

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)

Date Issued: March 14, 2012

Hearing Officer: Virginia A. Dietrich

DCSE
STUDENT HEARING OFFICE
2012 MAR 15 AM 8:56

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother (“Parent”) of _____-year old Student, filed a due process complaint notice on December 9, 2011 alleging that the District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DCPS had failed to evaluate Student in all areas of suspected disability when it failed to conduct or fund a neuropsychological evaluation as was recommended by Student’s treating psychiatrist, in order to determine whether or not Student had Asperger’s Disorder. Petitioner alleged that diagnosis of the disorder was necessary for proper educational programming for Student.

DCPS asserted that as a matter of law, Student was not entitled to a neuropsychological evaluation because Petitioner had enrolled Student in a private school at the beginning of the school year, and by doing so, Petitioner had removed herself from the circumstances under which the public school system was obligated to provide Student with a FAPE.

¹ Personal identification information is provided in Appendix A.

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Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 12/09/11. This Hearing Officer was assigned to the case on 12/12/11.

Petitioner waived the resolution meeting, but DCPS did not. A resolution meeting did not take place. The resolution period ended on 01/08/12, the 45-day timeline to issue a final decision began on 01/09/12 and the final decision was initially due on 02/22/12. On 02/07/12, Petitioner requested an unopposed continuance and it was granted. The case was continued for a hearing until 03/06/12 and the final decision due date was extended for 23 days, from 02/22/12 to 03/16/12.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner presented three witnesses: Petitioner; educational advocate; and Student's treating psychiatrist. DCPS elected not to present any witnesses.

Petitioner's disclosures dated 02/01/12, containing a witness list and Exhibits P-1 through P-11, were admitted into evidence without objection.

DCPS' disclosures dated 03/05/12, containing a witness list and the curriculum vitae of the two identified witnesses, were admitted into evidence without objection.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, thereby denying Petitioner the right to participate in the educational decision making of her child; specifically, by DCPS' failure to conduct a neuropsychological evaluation to determine whether Student had Asperger's Disorder, as was recommended by Student's treating psychiatrist and as was requested by Petitioner on 10/04/11.

For relief, Petitioner requested a finding that Student was denied a FAPE; funding from DCPS for an independent neuropsychological evaluation; and DCPS to convene a meeting within 10 days of receipt of the independent neuropsychological evaluation to review the

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evaluation, review and revise Student's IEP as appropriate, and discuss and determine placement/location of services.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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, age [redacted] and in the [redacted] grade, resides in the District of Columbia with his mother. Prior to the second week of September 2011, Student always had attended DCPS schools.²

#2. For the 5th grade and first half of the 6th grade, Student attended [redacted] School as a general education student, where he had behavior problems that consisted of being very talkative, very active in class, very disruptive to other students and to the teacher's ability to conduct the class, very defiant, and argumentative. In the classroom setting, Student had taken on the role of an adult and was telling other students what to do and couldn't understand what was wrong with his overall problematic behaviors. While Student attended [redacted] Petitioner received emails or telephone calls on a daily basis about Student's behavior and often she was required to go to the school to address the problem.³ There was no evidence in the record that Student was having trouble with academics at that time.

#3. In January 2011, when Student was in the 7th grade, Student received an involuntary transfer to [redacted] School by DCPS due to his behaviors.⁴

#4. On 04/13/11, an IEP was developed for Student after a Hearing Officer Determination found Student eligible for special education services.⁵ The IEP prescribed 3 hours/week of specialized instruction inside of general education in the area of reading, 3 hours/week of specialized instruction inside of general education in the area of mathematics, and 1.5 hours/week of specialized instruction inside of general education in the area of written expression. When the IEP was written, Student's overall intellectual functioning was in the Average range and the IEP noted that Student's disability of Other Health Impairment relating to Attention Deficit Hyperactivity Disorder ("ADHD") did not impede his academic performance in the academic areas in which he received specialized instruction.⁶

#5. The 04/13/11 IEP also prescribed 30 minutes/week of behavioral support services within the general education setting. The purpose of the behavioral support services was to improve Student's social emotional development specifically in the areas of impulse control, and

² P-6-4, Petitioner.

³ Petitioner.

⁴ Petitioner.

⁵ P-6-10.

⁶ P-6.

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peer relationships and to help Student control his behavioral impulses, attend and delay gratification and improve his overall self-control to prevent removal from the general education setting. In the classroom, Student needed constant redirection and verbal reinforcement to keep him focused in order to enable him to complete assigned tasks.⁷ At the time the IEP was developed, Student was exhibiting frustration with the classroom environment at [redacted] but he was not experiencing any behavior problems.⁸ Petitioner disagreed with the school placement at [redacted] but was willing to work with DCPS to secure an alternate school placement for the upcoming 2011-2012 school year.⁹

#6. From May to June 2011, Student experienced a general dissatisfaction with attending [redacted] Student lacked the incentive to go to school and Student was argumentative and combative with Petitioner on a daily basis about getting up and going to school, to the point of Petitioner having to call the truant officer to get Student to attend school.¹⁰

#7. For the first week of the 2011-2012 school year, Student attended [redacted] but then transferred to a private Catholic school where Student had received a scholarship. The application for the scholarship had been pending for some time and Petitioner took advantage of the opportunity to change schools in the hopes that Student would be more motivated to attend school.¹¹

#8. Since the summer of 2010, Student had been receiving the services of a community-based psychiatrist. During the course of treatment with Student, the psychiatrist formulated the hypothesis that Student may have Asperger's Disorder based on Student's extensive history of difficulty with interpersonal relationships in the school setting. In a letter dated 07/21/11 to the Office of Special Education, the psychiatrist recommended that a neuropsychological evaluation be conducted to assess Student's social behavior, language and non-verbal communication, adaptive behavior, motor skills, vulnerability to atypical behaviors and his cognition; with the purpose of better directing efforts at educational interventions.¹² Diagnosis of Asperger's Disorder is pertinent to educational programming because if Student has Asperger's Disorder, he could benefit from a 1:1 aide and from therapy with someone who specializes in treating Asperger's Disorder in order to address Student's challenging of authority, Student's inability to understand how to interact socially, and Student's continued difficulty with working with other students. A neuropsychological evaluation is the only type of evaluation that can diagnose Asperger's Disorder.¹³

#9. By letter dated 10/04/11, Petitioner asked DCPS to conduct or fund an independent neuropsychological assessment for the purposes of diagnosing whether or not Student had Asperger's Disorder.¹⁴ This request was made while Student attended the private Catholic school.

⁷ P-6-5.

⁸ P-6-4, P-6-11.

⁹ P-6.

¹⁰ Petitioner.

¹¹ Petitioner.

¹² P-5-2.

¹³ Psychiatrist.

¹⁴ P-5-1.

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#10. Petitioner is interested in returning Student to a public school placement.¹⁵

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:

"Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, thereby denying Petitioner the right to participate in the educational decision making of her child; specifically, by DCPS' failure to conduct a neuropsychological evaluation to determine whether Student had Asperger's Disorder, as was recommended by Student's treating psychiatrist and as was requested by Petitioner on 10/04/11.

The IDEA expressly requires states to make a FAPE "available to *all* children with disabilities *residing in the State* between the ages of 3 and 21" 20 U.S.C. § 1412(a)(1)(A) (emphasis added); see also 34 C.F.R. § 300.101, ("A free appropriate public education must be available to *all children residing in the State* between the ages of 3 and 21") (emphasis added). See also 5 D.C.M.R. 3002.1. Neither this subsection nor the limiting provision immediately following it restricts the state's obligation to only publicly enrolled children. See 20 U.S.C. § 1412(a)(1)(B) (exempting states from FAPE obligations in certain circumstances based on child's age).

The IDEA also requires a local education agency ("LEA") to ensure that a reevaluation of "each child with a disability" is conducted if the child's parents request it. 20 U.S.C. §

¹⁵ Petitioner.

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1414(a)(2)(A)(ii), 34 C.F.R. 300.303(a)(2). A limiting provision immediately following this subsection provides for the frequency of such reevaluations, but does not restrict the obligation to only publicly enrolled children. 20 U.S.C. § 1414(a)(2)(B). Federal and state implementing regulations echo this requirement. See 34 C.F.R. § 300.303(a)(2) ("A public agency must ensure that a reevaluation of each child with a disability is conducted ... [i]f the child's parent ... requests a reevaluation."); 5 D.C.M.R. 3005.7 ("Reevaluation shall be conducted sooner [than every three years] if ... the student's parent ... requests the reevaluation."). Such reevaluations are used to determine the content of the child's IEP. 20 U.S.C. § 1414(b)(2)(A)(ii), 5 D.C.M.R. 3005.4.

The statutory language makes clear that where parents request reevaluations of their child for purposes of having an offer of an FAPE made for the child, and the child is domiciled in the district, the school district must comply. An analysis of the case law in this area supports such a construction, recognizing that residency, rather than enrollment, triggers a district's FAPE obligations. See *Mooretown Twp. Bd. of Educ. v. S.D. and C.D. ex rel. M.D.*, 8100 F. Supp. 2d 1057 (2011), 57 IDELR 158, (the IDEA requires a reevaluation if a parent requests it for purposes of obtaining an offer of FAPE, regardless of enrollment status): citing *Dist. of Columbia v. West*, 699 F. Supp. 2d 273, 280 (D.D.C. 2010) (parents' due process claim was not frivolous for purposes of determining whether attorney's fees were warranted where district refused to evaluate child and develop IEP because she was not enrolled in public school); *Hawkins v. Dist. of Columbia*, 539 F. Supp. 2d 108, 115 (D.D.C. 2008) (school district had "fundamental obligation to provide FAPE to a child with a disability residing in the District of Columbia") (emphasis in original); and *Dist. of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85-86 (D.D.C. 2007) (school district's FAPE obligations extended to student attending private school in Connecticut, because he maintained his D.C. residency).

In a commentary to regulations implementing the 2006 IDEA Amendments, the Office of Special Education and Rehabilitative Services ("OSERS") within the United States Department of Education, stated that unless parents express a clear intention of keeping their child enrolled in a private school or a school located within another district, the school district of residence is responsible for making a FAPE available to that child. See *Assistance to States for the Educ. of Children with Disabilities & Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540-01, 46593 (Aug. 14, 2006), Questions and Answers on Serving Children with Disabilities Placed by their Parents in Private School, (January 1, 2007), 47 IDELR 197. Thus, a school district must reevaluate a privately enrolled student in its jurisdiction and review his IEP if the parent requests it.

The evidence in this case was clear and uncontroverted that Student had always attended public schools until the second week of the 2011-2012 school year, when a pending scholarship application to a private Catholic school materialized. Petitioner's main reason for exercising the scholarship was to help Student to become motivated to attend school. At least since Student began the 5th grade, Student, with Average cognitive ability, had difficulties with appropriate interpersonal relationships which resulted in an involuntary transfer from one school and pervasive poor interpersonal relationships with staff and students at the public schools he attended prior to his enrollment at the private Catholic school. The fallout of these long-term interpersonal difficulties was that none of Student's classmates liked him because of the way he talked and behaved, constant complaints from the public schools about Student's inappropriate

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behavior, and Petitioner's daily battle with Student about going to the public school to the point of Petitioner seeking truant officer intervention.

Petitioner simply seeks a neuropsychological evaluation to ascertain whether or not Student has Asperger's Disorder, as a precursor to an offer of FAPE from DCPS, because according to the credible testimony of Petitioner, she contemplates returning Student to the public school system. The results of the neuropsychological evaluation may affect the programming or IEP for Student. Insofar as different programming may allow Student to return to the public school system with services that will assist him in developing socially acceptable behavior, and to the extent that a neuropsychological evaluation can diagnose a disorder that undoubtedly will affect academic programming, a neuropsychological evaluation is warranted in order to evaluate Student in all areas of suspected disability. See 34 C.F.R. 300.304(c)(4). Aside from the educational need for this type of evaluation, Petitioner is entitled to a reevaluation of Student if she requests it. There was no evidence in the record that any of the circumstances precluding reevaluation under 34 C.F.R. 300.303 or case law, existed.

Although there was no evidence in the record that Student was denied an educational benefit per se, the evidence was clear that Student was having tremendous difficulty with behavior control and interpersonal relationships in the public school setting and in a greater sense, Student suffered educational harm because he had to be removed from the public school system by Petitioner due to his continuous behavioral maladjustment.

Petitioner seeks an offer of FAPE from DCPS and contemplates returning Student to the public school system. The Hearing Officer determines that DCPS' failure to conduct a neuropsychological evaluation was a violation of 34 C.F.R. 300.303 and the violation impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. Petitioner met her burden of proof that Student was denied a FAPE by DCPS.

ORDER

(1) DCPS shall provide Petitioner with funding for an independent neuropsychological evaluation, at the prevailing market rate, within 10 business days of this Order; and

(2) Within 10 business days of receipt of the independent neuropsychological evaluation, DCPS shall initiate correspondence to convene a Multidisciplinary Team to review the evaluation, review and revise Student's IEP as appropriate, and discuss and determine placement/location of services; and

(3) Any delay caused by Petitioner or Petitioner's representatives shall extend any deadline herein for DCPS, day for day.

IT IS SO ORDERED.

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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).

Date: March 14, 2012

/s/ Virginia A. Dietrich
Hearing Officer