OSSE
Student Hearing Office
March 15, 2013

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

PETITIONER,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: March 14, 2013

Hearing Officer: Peter B. Vaden

Case No: 2013-0001

Hearing Date: March 5, 2013

Student Hearing Office, Room 2009
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 "Student"), 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 ("DCMR"). In his Due Process Complaint, Petitioner, who is an adult student, alleges that DCPS has denied him a free appropriate public education ("FAPE") by not conducting a special education reevaluation since 2009 and by not revising or updating his Individualized Education Program (IEP) since October 2011.

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

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 2, 2013, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on January 3, 2013. The parties met for a resolution session on January 16, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on February 3, 2013. On January 29, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

On February 22, 2013, the parties filed cross-motions for summary judgment. Petitioner asserted that he was entitled to summary relief because there was no genuine issue of material fact as to DCPS' failure to comply with his request for reevaluation and failure to review and revise his IEP and educational placement on an annual basis. DCPS sought summary judgment that under the IDEA, as a parentally-placed private school child, Petitioner was entitled only to child find and an equitable services plan, and that Petitioner had not alleged a violation of the Act's child find or equitable services requirements. In my February 27, 2013 summary judgment decision and order, I granted summary judgment to DCPS on the issue of whether DCPS had denied Student a FAPE by failing to revise and update his IEP and placement. I denied summary judgment on the issue of whether DCPS had denied Student a FAPE by not conducting a special education reevaluation. *See* Decision and Order on Parties' Cross-Motions for Summary Judgment, Feb. 27, 2013.

The due process hearing was held before the undersigned Impartial Hearing Officer on March 5, 2013 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 witnesses, EDUCATIONAL ADVOCATE and HEAD OF SCHOOL. Petitioner's Exhibits P-1 through P-20 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-9 were admitted into evidence without objection. Counsel for Petitioner made an opening statement, Counsel for both parties made closing arguments. There was no request for post-hearing briefing.

JURISDICTION

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

PRIOR ADJUDICATIONS

On February 17, 2011, MOTHER filed a due process complaint on behalf of Student. In a May 4, 2011 Order, Hearing Officer Virginia A. Dietrich dismissed with prejudice Mother's claims (1) that DCPS failed to provide Student with an appropriate IEP beginning on July 9, 2010; (2) that DCPS failed to provide Student an appropriate placement beginning on July 9, 2010; and (3) that DCPS failed to issue an appropriate Prior to Action Notice following Mother's request for placement of Student at NONPUBLIC PLACEMENT in July 2010. Exhibit R-3. Mother filed another due process complaint on behalf of Student on November 16, 2011, alleging that DCPS had denied Student a FAPE by failing to provide an appropriate placement/location of services at a Multidisciplinary Team meeting on October 4, 2011 and by failing to issue a proper Prior Written Notice on October 4, 2011, explaining why DCPS had denied Mother's request for Student's placement at Nonpublic Placement. Following a hearing on January 24, 2012, Hearing Officer Dietrich issued a Hearing Officer Determination, holding, *inter alia*, that Mother had not met her burden of proof to show that DCPS had denied Student a

FAPE by not issuing a Prior Written Notice for placement of Student at a school to implement an October 4, 2011 Nonpublic Placement IEP. Hearing Officer Dietrich dismissed Mother's complaint with prejudice. Exhibit R-7.

ISSUES AND RELIEF SOUGHT

The issues originally alleged by Petitioner in the present complaint for due process were:

1. WHETHER DCPS DENIED STUDENT A FAPE BY NOT CONDUCTING A TRIENNIAL ELIGIBILITY REEVALUATION SINCE 2009; and

2. WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO REVISE AND UPDATE STUDENT'S IEP AND IEP PLACEMENT SINCE OCTOBER 2011.

In my summary judgment order, I granted summary judgment to DCPS on the second issue and dismissed that issue. For his relief on the remaining issue, failure to conduct a triennial reevaluation, Petitioner seeks an order for DCPS to conduct a reevaluation, including psychological, speech-language and vocational assessments.

STIPULATIONS OF THE PARTIES

At the due process hearing, counsel for the parties agreed to the following stipulations of fact, to which they had also agreed for purposes of their summary judgment motions:

A. Student is a resident of the District of Columbia and resides in Southeast Washington, D.C.

B. Student currently attends Nonpublic Placement, a separate, special education day school located in the District of Columbia, where he is in the GRADE.

C. Student has been parentally placed at Nonpublic Placement continuously since the beginning of the 2010-2011 School Year, and DCPS is not funding and has never funded Student's placement at Nonpublic Placement.

D. Student's last psycho-educational evaluation reviewed by DCPS was prepared on or about September 12, 2008.

E. Student's last psychiatric evaluation reviewed by DCPS was prepared on October 21, 2008.

F. Student's last adaptive Vineland assessment reviewed by DCPS was prepared on March 15, 2009.

G. Student's last speech and language evaluation reviewed by DCPS was prepared on August 21, 2009.

H. Student's last vocational evaluation reviewed by DCPS was conducted on December 2, 2009.

I. Student faxed a letter to DCPS on October 24, 2012 stating "[Student] hereby intends to remove himself from the District of Columbia Public Schools ("DCPS") and unilaterally enroll himself at [Nonpublic Placement] within ten (10) business days of receipt of this facsimile for the 2012-13 School Year . . . because DCPS has failed to provide him with a free and appropriate public education. . . . Additionally, the adult student will seek funding for his placement/location of services at [Nonpublic Placement] if need be, at administrative due process hearing.

J. Student faxed a letter to DCPS on November 12, 2012 stating "I hereby request that [Student] be comprehensively re-evaluated 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 adult resident of the District of Columbia. Testimony of Student.

2. Student is eligible for special education and related services under the primary disability classification, Specific Learning Disability (SLD). Exhibit P-11.

3. Student was last determined eligible for special education and related services on April 28, 2009. Exhibit P-11.

4. Since Student was parentally placed at Nonpublic Placement at the beginning of the 2010-2011 School Year, DCPS has not conducted a reevaluation to determine whether Student continues to have a disability and the nature and extent of the special education and related services that he needs. Testimony of Educational Advocate.

5. There was no agreement between Student and DCPS that a reevaluation was unnecessary. Testimony of Student.

6. Nonpublic Placement administered the Woodcock Johnson III Normative Update of Achievement ("WJ-III ACH") to Student on September 11, 2011 and a vocational evaluation of Student on September 21, 2011. At the time, Nonpublic Placement did not conduct additional assessments of Student because its staff considered those evaluations sufficient. Testimony of Head of School, Exhibit R-4. R-5.

7. On October 4, 2011, an annual IEP review for Student was conducted at Nonpublic Placement. The DCPS progress monitor attended. In the October 4, 2011 IEP, Student was provided 27 hours per week of Specialized Instruction outside general education and 30 minutes per week of Behavioral Support Services. Exhibits P-10, P-11.

8. Student is currently in grade at Nonpublic Placement. He is failing all of his classes. Student has major school attendance problems. He has been put on an "attendance contract" by Nonpublic Placement. Nonpublic Placement is considering giving Student notice that he may not be allowed to remain at the school if he does not comply with the school attendance policy. Testimony of Head of School.

9. On January 18, 2013, after the complaint in this case was filed, an annual IEP review for Student was conducted at Nonpublic Placement. Exhibit P-17. A DCPS representative was invited to attend, but declined for the reason that Student was not a DCPS Student. Exhibits P-15, P-16.

10. On February 21, 2013, DCPS' Private-Religious Office (PRO) mailed to Petitioner's Counsel a packet of forms to complete in order for Student to be reevaluated. Exhibit R-9.

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

The burden of proof in a due process hearing is properly placed on the party seeking relief – the Petitioner in this case. *See* DCMR, 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); *T.H. v. District of Columbia,* 620 F.Supp.2d 86, 89, n.5 (D.D.C.2009).

ANALYSIS

HAS DCPS DENIED STUDENT A FAPE BY NOT CONDUCTING A TRIENNIAL ELIGIBILITY REEVALUATION SINCE 2009?

DCPS has not conducted a special education reevaluation of Student since the spring of 2009. Student contends that by not conducting his triennial reevaluation, DCPS has denied him a FAPE. Student is correct that DCPS violated the IDEA by not timely conducting his triennial reevaluation. However, I find that Student has not met his burden of proof to show that DCPS' failure to comply with the Act's reevaluation requirement denied him a FAPE.

Under 34 CFR § 300.303, a Local Education Agency ("LEA") must ensure that a reevaluation of each child with a disability is conducted if (1) the LEA determines that the child's educational or related services needs, in light of the child's academic achievement and functional performance, warrant a reevaluation; or (2) the child's parent or teacher requests a reevaluation. A reevaluation may occur not more than once a year, unless the parent and LEA agree otherwise; and must occur at least once every three years, unless the parent and LEA agree that a reevaluation is unnecessary. *Id.*

For children with disabilities enrolled by their parents in private schools, the LEA where the private school is located is responsible for conducting the reevaluations. *See* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46593 (August 14, 2006). *See, also*, 20 U.S.C. § 1414(a)(2)(B); Questions and Answers on Serving Children with Disabilities Placed by Their Children at Private Schools, Question B-1, OSERS Memorandum, Rev. April 2011. The reevaluations must be conducted in accordance with the requirements in 34 CFR §§ 300.300 through 300.311, which describe the procedures for evaluations and reevaluations for all children with disabilities. 71 Fed. Reg. 46593, *supra.*

Since the beginning of the 2010-2011 school year, Student has been enrolled in Nonpublic Placement, a private secondary school located in the District of Columbia. As the LEA where Nonpublic Placement is located, DCPS is required to ensure that a reevaluation of Student is conducted at least once every three years unless the parent[2] and DCPS agree that a reevaluation is unnecessary. Student's last special education eligibility determination was made by DCPS on April 28, 2009 and there was no agreement that a reevaluation was unnecessary. Although Nonpublic Placement administered the WJ-III ACH and a vocational assessment to Student in November 2011, these assessments did not relieve DCPS of its obligation to conduct a triennial reevaluation of Student, in accordance with the requirements in 34 CFR §§ 300.300

[2] The parent's right to agree that a reevaluation was unnecessary transferred to Student on his 18th birthday. *See* 34 CFR § 300.520(a); DCMR, tit. 5-E, § 3023.1(b).

through 300.311.[3] Student's triennial reevaluation should have been completed by April 2012. DCPS' failure to conduct a timely reevaluation violated the IDEA.

An LEA's failure to conduct a timely reevaluation is a procedural violation of IDEA. *See, e.g., Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C.2010). Procedural violations of the IDEA do not inexorably lead a court to find a child was denied FAPE. *See, Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834, 371 (D.C. Cir.2006) (An IDEA claim is viable only if those procedural violations affected the student's substantive rights.) Student argues that DCPS' failure to timely perform his reevaluation constituted a denial of FAPE because it impeded his ability to participate in the decision-making process. The IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and educational placement process. *District of Columbia v. Vinyard*, 2012 WL 5378122, 2 (D.D.C.2012), citing 20 U.S.C.§ 1415(b)(1). While "not every technical violation of the procedural prerequisites of an IEP will invalidate its legitimacy . . ., procedural inadequacies that . . . seriously infringe upon the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of a FAPE." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005). But, "[b]efore an IEP is set aside, there must be some

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[3] The Nonpublic Placement assessments did not, for example, suffice to meet the requirements of 34 CFR § 300.306(a), which provides,

> General. Upon completion of the administration of assessments and other evaluation measures—
>
> (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child; and
>
> (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

Id.

rational basis to believe that procedural inadequacies . . . seriously hampered the parents' opportunity to participate in the formulation process. . . ." *Lesesne, supra*, at 834 (citations and internal quotations omitted).

To establish that DCPS' failure to timely conduct a triennial evaluation denied him a FAPE, Student's burden of proof was to show that DCPS thereby "denied his right to participate meaningfully in the development of [his] IEP." *See Smith v. District of Columbia*, 2010 WL 4861757, 5 (D.D.C.2010). Student's triennial reevaluation was due in April 2012. The evidence in this case is that prior to the filing of the due process complaint in this case, Nonpublic Placement last updated Student's IEP in October 2011. Student offered no evidence that his Nonpublic Placement IEP team met again before the present due process complaint was filed, or that, because DCPS had not completed his triennial evaluation. he was unable to participate in any subsequent IEP meeting that took place. *See Id.* at 5. (Judgment for DCPS where Petitioner did not show that DCPS' failure to conduct the reevaluations sooner affected substantive rights.) I conclude therefore that Student has not demonstrated that his right to participate in the IEP formulation process was affected by DCPS' failure to conduct his triennial reevaluation.

The IDEA requires that "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." *District of Columbia v. Pearson*, 2013 WL 485666, 6 (D.D.C.2013), quoting 20 U.S.C. § 1415(f)(3)(E)(i). Because I find that Student has not shown that DCPS' procedural violation – not timely conducting his triennial reevaluation – has resulted in a denial of a free appropriate publication education, I have no authority to order DCPS to conduct the

reevaluation.[4] Accordingly, Student's claim must fail on the merits. *See Lesesne, supra,* 447 F.3d at 834.

ORDER

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

All relief requested by the Petitioner in this matter is denied.

Date: March 14, 2013

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).

[4] My decision in this case should, in no way, be construed to relieve DCPS of its statutory obligation to ensure that a special education reevaluation of Student shall occur at least once every 3 years, unless Student and DCPS agree that a reevaluation is unnecessary. *See* 20 U.S.C. 1414(a)(2).