

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
June 26, 2015

STUDENT, ¹)	Date Issued: 6/25/15
through his Parent,)	
Petitioner,)	Case No.: 2015-0140
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates and Rooms:
("DCPS"),)	6/8/15 in 2006, 6/11/15 in 2006
Respondent.)	
)	Counsel of Record:
)	Roberta Gambale, Esq.
)	William Jaffe, Esq.
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, filed a due process complaint on 4/15/15, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS did not fully implement Student’s Individualized Education Program (“IEP”) during the 2014/15 school year and did not comprehensively evaluate Student. DCPS responded that it did implement Student’s IEP and is currently conducting additional evaluations as requested, and in any case Student is doing well and suffered no educational harm.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 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.

Hearing Officer Determination

Case No. 2015-0140

Procedural History

Following the filing of the due process complaint on 4/15/15, this Hearing Officer was assigned to the case on 4/17/15. DCPS's timely response to the complaint was filed on 4/17/15 and did not challenge jurisdiction.

The resolution session meeting ("RSM") took place on 5/11/15, at which time the parties did not resolve the case or end the resolution period. The 30-day resolution period ended on 5/15/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 6/29/15.

The due process hearing, which was closed to the public, took place on 6/8/15 and 6/11/15. Petitioner was represented by Roberta Gambale, Esq. DCPS was represented by William Jaffe, Esq. Counsel did not discuss settlement at the beginning of the hearing. Petitioner was present for the first day of hearing, but not the short second day.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on only one stipulation: "At the RSM, the School agreed to complete the requested evaluations (OT, Speech, and auditory processing). The School stated that the Psychological evaluation was already ordered and will be completed prior to the other evaluations."

Petitioner's Disclosure statement, submitted on 5/29/15, consisted of a witness list of 2 witnesses and documents P1 through P37. Petitioner's Disclosure statement and documents were admitted into evidence without objection.

Respondent's Disclosure statement, submitted on 6/1/15, consisted of a witness list of 7 witnesses and documents R1 through R12. Respondent's Disclosure statement and documents were admitted into evidence without objection.

Petitioner's counsel presented 2 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Parent
2. Consultant – qualified over objection as an expert in Special Education Instruction and Procedures

Respondent's counsel presented 2 witnesses in Respondent's case (*see* Appendix A):

1. Managing Director
2. Compliance Manager

Petitioner presented no rebuttal witnesses.

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

Hearing Officer Determination

Case No. 2015-0140

Issue 1: Whether Charter School denied Student a FAPE by failing to fully implement Student's IEP during the 2014/15 school year, where Student is (a) not receiving his 4 hours of specialized instruction per week in an out of general education setting and any pull-out that is occurring is not with special education students and a special education teacher, and (b) not receiving his 4.5 hours per week of push-in instruction from a special education teacher, except for two weeks from the special education coordinator.

Issue 2: Whether Charter School denied Student a FAPE by failing to comprehensively evaluate Student by not conducting the following evaluations: (a) comprehensive psychological, including clinical measures, (b) speech and language, (c) auditory processing, and (d) occupational therapy. Several of these evaluations were previously recommended but never conducted, while the comprehensive psychological evaluation was agreed to but is not being carried out as quickly as it should be.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE by DCPS/Charter School.
2. DCPS/Charter School shall immediately begin implementing Student's IEP by providing 4 hours per week of specialized instruction outside general education and 4.5 hours per week of push-in services in the general education classroom, all to be provided by special education teachers.
3. DCPS/Charter School shall fund the following independent evaluations of Student: (a) comprehensive psychological, (b) speech and language, (c) auditory processing, and (d) occupational therapy.
4. DCPS/Charter School shall convene an IEP meeting within 15 days of receiving the evaluations in the previous paragraph, review the evaluations, and modify Student's IEP as needed.
5. DCPS/Charter School shall fund compensatory education² for any denial of FAPE from the beginning of the 2014/15 school year.

² As stated in the Prehearing Order in this case, so far as Petitioner's request for compensatory education depended on the findings of evaluations to be completed in the future, that portion of the compensatory education claim would be reserved pending the completion of Student's evaluations and a determination of any eligibility for additional special education services.

With regard to any remaining request for compensatory education, Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered

Hearing Officer Determination

Case No. 2015-0140

6. Any other just and reasonable relief.

Oral closing arguments were made by counsel for both parties at the end of the due process hearing.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's mother ("Parent").⁴ Student is ■ years old and in 6th grade at Charter School,⁵ where he began in Kindergarten.⁶

2. Student received a Psychological Evaluation in 2009 and was found eligible for special education services as a student with a Specific Learning Disability, which has been his disability characterization since that time.⁷

3. Student was initially given 1 hour of specialized instruction inside general education and 1 hour outside. That was increased to 2 hours inside and 2 hours outside, and further increased on 10/10/12 to 4.5 hours inside and 4 hours outside.⁸ Student's hours of specialized instruction have remained constant since 10/10/12.⁹ On 3/30/15, the IEP team prepared a draft IEP proposing to reduce Student's hours of specialized instruction by about a third, but it was not finalized and no change was made.¹⁰

4. Student received a Speech Language Initial Evaluation, dated 6/1/09, which found some weaknesses, but no "*disabling* communication disorder."¹¹ The speech language

the alleged denial of FAPE. Respondent was put on notice that it should be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

³ 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.

⁴ Parent.

⁵ DCPS is the Local Education Agency ("LEA") for Charter School.

⁶ Parent.

⁷ P25-3; R-4.

⁸ P30-4; P30-9.

⁹ P23-4; P21-6; R4-6.

¹⁰ P9-7; Compliance Manager.

¹¹ P27-5 (emphasis in original).

Hearing Officer Determination

Case No. 2015-0140

evaluator believed Student's "communication skills should be monitored closely by school staff and the speech language pathologist."¹²

5. On 10/19/09, Student's Multidisciplinary Team ("MDT") made 3 recommendations: First, that Student "be assessed for phonological awareness and auditory processing as an addendum to the speech-language report."¹³ Second, that Student "be assessed by an Occupational Therapist for a Visual Perception."¹⁴ Finally, the team recommended a social-emotional evaluation out of concerns about "his attention and social emotional issues."¹⁵ The team's Meeting Notes concluded that the "team agreed to conduct an OT [occupational therapy] evaluation, a clinical evaluation with an ADHD screener, and speech language addendum."¹⁶ These evaluations were never conducted.¹⁷

6. On 1/13/15, Parent's counsel formally requested a comprehensive psychological reevaluation.¹⁸ DCPS agreed to conduct the comprehensive psychological reevaluation, promising on 3/30/15 to have it completed in 45 days, which would have been 5/14/15, 121 days from when it was requested on 1/13/15.¹⁹ However, the comprehensive psychological reevaluation was not completed as promised and had not been completed by the due process hearing on 6/11/15, although its completion was expected in the not too distant future.²⁰

7. Based largely on the 10/19/09 MDT recommendations, on 1/29/15 Parent's counsel requested a speech-language reevaluation and an occupational therapy evaluation.²¹ Student's MDT team concluded on 3/30/15 that there was no need for any evaluations other than the pending comprehensive psychological reevaluation and rejected the request of Parent's counsel.²² However, at the RSM on 5/11/15, Respondent agreed to conduct the requested evaluations.²³ Completion of these evaluations was not close at the time of the due process hearing on 6/11/15.²⁴

8. Charter School came to the 3/30/15 meeting prepared to discuss Student's IEP, but Parent needed to wait to have the IEP discussion until the reevaluations were available.²⁵

¹² P27-5.

¹³ P24-1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ P25-4.

¹⁷ P1-3; Parent.

¹⁸ P2-1.

¹⁹ P6-4; R8-1; Hearing Officer calculation.

²⁰ Compliance Manager.

²¹ P1-3.

²² P4-2; R5-5; R3-4.

²³ R12-2.

²⁴ Compliance Manager.

²⁵ *Id.*

Hearing Officer Determination

Case No. 2015-0140

9. To address his vision, Student previously received glasses and has been accommodated by being able to sit closer to the board in the classroom to be able to see.²⁶ However, Student has been diagnosed with Duane Syndrome Type I, which impacts eye movement, as Parent reported to the MDT team.²⁷

10. Student was receiving specialized instruction both in general education and outside general education from Special Education Teacher for the last couple of years, but that ended sometime before Christmas 2014, without any notice to Parent.²⁸ Special Education Teacher was reassigned in November 2014 due to other teachers going on maternity leave, which caused the resources of Charter School to be stretched thin.²⁹ Student began having problems and becoming more frustrated after the Christmas break without Special Education Teacher.³⁰

11. Student received 2 hours per week of LLI reading intervention from Science Teacher, with 2 other children.³¹ Science Teacher is not a special education teacher, but received training in LLI instruction.³² While the other two children in Student's reading group did not have IEPs, they were at RTI Tier 3 and receiving services similar to special education and were on Student's academic level in Reading.³³

12. Student received 45-minutes of instruction, in a program called Climbing the Mountain, 3 days a week in a small group from New Teacher and previously from Math Teacher.³⁴ Neither New Teacher nor Math Teacher is a special education teacher.³⁵ Student's small group consisted of other children who are not all special education students.³⁶ The other children are on a similar academic level to Student and either have an IEP or are "intervention" students.³⁷

13. In charter schools, OSSE permits general education teachers, who are not certified in special education, to teach special education pull-out sessions, as long as they are not giving grades.³⁸

²⁶ P30-8.

²⁷ P30-8; Parent.

²⁸ Parent.

²⁹ Managing Director; Compliance Manager.

³⁰ Parent.

³¹ R12-2; P4-1; Parent.

³² P4-1; P6-2; R12-2; Parent; Managing Director.

³³ Managing Director.

³⁴ P4-1; P6-2; Parent.

³⁵ *Id.*

³⁶ P5-1; Parent.

³⁷ Compliance Manager.

³⁸ R12-2; Managing Director.

Hearing Officer Determination

Case No. 2015-0140

14. Student was receiving no more than “consultative” services from the single teacher in the general education classroom from November 2014, when Special Education Teacher was moved and no longer providing services to Student, until Charter School realized that Student was not receiving his required services and Compliance Manager began providing push-in specialized instruction for Student in mid-March 2015.³⁹

15. Student missed his push-in services and felt that his teacher was ignoring him, causing frustration.⁴⁰ Student regularly asked for assistance in class, but was not receiving help; teacher would often promise to come back to Student, but would run out of time at the end of class.⁴¹ Student called Math Teacher on the telephone for help after school so often that it seemed Math Teacher was getting frustrated with Student.⁴²

16. Student often becomes frustrated if he cannot understand and “shuts down.”⁴³ When Student feels his teachers are not helping him, he also “shuts down.”⁴⁴

17. Testing revealed that Student slipped a little academically from Spring 2014 to Winter 2015, dropping in percentile rank from 34 to 29 in Mathematics and from 60 to 52 in Reading.⁴⁵

18. Student made little progress in Reading in the 2014/15 school year, as he was at level Q in May 2014 and then did not progress beyond level R until late March 2015.⁴⁶ To be on grade level, Student should have been at level U or above at the beginning of the 2014/15 school year.⁴⁷

19. On the other hand, Student’s trend lines since Fall 2010 have generally been positive, catching up to or exceeding the averages in his grade.⁴⁸ Further, Student’s ANet scores indicate that he was making progress in catching up to his peers between Advisory 2 and 3.⁴⁹

20. Student’s grades in the 2014/15 school year have been an A, B+, B-, B- in Advisory 2 and an A, B+, B-, C+ in Advisory 3.⁵⁰

³⁹ Compliance Manager; Parent; P4-1.

⁴⁰ P6-1; Parent.

⁴¹ Parent.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ P17-1; R5-2,3.

⁴⁶ P4-1; R4-5; R5-4.

⁴⁷ P4-1; P16-1.

⁴⁸ P17-2.

⁴⁹ R3-2.

⁵⁰ R11.

Hearing Officer Determination

Case No. 2015-0140

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 14-7086, 2015 WL 3371818, at *1 (D.C. Cir. May 26, 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

The IEP is "the 'centerpiece' of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing a FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

To provide a FAPE, once a child who may need special education services is identified, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer

Hearing Officer Determination

Case No. 2015-0140

may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

“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-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether Charter School denied Student a FAPE by failing to fully implement Student's IEP during the 2014/15 school year, where Student is (a) not receiving his 4 hours of specialized instruction per week in an out of general education setting and any pull-out that is occurring is not with special education students and a special education teacher, and (b) not receiving his 4.5 hours per week of push-in instruction from a special education teacher, except for two weeks from the special education coordinator.*

Petitioner met her burden of proof as to the failure of Charter School to provide 4.5 hours per week of specialized instruction inside general education (“push-in” services), but not as to the 4 hours per week of specialized instruction outside general education (“pull-out” services). For the reasons discussed below, this Hearing Officer concludes that the lack of push-in services for Student was a denial of FAPE.

The IDEA is violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

The uncontroverted evidence in this case was that after Special Education Teacher was reassigned in November 2014, there was no one available to provide push-in services to Student. Instead, it fell to the lone general education teacher in the classroom to attempt to assist Student by providing “consultative” services on an as-needed basis, while also teaching the rest of the class. No evidence was provided about whether Student actually received any extra attention from the teacher, much less 4.5 hours per week of specialized instruction while in the general education classroom. This Hearing Officer concludes that having only a single teacher in the general education classroom without another teacher to provide specialized instruction cannot and did not satisfy the requirement of Student's IEP

Hearing Officer Determination

Case No. 2015-0140

for 4.5 hours per week of push-in services. Indeed, in *Turner*, 952 F. Supp. 2d at 41-42, not only was the general education teacher not sufficient to provide push-in services, but a “paraprofessional in special education” was not sufficient either. For Student, the failure of Charter School to provide push-in services began in November 2014 when Special Education Teacher was reassigned and ended in mid-May 2015 once Charter School realized that Student was not receiving his required push-in services and Compliance Manager began working with Student.

On the other hand, there was evidence that Student was being pulled out of general education for two small groups that totaled a little over 4 hours per week, with 2 hours of LLI reading intervention and somewhat over 2 hours in a program called Climbing the Mountain. Petitioner raised serious issues about whether these small groups constituted specialized instruction as required by Student’s IEP, due to the teachers not being special education teachers and the other students in the small groups not all having IEPs. *See* 34 C.F.R. 300.39(b)(3) (specially designed instruction must be adapted to the unique needs of the child). However, this Hearing Officer was not persuaded by a preponderance of the evidence that Charter School failed to meet the requirements of Student’s IEP for pull-out services. First, Respondent asserted without contradiction or rebuttal – both at the RSM and in testimony on the first day of the due process hearing – that OSSE permits general education teachers to teach special education pull-out sessions, as long as they are not giving grades. Second, the evidence was that the other children in Student’s small groups were at a similar academic level to Student, and that even if they did not have IEPs they were very close to needing IEPs, so were a good fit to receive instruction with Student in the pull-out groups. It would elevate form over substance to find a compatible small group to be a failure to comply with the pull-out requirement of Student’s IEP and a substantive denial of FAPE, which this Hearing Officer declines to do.

When there is a material violation of an IEP, as occurred with Student’s push-in services, no educational harm need be shown. Contrary to DCPS’s arguments, decent grades and progress by Student are not defenses. *See Walker v. Dist. of Columbia*, 2014 WL 3883308, at *5 (D.D.C. 2014) (materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail”); *Turner*, 952 F. Supp. 2d at 40 (“[s]ignificantly, a plaintiff does not have to prove a resulting harm caused by the failure to implement”), *quoting Wilson*, 770 F. Supp. 2d at 275. Here, moreover, there was harm, as Student was frustrated and “shut down” when he was not able to understand the materials and when he was not able to get assistance from the teacher in the general education classroom.

Clearly, this is not a case of Charter School missing a few minutes of services here or there, which might be excused as a “minor discrepancy,” *Van Duyn*, 502 F.3d at 822. Here, just as in *Turner*, 952 F. Supp. 2d at 40-41, there was a “total lack of special education support within the general education environment” as required by Student’s IEP, which this Hearing Officer concludes was a denial of FAPE. The appropriate remedy for the lack of push-in services is discussed in the Compensatory Education section below.

Hearing Officer Determination

Case No. 2015-0140

Issue 2: *Whether Charter School denied Student a FAPE by failing to comprehensively evaluate Student by not conducting the following evaluations: (a) comprehensive psychological, including clinical measures, (b) speech and language, (c) auditory processing, and (d) occupational therapy. Several of these evaluations were previously recommended but never conducted, while the comprehensive psychological evaluation was agreed to but is not being carried out as quickly as it should be.*

Petitioner has met her burden of proof on the issue of Respondent's delays in completing requested reevaluations,⁵¹ which this Hearing Officer concludes is a substantive violation, although the remedy is both reserved and circumscribed as discussed below.

Around the time of his initial evaluation, Student's MDT team agreed to conduct additional evaluations ("OT evaluation, a clinical evaluation with an ADHD screener, and speech language addendum") on 10/19/09, but for some reason they were not carried out. Petitioner does not now assert claims based on the failure to conduct those evaluations in 2009, and does not claim that there was any other request for evaluations prior to January 2015. On 1/13/15, however, Parent's counsel formally requested a comprehensive psychological reevaluation, which DCPS agreed to conduct and promised on 3/30/15 to complete in 45 days, or by 5/14/15, just over 120 days from when it was requested. While reevaluations certainly should take less than 120 days, the comprehensive psychological reevaluation was not completed as promised and had not been completed even by the due process hearing on 6/11/15.

Further, on 1/29/15 Parent's counsel requested a speech-language evaluation and an occupational therapy evaluation, based in large measure on the MDT recommendations in 2009. However, Student's current MDT team concluded on 3/30/15 that there was no need for any evaluations (other than the pending comprehensive psychological) and rejected the request. Nonetheless, at the 5/11/15 RSM, Respondent agreed to conduct "OT, Speech, and auditory processing" evaluations, but completion appeared to not be close at the time of the due process hearing on 6/11/15.

The IDEA requires that a public agency must ensure that reevaluations are conducted when the child's parent requests them, although not more than once a year unless the parent and public agency agree. 34 C.F.R. 300.303. Once a reevaluation has been requested, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the child's parents, identify what additional

⁵¹ Because Student was initially evaluated and determined eligible for special education services in 2009, Parent's subsequent requests for evaluations are deemed requests for reevaluations. *See, e.g., Smith v. Dist. of Columbia*, 2010 WL 4861757, at *3 (D.D.C. 2010); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46640 (August 14, 2006) ("[o]nce a child has been fully evaluated [the 'initial evaluation'], a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation").

Hearing Officer Determination

Case No. 2015-0140

data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. 34 C.F.R. 300.305(a). The public agency must ensure that the child is “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. 300.304(c)(4). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993). Here, the evaluations had been previously selected by Student’s MDT team itself, so were not unreasonable for Parent to request.

The IDEA does not set a time frame within which a public agency must conduct a reevaluation after receiving a request from a child’s parent, although it is clearly less than the 120 days that the District of Columbia provides for an initial evaluation. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at *3 (D.D.C. 2010) (120-day period for initial evaluations does not apply to reevaluations), *quoting Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). Lacking statutory guidance, *Herbin* concluded that “[r]eevaluations should be conducted in a ‘reasonable period of time,’ or ‘without undue delay,’ as determined in each individual case.” *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). Here, Respondent clearly is late, as more than 120 days had already passed from the date of the requests to the date of the hearing. While Respondent suggested it needed 45 days for the comprehensive psychological reevaluation, this Hearing Officer uses 60 days as a reasonable measure for completing reevaluations and holding an IEP meeting.

Respondent’s failure to conduct timely reevaluations is a procedural violation of the IDEA. However, an IDEA claim is viable only if the procedural violation affected Student’s substantive rights, such as depriving Student of an educational benefit or significantly impeding Parent’s opportunity to participate in decision-making. 34 C.F.R. 300.513(a). Here, if the reevaluations had been completed within 60 days, they would have been available for consideration at the 3/30/15 IEP meeting, at which Parent was unwilling to discuss changes to Student’s IEP because the reevaluations were not available. The timely availability of the reevaluations would have allowed Parent’s participation in decision-making and may well have resulted in immediate modification of Student’s IEP. This Hearing Officer concludes that the lateness of the reevaluations was a significant impediment to Parent’s participation in the 3/30/15 IEP meeting and thus an actionable violation of the IDEA.

However, any remedy for this violation must be reserved until after the reevaluations are completed. As discussed during the 5/13/15 Prehearing Conference and confirmed in the 5/13/15 Prehearing Order, since Petitioner’s request for compensatory education relating to delay in reevaluating Student depends on the findings of reevaluations that had not been completed prior to the due process hearing, that portion of the compensatory education claim must be reserved until the reevaluations are completed and a determination of

Hearing Officer Determination

Case No. 2015-0140

Student's eligibility for any additional special education services has been made. Moreover, any future calculation of compensatory education is to be limited in duration to the period beginning 60 days from the date of request and ending on the date that Student's IEP team meets to review the reevaluations and modify his IEP as needed.⁵²

Compensatory Education Request

Petitioner seeks an award of compensatory education to compensate for the denial of FAPE in the 2014/15 school year. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. The proper amount of compensatory education, if any, depends on how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

The challenge of determining what additional educational benefits would have accrued, if Charter School had provided Student specialized instruction inside general education for four months in the 2014/15 school year, does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, it appears that Student missed approximately 70 to 85 hours of specialized instruction inside general education during the period from November 2014 to mid-March 2015 (at 4.5 hours per week), which is not mechanically applied to reach an award but provides a helpful starting point. This Hearing Officer is mindful of Student's reasonably good grades along with the worsening of his standardized test ranking. Careful consideration is also given to other relevant factors, including the benefit of one-on-one tutoring compared to push-in services when Student does not understand his lessons in the classroom, the Compensatory Education Proposal (proportionately reduced based on the conclusions herein) and testimony of Consultant, the testimony of other witnesses, and other documents admitted into evidence. This Hearing Officer concludes that Student did not make as much progress as he would have in Reading and Math with appropriate specialized

⁵² Specifically, any compensatory education relating to the comprehensive psychological reevaluation is limited to the period from 3/14/15 (which is 60 days after the 1/13/15 request) until the date of the IEP meeting ordered below, and (b) any compensatory education relating to the remaining reevaluations (OT, Speech, and auditory processing) is to be limited to the period from 3/30/15 (which is 60 days after the 1/29/15 request) until the date of the IEP meeting ordered below.

Hearing Officer Determination

Case No. 2015-0140

instruction on a consistent push-in basis. Such support would have carried out the goals of Student's IEP and reduced his frustrations. Considering the equities in an exercise of broad discretion, this Hearing Officer concludes that 45 hours of one-on-one academic tutoring is appropriate to restore Student to the level he should have achieved but for the denial of FAPE.

ORDER

Petitioner has met her burden of proof on certain issues, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Respondent shall provide a letter of funding within 15 days for independent compensatory education consisting of 45 hours of one-on-one tutoring in academic subjects.
- (2) Respondent shall complete the pending evaluations (comprehensive psychological, OT, Speech, and auditory processing) within 30 days and shall convene an IEP meeting within 15 days after receiving the last evaluation, review the evaluations, and modify Student's IEP as needed.
- (3) Compensatory education based on the pending evaluations is **reserved**, with (a) any compensatory education relating to the comprehensive psychological evaluation to be limited to the period from 3/14/15 until the date of the IEP meeting held pursuant to the previous paragraph, and (b) any compensatory education relating to the remaining evaluations (OT, Speech, and auditory processing) to be limited to the period from 3/30/15 until the date of the IEP meeting held pursuant to the previous paragraph.
- (4) Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

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).

Copies to:

Hearing Officer Determination

Case No. 2015-0140

Counsel of Record (above, by email)

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