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Confidential

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| <p>Public Charter School “School A” Local Educational Agency (“LEA”),</p> <p>Petitioner,</p> <p>vs.</p> <p>Parent on Behalf of Student,¹</p> <p>Respondent.</p> <p>Case # 2018-0301</p> <p>Date Issued: March 30, 2019</p> | <p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: March 11, 2018 March 13, 2018</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. The Due Process Hearing was convened on March 11, 2018, and March 13, 2018, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 423.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student's parent in the District of Columbia. Student attends a public charter school located in the District of Columbia (“School A”) where Student has attended since school year (“SY”) 2014-2015. School A is Student's local educational agency (“LEA”). On December 1, 2017, School A determined Student eligible for special education and related services pursuant to the IDEA with a disability classification of specific learning disability (“SLD”). (Petitioner’s Exhibits 25-4, 28-1)

School A asserts that, as a part of the initial evaluation, it completed a psycho-educational evaluation and a behavioral screening and that the evaluation included a review of previous evaluations including those in the areas of speech and language, physical therapy (“PT”) and occupational therapy (“OT”).

On October 5, 2018, Student’s parent, through counsel, sent a letter to School A requesting independent evaluation(s) (“IEE”) at School A’s expense. On November 19, 2018, School A (“Petitioner”) filed a due process complaint against the Student’s parent (“Respondent”) to defend its initial evaluation of Student and affirm its denial of Respondent’s requested IEE. Petitioner maintains that its evaluation of Student was appropriate and the additional evaluation(s) Respondent requested are unwarranted.

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 November 19, 2018, and originally ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on January 3, 2018.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on January 28, 2019. The Hearing Officer issued a pre-hearing order (“PHO”) on February t, 2019, outlining, inter alia, the issue to be adjudicated.

Following a continuance requested first by Petitioner, and then a second continuance requested by Respondent, the parties agreed to the hearing dates of March 11, 2019, and March 13, 2019. The motions for continuance and extension of the HOD due date were granted the HOD is now due March 30, 2019.

² The student’s current age and grade are indicated in Appendix B.

Relief Sought by Petitioner:

The LEA seeks as relief that the Hearing Officer determine that its initial evaluation of Student was comprehensive and appropriate, the evaluations requested by Respondent are unwarranted, and that Respondent is not entitled to any of the requested independent evaluation(s) (“IEE”) at the LEA’s expense.

Parent’s Response to the LEA’s Due Process Complaint:

On November 30, 2018, Respondent’s counsel filed a response to Petitioner’s due process complaint. In the response, Respondent stated the following, inter alia:

Student presents with numerous medical issues including, inter alia, cerebral palsy, asthma, anxiety, frequent falls, astigmatism of both eyes, allergies, hyperopia, and preterm birth. Student also presents with learning issues that are intertwined with Student’s medical issues. Student’s medical issues impact Student’s ability to access the general education curriculum. Petitioner was on notice of all of these medical issues. Student has been retained once, functions significantly below same age peers, and is not making satisfactory or appropriate progress in school academically, socially, and/or emotionally.

During Student’s enrollment at School A, Respondent repeatedly requested that Petitioner evaluate Student. In December 2017, Petitioner conducted a limited initial evaluation that did not appropriately address the evaluation of Student in all areas of suspected disability. The areas not assessed by Petitioner include, inter alia, medical, neuropsychological/psychological, executive functioning, speech/language, OT, PT, social/emotional/behavioral and assistive technology. Respondent also asserts that Petitioner failed to provide Respondent with the required Prior Written Notice as to the assessments that were going to be utilized as part of Student’s initial evaluation.

Respondent requests a finding that Petitioner’s initial evaluation failed to assess the Student in all areas of suspected disability, and that the failure constituted a denial of a free and appropriate public education, and interfered with Respondent’s rights as delineated by the IDEA. Respondent requests the Hearing Officer order that School A fund an IEE to assess Student in all areas of suspected disability, convene an IEP meeting to review the evaluation once completed, review and/or revise Student’s IEP, and determine an appropriate educational placement for Student.

ISSUE:³

Whether the LEA’s initial evaluation of Student was sufficiently comprehensive and appropriate such that the IEE requested by Respondent is unwarranted, to wit: neuropsychological, PT, OT, speech-language, Assistive Technology (“AT”) and functional behavior assessment (“FBA”),

³ The Hearing Officer clarified the issue at the outset of the hearing and the parties agreed that this was the issue to be adjudicated.

and whether Respondent is thus not entitled to the IEE, (or any of its component assessments) at the LEA's expense.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's (LEA) Exhibits 1 through 55 and Respondent's (Parent) Exhibits 1 through 41) 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

SUMMARY OF DECISION:

Petitioner held the burden of production and persuasion on the issue adjudicated.⁶ Based upon the evidence adduced during the administrative hearing, the Hearing Officer concluded Petitioner sustained the burden of persuasion by a preponderance of the evidence that its initial evaluation of Student was appropriate. Although the evidence supported a finding that Respondent requested that Student be evaluated in areas of suspected disability mentioned in her October 2018 request, those areas of disability were not areas that warranted evaluation at the time of Student's initial evaluation. Thus, Respondent is not entitled to an IEE at School A's expense. However, School A may take action appropriate to ensure that Student is now evaluated in those areas by the LEA conducting its own assessments if, and/or when, Respondent request a reevaluation and grants the required written consent.

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 presented seven witnesses: (1) Student's current general education teacher, (2) Student's current special education teacher, (3) School A's school psychologist who testified as an expert witness, (4) School A's speech language pathologist, who testified as an expert witness, (5) School A's physical therapist, who testified as an expert witness, (6) School A's occupational therapist, who testified as an expert witness, and (7) School A's director of student support services, who testified as an expert witness. Respondent presented two witnesses: (1) Student's parent ("Respondent"), and (2) an independent clinical, who testified as an expert witness.

⁶ 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 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.

FINDINGS OF FACT:⁷

1. Student resides with Respondent in the District of Columbia. Student attends School A, a public charter school located in the District of Columbia, where Student has attended since SY 2014-2015. School A is Student's LEA. (Petitioner's Exhibits 25 pg. 103, Respondent's testimony)
2. Student was born prematurely and was hospitalized for a significant amount of time during infancy. Student has been diagnosed with, among other things, Spastic Diplegic Cerebral Palsy, chronic lung disease, asthma and a small ASD (hole in Student's heart). (Petitioner's Exhibits 2 pg. 8, Exhibit 8 pg. 41, Respondent's testimony)
3. In August 2010, the D.C. Early Intervention program developed an Individualized Family Service Plan ("IFSP") for Student under which Student was provided physical therapy ("PT"). (Petitioner's Exhibit 1 pgs. 2, 11, Respondent's Exhibit 12)
4. In March 2012, an independent PT evaluation was conducted that found Student had Below Average gross motor skills. As a result of the findings, the independent evaluator recommended the Student receive 60 minutes per month of individual PT services, and that Student be evaluated again in 6 months to assess gross motor skills. A DCPS Early Stages physical therapist conducted a review of the March 2012 PT assessment, as well as an observation of Student while Student was in an evaluation center. The physical therapist concluded Student had improved gross motor skills, did not exhibit abnormal movement or movement patterns that would prevent Student from benefiting from the education program and that no further assessment was needed. (Petitioner's Exhibit 3 pgs. 13, 14, Witness 5's testimony)
5. In July 2012 District of Columbia Public Schools ("DCPS") Early Stages Program ("Early Stages") conducted an OT evaluation of Student with an evaluation report dated August 9, 2012. The evaluator noted Student's strengths in the assessed areas, including age appropriate neuromuscular skills and posture control to sit in a chair, utilizing the floor for classroom activities, age appropriate bilateral hand coordination, Average visual motor integration skills, and overall Good fine motor skills to participate in the classroom with manipulatives and writing tasks. The evaluator identified a weakness in Student's visual motor integration skills with pre-writing skills, experience grasping and manipulating scissors. The evaluator recommended that Student continue to gain and develop fine motor skills within an age appropriate classroom environment. (Petitioner's Exhibit 4 pgs. 15, 21)

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. Petitioner submitted 55 exhibits and total of 307 pages. In the case of Petitioner's exhibits, the second number following the exhibit number denotes the page number in the sequence of the total number of pages in the entire disclosure from which the fact was extracted. In the case of Respondent's exhibits, the 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.

6. In July 2012, Early Stages conducted a speech language evaluation of Student. Student was considered [REDACTED] dominant, and scored within the Average range in both receptive and expressive language skills. The evaluator concluded Student's receptive language, expressive language, voice and fluency were within age normal limits, and Student's communication skills were adequate to access academic curriculum and social development. (Petitioner's Exhibit 5 pgs. 23, 26, Witness 4's testimony)
7. On September 7, 2012, Early Stages convened an eligibility meeting, with Respondent participating, and reviewed the evaluations conducted of Student. Early Stages determined Student did not qualify as a child with a disability as defined by IDEA. Therefore, Student was not eligible for special education services. (Petitioner's Exhibit 6 pgs. 28, 34)
8. In December 2012, Student began attending a child development center ("School B") and was in an inclusive classroom with three adults and twelve children. In February 2013, School B conducted a PT evaluation of Student. The evaluator concluded Student had made nice gains in gross motor development and demonstrated age appropriate balance skills. Student's mobility skills were at the lower end of the Average range and recommended that student would benefit from direct PT sessions twice per month for 30 minutes to focus on family training and teacher /staff training on activities that could be practiced throughout the day. The evaluator concluded Student would benefit from improving higher-level gross motor skills such as jumping down from higher surfaces, jumping over hurdles, and hopping. (Petitioner's Exhibit 8 pgs. 41, 42).
9. School B conducted a speech-language evaluation of Student in February 2013. Student's expressive communication skills were in normal limits. Student receptive communication skills were mildly impaired, with weakness understanding quantitative and special concepts. The evaluator recommended that Student participate in a language-based classroom with exposure to typically developing peers. Student also required speech and language pathology services twice per month to address the use of four or more phrases for a variety of pragmatic functions, pursuant to Respondent's concerns. (Petitioner's Exhibit 9 pgs. 44, 45)
10. In August 2013, School B discharged Student from PT services noting that Student no longer required direct PT services. School B also discharged Student from speech language services, and noted that Student presented with age appropriate language skills and no longer warranted speech and language services. (Petitioner's Exhibits 11 pg. 51, 12 pg. 53, Witness 4's testimony)
11. Student entered pre-kindergarten at a different child development center ("School C") for SY 2013-2014. On August 15, 2013, Respondent's attorney, at the time, requested that School C evaluate Student for special education and that a meeting be convened to discuss Student's need for a plan under the Americans with Disabilities Act ("ADA") and Section 504 ("504 Plan"), while the evaluations were pending. (Petitioner's Exhibit 10 pg. 47)

12. School C had a speech language pathologist and physical therapist conduct observations of Student and review of Student's prior evaluations. The evaluators presented the results of their reviews on August 28, 2013. (Petitioner's Exhibit 13, 14)
13. In response to Parent's request, School C obtained a review of Student's medical records by an independent psychologist to assist in determining whether Student required a neuropsychological evaluation. Based upon the review of Student's records, on October 9, 2013, the independent psychologist determined that Student did not require a neuropsychological evaluation. (Petitioner's Exhibit 16)
14. In October 2013, Student's teacher completed an OT screening form and that noted Student showed no sensory processing concerns and was able to complete all gross and fine motor skills, with the exception of the ability to use scissors to cut lines and circles without difficulty. (Petitioner's Exhibit 15)
15. On October 10, 2013, School C convened an eligibility meeting and reviewed Student's evaluation data. Respondent participated in the meeting along with her attorney. The team reviewed the criteria for Student's eligibility with regard to speech or language impairment and developmental delay. The team determined that Student did not qualify for special education services, but determined that a 504 plan would be put in place. (Petitioner's Exhibits 17, 21)
16. School C developed a 504 plan that was implemented on November 6, 2013. The plan identified Student's impairment as "Vision impairment; mobility concerns as result of asthma and cerebral palsy." (Petitioner's Exhibit 20)
17. Student began attending School A at the start of SY 2014-2015. Parent informed School A about Student's medical history. Student has a high risk for falling in the past and during 2015 Student had an orthopedic boot due to losing balance and falling. As a result, Student received therapy in a hospital setting. (Respondent's testimony)
18. School A developed and implemented a 504 plan for Student. In December 2016, School A convened a Response to Intervention ("RTI") meeting with Student's parents and student's teachers to discuss Student's attendance, slow rate of progress, English proficiency and low reading, writing and math skill levels. (Respondent's Exhibits 7, 9)
19. On January 11, 2017, School A conducted an annual review of Student's 504 plan. (Respondent's Exhibit 8)
20. At the end of SY 2016-2017, Student was retained and repeated Student's grade SY 2017-2018. (Respondent's testimony)
21. Respondent then sought legal assistance, and drafted and sent a letter to School A requesting that Student be evaluated for a suspected learning disability. The letter requested expedited evaluations and specifically requested comprehensive psychological and educational evaluations. There was no request for any additional evaluations or a

statement concerning any other areas of likely disability. (Respondent's testimony, Respondent's Exhibit 16)

22. In the fall of 2017, Respondent brought School A a letter from a neuro-ophthalmologist recommending an AT device to help with Student's vision. (Respondent's testimony)
23. As a part of the initial evaluation, School A completed a psychoeducational evaluation and a behavioral screening. School A engaged a psychologist to evaluate Student. On October 29, 2019, and November 2, 2017, the psychologist conducted assessments of Student and completed an evaluation report dated November 4, 2017. The psychologist assessed Student's academic and cognitive functioning to determine whether Student had an educational disability. The evaluator reviewed all of Student's prior evaluations, including those for OT, PT and speech and language, reviewed Student's Developmental Assessment from 2010, Student's RTI data from School A, Student's work samples, and interviewed Respondent. The psychologist assessed Student using the Wechsler Intelligence Scale for Children-Fifth Edition ("WISC-V") and Wechsler Individual Achievement Test - Third Edition ("WIAT-III"). The psychologist conducted an assessment of Student's visual-motor integration ("VMI") and administered a behavioral assessment in response to Student's multidisciplinary team ("MDT") concern as to whether Student's retention would have an effect on Student's social emotional functioning. (Witness 3's testimony, Petitioner's Exhibit 25 pgs. 100, 101)
24. All the assessments including the WISC-V and WIAT-II were administered using standardized procedures. Student's IQ score was in the Low Average range with some variance in performance. Student's academic achievement rated from Above Average to Low range with an overall strength for math, but deficits in reading, oral language and written expression. Behavior rating scales were provided to Student's teacher, parent and Student, and the scales were completed independently following standard procedures. Student's teacher rated Student as "at-risk" in the area of somatization, because Student claimed to suffer from headaches and stomachaches. However, there was no recommendation for additional testing, because the Student's issues could be monitored and addressed through small group counseling. Student did not warrant an OT assessment because Student's VMI score was in the Low Average range. Student also did not require PT investigation, because Student's history did not reflect any need for inquiry as Student had previously been exited from PT services. (Witness 3's testimony, Petitioner's Exhibit 25)
25. The psychologist concluded Student did not have behavioral concerns such that a FBA would be requested, and Student was able to perform in the classroom without assistive technology. There was also no basis at the time for Student to have been assessed with a neuropsychological evaluation because there was no indication of a history of head injury, an unexplained decline in Student's cognitive profile, or a severe disparity in Student's cognitive profile. Since there were no factors that would indicate the need for further evaluation, the evaluating psychologist did determine that a neuropsychological evaluation was warranted. The evaluation Student received was sufficient to determine Student's eligibility and special education classification. Student was sufficiently and

comprehensively evaluated in all areas of suspected disability to determine Student's special education needs. (Witness 3's testimony)

26. School A convened an eligibility meeting on December 1, 2017. Respondent participated in the meeting along with Student's general education teacher, School A's speech language pathologist, two special education teachers and a school counselor and School A's assistant director of student support services. The team reviewed the Student's evaluation and determined Student eligible for special education and related services pursuant to a disability classification of SLD in the areas of reading and written expression. Respondent agreed with Student's eligibility determination. (Petitioner's Exhibits 26, 27, 28)
27. During the eligibility meeting, the team discussed the need for a speech and language evaluation, and determined that such an evaluation was not needed. Student's parent agreed with this determination. Student's initial Individualized Educational Program ("IEP") was developed on December 19, 2017. The IEP prescribed 5 hours per week of specialized instruction in the general education setting with goals in reading and written expression. The parent agreed with Student's initial IEP and agreed to the provision of special education services. (Witness 4's testimony, Petitioner's Exhibits 27, 30)
28. School A has implemented Student's IEP and the IEP was amended on April 29, 2018, to add extended school year ("ESY") services. (Petitioner's Exhibits 33, 38)
29. During SY 2017-2018 Student received "Proficient" or "Advanced" in all subjects on Student's report card. (Petitioner's Exhibit 38 pg. 222)
30. Student's general education teacher provides Student with instruction in reading, language arts and math. The classroom's assistant teacher provides Student with instruction in Social Studies. Student also has a special education teacher who sees Student most of the school day to provide both "pullout" (outside of the classroom) and "push-in" (inside of the classroom) services. Student's lead teacher consults daily with Student's special education teacher. Despite Student's absences from school, Student is doing well and making progress in reading and writing. (Witness 1's testimony, Witness 2's testimony)
31. Student is enrolled in English Language Support ("ELS") and receives instruction from an ELS teacher. Student's special education teacher has no concerns about Student's speech and language abilities, or fine motor skills. Student is able to exercise proper pencil grasp and is able to physically maneuver within the classroom without falling. Despite being retained, Student has not displayed any difficulty with performing or completing classroom tasks, and the special education teacher sees no concerns related to the services Student receives. (Witness 2's testimony)
32. On April 9, 2018, in response to Respondent's requests, School A initiated a PT and OT screener noting Respondent's concern for Student Cerebral Palsy diagnosis and Student falling. (Petitioner's Exhibit 31)

33. In May 2018, School A conducted both a PT and OT screener of Student. The screener reports were completed on June 1, 2018, and June 15, 2018, respectively. The screener reports were not reviewed with Respondent before the end of SY 2017-2018. (Witness 5's testimony, Witness 6's testimony, Respondent's testimony, Petitioner's Exhibits 35, 37)
34. On October 5, 2018, Respondent, through counsel, sent a letter to School A requesting the following independent comprehensive evaluations and LEA expense: psychological, speech/language, PT, OT, functional behavior assessment ("FBA") and assistive technology ("AT"). Respondent's counsel did not provide an explanation of the reason for disagreement with School A's evaluation of Student. (Respondent's Exhibit 15)
35. On October 7, 2018, and October 10, 2018, counsel for School A emailed Respondent's counsel and asked for clarity regarding the evaluation requests and whether Parent would be willing to meet to discuss the requests. Parent's counsel emailed a response that School A's evaluation was not sufficiently comprehensive. In response, School A did not agree to fund the evaluations, continued to attempt to convene a meeting, but stated it was willing to file a due process complaint to defend its evaluation(s). (Petitioner's Exhibit 41)
36. On November 5, 2018, Parent's counsel sent an email stating that parent did not want to delay her evaluation request for a meeting and amended the request for a neuropsychological evaluation instead of the psychological previously requested. Thereafter, Petitioner filed its due process complaint. (Petitioner's Exhibit 41 pg. 230)

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 issued adjudicated. The normal standard is 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 the LEA's initial evaluation of Student was sufficiently comprehensive and appropriate such that the IEE requested by Respondent is unwarranted, to wit: neuropsychological, PT, OT, speech-language, AT and FBA, and whether Respondent is thus not entitled to the IEE, (or any of its component assessments) at the LEA's expense.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that its evaluation was appropriate and School A is not required to grant Respondent's request for an IEE (or any of its component assessments) at the LEA's expense.

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).

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).

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a re-evaluation 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 re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. (*Emphasis added*)

Students are also entitled to a re-evaluation of their disability upon a parental request, provided that no re-evaluation occurs "more frequently than once a year," though a requested re-evaluation 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].").

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. An independent evaluation is one “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” The limited right arises only after the agency has procured an evaluation with which the parent “disagrees.” 34 C.F.R. § 300.502(b).

The 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 her disagreement, she 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).

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).

Respondent asserted that the LEA’s evaluation was inappropriate because the evaluation conducted was not a neuropsychological evaluation and the LEA did not assess Student in the areas of PT, OT, speech-language, AT and conduct an FBA. However, Respondent offered unconvincing evidentiary and legal support for her claim that the psycho-educational evaluation that the LEA conducted to assess Student needed to include areas Respondent alleged. Although Respondent cited case law to support a finding that an IEE may not be limited to a single area of assessment, the case cited was not on point.⁸ It addressed whether in granting a remedy a hearing officer can limit the scope of an IEE, not whether an initial evaluation needed to include

⁸ *Jones v. District of Columbia Civil Action No. 15-1501 (BAH/GMH) February 22, 2017*

areas beyond the scope of the evaluation question and areas of concern that an MDT concludes should be assessed.

The evidence in this case reveals that Student was born prematurely has been diagnosed with, among other things, Spastic Diplegic Cerebral Palsy, chronic lung disease, asthma and ASD. School A, the LEA, in conducting its evaluation was aware of Student's medical diagnoses and reviewed and considered the extensive prior evaluations that had been conducted of Student prior to Student attending School A. The evidence demonstrates that the LEA reasonably determined based upon the areas of concern raised by how Student's presented in the academic setting in the fall of 2017, and that were raised by Respondent in her request for evaluation, that the evaluation School A that was appropriate.

A recounting of the facts of this case clearly reveal that prior to Student attending School A, Student had been assessed comprehensively and these evaluations were available to and reviewed by School A when it conducted its initial evaluation of Student.

In August 2010, the D.C. Early Intervention program developed an IFSP for Student under which Student was provided PT. In March 2012, an independent PT evaluation was conducted that found Student had Below Average gross motor skills and the evaluator recommended the Student receive 60 minutes per month of individual PT services.

In July 2012 Early Stages conducted an OT evaluation of Student. That evaluation revealed Student's strengths in the assessed areas, including age appropriate neuromuscular skills and overall good fine motor skills.

In July 2012, Early Stages conducted a speech language evaluation of Student. Student was considered [REDACTED] dominant, and scored within the Average range in both receptive and expressive language skills

On September 7, 2012, Early Stages convened an eligibility meeting, with Respondent participating, and reviewed the evaluations conducted of Student and determined Student did not qualify as a child with a disability as defined by IDEA.

In December 2012, Student began attending School B. In February 2013, School B conducted a PT evaluation of Student. The evaluator concluded Student's mobility skills were at the lower end of the Average range.

School B conducted a speech-language evaluation of Student in February 2013. Student's expressive communication skills were in normal limits.

In August 2013, School B discharged Student from PT services noting that Student no longer required direct PT services. School B also discharged Student from speech language services, and noted that Student presented with age appropriate language skills and no longer warranted speech and language services.

Student then entered School C for SY 2013-2014. School C had a speech language pathologist and physical therapist conduct observations of Student and review of Student's prior evaluations. School C obtained a review of Student's medical records by an independent psychologist to assist in determining whether Student required a neuropsychological evaluation. Based upon the review of Student's records, on October 9, 2013, the independent psychologist determined that Student did not require a neuropsychological evaluation.

On October 10, 2013, School C convened an eligibility meeting and reviewed Student's evaluation data. The team determined that Student did not qualify for special education services, but put 504 plan in place.

When Student began attending School A at the start of SY 2014-2015, School C put a 504 plan in place and ultimately engaged Student in the RTI process. As a result of Respondent's request that Student be evaluated, School A conducted an initial evaluation of Student in October 2017.

The psychologist conducted assessments of Student and completed an evaluation report dated November 4, 2017. The psychologist assessed Student's academic and cognitive functioning to determine whether Student had an educational disability. The evaluator reviewed all of Student's prior evaluations, including those for OT, PT and speech and language, reviewed Student's Developmental Assessment from 2010, Student's RTI data from School A, Student's work samples, and interviewed Respondent. The psychologist assessed Student using the WISC-V and WIAT-III. The psychologist conducted an assessment of Student's VMI and administered a behavioral assessment.

Petitioner's psychologist, who evaluated Student testified as an expert witness, testified that the assessments she conducted including the WISC-V and WIAT-II were administered using standardized procedures. Behavior rating scales were provided to Student's teacher, parent and Student, and the scales were completed independently following standard procedures. This witness credibly testified that at the time Student was evaluated, there was no recommendation for additional testing, that Student did not warrant an OT assessment and also did not require PT evaluation or a speech and language evaluation. Student had previously been evaluated in these areas and had been exited from services. The psychologist as a part of her evaluation of Student reviewed Student's prior evaluations and performance data.

The evidence also reveals that during Student's eligibility meeting, the team discussed the need for a speech and language evaluation, and determined that such an evaluation was not needed. Student's parent agreed with this determination at the time.

Petitioner's psychologist credibly testified that Student did not have behavioral concerns such that a FBA would be requested, and Student was able to perform in the classroom without assistive technology. There was also no basis at the time for Student to have been assessed with a neuropsychological evaluation because there was no indication of a history of head injury or an unexplained decline in Student's cognitive profile that would have warranted such an evaluation.

IDEA lacks specific parameters regarding the content of psychological evaluations, or for that matter, of other evaluations. It merely requires that such evaluations "use technically sound

instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 20 U.S.C. § 1414(b)(2)(C). Its implementing regulations provide only that students be "assessed in all areas related to the suspected disability" and that such evaluations use "[a] variety of assessment tools and strategies ... to gather relevant functional and developmental information about the child [...] that may assist in determining -- [t]he content of the child's IEP." 34 C.F.R. § 300.304(b)(1), (c)(4). *Sylvia HILL et al., v. District of Columbia*, August 26, 2016 68 IDELR 133 citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012) (finding that evaluations "should be tailored to the specific problems a potentially disabled student is having" but not "designed to identify and diagnose every possible disability").

Petitioner's psychologist credibly testified that the evaluation Student received was sufficient to determine Student's eligibility and special education classification and Student was sufficiently and comprehensively evaluated in all areas of suspected disability to determine Student's special education needs.

The Hearing Officer found Petitioner's psychologist's testimony far more convincing than that of Respondent's expert witness. Unlike Petitioner's expert, Respondent's expert is a clinical psychologist, who only worked "briefly" within a school setting. Even when working in a school setting, Respondent's expert worked with students who suffered from severe emotional disturbance ("ED").

Although Respondent's expert provides Student with psychotherapy, this is not a case that involves any issue related to Student's counseling needs. Although Respondent's clinical psychologist testified as to Student's medical history in an attempt to justify the need for a neuropsychological, OT, PT, AT, and speech and language evaluations, her testimony in areas outside her specific area of expertise was unconvincing. The evidence demonstrated that Student had previously been assessed in these areas and either appropriately exited from services or the data did not support that this was an area of need for Student at the time the LEA conducted its evaluation.

Although Respondent requested that Student be evaluated in areas mentioned in her October 2018 request for an IEE, those areas of disability were not areas in which School A ultimately assessed Student.

As pointed out in the case law cited by Petitioner, *DS v Trumbull Board of Education*, 73 IDELR 228 (D. Conn 2/15/19):

"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.”

Based on the evidence adduced, the Hearing Officer concludes that in November 2017 the LEA assessed Student in all areas of suspected disability at the time of its initial evaluation of Student. The Hearing Officer also concludes that School A’s November 2017 psychological evaluation meets the threshold for a valid and appropriate evaluation for the purpose for which it was conducted and that the School A school psychologist followed the requirements of the IDEA Regulations, 34 CFR § 300.304. Therefore, the Petitioner is not entitled to an IEE at School A’s expense. *See 34 CFR §300.502(b)(2).*

Although Respondent’s October 2018 request was for assessments in areas of disability that were not warranted at the time of Student’s initial evaluation, School A may take action appropriate to ensure that Student is now evaluated in those areas by the LEA conducting its own assessments if, and/or when, Respondent requests such reevaluation and grants the required written consent.

ORDER:

1. The Hearing Officer hereby determines that the LEA’s initial evaluation of Student conducted in November 2017 was comprehensive and appropriate and Respondent is not entitled the requested IEE at the LEA’s expense. All other requested relief by Petitioner is denied.
2. All relief requested by Respondent 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: March 30, 2019

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