

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 21, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0247

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: October 30, 2017

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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.). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not ensuring that Student was offered appropriate Individualized Education Programs (IEPs) in February 2016 and January 2017 and by not ensuring that Student was timely reevaluated for special education needs.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 8, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on September 12, 2017. The parties met for a resolution session on September 26, 2017 and were unable to reach an agreement. My final decision in this case is due by November 22, 2017. On October 3, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned impartial hearing officer on October 30, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was open to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION DIRECTOR and by DCPS' COUNSEL.

The Petitioner called EDUCATIONAL ADVOCATE as her only witness. DCPS called as witnesses SCHOOL SOCIAL WORKER and Special Education Director. Petitioner's Exhibits P-1 through P-13 and P-15 were admitted into evidence, including Exhibits P-12 and P-13 admitted over DCPS' objections. Exhibit P-14 was withdrawn. DCPS' Exhibits R-1 through R-32 were admitted into evidence without objection. Counsel for the respective parties made opening statements. Counsel for Petitioner made a closing argument. There was no request to file post-hearing memoranda.

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 issues for determination were certified in the March 29, 2017

Prehearing Order:

- Whether Student’s January 24, 2017 and February 2, 2016 CITY SCHOOL IEPs were inadequate, including because the IEPs are not based on current evaluations, the IEP academic goals are not designed for Student to receive academic benefit, the current IEP states Student is on track to graduate in the current school year when this is impossible, the IEPs have no goals related to attendance issues, and the IEPs state that Student has no behavioral concerns although attendance is a significant issue; and
- Whether DCPS has failed to timely comprehensively reevaluate Student.

For relief, the parent requested that DCPS be ordered to ensure that Student is comprehensively reevaluated, that Student’s IEP be reviewed and revised as appropriate and that Student’s academic transcript be corrected to reflect the student’s current status and credits earned. In addition, the parent asserted reservation of the right to seek compensatory education relief after the requested reevaluations are completed.

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 with Mother.

Testimony of Mother. Student is eligible for special education under the IDEA disability classification Other Health Impairment - Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit P-3.

2. Student’s last special education eligibility meeting was held on February 18, 2015. Exhibit P-3. The last comprehensive psychological evaluation of Student was conducted in June 2009. Representation of Counsel.

3. Student is currently enrolled in GRADE at CITY HIGH SCHOOL. Since matriculating to City High School in the 2014-2015 school year, Student has failed most courses, including all core courses for the 2016-2017 regular school year. As of October 23, 2017, Student had earned 12.5 credits toward graduation. Exhibits P-9, R-31.

4. Student's poor academic performance is due to chronic absenteeism. Testimony of School Social Worker, Testimony of Special Education Director. In the 2014-2015 school year, Student was absent from school for 53 days. Exhibit P-8. In the 2015-2016 school year, attendance continued to be a major concern. Exhibit R-7. In the 2016-2017 school year, Student was absent from school for 77 days. Exhibit P-9.

5. Student's February 2, 2016 IEP identified as areas of concern Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. Student's educational achievement was formally tested in February 2015 using the Woodcock Johnson III Tests of Achievement. Grade equivalents were 1.9 for Broad Math, 3.8 for Broad Reading, 3.4 for Spelling and 4.9 for Writing Sample. All of these scores were years behind Student's then-current grade level. The IEP did not identify school attendance as an area of concern or provide annual goals for attendance. The IEP provided, as Special Education and Related Services, 7 hours per week of Specialized Instruction outside general education, 7.5 hours per week Specialized Instruction in general education and 2 hours per month of Behavioral Support Services outside general education. Exhibit P-1.

6. Student's IEP was revised at an annual IEP team meeting on January 24, 2017. Present Levels of Academic Performance were again derived from the Woodcock Johnson III achievement tests administered in February 2015. It was noted that teachers reported that low motivation and chronic absenteeism were barriers to

Student's optimal functioning in class. An annual behavioral goal for consistent and on-time class attendance was added to the IEP and it was noted that City High School's truancy prevention program would be used to support this effort. The January 24, 2017 IEP continued Special Education and Related Services at 7 hours per week of Specialized Instruction outside general education, 7.5 hours per week Specialized Instruction in general education and 2 hours per month Behavioral Support Services outside general education. Exhibit P-3.

7. School Social Worker has worked with Student as a social worker and volunteer mentor since the beginning of the 2015-2016 school year. School Social Worker and other school staff have counseled Student on improving school attendance. These efforts included an October 23, 2017 functional behavioral assessment and improvement plan, a February 19, 2017 Student Support Team Attendance Plan, letters to the parent, telephone calls to the parent, truancy outreach, adult mentorship, Behavioral Support counseling and home visits. Exhibits R-16, R-17, R-22, R-21, R-23, Testimony of School Social Worker.

8. The cost of an IEE comprehensive psychological assessment of Student would be \$3,000 to \$3,500. Testimony of Educational Advocate.

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 Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of

production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

1. Has DCPS has failed to timely comprehensively reevaluate Student?

The record in this case indicates that Student was last reevaluated to confirm eligibility for special education and related services on February 18, 2015. No records of that reevaluation were introduced by either party into evidence. However, counsel for DCPS represented that the reevaluation did not include a comprehensive psychological evaluation and that the last comprehensive psychological evaluation of Student was conducted in June 2009. Petitioner contends that this violates the IDEA's triennial reevaluation mandate. I agree.

The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). In *James v. District of Columbia*, 194 F. Supp. 3d 143 (D.D.C. 2016), U.S. District Judge Mehta wrote,

The IDEA . . . sets out detailed requirements for a reevaluation. 20 U.S.C. §

1414(b), (c). As pertinent here, a reevaluation requires the local education agency to review not only existing information about the child, *id.* § 1414(c), but also to conduct additional testing to determine the child's abilities and needs Among other testing requirements, the local education agency must "use technically sound instruments that may assess the relative contribution of cognitive and behavior factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C). In other words, a reevaluation requires a new round of tests and analysis to evaluate the child.

James at 143. "The failure to conduct a new comprehensive psychological evaluation of [the student] means that [the student's] IEP might not be sufficiently tailored to [the student's] special and evolving needs. This potentially compromises the effectiveness of the IDEA's protections as they pertain to [the student]." *Id.* at 144.

In the present case, when Student's 2016 and 2017 IEPs were developed, Student was far behind grade level in all academic areas and absenteeism was a chronic problem. The academic annual goals in both the February 2, 2016 IEP and the January 24, 2017 IEP were based largely on outdated January 2015 Woodcock-Johnson III educational achievement scores. Petitioner's expert, Educational Advocate, opined credibly that Student's IEP team needed an updated comprehensive psychological evaluation in order to set annual IEP goals for Student. I find, in addition, that an updated psychological evaluation was needed for the IEP team to assess whether there was a link between Student's OHI-ADHD disability and the student's chronic absenteeism. DCPS' failure to ensure that Student was comprehensively reevaluated with an appropriate psychological evaluation was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.)

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). In this case, I conclude that Petitioner has met her burden of persuasion that DCPS' failure to ensure that Student's IEP team was timely provided updated and comprehensive evaluations of Student impeded Student's right to a FAPE and significantly impeded the parent's opportunity to participate in the decision-making process. Student was therefore denied a FAPE.

- 2. Were Student's January 24, 2017 and February 2, 2016 City High School IEPs inadequate because the IEPs are not based on current evaluations; the IEP academic goals are not designed for Student to receive academic benefit; the current IEP states Student is on track to graduate in the current school year when this is impossible; the IEPs have no goals related to attendance issues, and the IEPs state that Student has no behavioral concerns although attendance is a significant issue?

Petitioner also alleges that the City High School IEPs for Student, dated February 2, 2016 and January 24, 2017, were inappropriate for Student due to the lack of an updated comprehensive evaluation, inappropriate academic goals and the lack of focus on Student's attendance issues. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). "A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially* designed" to meet a child's "*unique* needs" through an "*i*ndividualized education program." 20 U.S.C. §§

1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)." *Id.*

In this case, the teams that developed both the February 2, 2016 and January 24, 2017 IEPs for Student lacked current data, notably a comprehensive psychological evaluation, which provided information on Student's present levels of achievement and potential for growth as well as how Student's disability did, or did not, affect Student's attendance problems. Without current data, the IEP teams could not have developed appropriate annual goals designed to meet Student's unique needs or offered Student "specially designed" programs to enable Student to advance toward those goals. *See* 34 CFR § 300.320(b). I conclude that DCPS has not met its burden of persuasion that either the February 2, 2016 IEP or the January 24, 2017 was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Remedy

In this decision, I have concluded that DCPS denied Student a FAPE by failing to ensure that Student was appropriately reevaluated with a comprehensive psychological evaluation at the time of the February 2015 triennial reevaluation and by not ensuring that Student's 2016 and 2017 IEP teams had complete and up-to-date data on Student's present levels of achievement, potential for growth or how Student's disability affected school attendance. For relief, the parent originally requested that DCPS ensure that Student was comprehensively reevaluated and that Student's IEP team review and revise, as appropriate, the IEP. At the due process hearing, Petitioner's counsel sought funding for an Independent Educational Evaluation (IEE) psychological evaluation.

I find that in the first instance, it is necessary for DCPS, as the LEA, to conduct a

thorough and comprehensive reevaluation of Student to gather relevant functional, developmental, and academic information about Student to equip Student's IEP team to determine the content of Student's IEP and to devise behavior interventions to attempt to get Student to attend school. *See* 34 CFR § 300.304(b).

I do not find that City High School's outreach to Student and the parent, especially the efforts of School Social Worker, to get Student to come to school and attend classes, have been inadequate. However if a student's resistance to attending classes is related to his disability and prevents the student from benefitting from special education, it must be addressed in the IEP. *See Lexington Cty. Sch. Dist. One v. Frazier ex rel. D.T.*, 2011 WL 4435690 (D.S.C. Sept. 22, 2011). *But see, W.G. v. New York City Dept. of Educ.*, 801 F.Supp.2d 142, 170 (S.D.N.Y.2011) (The IDEA does not require school districts "to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend.") Should the parent disagree with the reevaluation conducted by DCPS, subject to enumerated conditions, she will then have the right to an IEE evaluation at public expense. *See* 34 CFR § 300.502(b). I find that the cost of such an assessment, if obtained by the parent will be \$3,000 to \$3,500.

In the due process complaint Petitioner elected not to seek a compensatory education remedy at this time and to reserve requesting such relief until after the special education reevaluation is completed. Petitioner did not put on compensatory education evidence at the due process hearing. I do not, therefore, order any compensatory education relief in this proceeding.

Finally, Petitioner requested in the due process complaint that DCPS be ordered

to ensure that Student's academic transcript is revised to reflect Student's current status and credits earned. However, Petitioner offered no probative evidence at the due process hearing that Student's transcript was erroneous. Therefore, I deny this relief request.

ORDER

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

ORDERED:

1. In order to conduct a comprehensive special education reevaluation of Student, within 10 school days of the date of this order, DCPS shall convene a Student Study Team (SST) to determine what assessments are needed at this time to obtain relevant cognitive, educational, social-emotional-behavioral and other data about Student in order to review and revise, as appropriate, Student's IEP and to devise behavior interventions to attempt to get Student to attend school. Subject to obtaining the parent's consent, DCPS shall ensure that these evaluations, including without limitation, a comprehensive psychological evaluation, are completed within 60 calendar days of the SST meeting. Upon receipt of the evaluation reports, DCPS shall promptly convene Student's IEP team, including the parent and her representatives, to revise Student's IEP as appropriate;
2. Parent's request that DCPS be ordered to fund an IEE psychological evaluation is denied without prejudice. In the event that the parent disagrees with the evaluation obtained by DCPS pursuant to this order, the parent may request a DCPS funded IEE psychological reevaluation, pursuant to 34 CFR § 502(b), at a cost not to exceed \$3,500.00;
3. No compensatory education is awarded at this time. Parent shall not be precluded by this order from seeking compensatory education in a new proceeding for the denials of FAPE found in this hearing officer determination and
4. All other relief requested by the Petitioner herein is denied.

Date: November 20, 2017

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