

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 October 12, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND & PROCEDURAL PROSTURE:

Student or "the student" is age _____ and has been determined eligible as a child with a disability under IDEA with a disability classification of intellectual disability also known as mental retardation ("MR"). The student attends a District of Columbia Public Schools ("DCPS") high school hereinafter referred to as "School A." The student's latest individualized educational program ("IEP") was developed November 4, 2010. DCPS convened IEP meetings for the student on February 24, 2011, and March 16, 2011, at which the student's IEP was reviewed. At the March 16, 2011, meeting the parent's educational advocate requested independent evaluations, as the student allegedly had not been provided triennial evaluations. DCPS instead agreed to conduct the evaluations. These evaluations were allegedly never conducted.

Petitioner filed the due process complaint on August 18, 2011, alleging, *inter alia*, that DCPS had failed to conduct timely reevaluations of the student and Petitioner requested independent evaluations.² At the resolution meeting held September 6, 2011, DCPS authorized Petitioner to obtain independent evaluations. However, the complaint was not resolved.

DCPS filed a written response on September 2, 2011. DCPS asserted that it has authorized Petitioner to obtain independent evaluations.³ A prehearing conference in this matter was held September 27, 2011.⁴ Petitioner alleged the rates authorized for the independent comprehensive psychological and auditory processing evaluations were insufficient to secure the independent evaluations as the evaluators who were contacted refused to conduct the evaluations for the authorized rates. A pre-hearing order was issued on September 27, 2011. The parties agreed the 45-day timeline would start the day after the thirty-day resolution period and the HOD is thus due November 1, 2011.

² Petitioner seeks as relief: (1) independent evaluations beyond the DCPS authorized rate, specifically: auditory processing evaluation, a psychological evaluation to include the following components: social history, cognitive, academic, social emotional, adaptive and assessments for ADHD. Petitioner is also seeking an occupational therapy ("OT") evaluation, (2) a meeting to review the evaluations and develop an appropriate IEP and determine and appropriate educational placement and location of services. Petitioner intends to eventually seek compensatory education in a subsequent complaint once the evaluations are completed and reviewed.

³ DCPS also asserted it conducted timely evaluations including a speech language evaluation on May 11, 2011, and attempted other evaluations including a functional behavioral assessment ("FBA") and updating the student's behavior intervention plan ("BIP") but asserted that because of the student's excessive absenteeism the evaluations could not be conducted. DCPS asserted that no OT evaluation was warranted and there has been no denial of FAPE.

⁴ This is the first date the parties were mutually available for the pre-hearing conference.

ISSUES: ⁵

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to timely reevaluate the student by failing to conduct triennial evaluations: psychological, adaptive, speech/language and FBA.
2. Whether DCPS denied the student a FAPE by failing to provide the student appropriate IEPs in SY 2009-2010 and SY 2010-2011 because the IEPs were based on outdated evaluations? ⁶

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-26 and DCPS Exhibit 1-5) that were admitted into the record and are listed in Appendix A.⁷ Witnesses are listed in Appendix B. At the conclusion of the hearing the Hearing Officer requested that the parties provide additional information in a post hearing submission as to the proposed costs for independent evaluations. As a result, on October 21, 2011, Petitioner's counsel submitted several documents including letters from evaluators indicating the rate they would charge to conduct independent evaluations. On October 26, 2011, DCPS counsel submitted a motion to exclude the Petitioner's post hearing submissions. On October 31, 2011, Petitioner's counsel resubmitted a document he submitted on October 21, 2011, as an opposition to DCPS' motion. Because the Hearing Officer requested post hearing submissions the Hearing Officer denies DCPS' motion to exclude and has admitted the documents submitted by Petitioner on October 21, 2011, and they are listed in the Appendix A as Petitioner's Exhibits 27-33.

⁵ The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. However, the parties agreed at the hearing that the issues listed here are the issues to be adjudicated.

⁶ Petitioner also alleged that the student's IEPs were inappropriate for the two previous school years: SY 2008-2009 and SY 2007-2008. However, DCPS has asserted as a defense that the two-year statute of limitations applies and Petitioner's counsel was directed in the pre-hearing order to present the basis for the exception(s) to the two-year statute of limitations. Petitioner counsel did not do so thus the two-year statute of limitation applies.

⁷ Respondent's counsel objected to the admission of several of the documents presented by Petitioner based on relevance. However, the objections were made during the hearing and not within two business days prior to the hearing which was required by the September 27, 2011, pre-hearing order. The Hearing Officer thus denied the objections and admitted all of Petitioner's disclosed documents. Petitioner had no objections to any of Respondent's documents.

FINDINGS OF FACT:⁸

1. The student is age _____ and has been determined eligible as a child with a disability under IDEA with a disability classification of MR. The student attends a District of Columbia public high school, School A. (DCPS Exhibit 2-1)
2. The student's latest IEP was developed November 4, 2010. The IEP prescribes that he be provided 15 hours per week of specialized instruction, 60 minutes of speech-language pathology and 30 minutes of behavioral support services per week. (Petitioner's Exhibit 16-5)
3. The student's last clinical psychological evaluation was conducted January 6, 2004, when the student was age nine. The evaluator recommended the student would benefit from a "self contained full-time therapeutic special education program for children with significant impairment in social emotional functioning." DCPS has not conducted a triennial psychological evaluation of the student since this evaluation was conducted. (Testimony, Petitioner's Exhibit 7-6)
4. DCPS convened IEP meetings for the student on February 24, 2011, and March 16, 2011, at which the student's IEP was reviewed. At the March 16, 2011, meeting the parent's educational advocate requested the student's most recent evaluations and was provided none that had been conducted within the past three years. As a result she requested the following evaluations be conducted independently: adaptive assessment, social history, psycho-educational, evaluation, clinical psychological evaluation, vocational assessment, auditory processing evaluation, or an occupational therapy evaluation. None of these evaluations had been conducted of the student in the past three years. DCPS instead agreed to conduct its own evaluations and to do so within forty-five (45) days and convene a meeting to review the evaluations. These evaluations were never conducted by DCPS and Petitioner filed the current complaint seeking the evaluations. (testimony, Petitioner's Exhibits 1, 15-3)
5. On May 11, 2011, DCPS conducted a speech and language evaluation of the student. The evaluator determined the student's receptive and expressive language skills were significantly below normal. The student has a current FBA. However, the student does not have a current an adaptive assessment, social history, psycho-educational, evaluation, clinical psychological evaluation, vocational assessment, auditory processing evaluation, or an occupational therapy evaluation. The student's current IEP is not based on current evaluations. (testimony, DCPS Exhibit 1-7)
6. During the 2010-2011 school year the student had significant school absences. However, the student was out much of time due to injury and hospitalization and due to some

⁸ 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.

suspensions. (Parent's testimony,

DCPS Exhibit 1 pages 12 thru 26)

7. The student's high school transcript reflects that he has failing grades in half of the courses he has taken and has a cumulative grade point average ("GPA") of ".71". The student is currently repeating the ninth grade for the second time. testimony, Petitioner's Exhibit 8)
8. On April 5, 2011, Dr. Richard Fleitas, Psy.D., in response to a request for public comment request regarding proposed changes by the District of Columbia Office of the State Superintendent of Education ("OSSE") to standard evaluation rates, submitted to OSSE written comments that many of the proposed changes would result in a reduction in payment by over 50% of what had been the standard rates authorized by the DCPS Chancellor's Directive from 2008, and that evaluators in the District Columbia generally charge between to for what the OSSE terms a comprehensive psychological evaluation. (Petitioner's Exhibit 11-1)
9. In July 2011 OSSE published new maximum evaluations costs in 5 DCMR § A-2853 with a proposed maximum evaluation cost: of for a comprehensive psychological evaluation and a maximum hourly rate for the evaluator of per hour. The proposed maximum rate for an occupational therapy evaluation is Title 5 of the DCMR § 2853 provides that the maximum number of hours that will be allowed for a comprehensive psychological evaluation is 13 hours and the maximum number of hours for a occupational therapy evaluation is 6 hours.⁹ (DCPS Exhibit 4-1, 4-2)
10. At a resolution meeting for the current complaint, DCPS authorized Petitioner to obtain the following independent evaluations for the following rates:

<u>Evaluation</u>	<u>Maximum Hourly Cost</u>	<u>Maximum Total Cost</u>
Psychological Evaluation ¹⁰		
Auditory Processing Evaluation		
Vocational II Assessment	N/A	

(Petitioner's Exhibits, 2, 3, 4-1)

11. Following the resolution meeting Petitioner's educational advocate sent inquiries to several evaluators to determine if any of them would conduct the independent evaluations for the rates that were proposed in the DCPS authorizations. However, none of the evaluators agreed that they could conduct the auditory processing evaluation and the comprehensive psychological evaluation with all the components that were listed for the

⁹ Rates for other types of evaluations are listed in this section of the DCMR but are not evaluations Petitioner has requested for the student.

¹⁰ Including social history, cognitive, academic, social emotional, adaptive, and ADHD components.

rates that DCPS had authorized.

testimony, Petitioner's Exhibit 13-1)

12. A firm that subcontracts with evaluators to conduct independent evaluations will charge approximately _____ for a comprehensive psychological evaluation with the following components cognitive, clinical and educational. The evaluator may be paid _____ and the contractor would attach an additional _____ fee for facilitating the evaluation. If the social history and adaptive components were added to the evaluation would be an additional _____ testimony)
13. An independent evaluator, Dr. Jay Lucker, has agreed to conduct an auditory processing assessments along with the audiological/hearing testing that is required as part of the assessment along with the review of records, the written report, and consultation at a fee of _____ (Petitioner's Exhibit 29)
14. An independent evaluator, Dr. Ronald Federici, has agreed to conduct a comprehensive neuropsychological evaluation for the student at a fee of _____. This is the discounted rate as normally it would cost _____ (Petitioner's Exhibit 28)

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. ¹¹ *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;

¹¹ 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.

and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

ISSUE 1: Whether DCPS denied the student a FAPE by failing to timely reevaluate the student by failing to conduct triennial evaluations: psychological, adaptive, speech/language and FBA.

Conclusion: DCPS did not conduct all necessary reevaluations of the student and should have conducted a comprehensive psychological evaluation, an adaptive, speech language and FBA. Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
 - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
 - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.304 titled "Reevaluations" provides in pertinent part:

- (b) In conducting the evaluation, the public agency must--
 - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining--
 - (i) Whether the child is a child with a disability under Sec. 300.8; and
 - (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
 - (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
 - (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (c) Other evaluation procedures. Each public agency must ensure that--...
 - (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; ...

(6) In evaluating each child with a disability under Sec. Sec. 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

The unrefuted testimony of _____ demonstrated that DCPS did not conduct triennial evaluations of the student including the following evaluations: comprehensive psychological evaluation, an adaptive, speech language and FBA. In addition, _____ credibly¹² testified that she requested that the student be provided an OT evaluation and the IEP team agreed to conduct the evaluation. However, only some of the evaluations that were due to be conducted were actually conducted: the speech language evaluation and the FBA, albeit the evidence still demonstrates these evaluations were not conducted timely consistent with the triennial requirement. In addition, although the student currently does not have OT services, _____ also credibly testified that that IEP team agreed to conduct this evaluation. The Hearing Officer concludes that failure to conduct timely reevaluations deprived the parent and the IEP team of vital evaluative data and significantly impeded the parent's opportunity to meaningfully participate in the decision making process regarding provision of FAPE.

Although DCPS authorized Petitioner to obtain some of the remaining evaluations independently, there was credible testimony that for two of the evaluations, the comprehensive psychological and the auditory processing evaluation Petitioner was unable to secure independent evaluators willing to conduct the evaluations at the rates DCPS offered. Because DCPS has asserted that rates for these evaluations it authorized are mandated in the DCMR, the Hearing Officer will first allow DCPS to conduct the evaluations itself. If that is not done within the time prescribed Petitioner shall be provided independent evaluation at the amounts that the evidence has demonstrated two evaluators are willing to conduct the evaluations.

Issue 2: Whether DCPS denied the student a FAPE by failing to provide the student appropriate IEPs in SY 2009-2010 and SY 2010-2011 because the IEPs were based on outdated evaluations?

Conclusion: There was sufficient evidence presented that the student's IEP was inappropriate as the IEP was not based on current evaluations. Petitioner sustained the burden of proof by a preponderance of evidence on this issue.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

¹² The Hearing Officer found Ms. Millis' testimony credible based on her demeanor and her years experience in the field of special education and her familiarity with the student and his educational history.

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The evidence demonstrates the student's latest IEP developed in November 2010 was not based on current evaluations thus the student's IEP cannot include a statement of the child's present levels of academic achievement and functional performance. DCPS presented no evidence to refute Ms. Millis' testimony that she requested and was not provided current evaluations for the student and DCPS agreed to conduct the evaluation but did not. The student's most recent psychological evaluation was conducted in 2004, over six years ago. The Hearing Officer thus concludes, absent any evidence to the contrary, that the student's most recent IEP was not based on current evaluations and thus did not meet the requirements of IDEA and caused the student deprivation of educational benefit.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate 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." *Reid, 401 F.3d 522 & 524*. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner presented no evidence as to compensatory education. Because no evidence was presented as to compensatory education the Hearing Officer is unable to grant any relief in this regard.¹³

ORDER:

1. DCPS shall within thirty (30) calendar days of the date of this Order conduct the following evaluations of the student: (1) comprehensive psycho-educational evaluation including the following components: adaptive assessment, social history, cognitive assessment, social/emotional components including assessments for ADHD, educational assessments, (2) vocational-II assessment, (3) auditory processing evaluation, and (4) an occupational therapy evaluation.

¹³ After the evaluations have been conducted and reviewed by an IEP Petitioner may still have a claim for relief for compensatory education for the violations and denials adjudicated in this HOD.

2. Petitioner shall make all good faith efforts to make the student available for evaluations and cooperate with the DCPS evaluators in conducting the evaluations. If DCPS is unable to complete the evaluations within this required timeline because of unavailability of the student and/or lack of cooperation of the Petitioner DCPS' recourse shall be to file a due process complaint with this Hearing Officer to direct Petitioner to comply with the Order.
3. Within fifteen (15) calendar days of the completion of the last of the evaluations DCPS shall convene an IEP meeting to review the evaluations and discuss and determine the student's disability classification and review and revise the student's IEP as appropriate and determine an appropriate education placement.
4. If DCPS does not complete the above listed evaluations within the required thirty (30) calendar days Petitioner DCPS shall fund the following independent evaluations at the following rates that have been established in the findings of fact herein: (1) a rate not to exceed _____ for an independent comprehensive psychological with the following components: adaptive assessment, social history, a comprehensive psychological including a cognitive assessment, social/emotional components including assessments for ADHD, educational assessments, and (2) a rate not to exceed _____ for an auditory processing evaluation and (3) a rate not to exceed _____ for a vocational assessment II.¹⁴
5. The parties may agree to forego the DCPS conducted evaluations and agree to proceed to obtain the following evaluations independently at the rates that are listed in the above paragraph.
6. If either scenario arises as described in paragraphs numbers 4 or 5 of this Order above, DCPS shall be required to convene the IEP meeting to review the independent evaluations within fifteen (15) calendar days of its receipt of the last of the independent evaluations to be completed and sent to DCPS by Petitioner.

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).



Coles B. Ruff, Esq.

¹⁴ Petitioner did not provide evidence of the market rate for the occupational therapy evaluation.

Hearing Officer

Date: November 1, 2011