

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

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

OSSE
Student Hearing Office
June 17, 2013

Parent,¹ on behalf of,
Student,

Petitioner,

Date Issued: June 16, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a _____ year old male, who is a _____ grade student attending School A. The student's current individualized education program (IEP) list multiple disabilities (MD) as the student's primary disability classification and provides for the student to receive twenty-five (25) hours per week of specialized instruction outside of the general education setting, one (1) hour per week of speech-language therapy outside of the general education setting, one half (.5) hour per week of occupational therapy (OT) outside of the general education setting, and one (1) hour per week of behavioral support services outside of the general education setting.

On April 2, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to timely complete the student's parentally requested reevaluation consisting of a psychiatric and comprehensive psychological assessments. As relief for this alleged denial of FAPE, Petitioner requested independent comprehensive and psychiatric assessments; and within ten (10) business or school days upon receipt of the last of the reevaluations, for DCPS to reconvene the student's IEP Team for the purpose of reviewing the reevaluations and revising and updating the student's IEP as appropriate, and to discuss and determine the student's least restrictive environment and placement. If the IEP Team determines that the student requires placement in a residential treatment program, DCPS to identify and place the student in an appropriate educational program within 30 calendar days. If the IEP Team determines that the student needs a change in placement or location of services to another

¹ Personal identification information is provided in Appendix A.

nonpublic school, for DCPS to identify an appropriate school for the student within 10 school days.

On April 11, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: the psychologist who conducted the student's psychological evaluation which resulted in a November 22, 2011 report, considered more than 25 different evaluations and assessments of the student, including the student's December 11, 2009 Psychiatric Report; the student's multidisciplinary team reviewed the November 22, 2011 report on February 13, 2012; on January 29, 2013, the student's IEP Team met and reviewed updated math and reading assessments of the student and agreed that the student continued to be a student with disabilities with the disability category of multiple disabilities; DCPS convened a meeting on March 29, 2013 to discuss the parent's request for comprehensive psychological and psychiatric assessments/evaluations; the student's behavior had greatly improved during the two weeks following the parent's request; the psychologist at the meeting did not agree that a comprehensive psychological assessment/evaluation was necessary but suggested that DCPS conduct a functional behavioral assessment (FBA) of the student; the IEP Team agreed to conduct an FBA and develop a behavioral intervention plan to address the student's behaviors; the parent renewed the request for comprehensive psychological and psychiatric assessments/evaluations on April 1, 2013; it is unreasonable for Petitioner to file a Complaint one day after parent's April 1, 2013 request and two days after the March 29, 2013 IEP Team meeting; there is no allegation of educational harm suffered by the student; the student's IEP is current; the student is receiving educational benefit in his current placement/location of services; and DCPS has not denied the student a FAPE.

On April 19, 2013, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on May 3, 2013, following the conclusion of the 30-day resolution period, and ends on June 16, 2013. The Hearing Officer Determination (HOD) is due on June 16, 2013.

On May 2, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on May 6, 2013. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On June 3, 2013, Petitioner filed Disclosures including thirty-one (31) exhibits and three (3) witnesses.² On June 3, 2013, Respondent filed Disclosures including eight (8) exhibits and two (2) witnesses.

The due process hearing commenced at approximately 9:36 a.m.³ on June 10, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Petitioner's Exhibits 1-27 and 29-31 were admitted without objection. Petitioner's Exhibit 28 was not admitted because it was duplicative of Respondent's Exhibit 7 however was missing two pages. Respondent's Exhibits 1-3 and 6-8 were admitted without objection. Respondent's Exhibit 4 was admitted over Petitioner's objection because it was found to be relevant. Following the testimony of witnesses, Petitioner withdrew its objection to Respondent's Exhibit 5. Respondent's Exhibit 5 was admitted into evidence.

The hearing concluded at approximately 12:01 p.m. on June 10, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS was obligated to conduct psychiatric and comprehensive psychological assessments/evaluations requested by the parent on March 14, 2013 and March 29, 2013, and if so, whether DCPS' failure to conduct the assessments/evaluations constitutes a denial of a FAPE?

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. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student's primary disability is MD. (Stipulated Fact)
3. The student's MD classification is based on the student's Attention Deficit Hyperactivity Disorder (ADHD), emotional disturbance (ED) and specific learning disability (SLD). (Respondent's Exhibit 7; Advocate's Testimony; Parent's Testimony)
4. The student has a family history of mental illness and substance abuse. (Respondent's Exhibit 7; Advocate's Testimony)

³ At 9:30 a.m., the scheduled time to begin the due process hearing, on the Hearing Officer, counsel for Petitioner, Petitioner and counsel for Respondent were present however counsel for Petitioner requested time to speak with Petitioner prior to the commencement of the hearing.

5. When given a measure of nonverbal intelligence, the student scored within the average range, while on a measure that required verbal input, the student scored within the borderline and/or mentally deficient range. (Respondent's Exhibit 7)
6. The student was hospitalized at Facility A in 2006. (Respondent's Exhibit 7)
7. The student received psychiatric evaluations in December 2004, December 2006, June 2008 (two evaluations), and December 2008. (Respondent's Exhibit 7)
8. The student received psychological evaluations in December 2004, February 2005, September 2009 and November 2011. (Respondent's Exhibit 7)
9. The student's multiple assessments and evaluations over the course of many years have had consistent results. (Respondent's Exhibit 7)
10. In elementary school, the student had multiple behavior incidents which included attempting to stab a classmate with a pencil, pulling out a teacher's hair, bringing a knife to school and threatening to harm classmates with the knife. (Respondent's Exhibit 7)
11. During the 2010-2011 school year, the student displayed extreme behaviors such as assaulting staff and fighting peers. (Advocate's Testimony)
12. During the 2010-2011 school year, the student displayed multiple inappropriate behaviors on a daily basis. (Advocate's Testimony)
13. During the 2010-2011 school year, the student had one behavioral escalation per quarter which required physical restraint. (Respondent's Exhibit 8)
14. The student's IEP Team conducted a reevaluation of the student in April 2011. (Respondent's Exhibit 8)
15. In April 2011, the student was performing at a K.8 grade level equivalency in Broad Math, a 1.4 grade level equivalency in Math Calculation, a K.8 grade level equivalency in Broad Reading and a K.9 grade level equivalency in Reading Comprehension Skills. (Respondent's Exhibit 8)
16. The student's motivation to complete academic work was declining and he often engaged in work refusal. (Respondent's Exhibit 8)
17. A Comprehensive Psychological Reevaluation of the student was completed in November 2011. (Respondent's Exhibit 7)
18. For the November 2011 Comprehensive Psychological Reevaluation, the evaluator conducted 13 separate assessments and reviewed 25 prior evaluations and assessments. (Respondent's Exhibit 7)
19. The November 2011 evaluator recommended that the student not be retested for at least three years unless the student experiences significant trauma, outstanding or unusual psychotic episodes that result in hospitalization or the onset of a condition that could additionally impact learning, such as seizures. (Respondent's Exhibit 7)
20. During the 2011-2012 school year, the student displayed inappropriate behaviors on a daily basis. (Advocate's Testimony)
21. During the 2011-2012 school year, the student would have periods of aggressive behaviors followed by periods of calm. (Advocate's Testimony)
22. On May 16, 2012, the student was suspended for fighting with another student. (Petitioner's Exhibit 14)
23. On November 6, 2012, the student threatened to "blow up this school" but was able to deescalate and successfully complete the school day. (Petitioner's Exhibit 15)

24. On November 14, 2012 the student threatened another student and physically assaulted the staff member who intervened. The student's dedicated aide was absent on the day of the incident. (Petitioner's Exhibit 16)
25. On December 10, 2012, the student threw a pencil at a staff member and tore his reading book. After processing with the social worker, the student accepted responsibility for his behavior. (Petitioner's Exhibit 17)
26. Prior to the development of the student's January 29, 2013 IEP Team meeting, DCPS administered the Key Math 3 and the Woodcock Reading Master Tests Revised to the student to assess the student's current math and reading performance levels. (Petitioner's Exhibit 4; Respondent's Exhibit 6; Advocate's Testimony)
27. The parent and the parent's advocate participated in the student's January 29, 2013 IEP Team meeting. (Petitioner's Exhibit 4; Respondent's Exhibit 6; Advocate's Testimony; Parent's Testimony)
28. On January 29, 2013, the student was not taking his medication consistently. Specifically, the student did not take his medication while visiting his father on weekends. (Respondent's Exhibit 6; Advocate's Testimony)
29. When the student returned from visits with his father, the student exhibited aggressive and explosive behaviors. (Respondent's Exhibit 6)
30. On January 29, 2013, the student was performing at the 1.2 grade level equivalency in Numeration, the 1.2 grade level equivalency in Algebra, the 3.8 grade equivalency in Geometry, the K.8 grade level equivalency in Data Analysis and Probability, the 1.8 grade level equivalency in Basic Concepts and the 1.8 grade level equivalency in Multiplication. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
31. On January 29, 2013, the student was performing at the 1.5 grade equivalency in Word Identity, the 1.4 grade equivalency in Word Attack, the 1.3 grade level equivalency in Word Comprehension, the 1.0 grade equivalency in Passage Comprehension, the 1.4 grade equivalency in Basic Skills Cluster, the 1.1 grade level equivalency in Reading Comprehension Cluster and the 1.3 grade level equivalency in Total Reading Cluster. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
32. On January 29, 2013, the student had built some positive relationships with staff members and had shown the ability to seek out and accept support from his dedicated aide, the social worker and staff members when he was upset. The student was maintaining high levels on the behavioral motivational system however continued to have difficulty with work avoidance and distraction. (Petitioner's Exhibit 4; Respondent's Exhibit 6)
33. The present levels of performance on the student's January 29, 2013 IEP are accurate. (Advocate's Testimony)
34. The goals on the student's January 29, 2013 IEP align with the student's present levels of performance. (Advocate's Testimony)
35. The student's January 29, 2013 IEP includes the accommodations of repetition of directions, oral responses to tests, small group testing, breaks between subtests, and extended time on subtests. (Petitioner's Exhibit 4)
36. On February 12, 2013, the student tore posters off of the classroom wall and tore the easel board off of the wall. After speaking with the social worker, the student was able to complete the school day. (Petitioner's Exhibit 18)

37. On February 20, 2013, the student threatened a staff member. After speaking with the social worker, the student completed the school day. (Petitioner's Exhibit 19)
38. On February 21, 2013, the student shoved a teacher. Following the incident, the student independently went to the timeout room. (Petitioner's Exhibit 20)
39. On March 8, 2013, the student "attacked" a staff member. The student was restrained during the incident. (Petitioner's Exhibit 21)
40. On March 11, 2013, the student pushed a staff member. The student was restrained during the incident. (Petitioner's Exhibit 22)
41. Following the March 11, 2013 incident, Children and Adolescent Mobile Psychiatric Service (ChAMPS) was contacted because of the student's suicidal statements made during the incident. (Petitioner's Exhibits 10 and 22; Respondent's Exhibit 5)
42. The parent scheduled an appointment for ChAMPS to assess the student's medication management and to monitor the student's medication. (Petitioner's Exhibit 12; Respondent's Exhibit 5; Advocate's Testimony; Parent's Testimony)
43. On March 13, 2013, the student engaged in an argument with another student and then informed a staff member that he had a knife and was going to stab the other student. Following the incident, the student explained that he did not intend to hurt the other student and that his possession of the knife on school grounds was unintentional. (Petitioner's Exhibit 23)
44. Following the March 13, 2013 incident, the student's behavior improved. (Petitioner's Exhibits 10, 11; Respondent's Exhibits 1, 5)
45. Five of the six incidents which occurred February 2013 – March 2013 involved female staff members. (Petitioner's Exhibits 18, 19, 20, 21, 22 and 23)
46. On March 14, 2013, the student's parent provided a written request for comprehensive psychological and psychiatric evaluations for the student. (Stipulated Fact)
47. On March 14, 2013, the parent requested comprehensive psychological and psychiatric evaluations for the student because of the student's "significant change in behavior" during March 2013. (Petitioner's Exhibits 5, 8 and 10; Advocate's Testimony)
48. On March 14, 2013 the Parent was concerned that "something might happen" because of the student's growing physique. (Parent's Testimony)
49. The student's IEP Team met on March 29, 2013 to discuss the parent's written request for comprehensive psychological and psychiatric evaluations for the student. (Stipulated Fact)
50. At the March 29, 2013 meeting, the student was on the "gold level" for behavior. (Petitioner's Exhibit 11; Respondent's Exhibit 5; Advocate's Testimony)
51. At the March 29, 2013 meeting, the student's IEP Team determined that an FBA should be conducted and a behavior intervention plan (BIP) developed to address the student's behaviors. (Respondent's Exhibit 5; Advocate's Testimony)
52. Following the March 29, 2013 meeting, DCPS provided the parent written notice of DCPS' reasons for denying the parent's request for comprehensive psychological and psychiatric evaluations for the student. (Petitioner's Exhibits 10, 11; Respondent's Exhibit 5; Advocate's Testimony)

53. The FBA conducted by DCPS pursuant to decision made at the March 29, 2013 meeting, focused on the student's inconsistent behaviors, distractibility, propensity to leave the classroom and aggression. (Petitioner's Exhibit 29; Respondent's Exhibit 3)
54. On May 13, 2013, the student's IEP Team met to review the student's FBA and develop a BIP for the student. (Petitioner's Exhibit 30; Respondent's Exhibit 1)
55. The parent and the parent's advocate participated in the student's May 13, 2013 IEP Team meeting. (Petitioner's Exhibits 29 and 30; Respondent's Exhibit 1; Advocate's Testimony)
56. During the 2012-2013 school year, the student received the grade letter "A" in his music class and the grade letter "B+" in his carpentry class. (Petitioner's Exhibit 27)
57. During the 2012-2013 school year, the student has not displayed inappropriate behaviors in his carpentry class. (Petitioner's Exhibit 29; Respondent's Exhibit 3)
58. The student's inappropriate behaviors increase when he attempts to avoid reading. (Respondent's Exhibit 3)
59. The student is reading on a 1st grade level. (Petitioner's Exhibit 4; Respondent's Exhibits 3, 6, 7 and 8; Advocate's Testimony; Parent's Testimony)
60. The student made slight academic progress from April 2011 to January 2013. (Petitioner's Exhibits 4 and 27; Respondent's Exhibits 7 and 8; Advocate's Testimony; Parent's Testimony)
61. The student requires the support of a dedicated aide, a multi-modal approach to learning, a small and structured environment, a small student-staff ratio, behavioral supports and services, behavior intervention and consistent administration of medication. (Petitioner's Exhibit 4; Respondent's Exhibits 1, 2, 3 and 7; Advocate's Testimony)
62. The student requires frequent breaks and breaks on subtests. (Petitioner's Exhibit 4; Respondent's Exhibit 5; Advocate's Testimony; Parent's Testimony)
63. The student is able to take frequent breaks during class time and is encouraged to take breaks when he becomes restless or agitated. (Petitioner's Exhibit 4; Respondent's Exhibit 5)
64. The student takes frequent breaks from class with his one-on-one aide. (Respondent's Exhibit 5; Advocate's Testimony; Parent's Testimony)
65. School A is implementing the student's IEP. (Parent's Testimony)
66. The primary factors in the student's lack of academic progress are the student's failure to remain in the classroom and the student's refusal to complete class assignments. (Petitioner's Exhibit 27; Respondent's Exhibit 5; Parent's Testimony)
67. The information contained within the student's November 2011 Comprehensive Psychological Reevaluation remains accurate at present. (Parent's Testimony)
68. The parent is displeased with the student's location of services. (Parent's Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term “free appropriate public education” means “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped.” The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA regulations at 34 CFR §300.513(a)(2) state that 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.

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §§300.304 through 300.311 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 if the child’s parent or teacher requests a reevaluation. 34 CFR §300.303(a). A reevaluation conducted under paragraph (a) of this section may occur not more than once a year, unless the parent and the public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR §300.303(b). Written notice must be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child. 34 CFR §300.503(a).

In the present case, the student was reevaluated in April 2011. At that time, the student was performing at a K.8 grade level equivalency in Broad Math, a 1.4 grade level equivalency in Math Calculation, a K.8 grade level equivalency in Broad Reading and a K.9 grade level equivalency in Reading Comprehension Skills. The student’s motivation to complete academic work was declining and he often engaged in work refusal. He had one escalation per quarter which required physical restraint.

During the student’s January 29, 2013 IEP Team meeting, the student was performing at the 1.2 grade level equivalency in Numeration, the 1.2 grade level equivalency in Algebra, the

3.8 grade equivalency in Geometry, the K.8 grade level equivalency in Data Analysis and Probability, the 1.8 grade level equivalency in Basic Concepts and the 1.8 grade level equivalency in Multiplication. In January 2013, the student was performing at the 1.5 grade equivalency in Word Identity, the 1.4 grade equivalency in Word Attack, the 1.3 grade level equivalency in Word Comprehension, the 1.0 grade equivalency in Passage Comprehension, the 1.4 grade equivalency in Basic Skills Cluster, the 1.1 grade level equivalency in Reading Comprehension Cluster and the 1.3 grade level equivalency in Total Reading Cluster. The student had built some positive relationships with staff members and had shown the ability to seek out and accept support from his dedicated aide, the social worker and staff members when he was upset. The student was maintaining high levels on the behavioral motivational system however continued to have difficulty with work avoidance and distraction.

During the months of February 2013 and March 2013, the student had six behavior incidents which resulted in an incident report. On March 14, 2013, the parent, through her attorney, requested comprehensive psychological and psychiatric evaluations for the student because of the student's "significant change in behavior" during March 2013. The Parent also testified that she requested the assessments because of things she "sees at home" and things she "hears at school." The Parent was also concerned that "something might happen" because of the student's growing physique.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "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 whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b).

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)). Notwithstanding this standard, the IDEA still requires written parental consent to conduct the reevaluation. *See* 20 U.S.C. § 1414(c)(3).

In April 2011, the student's IEP Team reevaluated the student. In November 2011, a comprehensive psychological evaluation of the student was completed, at which point the evaluator recommended that the student "not be retested for at least three years unless the student experiences significant trauma, outstanding or unusual psychotic episodes that result in hospitalization or the onset of a condition that could additionally impact learning, such as seizures" because the student had received no less than 26 "evaluations" between 2004 and 2011, with consistent results. During the due process hearing, the Parent testified that the information contained in the November 2011 Confidential Psychological Reevaluation remained accurate.

Prior to the development of the student's January 29, 2013 IEP Team meeting, DCPS administered the Key Math 3 and the Woodcock Reading Master Tests Revised to the student to assess the student's current math and reading performance levels.

Following a March 11, 2013 incident where the student made suicidal remarks, DCPS suggested that the parent work with ChAMPS. Based on the discussion during the student's January 29, 2013 IEP Team meeting, DCPS was aware that the student was not consistently taking his medication. The parent made an appointment with ChAMPS to address the student's medication management and monitoring of medication.

Following the parent's March 14, 2013 request, the student's IEP Team met on March 29, 2013. Following the March 13, 2013 incident, the student's behavior improved to the point where, on March 29, 2013, the student was on the "gold level" for behavior. The student's March 29, 2013 IEP Team discussed the parent's request for comprehensive psychological and psychiatric evaluations and determined that an FBA should be conducted in order to develop an appropriate BIP to address the student's behaviors. The Team also discussed the parent's communication with ChAMPS. DCPS informed the parent, in writing via the IEP Team meeting notes, of the reason DCPS determined not to conduct the comprehensive psychological and psychiatric assessments requested by the parent. The parent renewed her request for comprehensive psychological and psychiatric evaluations on March 29, 2013. The parent then filed the present Complaint on April 2, 2013, four days later.

Here, it is important to note the distinction between "evaluation" and specific assessment tools. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). A district has the prerogative to choose assessment tools and strategies. *See Amanda Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086 (2002) (parents did not provide any empirical grounds on which to base a challenge to the district's choice in assessment tools and strategies).

Although the Petitioner argued that DCPS did not adequately evaluate the student based on his behaviors, DCPS conducted an FBA. An FBA is an educational evaluation. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). "The IDEA...recognizes that the quality of a child's education is inextricably linked to that child's behavior" and "[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Id.* at 68. While the Petitioner argued that the student's behavior incidents in February 2013 – March 2013 had become more frequent and intensive than they had been in the past, thereby necessitating comprehensive psychological and psychiatric assessments, the Advocate testified that during the 2010-2011 school year, the student displayed multiple inappropriate behaviors on a daily basis including extreme behaviors such as assaulting staff and fighting peers. Further, the Parent testified that the student's November 22, 2011 Confidential Psychological Evaluation remained accurate. On May 13, 2013, the student's IEP Team met to review the FBA and develop a BIP for the student. Given the nature of the parent's request and the student's extensive history of evaluations, the Hearing Officer concludes that it was

appropriate for the student's IEP Team to conduct an FBA rather than comprehensive psychological and psychiatric assessments.

Even had the IEP Team been required to conduct the specific assessments requested by the parent, a failure to timely reevaluate is, at base, a procedural violation of IDEA. *See Lesesne ex rel. B.F. v. District of Columbia*, Civil Action No. 04-620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005) (characterizing cases “where a student is seeking a reevaluation, but is already in a placement” as involving procedural violations of IDEA). An IDEA claim is viable only if the procedural violations of procedural affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also Krivant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief because “although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents’ request, the [parents] have not shown that any harm resulted from that error”). “A delay does not affect substantive rights if the student's education would not have been different had there been no delay.” *D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued).

The Petitioner argued that comprehensive psychological and psychiatric assessments were necessary because the student had never before carried a knife to school and thus, his behavior had increased beyond previous behaviors. This argument is not supported by the record. The student's November 2011 Psychological Evaluation notes that in elementary school, the student had multiple behavior incidents which included attempting to stab a classmate with a pencil, pulling out a teacher's hair, bringing a knife to school and threatening to harm classmates with the knife. These behaviors were assessed and addressed in the November 22, 2011 evaluation. The Petitioner likewise suggested that comprehensive psychological and psychiatric assessments were necessary because of the student's lack of adequate academic progress. While the student has made only slight academic progress from April 2011 to January 2013, the record indicates that the primary factors in the student's lack of academic progress are the student's failure to remain in the classroom and the student's refusal to complete class assignments. The Hearing Officer also notes that five of the six incidents which occurred between February 2013 and March 2013 involved a female staff member; the student's inappropriate behaviors increased when he attempted to avoid reading, which is fathomable given the student is reading on a 1st grade level; the student has not had any behavioral incidents during the 2012-2013 school year in his carpentry class and the student received the grade letter “A” in his music class and the grade letter “B+” in his carpentry class.

The Petitioner also argued that comprehensive psychological and psychiatric assessments were necessary because an ID classification may be more appropriate for the student. The Hearing Officer is not persuaded by this argument. First, in November 2011, when given a measure of nonverbal intelligence, the student scored within the average range, while on a measure that required verbal input, the student scored within the borderline and/or mentally deficient range. The record contains ample evidence suggesting that the student's ADHD and ED behaviors are the primary factors contributing to his lack of academic progress rather than

his cognitive abilities contemplated in his SLD, rather than ID, classification. The IDEA does not give a substantive right to a particular disability classification. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability that is listed in 34 CFR §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 34 CFR §300.111(d). The student does have a right to an IEP which addresses his unique needs, regardless of his disability classification. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324.

Next, there was no evidence presented which suggested that the student's IEP goals, present levels of performance or accommodations and modifications were inappropriate for the student. In fact, the Parent testified that the present levels of performance on the student's IEP are accurate and that the goals on his current IEP align with his present levels of performance and the accommodations and modifications suggested by the Advocate are included on the student's IEP.

Finally, the Petitioner argued that DCPS' failure to complete comprehensive psychological and psychiatric assessments significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child because the requested assessments were necessary in order for the student's IEP Team to discuss a more restrictive placement for the student, specifically placement in a residential treatment facility. The Hearing Officer is also not persuaded by this argument. The student's placement must be determined at least annually and, in developing each IEP for the student, the concerns of the parent must be considered. *See* 34 CFR §§300.116(b)(1) and 300.324(a)(1)(ii). The parent has the right to discuss her concerns regarding the student's placement at the student's IEP Team meeting regardless of whether comprehensive psychological and psychiatric assessments are conducted. Additionally, the student's IEP Team is obligated to make placement decisions based on the student's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs.)

The IDEA "guarantees parents of disabled children the opportunity to participate in the evaluation and placement process." *Lesesne*, 2005 WL 3276205; *see also* 20 U.S.C. §§ 1414(f), 1415(b)(1). While "not every technical violation of the procedural prerequisites of an IEP will invalidate its legitimacy ..., procedural inadequacies that ... seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F. Supp. 2d 152, 164 (D.D.C. 2005) (internal quotation marks and citations omitted). In *Annette J.*, 267 F.3d at 892-93, the school district failed to disclose to the student's parents the student's full records, which included reports that the student exhibited behavioral characteristics associated with autism. The court found that this "procedural violation[], which prevented [the student's] parents from learning critical medical information about their child," denied the student a FAPE because "[the student's]

parents [were] prevented from participating fully, effectively, and in an informed manner in the development of [the student's] IEP[.]” *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 894 (9th Cir. 2001).

Here, by contrast, the Petitioner presented no compelling evidence supporting the assertion that the parent could not meaningfully participate in the development of the student's IEP. The student's last IEP was developed on January 29, 2013, the parent and the parent's advocate participated in the IEP Team meeting. There was no disagreement within the IEP Team as to the student's present levels of performance, goals or services contained with the student's IEP. Since January 29, 2013, the student's IEP goals and services have not been revised nor has the parent requested a revision of the IEP. While a BIP was added to the student's IEP on May 13, 2013, the parent and the parent's advocate participated in the IEP Team meeting to develop the BIP.

The Hearing Officer concludes that DCPS' failure to conduct comprehensive psychological and psychiatric assessments did not impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child or cause a deprivation of educational benefit.

The Petitioner failed to meet its burden with respect to the issue presented.

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

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 USC §1415(i).

Date: June 16, 2013


Hearing Officer