DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

ADULT STUDENT,[1] Petitioner, v. District of Columbia Public Schools ("DCPS"), Respondent.	)	Hearing Officer: Keith L. Seat, Esq.

HEARING OFFICER DETERMINATION

Background

Petitioner, an adult Student, filed a due process complaint on 2/2/15, alleging that he had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because DCPS (a) did not evaluate him in all areas of suspected disability and failed to provide services to address all areas of need during the years 2001 to 2009 when he received some special education services, (b) inappropriately removed him from special education services in 2009, and (c) did not later evaluate and find him eligible for special education services in periods since 2009 and ending on or about 10/15/14, when Student was incarcerated in federal prison. DCPS responded that the claims were baseless due to the statute of limitations and the steps taken to evaluate Petitioner in the Fall of 2014.

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.

Procedural History

Following the filing of the due process complaint on 2/2/15, another Hearing Officer was initially assigned to the case on 2/3/15; the case was reassigned to this Hearing Officer on 2/10/15. DCPS's timely response to the complaint was filed on 2/3/15, which also asserted that the complaint was insufficient pursuant to 34 C.F.R. 508(d). On 2/8/15, the initial Hearing Officer issued an Order on Respondent's Notice of Insufficiency holding that the complaint does meet the sufficiency requirements. DCPS filed an amended response on 2/10/15, and with leave granted at the prehearing conferences, DCPS filed a second amended response after close of business on 3/10/15.

The resolution meeting took place on 3/10/15, but the parties did not resolve the case. The 30-day resolution period ended on 3/4/15. 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 4/18/15.

Prehearing conferences were held by telephone on 2/24/15 and 3/10/15. A Prehearing Order was issued on 3/11/15 and a Revised Prehearing Order was issued on 3/12/15.

The due process hearing, which was closed to the public, took place on 3/20/15.

Counsel declined to discuss settlement at the beginning of the hearing. Petitioner was present for the entire hearing.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on just one stipulation, which was that: "Student did not attend a DCPS school from about 3/29/09 through June 2011 and DCPS was not responsible as the Local Education Agency ('LEA') during that time period."

Petitioner's Disclosure statement, submitted on 3/16/15 (by agreement of the parties), consisted of a witness list of 8 witnesses and documents P1 through P41. Petitioner's Disclosure statement and documents were admitted into evidence without objection.

Respondent's Disclosure statement, submitted on 3/16/15 (by agreement of the parties), consisted of a witness list of 3 witnesses and documents R1 through R22. Respondent's documents were admitted into evidence without objection, and a written objection to 2 of the witnesses was reserved until they testified, but Respondent chose not to present any witnesses, so there was no ruling on the objection.

Petitioner's counsel presented 5 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Clinical Psychologist 1 – qualified without objection as an expert in Clinical Psychology

2. Petitioner

3. Clinical Psychologist 2 – qualified without objection as an expert in Clinical Neuropsychology

4. GED Instructor

5. Director of Residential Services ("Director")

Respondent's counsel presented no witnesses in its case.

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

Issue 1: Whether DCPS denied Student a FAPE from 2001 through 2009 by failing to evaluate Student in all areas of suspected disability despite repeated requests from Parent, and/or by failing to provide services to address all areas of need, when DCPS failed to: (a) provide homework packets and related services in 2001 during a 5-month hospitalization during a sickle cell crisis, requiring Student to repeat 2d grade; (b) conduct triennial evaluations; (c) review and revise Student's IEP annually; (d) provide counseling as required by Student's IEP; and (e) address Student's ADHD, sickle cell anemia, and Specific Learning Disorder. In addition, whether exceptions to the statute of limitations apply because DCPS made specific misrepresentations to Parent about what it was doing for Student, and withheld from Parent required information on procedural rights.

Issue 2: Whether DCPS denied Student a FAPE from 3/4/09 forward by improperly removing him from special education at an eligibility meeting on or about 3/4/09, when DCPS (a) relied on but misconstrued a court-ordered evaluation dated 12/9/08 which should have resulted in additional services, (b) ignored DCPS evaluations dated 12/16/08, (c) failed to ensure that Student and/or his Parent were at the 3/4/09 meeting, and (d) returned Student to a Student Support Team rather than continue to provide special education services as needed. In addition, whether exceptions to the statute of limitations apply because DCPS made specific misrepresentations about the 12/9/08 evaluation, did not provide prior written notice about its decision to remove Student from special education services and to change his eligibility, and failed to provide procedural safeguards.

Issue 3: Whether DCPS denied Student a FAPE from the beginning of the 2011/12 school year[2] to July 2014 by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine eligibility for special education, when it should have been apparent from Student's (a) behavior, (b) failing grades, (c) hospitalization due to sickle cell anemia, and (d) case file that Student required special education services. In addition, whether the statute of limitations does not bar Student's claim prior to 2/2/13 because he was a ward of D.C. and homeless, but was not appointed a surrogate as required to protect his educational rights, and DCPS did not provide prior written notice about its decision not to evaluate Student and failed to provide procedural safeguards.

[2] All dates in the format "2011/12" refer to school years.

Issue 4: Whether DCPS denied Student a FAPE from July 2014 to 10/15/14 by failing to provide any special educational services during the time Student was incarcerated in the D.C. Jail, despite repeated requests by Juvenile and Special Education Law Clinic counsel for an IEP meeting and educational services.

Petitioner seeks the following relief:

1. A determination that Student is eligible for special education services.

2. DCPS shall develop a suitable IEP for Student with placement in a private residential facility, to be funded by DCPS.

3. DCPS shall provide compensatory education[3] for any denial of FAPE in the form of (a) extended eligibility under the IDEA, (b) placement in a private residential facility, and/or (c) other appropriate services and remedies.

4. Any other appropriate relief.

Closing arguments were made by counsel for both parties in writing with a due date for submissions of 3/24/15 at 9:00 p.m. Counsel for Respondent was some 7 hours late in his submission due to unspecified computer problems, but represented in writing that he had not opened or viewed Petitioner's closing arguments before submitting his own.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact[4] are as follows:

1. Petitioner is a resident of the District of Columbia.[5] Petitioner legally became an adult responsible for his own education and required to bring claims in his own

---

[3] Petitioner's counsel was put on notice during the Prehearing Conferences that 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 the alleged denial of FAPE. Respondent was also encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

[4] 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.

name in [redacted] more than [redacted] years prior to the filing of this complaint.[6] Petitioner was born in D.C. and there is no evidence that he ever has lived outside the District except for a short time with an uncle in Georgia and several recent months when he was involuntarily removed from the District while incarcerated [7] Petitioner expects to live in D.C., likely with his mother, when released from the halfway house where he has been since 3/11/15.[8]

3. Petitioner didn't take school seriously, which he feels is "coming back to haunt" him.[10] Petitioner has recognized and acknowledged that the path he had taken was inappropriate and will hinder his potential, but he is now motivated to study and develop himself.[11] Petitioner "is anxious to get back to school and correct his deficits in knowledge."[12]

4. On 11/20/13 and 11/29/13, Clinical Psychologist 2 conducted a Neuropsychological Evaluation of Petitioner in which he was diagnosed as having a Mathematics Disorder, ADHD, Cognitive Disorder NOS, Generalized Anxiety Disorder, and Dysthymic Disorder, as well as Sickle Cell Anemia.[13]

5. Petitioner's previous evaluations were generally in line with the November 2013 evaluation relating to Petitioner's weaknesses and cognitive issues.[14]

a. A 12/8/11 Updated Psychological Evaluation diagnosed an Oppositional Defiant Disorder, along with Sickle Cell Disease and ADHD, and concluded Petitioner needed a therapeutic academic placement with a small student to teacher ratio, individualized instruction and counseling.[15]

b. A 12/16/08 Psycho-Educational Evaluation overseen by Clinical Psychologist 1 concluded that Petitioner had a Learning Disorder Not Otherwise Specified and

---

[5] Petitioner.
[6] 34 C.F.R. 300.520.
[7] Petitioner; P4-5; R22.
[8] Petitioner.
[9] P4-14, 15.
[10] Petitioner.
[11] Petitioner; R7-4.
[12] R7-14.
[13] R7-14; Clinical Psychologist 2.
[14] Clinical Psychologist 1; Clinical Psychologist 2.
[15] P4-16,17; Clinical Psychologist 1.

needed intensive tutoring, a smaller and more intensive structured classroom, and extra time for processing his academic work.[16]

c. A 3/18/04 Psychological Evaluation of Petitioner found inattention, hyperactivity and impulsivity in the classroom, as well as Sickle Cell Anemia, qualifying him for special education services under Other Health Impairment ("OHI").[17]

6. Petitioner's IEP prior to March 2009 provided one hour per week of Speech-Language therapy and 30 minutes per week of Psychological Services (behavioral support).[18] Petitioner only occasionally received the required 30 minutes per week of behavioral support; there is no indication in the record that the missed services were ever rescheduled and made up.[19] Receiving behavioral support services two to three times per week would have been helpful to Petitioner.[20]

7. Petitioner's father signed a DCPS consent to evaluate form on 10/30/08 indicating that he had received Procedural Safeguards.[21]

8. When DCPS disqualified Petitioner from any special education services on 3/3/09, DCPS relied in large part on the 12/16/08 evaluation which called for additional services.[22] At that time, DCPS recognized that Petitioner had "Other Health Impairment (ADHD and Sickle Cell Disease)" in the past; DCPS concluded that these were not the cause of his excessive absences and that he could perform better in school if only he would apply himself.[23]

9. Petitioner was listed as a "Ward of State" in a Student Verification Form dated 5/18/12; an individual identified as a "Group Home Counselor" was identified under the "Parent/Guardian" section of the form.[24] There was no evidence presented at the due process hearing that Petitioner needed a surrogate parent, or that his own Parents could not act on his behalf.[25]

10. Petitioner often missed school due to his Disease, fell behind and was unable to catch up.[26] Petitioner dropped out of school near the end of 2011/12 after accumulating many absences.[27] Petitioner's grades also were very poor.[28] If Petitioner had

[16] R9-12,13; Clinical Psychologist 1.
[17] R19-6.
[18] R16-1.
[19] R14.
[20] Clinical Psychologist 2.
[21] R17.
[22] R9-12,13; Clinical Psychologist 1.
[23] R8-2.
[24] P13-1.
[25] Petitioner.
[26] Clinical Psychologist 2.
[27] P14-1; P11.

received the special education services needed to address his disabilities, he may have been more successful and not dropped out of school in 2011/12.[29]

11. Petitioner has only obtained 3.5 "Carnegie Units" out of a total of 24 required (along with other requirements) for a DCPS high school diploma.[30] If motivated and sufficiently supported, it may be possible for Petitioner to complete the requirements for a high school diploma in two years.[31]

12. Petitioner was incarcerated in the D.C. Jail; he received no special education services while in jail.[32] Not receiving special education services while in jail caused Petitioner to lose ground in Math and fail to make progress in other subjects.[33]

13. Petitioner's counsel sent numerous letters on 11/20/13 to DCPS schools noting that they were representing Petitioner relating to his "special education rights" and requesting his educational records.[34] The formal letters cited the statutory and regulatory bases for the requests, were signed by two law school advocates, named their supervising attorney, were on law school letterhead, and enclosed release forms signed by Petitioner. Specifically, Petitioner's counsel contacted Public School A,[35] Public School B,[36] Public School C,[37] Public School D,[38] Public School E,[39] and the Incarcerated Youth Program.[40] Additional letters were sent on 9/26/14.[41]

14. Petitioner was in a homeless shelter for young people aged 18-21 and made significant progress in life skills through daily one-on-one communication with Director.[42] While Petitioner struggled initially, he understood and accepted the limits and rules of the program over time.[43]

15. Beginning in mid-July 2014, while Petitioner again was in the D.C. Jail, his counsel made repeated efforts to obtain an IEP meeting and move toward educational services for

---

[28] R20-1.
[29] Clinical Psychologist 2.
[30] R20-2.
[31] Clinical Psychologist 2.
[32] Petitioner; Clinical Psychologist 2.
[33] Clinical Psychologist 2.
[34] P21-P26.
[35] P21.
[36] P22.
[37] P23.
[38] P24.
[39] P25.
[40] P26.
[41] P27, P28.
[42] Director.
[43] *Id.*

Petitioner, explaining Petitioner's background in a detailed letter transmitted on 7/14/14 to DCPS.[44] Petitioner's counsel followed up by telephone and email the next week but was told by DCPS on 7/22/14 that Petitioner was in a "disciplinary segregation" and would receive special education services when he was removed from disciplinary segregation.[45]

16. Petitioner's counsel continued to steadily push for an IEP meeting, noting the matter was "urgent"; DCPS responded on 7/28/14 that Petitioner was "declared ineligible for SpEd services on 03/04/2009."[46] Counsel for Petitioner responded three hours later on 7/28/14 that Petitioner is and has been a child with a disability; Petitioner's current evaluation was transmitted on 7/29/14, which on 8/1/14 DCPS acknowledged receiving.[47]

17. Petitioner's counsel emailed on 8/4/14 noting the need for an IEP meeting and seeking special education services; DCPS responded that classes resume for all students on 8/28/14.[48] Petitioner's counsel emailed on 8/6/14, noting that year-round services may be appropriate under the IDEA and that Petitioner had been out of school for the last two years.[49]

18. No further communications are in the record until 9/19/14 when Petitioner's counsel stated that she had met with Petitioner at the D.C. Jail on 9/4/14 and Petitioner indicated that he "has not received *any* educational services" during his detention.[50]

19. On 9/12/14, the Incarcerated Youth Program of DCPS completed a referral form to "initiate the eligibility determination for a student to receive special education and related services" based on Petitioner's November 2013 evaluation which "indicates that this student may be eligible."[51] On 10/2/14, an Acknowledgement of Referral letter was addressed to Petitioner, explaining that in mid-September the LEA received a referral for an initial evaluation of Petitioner.[52] On 9/30/14 a Prior Written Notice was provided referencing the November 2013 evaluation as indicating that Petitioner "may be a student who is eligible to receive Special Education and/or Related services."[53]

20. Petitioner's November 2013 evaluation is still reliable and, especially given the basic consistency in Petitioner's evaluations over time, it is not necessary to conduct new evaluations before providing academic services to him; Petitioner needs academic services

---

[44] P16.
[45] P18.
[46] P19.
[47] P20-3; R7.
[48] P20-2.
[49] P20-1.
[50] P20-1 (emphasis in original).
[51] R6.
[52] R1.
[53] R4.

immediately.[54] New evaluations may be needed before providing behavioral support services to determine if Petitioner's psychological profile has changed; new evaluations may be desirable for other areas as well.[55]

21. As stated in the November 2013 Evaluation, Petitioner "has a lot of remedial work to do [to achieve his educational and career goals] but it is not impossible. Rather than a GED, it will be in his best interest to pursue a high school diploma, even though it may take longer."[56] Petitioner views a high school diploma as more meaningful than a GED and is willing to put in the effort to achieve it.[57] Petitioner did work toward his GED while in the custody of BOP, as that was his only educational option there.[58] Petitioner convincingly stated that he needs to take steps to "really pursue" his education.[59]

22. Petitioner can make gains fairly quickly in Math and Written Expression if motivated and given the opportunity in a safe place.[60] Speech therapy would also be very helpful as Petitioner appears to have regressed without it.[61] There are many different elements needed for his treatment, so Petitioner needs an active case manager unless he receives a residential placement.[62]

23. Petitioner needs intensive year-round tutoring.[63] Petitioner's experts agreed that Petitioner needs intensive special education services at the maximum level possible, but disagreed as to whether that should include residential placement.[64] Petitioner will need additional time to complete his high school education.[65]

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).

---

[54] Clinical Psychologist 1; Clinical Psychologist 2.
[55] Clinical Psychologist 1.
[56] R7-5.
[57] Petitioner.
[58] *Id.*
[59] *Id.*
[60] Clinical Psychologist 2.
[61] *Id.*
[62] *Id.*
[63] Clinical Psychologist 2; Clinical Psychologist 1; GED Instructor.
[64] Clinical Psychologist 1, Clinical Psychologist 2.
[65] P38.

Hearing Officer Determination

To provide a FAPE for children with disabilities, "the child's parents, teachers, school officials, and other professionals collaborate in a 'multi-disciplinary team' to develop an individualized educational program (IEP) to meet the child's unique needs. *See* [20 U.S.C.] § 1414(d)(1)(B)." *D.K. v. Dist. of Columbia*, 983 F. Supp. 2d 138, 141 (D.D.C. 2013). *See also Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005); *Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 92 (D.D.C. 2014); *Smith v. Dist. of Columbia*, CV 12-2058 JEB/DAR, 2014 WL 1425737, at *4 (D.D.C. Mar. 14, 2014)

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 commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] 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).

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 occur 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 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 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 DCPS denied Student a FAPE from 2001 through 2009 by failing to evaluate Student in all areas of suspected disability despite repeated requests from Parent, and/or by failing to provide services to address all areas of need, when DCPS failed to: (a) provide homework packets and related services in 2001 during a 5-month*

hospitalization during a sickle cell crisis, requiring Student to repeat 2d grade; (b) conduct triennial evaluations; (c) review and revise Student's IEP annually; (d) provide counseling as required by Student's IEP; and (e) address Student's ADHD, sickle cell anemia, and Specific Learning Disorder. In addition, whether exceptions to the statute of limitations apply because DCPS made specific misrepresentations to Parent about what it was doing for Student, and withheld from Parent required information on procedural rights.

Issue 2: *Whether DCPS denied Student a FAPE from 3/4/09 forward by improperly removing him from special education at an eligibility meeting on or about 3/4/09, when DCPS (a) relied on but misconstrued a court-ordered evaluation dated 12/9/08 which should have resulted in additional services, (b) ignored DCPS evaluations dated 12/16/08, (c) failed to ensure that Student and/or his Parent were at the 3/4/09 meeting, and (d) returned Student to a Student Support Team rather than continue to provide special education services as needed. In addition, whether exceptions to the statute of limitations apply because DCPS made specific misrepresentations about the 12/9/08 evaluation, did not provide prior written notice about its decision to remove Student from special education services and to change his eligibility, and failed to provide procedural safeguards.*

A threshold issue in this case is the applicability of the IDEA's two-year statute of limitations, as Petitioner has brought claims going back to 2001. DCPS contends that claims prior to 2/2/13 are barred because the IDEA requires that the due process complaint must allege a violation that occurred not more than two years before the date the petitioner knew or should have known about the alleged action that forms the basis of the due process complaint. *See* 34 C.F.R. 300.507(a)(2).

Petitioner responded that none of his claims is barred by the two-year statute of limitation because of the applicability of one or both exceptions to the statute of limitations in 34 C.F.R. 300.511(f), which are "(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent."

This Hearing Officer concludes that neither exception applies in this case. Although Petitioner alleges there were specific misrepresentations relating to the termination of special education services for Student on 3/3/09, there was no evidence at the hearing proving that DCPS misrepresented the ongoing need for Petitioner's Speech-Language therapy, which was the primary special education service Petitioner was receiving. But even if that were true, DCPS made no claim that it "had resolved the problem" as required to toll the statute of limitations relating to the issues of Sickle Cell Disease, ADHD, and other serious concerns. Moreover, even if Petitioner's Parent had been misled by DCPS in 2009 that it had resolved all of Petitioner's problems, that would not excuse a delay in bringing a complaint for years to come.

As for the second exception, Petitioner's counsel asserts that procedural safeguards were not provided as required, because there is only one document in the record, R17, demonstrating that Petitioner's father at one point in 2008 signed for a copy of procedural

safeguards. However, there was no evidence presented showing that DCPS failed to provide procedural safeguards as required. Petitioner's mother and father were both listed by Petitioner as witnesses at the due process hearing and, at a minimum, might have testified to their recollections of whether they had received required information over the years, but neither testified at the due process hearing.

Petitioner's counsel argues that many of Petitioner's educational records were not produced by DCPS, despite repeated written requests of counsel over the course of many months, so that the lack of documentation should be construed against Respondent. *See* Petitioner's Objections to the Prehearing Order. This argument is unavailing. Petitioner's counsel did not include the inability to obtain educational records as a claim in the due process complaint, even though counsel had unsuccessfully sought complete educational records well in advance of filing the due process complaint. It was not until filing Petitioner's Objections to the Prehearing Order on 3/12/15 that Petitioner's counsel vigorously advocated that the documents needed to be produced.

On 3/12/15, Respondent moved for a continuance of the due process hearing for the express purpose of obtaining Petitioner's educational records from the archives. The continuance would have been granted but for Petitioner's refusal to agree, as explained in this Hearing Officer's Interim Order on Continuance Motion. While Petitioner was quite right that Respondent should have taken earlier steps to obtain the archived information, Petitioner could have given time for the additional archival records to be obtained, so it is inequitable for Petitioner to now seek to benefit from their absence.

While there is no way of knowing what would have been in the archives, the educational records might well have contained additional forms that parents routinely sign acknowledging that they are receiving procedural safeguards (such as R17 mentioned above). However, there are no routine forms signed when parents do *not* receive required information, which make it unlikely that the absent documents would have bolstered Petitioner's assertions concerning the statute of limitations.

Petitioner's counsel also argues that Student was a ward of the state and homeless, and that the statute of limitations should be tolled because Petitioner was not appointed a surrogate parent. *See* 34 C.F.R. 300.45, 300.519; 5E D.C.M.R. §§ 3022.1. Petitioner was listed as a "Ward of State" in a Student Verification Form dated 5/18/12, but there was no other evidence regarding whether he was in fact a ward of D.C. Petitioner was also in a homeless shelter at one point. An individual identified as a "Group Home Counselor" was identified under the "Parent/Guardian" section of the Student Verification Form, but there was no further evidence about the role of that individual. Pursuant to 34 C.F.R. 300.519, a public agency such as DCPS is required to assign a surrogate after "determining whether a child needs a surrogate parent." Here, Petitioner presented no evidence that he was in need of a surrogate which DCPS failed to assign, or that his own Parents could not act on his

behalf.[66] In any case, even if the statute of limitations had been tolled until Petitioner legally became an adult and responsible for bring claims in his own name in 2012, the two-year statute of limitations would still have barred his claims by the time his due process complaint was filed in 2015.

In sum, this Hearing Officer concludes that Petitioner has failed to meet his burden of proof by demonstrating that either exception applies to the statute of limitations. Thus, all claims prior to 2/2/13, including Issues 1, 2, and part of 3 (below) are barred by the statute of limitations.

Issue 3: *Whether DCPS denied Student a FAPE from the beginning of the 2011/12 to July 2014 by failing to comply with its affirmative Child Find obligations to locate, identify and evaluate Student to determine eligibility for special education, when it should have been apparent from Student's (a) behavior, (b) failing grades, (c) hospitalization due to sickle cell anemia, and (d) case file that Student required special education services. In addition, whether the statute of limitations does not bar Student's claim prior to 2/2/13 because he was a ward of D.C. and homeless, but was not appointed a surrogate as required to protect his educational rights, and DCPS did not provide prior written notice about its decision not to evaluate Student and failed to provide procedural safeguards.*

Issue 4: *Whether DCPS denied Student a FAPE from July 2014 to 10/15/14 by failing to provide any special educational services during the time Student was incarcerated in the D.C. Jail, despite repeated requests by Juvenile and Special Education Law Clinic counsel for an IEP meeting and educational services.*

While the statute of limitations bars claims prior to 2/2/13, as discussed above, Petitioner asserts a failure of DCPS to meet its ongoing Child Find obligations and to provide special education services within the two-year statute of limitations period. *See D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012) (school districts have a "continuing obligation" to identify and evaluate all students who are reasonably suspected of having a disability). Petitioner met his burden of proof by a preponderance of the evidence that DCPS failed in its affirmative Child Find obligations to identify, locate and evaluate Student and provide special education services in 2013 and 2014, as discussed next.

---

[66] The IDEA "does not require the automatic appointment of a surrogate parent for every child with a disability who is a ward of the State. States and LEAs must ensure that the rights of these children are protected and that a surrogate parent is appointed, if necessary, as provided in § 300.519(b)(1). If a child who is a ward of the State already has a person who meets the definition of *parent* in § 300.30, and that person is willing and able to assume the responsibilities of a parent under the Act, a surrogate parent might not be needed." Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46566 (August 14, 2006) (emphasis in original). *See also* 34 C.F.R. 300.30(b)(1).

Hearing Officer Determination

The basic legal framework at issue was set forth by U.S. District Judge Lamberth in *D.L. v. Dist. of Columbia*, 302 F.R.D. 1, 6-7 (D.D.C. 2013), *leave to appeal denied* (Jan. 30, 2014), as follows:

> [T]he IDEA requires that states and the District of Columbia "establish policies and procedures to ensure ... that free appropriate public education [FAPE] ... is available to disabled children." *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (internal quotations omitted); *see also* 20 U.S.C. § 1412(a)(1)(A). Under the IDEA, "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction." *Reid*, 401 F.3d at 518. Instead, the IDEA imposes an affirmative obligation on school systems to "ensure that all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* at 519 (internal quotations omitted); § 1412(a)(3)(A). The District's laws implementing the IDEA require that once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38–2561.02(a). The duties to identify, evaluate, and determine eligibility for disabled children are collectively known as the "Child Find" obligation.

While the IDEA establishes a continuing Child Find requirement on DCPS, the law does not impose *per se* or automatic liability on a school district any time one in need of special education and related services is not identified, located and evaluated. Here, however, in addition to DCPS's earlier history with this Student, during the statute of limitations period Petitioner came to DCPS's attention in three ways which in combination convince this Hearing Officer that DCPS has failed to comply with Child Find and failed to provide Petitioner a FAPE.

First, by his own testimony, Petitioner was incarcerated in the D.C. Jail in February 2013 for a few months, at which time DCPS had an obligation to provide him a FAPE and should have recognized him as having a disability, both through his DCPS records and through issues that would have been visible at that time relating to his Sickle Cell Disease, ADHD, and Oppositional Defiant Disorder, which had been diagnosed just a little over a year earlier.

In addition, later in 2013, Petitioner's counsel sent numerous letters to DCPS schools noting that legal counsel was representing Petitioner relating to his "special education rights" and requesting his educational records from Public School A, Public School B, Public School C, Public School D, and Public School E. The formal letters on 11/20/13 cited the statutory and regulatory basis for the document requests, were signed by two law student advocates, named their supervising attorney, were on law school letterhead and enclosed release forms signed by Petitioner. While Petitioner's counsel at that point did not make any specific requests beyond obtaining records, the letters very clearly focused on Petitioner's special education rights, which again brought Petitioner to DCPS's attention and flagged for DCPS that Petitioner might be a student with a disability in need of special

education and related services. As the court explained in *Kruvant v. Dist. of Columbia*, CIV.A. 03-1402 JDB, 2005 WL 3276300, at *9 (D.D.C. Aug. 10, 2005), "Congress intended the procedural protections to require school districts to respond adequately to parental concerns about their children, and that 'the informed suspicions of parents, who may have consulted outside experts, should trigger the statutory protections.' [*Pasatiempo v. Aizawa*, 103 F.3d 796] at 802 [(9th Cir.1996)]." This would certainly apply even more so to "informed suspicions" of legal counsel.

Finally, counsel for Petitioner made a concerted effort to obtain special education services for Petitioner from mid-July 2014 until Petitioner's transfer to the Bureau of Prisons in mid-October 2014. Counsel thoroughly explained Petitioner's background and need for special education services in a detailed letter transmitted on 7/14/14. However, instead of moving expeditiously to remedy the situation, DCPS pushed back and delayed week after week, until it was no longer the LEA responsible for Petitioner, on which basis DCPS now seeks to avoid liability, despite the clarity of *L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F. Supp. 2d 69 (D.D.C. 2012), that districts are responsible for their actions even after they are no longer the LEA for a student.[67]

In mid-July 2014, after multiple contacts by Petitioner's counsel, DCPS responded on 7/22/14 that Petitioner was in a "disciplinary segregation" and would receive special education services when he was removed from disciplinary segregation. Petitioner's counsel continued to emphasize the urgency for an IEP meeting and DCPS responded on 7/28/14 that Petitioner was "declared ineligible for SpEd services on 03/04/2009" which showed that DCPS reviewed Petitioner's records, but appeared to end the matter for DCPS. Certainly districts are not required to reevaluate students repeatedly at close interval, *see, e.g., Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 273 (3d Cir. 2012) ("IDEA does not require a

---

[67] *See* Order Denying Respondent's Motion for Summary Adjudication, issued in this case on 2/25/14, at 2:

> Respondent first asserts that this case must be dismissed because DCPS is not Student's current LEA, as Student is currently in the custody of the Bureau of Prisons ("BOP"). While these facts are not disputed, they are not legally dispositive, for Petitioner expressly confirmed in his Opposition that this case involves no claim against BOP; instead, all claims are against DCPS as Student's prior LEA. In *L.R.L. ex rel. Lomax v. Dist. of Columbia*, 896 F. Supp. 2d 69 (D.D.C. 2012), the court made clear that claims may be brought against prior LEAs for denial of a FAPE. The court explained that "[t]he IDEA sets forth stringent procedural safeguards to permit disabled children and their parents to seek redress from an LEA that is currently or has *in the past*, failed to fulfill its statutory responsibilities." *Id*. at 76 (emphasis in original). The *Lomax* court went on to conclude that students "are guaranteed the procedural safeguard of filing a due process complaint against an LEA with whom they dispute the sufficiency of a FAPE provided by that LEA. The fact that the student is no longer enrolled with the LEA is of no consequence." *Id*. at 79-80.

reevaluation every time a student posts a poor grade"), but it is remarkable that in 2014 DCPS would treat its determination of ineligibility five years earlier as sufficient.

Counsel for Petitioner immediately responded that Petitioner clearly is and has been a child with a disability, and transmitted Petitioner's November 2013 evaluation on 7/29/14, which DCPS acknowledged receiving on 8/1/14. At that point, with a current evaluation in hand, DCPS could have moved forward to determine eligibility and determine needed services, but delayed another six weeks before taking action.

Petitioner's counsel emailed again on 8/4/14 noting the need for an IEP meeting and seeking special education services, but DCPS merely responded that classes resume for all students on 8/28/14. Petitioner's counsel emailed again on 8/6/14, noting that year-round services may be appropriate under the IDEA and that Petitioner has been out of school for the last two years.

No further communications are in the record until 9/19/14 when Petitioner's counsel stated that she had met with Petitioner at the D.C. Jail on 9/4/14 and Petitioner indicated that he "has not received *any* educational services" during his detention.

On 9/12/14, the Incarcerated Youth Program of DCPS finally did refer Petitioner for an "initial evaluation" to determine if he was a child with a disability. It took the rest of the month for any further action by DCPS, but on 9/30/14 a Prior Written Notice was provided referring to the November 2013 evaluation as indicating that Petitioner "may be a student who is eligible to receive Special Education and/or Related services."

While the District generally has 120 days from referral to conduct initial evaluations to determine a child's eligibility for special education services, *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 56 (D.D.C. 2011) (*quoting* D.C. Code § 38-2561.02(a)), in this case Petitioner came to DCPS's attention in February 2013 and then in November 2013, prior to the vigorous efforts made by Petitioner's counsel in July 2014. At that time, Petitioner did not need initial evaluations, given his November 2013 Neuropsychological Evaluation, which his counsel provided to DCPS, as well as his long history with DCPS. DCPS could have and should have moved forward to confirm eligibility, develop an IEP and provide services, but failed to do so. If it wished to first conduct evaluations, it should have done so sooner and expeditiously. As it was, despite everything, DCPS still had not begun an evaluation of Petitioner by the time he was transferred to BOP in mid-October 2014.

Given the totality of the circumstances, this Hearing Officer concludes that it was not reasonable for DCPS to fail to take action until the end of September 2014 and only then move to evaluate Petitioner, when it could have evaluated Petitioner in 2013 or simply relied on Petitioner's November 2013 evaluation. The court explained in *Kruvant*, 2005 WL 3276300, at *9:

> the Act requires that, as part of the "initial evaluation," an IEP team (defined in the Act to include educational professionals, the parents, and certain others) shall review existing evaluations and then "identify what additional data, if any" are needed to make a disability determination. 20 U.S.C. § 1414(a)(1); 34 C.F.R. §§ 300.533. The

> clear import of the "if any" phrasing is that the school system may conclude that additional data are not needed.

As was the situation with Petitioner in this case, "a lack of action can itself constitute a denial of eligibility for special education services." *Id.* at *4, *citing Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003).

In some situations, a delay in finding and evaluating a student might simply be a procedural violation of IDEA which would not by itself mean a denial of FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). However, violations that result in a loss of educational benefits for the student do result in denial of FAPE. *See, e.g., A.I. ex rel. Iapalucci v. Dist. of Columbia*, 402 F. Supp. 2d 152, 164 (D.D.C. 2005); 20 U.S.C. § 1415(f)(3)(E). Here, Petitioner clearly suffered a substantive violation, as it has kept Petitioner from furthering his education and moving toward a DCPS high school diploma, and he is just over a year from aging out of his eligibility for special education services. Thus, the undersigned concludes that DCPS denied Petitioner a FAPE.

Compensatory Education Request

Petitioner seeks an award of compensatory education to make up for DCPS's denial of FAPE. 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 students 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 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*, 401 F.3d 516.

The challenge of determining what additional educational benefits would have accrued, if DCPS had been proactive in addressing Student's need for special education services in 2013 and 2014 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, Petitioner has been held back both in his education and in his ability to obtain credits toward a high school diploma. Petitioner needs to have an appropriate IEP developed by a Multi-Disciplinary Team ("MDT") based on the conclusion of this Hearing Officer that Petitioner is eligible for special education services. *See Friendship Edison Pub. Charter Sch. Chamberlain Campus v. Suggs*, 562 F. Supp. 2d 141, 151 (D.D.C. 2008) (hearing officer may order an IEP meeting to determine compensatory education); *Flores ex rel. J.F. v. Dist. of Columbia*, 437 F. Supp. 2d 22, 31 (D.D.C. 2006). Clinical Psychologist 2 convincingly confirmed that her November 2013 evaluation is a solid basis on which to

move forward immediately to provide special education services relating to Petitioner's academics. In addition, as Clinical Psychologist 2 also convincingly testified, it is desirable to obtain updated evaluations of Petitioner in order to determine what exactly is needed for Petitioner's behavioral support. However, Petitioner's compensatory education proposal for a residential placement was not endorsed by both its experts; while the undersigned found Clinical Psychologist 2 more credible on this point than Clinical Psychologist 1, residential placement is not ordered below, although Petitioner's MDT may consider it as an option.

Furthermore, since DCPS's denial of FAPE deprived Petitioner of the opportunity to earn credits toward his goal of pursuing a high school diploma, the most appropriate remedy is to provide Petitioner additional time to make up missed credits before he ages out of special education eligibility. Under District law, DCPS is obligated to provide FAPE to every resident child with a disability until he or she has graduated from high school with a regular high school diploma, or through the end of the semester he or she turns 22, whichever comes first. *See* 5E D.C.M.R. §§ 3002.1, 3002.2. To vindicate a student's substantive right to receive a FAPE and to compensate the student for past deprivations of educational opportunity, LEAs have been required to provide compensatory relief even where the student is no longer eligible for IDEA benefits. *See Lomax*, 896 F. Supp. 2d at 76, *citing*, *e.g.*, *Schaffer*, 546 U.S. at 55, (claim seeking reimbursement for past education expenses is not moot even if the student has graduated from high school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.3, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (same); *Ferren C. v. Sch. Dist.*, 612 F.3d 712, 718 (3d Cir. 2010) ("individual over [age 21] is still eligible for compensatory education for a school district's failure to provide a FAPE prior to the student turning twenty-one. A court may grant compensatory education in such cases through its equitable power . . . ." (citation omitted)). Accordingly, DCPS is ordered below to continue to provide FAPE to Student through the Fall semester of [redacted], or until he has graduated from high school with a DCPS high school diploma, whichever occurs first. The remedy of an additional [redacted] school years is based on the *Reid* considerations of what it would take to put Petitioner in the same position he would have occupied but for DCPS's violations, with an awareness of the schooling that Petitioner lost in 2013 and 2014 and the minimum time required for him to possibly earn a high school diploma.

The court in *Kelsey v. Dist. of Columbia*, CV 13-1956 (BAH), 2015 WL 1423620, at *4 (D.D.C. Mar. 30, 2015) (internal quotations omitted), very recently explained that, "[r]elief under the IDEA depends upon 'equitable considerations' and requires the court 'to mould each decree to the necessities of the particular case.' *Reid*, 401 F.3d at 523-24 (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944))." Here, the equities bolster the relief discussed above and ordered below.[68]

First, it is clear on this record that DCPS was well aware of Petitioner's conditions but did not ever provide him with an IEP addressing his Sickle Cell Disease or ADHD,

[68] While the undersigned has concluded that the statute of limitations bars all claims that arose prior to 2/2/13, testimony and documents prior to 2/2/13 are relevant and appropriate to consider in determining the equities in this case.

much less other disabilities found in his evaluations, which might have made a substantial difference to Petitioner over the years.

Second, Petitioner's special education services were terminated in March 2009 based in large part on an evaluation that called for his special education services to be *increased*, even while DCPS acknowledged that Petitioner should have qualified as OHI due to both his Sickle Cell Disease and ADHD.

Third, instead of considering behavioral interventions or other steps to address Petitioner's nonattendance as he had increasing difficulties keeping up in school, DCPS simply dropped him from its rolls in May 2012, so that in February 2013 he was not receiving any educational benefit from DCPS. *See Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if student was not in school, he could not be said to be receiving "a free appropriate public education"). If Petitioner had received the special education services needed to address his disabilities, he may well not have faced the frustration and difficulties that caused him to drop out of school in 2011/12.

In short, Petitioner has faced many challenges in his life and the unrebutted testimony in this case is that DCPS did not provide him the special education services he needed. At the same time, Petitioner acknowledges that he had taken the wrong path in his life but is now motivated to focus on his education and to apply himself. Petitioner is at a pivotal point and this HOD is intended to give him the opportunity to prove himself by moving forward with his education.

ORDER

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

1. Within 20 school days, DCPS shall convene an MDT meeting to develop an IEP for Petitioner with sufficient supports to give him a reasonable opportunity to graduate from high school by the end of the Fall semester of [redacted]. The IEP shall provide for both academic and behavioral supports, which shall be updated as appropriate when additional evaluations are completed. Residential placement is not ordered, but may be considered by the MDT. Petitioner's MDT shall include Director if she is available and willing to serve as part of the MDT.

2. DCPS shall provide a letter of funding within 10 days for an independent comprehensive psychological evaluation. In addition, DCPS shall conduct within 60 days, or fund within 10 days, additional assessments and evaluations as determined by Petitioner's MDT at the MDT meeting required in paragraph 1 above.

3. Petitioner's eligibility to receive a FAPE from DCPS shall be extended by [redacted] school years, through the end of the Fall semester of [redacted], or until Petitioner has graduated from high school with a regular high school diploma, whichever occurs first.

5. All other relief sought by Petitioner herein is denied.

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).