

DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

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**Confidential**

<p>STUDENT<sup>1</sup>, by and through Parent Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: August 19, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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STUDENT HEARING OFFICE



<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On June 26, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to timely conduct and review evaluations in all areas of suspected disability.

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to fund an independent neuropsychological evaluation of the Student, including current academic achievement testing to determine the extent of her executive functioning deficits and the effects that those deficits are having on her academic progress, and any other evaluation deemed warranted, at market rate. The Petitioner further requested that the Respondent convene a multidisciplinary team ("MDT") meeting to review all current evaluations, review and revise the Student's individualized education program ("IEP"), and discuss and determine appropriate educational placement.

On July 6, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

On July 17, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted the parent or guardian has not signed the Complaint, though such a signature is required by § 301.2.C.e of the OSSE Standard Operating Procedures. Based on this inadequacy, and to ensure that a hearing is the parent's desired course of action, Respondent requested that the parent be required to attend the hearing. The Respondent asserted it will perform the educational evaluation during the extended school year and will invite the parent to a meeting to review the report. The Respondent contends that requested neuropsychological evaluation is not warranted. The Respondent argued the Student has a current neurological evaluation (January 2009) and psychological evaluation (April 2008). A neuropsychological evaluation will not provide any new educationally relevant information. The Respondent argued the Petitioner requested a neuropsychological evaluation asserting a need, to determine whether the Student has a learning disability. The Respondent further argued the neurological evaluation conducted in January 2009 indicates that the Student already has a diagnosis of Attention Deficit Hyperactivity Disorder and Learning Disable. The Respondent claims that while a prior written notice of DCPS's refusal to conduct the evaluation was not issued, it is a procedural violation that has not caused any harm.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on July 27, 2009 at 12:30 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. Both Counsels provided a synopsis of their witnesses' testimony. The Petitioner reiterated her claims and the Respondent reasserted its position. The parties stipulated the Student is a resident of the DC and a student of the DCPS, the parties agreed that a neuropsychological evaluation was requested.

On July 29, 2009, the Petitioner filed the Memorandum of law requested the Petitioner asserted that the LEA is obligated to conduct and review reevaluations, without undue delay, upon the request of the parent. The Petitioner cited the IDEIA<sup>2</sup> requirement that the local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections B and C (ii) if the child's parent or the teacher requests a reevaluation in a reasonable period of time. The Petitioner argued that the neuropsychological evaluation was requested and the Respondent has not provided the evaluation or a prior written notice explaining its refusal. The Petitioner further argued that an initial educational evaluation has not been performed and the 60-days timeline for completing the evaluation has concluded without action.

On July 29, 2009, the Respondent filed a Memorandum Regarding Reevaluations again asserting it agreed to an educational evaluation; there is no timeframe by which the valuation must occur and that only two months have passed. The Respondent further argued that neuropsychological evaluation is not going to provide relevant information to determine the child's disability or creating an effective IEP and therefore not necessary.

On July 31, 2009, the Respondent filed an Amended Response and Motion to Dismiss asserting that upon a further investigations it is learned that at the end of the April 9, 2009 meeting, the parent decided she did not want the Respondent to conduct a new educational evaluation or an neural psychological evaluation; she was satisfy with current testing. Furthermore alleged the Respondent it attempted to conduct an educational evaluation of the Student on July 29, 2009 and the Petitioner revoked consent. The Respondent asserted that because it does not have consent to perform the evaluations, then no denial of FAPE can be predicated on the Respondent's failure to conduct evaluations.

An Order dated August 1, 2009 determined the Petitioner will have an opportunity for a hearing to demonstrate why an independent neuropsychological evaluation of the Student is necessary. The Petitioner further had to demonstrate that the educational evaluation is an initial evaluation and therefore must have been performed within an exact time period. Additionally, the Petitioner must show she acted in good faith when she revoked consent to evaluate and how the alleged failures have caused the Student or Petitioner harm. The Respondent had to demonstrate that a neuropsychological evaluation of the Student is not necessary. The Respondent had to show that the Student was not denied a FAPE.

A hearing was held on August 13, 2009, at 10:00 AM. The Petitioner presented a disclosure letter dated August 7, 2009 to which nine documents were attached, labeled P-1 through 9 and which listed six witnesses. One witness testified. The Respondent presented a disclosure letter dated August 6, 2009 identifying nine witnesses and to which seven documents were attached, labeled DCPS 1 through 7. Two witnesses testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special

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<sup>2</sup> See: 20 U.S.C. § 1414 (2)

Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

**II. ISSUE(S)**

1. Has the Respondent failed to timely conduct and review evaluations in all areas of suspected disability?
2. Did the Respondent deny the Student a FAPE?

**III. FINDINGS OF FACT**

1. Both the parent and the Student reside within the District of Columbia. The Student was enrolled in a DCPS during the 2008-2009 school year.<sup>3</sup>
2. The Student is a child with disabilities under the IDEIA. The Student's most recent IEP is dated April 9, 2009 it identifies the Student's disability coding as multiple disabilities it provides 20 hours of specialized instruction, 45 minutes of adapted physical education in a general education setting, 60 minutes of speech language pathology, 30 minutes of audiology, and 60 minutes of counseling services weekly.<sup>4</sup>
3. During a December 6, 2007, a MDT meeting the Petitioner informed the team that a neuropsychological evaluation was recommended by the Student's pediatrician and necessary to address the Student's executive functioning skills. On February 14, 2008, an IEP/MDT meeting was convened. During the meeting, the child's advocate requested a neuropsychological assessment. The audiologist recommended an evaluation be done by a neuropsychologist.<sup>5</sup>
4. The Student has difficulties to form her thoughts on paper; she works on her homework and 30 minutes later she cannot explain what she did. The Student lacks organizational skills she forgets to bring home the proper books and to turn in her homework. The Petitioner did not agree with neurological evaluation of 2008 because she thought that the protocol was below grade level from that of the Student's. The questions asked were simple how, when, where, and when questions instead of requiring evaluation or analysis from the Student. The Student's math assignments were very simple and not preparing her for the fraction work that a student has in the fifth grade. The Petitioner is not clear on what the Student's learning disability is and believes that before the IEP can be developed the disability coding must be identified. At the April meeting the DCPS team members said they had all the information on the Student necessary to draft the IEP. The MDT did not provide a response to the questions of the Student disability. During the last part of the month of July the Petitioner was contacted by a school psychologist to inform her that the Student would be evaluated. She sent a letter revoking her consent to evaluate. She revoked the consent because she believes that there are evaluations pending that are not

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<sup>3</sup> Parties stipulated facts.

<sup>4</sup> IEP is dated April 9, 2009.

<sup>5</sup> See: P#2 Hearing Officer Determination - September 3, 2008, Finding of Fact # 3 and 4.

what the psychologist was going to perform. The Petitioner has requested a neuropsychological because it has been recommended to her by the pediatrician and experts in the education field. The Student has gotten good grades but the parent disagrees with the grades because she knows the Student has not turned in class projects and has done poorly in some exams. The Petitioner wants to understand clearly what the Student's correct disability in order to assist her in preparing an educational and life plan for the future.<sup>6</sup>

5. At the April 2009 meeting the Student's neurological, audiological, and psychological and education evaluations were reviewed and the team determined that no further assessments were necessary. The Student had been extensively evaluated maintained a 3.0 grade average and was progressing academically. The school psychologist believed a neuropsychological evaluation would not add information for the development of the IEP. The school psychologist indicated that all evaluations have been reviewed discussed and show that the Student has a learning disability, ADHD and OHI and these have all been addressed in the Student's IEP. There were no new or different services requested at the meeting. A neurological evaluation focuses on gross sensory, motor, and perceptual abnormalities. The neuropsychological focuses on cognitive, psychomotor, and linguistic functions. For example, a typical neuropsychological examination is aimed at defining and specifying more subtle abnormalities in calculation, memory, language function, abstraction, visual-motor ability, and specific aspects of intelligence (IQ). At the meeting it was discussed that the Student coding is LD however there was no explanation on why.<sup>7</sup>
6. The Special Education Coordinator participated in the April 2009 IEP meeting. The neurological, educational, and audiological evaluations were discussed. The Petitioner had concerns about discrepancies in the educational evaluation and after it was explained she had no further concerns. The Student is close to being on the honor roll at school. There were no new services requested at the meeting. The Respondent attempted to perform the educational evaluation and the Petitioner instructed them to stop. The Student's current disability is MD; however the EZ-IEP form does not provide a space to include the specific disabilities. The MD coding is based on services required. There was no prior written notice explaining refusal to perform a neuropsychological evaluation.<sup>8</sup>

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an

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<sup>6</sup> Testimony of the mother.

<sup>7</sup> Testimony of the School Psychologist.

<sup>8</sup> Testimony of the Special Education Coordinator.

appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

### **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

### **Evaluations**

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.<sup>9</sup>

According to the IDEIA<sup>10</sup> the Respondent, as the local education agency is responsible for ensuring that every evaluation, of each child with a disability, shall occur –at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary. The local education agency must ensure that a student is evaluated so as to –gather relevant functional, developmental and academic information .... to assist in developing the content of the child’s individualized education program. Accordingly, D.C. Municipal Regulations place the obligation to conduct re-evaluations of the student upon the LEA. (30 DCMR Sec 3005.7)

### **Suspected disability**

The IDEIA and its regulations at 34 C.F.R. § 300.304(c)(4),(6)-(7) provides that the student be “assessed in all areas related to the suspected disability”, that the “evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs”, and that the public agency use “assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.”<sup>11</sup>

D.C. Mun. Regs. tit. 5, § 3005.1 (2003) requires that DCPS “shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services in order to determine if the child is a ‘child with a disability’. Evaluation means “procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child

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<sup>9</sup> See: Id. § 1400(d)(1)(A).

<sup>10</sup> 20 USC 1414(2)(a)(b)

<sup>11</sup> See: 20 U.S.C. § 1414(b)(1)-(3), 1412(a)(6)(B).

has a disability and the nature and extent of the special education and related services that the child needs.”

The Petitioner asserted that the neuropsychological evaluation is necessary because she has doubts as to the Student’s actual learning disability and knows the Student lacks concentration and focus. The Respondent argued there are current Neurological and Audiological Evaluations-January 2009, Psychological Evaluation- April 2008, Educational Evaluation February- 2008, and Speech and Language Reassessment Report –April 2008.

A neuropsychological evaluation is a comprehensive evaluation of cognitive, behavioral, and emotional functioning performed using standardized tests and procedures.<sup>12</sup>

While there is not a timeline by which reevaluations should be performed there is an expectation of reasonableness. The evidence is that an HOD in 2008 indicated that a neuropsychological evaluation was recommended, there was no prior written notice nor were the evaluations conducted. The Petitioner then formally requested a neuropsychological evaluation in April, 2009, and again did not receive a prior written notice, explaining the Respondent refusal to perform the evaluation. The Respondent waited for a Complaint to be filed and allowed months to pass prior to responding to a request for evaluation.

At the IEP meeting in April 2009 there was no reasons discussed with the parent to support the Student’s multiple disabilities coding. The Petitioner has questions fundamental to the educational programming for the Student. The neuropsychological evaluation is a comprehensive evaluation of cognitive, behavioral, and emotional functioning performed using standardized tests and procedures that can clarify a diagnosis.

There is an obligation to ensure that a child is –assessed in all areas of suspected disability. Furthermore, the public Agency has an obligation to re-evaluation upon the request of the parent and/or the recommendations of teachers or service providers. The Neuropsychological Evaluations may confirm or clarify a diagnosis, can provide a profile of strengths and weaknesses to guide the Student’s IEP.

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<sup>12</sup> Psychologist vs. Neurologist Testing- “Traditionally, neurologists have focused more on gross sensory, motor, and perceptual abnormalities as part of the neurological examination. Psychologists have focused more on cognitive, psychomotor, and linguistic functions. Neuropsychological or Neuropsychiatric testing is usually aimed at defining and specifying more subtle abnormalities in calculation, memory, language function, abstraction, visual-motor ability, and specific aspects of intelligence (IQ). A neuropsychological evaluation uses standardized tests and procedures. Neuropsychologist typically evaluates how the brain functions in the following areas:

1. Intellectual abilities
2. Attention/Concentration
3. Learning and Memory
4. Language
5. Problem solving, planning and organizational skills
6. Reasoning and Judgment
7. Perceptual and Motor Skills
- Visual-spatial skills
9. Academic Skills
10. Emotion, Behavior, and Personality”

Ask the Mental Health Expert Archives 2001-2004-<http://www.healthieryou.com/mhexpert/exp1090301b.html>.

Furthermore, the Respondent did not provide the parent with a written notice consistent with 34 C.F.R. § 300.503, which requires the Respondent to provide a detailed explanation within a reasonable time as to why it is refusing to conduct the reevaluations requested. The Respondent waited until July, 2009 after a DPC was filed to give the parent an explanation of the refusal. The Respondent has infringed its obligation.

A new IEP was developed in April 2009; there was no explanation of Student's disability or why the neuropsychological was not necessary. In the instant matter, it is clear the Respondent failed to comply with the requirements of the IDEA. to provide the parent with a written notice.

The Respondent failed to perform a procedural requirement of the IDEA. The IDEA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child's right to a free appropriate public education;
- ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- iii. caused a deprivation of educational benefits."

The Petitioner alleged a violation of the statutory right to receive an evaluation and a written notice consistent 34 C.F.R. § 300.503. The Petitioner provided she was significantly impeded from participating in the decision making process, by the Respondent maintaining the Petitioner speculating on the actual disability coding of the Student and not providing an evaluation that was recommended and requested by the parent. The Respondent hindered the Petitioner's prospect to have a meaningful participation in the educational programming for the Student constituting a denial of FAPE.

## V. SUMMARY OF DECISION

The Petitioner proved she was significantly impeded from participating in the decision making process, by the Respondent failing to provide or explain why a neuropsychological evaluation was not necessary, impeding her opportunity to design an educational program designed to meet the unique needs of the Student.. The Respondent shall conduct an educational evaluation by September 11, 2009, should the evaluation not be performed by that date the Respondent will fund an independent evaluation by September 30, 2009. The Respondent will fund an independent neuropsychological by September 11, 2009. The Petitioner must make efforts to have the evaluation conducted as soon as possible and get the reports to the Respondent within 5 school days of it receipt.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

## VI. ORDER

**ORDERED**, the Respondent will fund an independent neuropsychological by September 11, 2009. The Respondent shall conduct an educational evaluation by September 11, 2009, should the evaluation not be performed by that date the Respondent will fund an independent evaluation by September 30, 2009. The Petitioner must make efforts to have the evaluation conducted as soon as possible and get the reports to the Respondent within 5 school days of it receipt.

**IT IS FURTHER ORDERED**, Respondent shall within 10 school days of the receipt of the evaluation provide three dates to the Petitioner to schedule and convene a MDT/IEP with the appropriate personnel to review the evaluations identify and describe with clarity the Student's disability coding to the Petitioner; develop an IEP and discuss placement if warranted.

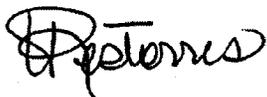
**IT IS FURTHER ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

**IT IS FURTHER ORDERED**, in the event that the Respondent should fail to comply with the terms herein, and an issue arises out of the noncompliance the Petitioner may file a request for a hearing and the hearing will be scheduled within 20 calendar days.

This order resolves all matters presented in the Petitioner's June 26, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

### NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



**Wanda Iris Resto - Hearing Officer**

**Date: August 19, 2009**