

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

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

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STUDENT HEARING OFFICE
2011 SEP 30 AM 9:11

PETITIONER, on behalf of
[STUDENT],¹

Date Issued: September 29, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER (the "Petitioner"), 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 Petitioner alleges that DCPS denied Student a FAPE by not conducting a timely triennial evaluation, by not developing an appropriate IEP and by not providing her access to Student's educational records.

¹
Personal identification information is provided in Appendix A.

Student, an AGE young woman, is a resident of the District of Columbia. The Petitioner's Due Process Complaint, filed on August 19, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 22, 2011. DCPS waived the resolution session on August 26, 2011. The 45-day time line for issuance of this HOD began on August 27, 2011. On September 7, 2011, a prehearing telephone conference was held with the Hearing Officer and 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 September 26, 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 device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witness EDUCATIONAL ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-10 were admitted into evidence without objection. DCPS Exhibits R-1 through R-6 were admitted into evidence without objection. Prior to the taking of testimony, Petitioner made a motion for a directed finding, which the Hearing Officer denied.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

- WHETHER DCPS FAILED TO CONDUCT A TIMELY TRIENNIAL REEVALUATION OF STUDENT;
- WHETHER STUDENT'S MARCH 15, 2011 IEP IS INADEQUATE BECAUSE IT IS NOT BASED UPON UPDATED EVALUATIONS AND STUDENT WAS NOT MAKING EDUCATIONAL PROGRESS UNDER HER PRIOR IEP; and

– WHETHER DCPS DENIED STUDENT A FAPE BY NOT PROVIDING PETITIONER ACCESS TO STUDENT’S EDUCATIONAL RECORDS.

Petitioner requests that DCPS be ordered to conduct a comprehensive psychological evaluation of student and to reconvene Student’s IEP team to revise her IEP based upon the new evaluation.

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 young woman. Student resides with Mother in the District of Columbia. Testimony of Mother.
2. Student is eligible for special education and related services under the Primary Disability classification, Specific Learning Disability (“SLD”). Exhibit P-8. Student has received special education services since her second grade year. Testimony of Mother.
3. For the 2011-2012 school year, Student is enrolled in GRADE at CITY PUBLIC CHARTER SCHOOL (“CPCS”). Testimony of Mother.
4. Student’s most recent educational reevaluation was conducted on or about December 3, 2008. Exhibits P-8. (Petitioner’s primary contention in this case is that no triennial evaluation was completed in the past three years. Although the triennial evaluation report is not in evidence, Student’s March 23, 2011 IEP reflects that her IEP team considered Student’s scores on a Woodcock Johnson III (“WJ III”) achievement test dated December 3, 2008. Although this evidence is circumstantial, I find it establishes that a triennial reevaluation was in fact completed at that time.)

5. Student's April 23, 2010 IEP at CITY MIDDLE SCHOOL ("CMS") provided 17.5 hours per week of Specialized Instruction in the General Education setting and 30 minutes per week of Behavioral Support Services. Exhibit P-10.

6. On the CMS end-of-year Report to Parents on Student Progress for the 2010-2011 school year, Student received failing grades in Pre-Algebra and English. She received a D+ in U.S. History. Exhibit P-3.

7. During the 2010-2011 school year, Student was present for 137.5 of 174 school days. She had 159 class absences, of which 51 were unexcused. Exhibit P-5. Some of the absences were due to a chronic asthma condition. Testimony of Mother.

8. Student's IEP team convened at CMS on March 15, 2011 for the annual IEP review meeting. Mother attended by telephone. In the March 15, 2011 IEP, the total hours of Specialized Instruction services were unchanged from the prior IEP. Behavioral Support Services were reduced to 90 minutes per month. Exhibit P-8. The "biggest concern" noted at the IEP meeting was Student's attendance. Exhibit R-2. Mother signed the IEP to indicate that she agreed with its content. Testimony of Mother.

9. Mother did not request CMS to reevaluate Student. Testimony of Mother.

10. On May 16, 2011, Educational Advocate, an employee of Petitioner's Counsel, wrote the special education coordinator at CMS to request a copy of Student's records, including all report cards, all IEPs, all evaluations, all behavior incident reports and all suspension/disciplinary notices. He wrote that he intended to pick up the records at the school on May 19, 2011. Exhibit P-7. Educational Advocate delivered another copy of the request to the school and faxed a request to the CMS principal on May 23, 2011. Exhibits P-5, P-6. On May 27, 2011, Educational Advocate again wrote the special education coordinator. In this letter, he

acknowledged receipt of some records, but stated that previous IEPs were missing. He requested the 2009 and 2010 IEPs. Exhibit P-4.

11. Educational Advocate visited CMS on May 23, 2011 to review and obtain copies of Student's records. That day, the CMS office manager did not provide him the records because she was unable to contact the special education coordinator or school principal. Testimony of Educational Advocate.

12. Student's end-of-year IEP Progress Report dated June 15, 2011 shows that Student was "Progressing" on all IEP academic and behavioral goals for the last reporting period. Exhibit R-6

13. At the resolution session on June 14, 2011, DCPS offered to fund an Independent Education Evaluation ("IEE") comprehensive psychological evaluation of Student and to convene the MDT team to consider the new evaluation and update Student's IEP. Exhibit R-5.

CONCLUSIONS OF LAW

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

DISCUSSION

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *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); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1 DID DCPS FAIL TO CONDUCT A TIMELY TRIENNIAL REEVALUATION OF STUDENT?

Petitioner alleges that DCPS failed to conduct timely special education eligibility reevaluations of Student. Under the IDEA, reevaluations of a child with a disability must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). Student was reevaluated in December 2008. The December 2008 reevaluation was considered by the IEP team at its March 15, 2011 annual review meeting. Petitioner provided no evidence that the December 2008 reevaluation was untimely or that additional evaluations were required before the next triennial date (December 2011).

2. IS STUDENT'S MARCH 15, 2011 IEP INADEQUATE BECAUSE IT IS NOT BASED UPON UPDATED EVALUATIONS OR BECAUSE STUDENT WAS NOT MAKING EDUCATIONAL PROGRESS UNDER HER PRIOR IEP?

Petitioner contends that the March 15, 2011 IEP is inappropriate because Student was not timely reevaluated. Because I have found that additional evaluations were not required before the next triennial date (December 2011), this claim has no merit. Petitioner also alleges that the IEP is inadequate because the Student was not making educational progress under her prior April 23, 2010 IEP. The well-established standard for determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004). The CMS IEP Progress Report for the reporting period ending June 17, 2011 show that Student was progressing in all academic and behavioral goals. At the hearing, Petitioner offered no evidence that Student was not making progress under the prior IEP except

for her failing grades in English and Algebra and poor grade in History. Whether those poor grades were due to IEP inadequacies, to Student's poor attendance or to other causes was not established. See *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007). (IDEA does not provide a remedy where student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to her.) I conclude that Petitioner has not met her burden of proving that the March 15, 2011 IEP was not reasonably calculated to enable Student to receive educational benefits.

3. DID DCPS DENY STUDENT A FAPE BY NOT PROVIDING ACCESS TO STUDENT'S EDUCATIONAL RECORDS?

In connection with this case, Educational Advocate wrote the special education coordinator on May 16, 2011 to request copies of Student's records. He stated that he intended to pick up the records on May 19, 2011. Educational Advocate went to the school on May 23, 2011, but the principal and special education coordinator were not available. He followed up with a request on May 26, 2011 that the school send the records to him by facsimile. The school sent some records, but did not include Student's 2009 and 2010 IEPs.

The District of Columbia Municipal Regulations provide for parent access to a student's records:

In accordance with the confidentiality procedures of 34 C.F.R. 300.560-300.576 and 34 C.F.R. 99, the parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement and the provision of FAPE.

D.C. Regs. tit. 5-E, § 3021.1. Further, the Student Hearing Office — Standard Operating Procedures ("SHO-SOP") provide:

Right to examine pupil records: Parents have the right to examine all records maintained by the school that are related to their child. Parents should call or write their individual LEA or school(s) to request access to the pupil records. Parents may authorize counsel, advocates, investigators or other individuals to review and obtain copies of their children's records.

SHO-SOP § 800.2(1). In sum, parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records. However, counsel must do more than merely request copies of documents by letter. *See Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13 (D.D.C. 2008).

Here, Educational Advocate did more than the parent's attorney in *Jalloh*. He wrote CMS and provided the specific date and time that he would visit the school to examine Student's records. However, he appeared four days later than the appointed day and the evidence does not establish that he made arrangements for the special education coordinator or principal to be present that day to open Student's records to him. Moreover, although not required to, the special education coordinator did deliver copies of some of Students' records to Educational Advocate on May 26, 2011. I conclude, therefore, that the evidence does not establish that DCPS denied Student a FAPE based solely on the alleged failure to provide access to Student's educational records.

SUMMARY

In summary, I find that the evidence does not establish that DCPS failed to conduct Student's triennial evaluation on a timely basis, that the March 15, 2011 IEP was not reasonably calculated to provided educational benefits or that DCPS has otherwise denied Student a FAPE.

ORDER

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

All relief requested by Petitioner herein is denied.

Date: September 29, 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).