DISTRICT OF COLUMBIA
OFFICE OF STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

OSSE STUDENT HEARING OFFICE 2010 FEB 12 AM 11: 57

PUBLIC CHARTER SCHOOL, INC.,	)	
Petitioner,	)	
v.	)	**Bruce Ryan, Hearing Officer**
PARENT of STUDENTS,[1]	)	**Issued: February 10, 2010**
Respondent.	)	

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

On November 30, 2009, the United States District Court for the District of Columbia (Hon. Ellen Segal Huvelle) issued an Order in Civil Action No. 09-1564 (ESH) initiated by Petitioner Public Charter School The District Court Order: (a) vacated the August 5, 2009, Hearing Officer Determinations in the above-captioned cases, filed pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*; (b) remanded the matter for a hearing to be scheduled forthwith before a Hearing Officer to be appointed by the Student Hearing Office ("SHO"); and (c) directed that "the only issue before the Hearing Officer is whether the parent defendant is entitled to independent education evaluations of one or more of her children."

The appeal and remand in Civil Action No. 09-1564 (ESH) relates to the following cases: (a) three Due Process Complaints filed on or about June 5, 2009 by against the Parent, concerning each of her three children – hereinafter referred to as "Child A" "Child B" and "Child C" and (b) three earlier complaints filed by the

[1] Personally identifiable information is attached as an Appendix to this decision and must be removed prior to public distribution.

Parent against regarding the same three children (for Child A; for Child B; and for Child C), which had been consolidated with complaints. As noted below, the Parent agreed to withdraw the three earlier complaints in light of the remand and scheduled hearing on the complaints. *See Prehearing Order* (Dec. 21, 2009), ¶ 5.

This Hearing Officer was appointed by the SHO to hear these cases on December 8, 2009; a Prehearing Conference ("PHC") was held on December 15, 2009; and a Prehearing Order was issued on December 21, 2009. At the PHC, the Hearing Officer and the parties discussed the factual allegations set forth in the various complaints and responses on file with respect to this issue on remand. It was agreed and ordered as follows (*Prehearing Order*, ¶ 5):

> (a) Each of the June 5, 2009 complaints filed by requests a hearing to show that its March 2009 evaluation of the student is "appropriate" within the meaning of the IDEA and regulations. *See* 34 C.F.R. § 300.502(b)(2)(i). In each case, the relief requested consists of a finding that the March 2009 evaluation was appropriate and that the Parent therefore is not entitled to an independent evaluation at public expense.
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> (b) Parent's June 15, 2009 responses to the complaints assert (*inter alia*) that the evaluations conducted by in March 2009 were not appropriate, for the reasons discussed at pages 3-4 of each response. It was agreed that Parent-Respondent's case at hearing regarding the inappropriateness of the March 2009 evaluations would be limited to the specific grounds and allegations set forth in each response.
>
> (c) As the Petitioner in Case Nos. and shall proceed first at the hearing and shall carry the burden of proof on the issue whether Parent-Respondent is entitled to independent education evaluations of one or more of her children. Pursuant to 34 C.F.R. § 300.502(b)(2)(i), must "show that its evaluation is appropriate" for each child, within the meaning of the IDEA, *see, e.g., id.* §§ 300.304, 300.305; DCMR 5-3005.
>
> (d) As part of its five-day disclosures, Parent-Respondent shall indicate with reasonable specificity the nature of any expert witness or other testimony regarding the assertions in her responses that one or more of the March 2009 evaluations are not appropriate because they do not adequately assess social-emotional, behavioral and/or attention difficulties.
>
> (e) Parent-Respondent agreed to withdraw, without prejudice, the complaints in Case Nos. and in light of the remand and scheduled hearing on the complaints.

Following the PHC, both parties filed five-day disclosures as directed, on or about January 4, 2010. Petitioner also filed a "Motion for Judgment" in Case No. 2009-

on January 4, and a "Motion in Limine" in all three cases on January 5, 2010. Respondent filed a written opposition to both motions, and the Hearing Officer denied them by Memorandum Order issued January 8, 2010.

With respect to the Motion for Judgment, the Hearing Officer found that concerns raised regarding an undisclosed prior evaluation did not entitle to judgment in the absence of a hearing. To the extent contended that evidence regarding the existence of and/or failure to disclose such prior evaluation was relevant to the issue specified for hearing, the Hearing Officer ruled that was free to present such evidence including cross examination of Respondent at the hearing. *Memorandum Order* (Jan. 8, 2010), ¶ 1. With respect to the Motion in Limine, which sought to bar the testimony of three individuals who are employees of Respondent's law firm, the Hearing Officer found that failed to demonstrate prejudice. Moreover, even assuming possible prejudice to the only legal authority cited in the motion – Rule 3.7 of the District of Columbia Rules of Professional Conduct – did not support the relief requested. [2] Nor was the Hearing Officer aware of anything in the IDEA or the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")* that would prohibit such testimony, which is common in IDEA due process hearings in this jurisdiction where educational advocates may have relevant information based on their participation in the MDT/IEP process. *See also Schaffer v. Weast,* 546 U.S. 49 (2005) ("IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence"); *SOP,* Section 700.4 ("hearing is not governed by formal rules of procedure or evidence"). *See Memorandum Order* (Jan. 8, 2010), ¶ 2.

On January 8, 2010, filed a "Second Motion In Limine" in all three cases, seeking to bar testimony for failure to comply with paragraph 5(d) of the Prehearing Order. On the record at the outset of the Due Process Hearing, the Hearing Officer denied this motion, but ruled that would be allowed to present rebuttal testimony if Parent-Respondent presented evidence not reasonably anticipated by the parties' five-day disclosures.

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[2] Rule 3.7 generally would *not* entitle an opposing party to object to testimony by non-attorney employees of a party's law firm on the basis of personal knowledge. *See, e.g.,* Comment 5 (noting that, even with respect to other lawyers in the firm, "there is no general rule of imputed disqualification applicable to Rule 3.7"; and that provision covering other lawyers "is designed to provide protection for the client, not rights of disqualification to the adversary").

The Due Process Hearing was held in two sessions, on January 11 and 15, 2010. Petitioners elected for the hearing to be closed. At the hearing, the following documentary exhibits were admitted into evidence (without objection):

Child A; Case No. Exhibits CC-1 through CC-7, submitted by Petitioner
Exhibits P-1 through P-8, submitted by Respondent.

Child B; Case No. Exhibits CC-1 through CC-6, submitted by Petitioner
Exhibits P-1 through P-9, submitted by Respondent.

Child C; Case No. Exhibits CC-1 through CC-7, submitted by Petitioner
Exhibits P-1 through P-9, submitted by Respondent.

Testifying at the hearing on behalf of Petitioner were: Psychologist ("CC-Psy."); and Dean of Special Education ("CC-Dean"). Petitioner also presented rebuttal testimony from the CC-Dean.

Testifying at the hearing on behalf of Respondent were the Parent and Respondent's Psychologist ("R-Psy.").

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*").

II. ISSUE AND REQUESTED RELIEF

As noted above, pursuant to the Court's Remand Order, the only issue before the Hearing Officer is: ***"Whether the Parent ...is entitled to independent education evaluations of one or more of her children."*** *Prehearing Order,* ¶ 5 (emphasis added). In each case, the relief requested consists of a finding that the March 2009 evaluation was appropriate and that the Parent therefore is not entitled to an independent evaluation at public expense. *Id.* ¶ 5 (a).

III. FINDINGS OF FACT

1. Child A is a old student who; Child B is a five-year old student; and Child C is a r old student. All three students reside in the District of Columbia with the Parent-Respondent, and all three students have been enrolled at since it opened in the fall of

2008. Only Child A has been determined to be eligible for special education and related services as a child with a disability under the IDEA.

2. Early in the 2008-2009 school year, in approximately October or November 2008, Parent requested that conduct evaluations of Child A and Child B to determine each child's eligibility for specialized instruction and related services. *See Parent Test.; P-6 (*

Parent subsequently requested that also evaluate Child C. *P-6 (*

3. Prior to the Parent's requests for initial evaluations, each child had experienced difficulties in school. Child A experienced academic, behavioral, and social-emotional difficulties and had been retained in grade twice. *See Parent Test.; CC-3; CC-4; P-4*

Child B had experienced behavior problems in the school setting, including throwing temper tantrums, running from his classroom, pouting, refusing to do work, and throwing school materials in the classroom. *Parent Test.; CC-2; P-4 (* Child C had also experienced numerous behavior problems at school, including fighting with peers, disrespecting teachers, and failing to focus on class material. *Parent Test.; P-4 (*

4. In requesting that Child B be evaluated, Parent's primary concern was his behavior. *Parent Test.; P-4.* Child B's first teacher during the 2008-2009 school year called Parent almost daily to discuss his behavior, beginning in the second week of school. Child B's second teacher during the 2008-2009 school year also frequently reported behavior problems to Parent. *Id.*

5. Behavior issues also motivated Parent's request to evaluate Child C. During the summer of 2008, Parent sought services for Child C through a social services agency, which diagnosed him as having Attention Deficit Hyperactivity Disorder ("ADHD") and prescribed Concerta. *Parent Test.; P-4* (Advocate notes). Upon enrolling Child C at at the start of the 2008-2009 school year, Parent informed the principal and teacher about these developments. *Id.* [3] Early in that school year, Parent began receiving reports from Child C's teacher about his behavior and attention problems. Parent and Teacher spoke approximately 2-3

[3] Prior to his enrollment at Child C attended the parochial school which then occupied the space that later took over and which had the same principal in charge of student discipline. He was suspended five times during the 2007-2008 school year, and was ultimately expelled from the parochial school in or around April 2008. Upon Child C's expulsion from the parochial school, the principal told Parent that she could reenroll Child C if she first found him some counseling. *Parent Test.*

times per week about Child C's difficulties focusing, refusal to participate in class work, distractibility, failure to attend to detail, and failure to complete assignments. *Id.*

6. In late March 2009, produced initial evaluations of all three children. A comprehensive psychological evaluation (psycho-educational and clinical) was completed for Child A on or about March 31, 2009, *see P-5* a psycho-educational evaluation was completed for Child B on or about March 27, 2009, *see P-5* and a psycho-educational evaluation was completed for Child C on or about March 27, 2009. *P-5*

Child A Evaluation (Case No.

7. The comprehensive psychological evaluation of Child A was conducted in three sessions, on March 12, 24, and 25, 2009, by outside retained psychologist, who holds a Psy.D. Degree in Clinical Psychology from George Washington University and is licensed in the District of Columbia. *CC-3; CC-4; CC-Psy. Test.* The evaluation used a variety of assessment tools and strategies, including: Bender Visual-Motor Gestalt Test-2d Edition ("Bender-II"), Wechsler Intelligence Scale for Children-4th Edition ("WISC-IV"); Wechsler Individual Achievement Test-2d Edition ("WIAT-II"); Behavior Assessment System for Children-2d Edition ("BASC-II") - Parent and Teacher Rating Scales; Classroom Observation; Teacher Interview; and review of Incident Reports from *Id.* The evaluation used technically sound instruments; the assessments or measures were valid and reliable; and they were administered by trained and knowledgeable personnel. *Id.* However, Child A's evaluation did not include a parent interview or formal social history. *Id.*[4]

8. The March 31, 2009 evaluation report diagnosed Child A with "Adjustment Disorder with Depressed Mood," and found that she was "currently experiencing significant upset about her [step]father's incarceration and its impact on her family." *CC-4 & P-5*, p. 9. The evaluation found that Child A's social-emotional functioning was adversely impacting her education: "She is internalizing the distress in ways that are negatively impacting her feelings

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[4] Psychologist testified that a parent interview and social history would ordinarily be helpful in a clinical evaluation, but that she had been asked by to expedite Child A's evaluation due to the timeline for completing it. *CC-Psy. Test.* She said that she attempted once to contact the Parent, but that the telephone number was out of service. *Id.* However, the March 31, 2009 report makes no reference to this attempt, and Parent testified that her number has been the same for years and that her children's teachers had reached her many times via telephone. *See CC-4; Parent Test.* Nevertheless, Parent completed the BASC rating form and also had the opportunity to provide oral input at the MDT meeting.

about herself and her ability to concentrate on her schoolwork and negotiate relationships." *Id.* Her cognitive skills were determined to be within the Borderline range, with a Full-Scale IQ ("FSIQ") score of 72; and her academic skills were assessed in the Low Average range on reading and written language composites, and in the Borderline and Extremely Low ranges on math.[5] *Id., pp. 8-9.* "Although her academic score profile revealed areas of relative weakness, no specific learning disabilities were detected by this testing." *Id.,* p. 9.

9. The evaluation concluded that, based upon current test results, clinical observations, and parent/teacher reports, Child A appeared to qualify for special education services as a student with an Emotional Disturbance ("ED").[6] However, Child A did not appear to qualify as a student with Specific Learning Disability ("SLD"). *Id.,* pp. 9-10. According to the evaluator, "nothing in [Child A's] academic scores was out of line with [her] cognitive functioning." *CC-Psy. Test.; see also CC-3* ("testing shows that [Child A] is functioning according to ability when reviewing both cognitive and achievement testing').

Child B Evaluation (Case No.

10. Child B was evaluated on March 24, 2009, by the same psychologist. The psycho-educational evaluation consisted of a 20-minute classroom observation, Bender-II, WIAT-II, and Wechsler Preschool and Primary Scale of Intelligence-3d Edition ("WPPSI-III"). *CC-3; CC-Psy.Test.* The evaluation used technically sound instruments; the assessments or measures were valid and reliable; and they were administered by trained and knowledgeable personnel. However, Child B's evaluation did not include interviews or background information from Parent or any of Child B's teachers; did not include a social history assessment; and did not include any clinical or behavioral elements, including behavior rating scales. *CC-3; Parent Test.; CC-Psy. Test.; CC-Dean Test.* [7]

11. The March 27, 2009 psycho-educational report for Child B determined that his visual-motor integration skills were within the Low Average range; that his performance on the

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[5] The evaluator testified that when the WIAT-II math composite score is lower than both subtest scores, as here (69), the subtest scores (72, Borderline range) may be more relevant. *CC-Psy. Test.* She also testified that she did not find a statistically significant difference between the 72 and 69 scores in any event. *Id.*

[6] The BASC-II Rating Scales indicated Clinically Significant behaviors for Depression, Atypicality, Aggression, Adaptability, Sense of Inadequacy, and Emotional Symptoms, under one or more of the sets of responses (child, parent, classroom teacher). *CC-4,* pp. 7-8.

[7]

WPPSI-III indicates cognitive functioning in the Low Average range (FSIQ 88); and that his academic readiness skills were developing commensurate with his cognitive ability. *CC-3.* The report does not include any assessments of his behavior or attention, although it reported physical distress as a result of a recent visit to his father. *CC-3; CC-Psy. Test.*

Child C Evaluation (Case No.

12. Child C was evaluated on March 12 and 24, 2009, by the same psychologist. *CC-4; CC-Psy.Test.* The psycho-educational evaluation consisted of a 15-minute classroom observation, Bender-II, WIAT-II, Kaufman Brief Intelligence Test ("K-BIT"), and review of school records including a prior 2003 DCPS psycho-educational report. *Id.* The evaluation used technically sound instruments; the assessments or measures were valid and reliable; and they were administered by trained and knowledgeable personnel. *Id.* However, the evaluation did not include a parent interview or social history assessment. *Id.; Parent Test.; CC-Dean Test.* [8]

13. The March 27, 2009 psycho-educational report for Child C determined that his visual-motor integration skills were within age appropriate limits; that his K-BIT intelligence score was in the Average range (K-BIT IQ Composite of 103); that his academic skills in reading, math, and written language were in the Low Average range; and that no specific learning disabilities were detected. *CC-4.* The report does not include any assessments of his behavior or attention. *CC-4; CC-Psy. Test.*

MDT Meetings/Determinations

14. ***Child A.*** On or about May 15, 2009, an MDT convened by determined that Child A did qualify for special education and related services as a child with a disability under the IDEA. Specifically, the MDT found that Child A qualified as a child with an Emotional Disturbance, but found that she did not qualify as Learning Disabled. *CC-3 (Case No.*

An initial IEP was developed which provided for 10 hours per week of specialized instruction in a General Education setting and 60 minutes per week of behavioral support services Outside general Education. *CC-5.* It includes academic goals in reading, math and

[8] In addition, while the March 27, 2009 report for Child C lists a "teacher interview" in the list of assessments administered, no findings from that interview are reported. *CC-4.*

written expression, in addition to emotional, social and behavioral development. *Id.; CC-Psy.Test.*

15. ***Child B.*** On or about May 15, 2009, an MDT convened by determined that Child B did NOT qualify for special education and related services as a child with a disability under the IDEA. Specifically, the MDT found that Child B did not qualify as Learning Disabled. The MDT meeting notes do not reflect any determination as to whether Child B would qualify under any other disability classification, including Emotional Disturbance or Other Health Impairment. *P-4; CC-Dean Test.*

16. ***Child C.*** On or about May 15, 2009, an MDT convened by determined that Child C did NOT qualify for special education and related services as a child with a disability under the IDEA. Specifically, the MDT found that Child C did not qualify as Learning Disabled. The MDT meeting notes do not reflect any determination as to whether Child C would qualify under any other disability classification, including Emotional Disturbance or Other Health Impairment. At that time, the team found that Child C was performing "admirably in the classroom both academically and behaviorally," was "happy at school," and "exhibits no behavioral issues." *CC-3 (Case No.*

17. On or about May 15, 2009, the parent expressed her disagreement with evaluations of all three children, and requested authorization to obtain an independent evaluation of each child at expense. *See P-4 (*5/15/09 MDT meeting notes in all 3 cases)*; CC-Dean Test.*

18. refused to fund an independent evaluation of any of the three children. Dean testified that he had seen independent evaluations in the past that he believed to be inadequate and generally preferred to rely on the school's own evaluations. *See CC-Dean Test.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; 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. *See* DCMR 5-3030.3;

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). In this case, Petitioner has the burden of proof on the issue whether Parent-Respondent is entitled to independent education evaluations of one or more of her children. *Prehearing Order,* ¶ 6. Both and Parent had a full and fair opportunity to present evidence and arguments regarding the appropriateness of evaluations, including rebuttal testimony by *See, e.g., P.R. v. Woodmore Local School District,* 256 F. Appx. 751 (6th Cir. 2007).

2. Pursuant to its "child find" mandate under IDEA, has an affirmative duty to identify, locate and evaluate any potentially disabled child attending its school. *See* 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). "must conduct a full and individual initial evaluation" of any child who is "suspected" of being a child with a disability in accordance with IDEA requirements. 34 C.F.R. §§ 300.301(a), 300.111(c); DCMR 5-3005.1. The evaluation must include a "variety of assessment tools and strategies to gather relevant information," including information provided by the parent, to assist in determining (i) whether the child is a child with a disability under § 300.8, and (ii) the content of the child's IEP. 34 C.F.R. § 300.304(b)(1). And in carrying out such evaluation, must (*inter alia*) ensure that the child "is assessed in all areas related to the suspected disability, including, if appropriate, ...social and emotional status," 34 C.F.R. §300.304 (c) (4); and must ensure that 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 [is] classified." *Id.* §300.304 (c) (6); DCMR 5-3005.9.[9]

3. IDEA regulations confer on a parent "the right to an independent educational evaluation [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502 (b)(1). If a parent requests an IEE, the public agency "must, without unnecessary delay, either – (i) file a due process complaint ***to request a hearing to show that its evaluation is appropriate***; or (ii) ensure that an [IEE] is provided at public expense...." *Id.* § 300.502(b)(2) (emphasis added). [10] Under the plain language of these

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[9] *See, e.g., IDEA Public Charter School v. McKinley*, 570 F. Supp. 2d 28 (D.D.C. 2008); *Hawkins v. D.C.,* 539 F. Supp. 2d 108 (D.D.C. 2008); *D.C. v. Abramson,* 493 F. Supp. 2d 80, 85 (D.D.C. 2007).

[10] The agency "may ask for the parent's reason why he or she objects to the public evaluation," but "may not require the parent to provide an explanation. " 34 C.F.R. § 300.502(b) (4). And a "parent is entitled to only one

regulations, parents are entitled to an independent evaluation at public expense whenever they disagree with the school's evaluation, unless the school subsequently demonstrates the appropriateness of its evaluation at a due process hearing. *See Mullen v. District of Columbia,* 16 IDELR 792 (D.D.C. 1990). The decided cases indicate that an "appropriate" evaluation is one which generally meets the requirements of the statute and regulations.[11] must therefore show that its evaluation is appropriate, within the meaning of the IDEA and DCMR, *e.g. id.* §§ 300.304, 300.305; DCMR 5-3005, for each of the children involved in this case.

4. Based on the record compiled at the hearing, the Hearing Officer concludes that evaluation of Child A was appropriate, but that its evaluations of Child B and Child C were NOT appropriate in the specific respects discussed below. Thus, Parent is entitled to publicly funded, independent evaluations of Child B and Child C, as described herein.

Child A (Case No.

5. Parent alleges that March 2009 comprehensive psychological evaluation of Child A is not appropriate because it: (a) "does not contain any data derived from a social history assessment or any input from [Child A's] family"; (b) "includes only a 25-minute classroom observation by the evaluator"; (c) "was conducted during a time in [Child A's] life when she was suffering a particular emotional strain"; and (d) otherwise "does not adequately and comprehensively explore [Child A's] social-emotional and academic difficulties." *P-2*, p. 3. *See also Respondent's Closing Argument,* pp. 3-4.

6. As a result of the March 2009 evaluation, Child A was determined to be a child with a disability eligible for special education services under IDEA, and an IEP was developed. As notes in its Closing Argument, there has been no challenge to the qualifications of the evaluator or the reliability of the assessment tools she used. Moreover, at the 5/15/09 MDT meeting, Child A's educational advocate acknowledged that "the appropriate elements of the Clinical were all administered." *CC-3.*

[IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." *Id.* § 300.502(b)(5).

[11] *See, e.g., Blake B. v. Council Rock School Dist.,* 51 IDELR 100 (E.D. Pa. 2008) (school district's evaluation found appropriate where, *inter alia,* psychologist used variety of assessment tools, utilized technically sound instruments, and evaluated in all areas of suspected disability); *P.R. v. Woodmore Local School District, supra* (school district successfully proved appropriateness of evaluation, including testing process and conclusions); *Holmes v. Millcreek Township School Dist.,* 205 F. 3d 583 (3d Cir. 2000).

7. The thrust of Parent's disagreement with Child A's evaluation appears to be her belief that Child A has a learning disability and should not receive a primary disability classification of ED. *See CC-3; Parent Test.* However, "IDEA simply gives [Parents] the right to an appropriate evaluation – not diagnoses with which they agree." *Blake B. v. Council Rock School Dist.,* 51 IDELR 100 (E.D. Pa. 2008), slip op. at 9; *see also L.S. v. Abington School Dist.,* 48 IDELR 244 (E.D. Pa. 2007) (parents "cannot simply argue that the evaluation was inappropriate because they disagree with its findings. The key is the methodology."). Here, both the evaluator and the team concluded that Child A did not qualify for a learning disability, but that Child A's social-emotional functioning was impacting her school performance. *See CC-3; CC-4,* pp. 9-10; *CC-Psy. Test.* These conclusions were reached based on a variety of assessment tools, including current test results, clinical observations, and parent and teacher reports. *Id.* While Parent argues that additional information (including a social history and further parent input) might have indicated the *in*appropriateness of an ED classification, *Respondent's Closing Argument,* pp. 3-4, there was no evidence to show that evaluation failed to identify all of Child A's special education needs (regardless of disability classification) or that such additional information would change the content of the IEP, 34 C.F.R. §§ 300.304 (b)(1)(ii),(6). *See CC-Psy. Test.; CC-Dean Test.; CC-5* (academic goals).

8. Accordingly, the Hearing Officer concludes that March 2009 evaluation of Child A was appropriate within the meaning of the IDEA and that Parent therefore is ***not*** entitled to a publicly-funded, independent evaluation of Child A at this time.[12]

Child B (Case No.

9. Parent alleges that March 2009 psycho-educational evaluation of Child B is not appropriate because it: (a) "does not contain any data derived from a social history assessment or any input from [Child B's] family"; (b) "does not include any data derived from an interview with [Child B's] teachers"; (c) "does not include any behavior assessments";

[12] The Hearing Officer assumes that will consider all relevant updated information (including results of counseling, progress toward goals, as well as any new information suggesting learning difficulties) in connection with its annual review of Child A's IEP pursuant to 34 C.F.R. § 300.324 (b) and/or any re-evaluation conducted pursuant to § 300.303. This may be particularly appropriate here, given the psychologist's recognition at hearing that Adjustment Disorder is often a temporary condition that can be expected to remediate within approximately six months. *CC-Psy. Test. See also Forest Grove School District v. T.A.,* No. 08-305, __U.S.__ (June 22, 2009), slip op. at 16 ("In considering the equities, courts [and hearing officers] should generally presume that public-school officials are properly performing their obligations under IDEA.").

(d)"includes only a 20-minute observation by the evaluator"; and (e) otherwise "does not assess [Child B's] behavior or attention difficulties and their impact on [Child B's] access to the general education curriculum." *P-2*, p. 3. *See also Respondent's Closing Argument,* p. 4.

10. As a result of the March 2009 evaluation, Child B was determined NOT to be a child with a disability eligible for special education services under IDEA. As in the case of Child A, there has been no challenge to the qualifications of the evaluator or the reliability of the assessment tools she used. However, unlike Child A's evaluation, Child B's evaluation was limited to primarily psycho-educational testing and did not include any clinical or behavioral elements. conducted no assessments to determine whether Child B would qualify for specialized instruction and related services as a child with an Emotional Disturbance or Other Health Impairment (ADHD), despite the fact that (a) in requesting that Child B be evaluated, Parent's primary concern was his behavior, and (b) Child B's attention and behavior difficulties were well known to Child B's teacher and other school officials. [13]

11. The legal standards and evidence presented at hearing establish that this approach was not appropriate. *See Parent Test.; R-Psy.Test.; CC-Psy. Test.; CC-3.* The regulations implementing IDEA "stress the broad scope of evaluations," which "must take into account a holistic perspective of the child's needs." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 67 (D.D.C. 2008). Moreover, as noted above, the public agency must use "technically sound instruments that may assess the relative contribution of cognitive *and behavioral factors*," and must assess in "all areas related to the suspected disability, including, if appropriate, *...social and emotional status....*" *Id.* § 300.304 (b)(3),(4) (emphasis added). "The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems." *Harris,* 561 F. Supp. 2d at 68.

12. primarily argues that there is no reason for any further evaluations because the March 2009 psycho-educational testing shows that Child B's "educational performance was within, if not above, the expected range," and thus Child B cannot be

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[13] evaluating psychologist testified that she did not even know why Parent requested that Child B be evaluated , as the information was not included in the referral and she never spoke with Parent about Child B. *CC-Psy.Test.* (cross examination). She also testified that the measures employed to evaluate Child B were not designed to determine the existence of an ED condition. *Id.*

determined to have any disability that has an adverse impact on his education. *Closing Argument,* p. 2. However, the issue in this hearing is the appropriate scope of an initial evaluation, not whether an ultimate eligibility determination is correct. Moreover, IDEA makes clear that "must use a variety of assessment tools" and must "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." 34 C.F.R. § 300.304 (b)(1), (2). Thus, has not shown that it is appropriate to rely solely on standardized cognitive/academic achievement testing, while disregarding other evidence (such as parent and teacher reports) regarding the potential significance of behavioral factors – especially in the case of a five-year old child with very little educational experience. *See, e.g., Blake B. v. Council Rock School Dist., supra,* slip op. at pp. 8-9 (school district did not violate IDEA where evaluation report relied upon not only standardized testing, but also parent and teacher interviews, psychologist observations, and other information).

13. Indeed, own evaluation of Child A appears to prove the opposite. In the case of Child A, argues that "[t]here is no dispute that the evaluations performed demonstrated [that Child A's] emotional issues were adversely impacting her education." *Closing Argument,* p. 2. Yet similar to Child B, academic achievement was commensurate with cognitive functioning; standardized testing indicated that Child A was "functioning according to ability when reviewing both cognitive and achievement testing." *CC-3; see Findings*, ¶ 9. It was only broader evaluation of Child A (which included clinical and behavioral assessments) that appears to have enabled it to determine that Child A was eligible for special education as a child with a disability – specifically, an Emotional Disturbance adversely affecting educational performance – under 34 C.F.R.§300.8(a)(4).

14. also points to the 5/15/09 MDT meeting notes, which indicate that the school "proposed to complete a clinical evaluation based on the ...behavioral concerns that have been raised by the parent and interim teacher," but that the advocate and Parent refused because they wanted to seek an independent evaluation. *CC-2.* claims that such refusal "prevent[ed] the public agency from conducting its own evaluation" and thus "blocks the parent from obtaining one at public expense." *Closing Argument,* p. 5. The Hearing Officer finds this argument to be without merit. By the date of the MDT meeting, had been on notice of Child B's behavioral issues for approximately ***seven months***, since Parent first

requested an evaluation in October 2008. After Parent disagreed with the scope of the March 2009 evaluation, could not belatedly insist on a "second opportunity to conduct evaluations" when its first evaluation was inappropriately limited. *Cf. Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994). If the agency does not conduct an appropriate evaluation in the first instance, the IDEA makes clear that the parent has the right to an independent evaluation at public expense.

15. Accordingly, the Hearing Officer concludes that March 2009 evaluation of Child B was ***not*** appropriate within the meaning of the IDEA and that Parent therefore is entitled to a publicly-funded, independent evaluation of Child B at this time. Parent shall be authorized to obtain an independent comprehensive psychological evaluation (including clinical and social history components) and a functional behavioral assessment ("FBA"),[14] at the expense of

Child C (Case No.

16. Parent alleges that March 2009 psycho-educational evaluation of Child C is not appropriate because it: (a) "contains inaccurate data regarding [Child C's] attendance at school"; (b) "does not include any formal behavior assessments"; (c) "does not include any information from the parent"; (d) "includes only a 'brief' teacher interview"; (e)"indicates that [Child C] was observed in class for approximately 15 minutes by the evaluator"; and (f) otherwise "does not assess [Child C's] behavior or attention difficulties and their impact on [Child C's] access to the general education curriculum." *P-2*, p. 4. *See also Respondent's Closing Argument,* pp. 4-5.

17. As a result of the March 2009 evaluation, Child C was determined NOT to be a child with a disability eligible for special education services under IDEA. As in the case of the other two children, there has been no challenge to the qualifications of the evaluator or the reliability of the assessment tools she used. However, like Child B, Child C's evaluation was limited to primarily psycho-educational testing and did not include clinical or behavioral elements. conducted no assessments to determine whether Child C would qualify for specialized instruction and related services as a child with an Emotional Disturbance or Other

[14] "The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." *Harris,* 561 F. Supp. 2d at 68. *See also* 34 C.F.R.§ 300.324 (a) (2).

Health Impairment (ADHD), despite the fact that (a) Parent informed principal of Child C's ADHD diagnosis early in the 2008-2009 school year, and (b) Child C's attention and behavior difficulties were the subject of frequent communications between Parent and Teacher during the course of that school year.

18. emphasizes that the MDT meeting notes indicate no current attention or behavior issues that needed to be addressed. *See CC-3* (noting "the fact that [Child C] has been performing admirably in the classroom both academically and behaviorally, and the fact that [Child C] is happy at school according to reports and exhibits no behavioral issues."); *id.* (noting that "attentional issues ...were not observed on testing"). However, Parent apparently did inform the MDT about Child C's documented diagnosis of ADHD and the frequent reports from school about attention and behavior concerns throughout the school year. *See, e.g., P-4* (Advocate notes) ("Teacher said he was easily distracted, missed details, forgets directions, & frequently doesn't complete activities."); *Parent Test.* Yet the school psychologist's evaluation contained no information from the parent, no background concerning the previous ADHD diagnosis, and no assessment of his attention or behavior difficulties, despite the earlier parent and teacher reports. *See CC-4.* [15]

19. For reasons similar to those discussed above for Child B, the Hearing Officer concludes that this limited, psycho-educational evaluation was ***not*** appropriate under the circumstances. *See Harris v. District of Columbia,* 561 F. Supp. 2d 63, 67-68; 34 C.F.R. §300.304 (b)(3),(4); DCMR 5-3005. Accordingly, the Hearing Officer concludes that Parent is entitled to a publicly-funded, independent evaluation of Child C at this time. Parent shall be authorized to obtain an independent comprehensive psychological evaluation (including clinical and social history components) and an FBA, at the expense of

C. <u>Appropriate Relief</u>

20. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7,

[15] Again, psychologist testified that she did not know why Parent requested an evaluation of Child C, and that she was not aware of any prior diagnosis or medication of Child C. *CC-Psy.Test.* (cross examination). She further testified that her evaluation would not help an MDT to determine if Child C had an ED or OHI, since it only included cognitive and academic testing. *Id.*

15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In this case, the Hearing Officer has decided the sole issue presented in this hearing – *i.e.,* whether the Parent is entitled to independent education evaluations of one or more of her children. The Hearing Officer has concluded that March 2009 evaluation of Child A was appropriate, but that its March 2009 evaluations of Child B and Child C were not appropriate, for the reasons discussed above. Therefore, Parent is entitled to independent education evaluations of Child B and Child C, consisting of a comprehensive psychological evaluation (including clinical and social history components) and an FBA, at the expense of shall also be directed to convene MDT meetings for Child B and Child C, respectively, to review the results of the independent evaluations and determine eligibility based on those results and any other updated information.

V. ORDER

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

1. Petitioner requests for relief in Case No. shall be, and hereby are, **GRANTED;**
2. Petitioner requests for relief in Case Nos. and shall be, and hereby are, **DENIED;**
3. Respondent Parent shall be, and hereby is, authorized to obtain an **independent comprehensive psychological evaluation (including clinical and social history components) and a functional behavior assessment**, at the expense of for Child B and Child C;
4. Petitioner shall convene meetings of the Multi-disciplinary Teams ("MDTs") for Child B and Child C **within 10 school days** of receiving the results of each independent education evaluation, at which the MDT shall review the results of the independent evaluations and determine eligibility based on those results and any other updated information;
5. Respondent Parent's Due Process Complaints filed in Case Nos. and having been withdrawn by Respondent, shall be, and hereby are, **DISMISSED;** and
6. These cases shall be, and hereby are, **CLOSED.**

Dated: February 10, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).