District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
STUDENT HEARING OFFICE
2012 SEP -4 AM 9:35

Confidential

PARENT OF STUDENT[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent. Case # 2012-0442	HEARING OFFICER'S DETERMINATION Hearing Dates: August 22, 2012 August 23, 2012 Representatives: Counsel for Petitioner: Fatmata Barrie, Esq. 10125 Colesville Road #245 Silver Spring, Md. 20901 Counsel for DCPS: William Jaffe, Esq. Assistant Attorney General 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

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 for two days on August 22, 2012, and August 23, 2012, at the OSSE Student Hearing Office, 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a District of Columbia Public Schools ("DCPS") high school, hereinafter referred to as "School A." The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of specific learning disability ("SLD").

During the 2011-2012 school year ("SY") the student was repeating ninth grade for the second time and is scheduled to be in grade for the third time in SY 2012-2013. DCPS has not conducted a triennial psychological evaluation of the student since June 2008. Sometime after the student's most recent individualized educational program ("IEP") meeting in March 2012 the parent requested DCPS conduct a re-evaluation of the student to determine why the student is having difficulty successfully completing ninth grade. DCPS has not yet conducted the re-evaluation.

On June 19, 2012, the student's parent filed a due process complaint alleging DCPS failed to conduct a triennial psychological evaluation and failed to provide the student an appropriate IEP because the most recent IEP was not based on a current psychological evaluation. Petitioner seeks as relief that the Hearing Officer order DCPS to fund an independent comprehensive psychological evaluation and convene an IEP meeting to review the evaluation and update the student's IEP.

DCPS filed a response to the complaint on June 28, 2012. DCPS acknowledges that there is no up to date psychological evaluation but asserts this is at most a procedural violation that has resulted in no harm and no denial of a FAPE. DCPS maintains the student's current IEP is appropriate.

The parties held a resolution meeting on July 16, 2012. The meeting was unsuccessful in resolving the issues. The parties expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on July 19, 2012, and ends (and the HOD is due) on September 2, 2012.

A pre-hearing conference was conducted on July 31, 2012, at which the issues to be adjudicated were discussed and determined. On August 2, 2012, the Hearing Officer issued a pre-hearing order outlining the issues to be adjudicated.

On August 15, 2012, DCPS counsel filed a motion to dismiss or in the alternative a motion for summary adjudication. In the motion DCPS counsel asserted that DCPS offered Petitioner the

requested relief at a resolution meeting and the only remaining item in dispute was attorney fees. DCPS asserted that attorney fees is not a grounds to reject an otherwise valid settlement offer and therefore, the complaint should either be dismissed or the Hearing Officer should summarily find in DCPS' favor. The parties were allowed to argue the motion at the outset of the hearing. The Hearing Officer concluded that despite a settlement offer by DCPS the parties had not reached a settlement agreement and there remained a dispute as to fact as well as law. Thus, the Hearing Officer denied DCPS' motion on the record and directed that the hearing proceed.

ISSUES: [2]

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to conduct a triennial psychological evaluation of the student by June 2011 in violation of 34 C.F.R. §300.303.

2. Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP because the IEP was not based on an updated psychological evaluation.[3]

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-15 and DCPS Exhibit 1-5) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:

1. The student is age in grade attending a DCPS high school, School A, and has been determined by DCPS to be a child with a disability under IDEA with a disability classification of SLD. (Petitioner's Exhibit 2-1

2. The student's most recent psychological evaluation was conducted in June 2008 when the student was age thirteen and in sixth grade. The reason stated for the evaluation being conducted was "...because a re-evaluation is mandated by the District of Columbia Public Schools after 3 years." The student's full-scale IQ score was 68; however, the evaluator determined the student displayed some cognitive strengths and her low IQ score should be "de-emphasized." Nonetheless, the evaluator concluded the student was not able to learn at the same rate and in the same manner as other students her age in a general education classroom and she should be classified as a student with SLD. The

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[2] The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

[3] Although not expressly noted in the complaint the Hearing Officer inferred that the applicable procedural requirement is 34 C.F.R. 300.324(b)(1).

evaluator also noted that the student's behavioral and emotional concerns were negatively affecting her academic performance. (Petitioner's Exhibit 6-1, 6-10, 6-11)

3. DCPS has conducted no psychological evaluation of the student since the June 2008 evaluation. (Ms. Wright's testimony)

4. The student's most recent IEP was developed at School A on March 1, 2012. The student's IEP includes academic goals in the area of math, reading, and written expression and emotional and social and behavioral development. The IEP prescribes that the student be provided 13 hours per week of specialized instruction in the general education setting and 30 minutes per week of behavioral support services. (DCPS Exhibit 5-1, 5-2, 5-3, 5-4, 5-5, 5-6)

5. The student is receiving, at School A, all the services that are currently prescribed by her most recent IEP. (Ms. Wright's testimony)

6. The student has been in the ninth grade for the past two school years at School A and she is due to repeat the ninth grade for the third time in SY 2012-2013. The parent attended the student's most recent IEP meeting on March 1, 2012. There was no recent evaluation data presented at the meeting from which the parent could ascertain why her daughter continues to struggle academically. (Parent's testimony)

7. The student's parent asked School A staff during SY 2011-2012 for the student to be re-evaluated to determine why the student is having difficulty successfully completing ninth grade. However, the parent was informed that the evaluation would probably not be conducted until SY 2012-2013 because of a backlog of evaluations that need to be conducted. The failure to have recent psychological evaluation data for the student is frustrating to the parent and negatively affects her ability to address her daughter's educational needs and fully advocate for her in IEP meetings. (Parent's testimony)

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.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [4] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent

[4] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence

is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue 1: Whether DCPS denied the student a FAPE by failing to conduct a triennial psychological evaluation of the student by June 2011 in violation of 34 C.F.R. §300.303.

Conclusion: The evidence clearly demonstrates DCPS failed to conduct a triennial psychological evaluation and DCPS' failure to conduct the evaluation significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE to the student. Petitioner sustained the burden of proof by a preponderance of the evidence.

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.

The evidence demonstrates at School A the student is receiving the special education services prescribed by her March 1, 2012, IEP. However, the evidence demonstrates that the student has repeated the ninth grade twice and will also be in ninth grade for SY 2012-2013. The student's

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presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

parent sought a re-evaluation to help determine the reason for the student's academic stagnation. The parent credibly[5] testified that the student has experienced academic difficulties at School A and that the parent's ability to effectively address her daughter's educational needs and advocate for her at IEP meetings has been hindered because there is no current psychological evaluation for the student.

There was no evidence presented by DCPS that the parent agreed that re-evaluation was unnecessary. Although DCPS presented a witness, the witness was not personally knowledgeable about the student's IEP, her school attendance or her academic progress. Nor was the DCPS witness present for the student's most recent IEP meeting. This witness' testimony did not refute the parent's testimony that the student has had academic difficulties at School A and that the parent's ability to effectively address her daughter's educational needs has been hindered because there is no current psychological evaluation. The Hearing Officer concludes DCPS' failure to conduct the reevaluation significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE to the student.

Issue 2: Whether DCPS denied the student a FAPE by failing to provide an appropriate IEP because the IEP was not based on an updated psychological evaluation.

34 C.F.R.§ 300.324 (b)(1)(ii)(B) provides:

> Each public agency must ensure that the IEP team--
> reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
> (ii) revises the IEP, as appropriate, to address ...
> the results of any reevaluation conducted under Sec. 300.303;

Conclusion: The Hearing Officer concludes that despite DCPS' failure to conduct a triennial evaluation the evidence is insufficient to conclude that that student's current IEP is inappropriate. Petitioner failed to sustain the burden of proof on this issue by a preponderance of the evidence.

The evidence demonstrates the parent attended the student's March 1, 2012, IEP meeting and the IEP team did not have the benefit of an updated psychological evaluation when it developed the student's most recent IEP. The parent's ability to effectively participate in the decision-making process regarding provision of FAPE to her daughter was thus impeded. However, the evidence was inconclusive as to whether DCPS' failure to reevaluate the student was the direct cause of the student's repeated retention or whether the student's current education program is inappropriate.

It is premature to conclude that the student's IEP is inappropriate simply because the IEP team did not have the benefit of a recent psychological evaluation. Once the evaluation is completed

[5] The witness' testimony was found credible based upon her demeanor.

based upon the Order below an IEP team will have the opportunity to determine if the student's IEP should be changed based upon the evaluation results. The Hearing Officer concludes that as to issue #2 Petitioner did not sustain the burden of proof by a preponderance of the evidence.

ORDER:

1. DCPS shall within thirty (30) calendar days of the issuance of this Order fund an independent comprehensive psychological evaluation for this student.

2. Petitioner shall within sixty (60) calendar days of the issuance of this Order obtain the independent comprehensive psychological evaluation and provide the evaluation report to DCPS.

3. DCPS shall within thirty (30) calendar days of its receipt of the independent comprehensive psychological evaluation report convene an IEP meeting to review the independent evaluation report and update the student's IEP as warranted.

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 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: September 2, 2012