

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

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

OSSE
Student Hearing Office
May 03, 2013

[Parent], on behalf of
[Student],¹

Date Issued: May 3, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 22, 2013.

A

response to the complaint was filed on April 1, 2013. A prehearing conference was convened on April 2, 2013 and a prehearing order was issued on that date.

The Respondent filed a motion permit its three witnesses to testify via telephone on April 15, 2013. The motion was granted as to one of the witnesses and denied as to the other two. The Respondent provided evidence supporting good cause for only the one witness who was permitted to testify via telephone.

The Petitioner filed a motion for partial dismissal on April 18, 2013. This motion was withdrawn at the hearing because it did not concern an issue for determination, only one of the

¹ Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

originally proposed remedies – compensatory education – which the Petitioner is not currently seeking.

The parties filed disclosures on April 19, 2013. The Petitioner filed a motion to strike Respondent’s disclosure R 12. The Petitioner’s objection to R 12 was handled at the hearing as part of the admission of exhibits and Respondent did not offer R 12. Thus, the motion became moot and no determination is made as to the motion.

A resolution meeting was convened on April 22, 2013, and resulted in no agreements. (The resolution meeting was required to have been convened no later than March 28, 2013, pursuant to 34 C.F.R. § 300.532(c)(3)(i)). The Petitioner filed a motion to limit the Respondent’s defenses on April 25, 2013. The parties presented arguments on the motion at the hearing. The Undersigned did not rule on the motion at the start of the hearing because it sought to address something that had not yet happened – the offer of testimony from the resolution meeting held April 22, 2013. When the testimony was presented during the course of the hearing, it was permitted over the Petitioner’s objection. The testimony only concerned the Respondent’s position that it would provide the Student an independently provided psychological assessment (Testimony of A.M.). No evidence of a settlement (an exchange) was offered into evidence.² Thus, the motion was effectively denied and the Respondent was not prohibited from arguing that the matter should be dismissed because it would provide the assessment.

Because this matter was expedited, due to the Office of the State Superintendent of Education’s (OSSE) interpretation of 34 C.F.R. § 300.532 (which holds that any matter that raises concerns about a manifestation determination, whether or not a manifestation determination is appealed, must be expedited, and that if a hearing officer does not expedite such

² In other words, there was no evidence that the Respondent offered the Petitioner the assessment in exchange for something, such as withdrawing the complaint.

a matter and issues a hearing officer determination beyond the deadline for an expedited matter, the hearing officer's contract with OSSE will be terminated) the due process hearing was required to be held within 20 school days of the complaint (no later than April 30, 2013), and was convened and timely held on April 26, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is May 10, 2013 (10 school days following the hearing). This HOD is issued on May 3, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

1. Whether the Respondent failed to ensure a reevaluation of the Student occurred at least once every three years when the last evaluation occurred in September 2007?
2. Whether the Respondent failed to ensure the Student has been provided an evaluation sufficiently comprehensive to identify all of her special education and related service needs, whether or not commonly linked to the disability category in which she has been classified, when it has not assessed her to determine her social/emotional needs?
3. Whether the Respondent failed to convene a meeting to determine whether conduct for which she was removed from school for more than ten school days in February 2013, was a manifestation of her disability?³

The Petitioner is seeking an independently provided comprehensive psychological evaluation and a team meeting within ten days of the evaluation.

³ This issue originally included a claim about the 2011-2012 school year, and that part of the issue was removed at the Petitioner's request at the start of the due process hearing.

The Respondent failed to ensure a reevaluation of the Student occurred at least once every three years when the last comprehensive evaluation occurred no later than September 2007. Furthermore, the Respondent failed to ensure the Student has been provided an evaluation sufficiently comprehensive to identify all of her special education and related service needs due to the lack of a timely and complete reevaluation. The evidence does not show, however, that the Student's behavior should have triggered an assessment of her social/emotional needs. The Respondent was not required to convene a manifestation determination meeting because the Student was only suspended for ten days in February and March 2013.

IV. EVIDENCE

Two witnesses testified at the hearing, one for the Petitioner and one for the Respondent. The Petitioner was her own witness (P), and Student's Special Education Teacher (A.M.) was the Respondent's witness.

Eight of the Petitioner's 11 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. Five of the Respondent's 12 disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The witnesses testified reasonably credibly, although both suffered from some confusion or lack of first hand knowledge. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law

is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is a year old learner with a disability enrolled in the grade at Senior High School.⁴ The Student was determined eligible for special education and related services under the definition of specific learning disability (SLD).⁵ The Student's needs are in the areas of reading and writing.⁶
2. In 2007 the Student was provided a psychological evaluation while attending the Public Charter School.⁷ At some point, and by the 2008-2009 school year, the Student was attending Public Charter School, for which the Respondent was the local education agency for purposes of special education.⁸
3. On October 23, 2008, the individualized education program (IEP) team, including the Petitioner, met to conduct a "30-day review and annual of [sic] academic and behavior performance based on teacher observations and assessment data."⁹ The team reviewed the Student's attendance record, the Student's IEP, and progress reports from a special education teacher and a general education teacher.¹⁰ The Petitioner expressed concern about the Student

⁴ R 5/P 6, Testimony (T) of P.

⁵ R 5/P 6.

⁶ R 5/P 6.

⁷ P 8, T of P.

⁸ P 8.

⁹ P 8.

¹⁰ P 8.

failing math.¹¹ The School had the Student's 2007 psychological evaluation on file, but did not review it.¹² The team did not recommend any additional evaluations.¹³

4. In the fall of 2008 the Student had been suspended for three days for fighting.¹⁴
5. The Student's IEP team met on October 28, 2010, to make an eligibility determination.¹⁵ The Final Eligibility Determination Report states that the team "used assessment procedures that were valid for the purposes intended and valid for the student."¹⁶ However, the team only examined existing data consisting of: the IEP; grades on tests and quizzes; and classwork consisting of exit tickets, work samples, and journal response prompts.¹⁷ The team, without conducting a reevaluation, determined the Student continued to be eligible for special education and related services under the definition of SLD.¹⁸ The Petitioner agreed with the determination and did not think the Student required anything else.¹⁹
6. The Student's IEP was last revised in October 2012.²⁰ The Petitioner and Student both participated in the IEP team meeting.²¹ The Student is working on sixth and seventh grade academic standards in reading and writing.²² The Student is receiving seven hours per week of specialized instruction in the general education setting.²³

¹¹ P 8.

¹² P 8.

¹³ P 8.

¹⁴ P 8.

¹⁵ R 1.

¹⁶ R 1.

¹⁷ R 1.

¹⁸ R 1.

¹⁹ T of P.

²⁰ R 5/P 6.

²¹ R 5/P 6.

²² R 5/P 6.

²³ R 5/P 6.

7. On February 21, 2013, the Student was in a fight with another student.²⁴ She was suspended for ten days and also arrested and charged.²⁵ The Student was not suspended any other time during the current school year.²⁶
8. The Respondent did not provide the Petitioner with notice of the Student's discipline, but called her to send the Student home.²⁷ A confusing document titled "Notification to Parent Meeting of Pending Student Disciplinary Action" was sent to the Petitioner, dated February 26, 2013, indicating the Student had been fighting and engaged in "ongoing group activity as it relates to gang fighting."²⁸ The notice states "Student MUST RETURN with parent on pending 45 days of suspension (long term) between the hours of: [blank]."²⁹ The Petitioner went to the school to talk to someone about the suspension and was told that the Student would be sent to a different school.³⁰ Not until the Student's Case Manager, A.M. called the Petitioner and talked to her on March 21, 2013, did the Petitioner learn that the Student was only suspended for 10 days.³¹ The Petitioner had kept the Student home from school until that time.³²
9. The Petitioner is concerned about the Student getting into fights, although it happens rarely.³³ She is also concerned about the Student's performance in math.³⁴ The Student earned a B- in Algebra I last school year, and is in danger of failing Honors Algebra II this school year.³⁵

²⁴ T of P, T of A.M.

²⁵ T of P, T of A.M., P 2/R 11.

²⁶ P 2/R 11, T of P.

²⁷ T of P.

²⁸ P 5.

²⁹ P 5.

³⁰ T of P.

³¹ T of P, T of A.M. (Petitioner thought it was the Principal of the School who had called her, but A.M. and P 10 show that she was in err.)

³² T of P, P 2/R 11.

³³ T of P.

³⁴ T of P.

³⁵ P 1, P 4.

10. On March 22, 2013, the Petitioner, through Counsel, requested a Developmental Optometry Evaluation for the Student, while at the same time filing this complaint concerning a comprehensive reevaluation.³⁶

11. On April 22, 2013, the Respondent advised the Petitioner it would proceed with an independently provided psychological assessment.³⁷

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. Students with disabilities must be reevaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311 under certain circumstances, including at least once every three years, unless the Respondent and parent agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303. *See also*, D.C. Mun. Regs. 5-E3005.7. 34 C.F.R. § 300.304 requires, in relevant part:

³⁶ P 3, Due Process Complaint dated March 22, 2013.

³⁷ T of A.M.

- (b) In conducting the evaluation, the public agency must—
- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under § 300.8; and
 - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
 - (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
 - (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (c) *Other evaluation procedures.* Each public agency must ensure that—
- (1) Assessments and other evaluation materials used to assess a child under this part—
 - (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
 - (ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
 - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
 - (iv) Are administered by trained and knowledgeable personnel; and
 - (v) Are administered in accordance with any instructions provided by the producer of the assessments.
 - (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
 - (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child’s aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child’s impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
 - (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; . . .
 - (6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
 - (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

See also D.C. Mun. Regs. 5-E3005.9. D.C. Mun. Regs. 5-E3005.4 provides that

- as part of any reevaluation, the IEP team, including other qualified professionals, as appropriate, shall:
- (a) review existing evaluation data on the child, including:
 - (1) evaluations and information provided by the parents of the child;
 - (2) current classroom-based assessments and observations; and
 - (3) observations by teachers and related service providers; and
 - (b) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine:
 - (1) whether the child has a particular category of disability under this Chapter or, in the case of a reevaluation of a child, whether the child continues to have such a disability;
 - (2) the present levels of performance and educational needs of the child;
 - (3) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

3. The last likely evaluation of the Student was in 2007. In 2010, the Respondent attempted to conduct a reevaluation of the Student and failed to review existing evaluation data, looking only at the IEP, grades on tests and quizzes, and classwork consisting of exit tickets, work samples, and journal response prompts. This level of data review does not meet requirements for a reevaluation. Thus, the Student has not been timely reevaluated since at least 2007.
4. Since the reevaluation did not take place, there was not a sufficiently comprehensive reevaluation to identify all of her special education and related services needs, whether or not commonly linked to her SLD. However, the Respondent had no reason to suspect the Student had emotional or behavioral needs based on occasional fighting engaged in by the Student. Nevertheless, now that the Petitioner has made known her concerns about the Student's behavior, it is appropriate to assess, her social and emotional status to determine whether a disability is a cause of her behavior.
5. When a child with a disability under IDEA engages in behavior that results in discipline that will change the Student's educational placement, a manifestation determination must be made. 34C.F.R. § 300.530(e). A change in educational placement occurs if the disciplinary removal is for more than 10 consecutive school days, or the child has been subject to a series of removals that constitute a pattern because the series of removals total more than 10 school days in the school year, the behavior resulting in the removals is substantially similar, and because of consideration of such factors as: the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).
6. The Student was not removed for more than 10 school days this year. The Respondent failed to follow proper disciplinary due process procedures by not providing appropriate notice,

resulting in considerable confusion on behalf of the Petitioner, and that is not within the authority of this hearing officer to address because it does not concern the identification, evaluation or educational placement of the Student, or the provision of free appropriate public education (FAPE) to the Student. In short, the improper disciplinary notice, in this case, is not an IDEA claim, and is not the claim the Petitioner raised in her complaint.

7. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Respondent has argued that if the Student has not suffered any harm as a result of a violation, no relief may be granted. Respondent relies upon the reasoning of the Court in Lesesne v. District of Columbia, 477 F.3d 828 (D.C. Cir. 2006), which holds that:

an IDEA claim is viable only if those procedural violations affected the student's substantive rights. See, e.g., Kruvant v. District of Columbia, 99 Fed.Appx. 232, 233 (D.C.Cir.2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); C.M. v. Bd. of Educ., 128 Fed.Appx. 876, 881 (3d Cir.2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); M.M. ex rel. D.M. v. Sch. Dist., 303 F.3d 523, 533-34 (4th Cir.2002) ("If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations."); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir.1990) (en banc) ("[P]rocedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits." (citations omitted)); W.G. v. Bd. of Trustees, 960 F.2d 1479, 1484 (9th Cir.1992) (rejecting the proposition that procedural flaws "automatically require a finding of a denial of a FAPE"); Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 (6th Cir.1990) (rejecting an IDEA claim for technical noncompliance with procedural requirements where the alleged violations did not result in a "substantive deprivation" of the student's rights); Burke County Bd. Of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir.1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

Id. at 834. Lesesne, like the cases it relies on, dealt with a question of FAPE and a corresponding remedy, as opposed to evaluation and its corresponding remedy. The Respondent presumes that any IDEA complaint raises a question of FAPE. However, the Statute and its implementing regulations lay out four different bases for an IDEA complaint:

identification, evaluation or educational placement of a child with a disability, or the provision of free appropriate public education (FAPE) to a child with a disability. 34 C.F.R. § 300.507(a). In this case, two of the issues deal specifically with the evaluation of the Student. The sought after remedy, and the typically appropriate remedy where there has been a failure to evaluate, is to require the evaluation. Thus, in this case, the Respondent will be required to conduct a comprehensive reevaluation of the Student, including examining her social and emotional status, to determine whether she continue to have any educational needs in all areas based on disability.

8. Finally, it must be noted that the parties here both failed to take reasonable measures to avoid litigation. On the one hand the Petitioner, through counsel, filed a due process complaint rather than requesting a comprehensive reevaluation of the Student, even though she simultaneously requested a developmental optometry assessment. The Respondent could have agreed to conduct the reevaluation or, if it refused, the Petitioner would then have a basis to file a complaint. On the other hand, when the complaint was filed, the Respondent had the opportunity to timely resolve the matter at a statutorily required resolution meeting, and failed to even convene the meeting until the week of the due process hearing. When it did convene the meeting, it did not attempt to settle the matter with a written offer of settlement pursuant to 34 C.F.R. § 300.517(c)(2)(1)(A), but merely informed the Petitioner she could have an assessment. Being mere days prior to the hearing, this likely compelled the Petitioner to continue to pursue her claim due to the expense thus far expended. What the impact of the behavior of the parties in this regard will be is a matter beyond the authority of the Undersigned. Yet, it is important to note here, as common sense was not involved and

little, if any, effort was made to work cooperatively to resolve the matter before and after the filing of the complaint, thus expending valuable public resources.

VII. DECISION

1. The Respondent failed to ensure a reevaluation of the Student occurred at least once every three years when the last comprehensive evaluation occurred no later than September 2007.
2. The Respondent failed to ensure the Student has been provided an evaluation sufficiently comprehensive to identify all of her special education and related service needs due to the lack of a timely and complete reevaluation. The evidence does not show, however, that the Student's behavior should have triggered an assessment of her social/emotional needs.
3. The Respondent was not required to convene a manifestation determination meeting because the Student was only suspended for ten days in February and March 2013.

VIII. ORDER

1. The Respondent must comprehensively reevaluate the Student in all areas, including her social and emotional status, with new assessments, to determine: whether she continues to have a disability; her present levels of performance and educational needs; whether she continues to need special education and related services; and whether any additions or modifications to her special education and related services are needed to enable her to meet the measurable annual goals set out in her IEP and to participate in the general curriculum.
2. The reevaluation must be completed no later than May 31, 2013, and the IEP team convened to review the assessment reports, write the evaluation report, and revise the IEP, if necessary, within 10 business days of the date the last assessment of the reevaluation is completed.

3. The timeline herein will be extended day for day for any delay caused by the Petitioner or Student.

IT IS SO ORDERED.

Date: May 3, 2013



Independent 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 USC §1415(i).