District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance
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OSSE
STUDENT HEARING OFFICE
2012 AUG -8 AM 8:56

Confidential

PARENT & STUDENT[1], Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

1 Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on July 27, 2012, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in grade attending a private full-time special education day school, hereinafter referred to as "School A." The student's attendance at School A is funded by the District of Columbia Public Schools ("DCPS"). The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of multiple disabilities ("MD") including emotional disturbance ("ED") and other health impairment ("OHI") for the condition of Attention Deficit Hyperactivity Disorder ("ADHD").

The student began attending School A at the start of the 2011-2012 school year ("SY"). Prior to attending School A the student attended another full time special education day school (hereinafter referred to as "School B") with DCPS funding.

While attending School B the student engaged in disruptive in-school behaviors and a result the School B staff recommended that a psychiatric evaluation be conducted to address his behaviors.

On July 19, 2011, DCPS authorized the student's parent to obtain an independent psychiatric evaluation. However, the parent at first had difficulty indentifying an evaluator to conduct the evaluation and as a result the evaluation was not completed until the second semester of SY 2011-2012 when the student was attending School A.

The student's disruptive behaviors continued at School A. He had frequent and repeated incidents throughout SY 2011-2012 of aggressive and disruptive behaviors, including fighting and threatening peers and disrespecting school staff. The student's aggressive and disruptive behaviors occurred both in school and on the school bus while riding to and from school.

In February 2012 the independent psychiatric evaluation was conducted. The evaluating psychiatrist confirmed the student suffers from ADHD, as well as oppositional defiant disorder ("ODD"). The psychiatrist recommended the student be provided, as part of his educational program, individual and family therapy, ongoing or wraparound mental health services, medication management, and continuation of placement at School A.

On March 3, 2012, the parent's counsel provided DCPS a copy of the independent psychiatric evaluation and requested that DCPS review the evaluation and convene the an individualized educational program ("IEP') meeting to discuss the evaluation, its findings and recommendations.

By May 2012 DCPS had yet to convene an IEP meeting to review the independent psychiatric evaluation. On May 24, 2012, the student's parent, through counsel, filed a due process complaint alleging DCPS denied the student a free and appropriate public education ("FAPE") by failing to review the independent psychiatric evaluation. The parent requested that the Hearing Officer order DCPS to convene an IEP meeting to review the independent evaluation.[2]

DCPS filed a response to the complaint on June 11, 2012. DCPS asserted that even though DCPS authorized the independent evaluation it was not necessary for the student's educational programming and there was no denial of FAPE.

A resolution meeting was held June 20, 2012. No agreement between the parties was reached.

A pre-hearing conference was conducted on June 28, 2012, at which the issue to be adjudicated was discussed and determined. On July 5, 2012, the Hearing Officer issued a pre-hearing order.

ISSUE: [3]

The issue adjudicated is:

> Whether DCPS denied the student a FAPE by failing to timely review the February 25, 2012, independent psychiatric evaluation that was provided to DCPS by Petitioner on or about March 13, 2012.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-52 and DCPS Exhibit 1-9) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. DCPS disclosed witnesses, however, presented no witnesses at the hearing to refute the testimony presented by Petitioner's witnesses.

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[2] In the complaint Petitioner sought both an order directing DCPS to convene an IEP meeting to review the evaluation and compensatory education for the alleged delay in DCPS reviewing the evaluation. The Hearing Officer directed Petitioner to file a proposed compensatory education plan prior to the hearing. Petitioner filed no proposed plan and at the hearing Petitioner acknowledged that compensatory education was not being sought.

[3] The alleged violations and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined under this section. However, the Hearing Officer restated the issue(s) in the pre-hearing order and at the outset of the hearing and the parties agreed that this is the issue(s) to be adjudicated.

FINDINGS OF FACT: [4]

1. The student is age and attending a private full-time special education day school, School A, located in the District of Columbia. The student's attendance at School A is funded by DCPS. The student is moving to the eighth grade for SY 2012-2013. testimony, Petitioner's Exhibit 51-1)

2. The student has been determined by DCPS to be a child with a disability under IDEA with a disability classification of MD including ED and OHI for the condition ADHD. testimony, Petitioner's Exhibit 51-1)

3. The student began attending School A at the start of SY 2011-2012. Prior to attending School A the student attended another full time special education day school, School B, with DCPS funding. testimony)

4. While attending School B the student was threatening and assaulting to peers, staff, and to school bus staff and thus the school staff recommended at a June 2011 IEP meeting that a psychiatric evaluation be conducted to address his behaviors and that the student move to another school. DCPS did not conduct the psychiatric evaluation and a due process complaint was filed. testimony, Petitioner's Exhibit 4)

5. On July 19, 2011, DCPS authorized the student's parent to obtain an independent psychiatric evaluation. The parent was originally invested in having the evaluation completed by her private insurer but eventually asked her counsel to provide the name of an evaluating psychiatrist. As a result the evaluation was not completed until well into SY 2011-2012 when the student was attending School A. testimony, DCPS Exhibit 2, Petitioner's Exhibit 6-2, 6-3, 6-4)

6. On November 11, 2011, DCPS convened an IEP meeting at School A. The IEP team amended the student's IEP to increase behavioral support services to 2.5 hours per week. The IEP also prescribed the student receive 24 hours per week of specialized instruction. (DCPS Exhibits 3-1, 3-8, 5-1)

7. The student's disruptive behaviors continued at School A. The student had frequent and repeated incidents throughout SY 2011-2012 of aggressive and disruptive behaviors, including fighting and threatening peers and disrespecting school staff. The student's aggressive and disruptive behaviors occurred both in school and on the school bus while riding to and from school. (Parent's testimony, Mr. Weeks' testimony, testimony, Petitioner's Exhibits 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 22, 40)

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[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

8. On February 25, 2012, the independent psychiatric evaluation was finally conducted. The evaluating psychiatrist, Dr. Rama Prayaga, concluded the student suffers from ADHD, as well as ODD. Dr. Prayaga recommended the student be provided, as part of his educational program, individual and family therapy, ongoing or wraparound mental health services, medication management, and that he remain at School A. Dr. Prayaga noted that in the future the student may benefit from a slow transition into a general education school. (Petitioner's Exhibit 6-1, 6-6)

9. On March 3, 2012, Petitioner's counsel provided DCPS a copy of the independent psychiatric evaluation and requested that DCPS review the evaluation and convene the student's IEP meeting to discuss the evaluation. (Petitioner's Exhibit 6-1)

10. By May 2012, DCPS had yet to convene an IEP meeting to review the independent psychiatric evaluation. On May 24, 2012, the student's parent filed a due process complaint against DCPS alleging DCPS failed to review the independent psychiatric evaluation. testimony, Petitioner's Exhibit 2)

11. The student has excellent academic potential but because of his behavioral difficulties his academic performance at School A has suffered. The School A staff and the parent believe the psychiatric evaluation would assist the IEP team in gaining insight into the student's disruptive behaviors and provide ideas of how to effectively address those behaviors. Untimely review the independent psychiatric evaluation resulted in an IEP team not considering the information and recommendations in the evaluation. (Parent's testimony, testimony)

12. According to the student's classroom teacher and therapist from March 2012 until the end of SY 2011-12 the student had enormous difficulty, assaultive and aggressive behavior and inappropriate sexual language toward staff. The student was disruptive in class and failing all of his courses. As a result of the student's behaviors resulting in school and out of school suspensions the student made little if any academic progress during SY 2012-2011. The student is not currently on medication but for a brief five-week period in the fall 2011 he was on medication and the School A staff noticed improvement in his behavior but the parent took him off the medication because of side effects. The parent and student are now willing to reconsider medication therapy. (Parent's testimony, testimony, testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the

decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [5] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Issue: Whether DCPS denied the student a FAPE by failing to timely review the February 25, 2012, independent psychiatric evaluation that was provided to DCPS by Petitioner on or about March 13, 2012.

Conclusion: DCPS' failed to convene an IEP meeting to review the student's independent psychiatric evaluation and DCPS' failure to do significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, and caused the student a deprivation of educational benefits. Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.502 (c), if the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation – (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part.

Federal regulations require that parents and school personnel act as equal participants in the development of a child's IEP and that the parents' participation in the IEP process must be meaningful. In many cases, independent evaluations provide support for the parents'

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[5] The burden of proof shall be the responsibility of the party seeking relief. 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.

opinions and requests. When a school district refuses to consider an independent evaluation it not only denies equal and meaningful input from the parents, but it also prevents important information from the evaluation from being considered by the IEP team that develops the IEP. In support of this proposition is the case of *DiBuo v. Bd. Of Educ. Of Worcester County*, 35 IDELR 248 (Nov. 14, 2001). In *DiBuo*, a United States District Court in Maryland ruled that an IEP team's failure to consider the private evaluations submitted by the parents was such a serious violation of the IDEA that this alone constituted a denial of a free appropriate public education. In *DiBuo*, the court found that district officials "did not even deign to 'look at' the expert reports submitted by [the student's] parents -- much less consider them -- in devising [his] IEP." It ruled the district's inaction seriously infringed on the parents' opportunity to participate in the IEP process, leading to a denial of FAPE...

In the case at hand the parent, through counsel, on March 13, 2012, provided DCPS a copy of the student's recently completed independent psychiatric evaluation. According to the psychiatrist, the student suffers from ADHD, as well as oppositional defiant disorder; and should be provided, as part of his educational program, individual and family therapy, ongoing or wraparound mental health services, medication management, and continuation of placement in his current school. To date DCPS has yet to review the parent's independent evaluation.

DCPS' failure to convene the student's IEP meeting to review the independent evaluation has denied the student a FAPE as the parent and the rest of the IEP team have yet to consider the findings and recommendations of the evaluation and allow the parent and the rest of the IEP team to make further educational related decisions regarding the student.

Petitioner's witnesses were credible and their testimony was unrefuted. DCPS presented no witnesses to refute the testimony and voluminous documentation showing that the student's continued disruptive behavior in school and on the school bus significantly harmed his abilities to receive the educational benefit available to him at School A. The evidence clearly demonstrates, through testimony, that School A staff desired the information in a psychiatric evaluation as it might assist in addressing the student's aberrant behaviors. DCPS' failure to do convene an IEP meeting to review the independent psychiatric evaluation significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, and caused the student a deprivation of educational benefits. Petitioner sustained the burden of proof by a preponderance of the evidence.

ORDER:

DCPS shall within ten (10) business days of the issuance of this Order convene an IEP meeting to review the student's independent psychiatric evaluation and review and revise the student's IEP as appropriate.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of

the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: August 7, 2012