

**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  
June 20, 2013

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

Date Issued: June 20, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: May 1, 2013; June 11, 2013

Respondent.

Student Hearing Office, Rooms 2009, 2003  
Washington, D.C.

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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”) has denied Student a Free Appropriate Public Education (“FAPE”) by failing, prior to February 2013, to identify and evaluate her as a potential child with a disability.

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

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 26, 2013, named DCPS as respondent. The case was originally assigned to former Impartial Hearing Officer Virginia Dietrich. The original complaint included a discipline issue, which Hearing Officer Dietrich ordered bifurcated to be heard separately as expedited Case No. [redacted]. -B. On March 8, 2013, Petitioner withdrew her claim in Case No. [redacted] and the expedited case was dismissed. Case No. [redacted] was reassigned to the undersigned Hearing Officer on March 26, 2013. The parties met for a resolution session on March 13, 2013 and were unable to reach an agreement. On April 1, 2013, this Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On April 17, 2013, Petitioner filed a motion for summary judgment that DCPS had violated its "child-find" obligation under the IDEA by failing to evaluate Student for eligibility for special education and related services within the time frame required by the IDEA and District of Columbia law. DCPS timely filed a response in opposition to the motion. By order of April 23, 2013, I denied Petitioner's motion for summary judgment.

When the parties convened for the due process hearing on May 1, 2013, Student's initial eligibility evaluations were then under way. Petitioner requested a continuance until June 21, 2013 to allow sufficient time to reconvene the hearing, after the evaluations were completed and Student's eligibility for special education services had been determined. On May 10, 2013, the Chief Hearing Officer granted Petitioner's continuance request. The deadline for issuance of this decision was extended to June 21, 2013.

The due process hearing was reconvened before the undersigned Impartial Hearing Officer on June 11, 2013 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. Respondent DCPS was represented by DCPS COUNSEL.

Petitioner testified and called as witnesses, Student, COMMUNITY SOCIAL WORKER (“CSW”) and DIRECTOR of READING CENTER. DCPS called, as its only witness, RESOLUTION SPECIALIST. Petitioner’s Exhibits P-1 through P-23 were admitted into evidence without objection. DCPS’ Exhibits R-1 through R-17 were admitted without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made closing statements. 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**

As of the continued hearing date, June 11, 2013, the only issue remaining for determination was:

- Whether DCPS has violated the IDEA child find requirement by failing to timely identify and evaluate Student as a potential child with a disability.

For relief, the Petitioner seeks an award of compensatory education for DCPS’ delay in providing special education and related services to Student.

### **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, an AGE young woman, resides with Mother in the District of Columbia.

Testimony of Student.

2. On May 6, 2013, Student was, for the first time, determined by DCPS to be eligible for special education and related services, under the primary disability classification, Multiple Disabilities (“MD”) based upon the impairments, Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”). Exhibit P-22.

3. Student’s school problems started in middle school. Testimony of Mother. In the 2010-2011 school year, when Student was attending CITY HIGH SCHOOL, Student got into fights, ran away from home, was arrested and became involved with the juvenile justice system. Testimony of Mother, Exhibit P-1.

4. Following a conviction for assault on March 9, 2011, Student was referred by the Superior Court of the District of Columbia for a pre-disposition psychological evaluation. The court-appointed evaluator administered a series of cognitive, achievement, and emotional/behavioral tests. In her April 10, 2011 report, the evaluator concluded that Student has a Low Average full scale IQ, with more advanced non-verbal skills than verbal reasoning ability and overall Limited to Average academic proficiency. The emotional/behavioral test results suggested that Student suffered from Depressive Disorder – Not Otherwise Specified, which was characterized by acting-out behaviors, such as being disruptive in class, getting into fights and defiance. The evaluator diagnosed Student with Depressive Disorder – Not Otherwise Specified, Reading Disorder, Mathematics Disorder, and Mixed Receptive-Expressive Language Disorder. The evaluator recommended, *inter alia*, that Student receive a Speech-Language evaluation to assess her current level of expressive and receptive language functioning, and that Student may benefit from special education services and having an IEP. Exhibit P-1.

5. On May 4, 2011, COURT-APPOINTED ATTORNEY provided, by facsimile, a copy of the April 10, 2011 Psychological Evaluation report to PRINCIPAL of City High School.

Court-Appointed Attorney informed Principal, *inter alia*, that Petitioner requested that the school convene a meeting to determine whether Student should be evaluated, to formally determine whether she qualified for special education services. Exhibit P-2. Court-Appointed Attorney sent a follow-up letter to Principal on May 16, 2011, in which she again requested that the school convene a meeting to determine whether Student should be further tested to determine whether she qualified for special education services. Exhibit P-3.

6. On July 25, 2011, Petitioner and Court-Appointed Attorney met with SPECIAL EDUCATION COORDINATOR at City High School regarding Petitioner's request that Student be evaluated. As of October 5, 2011, Special Education Coordinator had not provided any information or updates to Court-Appointed Attorney about the evaluation request. Exhibit P-4. Prior to February 2013, when Petitioner filed her complaint in this case, DCPS did not evaluate Student for special education eligibility. Testimony of Mother.

7. Student has an extremely poor class attendance record at City High School. In the 2011-2012 school year, she had 328 unexcused class absences. Exhibit R-10. Student was absent from school, following the birth of her son, from November 4, 2011 through the end of January 2012. Testimony of Student. In the 2012-2013 school year, she had 247 unexcused class absences. Exhibit R-8.

8. In February 2013, following a disciplinary suspension of Student from City High School, Petitioner's Counsel contacted Principal and the school's current special education coordinator to again request that Student be evaluated for special education eligibility. Exhibit P-5.

9. On February 19, 2013, City High School scheduled a Student Support Team ("SST") meeting for Student designed to problem-solve on how to assist Student to be more

successful in school. The SST meeting was held on February 22, 2013 and was attended by Petitioner, Student and Petitioner's Counsel. At this meeting, Petitioner again requested that Student be evaluated for special education. Exhibit P-12. Student was then referred for special education eligibility evaluations. Exhibit R-11

10. On February 26, 2013, Petitioner filed her due process complaint in the present case.

11. On March 27, 2013, DCPS PSYCHOLOGIST conducted a psychological evaluation of Student. DCPS Psychologist administered a battery of cognitive and academic achievement tests to Student. He also had Mother and Student's teachers complete social-emotional functioning questionnaires. DCPS Psychologist concluded that Student showed mild deficits in overall development of general intelligence. He reported that, overall, Student's academic skills were limited. Her sight reading ability, math calculation skill, and spelling were limited. The overall fluency with which Student performs academic tasks was limited. Specifically, her fluency with reading and writing tasks was limited to average. Her fluency with mathematics problems was limited. Her overall ability to apply her academic skills was limited. Her writing ability was limited to average. Her passage comprehension ability was limited. Student's quantitative reasoning was very limited. When compared to the scores earned by others at her age level, Student's overall level of achievement was low. Her fluency with academic tasks was within the low average range. Her ability to apply academic skills was within the low range. When compared to others at her age level, Student's standard scores were low average in broad reading, brief reading, written expression, and brief writing. Her brief mathematics and broad written language scores were in the low range. Her standard scores were very low (compared to age peers) in broad mathematics and math calculation skills. When scores

for a selected set of her achievement areas were compared, Student demonstrated a significant weakness in broad mathematics. Exhibit R-3.

12. DCPS Psychologist reported that information from Mother and Student's teachers indicated that Student exhibited emotional-behavioral issues. Student's scores on the Behavior Assessment System for Children, Second Edition (BASC-2), Parent and Teacher Rating Scale - Adolescent, fell in the Clinically Significant classification range scale for Hyperactivity, Aggression, Depression, and Attention Problems. Student has significant difficulty maintaining necessary levels of attention at school. The problems experienced by Student are probably interfering with academic performance and her functioning in other areas. Student has significant difficulty comprehending and completing schoolwork in a variety of academic areas. She has difficulty maintaining necessary levels of attention at school. DCPS Psychologist concluded that the problems experienced by Student might disrupt academic performance and functioning in other areas, that Student demonstrates poor expressive and receptive communication skills, and that she has difficulty seeking out and finding information on her own. He reported that Student's behaviors have been documented on numerous occasions at home and school, and that, based on previous reports, these behaviors have exhibited over years. Exhibit R-3.

13. DCPS Psychologist concluded that Student meets the IDEA disability criteria for MD, with Emotional Disturbance ("ED") as the primary impairment and Other Health Impairment - (possible Attention Deficit Hyperactivity Disorder) secondary. Exhibit R-3.

14. Reading Center administered aptitude and achievement tests to Student on April 19, 2013. Student scored at the 2.6 grade equivalent on the Woodcock Reading Master Test, 3.8 grade equivalent on the Slosson Oral Reading Test, 4.7 grade equivalent on the Wide Range

Achievement Test (“WRAT”) for spelling, 3.7 grade equivalent on the WRAT for math, and 3.5 grade equivalent on the Gray Oral Reading Test. On the Gray Oral Reading Test 4, Student tested at 6.4 grade equivalent for rate, 4.0 for accuracy, 4.7 for fluency and 10.7 for comprehension. Exhibit P-20.

15. DCPS administered a Speech/Language Evaluation to Student on May 28, 2013. DCPS’ Speech/Language Pathologist concluded that Student’s strengths are voice, fluency, articulation, pragmatics and overall language skills. Her weakness is vocabulary, which affects her ability to identify target synonyms and use appropriate words to complete sentences. Although Student’s vocabulary skills are low, she understands meanings of words in context and non-literal language. She also has good syntactic skills. She appropriately constructs sentences and identifies word relationships. Student’s language weaknesses are identifying synonyms and comprehending sentences. Exhibit R-2.

16. At a June 6, 2013 IEP meeting, Student’s IEP team developed an initial IEP for her that provided for 10 hours per week of Specialized Instruction and 30 minutes per week of Behavioral Support Services, all in the general education setting. Exhibit P-22.

17. On June 6, 2013, in an endeavor to resolve this case, DCPS authorized Student to obtain, at DCPS expense, 30 hours of tutoring and 30 hours of behavior support from independent providers. In addition to the letter authorization for services, DCPS also provided Student a laptop computer and a software voucher. The parties did not conclude a settlement agreement because Petitioner’s Counsel was not satisfied with provision for attorney’s fees. Exhibit P-23, Testimony of Resolution Specialist.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact and 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 normally 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

DID DCPS VIOLATE THE IDEA'S CHILD FIND REQUIREMENT BY FAILING TO TIMELY IDENTIFY AND EVALUATE STUDENT AS A POTENTIAL CHILD WITH A DISABILITY?

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). The District must “ensure that ‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’ ” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (citing *id.*); 20 U.S.C. § 1412(a)(3). Under the IDEA's child-find requirements, “[a]s soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the child's eligibility for special education services “within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment.” *Id.* (quoting D.C.Code § 38–2561.02(a)). Once the

eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia* 2013 WL 620379, 5-6 (D.D.C. Feb. 20, 2013).

In this case, Student was referred to the District for an assessment, and the 120-day evaluation period began to run on May 4, 2011, the date that Court-Appointed Attorney forwarded the April 10, 2011 court-ordered psychological evaluation to City High School Principal and requested that Student be evaluated for special education eligibility. DCPS had until September 1, 2011 to evaluate Student and to make an eligibility determination. Confirmation that Student does have a qualifying disability – MD – was finally made by DCPS Psychologist on April 19, 2013. As DCPS Psychologist reported, Student’s behaviors underlying her MD disability classification “have exhibited over years” based upon previous reports and evaluations. DCPS did not determine that Student was eligible until May 6, 2013.

The failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE. *N.G. v. District of Columbia* 556 F.Supp.2d 11, 16 (D.D.C. 2008). In this case, DCPS’ delaying evaluation of Student’s special education eligibility deprived her of access to special education services for almost two entire school years. DCPS’ defaulting on its “statutory obligations” in this manner, therefore, denied Student her substantive right to a FAPE. *See, G.G., supra* at 16.N.G., 556 F.Supp.2d at 39. Petitioner prevails on this issue.

#### Remedy – Compensatory Education

Petitioner seeks an award of compensatory education to compensate Student for DCPS’ failure to provide her a Free Appropriate Public Education since she was referred for evaluation in 2011. Once a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those

compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if she had received the required special education services and the type and amount of services that would place the child in the same position she would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, *supra*, 401 F.3d at 518.)

Allowing DCPS the full 120 days to evaluate Student after Court-Appointed Attorney's May 4, 2011 special education referral, *see* D.C. Code § 38-2561.02(a), and an additional 30 days to develop the initial IEP, DCPS should have been providing special education and related services to Student at least since October 2011. DCPS' failure to offer special education services to Student until June 6, 2013 was a denial of FAPE and Student is entitled to a compensatory education award. At the due process hearing, Petitioner called Reading Center Director to provide evidence on where Student was academically as compared to where she should be; the number of hours of compensatory education needed; and what program would get the student where she should be. Reading Center Director testified that the center's testing showed Student's actual grade level equivalents in reading, spelling and mathematic are years behind Student's current GRADE at City High School. Director recommended that Student would benefit from 4 hours per day of 1:1 instruction at the Reading Center, 5 days per week, for 22-24 weeks, to begin to close that academic gap. I found Reading Center Director to be a

credible witness. Her testimony did not answer the question of how much more progress Student might have shown if DCPS had provided her special education services beginning in October 2011. However, Petitioner is not required “to have a perfect case to be entitled to compensatory education.” *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (citations omitted.)

DCPS argues that Student must share the blame for her academic deficit because of her abysmal school attendance record, including several months absence from school following the birth of Student’s son in November 2011. *See, e.g., Reid, supra* at 524 (Equity may sometimes require consideration of the parties’ conduct.) I find this argument unpersuasive. The evidence in this case establishes that Student’s MD disability has been a major factor in her poor school attendance. For example, DCPS Psychologist reported that Student’s emotional-behavioral problems interfere with her academic performance and functioning in other areas. An appropriate and timely-implemented IEP would have targeted Student’s class attendance issues. *See, e.g., Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18, 34 (D.Me.2005) (IEP, which failed to address in some fashion student’s persistent absence and tardiness, could not be “adequate and appropriate.”) *Cf. Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (DCPS’ failure to complete a Functional Behavioral Assessment and Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE.)

DCPS has now developed an IEP for Student which should be implemented at City High School at the beginning of the 2013-2014 school year. (The appropriateness of this IEP is not an issue before the Hearing Officer.) Although I found Reading Center Director to be a credible witness, implementing her recommendation that Student receive 22-24 weeks of intensive 1:1 instruction at the Reading Center would be problematical, if Student is to remain enrolled at City

High School, the least restrictive educational environment for her. *See, e.g., A.M. v. District of Columbia*, 2013 WL 1248999, 13 (D.D.C.Mar. 28, 2013) (Both the IDEA and the District’s regulations express a preference—indeed a requirement—that the student be educated in the least restrictive environment.) I conclude that Student would not be likely to continue to receive educational benefit from a 4-hour per day program at the Reading Center, while, concurrently, attending City High School under her new IEP. *See Reid*, *supra*, 401 F.3d at 525. (Compensatory education must compensate for prior FAPE denials in addition to providing some benefit going forward.) Accordingly, I will order DCPS to fund Student’s 1:1 program at Reading Center, but only until the beginning of the 2013-2014 school year.

#### ORDER

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

1. As compensatory education for DCPS’ failure to provide FAPE to Student beginning in the 2011-2012 school year, DCPS is ordered to fund Student’s 1:1 instruction at Reading Center for four hours per day, five days per week, on the Reading Center’s summer schedule, up to DCPS’ first day of school on August 26, 2013. Student’s instruction at Reading Center shall begin within 5 work days of this order, or the earliest date thereafter that Reading Center is able to program Student. DCPS shall provide daily school transportation for Student to and from the Reading Center;

2. The foregoing compensatory education award shall be provided by DCPS instead of – not in addition to – the independent tutoring, behavior support and laptop with voucher previously offered by DCPS to Student per its June 6, 2013 letter authorization. DCPS may require Petitioner to return the independent instruction authorization and/or laptop with voucher as a condition to Student’s receiving DCPS funding for compensatory education instruction at

Reading Center; and

3. All other relief requested by the Petitioner in this matter is denied.

Date: June 20, 2013

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).