

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

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

OSSE
Student Hearing Office
October 4, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: October 3, 2013

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 Petitioner (the “Petitioner” or “GUARDIAN”), 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 her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (“DCPS”) has denied Student a free appropriate public education (“FAPE”) by finding she is no longer eligible for special education, as a child with a disability, within the meaning of the IDEA.

¹ Personal identification information is provided in Appendix A.

Student, an AGE girl, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 24, 2013, named DCPS as respondent. The parties met for a resolution session on August 5, 2013 and were unable to reach an agreement. On August 15, 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 convened before the undersigned Impartial Hearing Officer on September 24, 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. DCPS was represented by DCPS SCHOOL PSYCHOLOGIST and by DCPS' COUNSEL.

Petitioner testified, and called as witnesses LICENSED PSYCHOLOGIST, CASE WORKER and EDUCATIONAL ADVOCATE. DCPS called as witnesses DCPS School Psychologist, OSE SOCIAL WORKER and CASE MANAGER. Petitioner's Exhibits P-2 through P-22 and DCPS' Exhibits R-1 through R-9 were admitted into evidence without objection. Exhibit P-1 was admitted over DCPS' objection. Counsel for both parties made opening and closing statements. At the conclusion of Petitioner's case in chief, DCPS' Counsel made a motion for a directed finding against Petitioner, which I denied.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether DCPS denied Student a FAPE by determining at a May 29, 2013 Multidisciplinary team ("MDT") meeting that she was no longer a child with a

disability and by failing to find her eligible for special education and related services as a child with an Other Health Impairment and/or Emotional Disturbance disability;

- Whether DCPS denied Student a FAPE by failing to evaluate her in accordance with 34 CFR §§ 300.304 through 300.311 before determining that she was no longer a child with a disability, and by failing to assess Student in all areas of suspected disability, to identify other possible areas in which the child may have needs that require special education and related services, including appropriate assessments for Speech-Language, Occupational Therapy, Physical Therapy, social-emotional functioning and Attention-Deficit Hyperactivity Disorder.

For relief, Petitioner seeks an order for DCPS to fully evaluate Student for continued special education eligibility and that Student be determined to be eligible to continue to receive special education and related services as a child with a disability.

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 child, resides with Petitioner in the District of Columbia.

Testimony of Petitioner.

2. According to information provided by Guardian to OSE Social Worker, Guardian is Student's great aunt, by marriage. In 2005, Student and her sister came to live with Guardian following a signed transfer of custody from the girls' father. For a period of approximately one year, Student and her sister went to live with Guardian's sister, after which time they resumed residing with Guardian. Exhibit R-3.

3. According to information provided by Guardian to OSE Social Worker, from the age of two years old to the age of five years old, Student attended NONPROFIT SCHOOL and received services for developmental delays. At Nonprofit School, Student received physical therapy, occupational therapy and speech/language therapy services. Exhibit R-3.

4. When she was 4 years old, Student started school at PUBLIC CHARTER SCHOOL as a kindergarten child. She remained at Public Charter School until she completed the second grade. Testimony of Guardian, Exhibit R-3.

5. At Public Charter School, Student was determined eligible for special education and related services under the Primary Disability Classification Developmental Delay. Under her August 27, 2010 IEP at Public Charter School, Student was provided 12.5 hours per week of Specialized Instruction, 30 minutes per week of Physical Therapy (“PT”) and 30 minutes per week of Behavioral Support Services, all outside the General Education Setting. Exhibit P-17. Her PT services were curtailed in an October 15, 2010 IEP revision. Exhibit P-18.

6. For her third grade year, Student received a D.C. Opportunity Program scholarship for tuition at a private school. Guardian enrolled Student PRIVATE SCHOOL. Exhibit R-3. Guardian decided to move Student from Public Charter School to Private School because Private School had smaller classroom settings and the staff there said they could accommodate Student. At the end of that school year, Private School informed Guardian that Student’s IEP was not being implemented. Private School also informed Guardian that Student would be retained in third grade. For the 2012-2013 school year, Guardian decided to move Student to RELIGIOUS SCHOOL. Testimony of Guardian.

7. At Religious School, Student was reported to make satisfactory progress. Her grades, as of May 24, 2013, were C’s and higher, except for a D in Language Arts. Exhibit P-5. In their reports to OSE Social Worker, Student’s Religious School teachers were mostly positive in their comments on Student’s classroom performance, indicating that she is not a behavior problem, is respectful, responsible and an active participant in class. They reported that Student completes her work independently and consistently when she is in the classroom, that she is well

liked by her peers and teachers, and is able to interact well with both. Exhibit R-4.

8. In early February 2013, Guardian met with Caseworker about reevaluating Student and re-enrolling her in a DCPS public school. She requested DCPS' Private and Religious Office ("PRO") to conduct special education eligibility reevaluations of Student. Testimony of Case Manager, Exhibit P-7. At the time, Guardian decided keep Student in Religious School until the reevaluation process was completed. Case Manager scheduled an MDT meeting for March 13, 2013 to follow up on the reevaluation request. Exhibit R-1.

9. The MDT team meeting was convened on March 13, 2013 at CITY ELEMENTARY SCHOOL. Guardian and her attorney participated by telephone. At the meeting, the MDT team considered the existing data which had been provided by Guardian and Religious School. Student's last educational assessment had been completed on March 16, 2009. Student had been discharged from school-based PT on November 23, 2010. Student's last OT evaluation had been completed on November 15, 2007. Guardian stated that she did not see OT as an area of concern for Student. When questioned by her attorney, Guardian stated that she did see a need to assess Student in OT or PT. Testimony of Case Manager, Exhibit R-5.

10. After discussing and reviewing all of the information and data presented, the MDT team made the recommendation that a comprehensive psychological evaluation to address Student's academic, behavioral and cognitive concerns was needed. The team also recommended that an updated Social History Assessment was warranted. Exhibit R-5.

11. On April 22, 2013, DCPS School Psychologist conducted a psychological reevaluation of Student. In her April 26, 2013 report, DCPS School Psychologist stated that the "purpose of the evaluation will be to ascertain her current levels of cognitive and academic functioning and determine whether she [meets] criteria for a Specific Learning Disability [under]

the Individuals with Disabilities Act of 2004 (IDEA) and if she will require special education and/or related services.” The psychological reevaluation included interviews with Guardian, Student and her teachers, a classroom observation, and a review of Student’s records. School Psychologist administered to Student the Reynolds Intellectual Assessment Scales (“RIAS”) and the Woodcock Johnson III Tests of Achievement (“WJ-III ACH”). Exhibit R-2.

12. Student’s scores on the RIAS indicated an overall Composite Intelligence Score in the below average range; Her performance on verbal, nonverbal, and memory tasks also fell in the below average range. Student’s verbal and nonverbal performances were measured to be consistent with her overall intellectual ability, indicating similarly developed skills. Student’s performance on memory tasks indicated that her working memory skills were similarly developed to her overall intellectual ability. She performed better on tasks of nonverbal memory than verbal memory. Student’s cognitive skills appeared to be similarly developed and did not indicate deficits among index areas. However, the examiner predicted that Student may exhibit more difficulties than the average child on academic tasks, as her skills fell below the average of most same-aged peers. Student’s cognitive skills were found to be slightly lower than that of her academic skills. Academic testing utilizing the WJ-III ACH indicated an overall low average achievement score. Student’s performance ranged from Low Average to Average, indicating that her academic skills were similarly developed across the areas of reading, writing, and math. One area of poor performance was noted on the math fluency task. No significant differences were measured across academic cluster areas. Exhibit P-4.

13. DCPS School Psychologist reported that Student’s math and English teachers at Religious School expressed that they had no concerns about Student’s academic performance, social interactions or behavior. Student was described to be on grade level across all areas.

DCPS School Psychologist's behavior observations of Student in the classroom and during testing indicated that she demonstrated typical levels of activity and appeared to give her full attention and effort to tasks administered. Exhibit P-4.

14. OSE Social Worker completed a Social Work Assessment Report on May 8, 2013. OSE Social Worker observed Student at Religious School on April 30, 2013. Throughout the observation Student seemed to be on task and willing to participate, but a little timid when raising her hand. There were never any behavior issues during the time she was observed. After observing Student in class, OSE Social Worker interviewed her. Student stated that she likes school and her teachers and that the only thing that she did not like too much was not being able to do some of her work because it is a little hard. Student appeared to OSE Social Worker to be a well behaved, happy girl who likes school and is motivated to do her best. Student's Math/Science teacher reported to OSE Social Worker that Student's only weakness was her lack of homework completion. Student's Social Studies teacher reported that Student relies on a lot of teacher encouragement; that Student reads grade-level material and completes her work independently on an average level; that Student is quiet and works well with others; and that Student's critical thinking can be difficult for her if not guided to reach the goal. Exhibit P-3.

15. On May 29, 2013, Student's MDT team convened to determine Student's continued eligibility for special education services and to review the psychological reevaluation and social history. The team decided that based upon its review of the data and current evaluations, Student did not meet IDEA eligibility criteria as a child with a Specific Learning Disability ("SLD"). Educational Advocate attended the meeting and voiced her disagreement with the decision. Exhibit R-5. Guardian stated at the meeting that she wanted to leave Student at Religious School, because if it's not broke she doesn't want to fix it. Exhibit P-2.

16. On May 29, 2013, DCPS issued a Prior Written Notice to Guardian advising that at the reevaluation meeting that day, it was determined that Student did not meet the criteria for special education services. Exhibit R-7.

17. On July 23, 2013, DCPS issued authorization to Guardian to obtain an Independent Educational Evaluation (“IEE”) comprehensive psychological evaluation. Exhibit R-8. The DCPS-funded IEE psychological evaluation, which included Behavior Assessment Scale for Children, Second Edition (BASC-2) rating scales, was conducted by Licensed Psychologist on August 24, 2013. Licensed Psychologist issued her Comprehensive Psychological Evaluation report on September 15, 2013, nine days before the due process hearing in this case. In the IEE psychological report, Licensed Psychologist diagnosed Student with an Adjustment Disorder with Mixed Anxiety and Depressed Mood, Learning Disorder Not Otherwise Specified, Attention-Deficit Hyperactivity Disorder (“ADHD”) (previously diagnosed) and Depressive Disorder (previously diagnosed). Licensed Psychologist concluded that Student met the criteria for SLD because she presented with academic deficits two age levels below expectations on Reading Comprehension, Math Problem Solving, Essay Composition, Math Fluency and Pseudo-word Decoding. Exhibit P-1.

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 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

Student's Rights as a Parentally Placed Private School Child

Before reaching the substantive issues in this case, it is necessary to address the framework for Student's rights under the IDEA as a parentally-placed private school child. The IDEA does not require a Local Education Agency ("LEA") to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parent elected to place the child in a private school or facility. *See* 34 CFR § 300.148(a). Here, beginning with the 2011-2012 school year, the Guardian decided to place Student at private schools – first at Private School, then at Religious School – because Guardian was able to obtain a D.C. Opportunity Program scholarship for Student to attend a private school. There is no allegation in this case that DCPS did not make FAPE available to Student before the Guardian elected to place her in a private school. Therefore, Student is a parentally-placed private school child, as defined by the IDEA regulations:

Parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities . . . other than [children with disabilities who are or have been placed in or referred to a private school or facility by a public agency.]

34 CFR § 300.130. As the LEA where Religious School is located, DCPS remained responsible for conducting IDEA eligibility reevaluations of Student. *See* Questions and Answers on Serving Children with Disabilities Placed by Their Children at Private Schools, Question B-1, OSERS Memorandum, Rev. April 2011. *See, also* 20 U.S.C. § 1414(a)(2)(B), 34 CFR § 300.303. However, DCPS was not obliged to provide Student a FAPE for the 2011-2012 school

year or at the beginning of the 2012-2013 school year. *See District of Columbia v. Vinyard*, 2013 WL 5302674, 6 (D.D.C. Sept. 22, 2013) (District was relieved of any obligation to provide child with a FAPE at the point the parents declined the District's offer of services and clearly expressed their intent to keep child enrolled in private school.)

Issues for Decision

In February 2013, Guardian met with Case Manager about reevaluating Student and re-enrolling her in a DCPS public school. At the time, Guardian decided keep Student in Religious School until the reevaluation process was completed. After Student was reevaluated in April 2013, DCPS' MDT team determined on May 29, 2013 that Student was not eligible for special education services because she did not meet the criteria for an SLD disability. The issues for decision in this case are limited to (i) whether DCPS complied with the IDEA in conducting the reevaluation and (ii) whether DCPS denied Student a FAPE by not finding her eligible.

1. *Did DCPS deny Student a FAPE by failing to evaluate her in accordance with 34 CFR §§ 300.304 through 300.311 before determining that she was no longer a child with a disability, and by failing to assess Student in all areas of suspected disability, to identify other possible areas in which the child may have needs that require special education and related services, including appropriate assessments for speech-language, OT, PT, social-emotional functioning and ADHD?*

U.S. Department of Education regulations require that, as part of a special education reevaluation, the LEA must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Following Guardian's February 2013 request for a reevaluation of Student, DCPS convened Student's MDT team on March 13, 2013 to determine

the areas to be assessed. The Guardian and her attorney participated in the meeting. After considering the existing data and information provided by the Guardian, the team decided that Student should be assessed with a comprehensive psychological evaluation to address academic, behavioral and cognitive concerns, and that an updated social history should be obtained. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). The team considered, *inter alia*, that Student had been diagnosed with ADHD but was not currently prescribed medication for that condition, that Student had been discharged from PT services in 2010 and that Guardian did not see OT as an area of concern. When asked, expressly, by her attorney about assessing for OT or PT, the Guardian stated that she did not see a need.² Nor were other assessment concerns raised by Guardian at the meeting. I find that Petitioner has not shown that at the time of the March 13, 2013 meeting, other assessments, in addition to the comprehensive psychological evaluation and social history, were warranted by the suspected needs of Student.

When School Psychologist conducted the psychological reevaluation in April 2013, she limited the scope of her evaluation to ascertaining Student's current levels of cognitive and academic functioning and determining whether Student met criteria for the SLD disability. The March 13, 2013 MDT team had determined that behavioral concerns were an area that needed to be addressed in the comprehensive psychological evaluation. Although School Psychologist collected anecdotal behavior information from Student's teachers, she did not administer formal

² In her due process hearing testimony, Clinical Psychologist opined that Student should be evaluated for OT needs because of the score obtained on the Beery-Buktenica Developmental Test of Visual-Motor Integration she administered and for PT needs because of Student's "clumsiness." Clinical Psychologist's report was completed only 9 days before the due process hearing and has not been reviewed by Student's MDT team. When Student's MDT team meets to consider Clinical Psychologist's report, the team must consider what, if any additional data is needed to determine whether Student is a child with a disability. *See* 34 CFR § 300.305(a)(2).

behavior ratings scales to Student, her teachers or to Guardian. In her conclusions, School Psychologist addressed whether Student met criteria for SLD, but she did not address whether Student had a behavior-related disability. Therefore, I conclude that, prior to the May 29, 2013 eligibility meeting, DCPS failed to assure that Student's psychological assessment was sufficiently comprehensive. *See* 34 CFR § 300.304(b)(6) (Public agency must assure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs.) I further find that at the May 29, 2013 meeting, the MDT team made its eligibility determination for Student without ensuring that it had all of the data it needed to determine whether Student continued to have a disability – namely data on the behavioral concern area. *See* 34 CFR § 300.305(a)(2).

An LEA's failure to appropriately assess a student for suspected disabilities is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). However, not all procedural violations are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (Only procedural violations which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.); *Roark ex rel. Roark v. Dist. of Columbia*, 460 F.Supp.2d 32, 42 (D.D.C. 2006) (To succeed on a procedural claim, the Parent was required to demonstrate that the school district's procedural violations affected her child's ability to receive educational benefit.) I conclude that DCPS' omission to formally assess Student in the area of behavioral concerns, prior to the MDT team's May 29, 2013 eligibility meeting, significantly impeded the Guardian's opportunity to participate in the eligibility determination process, resulting in an actionable violation of the IDEA. *See* 34 CFR § 300.513(a).

2. *Did DCPS deny Student a FAPE by determining at the May 29, 2013 MDT meeting that she was no longer a child with a disability and by failing to find her*

eligible for special education and related services as a child with an Other Health Impairment and/or Emotional Disturbance disability?

Under the IDEA, a child is eligible for special education if (1) she has been evaluated as having one or more of the conditions identified in the Act, and (2) by reason thereof, needs special education and related services. *See* 34 CFR § 300.8(a) (definition of “Child with a disability”); *Kruvant v. District of Columbia*, 99 Fed.Appx. 232 (D.C.Cir. 2004). Petitioner contends that DCPS has denied Student a FAPE by failing to find her eligible at the May 29, 2013 MDT meeting, under the disability classifications Other Health Impairment (“OHI”) and/or Emotional Disturbance (“ED”). In the preceding section, I concluded that DCPS violated the IDEA by not ensuring that Student’s psychological reevaluation formally assessed Student in the area of behavioral concerns. On July 23, 2013, DCPS authorized Guardian to obtain an Independent Educational Evaluation (“IEE”) comprehensive psychological evaluation of Student. The DCPS-funded IEE psychological evaluation, which included Behavior Assessment Scale for Children, Second Edition (BASC-2) rating scales, was conducted by Licensed Psychologist on August 24, 2013. Licensed Psychologist issued her Comprehensive Psychological Evaluation report on September 15, 2013, nine days before the due process hearing in this case. She diagnosed Student with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Learning Disorder Not Otherwise Specified. Clinical Psychologist also reported Student’s previously diagnosed ADHD, Posttraumatic Stress Disorder and Depressive Disorder. Assuming, without deciding, that Student does have these mental health syndromes, I find that Petitioner has not established that by reason of these conditions, Student needs special education and related services. Notably, Student’s teachers at Religious School were mostly positive in their comments on Student’s classroom performance. They report she is not a behavior problem, is respectful, responsible and an active participant in class, that she completes

her work independently and consistently and that she is well liked by her peers and teachers. Student's 2012-2013 grades, mostly C's or higher, also indicated that she was making satisfactory progress.

Special Education Hearing Officers have broad discretion in ordering relief under the IDEA. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 8 (D.D.C. Feb. 20, 2013) (Once a court holds that the public placement violated the IDEA, the court enjoys broad discretion in granting such relief as it determines is appropriate.) Here, DCPS has already funded an IEE comprehensive psychological evaluation of Student, which was completed by Clinical Psychologist on September 9, 2013. I find that an appropriate, equitable, remedy for DCPS' earlier omission to formally assess Student in the area of behavioral concerns will be to order DCPS to reconvene Student's MDT team to reconsider whether Student is a child with a disability. At that meeting, the MDT team must consider the results of the IEE comprehensive psychological evaluation report, including Clinical Psychologist's diagnoses and recommendations. *See* CFR § 300.502(c)(1).

I deny Petitioner's request for a compensatory education award, without prejudice, because at this juncture, it has not been established that Student is eligible for special education or that DCPS should have supplied her special education services following the May 29, 2013 MDT eligibility meeting. *See, e.g., Gill v. District of Columbia*, 770 F.Supp.2d 112, 116 (D.D.C. 2011) (Compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.)

SUMMARY

In her complaint, Petitioner alleges that DCPS has denied Student a FAPE by

determining at the May 29, 2013 MDT meeting that she was no longer a child with a disability and by failing to evaluate her in accordance with the requirements of the IDEA. I have determined that when Student's MDT team made its eligibility determination, it lacked a comprehensive psychological evaluation which formally assessed Student's behavioral concerns, resulting in an actionable procedural violation of the IDEA. I have found that Petitioner has not borne her burden of proof to establish that DCPS has, otherwise, failed to assess Student in all areas of suspected disability or that Student is eligible for special education as a child with an OHI or ED disability.

ORDER

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

1. Within 15 school days of issuance of this Order, DCPS shall reconvene Student's MDT team to reconsider her eligibility for special education and related services. DCPS shall ensure that at that meeting, the MDT team considers the results of Clinical Psychologist's September 15, 2013 report and any other data provided by Guardian and that the team determines whether any additional data are needed to determine whether Student is a child with a disability, and, if so, what are her educational needs;
2. Petitioner's request that the Hearing Officer determine that Student continues to be eligible to receive special education and related services as a child with an OHI and/or ED disability is denied without prejudice; and
3. All other relief requested by Petitioner herein is denied.

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).