DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

RECEIVED
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[STUDENT],[1]
through the Parent,

Petitioner,

v

DCPS,

Respondent.

Date Issued: June 16, 2010

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 6/9/10 Room: 4A

HEARING OFFICER DETERMINATION

BACKGROUND

The student is a year old female attending the grade at the DCPS school of School. The student has not yet been found eligible for special education services. On April 14, 2010 counsel for the petitioner filed a due process complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), alleging the District of Columbia Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE) by failing to conduct a neurological evaluation.

A Pre-Hearing Conference was held by telephone on May 10, 2010 and a Pre-Hearing Order was issued on that date ordering a hearing to commence on June 9, 2010 on the above issue.

[1] Personal identification information is provided in Appendix A.

The hearing convened on June 9, 2010 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300 and Title V of the District of Columbia Municipal Regulations.*

The hearing was a closed hearing held in Hearing Room 4A at the Student Hearing Office, OSSE, 1150 Fifth Street, S.E., Washington, D.C. 20003. Domiento Hill represented the petitioner and Harsharen Bhuller represented DCPS. Petitioner's Documents 1-7 and DCPS Documents R-1-4 were admitted into evidence without objection. All witnesses were sworn in under oath. Dr. Dellena Cunningham and Ms. Dori Cook testified for the petitioner and Ms. La Tanya Randolph testified for DCPS. Written closing arguments were submitted on June 14, 2010.

ISSUE

The issue to be determined is as follows:

Did DCPS deny a FAPE to the student by failing to conduct a neurological evaluation?

FINDINGS OF FACT

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

1. An independent comprehensive psychological evaluation was conducted by Dr. Dellena Cunningham on the student on February 17, 2010 and a written report was done on February 24, 2010. The student was referred for this evaluation to

assess current intellectual and achievement levels and to provide information for academic planning purposes. The evaluator found "[The student] arrived on time for the evaluation and was relatively cooperative and focused. However, she was noted to have some difficulty in comprehending some testing directions and expressed frustration on the tasks that involved writing. In other instances, [the student] seemed not have grasped the percept of a design she was asked to replicate and sometimes gave concrete responses when the more abstract response was required. At other times, [the student] perseverated responses from earlier items in response to subsequent items. The perseveration of ideas, thoughts and motoric activity, concrete thinking and the difficulty in self-regulating extreme emotions are signs of organic brain dysfunction. [The student] should have a thorough neurological evaluation to rule out a neurological basis for these processes. " (P-5 at p.9) The evaluator concluded: "According to her school records and interviews with key personnel, [the student] is demonstrating behavioral outbursts in school that are increasing in both intensity and duration. Records indicate that, once [the student] becomes agitated, she is unable to self-regulate her response and several staff have to help her to calm down. Reportedly, this behavior started in this academic year. Ms. Hunter denies that this behavior occurs in the home. A noted change at home is the birth of her new baby sister. Again, a Neurological Evaluation is warranted to help determine whether these behavioral difficulties are neurologically based. The MDT addressing [the student's] needs should consider her eligible for specialized educational services to address her learning difficulties-particularly in math. In

addition, consideration should be made for her behavioral difficulties. However, the category under which these services should be classified will depend on whether there is a neurological basis for her functioning. A Neurological, and subsequent Neuropsychological Evaluation, will need to be administered." (P-5 at p.10) Dr. Cunningham recommended: "A Neurological Evaluation is required to determine whether [the student's] deficits in academics and behavior are neurologically based. A subsequent Neuropsychological Evaluation may be warranted, as per recommendation by the neurologist." (P-5 at p.11) Dr. Cunningham testified by telephone at the hearing and was qualified as an expert witness in clinical psychology. Dr. Cunningham reiterated her findings and recommendation for a neurological evaluation. It was Dr. Cunningham's expert opinion that a neurological evaluation was required to determine whether the student was only learning disabled or whether she had functional and structural brain deficits. She testified that a neurological evaluation was a strong way to get at brain structure and processes. It was her expert opinion that if the student had neurological problems it would change the interventions and behavioral issues that need to be addressed. (Testimony of Dr. Cunningham)

2. An independent psychiatric evaluation was conducted by Dr. Rahsaan Lindsey, psychiatrist on the student on January 30, 2010 with a written report completed on March 2, 2010. His report stated the referral for his evaluation "was requested by DCPS for the purpose of evaluating her potential psychiatric diagnoses, assessing her current level of functioning, and suggesting possible treatment modalities." Dr. Lindsey recommended: "[The student] should complete a Neuropsychological

Evaluation to determine if her cognitive and achievement deficits are neurologically based and to provide recommendations on how to improve some of her limitations." (P-6 at p.5)

3. The special education advocate talked to the student's teacher who told her the student has explosive behaviors and needs outside help on a frequent basis. The teacher also told her the student has difficulty processing information and what is going on in the classroom. The advocate attended the MDT/Resolution meeting on May 6, 2010. She testified that the student's teacher at the MDT meeting stated the behavior intervention plan is not working and her behavior is very explosive. The advocate observed the student in her class and saw that she did not interact with her peers appropriately and was not processing what was going on in the classroom. (Testimony of

4. The DCPS school psychologist testified she did not see the basis for the neurological evaluation and that the student's low cognitive ability of 68 could account for her problems as opposed to organic brain dysfunction. She has never in her experience been on an MDT team that ordered a neurological evaluation and believes it is a medical not educational assessment. She also testified she has not observed the student in her classroom, has not evaluated her and has never met her. She also did not talk to Dr. Cunningham. She testified she did not see how a neurological evaluation would help plan for the education of the student. (Testimony of Ms. Randolph)

5. On May 6, 2010 a resolution meeting was convened and DCPS did not determine that a neuropsychological was warranted. The Meeting Notes do not say a

neurological evaluation, but instead state: "The purpose of the meeting is stated a resolution meeting to address Due Process filed April 14, 2010 to address the fact that DCPS failed to conduct a neuropsychological as was recommended in the psychiatric evaluation. At this time there is no resolution; DCPS does not feel that a neuropsychological is warranted." There is no indication in the Resolution Meeting Notes that the independent comprehensive psychological evaluation was reviewed. (P-3)

6. The student is attending School where she is in the third grade. DCPS has made no determination as to whether the student is eligible for special education services.

CONCLUSIONS OF LAW

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

IDEA requires that "Each public agency must ensure that (4) The child is assessed in all areas related to the suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." *34 CFR Section 300.304 (c) (4).* In this case, counsel for the petitioner has met his burden of proof through the independent comprehensive psychological evaluation by Dr. Cunningham, the psychiatric evaluation requested by DCPS, the observations of the educational advocate, and the expert opinion of Dr. Cunningham at the hearing that a neurological evaluation is warranted to determine if an organic brain dysfunction is an area related to the suspected disability. A hearing officer is responsible for assessing the credibility of witnesses. *Shore*

Regional High School Bd. Of Educ. v. P.S., 381 F. 3d 194 (3rd Cir. 2004) This hearing officer gives great weight to the expert opinion of Dr. Cunningham based on her evaluation of the student that the student's academic and behavioral issues may be neurologically based and warrant a neurological evaluation to determine this and possibly a neuropsychological if recommended by the neurologist. Dr. Cunningham's recommendation is further supported by the recommendation of Dr. Lindsey's psychiatric evaluation and the observations of the educational advocate. In contrast, this hearing officer gives little weight to the testimony of the school witness that a neurological evaluation is not warranted because she did not evaluate the student, observe the student, meet the student or talk to the expert Dr. Cunningham about the basis for her recommendation. The school witness also never recommended a neurological and did not see how it would affect the student's educational programming. As Dr. Cunningham testified a neurological evaluation can give a strong indication of the student's processing deficits and if they are organically based or not. The neurological evaluation could rule out any organic brain dysfunction and then the MDT team could focus on interventions to address the student's deficits as a learning disability. The evaluation could also determine that the student's deficits are organically related and would require different educational and behavioral interventions. An MDT team needs this vital information in determining the eligibility classification of the student and the IEP that should be developed to address those unique needs. The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs…" *20 U.S.C. Section 1400 (d) (1) (A).*

Counsel for DCPS argues in her closing written legal memorandum that the case of *IDEA Public Charter School v. Belton, 2007 WL 2071668 (D.D.C. 2007)* supports her argument that a

neurological evaluation is not warranted. In that case, the court agreed with the hearing officer that "an MDT is not required to conduct any and every evaluation that the parent requests. There must be a basis for the request." *5 The Court found that based on the facts in that case where an earlier HOD had denied a neurological evaluation and that case was not appealed, that the charter school was in its rights to decline to conduct more tests. In this case, however, the above Findings of Fact show a basis for the request.

Counsel for the petitioner argues in his written closing argument that the recent case of *Suggs v. District of Columbia*, Civil Action No. 08-0938 (PLF) decided January 19, 2010 supports his position that this evaluation is warranted. That decision dealt with whether an MRI and EEG should have been conducted to see if a traumatic brain injury classification was warranted and remanded to a hearing officer for further proceedings. The result of those evaluations the court indicated could affect the educational programming of the student. This hearing officer finds that case applicable here where the results of a neurological evaluation could also affect the interventions provided to this student.

Based on the above discussion, this hearing officer concludes that DCPS denied a FAPE to the student in not finding a neurological evaluation warranted.

ORDER

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

DCPS shall fund an independent neurological evaluation. The MDT team shall reconvene within fifteen business days of the receipt of the neurological evaluation to review the evaluation and other current evaluations including the February 24, 2010 independent comprehensive psychological evaluation and determine the student's eligibility for special education services. If the student is found eligible for special education

services, the MDT team shall develop and appropriate IEP for the student. The MDT meeting shall be scheduled at a mutually agreeable time through counsel for the parent.

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 USC §1415(I).*

Date: June 16, 2010 Seymour DuBow/s/
Hearing Officer