

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2011 MAR 18 PM 12:28

PETITIONER, on behalf of
[STUDENT],¹

Date Issued: March 18, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: March 7, 2011

Respondent.

Student Hearing Office, Room 2003
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 PARENT (the "Parent"), 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, the Parent alleges that District of Columbia Public Schools ("DCPS") violated the IDEA when it refused her January 26, 2011 request for a neuropsychological evaluation of Student. In addition, Parent

¹ Personal identification information is provided in Appendix A.

alleges that DCPS failed to give her prior written notice when it refused her request for the evaluation.

Student, an AGE young man, is a resident of the District of Columbia. He has not been found eligible for special education services. The Parent's Due Process Complaint, filed on January 28, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on January 31, 2011. The parties met for a resolution session on February 8, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on February 14, 2011 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 March 7, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording system. The Parent appeared in person and was represented by counsel. Respondent DCPS was represented by counsel. The Parent testified and called as witness EDUCATIONAL ADVOCATE.² DCPS called as its only witness SCHOOL PSYCHOLOGIST. Parent's Exhibits P-1 through P-8 and DCPS's Exhibits R-1 through R-3 were deemed stipulated without objection, and received into evidence pursuant to the Prehearing Order.

² The Hearing Officer denied Parent's request to continue the hearing to receive the testimony of CLINICAL PSYCHOLOGIST. The due process hearing was scheduled for March 7, 2011 from 9:00 a.m to 12:00 p.m. The Prehearing Order provided that Parent would proceed first at the hearing. At the beginning of the hearing, counsel for Parent informed the Hearing Officer that Clinical Psychologist had an appointment and would not be available to testify until 12:00 p.m. No Notice to Appear had been requested for Clinical Psychologist. Over the objection of DCPS, the Hearing Officer ordered that Parent would be permitted to call Clinical Psychologist, out of order, after DCPS's only witness, School Psychologist, testified. However, when School Psychologist's testimony was completed at around 10:30 a.m., Clinical Psychologist was still not available. Holding that it was the responsibility of each party to assure that their witnesses were available to testify when called, the Hearing Officer denied Parent's request to continue the hearing until 12:00 p.m. when Clinical Psychologist was expected to be available. Although Clinical Psychologist did not testify, her September 20, 2010 Comprehensive Psychological Evaluation of Student (Exhibit P-6) was received into evidence.

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

- WHETHER DCPS WAS REQUIRED TO CONDUCT A NEUROPSYCHOLOGICAL EVALUATION OF STUDENT; and
- WHETHER DCPS VIOLATED THE IDEA BY NOT PROVIDING PRIOR WRITTEN NOTICE OF ITS REFUSAL TO CONDUCT THE REQUESTED NEUROPSYCHOLOGICAL EVALUATION.

Parent requests that DCPS be ordered to fund an independent neuropsychological evaluation of Student, and, if Student is found to have a neuropsychological disability, that Student's Multidisciplinary Team ("MDT") be reconvened to determine eligibility for special education services.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia. Exhibit P-6 He is enrolled in the GRADE at CITY HIGH SCHOOL ("CHS"). Exhibit R-3
2. Student was referred for a September 13, 2010 independent Comprehensive Psychological Evaluation to assess possible causes of academic difficulties and to evaluate his level of cognitive, academic and social-emotional functioning. Exhibit P-6
3. Clinical Psychologist administered to Student, among other tests, the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and the Woodcock-Johnson Tests of Achievement, 3rd Edition (WJ-III). On the WISC-IV, Student obtained a Full Scale IQ score of 79, which indicated an overall borderline level of intellectual functioning. On the WJ-III,

Student's scores were in the average range. Clinical Psychologist concluded, *inter alia*, that her test findings suggested that Student performed to his full potential and above, and that there was no evidence of a learning disability. *Id.*

4. Parent reported to Clinical Psychologist that Student began having seizures when he was a one-year old child, that he had not experienced any seizure activity within the past few years, and that Student's general practitioner had discontinued seizure medication treatment approximately one year before the evaluation. *Id.*

5. Student's IEP Team convened at CHS on January 26, 2011. Student, Parent and Educational Advocate participated with DCPS personnel. The purpose of the meeting was to review the Comprehensive Psychological Evaluation, a Vocational Assessment and a Functional Behavioral Assessment. The IEP Team concluded that Student was not eligible for special education services under the criteria for Specific Learning Disability ("SLD"), Emotional Disturbance ("ED"), or Intellectual Disability ("ID"). The team agreed to reconvene to review Student's Speech and Language evaluation. Exhibit P-5 Subsequently, the IEP team determined that Student was not eligible for services based upon a Speech or Language Impairment.

Testimony of School Psychologist

6. At the January 26, 2011 eligibility meeting, Educational Advocate requested that DCPS fund an independent neuropsychological evaluation due to student's past history of seizures. Exhibit P-5 Compliance Case Manager responded that DCPS does not do neuropsychological evaluations because DCPS has found that a comprehensive psychological evaluation is sufficient for education purposes. Exhibit P-6

7. DCPS did not give the Parent written notice when it refused Parent's request for an independent neuropsychological evaluation. Testimony of Educational Advocate

8. Student is frequently absent from school. Exhibit P-7 In the current school years as of February 28, 2011, Student had 292 unexcused class absences and had been recorded present for only 36 out of 110 school days. Exhibit R-3.

CONCLUSIONS OF LAW

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

DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, the Parent. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005) (Burden of proof in an administrative hearing challenging an IEP placed upon the party seeking relief); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. WAS DCPS REQUIRED TO FUND AN INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION OF STUDENT?

The only substantive issue before the Hearing Officer is whether the Independent Educational Evaluation ("IEE"), which DCPS funded for Student, had to include a neuropsychological evaluation.³ DCPS funded an independent Comprehensive Psychological Evaluation for Student at the beginning of the 2010-2011 school year. At the January 26, 2011

³ A parent may have a right to an independent education evaluation ("IEE") at public expenses if she disagrees with an evaluation obtained by the LEA. 34 CFR § 300.502(b)(1). If a parent requests an IEE, the LEA must either file a due process complaint to show that its evaluation is appropriate or ensure that an IEE is provided at public expense. 34 CFR § 300.502(b)(2). However, a parent is entitled to only one IEE at public expense each time the LEA conducts an evaluation with which the parent disagrees. 34 CFR 300.502(b)(5). In this case, DCPS has already provided an IEE for the Student for the current eligibility evaluation. Hence the issue for this case is not whether Parent had a right to an IEE, but rather whether the IEE should have included a neuropsychological examination.

eligibility meeting, Educational Advocate requested that Student's IEE be supplemented with an independent neuropsychological evaluation because Student had a history of seizures. DCPS denied the request. School Psychologist testified that DCPS denied the request because (i) Student had not experienced seizure activities within the past three years, and (ii) the Comprehensive Psychological Evaluation showed that Student was achieving at or above his expected levels.

U. S. Department of Education regulations require that, as part of an initial eligibility evaluation for special education services, the Local Education Agency ("LEA") must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006).

Parent's attorney argued at the due process hearing that Student had a suspected OHI disability and therefore should have received a neuropsychological evaluation. As defined in the IDEA, OHI means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (a) is due to chronic or acute health problems . . . and
- (b) adversely affects a child's educational performance.

See 34 CFR 300.8(c)(9). Thus, to qualify as OHI eligible, a child must meet three conditions. First, he must suffer from a chronic or acute health condition. Second, the health condition must cause limited alertness to the educational environment due to limited strength, vitality, or alertness or heightened alertness to the surrounding environment. Third, the child's educational performance must be adversely affected by the disability. In addition, OHI, like all other qualifying conditions, must create a need for special education services. *See* 34 CFR § 300.8(a)(1) (Definition of "Child with a disability").

Parent points to Student's history of seizures, as well as reports of Student's problems attending in class, as indications of a suspected OHI disability. By itself, Student's history of seizures might not warrant a suspicion of OHI. According to the Comprehensive Psychological Evaluation, Parent reported that Student has not experienced any seizure activity within the past few years. However, Clinical Psychologist also reported that "Clinically Significant" At-Risk levels of attention problems were reported by the Parent and by Student on the Behavior Assessment System for Children-2 (BASC-2). (Although Clinical Psychologist reported that the BASC-2 teacher questionnaire was also distributed, her findings omit any teacher responses.) I find that Student's history of seizures, together with his reported levels of attention problems would have warranted a suspicion that Student could have an attention deficit condition, such as Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD").

Whether or not Student has an attention deficit condition, the evidence in this case does not establish that DCPS had reason to suspect that such an impairment adversely affects Student's educational performance. Clinical Psychologist reported that her findings suggested that Student "performed to his full potential and above" and that "he is able to learn and to gain academic skills necessary for a general curriculum." She concluded that Student did not appear to meet

special education criteria. School Psychologist testified that Student's eligibility team reviewed his Comprehensive Psychological Evaluation and concluded that Student was achieving at or above the levels expected for his tested verbal and nonverbal abilities. She opined that the evaluation did not indicate that Student had learning problems. Moreover, Student's frequent school absences derogate from expected academic performance. In sum, although DCPS had some reason to suspect that Student may have an attention deficit condition, there was no indication of an adverse effect on Student's educational performance. Consequently, the evidence does not establish that OHI should have been one of Student's suspected disabilities or that he should have been assessed in that area.

In addition, the evidence does not establish that a neuropsychological exam is necessary to assess for a suspected OHI attention deficit disability. In the Comprehensive Psychological Assessment, Clinical Psychologist recommended that Student would benefit from a full neuropsychological exam "to determine his strengths and weaknesses and to determine possible brain organicity due to his history of seizure disorder" (Exhibit P-6 at 12) However, she did not opine that a neuropsychological examination was necessary to diagnose ADD or ADHD, or to assess for an OHI disability. School Psychologist stated that DCPS finds that a Comprehensive Psychological Evaluation provides sufficient information for educational purposes. Exhibit P-5 Because the evidence in this case does not establish that OHI should have been a suspected disability or that a neuropsychological examination is necessary to assess for OHI, I find DCPS was not required to fund an independent neuropsychological assessment of Student.

2. FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

Parent also contends, and DCPS concedes, that DCPS failed to provide written notice of its refusal to fund a neuropsychological assessment of Student. Under the IDEA, an LEA must

give written notice to the parent when it refuses to initiate or change the evaluation of the child. See 34 CFR § 300.503(a)(2). I find that DCPS's failure to provide prior written notice in this case resulted in a procedural violation of the IDEA. However while a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a Free Appropriate Public Education ("FAPE"). To succeed on a procedural claim, parents must demonstrate that the school district's procedural violations affected their child's ability to receive the educational benefit that the IDEA requires. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 42 (D.D.C. 2006), citing *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). In this case, despite not receiving written notice, Parent filed her due process complaint only two days after DCPS denied her request for an independent neuropsychological examination. Clearly DCPS's failure to provide prior written notice did not affect Student's ability to receive educational benefit. Accordingly, Parent's claim for failure to provide written notice fails on the merits.

ORDER

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

All relief requested by the Parent in her Due Process Complaint is denied. This case is dismissed.

Date: March 18, 2011

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).