

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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Student Hearing Office  
March 18, 2014

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: March 15, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: March 4, 2014

Student Hearing Office,  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA ), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not conducting a triennial reevaluation in March 2013, by not providing Student an

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<sup>1</sup> Personal identification information is provided in Appendix A.

appropriate Individualized Education Program (IEP) in December 2013 and by not implementing Student's IEP in the current school year.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's due process complaint, filed on December 13, 2013, named DCPS as respondent. On December 30, 2013, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters and I issued my Prehearing Order on the same day. The parties met for a resolution session on January 27, 2014 and did not reach an agreement. The original 45-day time limit for issuance of the Hearing Officer Determination in this case started on January 13, 2014. The due process hearing was scheduled for February 13, 2014, but was postponed because the Student Hearing Office was closed for inclement weather. On February 21, 2014, the Chief Hearing Officer granted Petitioner's unopposed request for an 18-day continuance, in order to reschedule the hearing to a date when counsel and the Hearing Officer were all available. The due date for this Hearing Officer Determination is now March 16, 2014.

The due process hearing was convened before me on March 4, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Counsel for both parties made opening and closing statements. MOTHER testified and called as witnesses, EDUCATIONAL CONSULTANT and NONPUBLIC SCHOOL DIRECTOR OF ADMISSIONS. DCPS called as witnesses, SPECIAL EDUCATION TEACHER 1, SPECIAL EDUCATION TEACHER 2 and SCHOOL

PSYCHOLOGIST. Petitioner's Exhibits P-1 through P-14 and DCPS' Exhibits R-1 through R-15 were admitted into evidence without objection. Neither party requested leave to file a post-hearing memorandum.

### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The issues to be determined in this case and relief sought are:

Whether Student's IEP developed on December 5, 2013 is inappropriate because it does not meet her alleged need for full-time, outside of general education, special education services;

Whether DCPS has denied Student a FAPE by failing to implement her January 10, 2013 IEP since the beginning of the 2013-2014 school year; and

Whether DCPS has denied Student a FAPE by failing to conduct a triennial reevaluation since March of 2010.

For relief, Petitioner seeks an order for DCPS to fund Student's nonpublic placement in a full-time special education program, for DCPS to pay for an Independent Educational Evaluation (IEE) comprehensive psychological reevaluation of Student, and an award of compensatory education services as compensation for DCPS' alleged failure to provide appropriate IEP services to Student and for its alleged failure to implement her IEP from the first day of the 2013-2014 school year.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student resides with Mother in the District of Columbia. Testimony of Mother. She is a "child with a disability" in need of special education and related

services as defined by the IDEA. Student's primary disability classification is Specific Learning Disability (SLD). Exhibit R-10.

2. Student was first determined eligible for special education and related services when she was in the third grade at CITY ELEMENTARY SCHOOL. Since the 2012-2013 school year, Student has attended CITY MIDDLE SCHOOL. Testimony of Mother.

3. DCPS conducted an educational evaluation and a psychological evaluation of Student in February and March 2010. Exhibits R-13 and R-14. Student's continued eligibility for special education, as a child with an SLD, was determined on May 10, 2010. Exhibit R-12. An eligibility reevaluation of Student was conducted on January 10, 2013 at City Middle School. Mother attended the eligibility meeting. The eligibility team discussed teachers' concerns, current data concerning Student, Student's grades and School Psychologist's Analysis of Existing Data. The eligibility team determined it had sufficient existing data to confirm Student's continued special education eligibility under the primary disability classification SLD. There was no discussion at the meeting about conducting additional assessments. Testimony of School Psychologist, Exhibits R-10 and R-11. Mother testified that she did not recall participating in the eligibility meeting on January 10, 2013. However, she acknowledged attending the IEP meeting, which followed the eligibility meeting, on the same day. Testimony of Mother, Exhibit P-1. To the extent there is a conflict in Mother's and School Psychologist's testimony over whether Student's eligibility team met on January 10, 2013, I find School Psychologist's testimony to be more credible.

4. Student's IEP team met at City Middle School on January 10, 2013. The IEP team identified Mathematics and Reading as areas of concern for Student. The

January 10, 2013 IEP provided Student ten hours per week of Specialized Instruction services in the General Education setting. Exhibit P-1.

5. Student's IEP Progress Reports for the third and fourth reporting periods of the 2012-2013 school year reported that Student was progressing on all of her IEP goals. Exhibit R-8. For her final grades for the 2012-2013 school year, Student received B's in all core courses. Exhibit R-7. Over the 2012-2013 school year, on District of Columbia Comprehensive Assessment System (DC-CAS) testing, Student progressed from Below Basic to Basic in Reading and also improved in Math. Exhibit R-9.

6. On an August 29, 2013 Scholastic Reading Inventory (SRI) classroom reading test, Student obtained a score of 677, which was some 90 points below the Grade Mean of 768. Exhibit R-5. (Grade Mean is the average score for all students in the same grade.) On the Paced Interim Assessment (PIA) for Math, administered December 13, 2013, Student scored 24%, 10 percent behind the 34% average for her class. Exhibits P-8, R-8.

7. During the 2013-2014 school year, Special Education Teacher 1 provided Student the majority of her Specialized Instruction services in math. Special Education Teacher 1 co-teaches in Student's mathematics class. The class operates on a blended-learning model and the regular education teacher and Special Education Teacher 1 divide the class into smaller groups. Student is usually in Special Education Teacher 1's small group for mathematics. Testimony of Special Education Teacher 1.

8. Special Education Teacher 2 provides English Language Arts (ELA) instruction to Student. Special Education Teacher 2 co-teaches with the general education teacher in Student's ELA class. As needed, Special Education Teacher 2 provides pull-out targeted instruction. Student receives reading instruction from

another teacher using the READ 180 program. Testimony of Special Education Teacher 2.

9. At the end of the 2013-2014 school year second reporting period (ending January 24, 2014), Student was reported as Progressing on all of her IEP goals except for identification of constant of proportionality (unit rate), which Student was reported to have Mastered. Exhibit R-4. For the second term, Student received B's and C's in all of her courses, except for an A in Computer Applications. Exhibit R-3. For the proceeding first term, Student had received an F in Mathematics and D's in English and World History. Exhibit R-3. That term, in math, Student was only completing about one-half of her assigned homework. By the second term, she improved in homework completion and earned higher scores on quizzes and tests. Testimony of Special Education Teacher 1.

10. Special Education Teacher 2 observed that this school year, Student has progressed academically. Her Scholastic Reading Inventory (SRI) has improved. Her writing level has gone from 1 to about 2, on a 1 to 4 scale. Student's social interaction in class has also improved. Testimony of Special Education Teacher 2.

11. On December 5, 2013, Student's IEP team at City Middle School met to review her IEP. Mother felt that Student needed a full-time, outside of General Education placement. The school team members felt that Student was demonstrating adequate growth with the Specialized Instruction services and accommodations she was receiving under the January 10, 2013 IEP. Testimony of Special Education Teacher 1. The IEP team continued Student's IEP Specialized Instruction services at ten hours per week, in the General Education setting. Exhibit P-2.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact and oral argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

### Analysis

1. Has DCPS denied Student a FAPE by failing to conduct a triennial reevaluations since March of 2010?

Petitioner claims that DCPS has denied Student a FAPE by failing to conduct a special education eligibility reevaluation since March of 2010. DCPS maintains that it conducted a timely triennial reevaluation in January 2013. The IDEA requires that a reevaluation of each child with a disability is conducted at least once every three years and sooner, if the child's parent or teacher requests a reevaluation or if the LEA determines that the needs of the child warrant a reevaluation. *See* 34 CFR § 300.303. Based on their review of the existing data, and input from the child's parents, the eligibility group must decide, on a case-by-case basis, depending on the needs of the child and the information available regarding the child, what additional data, if any, are needed to determine whether the child is a child with a disability, and the educational needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46658 (August 14, 2006). On January 10,

2013, DCPS convened a triennial eligibility determination meeting for Student. Mother attended the meeting. The eligibility team discussed teachers' concerns, current data concerning Student, Student's grades and School Psychologist's Analysis of Existing Data. At the due process hearing in this case, Petitioner's Counsel examined School Psychologist on DCPS' decision not to conduct new assessments of Student. School Psychologist confirmed that the January 10, 2013 eligibility team determined it had sufficient data. There was no contrary evidence that the existing data was not sufficient or that Mother or any teacher requested additional assessments. Student's prior reevaluation had been conducted on May 10, 2010. Therefore, I find that Mother has not shown that DCPS' January 10, 2013 reevaluation of Student was not timely or that the team lacked sufficient data to determine Student's continued eligibility and her educational needs.

2. Has DCPS denied Student a FAPE by failing to implement her January 10, 2013 IEP since the beginning of the 2013-2014 school year?

Student's January 10, 2013 IEP required DCPS to provide Student ten hours per week of Specialized Instruction in the General Education, inclusion, setting. Mother contends that during the 2013-2014 school year, DCPS failed to provide these services to Student, until she raised concerns at the December 5, 2013 IEP meeting. Mother apparently was told by Student that she was not receiving special education services. Special Education Teacher 1 and Special Education Teacher 2 testified that they had provided Specialized Instruction services to Student in her regular education classroom, but they may not have identified themselves as special education teachers. Special Education Teacher 2 testified that he began providing specialized instruction to Student in mid-October 2013 and that he replaced FORMER CASE MANAGER, who provided

services earlier in the school year. Mother conceded in her testimony that it was possible that Student had, in fact, received inclusion Specialized Instruction services in the regular education classroom, as the special education teachers testified. I find that Mother has not proven, by a preponderance of the evidence, that DCPS has not provided Specialized Instruction services to Student, pursuant to her IEP, during the 2013-2014 school year.

3. Is DCPS' December 5, 2013 IEP inappropriate because it does not meet Student's alleged need for full-time, outside of general education, special education services?

Petitioner contends that DCPS' current, December 5, 2013, IEP, which provides Student 10 hours per week of Specialized Instruction in the General Education setting, is inappropriate because Student requires a full-time, outside of general education, placement. DCPS responds that the IEP, which continues the level of services from Student's January 10, 2013 IEP, meet's Students educational needs. In *K.S. v. District of Columbia*, 2013 WL 4506969 (D.D.C. Aug. 26, 2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034 (1982). IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a "basic floor of opportunity" for students, *Rowley* 458 U.S. at 201, rather than "a potential-maximizing education." *Id.* at 197 n. 21, 102 S.Ct. 3034; see also *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be "more appropriate or better able to serve the child") (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee "the best possible education, nor one that will maximize the student's educational potential"; instead, it requires only that the benefit "cannot be a mere modicum or *de minimis*; rather,

an IEP must be likely to produce progress, not regression or trivial educational advancement.’ ”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so”; thus, “the court judges the IEP prospectively and looks to the IEP’s goals and methodology at the time of its implementation.” Report<sup>2</sup> at 11 (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). Academic progress under a prior plan may be relevant in determining the appropriateness of a challenged IEP. See *Roark ex rel. Roark v. Dist. of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C.2006) (“Academic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’ ”) (quoting *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir.2003)); *Hunter v. Dist. of Columbia*, No. 07–695, 2008 WL 4307492, at \*9 (D.D.C. Sept. 17, 2008) (citing cases with same holding). . . .

*K.S.*, 2013 WL 4506969 at 3-5; See also *D.S. v. Hawaii*, No. 11–161, 2011 WL 6819060, at \*10 (D.Haw. Dec. 27, 2011) (“[T]hroughout the proceedings, Mother has sought, as all good parents do, to secure the best services for her child. The role of the district court in IDEA appeals, however, is not to determine whether an educational agency offered the best services, but whether the services offered confer the child with a meaningful benefit.”)

Parent’s expert, Educational Consultant, opined that the December 5, 2013 IEP was not appropriate for Student because Student has tested below grade level, especially in reading and mathematics. On an August 29, 2013 Scholastic Reading Inventory (SRI) classroom reading test, Student obtained a score of 677, which was some 90 points below the Grade Mean of 768. (Grade Mean is the average score for all students in the same grade.) On the Paced Interim Assessment (PIA) for Math, Student most recently

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<sup>2</sup> U.S. Magistrate Judge Kay’s Report and Recommendation, June 10, 2013

scored 24%, 10 percent behind the 34% average for her class. I did not find Educational Consultant's opinion to be persuasive. She admitted in her testimony that she was not familiar with PIA assessments, which she relied upon for her opinion about Student's achievement levels in math. More significantly, by focusing on Student's grade level equivalency, rather than on whether Student has made academic progress, Educational Consultant misapprehends the requirements of the IDEA. *See Jefferson County Bd. of Educ. v. Lolita S.*, 2013 WL 5519656 (N.D.Ala.2013) (“[A] court does not measure FAPE by whether the student progresses on schedule to the next grade level, although whether he receives passing grades and, thus, progresses from grade to grade is one important factor, among many, that the hearing officer and court view in determining whether the IEP was reasonably calculated to provide a meaningful educational benefit.” *Id.* at 18-19 (citing *Rowley*, 458 U.S. at 207 & n. 28, 102 S.Ct. 3034.))

Here the evidence establishes that Student was able to make academic progress under the January 10, 2013 IEP, which provided Student 10 hours per week of Specialized Instruction, all in the General Education setting. Educational Consultant agreed that Student had progressed from first to third grade level in Reading over the 2012-2013 school year and improved to just below grade level by August 2013. This school year, after a slow start in Term 1, when Student was not completing her homework, Student's core subject grades for Term 2 were B's and C's. Notably, from Term 1 to Term 2, her math grade rose from F to B and English and World History both improved from D to C. Student's math special education teacher testified that Student has made progress in Term 2, in which she had a “huge upswing” in productivity and homework. Student's ELA special education teacher testified that he was seeing progress in Student this school year, noting improvements in her SRI score, writing

ability and social interaction in class. Because the evidence establishes that Student received educational benefit under the January 10, 2013 IEP, and the December 5, 2013 IEP maintains the same level of services, I find that the December 5, 2013 IEP was reasonably calculated to enable Student to receive educational benefits. *See Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C.2006) (Academic success is an important factor in determining whether an IEP is reasonably calculated to provide education benefits;) *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 81 (D.D.C.2004) (Academic progress is strong, though not probative, evidence that an IEP provides educational benefit.)

I further find that Petitioner's contention that Student requires a full-time special education placement in a nonpublic school is not supported by the evidence. The IDEA requires that children with disabilities be placed in the least restrictive environment possible. *See, e.g., J.N. v. District of Columbia*, 677 F.Supp.2d 314, 324 (D.D.C.2010) (IDEA requires school districts to place disabled children in the least restrictive environment possible;) *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 (D.D.C.2012) (Given Congress's preference for inclusion-based education, Plaintiffs must show that a non-general education is appropriate.) Because the evidence establishes that Student has been able to receive educational benefits in the General Education setting at City Middle School, it follows that a full-time special education placement is not the least restrictive environment for Student.

#### ORDER

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

All relief requested by the Petitioner herein is denied.

Date: March 15, 2014

s/ Peter B. Vaden  
Peter B. Vaden, 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).