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STUDENT HEARING OFFICE
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Office of Review & Compliance

Student Hearing Office
Van Ness Elementary School
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Confidential

The Student Through their)	IMPARTIAL
)	DUE PROCESS HEARING
Parents,*)	
Case No.:)	
)	DECISION and ORDER
Petitioner,)	
)	
vs.)	Due Process Compl. Filed: June 25, 2009
)	Continued Hr'g Date: August 25, 2009
The District of Columbia Public Schools,)	Held at: Van Ness Elementary School
Home School:)	1150 5th Street, S.E., 1st Floor
Attending:)	Washington, D.C. 20003
)	
Respondent.)	Pre-Hr'g Conference Held By-Phone on
)	Tuesday, July 14, 2009 at 10:00 a.m.

Counsel for the Parent/Student: **Roberta L. Gambale, Esq.**
James E. Brown & Associates, PLLC
Attorneys at Law
1220 L Street N.W., Suite 700
Washington, D.C. 20005

District of Columbia Public Schools: **Laura George, Esq.**
Assistant Attorney General
Office of the General Counsel, OSSE
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20005

Independent Hearing Officer: **Frederick E. Woods**

*** Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.**

I. Case Background and Procedural Information

A. JURISDICTION

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033.

B. DUE PROCESS RIGHTS

Before the hearing the parent had been advised of their due process rights.

C. FIVE-DAY DISCLOSURES

Petitioner: Admitted, without objection, a disclosure letter filed with the SHO on 08/14/09 that list nine (9)-witnesses and attached twenty-nine exhibits sequentially labeled and tabbed Parent-01 through Parent-29. Two witnesses were called to testify: (1) the parent; and (2) a private psychologist.

Respondent: Admitted, without objection, disclosure letters filed on 07/29/09 and 07/24/09 that together lists three (3)-witnesses and attached three exhibits sequentially labeled DCPS-01 through DCPS-03. One witness was called to testify: (1) a DCPS school psychologist.

D. STATEMENT OF THE CASE

The student, born _____ age _____ years 8-months, is a _____ grade general education student attending _____ School located in _____ Washington, D.C. (R. at Parent-03.)

The student's MDT/Eligibility Team Meeting convened on June 11, 2009 to determine if the student was eligible for special education services. After reviewing the parent's independent education evaluation ("IEEs") reports the team found the student ineligible for special education services at that time and referred the student for more testing. (R. at DCPS-02, 03.) The parent disagreed with the team's ineligibility determination and wants the student found eligible for special education services with the IDEA disability codes of Specific Learning Disabled ("SLD") and Emotionally Disturbed ("ED"). (R. at Parent-03.)

Towards this end, the parent filed the student's 06/25/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing one thing: (1) failing to find the student eligible for special education services at his 06/11/09 MDT/Eligibility Team

Meeting when the private psychologist who evaluated the student stated in their IEE evaluator report that the student was eligible for special education services as an MD—ED and SLD disabled student. (R. at Parent-03, 23.)

As relief, the parent wants the hearing officer to review the IEE reports and find the student eligible for special education services. Then require DCPS to develop the student's initial IEP and provide the student with an appropriate educational setting to implement the IEP. (R. at Parent-03.)

The DCPS 07/06/09 written Response to the parent's DPC and its oral updated response to the DPC provided at the due process hearing denied the parent's claims for these reasons: (1) the student's 06/11/09 MDT/Eligibility Team correctly found the student ineligible for special education services at that time and referred the student for further testing; and (2) the parent gave written consent on 08/24/09 to the team's requested testing that was scheduled to be performed at 3:15 p.m. on 08/25/09—the same day the due process hearing in this matter was held.

The OSSE Student Hearing Office ("SHO") scheduled the due process hearing for 1:00 p.m. on Wednesday, August 12, 2009 that was convened and continued until 9:00 a.m. August 25, 2009 because the parent did not attend the hearing. The hearings were held at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parent selected to have a closed due process hearing that convened, as continued, 60-days after the 06/25/09 DPC was filed.

Assistant Attorney General Laura George appeared in-person representing DCPS. Attorney Roberta L. Gambale appeared in-person representing the student who was not present; and the student's mother who was present.

II. Issue

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE during the 2008-09 school year by doing one thing: (1) failing to find the student eligible for special education services at his 06/11/09 MDT/Eligibility Meeting when the private psychologist who evaluated the student stated in their IEE evaluator report that the student was eligible for special education services as an MD—Ed and SLD disabled student but the MDT requested more testing before making an eligibility determination?

Brief Answer

No. Both the DCPS school psychologist and the student's private psychologist agreed in their testimony with the student's MDT that additional testing is required to determine the student's eligibility for special education services.

III. FINDINGS OF FACT

1. The student, born _____ age _____ years 8-months, is a grade general education student attending _____ located in Washington, D.C. (R. at Parent-03.)
2. On August 13, 2008, parent's counsel sent a letter to the principal of _____ requesting an initial evaluation of the student. (R. at Parent-18.)
3. On 12/17/08 the parent filed a DPC alleging that DCPS failed to evaluate the student when requested on 08/13/08. And that claim was resolved by a Hearing Officer's Decision ("HOD") issued January 26, 2009. (R. at Parent-16.)
4. Thus, the sole issue raised in the parent's 06/25/09 DPC is about the parent's disagreement with the student's 06/11/09 MDT finding that the student was ineligible for special education services albeit the student's IEE evaluator reports that the team reviewed when making their decision said otherwise. (R. at Parent-23, 24, 25.)
5. According to the student's mother and the 04/04/09 Comprehensive Psychological Evaluation Report, written by the private psychologist who evaluated the student, the student was referred for an evaluation because of a significant history of behavioral difficulties and academic underachievement. The mother said that the student's anger is out of control, he was suspended from school several times for fighting, and that he has never been retained albeit his grades are not good. (R. at Parent-23; testimony of the parent and private psychologist.)
6. Functioning below grade level is also supported by the student's 04/04/09 Psychological Assessment subtest scores and the evaluator's testimony about the student's intellectual and academic functioning which are as follows:
 - i. Based on the student's test results from the Wechsler Intelligence Scale for Children, fourth edition ("WISC-IV"), the student has a Full Scale Intelligence Quotient ("FSIQ") of 72—placing his intelligence in the 3rd percentile when compared with other adolescents his age. That classifies him in the borderline range of intelligence meaning that his overall performance exceeds about 3% of other adolescents his age.
 - ii. His academic achievement, based on his subtest scores from the Woodcock-Johnson Test of Achievement, third edition

("WJ-III"), places him between 2-7 grade levels ("G.E.") below his 9th grade level in the subjects tested, among them—

- a.) Reading Comprehension, 2.4 G.E.;
- b.) Broad Reading Composite, 5.7 G.E.;
- c.) Math Calculation Composite, 1.9 G.E.
- d.) Math Fluency, 2.1 G.E.;
- e.) Written Expression, 3.9 G.E.;
- f.) Writing Fluency, 4.2 G.E.;
- g.) Reading Fluency, 7.6 G.E.; and
- h.) Letter-Word Identification, 6.7 G.E.

iii. His emotional/personality functioning diagnostically shows that he is suffering from a Disruptive Behavior Disorder, Not Otherwise Specified ("Behavior Disorder NOS"). "His recent use of marijuana may also be in his way of managing his negative feelings. Additionally, he is genetically predisposed to mental illness because his father suffers from a mental illness."

iv. His Diagnoses on Axis I was as follows: (1) Dysthymic Disorder; (2) Disruptive Behavior Disorder NOS; (3) Mathematics Disorder; (4) Cannabis Abuse; and (5) R/O Posttraumatic Stress Disorder.

v. Axis II was Borderline Intellectual Functioning.

vi. Axis III was blank.

vii. Axis IV was academic/school difficulties; loss [death] of his dog, grandmother and sister; his mother's divorce; poor social skills; legal entanglements; and lack of appropriate peer support.

viii. And based on the student's test results and diagnoses the evaluator recommended, among other things, the following—

- a.) The student "continues to be eligible for full-time special education services under the educational handicapping condition of Multiple Disabled ("MD") to include Emotionally Disturbed and Learning Disabled."
(R. at Parent-23; testimony of the private psychologist.)

7. According to the student's independent 04/01/09 Speech-Language Evaluation Report, the speech-language diagnostician who evaluated the student said that the student's Expressive One-Word Picture Vocabulary Test ("EOWPVT") scored the student 6-years 5-months

below his chronological age; and the student's Receptive One-Word Picture Vocabulary Test ("ROWPVT") scored the student 4-years 9-months below his chronological age." And the examiner recommended direct speech-language intervention services at 60-minutes per week. (R. at Parent-24.)

8. On June 9, 2009 DCPS convened the student's MDT/Eligibility Meeting to review the parent's IEEs and to determine if the student was eligible for special education services. And based on that review the team decided three things: (1) "based on the assessment review the student was not eligible for special education services at that time; (2) that additional test should be performed before determining whether the student is eligible for special education services and if eligible, to determine the appropriate disability classification; and (3) the student would be referred back to the school's support team." (R. at DCPS-03.)
9. On June 11, 2009 DCPS sent the parent a Prior Notice Letter informing her that the student was not eligible for special education services. (R. at DCPS-02.)
10. At the eligibility meeting, the DCPS school psychologist who reviewed the parent's IEE, the 04/04/09 Comprehensive Psychological Evaluation Report, stated that "although [the student's] overall FSIQ score on the WISC-4 was 72, there is no evidence that another comprehensive test of intelligence was administered, and it is considered a good practice to do so when a student's measured IQ score is 72. The additional test should be done before we [the MDT] determine whether or not [the student] is eligible for [special education] services and determine his appropriate disability classification. (R. at DCPS-03, Eligibility Meeting Notes, p. 6 of 8.)
11. The DCPS school psychologist's testified that if a student's measured FSIQ score on a standardized test is in the "Borderline" range, i.e., 72, whoever performs a verbal or written IQ evaluation should not accept that score as something that is written in stone. And someone who is reviewing the evaluation and assessment information should also not accept the one intelligence test score as the best indication of the student's thinking, reasoning, and problem solving abilities without support for that level of intellectual functioning that can be gained by the administration of a second valid, reliable intelligence test result. It is considered a good practice to also administer to a student with a borderline FSIQ of 72 a Test on Non-Verbal Intelligence ("TONI"). That is because the student may present as SLD student but may in fact be Mentally Retarded. (R. at DCPS-03, school psychologist's testimony.)

12. Furthermore, the school psychologist testified that when considering whether the student should be classified as emotionally disturbed, given the student's borderline intelligence score a nexus must be shown between the student's behavior problems and his poor academic performance. That is because the student's poor academic performance might be attributable to an intellectual deficiency rather than an emotional disturbance. (R. at DCPS-03, school psychologist's testimony.)
13. Therefore, more testing is needed based on the testimony of the DCPS school psychologist. And the parent's private psychologist also said more testing is needed but for another reason.
14. Under direct examination of the parent's rebuttal witness—her private psychologist, the parent did not offer her psychologist's in her case-in-chief, he testified that there would be no reason to conduct a TONI unless the student showed language deficits. On cross-examination, however, portions of the student's 04/01/09 Speech-Language Evaluation Report were read to the witness, a report that he did not review as part of his examination of the student, that expressly states that the student's expressive vocabulary skills are six years and five months below his chronological age and his receptive vocabulary skills are four years and nine months below his chronological age. When asked whether those test scores would warrant conducting a TONI before determining the student's eligibility for special education services, he answered unequivocally, "Yes, in that case it would." (R. at Parent-23, 24, private psychologist's testimony.)
15. Thus, the parent's own witness' testimony supported DCPS' position that further testing should be done.
16. Towards this end, the parent provided written consent to DCPS to perform the TONI on 08/24/09 and the TONI testing had been scheduled to be performed at 3:15 p.m. on 08/25/09—the same day the due process hearing in this matter was held and the second day of the 2009-10 school year.
17. Ergo, based on these findings the parent did not prove that DCPS denied the student a FAPE.

IV. DISCUSSION and CONCLUSIONS OF LAW:

I

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

The IDEA codified at 20 U.S.C. §§ 1400 - 1482. and 5 D.C.M.R. § 3000.1 requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

The LEA met its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, "[t]he services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability."
3. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."
4. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
5. Pursuant to the IDEA at 20 U.S.C. § 1414 (d) (A), (B); 34 C.F.R. § 300.323 (a) Requirement that Program be in Effect—

At the beginning of each school year, each local educational agency ... shall have in effect for each child with a disability in the agency's jurisdiction an IEP.

6. Pursuant to Initial Evaluations at 34 C.F.R. § 300.301 (a): "Each public agency shall conduct a full and individual initial evaluation in accordance with § 300.305 and § 300.306 before the initial provisions of special education and related services [are provided] to a child with a disability under this part [Part B of the IDEA]."
7. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(4): "Each public agency must ensure that ... (4) "the child is assessed in all areas related to the suspected disability, including, if appropriate ... [their] social and emotional status."
8. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(6): "Each public agency must ensure that ... (6) "in evaluating each child with a disability

under §§ 300.304 - 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."

9. Pursuant to 20 U.S.C. § 1414 (c)(1), "initial evaluation shall consist of procedures to determine whether a child is a child with a disability ... within 60-days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe." The District of Columbia's established evaluation timeline codified at D.C. Code Ann. § 38-2051(a) was [within 120-days of receipt of the referral].
10. Pursuant to the IDEA at 20 U.S.C. § 1414 (c)(3), Parental Consent, "Each local educational agency [LEA] shall obtain informed consent ... prior to conducting a reevaluation of a child with a disability."
11. Pursuant to the IDEA federal regulations at 34 C.F.R. § 300.09 consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought ... and the parent understands and agrees in writing to carry out the activity.
12. And pursuant to the IDEA federal regulations at 34 C.F.R. § 300.300, parental consent is required to conduct an initial evaluation or reevaluation consisting of more than a review of existing information.
13. The student's MDT/Eligibility Team members complied with the IDEA when it did the following: (1) referred the student for an initial evaluation; (2) reviewed the parent's three IEEs and found the student ineligible for special education services on 06/11/09; and (3) referred the student for more testing before reconvening a MDT to determine whether the student would be eligible for special education services when reconsidering the existing IEEs and considering for the first time the additional test results. (R. at DCPS-02, 03; DCPS school psychologist's and mother's testimony.)
14. So the sole issue in this case is whether the team had enough information at the 06/11/09 MDT Meeting to find the student eligible for special education services as MD—ED and SLD. It did not and here is why.
15. According to the IDEA at 34 C.F. R. § 300.8 (b)(4)(i) Emotional Disturbance is defined as being "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under

normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.”

16. According to the IDEA at 34 C.F.R. § 300.8 (b)(10), Specific Learning Disability "means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” ... (ii) Specific Learning Disability does not include learning problems that are primarily the result of ... mental retardation....”
17. The hearing officer is persuaded by the testimony of both the parent’s private psychologist who evaluated the student and the DCPS school psychologist who reviewed the private psychologist’s 04/04/09 evaluation report that more assessments are required before determining the student’s eligibility for special education services. Here is what the psychologists’ said.
18. At the eligibility meeting, the DCPS school psychologist who reviewed the parent’s IEE—04/04/09 Comprehensive Psychological Evaluation Report stated that “although [the student’s] overall FSIQ score on the WISC-4 was 72, there is no evidence that another comprehensive test of intelligence was administered, and it is considered a good practice to do so when a student’s measured IQ score is 72. The additional test should be done before we [the MDT] determine whether or not [the student] is eligible for [special education] services and determine his appropriate disability classification. (R. at DCPS-03, Eligibility Meeting Notes, p. 6 of 8.)
19. The DCPS school psychologist’s testified that if a student’s measured FSIQ score on a standardized test is in the "Borderline" range, i.e., 72, that should not be accepted as the best indication of the student’s thinking, reasoning, and problem solving abilities without support for that level of intellectual functioning that can be gained by the administration of a second valid, reliable intelligence test result. It is considered a good practice to also administer to a student with a borderline FSIQ of 72 a Test on Non-Verbal Intelligence (“TONI”). That is because the student may present as SLD student but may in fact be Mentally Retarded. (R. at DCPS-03, school psychologist’s testimony.)
20. Moreover, the school psychologist said that when considering whether the student should be classified as emotionally disturbed, given the student’s borderline intelligence score that could mean that he is MR, a nexus must be shown between the student’s behavior problems and his poor academic performance. That is because the student’s poor academic performance might be attributable to an intellectual deficiency rather than an emotional disturbance. (R. at DCPS-03, school psychologist’s testimony.)

21. Albeit for a different reason, the parent's private psychologist also testified that more testing is required.
22. He said under direct examination as the parent's rebuttal witness that there would be no reason to conduct a TONI unless the student showed language deficits. On cross-examination, however, portions of the student's 04/01/09 Speech-Language Evaluation Report were read to him, a report that he did not review as part of his examination of the student, that expressly states that the student's expressive vocabulary skills are six years and five months below his chronological age and his receptive vocabulary skills are four years and nine months below his chronological age. When asked whether those test scores would warrant conducting a TONI before determining the student's eligibility for special education services, he answered unequivocally, "Yes, in that case it would." (R. at Parent-23, 24, private psychologist's testimony.)
23. Therefore, based on the credible evidence presented by the parties' respective psychologist, at a minimum a TONI should be conducted on the student.
24. And the parent provided written consent to DCPS to perform the TONI on 08/24/09 and the TONI testing had been scheduled to be performed at 3:15 p.m. on 08/25/09—the same day the due process hearing in this matter was held which was also the second day of the 2009-10 school year.
25. In Richardson v. District of Columbia, 541 F. Supp. 2d 346, 357 (D.D.C. 2008), the Court upheld an MDT's determination that a student was not eligible for special education services when more information was needed to determine whether the student suffered from emotional disturbance.
26. In Richardson, 341 F. Supp. 2d at 357, the Court said that "[w]ithout the psychiatric treatment records, [the records sought by the student's MDT and Hearing Officer] it was reasonable for the MDT and Hearing Officer to find [the student's] behavior difficulties were not attributable to a disability, despite indications from some previous evaluations suggesting that the student could be eligible for special education services."
27. In this case, the student's MDT, DCPS school psychologist, the parent's own private psychologist, and now the Hearing Officer all agree that additional testing is required to accurately determine the student's eligibility for special education services despite indications from the student's Psychological evaluation that says otherwise.
28. According to the IDEA at 34 C.F. R. § 300.306 (b)(2), Determination of Eligibility, "[a] child must not be determined to be a child with a disability ... if the child does not otherwise meet the eligibility criteria under § 300.8 (a)."

29. For this student at this time, the IEEs upon which the parent's seeks a finding of eligibility for special education are inconclusive based on the subtest results as interpreted by a DCPS school psychologist and the parent's own private psychologist. (R. at Parent 23, DCPS school psychologist and parent's private psychologist's testimony.)
30. So pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a Free Appropriate Public Education (FAPE)."
31. The parent, who filed the Due Process Complaint, had and did not meet their burden of proof in this case because the parent:

Failed to prove that DCPS denied the student a FAPE when on 06/11/09 it determined the student was ineligible for special education services and referred the student for more testing.

So in consideration of the hearing record, there is no finding that the student was denied a FAPE because the parent did not meet their burden of proof under the IDEA by proving any alleged violation of the IDEA that denied the student a FAPE. And based on the evidence and governing law the hearing officer issues this—

ORDER

1. The parent's 06/25/09, Due Process Complaint ("DPC") in Case No.:
is dismissed, with prejudice—meaning that the issues that were or could have been raised in the 06/25/09 DPC based on the same facts against the same parties or privies that arise from the same time period that formed the basis for the 06/25/09 DPC that is resolved herein by a final judgment on the merits cannot be relitigated. See Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004).
2. There is no finding that the student was denied a FAPE.
3. This Order resolved all issues presented at the 08/25/09 due process hearing that were raised in the student's 06/25/09 Due Process Complaint in Case Number 2009-0943 that is dismissed with prejudice.
4. And the hearing officer made no additional findings.

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

/s/ Frederick E. Woods
Frederick E. Woods
Hearing Officer

August 29, 2009
Date