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Student Hearing Office
May 22, 2013

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

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: May 21, 2013

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: May 15, 2013

Student Hearing Office, Room 2003
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 "FATHER"), 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 alleges that Respondent District of Columbia Public Schools ("DCPS") has denied the Student a Free Appropriate Public Education ("FAPE") by not timely conducting a reevaluation of Student requested by Father in November 2012.

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

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 13, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 15, 2013. The parties met for a resolution session on March 29, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 13, 2013. On April 10, 2013, the Hearing Officer convened a telephone prehearing conference with 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 May 15, 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.

Petitioner testified and called as witness EDUCATIONAL ADVOCATE. DCPS called, as its only witness, PROGRESS MONITOR. Petitioner's Exhibits P-1 through P-9, P-14 through P-17, P-21 and P-22 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-6 were admitted without objection. Counsel for the respective parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

– WHETHER DCPS HAS DENIED STUDENT A FAPE BY NOT CONDUCTING A COMPREHENSIVE PSYCHOLOGICAL REEVALUATION, AS REQUESTED BY PARENT IN NOVEMBER 2012.

For relief, Petitioner requests that DCPS be ordered to fund an Independent Educational Evaluation ("IEE") comprehensive psychological evaluation of Student.

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 an AGE young man, resides with Father in the District of Columbia. Testimony of Father.

2. Student is eligible for special education and related services under the primary disability classification, Other Health Impairment ("OHI"), due to Attention Deficit Hyperactivity Disorder. Testimony of Progress Monitor. Student's last eligibility meeting date was March 28, 2012. Exhibit R-3. For 4 to 5 school years, DCPS has funded Student's private placement at Non-Public School in suburban Virginia, where he is currently in the GRADE. Testimony of Educational Advocate. According to Student's most recent Individualized Education Program ("IEP"), Student cannot be served in the general education setting because he requires a small student-to-staff ratio and a placement that will allow for individualized education planning and behavioral planning. Exhibit R-3. (This IEP is dated March 7, 2013, but the actual meeting date was March 12, 2013. See, e.g, P-13, P-17.

3. Prior to November 1, 2012, EDUCATION PROGRAM COORDINATOR at Non-Public School contacted Petitioner's Counsel regarding the possible transition of Student to a less restrictive environment within the DCPS public school system. Testimony of Educational Advocate; Exhibit P-5. On November 2, 2012, Petitioner's counsel wrote Educational Program Coordinator, by email, to request that Student be reevaluated to determine his current level of academic and related service functioning, prior to any revision to his IEP or educational

placement. Counsel requested, specifically, that Student be evaluated with a comprehensive psychological evaluation assessment and a Level II vocational assessment. Exhibit P-6.

4. At an IEP team meeting at Non-Public School on November 27, 2012, the IEP team found that Student's academic testing was recent, but his cognitive testing was several years old. The IEP team felt that updated cognitive tests would be appropriate. DCPS' Progress Monitor agreed that DCPS would conduct a new psychological cognitive assessment. DCPS SCHOOL PSYCHOLOGIST, who attended the IEP meeting by telephone, agreed to conduct the assessment. Student's IEP team was to reconvene in mid-March 2013 after the assessment was completed. Exhibits P-8, P-9; Testimony of Progress Monitor.

5. DCPS School Psychologist spoke to Father "a couple of times" by telephone. Testimony of Father. Cognitive testing of Student was completed in December 2012 and School Psychologist conducted an observation of Student. Testimony of Progress Monitor.

6. Student's IEP team convened again on March 12, 2013 at Non-Public School. Father and Educational Advocate attended the meeting. As of that date, the status of Student's psychological assessment was that School Psychologist had completed testing of Student and had also interviewed Father. Testimony of Progress Monitor; Exhibit P-16. However the psychological assessment report had not been completed. A DCPS representative at the IEP meeting committed to follow up with School Psychologist to get the report and provide it to the IEP team as soon as possible. Exhibit P-17. On March 12, 2013, Educational Advocate wrote Progress Monitor by email to request a copy of the psychological evaluation upon completion. Exhibit P-14.

7. At the March 12, 2013 IEP meeting, a full review of Student's IEP was conducted. There was no objection from Father or from Educational Advocate to updating

Student's IEP before the psychological reassessment report was available. Testimony of Progress Monitor.

8. The IEP team agreed at the March 12, 2013 IEP meeting to reconvene before the end of the school year to decide upon Student's placement for the 2013-2014 school year. The next IEP meeting is scheduled for June 3, 2013. A Letter of Invitation has been sent to Father. Testimony of Progress Monitor.

9. Prior to the March 12, 2013 IEP meeting, DCPS completed a Functional Behavioral Assessment of Student and a Behavior Intervention Plan ("BIP") was developed. The IEP team agreed to the BIP at the March 12, 2013 meeting. Testimony of Educational Advocate.

10. Prior to the March 12, 2013 IEP meeting, a Devereau social-emotional assessment of Student was completed. Testimony of Progress Monitor.

11. As of the week prior to the due process hearing, School Psychologist has not completed his psychological evaluation report. After completing testing and observation of Student, School Psychologist was away from work on medical leave for an extended period. DCPS looked into having a contractor psychologist complete the report, but School Psychologist assured DCPS that he would return to work soon. He returned to work in May 2013. Testimony of Progress Monitor.

12. No decision has been made about Student's placement for the 2013-2014 school year. Testimony of Progress Monitor.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and 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:

Burden of Proof

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

ANALYSIS

HAS DCPS DENIED STUDENT A FAPE BY NOT CONDUCTING A COMPREHENSIVE PSYCHOLOGICAL REEVALUATION, AS REQUESTED BY PARENT IN NOVEMBER 2012?

Petitioner alleges that DCPS has denied Student a FAPE because it has not completed a comprehensive psychological evaluation of Student, which the parent's representative requested at a November 27, 2012 IEP meeting. DCPS concedes that the psychological assessment report has not been completed, but denies that the delay has resulted in denial of FAPE to Student. Although Petitioner describes his request as seeking a "parentally-requested reevaluation," it is important to clarify that Father's request was for a specific assessment – the comprehensive psychological assessment – not a "reevaluation" as that term is used in the IDEA.

A reevaluation under the IDEA is the process by which the IEP team determines whether the child continues to need special education and related services. *See* 34 CFR §§ 300.303 through 300.305. Once a child has been fully evaluated (the "initial evaluation"), a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a "reevaluation." *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. 46640 (August 14, 2006).

Student's last eligibility reevaluation was completed on March 28, 2012. When Father's representative requested a psychological reevaluation at the November 27, 2012 IEP meeting, absent DCPS' agreement, a reevaluation was not required by the IDEA. *See* Analysis of Comments and Changes, *supra*, 71 Fed. Reg. 46746 (34 CFR § 300.303(b)(1) prohibits conducting more than one reevaluation in a single year without the agreement of the school district and the parent.) However, at the November 27, 2012 IEP meeting, Student's IEP team concluded that Student's cognitive testing was outdated and that a psychological reassessment was needed, as "additional data," to determine Student's current educational needs. *See* 34 CFR § 300.305(a)(2). DCPS' School Psychologist undertook to conduct the psychological reassessment, but he had not completed his report as of the May 15, 2013 due process hearing date.

The IDEA regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005) (decided under the IDEA, prior to enactment of the 2004 amendments to the statute.) In light of the lack of statutory guidance, U.S. District Judge Roberts concluded in *Herbin* that "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)). *See, also, Williams v. District of Columbia*, 771 F.Supp.2d 29, 31 n.1 (D.D.C.2011). Extrapolating from Judge Robert's decision in *Herbin*, I conclude that, as with IDEA reevaluations, additional

assessments deemed needed by a student's IEP team should be conducted in a reasonable period of time and without undue delay.

I find that under the facts in the present case, DCPS' 6-month delay in completing the psychological reassessment of Student is not unreasonable or undue. DCPS did agree to conduct the additional psychological reassessment as soon as Father's representative made the request at the November 27, 2012 IEP meeting. School Psychologist very promptly initiated psychological testing, student and family interviews and a school observation. However, School Psychologist failed to complete his report in time for Student's March 2013 IEP review meeting, reportedly because the psychologist was on medical leave.[2] At the March 12, 2013 IEP meeting, Student's IEP team was able to review and revise Student's IEP based upon data in hand, including a Devereau social-emotional assessment and a Functional Behavioral Assessment which had both been completed since the November 2012 IEP meeting. Father and Educational Advocate attended the March 2013 IEP meeting and did not object to the IEP team's completing the IEP annual review without the psychological reassessment report. Finally, DCPS has committed to completing the psychological reassessment before the end of the 2012-2013 school year and prior to making any change to Student's IEP placement. DCPS has issued a Letter of Invitation to the parent to attend a meeting to consider the psychological reassessment on June 3, 2013. Under these facts, is unlikely that Student will suffer educational harm from the delay in completion of his psychological reassessment. *Cf. Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir. 2006) (holding that the hearing officer properly determined that the plaintiff was required to demonstrate that her child suffered educational harm in order to establish that he was denied FAPE by the school district's procedural violation). I conclude,

[2] At the due process hearing in this case, counsel for Petitioner represented that he learned for the first time, at the hearing, that School Psychologist had been on medical leave. Counsel's frustration with the time taken to complete the reassessment process is therefore understandable.

therefore, that under the circumstances as determined in this case, DCPS' delay in completing Student's psychological reassessment has not been undue or unreasonable and that the delay has not denied Student a free appropriate public education. *See Herbin, supra.*

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: May 21, 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).