

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

OSSE
Office of Dispute Resolution
April 17, 2015

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: April 17, 2015
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

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SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on February 2, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On February 5, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) on February 24, 2015. The parties did not reach an agreement during the RSM, but agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on March 5, 2015, and the Hearing Officer Determination due date is April 18, 2015.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on March 2, 2015, during which the parties discussed and clarified

¹ Personal identification information is provided in Appendix A.

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the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 17, 2015 and that the DPH would be held on March 24, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on March 2, 2015.

The DPH was held on March 24, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Petitioner elected for the hearing to be closed.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-37 are deemed admitted into evidence, without objection.² Respondent’s exhibits R-1, R-2 and R-4 through R-15 are admitted into evidence without objection. Respondent’s exhibit R-3 was admitted into evidence over Petitioner’s objection.

Petitioner called the following witnesses at the DPH:

- (a) Petitioner/Parent
- (b) Parent’s Clinical Psychologist³
- (c) Parent’s Literacy Consultant⁴

Respondent called the following witness at the DPH:

- (a) Local Education Authority Representative (“LEA Rep”)

Petitioner and Respondent each gave an oral closing argument.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a free appropriate public education (“FAPE”) by failing to timely identify and evaluate Student, pursuant to 34 C.F.R. § 300.111 and DCMR 5E-3002.1(d).
- (b) Whether DCPS denied Student a FAPE by failing to evaluate Student within 120 days of a referral by Parent, pursuant to 34 C.F.R. § 300.301 and D.C. Code § 38-2561.02(c).

²Respondent submitted objections; however, the objections were not received by the opposing counsel, the IHO or the Office of Dispute Resolution by the filing deadline. Respondent was permitted to state Respondent’s objections on the record at the DPH; however, Petitioner’s disclosures are deemed admitted without objection.

³ Qualified without objection from as an expert in clinical psychology, specifically in the interpretation of educational records and evaluations and making recommendation for educational programming for students with disabilities.

⁴ Qualified over Respondent’s objection as an expert in literacy, specializing in literacy program implementation.

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RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner’s favor as to each issue;
- (b) an Order that DCPS fund Student’s compensatory education plan, to include 75 hours in a multi-sensory reading program, 125 hours of tutoring for the 2014-2015 school year, funding for an academic program/summer camp for the summer of 2015, and placing Student in eighth grade next school, with the necessary supports to help him to be successful in eighth grade.

FINDINGS OF FACT

1. Student resides with his mother (“Parent”/“Petitioner”) in Washington, D.C.⁵
2. Student is a [REDACTED] grader at District Middle School, where he has attended throughout the 2014-2015 school year.⁶
3. During the 2013-2014 school year, Student attended District Charter School, also as a [REDACTED] grader.⁷ District of Columbia Public Schools serves as the local education agency (“LEA”) for District Charter School.⁸
4. At least as early as October 8, 2013, Parent formally requested, via electronic mail to District Charter School, that Student be evaluated for eligibility for special education and related services.⁹ Parent expressed concerns to District Charter School staff at several other points during the school year as well.¹⁰
5. In January 2014, District Charter School convened a Student Support Team (“SST”)¹¹ meeting to discuss potential interventions to assist Student academically and behaviorally.¹²
6. In May 2014, a DCPS representative met with Parent and told her that Student would be tested at District Middle School, which was where Parent planned to enroll Student for the upcoming school year.
7. Student struggled behaviorally and academically during the 2013-2014 school year.¹³

⁵ Testimony of Parent; P-33.

⁶ Testimony of Parent.

⁷ Testimony of Parent.

⁸ P-1-1.

⁹ Testimony of Parent; P-2-1.

¹⁰ P-2.

¹¹ The SST process is a three stage process in which interventions are provided to a student. P-6.

¹² Testimony of Parent; P-6; R-2-3.

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8. Student sporadically did well in certain classes throughout the 2013-2014 school year. However, Student failed one class during the first advisory of 2013-2014, failed three classes during the second advisory, one class during the third advisory and three classes (math, English and art) during the fourth advisory.¹⁴ In the 2014-2015 school year, Student responded well to SST interventions and performed well in the core classes of math and English. Student was retained in the [REDACTED] grade at the conclusion of the 2013-2014 school year.¹⁵ Based on the academic potential Student has demonstrated, particularly with particular interventions, the Hearing Officer concludes that it is more likely than not that Student would not have been retained in the [REDACTED] grade had an IEP been in place for him just prior to the fourth advisory of the 2013-2014 school year, as required by the statutory timeline.

9. Parent followed up with District Charter School and District Middle School at several points during the summer of 2014 about testing for Student, including meeting in person with the special education coordinator in August 2014.¹⁶

10. District Middle School personnel placed Student in the SST program, in order to gather more data about Student prior to testing him for eligibility for special education and related services.¹⁷

11. Student was diagnosed by his pediatrician with attention deficit hyperactivity disorder in the fall of 2014.¹⁸ Subsequent to this diagnosis, the District Middle School team decided to move forward with testing Student for eligibility for special education and related services.¹⁹

12. Parent was first provided an evaluation consent form to sign in January 2015. Parent signed the form, and Student was first evaluated, in January 2015.²⁰

13. Student was found eligible for special education and related services on February 24, 2015 under the disability classification Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder).²¹

14. Student has done better academically in school during the 2014-2015 school year, as compared to the 2013-2014 school year.²²

¹³Testimony of Parent; P-6; P-7; P-8; P-9; P-10.

¹⁴ P-10.

¹⁵ P-10.

¹⁶ Testimony of Parent.

¹⁷ Testimony of LEA Representative.

¹⁸ Testimony of LEA Representative; R-15.

¹⁹ Testimony of LEA Representative.

²⁰ Testimony of Parent; P-13; R-11.

²¹ R-4.

²² Testimony of Parent.

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student’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).

I. Whether DCPS denied Student a free appropriate public education (“FAPE”) by failing to timely identify and evaluate Student, pursuant to 34 C.F.R. § 300.111 and DCMR 5E-3002.1(d).

Pursuant to 34 C.F.R. § 300.111, DCPS is responsible for identifying, locating and evaluating all children with disabilities who reside in the District of Columbia and who are in need of special education and related services, regardless of the severity of their disability. DCPS’ Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). Parent requested that Student be evaluated at least as of October 8, 2013 and several times thereafter. Student had numerous behavioral and attention problems throughout the 2013-2014 school year that directly impacted his educational progress, and which ultimately led to him being retained in █ grade at the conclusion of the 2013-2014 school year. The Hearing Officer concludes that DCPS should have identified Student as a potential candidate for services at least when Parent requested that Student be evaluated in October 2014. The failure to initially evaluate a potentially disabled child is a substantive violation of IDEA and, in itself, constitutes a denial of FAPE. *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. 2013), *citing N.G. v. District of Columbia* 556 F.Supp.2d 1, 16 (D.D.C. 2008). Therefore, Petitioner meets the burden of proving that DCPS denied Student a FAPE by failing to comply with the child find regulation during the 2013-2014 and the 2014-2015 school years.

II. Whether DCPS denied Student a FAPE by failing to evaluate Student within 120 days of a referral by Parent, pursuant to 34 C.F.R. § 300.301 and D.C. Code § 38-2561.02(c).

DCPS 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.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011),

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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). There are a number of ways a student can be referred to DCPS for initial evaluation for special education eligibility, and one such method is via a parent’s request for evaluation. See 34 C.F.R. 300.301(b) and 5-E D.C.M.R. § 3004.1(a) and (b). The fact that District Grade School and District Middle School both placed Student in the SST process did not alter DCPS’ statutory obligation to evaluate Student within the statutory timeframe. See *Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006) (the court found a denial of FAPE where the school had engaged in “alternative strategies” similar to the SST process rather than evaluating the student in the required timeframe).

In this case, the 120 day period began to run at least as of October 8, 2013. By February 24, 2015 when an eligibility determination was made, over 520 days had passed. By the time an IEP was in place for Student, over 550 days had passed from the time Parent made the October 8, 2013 request, far in excess of the statutory timeframe. DCPS is the LEA for District Grade School as well as for District Middle School, and the statutory obligation runs to DCPS as the LEA.²³ Therefore, the fact that Student attended District Grade School (a charter school) during the 2013-2014 school year does not change DCPS’ 120-day obligation to evaluate and determine eligibility.²⁴ The failure to initially evaluate a potentially disabled child is a substantive violation of IDEA and in itself constitutes a denial of FAPE. *G.G. v. District of Columbia*, 924 F. Supp. 2d 273 (D.D.C. February 24, 2014), citing *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C. 2008). Petitioner, therefore, met her burden of proving that DCPS denied Student a FAPE by failing to evaluate and place the student within 120 days of the request being made by Parent at least as of October 8, 2013.

Compensatory Education

IDEA gives hearing officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. See *Reid, supra*, 401 F.3d at 522-23. The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010), quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527. See also, e.g., *Turner v. District of Columbia*, 2013 WL 3324358, 10-11 (D.D.C. July 2, 2013).

²³ 5E D.C.M.R. § 923.3; P-1.

²⁴ Even once Student began attending District Middle School (a conventional DCPS school), more than 120 days passed between the time Parent met with District Middle School personnel in August 2014 to continue following up on her request that Student be evaluated and the time Student was actually evaluated and determined eligible.

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Here, Petitioner claims Student was harmed by DCPS' failure to evaluate Student and determine whether he was eligible for special education and related services once DCPS' child find obligation were triggered and/or within 120 days of Parent making a request that Student be evaluated. Petitioner claims that Student was particularly harmed by being retained in [REDACTED] grade. Petitioner alleges that Student would not have been retained had Student been determined eligible in a timely fashion. Once Student was evaluated, he was determined eligible and given an IEP. Petitioner asserts that had these supports been available in a timely fashion (at least a year earlier) and been given the appropriate supports, Student would not have been retained in the 2013-2014 school year.²⁵

Allowing 120 days from Parent's October 8, 2013 request for DCPS to have evaluated and determined Student eligible (by approximately February 6, 2014), and an additional 30 days for Student's IEP to have had an IEP in place for Student (by approximately March 8, 2014), Student would have had an IEP in place prior to the start of the 4th quarter of the 2013-2014 school year, had the statutory timeframe been followed. Not all students who are retained in a year when they are not timely evaluated would have necessarily avoided retention had an IEP been timely developed for them. However, as stated in the "Findings of Fact" above, based on the totality of the evidence, the Hearing Officer has concluded that it is more likely than not that Student would not have been retained had an IEP been in place for him by the 4th quarter of 2013-2014.

A retention tied at least in part to a lack of appropriate services is a serious harm, with potential far reaching consequences, impacting not only Student's experiences during the school year, but also his employment timeline and even earning potential throughout his lifetime. On the other hand, Respondent has brought to the Hearing Officer's attention important concerns that District Middle School principal has raised about the feasibility of placing Student in the [REDACTED] grade in the upcoming school year.

It is this Hearing Officer's view that Student should be allowed to catch up with the grade he otherwise would have been in to the extent possible, and as soon as possible. However, Student's IEP team would be best equipped to make a determination as to whether this is possible and what timeline and supports would be necessary. Therefore, while the Hearing Officer will not order that Student be placed in [REDACTED] grade next year, this decision will include an order that Student's IEP team meet and seriously consider the extent to which a plan can be developed and implemented that will afford Student the opportunity to catch up with his correct grade over the next two years. Petitioner's other compensatory education requests will also be ordered, as they are reasonably calculated to place Student in the position he would have been in, but for the denial of FAPE.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A. DCPS shall fund 75 hours of a multi-sensory reading program of Parent's choice for Student.

²⁵ P-30.

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- B. DCPS shall fund 125 hours of tutoring for Student in an academic program of Parent's choice.
- C. DCPS shall fund an academic summer camp/program for Student for the summer of 2015.
- D. Within 30 school days of this decision, Student's MDT/IEP shall convene to discuss:
 - a. factors weighing in favor of placing Student in the grade he would have been in had he not been retained in 2013-2014 school year ("his correct grade");
 - b. actual and potential challenges to placing Student in his correct grade;
 - c. the extent to which interventions and/or supports could be put in place to address each actual and potential challenge to placing Student in his correct grade;
 - d. the extent to which it is feasible to move Student into his correct grade, with appropriate supports, either by the start of the 2015-2016 school year, or by the start of the 2016-2017 school year.

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: April 17, 2015

/s/ NaKeisha Sylvester Blount
Impartial 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).