

**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office for Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
October 15, 2014

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**STUDENT<sup>1</sup>** )  
**through the Parent** )  
 )  
**Petitioner,** )  
 )  
**v.** )  
 )  
**District of Columbia Public Schools** )  
 )  
**Respondent(s).** )  
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**Date Issued: October 15, 2014**

**John Straus, Hearing Officer**

**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the mother of the Student, filed a due process complaint notice on July 25, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that DCPS failed to evaluate Student in all areas of suspected disability when DCPS failed to timely conduct an evaluation within 120 days of Petitioner’s September 20, 2012 request that the Student be evaluated for special education services and three years from the last evaluation of the Student. The Petitioner also alleged that DCPS had failed to develop an Individualized Education Program (“IEP”) and determine a location of services since September 20, 2012 even though the Student was attending a private school. Finally, the Petitioner alleged that DCPS failed to provide Petitioner with a copy of the Student’s educational record since September 20, 2010 within 45 days of parent’s written request for records on September 20, 2012.

DCPS denied that Student was denied a FAPE. DCPS argued the guiding provision of Child Find for students’ who are parentally placed in nonpublic schools under the IDEA, makes no mention of the reevaluation provision. However, the student has already been found to be eligible for special education services. Therefore, DCPS’s obligations under Child Find have been fulfilled. Unless a parent makes clear an intent to return the student to the LEA in which

<sup>1</sup> Personally identifiable information is provided in Appendix A.

the private school child resides, that LEA is not required to provide services. Finally, DCPS will provide a copy of the requested records.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on July 25, 2014. The case was originally assigned to Hearing Officer Edwards on July 29, 2014. This Hearing Officer was assigned to the case on August 21, 2014. DCPS timely filed a response to the complaint on August 7, 2014 and made no challenges to jurisdiction.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on August 15, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on August 24, 2014, the 45-day timeline to issue a final decision began on August 25, 2014. A prehearing conference took place on August 27, 2014. A Prehearing Order was issued on September 24, 2014. On August 28, 2014, DCPS filed a motion to continue in order for parties to accommodate the various schedule conflicts and continue working on possible resolution outside of the hearing. The Hearing Officer agreed to the consent motion and the final decision was due by October 18, 2014.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

The Petitioner’s Disclosure Statement, filed and served on September 29, 2014, consisted of a witness list of five (5) witnesses and documents P-01 through P-20. The Petitioner’s documents P-1 through P-3, P-5, P-6, P-10 through P-12, P-13-2, and P-20 were admitted into evidence over objection. Petitioner’s documents P-7, P-13-1 and P-13-3 through P-13-6 were withdrawn by the Petitioner when DCPS objected to them and Petitioner’s documents P-15 through P-18 were excluded by the Hearing Officer when DCPS objected to them. All other documents presented by the Petitioner were admitted into evidence without objection. DCPS initially objected to Petitioner’s documents P-4 and P-8 but withdrew its objection at the outset of the hearing. DCPS’ Disclosure Statement, filed and served on September 29, 2014, consisted of a witness list of four (4) witnesses and documents R-1 through R-3. DCPS’ documents were admitted in to evidence without objection.

The Petitioner presented the following three witnesses in her case in chief: (1) the Petitioner, (2) the Student and (3) an Educational Advocate. DCPS presented two witnesses:

(1) Case Manager, DCPS Private and Religious Schools ("PRO") office; and (2) Special Education Coordinator ("SEC") Education Campus.

The issues to be determined in this Hearing Officer Determination are as follows:

1. Whether Respondent denied Student a FAPE by failing to timely conduct a psychoeducational assessment, vocational assessment and social history assessment within 120 days of Petitioner's request on September 20, 2012 that the Student be evaluated for special education services and three years from the last evaluation of the student.
2. Whether Respondent denied Student a FAPE by failing to develop an IEP since the Spring of 2012 for the parent to review even though Student was attending a private school.
3. Whether DCPS denied Student a FAPE by failing to provide Petitioner with a copy of any DCPS PRO records and cumulative and special education files since September 20, 2010 within 45 days of parent's written request on September 20, 2012 for a copy of Student's complete educational record.

The Petitioner requested the following relief:

- (1) DCPS to conduct assessments consisting of psychoeducational assessment, vocational assessment and social history within 30 days from the issuance of the HOD and
- (2) Within 10 days of the completion of the last of the assessments, Respondent to convene a meeting to review the assessments, and develop the Student's education plan.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact<sup>2</sup> are as follows:

1. The Student is a resident of the District of Columbia. The Petitioner is the Student's mother.<sup>3</sup>
2. The Student attended Public Charter School during the 2008-2009 and 2009-2010 school years for fifth and sixth grade. In 2009, the IEP team determined the student was a

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>3</sup> Petitioner

student with an Other Health Impairment under the IDEA. On June 15, 2010, the IEP team reviewed and revised the student's IEP.<sup>4</sup>

3. The Student attended Education Campus during the 2010-2011 school year for 7th grade.<sup>5</sup> On March 22, 2011, the IEP team at Education Campus reviewed and revised the student's IEP goals. The team determined the student required three hours per week of specialized instruction outside general education.<sup>6</sup>
4. The Student was enrolled by the Petitioner in a private middle school on August 18, 2011 for 8<sup>th</sup> grade year through the DC opportunity scholarship program. She then was enrolled in private high school through the DC opportunity scholarship program at the beginning of the 2012-2013 school year for 9<sup>th</sup> grade. She has remained at private high school since her enrollment at the beginning of the 2012-2013 school year and is now in the 11<sup>th</sup> grade.<sup>7</sup>
5. The Student received the following grade while enrolled in private high school

2012-2013 school year

Algebra 1	D
Algebra 1 Lab	C
Art Appreciation	A
Seminar	F
Catholicism	D
Conceptual Physics	F
English 1	F
Intro Technology/Applications	C
Women's PE 1	A

2013-2014 school year

Biology	F
Christ: Mission, Church, Sacr.	F
Conceptual Physics SS	F
English 1 SS	B
Geometry	D
Health and Wellness	D
Literacy Analysis 10	F
Literacy Analysis 10 SS	C

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<sup>4</sup> P-4, Petitioner

<sup>5</sup> Petitioner

<sup>6</sup> P-4

<sup>7</sup> Petitioner, R-2

Math Problem Solving	B+
Textual Analysis 2 LIS	B
World History	F <sup>8</sup>

6. The Petitioner was concerned about the Student's grades. On September 14, 2012, the parent contacted the DCPS PRO to request a new IEP for the student.<sup>9</sup>
7. The Petitioner retained counsel. On September 20, 2012, the Petitioner, through her counsel, made a request, via faxed letter, to have the student evaluated for special education services and requested a copy of the student's educational records. The request was sent to the DCPS Office for Special Education Services, DCPS Office of the Legal Counsel and the Private High School.<sup>10</sup>
8. On July 2, 2014, the Petitioner, through counsel, made a second request for the Student's records, via faxed letter, to Private High School and PRO.<sup>11</sup>
9. Private High School developed a Catholic Accommodations Plan for the student based on the March 22, 2011 IEP.<sup>12</sup>
10. According to the PRO office, the procedure for evaluating student's attending private schools in the District of Columbia whose parent's request an evaluation to determine eligibility for special education services is to convene a meeting to determine the assessments necessary for the evaluation. Conduct the assessments and reconvene a meeting to review the assessments. If eligible, develop an IEP for the student to be implemented at a DCPS school or Individual Services Plan ("ISP") for the student to be implemented at the private school. If a parent whose student has an IEP but is attending a private school and wants to enroll the student in the neighborhood school, the PRO would conduct assessments and develop a new IEP if the student has not yet enrolled in the neighborhood school.<sup>13</sup>
11. The Petitioner has considered enrolling the Student in public school in order to receive special education services.<sup>14</sup>
12. The Petitioner has all the Student's education records.<sup>15</sup>

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<sup>8</sup> P-11

<sup>9</sup> Petitioner

<sup>10</sup> P-9

<sup>11</sup> P-8

<sup>12</sup> P-10

<sup>13</sup> Case Manager

<sup>14</sup> Petitioner, Student

### 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:

"Based solely upon 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 with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A parent may file a due process complaint on any of the matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to a student. 34 C.F.R. § 300.513(a). The due process hearing procedures are set for in 34 C.F.R. §§ 300.504 through 300.519.

**DCPS did not deny Student a FAPE by failing to timely conduct a psychoeducational assessment, vocational assessment and social history assessment within 120 days of Petitioner's request on September 20, 2012 that the Student be evaluated for special education services and three years from the last evaluation of the student.**

Pursuant to 34 C.F.R. § 300.303(a), DCPS must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests an evaluation. Additionally, pursuant to 34 C.F.R. § 300.303(b) a reevaluation must occur at least once every 3 years, unless the parent and DCPS agree that a reevaluation is unnecessary.

In this case, the last evaluation was completed in 2009; therefore, pursuant to 34 C.F.R. § 300.303(b), the Student should have been reevaluated in 2012.<sup>16</sup> Furthermore, the Petitioner made a request for an evaluation on September 20, 2012. Therefore, pursuant to 34 C.F.R. § 300.303(a) and D.C. Official Code § 38-2561.02, the assessments should have been completed no later than January 18, 2013 if they were completed 120 days from the request for evaluations.

However, in this case, the Student was enrolled by the Petitioner in private schools since August 18, 2011. The applicable regulations regarding students who are parentally placed in private schools are set forth in 34 C.F.R. §§ 300.129 through 300.144. Pursuant to 34 C.F.R. § 300.140(a), except child find complaints, due process under 34 C.F.R. §§ 300.504 through 300.519 is not applicable to students who are parentally placed in private schools except for child find issues. *See* 34 C.F.R. § 300.301. Furthermore, pursuant to 34 C.F.R. § 300.137(a), no parentally placed private child with a disability has an individual right to receive some or all of

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<sup>15</sup> Petitioner

<sup>16</sup> There is nothing in the record indicating the date on which the student was evaluated in 2009.

the special education and related services that the child would receive if enrolled in a public school.

The Petitioner argues that *District of Columbia v. Wolfire*, 62 IDELR 198 (D.D.C. 2014) is applicable. *Wolfire* states when a student with a disability is parentally placed in a private school, the LEA “must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher.” However, *Wolfire* is not applicable because it refers to 20 U.S.C. § 1412(a)(3)(A) which is the statutory framework for child find. See *Wolfire*, 62 IDELR 198 (D.D.C. 2014).

Here, the student has already been found to be eligible for special education services and DCPS’s obligations under Child Find have been fulfilled. Therefore, the DCPS did not deny the student a FAPE by not completing a psychoeducational assessment, vocational assessment and social history assessment.

**DCPS did not deny Student a FAPE by failing to develop an IEP since the Spring of 2012 for the parent to review even though Student was attending a private school**

The Petitioner relies on *Wolfire supra* to argue that DCPS is obligated to develop an IEP for the student. In *Wolfire*, the court stated that a central requirement of the IDEA is that the district in which a student with disabilities resides must offer that student FAPE which entitles each student with a disability to an IEP that is designed to meet his or her specialized educational needs. The district must develop an IEP so the parents can see what the district's offer of FAPE will entail. Because the parents here asked the district to develop an IEP, the district had to document the services it was offering to provide.<sup>17</sup>

In this case, the facts are significantly different from *Wolfire*. Unlike *Wolfire*, DCPS did develop an IEP on March 22, 2011. The Petitioner argues that the student’s IEP “expired” on March 22, 2012. This is not the case. Pursuant to 34 C.F.R. § 300.324(b)(1), DCPS must ensure that the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate the results of any reevaluation conducted, information about the child provided to, or by, the parents regarding the child's anticipated needs; or other matters. While DCPS has a procedural obligation to review and revise the students IEP on an annual

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<sup>17</sup> In *Wolfire*, the District of Columbia violated the IDEA when it failed to develop an IEP for a parentally placed private school student who had never attended its schools. Explaining that the district had an obligation to make FAPE available at the parents' request, the U.S. District Court, District of Columbia upheld an administrative decision in the parents' favor. U.S. District Judge Amy Berman Jackson rejected the notion that developing an IEP was tantamount to providing the student FAPE. The judge pointed out that the IDEA requires districts to make FAPE available to all resident students with disabilities -- including those not enrolled in the public school system. As such, the parents' request for an evaluation and IEP required the district to make FAPE available to the student. "So, as there is no requirement that a child be currently enrolled in a public school to be entitled to a FAPE offer, similarly there is no requirement that the child be currently enrolled in a public school in order to trigger the [district's] obligation to develop an IEP for that child," Judge Jackson wrote.

basis, there is nothing in the IDEA that states the IEP “expires” if the IEP team does not review or revise the IEP.

In this case, because the parent unilaterally placed the student in a private school, DCPS has no occasion to implement the student’s IEP goals so that DCPS cannot determine whether the student is making progress on his goals, there are no assessments for the IEP team to review and the only anticipated need presented by the Petitioner was compensatory education which is not applicable in this case.<sup>18</sup> Therefore, the Hearing Officer finds the IEP team had no reason to review or revise the student’s current IEP even though it was developed on March 11, 2011.

IDEA requires that each public agency must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a). Here, the Petitioner and Student both testified that they are considering enrollment in the student’s neighborhood school. Under *Wolfire*, the Petitioner has a right to know the contents of the IEP before enrolling in the neighborhood school. If they do that, DCPS is obligated to implement the student’s March 11, 2011 IEP at the student’s neighborhood school. The Petitioner can make an informed decision regarding DCPS offer of FAPE pursuant to *Wolfire* because DCPS is required to implement the March 11, 2011 IEP. Therefore, DCPS did not deny the student a FAPE by failing to develop an IEP since the Spring of 2012 for the parent to review even though Student was attending a private school.

**DCPS did not deny Student a FAPE by failing to provide Petitioner with a copy of any DCPS PRO records and cumulative and special education files since September 20, 2010 within 45 days of parent’s written request on September 20, 2012 for a copy of Student’s complete educational record**

Pursuant to 34 C.F.R. § 300.501(a), the parents of a child with a disability must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Furthermore, pursuant to 34 C.F.R. § 300.613(a) DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. DCPS must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing or resolution session and in no case more than 45 days after the request has been made.

In this case, the only IEP disclosed by either party was the March 22, 2011 IEP. That IEP refers to previous IEP and suggests that assessments were conducted to determine eligibility for special education services. There were no assessment reports disclosed. However, the Petitioner provided compelling testimony that she did have all of the student’s educational

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<sup>18</sup> See *Phillips ex rel. T.P. v. District of Columbia*, 110 LRP 51586 (D.D.C. 2010). In *Phillips*, the court found the purpose of compensatory education is to make up for any deficiencies resulting from a district’s denial of FAPE. As such, calculating an award of compensatory services requires consideration of a student’s current educational needs. In this case, there is no finding of a denial of FAPE. Although DCPS made FAPR available, the Petitioner elected not to accept DCPS’s offer of FAPE.

records. Therefore, DCPS did not deny Student a FAPE by failing to provide Petitioner with a copy of any DCPS PRO records and cumulative and special education files since September 20, 2010 within 45 days of parent's written request on September 20, 2012 for a copy of Student's complete educational record.

### **Conclusion**

This case differs significantly from *Wolfire* in that *Wolfire* involved initial evaluations and initial IEPs while this case involves reevaluations and reviewing and revising IEPs. The Petitioner's reliance on *Wolfire* is misplaced. Therefore, the Petitioner did not meet her burden on the issues in her complaint. However, the Petitioner is not without recourse. If she enrolls the student in the neighborhood school, she may receive all of legal rights afforded to her under the IDEA.

### **ORDER**

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

The complaint is DISMISSED with prejudice.

All requested relief is denied.

**SO ORDERED.**

### **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 U.S.C. §1415(i).

Date: October 12, 2014

/s/ John Straus

Hearing Officer