

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

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Office of Dispute Resolution
March 15, 2019

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Date Issued: March 15, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2019-0035

v.

Hearing Date: March 12, 2019

PARENT,
on behalf of STUDENT,¹

Office of Dispute Resolution, Room 112
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by District of Columbia Public Schools (DCPS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). DCPS seeks a determination that its December 2018 comprehensive psychological evaluation of Student was appropriate, in response to a request from the parent’s representatives for public funding for an Independent Educational Evaluation.

Student, an AGE youth, is a resident of the District of Columbia. DCPS’ Due Process Complaint, filed on February 1, 2019, named the parent (PARENT or MOTHER) as respondent. The undersigned Hearing Officer was appointed on February 4, 2019. Mother filed her response to DCPS’ complaint on February 15, 2019. On February 19,

¹ Personal identification information is provided in Appendix A.

2019, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. Because the complaint in this case was brought by the local education agency, not by the parent, there was no provision for a Resolution period. *See* 34 CFR § 300.510. My final decision is due by March 18, 2019.

The due process hearing was convened on March 12, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner DCPS was represented by SCHOOL PSYCHOLOGIST and by DCPS' COUNSEL. MOTHER appeared in person and was represented by PARENT'S COUNSEL. Counsel for both parties made opening statements.

DCPS called as witnesses SPECIAL EDUCATION COORDINATOR (SEC) and School Psychologist. Mother testified and called as additional witnesses INDEPENDENT PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS' Exhibits P-1 through P-7 and Exhibit 8, pages 1 through 5, were admitted into evidence without objection. DCPS' Counsel withdrew page 6 of Exhibit P-8. Parent's Exhibits R-4 through R-18, R-24 through R-28, R-30 through R-48, and R-50 through R-54 were admitted into evidence, including Exhibits R-13, R-14, R-15, R-35, R-37, R-42 through R-48, R-51 and R-52 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits R-19 through R-23, R-29 and R-49. Parent's Counsel withdrew Exhibits R-1 through R-3 and R-55. Counsel for the respective parties made closing arguments. There was no request to file post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issue for determination was certified in the February 19, 2019 Prehearing Order:

Whether the December 2018 Comprehensive Psychological Evaluation of Student conducted by the DCPS is appropriate.

For relief, DCPS requests a determination by the hearing officer that its December 2018 Comprehensive Psychological Evaluation of Student is appropriate.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia. Testimony of Mother. Student is eligible for special education as student with a Specific Learning Disability and an Other Health Impairment. Exhibit P-5.
2. Since the beginning of the 2018-2019 school year, Student has attended CITY SCHOOL, a DCPS public school. Student is currently in GRADE. Testimony of SEC. Student enrolled in City School with an Individualized Education Program (IEP) last revised on December 6, 2018 at PRIOR DCPS SCHOOL. Before enrolling at City School, Student's last special education eligibility meeting date was January 20, 2016. Exhibit R-14.
3. City School convened an IEP team meeting for Student on November 19,

2018. Following the meeting, on November 20, 2019, Educational Advocate wrote SEC a “dissent letter” stating that the parent’s representatives were not in agreement with the content of the current IEP and requesting, *inter alia*, a Comprehensive Psychological reevaluation of Student. Exhibit R-9. SEC responded by inviting Mother and her representatives to an Analysis of Existing Data (AED) meeting on November 28, 2018. Exhibit R-9. At the November 28, 2019 meeting, DCPS agreed to conduct a Comprehensive Psychological reevaluation of Student along with an Auditory Processing Assessment. Mother provided her consent for these assessments. Exhibits P-1 through P-3.

4. School Psychologist conducted a psycho-educational reevaluation of Student in December 2018 and January 2019 (the Psychological Evaluation). School Psychologist has worked as a school psychologist for DCPS for more than 2 years, where he has conducted about 270 psychological evaluations. School Psychologist previously worked for 15 years as a school psychologist in California. School Psychologist has a masters degree in educational psychology and a doctorate in educational leadership. Testimony of School Psychologist, Exhibit P-8.

5. For Student’s Psychological Evaluation, School Psychologist administered the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2), the Test of Nonverbal Intelligence, Fourth Edition (TONI-4), the Behavioral and Emotional Rating Scale - Second Edition (BERS-2) (completed by teacher and Mother), the Conners 3rd Edition (Conners 3 Short Form) (completed by Student and Mother), the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), the Cognitive Assessment System—Second Edition (CASS2) and the Woodcock—Johnson IV

Tests of Achievement (WJ IV ACH). School Psychologist also interviewed Student, Mother and one of Student's teachers at City School. In his January 11, 2019 final evaluation report, School Psychologist stated that the data supported Student's continuing to meet criteria for the SLD disability and that, additionally, based on medical data provided by Mother, Student also met the qualification for Other Health Impairment for Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit P-6. On January 12, 2019, School Psychologist sent the final report by email to Mother, Petitioner's Counsel, Educational Advocate and others. Exhibit R-8, Testimony of School Psychologist.

6. On January 8, 2019, School Psychologist sent a "draft" of the Psychological Evaluation report to the parent and her representatives to be sure there were no typographical errors or missing information that the parent might provide. The January 8, 2019 draft report did not include a discussion of OHI-ADHD criteria. After Mother received the draft report, she provided School Psychologist medical information supporting an ADHD diagnosis for Student. School Psychologist added the OHI criteria discussion and the information on Mother's providing ADHD medical data to the final report. The January 11, 2019 Psycho-Educational Evaluation, Exhibit P-6, sent to the parent on January 12, 2019, is the final Psychological Evaluation report, although a typographical error on Page 1 of the report continues to label the report as "DRAFT." Testimony of School Psychologist.

7. On January 9, 2019, Student's Multidisciplinary Team (MDT) met at City School to discuss the recent assessments of Student and Student's continued special education eligibility. Testimony of SEC, Testimony of Educational Advocate.

8. At the January 9, 2019 MDT team meeting, the team determined that Student met eligibility criteria for IDEA SLD and OHI-ADHD disabilities. Exhibit P-5, Testimony of SEC.

9. On January 11, 2019, prior to receiving the final Psychological Evaluation report on Student, Educational Advocate wrote School Psychologist by email, with copies to SEC and DCPS' Counsel, that the parent disagreed with the psychological evaluation because it did not include "a complete intelligence test resulting in a Full-Scale Intelligence Quotient (FSIQ) composite score, thus impeding a thorough analysis of how the additional diagnosis of ADHD impact[s] [Student's] cognitive, social and emotional functioning" and because Student's eligibility had been updated to reflect Multiple Disabilities for Specific Learning Disability and Other Health Impairment. Exhibit P-7. On February 1, 2019, DCPS filed its complaint in this case to request a due process hearing to defend its psychological evaluation of Student.

10. When Mother's representatives requested an IEE psychological evaluation, DCPS did not provide the parent information about where an independent educational evaluation could be obtained. Testimony of Mother.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Students Rights Act of 2014, except where there is a dispute about the appropriateness of the child's IEP or placement, or of

the program or placement proposed by DCPS, the party who filed for the due process hearing bears the burden of production and the burden of persuasion. As the Petitioner, DCPS has the burden of persuasion in this case. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Was DCPS' Comprehensive Psychological Evaluation of Student appropriate?

In December 2019 and January 2019, School Psychologist completed a psycho-educational reevaluation of Student as requested by Student's IEP team at a meeting on November 28, 2018. The final report was provided to the parent and her representatives on January 12, 2019. By email of January 11, 2019, Mother's representatives notified City School officials that Mother disagreed with the Psychological Evaluation and requested DCPS funding to obtain an Independent Educational Evaluation (IEE) psychological reevaluation. DCPS decided, instead, to file an administrative complaint to request a due process hearing to defend School Psychologist's Psychological Evaluation. In her answer to DCPS' complaint, the parent alleged that DCPS' psychological reevaluation lacks sufficiency and is inadequate. The parent also alleges that DCPS failed to follow proper procedural safeguards in responding to Parent's request for an IEE.

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." 34 C.F.R. § 300.502(a)(3)(i). 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, “without unnecessary delay,” either provide – or 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). When a student is evaluated for a specific disability, IDEA regulations require the following of the education agency: 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; not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; use technically sound instruments which are selected and administered so as not to be discriminatory on a racial or cultural basis; and use the instruments for the

purposes for which the assessments or measures are valid and reliable, administered in accordance with any instructions provided by the producer of the assessments. The agency must also ensure that the assessments are administered by trained and knowledgeable personnel. *See* 34 CFR § 300.304(b), (c).

Federal IDEA law and regulations do not impose any specific requirements on the content of a psychological evaluation. *See Richardson v. District of Columbia*, 273 F. Supp. 3d 94, 100. *See, also, Hill v. District of Columbia*, No. 14-CV-1893 (GMH), 2016 WL 4506972 (D.D.C. Aug. 26, 2016) (“In fact, the 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).”)

I find that DCPS has met its burden of persuasion that its psychological evaluation of Student was appropriate. The evidence established that School Psychologist is trained and knowledgeable in conducting psychological evaluations of students with disabilities. School Psychologist holds a masters degree in educational psychology and a doctorate in educational leadership. He is licensed in the District as a school psychologist and has conducted some 270 comprehensive psychological

assessments during the 2-plus year period he has been employed by DCPS. Previously he worked for many years as a school psychologist in California.

Student was assessed for SLD and ADHD, the areas of Student's suspected disabilities. In his assessment of Student, School Psychologist used a variety of cognitive, educational and behavioral assessment tools. These included the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2), the Test of Nonverbal Intelligence, Fourth Edition (TONI-4), the Behavioral and Emotional Rating Scale - Second Edition (BERS-2) (completed by teacher and Mother), the Conners 3rd Edition (Conners 3 Short Form) (completed by Student and Mother), the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), the Cognitive Assessment System--Second Edition (CASS2) and the Woodcock--Johnson IV Tests of Achievement (WJ IV ACH). There was no evidence that any of these instruments was not technically sound or not used in accordance with the respective developer's instructions. School Psychologist also interviewed Student, Mother and one of Student's teachers at City School. Based on School Psychologist's evaluation, the City School eligibility team determined on January 9, 2019 that Student met IDEA special education eligibility criteria as a student with SLD and OHI-ADHD disabilities.

Parent's expert, Independent Psychologist, opined that School Psychologist's psychological evaluation was not sufficiently comprehensive because School Psychologist used the RIAS-2 instead of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which had been used to measure Student's cognitive ability in DCPS' prior, 2015, psychological evaluation of Student. Independent Psychologist also opined that the best practice would have been to conduct a

neuropsychological assessment of Student to measure executive functioning issues. This expert faulted School Psychologist's decision not to have Student's teacher complete the Connors 3 rating scales to assess Student's attention issues. Independent Psychologist also opined that by omitting the writing fluency and spelling subtests of the WJ IV ACH, School Psychologist did not obtain a full picture of Student's writing abilities.

School Psychologist explained that he chose to use the RIAS-2 instead of the WISC because of studies purporting to show that IQ tests such as the WISC may be culturally biased and may not accurately show how minority students are performing. Although School Psychologist did not have Student's teacher complete the Connors 3 scales, he interviewed the teacher, who reported that Student sometime has problems staying on task and described the interventions she used including prompting, redirection and extended time. School Psychologist explained that he elected not to administer the writing fluency and spelling subtests of the WJ IV ACH because he obtained data on Student's written expression abilities from the other tests he administered.

Independent Psychologist's disagreements with School Psychologist's psychological evaluation appeared to focus on "best practices," not the more limited evaluation requirements of the IDEA, *i.e.* to use technically sound instruments, including variety of assessment tools and strategies, in order to assess the student in all areas related to the suspected disabilities and to gather relevant functional and developmental information about the student that may assist in determining the content of the student's IEP. *See Hill, supra.* Independent Psychologist's criticisms appear to

reflect a difference between professionals as to preferred assessment instruments and strategies, rather than a deficiency in the final January 11, 2019 psychological evaluation report. In that regard, I find that School Psychologist was better placed to select assessment tools and strategies than Independent Psychologist who has never met the student or met with the IEP team. In sum, I find that DCPS established that School Psychologist followed the evaluation requirements of the IDEA Regulations, 34 CFR § 300.304(b) and (c), for conducting the comprehensive psychological evaluation of Student. Therefore, I find that DCPS has met its burden of persuasion that its Psychological Evaluation of Student was appropriate.

The parent also alleges that DCPS failed to provide her information about where an independent educational evaluation could be obtained at the time she requested the IEE psychological reevaluation of Student. *See* 34 CFR § 300.502(a)(2). (“Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations” *Id.*) DCPS’ failure to provide this information to the parent was a procedural violation of the IDEA. Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). Parent’s January 11, 2019 request for a publically funded IEE

was made by her special education attorney and educational advocate. These professionals undoubtedly were already knowledgeable about where an IEE psychological evaluation may be obtained in the District and DCPS' failure to provide that information would not have prejudiced Student. I find that DCPS' failure to provide information about where to obtain an IEE, upon the parent's January 11, 2019 IEE request, did not impede Student's right to a FAPE, impede the parent's opportunity to participate in the decision-making process or cause a deprivation of educational benefit. Therefore, this procedural omission may not be deemed a denial of FAPE.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

DCPS' psychological evaluation of Student, as reported in the January 11, 2019 Psycho-Educational Evaluation report, is appropriate. Respondent parent does not have the right to an IEE comprehensive psychological reevaluation of Student at public expense.

Date: March 15, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: **Counsel of Record**
Office of Dispute Resolution
OSSE Division of Specialized Education
DCPS Resolution Team