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Confidential

<p>District of Columbia Public Schools “DCPS”) Local Educational Agency (“LEA”),</p> <p>Petitioner,</p> <p>vs.</p> <p>Parent on Behalf of Student,¹</p> <p>Respondent.</p> <p>Case # 2020-0092</p> <p>Date Issued: July 7, 2020</p>	<p>REVISED HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: June 12, 2020 June 15, 2020 June 25, 2020</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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 E30.

BACKGROUND AND PROCEDURAL HISTORY:

The Student who is the subject of this due process hearing ("Student") resides with Student's parent ("Respondent") in the District of Columbia, and the District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA"). Student has been identified as a child with a disability pursuant to IDEA, with a disability classification of intellectual disability ("ID").

Student is a currently age ____ and in grade ____.² Student was enrolled in a DCPS school ("School A") during school year ("SY") 2018-2019 and SY 2019-2020.

On June 26, 2019, Respondent filed a due process complaint against DCPS alleging, inter alia, that DCPS failed to comprehensively evaluate Student. On July 25, 2019, DCPS filed a due process complaint against Respondent seeking a determination that the May 2019 psychological evaluation and occupational therapy ("OT") evaluation that DCPS conducted of Student were appropriate. The assigned Independent Hearing Officer ("IHO") consolidated the cases and issued a Hearing Officer's Determination ("HOD") on October 4, 2019.

The IHO concluded, among other things, that DCPS's OT evaluation lacked an assessment of Student's sensory processing. The IHO granted Respondent public funding of an independent educational evaluation ("IEE") to assess Student's sensory processing functioning.

On January 14, 2020, School A convened a multidisciplinary team ("MDT") meeting to review the IEE. At that meeting, Respondent requested that DCPS conduct evaluations that were allegedly recommended by the IEE including a "Developmental Optometrist" evaluation. DCPS denied Respondent's request for this evaluation.

On February 7, 2020, DCPS filed a due process complaint against Petitioner. That complaint was dismissed without prejudice on March 24, 2020, and with a finding that even though there was no evidence that Respondent ever received and responded to the due process complaint, DCPS acted without delay to defend its evaluation of Student. (Case # 2020-0035)

On April 13, 2020, Respondent filed a due process complaint against DCPS asserting, among other things, that DCPS denied Student a FAPE by failing to conduct a "Developmental Optometrist" evaluation.

² The Student's current age and grade are indicated in Appendix B.

On April 23, 2020, DCPS filed the current due process complaint against Respondent, seeking to defend its evaluation of Student. and to obtain a ruling by the Hearing Officer that Petitioner's request for an evaluation by a Developmental Optometrist was in effect a request for an IEE that should not be granted.

Relief Sought by Petitioner, DCPS:

Petitioner seeks as relief the following: an order concluding that DCPS' evaluation of Student is appropriate and Respondent is not entitled to an independent evaluation at public expense.

Response to the Complaint:

Respondent filed a response to the complaint on April 27, 2020 and stated, *inter alia*, the following:

Parent admits that there was an HOD issued on or about October 4, 2019, that ordered DCPS to authorize an IEE to assess the student in the area of "sensory processing functioning". Parent admits that a meeting was held on or about January 14, 2020, to review the independent OT evaluation DCPS authorized pursuant to the October 4, 2019, HOD.

At the January 14, 2020 meeting, parent requested that DCPS conduct a Developmental Optometrist evaluation, based on the express recommendations of the independent occupational therapy evaluation, but denies that he was seeking funding for an independent educational evaluation. Rather, Parent requested that DCPS assume responsibility for ensuring that this evaluation was completed.

Parent admits that DCPS asserted that it does not conduct or fund medical evaluations at the January 14, 2020, meeting. Parent asserts that because there was no evaluation conducted by the public agency and the parent wasn't seeking an independent evaluation pursuant to 34 C.F.R. § 300.502, that provision is inapplicable here.³

Resolution Meeting and Pre-Hearing Conference and Order:

There is no resolution period for complaints filed by an LEA. The 45-day period, in which the due process complaint was to be adjudicated, began on April 23, 2020. The parties agreed and filed a motion for the timeline in this case and HOD due date to coincide with the due process complaint filed by the Parent/Respondent. That motion was granted and the HOD is now due on July 7, 2020.

³ Parent/Respondent also asserted an affirmative defense requesting dismissal of DCPS's due process complaint because Petitioner was not requesting an IEE under 34 C.F.R. § 300.502. On April 28, 2020, Respondent filed a motion to that effect. DCPS filed an opposition, and on May 9, 2020, the Hearing Officer issued an order denying Respondent's motion stating, *inter alia*, the following: Albeit Respondent has presented plausible arguments as to why he believes he should prevail, a decision on the merits is what is required and Petitioner and Respondent shall be allowed to present evidence and make oral arguments on the record about the facts and their respective interpretations of the law.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on May 5, 2020. The Hearing Officer issued a pre-hearing order (“PHO”) on May 14, 2020, outlining, inter alia, the issue to be adjudicated.

ISSUE ADJUDICATED:

The Hearing Officer determined, and the parties agreed at the start of the hearing, that the following is the only issue to be adjudicated:

Whether DCPS appropriately evaluated Student such that Respondent’s requested evaluation by a Developmental Optometrist is unwarranted and Respondent is not entitled to that evaluation at public expense.

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 12, 2020, and June 15, 2020, and June 25, 2020. Due to the COVID-19 emergency, the hearing was conducted via video-teleconference. The parties submitted written closing arguments after the hearing. For expediency, the parties simultaneously presented their respective cases in this case for DCPS’ due process complaint and in the case brought by Petitioner (2020-0087). However, the cases are decided in separate HODs.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 47 and Respondent’s Exhibits 1 through 38) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

⁴ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁵ Petitioner/DCPS presented five witnesses: (1) a DCPS Psychologist, (2) a DCPS Occupational Therapist, (3) a School A’s Social Worker, (4) Student’s Special Education Teacher, and (5) School A’s Director of Specialized Instruction, all of whom testified as experts. Respondent/Parent presented four witnesses: Respondent and three others who testified as experts: (1) the Independent Occupational Therapist who evaluated Student, (2) Respondent's Educational Advocate who is employed by the law firm representing Respondent, (3) a Psychologist who is also employed by the law firm representing Respondent. The Hearing Officer 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.

SUMMARY OF DECISION:

Petitioner held the burden of production and persuasion on the issue adjudicated. Based upon the evidence adduced during the administrative hearing, the Hearing Officer concluded Petitioner did not sustain the burden of persuasion by a preponderance of the evidence.

FINDINGS OF FACT:⁶

1. Student resides with Student's parent, Petitioner, in the District of Columbia, and DCPS is Student's LEA. Student has been identified as a child with a disability pursuant to IDEA, with a disability classification of ID. (Respondent's Exhibit 32-1)
2. DCPS developed Student's initial IEP on March 23, 2017, and DCPS completed an annual review of the IEP on March 16, 2018. Petitioner then moved to Pennsylvania and enrolled Student in a Pennsylvania school. Student obtained a Pennsylvania IEP on May 24, 2018. Petitioner thereafter, returned to the District of Columbia and enrolled Student with DCPS for SY 2018-2019. Student began attending School A after the first few days at the start of SY 2018-2019. School A amended Student's IEP on October 4, 2018, and convened an annual IEP review meeting on March 14, 2019, and updated Student's IEP. (Petitioner's Exhibit 32-9, 32-10, 32-11, 32-12, 32-13, Respondent's Exhibit 5)
3. On May 14, 2019, a DCPS psychologist conducted a triennial psychological reevaluation of Student with an evaluation report dated May 17, 2019. A DCPS occupational therapist conducted an OT evaluation of Student with a report dated May 13, 2019. (Petitioner's Exhibit 32-14, 32-15, 32-16, Respondent's Exhibits 3, 4)
4. On June 26, 2019, Respondent filed a due process complaint against DCPS alleging, inter alia, that DCPS failed to comprehensively evaluate Student. On July 25, 2019, DCPS filed a due process complaint against Respondent seeking a determination that its May 2019 psychological and OT evaluations were appropriate. The IHO consolidated the cases and issued an HOD issued on October 4, 2019. (Petitioner's Exhibit 32-1, 32-2)
5. In the October 4, 2019, HOD, the IHO granted Petitioner public funding of an IEE to assess Student's sensory processing. (Petitioner's Exhibit 32)
6. As a result of the IEE authorized by the October 4, 2019, HOD, Petitioner had an independent evaluator conduct an OT evaluation. She evaluated Student at School A on November 18 and 26, 2019, for 3 hours over the two days. She finalized the evaluation at the beginning of December 2019. The evaluator did not observe Student in the classroom or directly consult with Student's teachers or service providers. The evaluator assessed Student's current sensory, motor, visual-motor integration, and visual perception

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. A second number following the exhibit number is the page number in that exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

functioning to determine Student's need for occupational therapy intervention. The evaluator conducted observations of Student's sensory processing, consulted with Student's parent, interviewed Student, reviewed records, and conducted the following assessments: Bruininks-Oseretsky Test of Motor Proficiency 2nd Edition ("BOT2"), Developmental Test of Visual Perception 3rd Edition ("DtVP-3"), WOLD Sentence Copying Test, Sensory Profile 2 School Companion, Sensory Processing 3 Dimensions Assessment ("SP3D"). (Witness 1's testimony, Petitioner's Exhibit 1-1, 1-3)

7. The evaluator concluded that Student has below-average fine manual control and manual coordination and Student's visual-motor integration below age expectations. Student can perform written copying tasks, but struggles with sequencing, finding the proper place when copying, and with legibility. Student's overall writing mechanics (alignment, spacing, sizing, speed, ease) are below expectations and contribute to illegibility. She suggested that Student be explicitly taught keyboarding and that Student was a candidate for an assistive technology evaluation to determine if a laptop or desktop computer, word processing programs, or another writing/reading software or hardware are required for Student to access the general education curriculum successfully. (Witness 1's testimony, Petitioner's Exhibit 1-9, 1-13)
8. The evaluator determined that Student has average skills in some areas of visual perception and deficits in others, but overall, Student's visual perception skills are in the below-average range. The evaluator noted that Student struggled with multi-step directions, sequencing information, and developing ideas, which she termed "executive function" skills. She concluded that Student's balance is adequate for the school environment. She also noted that Student can become quickly excitable in multi-sensory stimulating activities or environments, which can cause over-arousal and difficulty with self-regulation. She stated that this will require coaching and teaching of self-regulation awareness, language, and techniques. Student's over-responsivity to sensory input can require consistent movement breaks, and breaks from over-stimulating environments and activities. The evaluator noted that Student may not always be able to "feel" ■■■ body within ■■■ environment, so will benefit from adaptive equipment such as seat cushions, fidgets, and multi-sensory learning strategies. She recommended as a result of her findings that Student receive school-based occupational therapy of 60 minutes per week as part of an IEP. (Witness 1's testimony, Petitioner's Exhibit 1-14, 1-15)
9. The evaluator made a plethora of recommendations, including that Student's BIP, in consultation with an occupational therapist, be updated to include sensory strategies to support self-regulation and behavior management. She recommended that the Classroom Aides and Services section of Student's IEP include a quiet place for Student to transition, alternative locations for lunch and physical education, teachers being trained on pre-emptive behaviors, a spacer for copying tasks, a visual blocker, and all multi-step directions given to Student clearly and slowly. She also recommended that the team consider adding functional goals related to keyboarding through a deliberate measurable program to develop skills supplementing written communication/assignments and support long term use of assistive technology, explore ideas for visual perception treatment activities. (Witness 1's testimony, Petitioner's Exhibit 1-14)

10. In a section the evaluator termed “Follow up” in her evaluation report, the evaluator stated the following: “a. [Student] should be seen by a Developmental Optometrist (not an Ophthalmologist or regular Optometrist) to ascertain convergence insufficiency. b. [Student] may benefit from an Assistive Technology Evaluation to determine if various hardware and/or software would improve reading and written communication. c. Enroll [Student] in children’s martial arts, yoga, or other community-based class or sports to help [Student] with improving strength endurance, balance, self-regulation, and perhaps some areas of executive functioning.” The evaluator stated that she regularly refers children for an evaluation by a developmental optometrist who charges \$400 for the evaluation. (Witness 1’s, testimony, Petitioner’s Exhibit 1-17)
11. On January 14, 2020, School A convened an MDT meeting to review the IEE. Petitioner and his attorney and educational advocate participated in the meeting. The DCPS occupational therapist reviewed the IEE during the meeting. Petitioner, through his representatives, asked that School A to conduct an AT evaluation and a PT evaluation. School A agreed to make a referral for an AT evaluation, but declined the request as to the PT evaluation. School A refused to conduct such an evaluation, stating that Student's ability to walk upstairs excluded such an evaluation. (Witness 2's testimony, Petitioner's Exhibit 8)
12. During the January 14, 2020, meeting Petitioner’s representatives also requested that DCPS conduct a “Developmental Optometrist” evaluation. DCPS denied the request, concluding that the requested evaluation was a medical evaluation and a request for another IEE. DCPS stated that it would file a due process complaint to defend the inappropriateness of the request, and on February 3, 2020, issued a prior written notice (“PWN”) to that effect. DCPS does not have an optometrist on staff. (Witness 8’s testimony, Petitioner’s Exhibit 7, Respondent’s Exhibit 35)
13. The DCPS therapist disagreed with some of the recommendations the IEE, including the need for assessment of Student ocular motor functioning. The DCPS therapist had observed that Student can track, and she noticed no ocular motor deficits, which she claimed would result in Student displaying clumsiness and experiencing dizziness, which had not been noted. The OT therapist noted that Student had passed both a hearing and vision screening, which means that Student can see objects from a distance. If any student does not pass a vision screening, then DCPS will not proceed with an OT evaluation until the Student's vision deficits are addressed. (Witness 6's testimony)
14. On February 7, 2020, DCPS filed a due process complaint against Petitioner. That complaint was dismissed without prejudice on March 24, 2020, and with a finding that even though there is no evidence that Respondent ever received and responded to the due process complaint, DCPS acted without delay to defend its evaluation of Student. (Case # 2020-0035)

15. On April 13, 2020, Respondent filed a due process complaint against DCPS asserting, among other things, that DCPS denied Student a FAPE by failing to conduct a “Developmental Optometrist” evaluation.
16. On April 23, 2020, DCPS filed the current due process complaint against Respondent, seeking to defend its evaluation of Student, and to obtain a ruling by the Hearing Officer that Petitioner’s request for an evaluation by a Developmental Optometrist was in effect a request for an IEE that should not be granted.

CONCLUSIONS OF LAW:

Pursuant to IDEA §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 IDEA §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. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner had both the burden of production and persuasion on the issue adjudicated. The normal standard is the 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).

ISSUE: Whether DCPS appropriately evaluated Student such that Respondent’s requested evaluation by a Developmental Optometrist is unwarranted and Respondent is not entitled to that evaluation at public expense.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that Respondent disagreed with an evaluation that DCPS conducted, or that Respondent is seeking an IEE pursuant 34 C.F.R. § 300.502, such that there was an evaluation for DCPS to defend under that provision.

34 C.F.R. § 300.303 provides:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, 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 § 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.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

Letter to Baus, 65 IDELR 81 states in pertinent part:

When an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs. Under 34 CFR §300.502(b)(2), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either: (i) initiate a hearing under 34 CFR §300.507 to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 CFR §300.507 that the evaluation obtained by the parent did not meet agency criteria.⁷

As stated above, pursuant to 34 C.F.R § 300.502 DCPS must either file a due process complaint to show its evaluation is appropriate or provide the requested evaluation at public expense. DCPS asserts it appropriately evaluated Student and the parent disagreed and requested a medical evaluation that does not impact Student's access to the curriculum, and is not appropriate or required.

⁷ *Letter to Baus* also states: "Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented."

The evidence in this case demonstrates that on June 26, 2019, Respondent filed a due process complaint against DCPS alleging, inter alia, that DCPS failed to comprehensively evaluate Student. On July 25, 2019, DCPS filed a due process complaint against Respondent seeking a determination that its May 2019 psychological and OT evaluations were appropriate. The IHO consolidated the cases and issued an HOD issued on October 4, 2019. In the October 4, 2019, HOD, the IHO granted Petitioner public funding of an IEE to assess Student's sensory processing.

The IDEA regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses his disagreement, he may request an independent reevaluation at public expense, which the agency must either provide or, as the LEA has done in this case, file a due process complaint to establish that its evaluation is "appropriate." *See 34 CFR § 300.502(b)(2).* If the agency's evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. *34 C.F.R. § 300.502(b)(3).* *See South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014).

DCPS asserts it appropriately evaluated Student and Respondent disagreed and requested a medical evaluation at the January 14, 2020, meeting. Respondent principally asserts that he has not requested an IEE. There is no evidence that Respondent requested an IEE before filing his due process complaint. His due process complaint first requests as relief that that DCPS conduct the requested evaluation, and as alternative that an IEE be granted.

In addition, there is no evidence in this case that DCPS conducted any evaluation with which Respondent disagreed after the October 4, 2019, HOD was issued. That HOD specifically addressed Respondent's disagreement with DCPS's evaluation of Student and Respondent's request for an IEE. In this instance, Respondent requested that DCPS conduct the assessment of Student's ocular motor functioning and DCPS declined the request.

In *F.C. v. Montgomery County Public Schools*, 68 IDELR 6 (D. Md. 2016), the Court held there has to be an actual underlying agency evaluation before an action can be brought to uphold the sufficiency of an agency evaluation under 34 CFR 300.502.

In *DS v. Trumbull Board of Education*, 73 IDELR 228 (D. Conn 2/15/19) the Court held:

"IDEA does not create a freestanding right to a publicly financed IEE upon parental demand. Instead, the right to a publicly financed IEE must be premised on an actual disagreement with an evaluation that the school district has conducted." "...the right to a publicly funded IEE turns on the parents' disagreement with an evaluation that was actually done, not a parent's disagreement with an evaluation that was not done. The IEE regulation's requirement that there be a disagreement with an existing evaluation would be meaningless if a parent could lodge a "disagreement" with any particular evaluation as no more than a device to demand a publicly funded IEE for testing beyond the intended or proper scope of the evaluation with which the parents purportedly disagree." "If a parent were entitled to demand an IEE to evaluate aspects of a child's disabilities that were not intended to be measured by the testing

that was actually performed by the agency, then this provision of the regulation would be pointless, because the school district could scarcely hope to prove that its "evaluation" was "appropriate" if its adequacy is to be measured against goals outside the very scope of what the evaluation is designed and intended to measure..."

"Of course, if a school district refuses to conduct an evaluation that the parent requests, see 34 C.F.R. § 300.303(a)(2) (providing for right of parent to request a reevaluation), then a parent is free to file for a due process hearing to insist that the school district's failure to conduct a reevaluation as requested by the parent is inconsistent with the student's IEP or the school district's overall duty to provide a free and appropriate education. What a parent may not do, however, is circumvent the right of the school district to consider whether to conduct its own evaluation by insisting that the school district must pay for an independent evaluation in the first instance."

DCPS's primary resistance to conducting an assessment of Student's ocular motor functioning is that it considers such an assessment a medical evaluation, and DCPS does not have an optometrist on staff. DCPS's assertion that it does not conduct medical evaluations is not a sufficient basis for its refusal to assess Student's ocular motor functioning. DCPS is required to assess a student in all areas, including academic performance, health, vision, hearing, social and emotional status, and general intelligence. There is no exception to that requirement based on a school's district personnel choices.

As the Court points out in *In DS v. Trumbull Board of Education*, if a school district refuses to conduct an evaluation that the parent requests, then a parent is free to file for a due process hearing to insist that the school district's failure to conduct a reevaluation as requested by the parent is inconsistent the school district's overall duty to provide a FAPE. Respondent did just that.

Based on the evidence in this case, the Hearing Officer concludes that DCPS did not sustain the burden of persuasion by a preponderance of the evidence that Respondent disagreed with an evaluation that DCPS conducted, or that Respondent was seeking an IEE pursuant 34 C.F.R § 300.502, such that there was an evaluation for DCPS to defend under that provision. Consequently, Petitioner's due process complaint is dismissed.

ORDER:

1. The Hearing Officer hereby determines that Respondent/Parent has not disagreed with an evaluation conducted by Petitioner/DCPS and has not made a request for an IEE pursuant to 34 C.F.R § 300.502.
2. Petitioner's due process complaint is hereby dismissed with prejudice at to Respondent's request that DCPS assess Student's ocular motor functioning.
3. All relief requested by Petitioner is denied.

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: July 7, 2020

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