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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 7/21/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 7/14/11 Room: 2004

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a -year-old female attending the grade at School. The student has been found eligible for special education and related services as a student with the disability classification of multiple disabilities. (R-13) On May 20, 2011 counsel for petitioner filed a due process complaint alleging that DCPS failed to conduct a psychiatric evaluation requested by parent's counsel on October 13, 2010 and failed to conduct an Orientation and Mobility evaluation requested by parent's counsel on October 20, 2010. (P-2) On June 1, 2011 counsel for respondent DCPS filed a response stating that the MDT determined that further evaluations were not necessary. (P-3) On June 23, 2011 counsel for respondent DCPS filed a Motion to Dismiss because the parent did not participate in the resolution meeting scheduled for June 16, 2011. Counsel for the petitioner filed his opposition on June 28, 2011.

[1] Personal identification information is provided in Appendix A.

On July 7, 2011 a prehearing conference was held with counsel for petitioner, Nicholas Ostrem and counsel for respondent DCPS, Harsharen Bhuller. A prehearing Order was issued on July 7, 2011 and an amended prehearing Order was issued on July 8, 2011. The amended prehearing Order stated:

> Counsel for respondent filed a motion to dismiss on June 23, 2011 pursuant to *Section 300.510 (b) (4)* stating: "If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in *Section 300.322 (d)*, the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint." Counsel for respondent asserted that neither the parent nor her counsel appeared for a scheduled June 16, 2011 resolution meeting. On June 28, 2011 counsel for petitioner filed his opposition to the motion to dismiss and stated he was present at the resolution meeting, but the parent could not participate by phone due to technical difficulties. At the June 16, 2011 resolution meeting counsel for petitioner and the DCPS representative agreed to reconvene the resolution meeting. At the prehearing conference counsel for petitioner agreed to attend another resolution meeting with the parent and the date was to be agreed on between counsel. This hearing officer DENIED the motion to dismiss in light of counsel for petitioner's presence at the June 16, 2011 resolution meeting and technical problems for the parent to participate and the agreement to attend another resolution meeting.

A resolution meeting was held on July 8, 2011 and the parties failed to reach an agreement. (P-10) The prehearing Orders stated that the issues to be decided at the due process hearing are: 1. Did DCPS deny a FAPE to the student by failing to perform a psychiatric evaluation requested by counsel for petitioner in a letter of October 13, 2010? 2. Did DCPS deny a FAPE in failing to perform an Orientation and Mobility evaluation requested by counsel for petitioner in a letter of October 20, 2010?

The due process hearing convened at 9 a.m. on July 14, 2011 in Room 2004 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Nicholas Ostrem represented the petitioner and Victoria Healy represented the respondent DCPS. The hearing was closed. At the outset of the hearing, petitioner's documents P-1-P-11 were admitted into

evidence without objection. Counsel for petitioner's Motion to add two disclosures P-10-& P-11 that were ordered as part of the prehearing Order was granted. Respondent's documents R-1-R-13 were admitted into evidence over the objection of counsel for petitioner. Counsel for petitioner objected to DCPS's documents on the grounds of relevance and this hearing officer overruled that objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the educational advocate, Lucretia Bailey, and Dr. Natasha Nelson who both testified by telephone and Dr. Ida Jean Holman, educational advocate, who testified in person. Counsel for respondent did not call any witnesses and rested on her documents.

JURISDICTION

The hearing was convened on July 14 , 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a -year-old female attending the grade at School. The student has been found eligible for special education and related services as a student with the disability classification of multiple disabilities. (R-13) On May 20, 2011 counsel for petitioner filed a due process complaint alleging that DCPS failed to conduct a psychiatric evaluation requested by parent's counsel on October 13, 2010 and failed to conduct an Orientation and Mobility evaluation requested by parent's counsel on October 20, 2010. (P-2) On June 1, 2011 counsel for respondent DCPS filed a response stating that the MDT determined

that further evaluations were not necessary. (P-3) Counsel for respondent argues that the claim for an independent psychiatric evaluation is barred by the terms of the settlement agreement entered on September 29, 2010 by both parties.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student by failing to perform a psychiatric evaluation requested by counsel for petitioner in a letter of October 13, 2010?
2. Did DCPS deny a FAPE to the student by failing to perform an Orientation and Mobility Evaluation requested by counsel for petitioner in a letter of October 20, 2010?

The relief requested is funding of an independent psychiatric evaluation and an independent Orientation and Mobility evaluation.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one the failure to conduct a psychiatric evaluation are as follows:

I.

1. The student is a ·year-old female attending the grade at School. The student has been found eligible for special education and related services as a student with the disability classification of multiple disabilities. (R-13)
2. On February 20, 2010 an independent comprehensive psychological evaluation was conducted on the student by Dr. Natasha Nelson. Dr. Nelson's written report of

March 4, 2010 stated: "A consultation with a psychiatrist is recommended, so that [student] can receive information about the different psychopharmacological interventions available to her in improving upon her current functioning." (P-6 at p.20 #5) Dr. Nelson has not contacted the student since her evaluation on February 20, 2010. (Testimony of Dr. Nelson)

3. On July 9, 2010 an MDT meeting convened for the purpose of reviewing the independent comprehensive psychological evaluation, reviewing and revising the student's IEP, and discussing and determining location of services. The MDT Notes indicate that the school psychologist in reviewing the psychological evaluation stated that the student was formally on medication but was taken off by the parent even though the student showed improvement because the parent believed she was becoming addicted to the medication. The school psychologist stated in the MDT Meeting Notes that the medication is not addictive and suggested the parent consult with a medical professional about the medication and its effects. (R-10 at p.3)
4. On September 29, 2010 a resolution meeting was convened to review the due process complaint filed on September 13, 2010. The resolution meeting notes indicate that counsel for petitioner requested an independent psychiatric evaluation because the independent psychological evaluation recommended a consultation with a psychiatrist. The notes indicate that the school psychologist "stated that a psychiatric evaluation is not going to reveal any information what we don't have academically. The evaluation would provide information about mediation [sic] that could provide some assistance with the student's emotional issues" The school psychologist also stated: " that unless something has changed since the comprehensive psychological

evaluation was completed there would be no new data that would come out of the psychiatric evaluation. It seem [sic] like base [sic] on the information shared with the team today the student is making progress without the completion of the psychiatric evaluation."(R-11 at p.4) The MDT determined that a psychiatric evaluation was not necessary. (R-11)

5. At the September 29, 2010 resolution meeting the petitioner and her counsel reviewed the proposed settlement agreement and agreed to it. (R-11 at p.5, P-1) The settlement agreement authorized the parent to obtain an independent occupational therapy and auditory processing evaluation at DCPS expense and upon receipt of those independent evaluations DCPS would convene an MDT/IEP meeting within 20 business days to review the independent OT and auditory processing evaluation and review and revise the student's IEP if necessary and discuss and determine site location if necessary and discuss compensatory education if warranted. Paragraph 10 of the settlement agreement stated: "This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending Complaint, including those claims under IDEA and Section 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement." (P-1)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two the failure to conduct an Orientation and Mobility evaluation are as follows:

II.

1. On October 20, 2010 counsel for petitioner in a letter requested DCPS to conduct an Orientation and Mobility Evaluation. (P-5)
2. The student has Stickler syndrome that causes her to be near-sighted. (P-7 at p.2) She has limited vision and had cataract surgery and had to re-implant a lens that fell out after a fall in May 2010. (Testimony of Dr. Holman)
3. An independent occupational therapy evaluation stated that the student's classes are on three different levels of the school and she reported "it is difficult for her going up and down the stairs." (P-7 at p.2)
4. An Orientation and Mobility evaluation can help the student travel safely in the school building by helping her understand and orient herself to her school environment. (Testimony of Dr. Holman)
5. At a November 4, 2010 MDT meeting, Dr. Holman requested an Orientation and Mobility Evaluation and the MDT decided against conducting the evaluation. (Testimony of Dr. Holman)
6. The student's IEP calls for a magnifying glass as a classroom accommodation. (R-13 at p.8)

DISCUSSION/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 on issue one:

Counsel for petitioner argues that DCPS denied a FAPE in not conducting a psychiatric evaluation when requested by counsel for petitioner. Counsel for DCPS counters that counsel for petitioner raised this same issue at the September 29, 2010 resolution meeting. After discussion by the MDT on the need for a psychiatric evaluation, the MDT determined that a psychiatric evaluation was not necessary. In a settlement agreement reached on that date all parties agreed that DCPS would only fund independent OT and auditory processing evaluations requested by counsel for petitioner. Paragraph 10 of the settlement agreement states: "This Settlement Agreement is in full satisfaction and settlement of all the claims contained in the pending Complaint, including those claims under IDEA and Section 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement." (See Findings of Fact I. #5) Counsel for DCPS argues that petitioner is barred by the terms of the settlement agreement from re-litigating this issue now.

In D.R. v. East Brunswick Bd. of Educ., 109 F. 3d 896 (3rd Cir. 1997) , the Third Circuit examined a settlement agreement reached by the parties which limited the school district's funding obligations regarding the student's residential placement and concluded it was a binding and enforceable contract, voluntarily entered into by the parties. The Third Circuit held the district court improperly voided that settlement agreement. "Because we conclude that D.R.'s circumstances have not changed and that the settlement agreement is therefore binding on the

parties, we hold that the district court reading of the 'clear and unambiguous" terms of the agreement applies."*Id.* at 902 The Court further noted: "The issue before the district court was change of circumstances; if D.R.'s circumstances had not changed, the agreement would be valid." *Id.* at fn.3 In this case, the student's circumstances have not changed since the settlement agreement was reached. The recommendation for the psychiatric consultation by Dr. Nelson in her independent psychological evaluation of February 20, 2010 was before the settlement agreement. This recommendation in Dr. Nelson's evaluation was considered by the MDT team at the resolution meeting and the MDT determined an independent psychiatric evaluation was not necessary. (See Findings of Fact I. #4) The parties entered a settlement agreement authorizing two other independent assessments requested by counsel for petitioner. Dr. Nelson has not contacted the student since her February 20, 2010 evaluation. (See Findings of Fact I. #2) Counsel for petitioner presented no evidence of a change of circumstances on the psychiatric evaluation issue since the September 29, 2010 settlement agreement.

In *Welsing v. District of Columbia,* 784 F. Supp. 917 (D.D.C. 1992), the Court held that once a party settles a case, that party cannot seek "both the benefit of that settlement and the additional right to maintain an action that arose out of the same nucleus of operative facts. If such an action were to be permitted, the certainty and finality that accompanies a settlement agreement would always be subject to question." (Quoting *Conservative Club of Washington v. Finkelstein*, 738 F. Supp.6, 13 (D.D.C. 1990) A review of the September 29, 2010 settlement agreement also shows it was voluntarily entered into by the parties and is a binding contract between the parties. This hearing officer therefore concludes that the settlement agreement is controlling and agrees with the argument of counsel for respondent DCPS that the claim for a psychiatric evaluation is barred by the terms of that settlement agreement.

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 on issue two:

Counsel for petitioner has met his burden of proof that DCPS denied a FAPE to the student in not conducting an Orientation and Mobility evaluation requested by counsel for petitioner in an October 20, 2010 letter. The student's disability of vision impairment caused by Stickler syndrome has resulted in the student's difficulty in going up and down stairs to her classes that are on three levels. (See Findings of Fact II. #3). The student's counsel and educational advocate requested an Orientation and Mobility evaluation to help the student know her school environment and go from class to class safely. The student's IEP calls for a magnifying class as a classroom accommodation. (See Findings of Fact II. #6) The school has a reasonable basis to suspect that the student's vision loss effects her orientation to the school setting.

Counsel for petitioner has presented through the expert testimony of Dr. Holman that based on the student's vision impairment disability that the student needs an Orientation and Mobility evaluation to assist the student to safely navigate the school setting and have timely access to her educational curriculum. (See Findings of Fact II. #2-#4) Counsel for respondent DCPS has not rebutted this claim. This hearing officer concludes that the failure to conduct the Orientation and Mobility Evaluation "impeded the child's right to a FAPE." *34 C.F.R. Section 300.513 (a)(2)(i).*

ORDER

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

DCPS shall authorize the funding of an independent Orientation and Mobility Evaluation of the student at rates currently set forth in the Chancellor's Directive dated July 18, 2008. DCPS will reimburse reasonable and documented fees if the Orientation and Mobility evaluation is not included in the Chancellor's Directive dated July 18, 2008.

The claim for the independent psychiatric evaluation is DISMISSED based on the terms of the September 29, 2010 settlement agreement.

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: 7/21/11 _____Seymour DuBow /s/_____
Hearing Officer