by conducting the Wechsler Individual Achievement Test – 4th edition, and to seek information from medical providers from Student's former outpatient program to the extent that Parents have already granted consent to that outpatient program to release information and discuss Student with DCPS.

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 ninety (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).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: January 28, 2024

Copies to: Counsel for Petitioner