

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

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

Date Issued: August 2, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0112

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: July 29, 2020

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (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 (“D.C. Regs.”). 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 to afford the parent access to Student’s complete education records, as requested by counsel beginning in March 2020.

Petitioner’s Due Process Complaint, filed on May 29, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on June 1, 2020. On June

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

5, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. On June 19, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision is due by August 12, 2020.

On July 22, 2020, DCPS filed a motion to quash a notice to appear issued on behalf of Petitioner to INFORMATION OFFICER. This hearing officer denied the motion by order issued July 27, 2020.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on July 29, 2020. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION COORDINATOR (SEC) and by DCPS' COUNSEL.

Counsel elected to waive making opening statements. Petitioner called as witnesses Information Officer, EDUCATIONAL ADVOCATE and Special Education Coordinator. DCPS called no additional witnesses. Petitioner's Exhibits P-1 through P-27 and DCPS' Exhibits R-1 through R-6 were all admitted into evidence without objection. After the taking of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file post-hearing written argument.

**JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

**ISSUE AND RELIEF SOUGHT**

The issue for determination in this case, as identified in the June 19, 2020 Prehearing Order, is:

Whether DCPS has denied Student a FAPE by failing to afford the parent access to Student’s complete education records, as requested by Petitioner’s counsel beginning March 3, 2020.

For relief Petitioner requests that DCPS be ordered to provide access to the parent to all of Student’s education records. Parent also seeks a compensatory education award for the alleged denial of FAPE.

**FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia. Student is eligible for special education services under the IDEA disability classification Autism Spectrum Disorder (ASD). Exhibit P-4. Student was initially determined eligible for special education by DCPS in the 2011-2012 school year. Exhibit P-9. Student is currently enrolled in GRADE at CITY SCHOOL. Exhibit P-4.

2. On March 3, 2020, LAW FIRM made a request to City School for Student’s education records. Exhibit P-18. On March 11, 2020, City School provided to Law Firm

copies of some of Student's education records. Exhibit P-21.

3. On March 16, 2020, DCPS school buildings were closed in response to the Coronavirus national emergency. For the end of the 2019-2020 regular school year DCPS supported learning at home for all students. Hearing Officer Notice. As of the due process hearing date, DCPS' school buildings remain closed to staff and to the public. Representation of DCPS' Counsel.

4. On April 16, 2020, Law Firm emailed a follow-up request to City School requesting the following additional records for Student:

1. All IEPs
2. IEP Progress Report for the 1st 2nd, 3rd term of the 2019-2020 school year
3. IEP Progress Report for the 1st, 2nd, 3rd, and 4th term of the 2017-2018, 2018-2019 school year
4. Analysis of Existing Data ("AED") 2017-2018, 2018-2019, and 2019-2020 school years
5. All neuropsychological evaluations
6. All psychological evaluations
7. All educational evaluations
8. All occupational therapy evaluations
9. All speech and language evaluations
10. All physical therapy evaluations
11. All Functional Behavioral Assessments
12. All assistive technology evaluations
13. Occupational Therapy service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
14. Physical Therapy service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
15. Speech and Language service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
16. BSS trackers for 2017-2018, 2018-2019, and 2019-2020
17. BIP data for 2017-2018, 2018-2019, and 2019-2020 school years
18. Full Report card for the 1st, 2nd, 3rd term for the 2019-2020 school year
19. Full Report card for the 1st, 2nd, 3rd, 4th, term for the 2017-2018 and

- 2018-2019 school year
20. BOY/ MOY full reports for testing for the 2019-2020 school year
  21. BOY/ MOY/ EOY full reports for testing for the 2017-2018 and 2018-2019 school years
  22. Meeting notes for discussions about ■ IEP/ AED/ Evaluations for 2017-2018, 2018-2019, and 2019-2020 school years
  23. LOIs for 2017-2018, 2018-2019, and 2019-2020 school years
  24. PWN for 2017-2018, 2018-2019, and 2019-2020 school years
  25. Attendance records for the 2017-2018 and 2018-2019 school years
  26. Cumulative file

On April 23, 2020, Law Firm sent a follow-up email request to City School for the same records. Exhibit P-21.

5. Special Education Coordinator is able to access most of the education records requested by Law Firm on the electronic Special Education Data System (SEDS) maintained by the D.C. Office of the State Superintendent of Education (OSSE).

Testimony of Special Education Coordinator. On April 23, 2020, Special Education Coordinator wrote law firm by email that under normal, circumstances, *i.e.* when schools were not closed due to the Coronavirus, she would print the requested documents and set up a pick up time with Law Firm. Special Education Coordinator wrote that when she returned to the school building, she would copy the remaining documents and set up a time for pickup. Special Education Coordinator wrote that the requested documents were a large number of documents for her to save, upload and email to Law Firm. Special Education Coordinator sent “[i]n the meantime” Student’s most recent Individualized Education Program (IEP) and evaluations. Exhibit P-21.

6. On April 24, 2020, Petitioner’s Counsel and DCPS’ Counsel corresponded

by email regarding the education records request. Petitioner's Counsel proposed alternative modes for DCPS to provide the documents electronically. DCPS' Counsel responded that "per the IDEA," DCPS was not required to provide copies of records and that Special Education Coordinator had explained that she would not provide Student's records until she was able to access the school building and, then, she would, as a courtesy, make a copy of the documents available to counsel. DCPS' Counsel wrote that Special Education Coordinator did not have the capacity to send the requested records electronically because they were voluminous. Exhibit P-21.

7. On May 27, 2020, Petitioner's Counsel made an email request to DCPS for specific records of Student in electronic form, including,

1. All IEPs (Already have 10/30/2019 IEP)
2. IEP Progress Report for the 1st 2nd, 3rd term of the 2019-2020 school year
3. IEP Progress Report for the 1st, 2nd, 3rd, and 4th term of the 2017-2018, 2018-2019 school year
4. Analysis of Existing Data ("AED") 2017-2018, 2018-2019, and 2019-2020 school years
5. All evaluations including:
  - i. All neuropsychological evaluations
  - ii. All psychological evaluations (Already have the comprehensive psychological evaluation from 4/10/15)
  - iii. All occupational therapy evaluations (Already have the occupational therapy evaluation from 4/10/15)
  - iv. All speech and language evaluations (Already have the speech and language evaluation from 4/9/15)
  - v. All physical therapy evaluations
  - vi. All Functional Behavioral Assessments
  - vii. All assistive technology evaluations

6. Occupational Therapy service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
7. Physical Therapy service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
8. Speech and Language service trackers for 2017-2018, 2018-2019, and 2019-2020 school years
9. BSS trackers for 2017-2018, 2018-2019, and 2019-2020
10. BIP data for 2017-2018, 2018-2019, and 2019-2020 school years
11. Full Report card for the 1st, 2nd, and 4th term for the 2019-2020 school year (Already have 3<sup>rd</sup> term report card)
12. Full Report card for the 1st, 2nd, 3rd, 4th, term for the 2017-2018 and 2018-2019 school year
13. BOY/ MOY full reports for testing for the 2019-2020 school year
14. BOY/ MOY/ EOY full reports for testing for the 2017-2018 and 2018-2019 school years
15. Meeting notes for discussions about [REDACTED] IEP/ AED/ Evaluations for 2017-2018, 2018-2019, and 2019-2020 school years
16. LOIs for 2017-2018, 2018-2019, and 2019-2020 school years
17. PWN for 2017-2018, 2018-2019, and 2019-2020 school years
18. Attendance records for the 2017-2018 and 2018-2019 school years
19. Any incident reports
20. Work samples
21. Cumulative file
22. Medical documentation or psychological documentation related to any diagnoses including Autism and ADHD or ADHD
23. Assessments and screeners referenced in Student's 10/30/2019 IEP
  - i. Number Sense Diagnostic Assessment given on 09/18/2019
  - ii. Single-skill timed Arithmetic Fluency Assessment), referenced in Student's 10/30/2019 IEP under mathematics
  - iii. Curriculum-based Number Sense Assessment given on 09/20/2019
  - iv. Curriculum-based Computation Assessment given on 09/23/2019
  - v. Curriculum-based Applied Problem Solving Assessment given on 09/25/2019
  - vi. Concepts of Print Assessment given on 08/28/2019
  - vii. Phonemic Awareness Assessment given on 09/04/2019
  - viii. Phonemic Awareness Assessment given on 09/04/2019.
  - ix. Letter Identification Assessment given on 09/06/2019
  - x. Word List Tracking Sheet last updated on 09/09/2019
  - xi. Phonics Screener or a teacher-created word list given on 09/11/2019
  - xii. Oral Reading Fluency Assessment given on 09/13/2019

- xiii. The problem behavior was observed from 8/26/19 to 10/29/19 during class and documented using a ABC observation form (i.e. Antecedent-Behavior-Consequence) completed on 10/07/2019
- xiv. The Basic Concepts Skills Screener (BCSS), referenced in Student's 10/30/2019 IEP under Communication/Speech and Language.

DCPS' Counsel responded by email on May 27, 2020 that "due to Covid 19," the District of Columbia remained in a stay at home status and schools remained on a distance learning status until the end of the school year, and that when DCPS was back in session ("back in the school building"), the parent's records request would be accommodated by allowing access to Student's educational record. Exhibit P-21.

8. As of the due process hearing date, DCPS had not provided to Law Firm the requested documents listed in Petitioner's Counsel's May 27, 2020 email. Special Education Coordinator has no knowledge of when she would be allowed back into the City School building to print copies of Student's education records for Law Firm.

Testimony of Special Education Coordinator.

9. Educational Advocate is the assigned educational advocate for Student at Law Firm. Educational Advocate has only had access to very limited educational documents and assessments for Student. Without having access to Student's education records, Educational Advocate is unable to provide an informed recommendation to the parent or participate in meetings for Student. Testimony of Educational Advocate.

10. District of Columbia Deputy Mayor of Education Paul Kihn announced on July 30, 2020 that the District was "moving forward with an all-virtual start to the school year for students in pre-K through the 12th grade, through Term 1, until Nov. 6



[2020].” No date for the reopening of school buildings for DCPS staff was announced.

Hearing Officer Notice.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer’s own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student’s IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). Petitioner has the burden of persuasion in this case.

#### **Analysis**

Did DCPS deny Student a FAPE by failing to afford the parent access to Student’s complete education records, as requested by Petitioner’s counsel beginning March 3, 2020?

Petitioner claims that DCPS has denied Student a FAPE by failing to provide copies of most of Student’s education records to Law Firm following requests made in

March, April and May 2020. DCPS admits receipt of Law Firm's requests for Student's records, but asserts that it has been unable, as yet, to provide copies of most of the requested records due to the closing of City School on March 16, 2020 in the wake of the Coronavirus national emergency.

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, DCPS must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. *See* 34 CFR §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006). The DC Regs. provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. *See, e.g., N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent's requests for records.)

In the present case, DCPS admits that Law Firm made a request to DCPS for copies of Student's education records on March 3, 2020. Under the 45 day deadline, 34 CFR § 300.613(a), DCPS was obliged to comply with Law Firm's request by April 17, 2020. That does not mean that DCPS had to provide copies of all of the voluminous education records requested by Law Firm, but DCPS was required to allow Mother or her representative to inspect and review the records at City School or another suitable

site. *See id.* On March 11 and April 23, 2020 City School staff provided Law Firm electronic copies of some of Student's education records but DCPS has indefinitely delayed providing numerous requested records, pending the reopening of City School, which has been closed since March 16, 2020 due to the Coronavirus emergency.

To ensure that children and their parents are afforded a FAPE in accordance with the IDEA, Congress "enacted certain procedural safeguards which shall be established or maintained by any 'State educational agency, State agency, or local educational agency that receives assistance' under the Act. 20 U.S.C. § 1415(a)." *Idea Pub. Charter Sch. v. District of Columbia*, 374 F. Supp. 2d 158, 163 (D.D.C. 2005). Those procedural safeguards, including access to education records, have not been suspended during the Coronavirus emergency. On May 12, 2020, the U.S. Department of Education pronounced that except when a local education agency (LEA) closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, the LEA must make every effort to provide special education and related services to children with disabilities in accordance with the child's individualized education program (IEP). U.S. Department of Education, *Questions and Answers: Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak (March 2020)* (OSERS May 12, 2020).

In the District, DCPS resumed providing educational services to its general student population, in the form of learning at home services, for the last weeks of the 2019-2020 school year. In accordance with the above Department of Education

pronouncement, DCPS was required to also resume making every effort to provide special education and related services to students with disabilities. I find that this obligation included making every effort to honor requests for education records made by parents of students with disabilities.

The IDEA requires that DCPS must permit parents to inspect and review education records. However, neither the IDEA nor the D.C. Regs. require, in the normal course, that DCPS provide parents copies of requested education records. However, consistent with 34 CFR § 300.613(b)(2), the District must provide copies of a child's education records to a parent, if failure to do so would effectively prevent a parent from exercising the right to inspect and review the records, such as if a parent lives outside of commuting distance of the agency. *See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46688 (August 14, 2006).

At this point, the parent has been denied access to most of Student's education records since City School was closed on March 16, 2020. DCPS' Counsel has advised Petitioner's Counsel that DCPS will only accommodate Law Firm's records request when DCPS is back in the school building. At present, there is no indication that DCPS will be back in the City School building before November 2020. Under these circumstances, DCPS' failure to provide the parent's representatives copies of Student's education records is effectively preventing the parent from exercising her right to inspect and review the records. I find that this is a procedural violation of the IDEA.

A procedural violation gives rise to a substantive violation of the IDEA only if the procedural deficiency “(i) [i]mpeded the child’s right to a FAPE; (ii) [s]ignificantly 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) [c]aused a deprivation of educational benefit.” *Hart v. District of Columbia*, 323 F. Supp. 3d 1, 3–4 (D.D.C. 2018) (quoting 34 C.F.R. § 300.513(a)(2), other internal quotations omitted). Educational Advocate testified, credibly, that without access to Student’s education records, she is not able to provide informed educational recommendations to Mother or to participate in special education meetings for Student. Mother has established, therefore, that DCPS’ not providing copies of Student’s education records is significantly impeding her opportunity to participate in the decision-making process for Student. I conclude that this procedural violation has given rise to a denial of FAPE.

DCPS does not dispute that even though City School is closed, it has the capability to produce copies of Student’s education records maintained in the electronic Special Education Data System (SEDS). To date, DCPS has balked at providing the records because printing the records and scanning and emailing the documents to Law Firm would be overly burdensome. But neither the IDEA nor the DC Regs. excuses DCPS from timely honoring a parent’s request for education records, even when compliance with the request is burdensome. Accordingly, I will order DCPS to forthwith provide the parent or her representatives copies of the rest of Student’s requested education records, to the extent the records are maintained in the SEDS system. I will

leave it up to the District whether to provide the documents in electronic format or to provide hard copies.

The parent has also requested compensatory education for Student to address this procedural violation. However the parent did not offer any evidence that Student has actually been harmed by DCPS' not providing copies of all of Student's education records to Law Firm. *See B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016). (Hearing Officer should be guided by the principle that, "[t]o fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made.") As noted in this decision, DCPS schools have been closed since March 16, 2020 due to the Coronavirus. Undoubtedly Student, like all children in the District, has been impacted by not having the opportunity to attend classes during this period. But to assume that Student has been additionally harmed by DCPS' not providing copies of Student's education records to counsel is too speculative. Understandably, Petitioner elected not to submit a compensatory education proposal at the due process hearing.

Moreover, compensatory education is an equitable remedy. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief.) The Coronavirus pandemic has presented a huge challenge for the District and for DCPS. The D.C. government first announced that schools in the district would be closed only from March 16 through March 31, 2020. The reopening

date for DCPS schools has since been postponed, repeatedly – most recently to November 4, 2020. City School appears to have acted in good faith in responding to Law Firm’s records request and should not be faulted for initially waiting for the school building to reopen before printing copies of Student’s records for Law Firm. In light of these unprecedented circumstances, I find it would not be equitable to order DCPS to provide compensatory education to Student for its delay in providing the requested education records.

**ORDER**

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

ORDERED:

1. Within 15 business days of the date of this order, DCPS shall provide to Law Firm copies of Student’s education records, as listed by Petitioner’s Counsel in the May 27, 2020 email to DCPS’ Counsel, to the extent such documents are maintained in the SEDS system. At its election, DCPS may provide the documents in electronic format or provide hard copies; and
2. All other relief requested by the Petitioner herein is denied.

Date: August 2, 2020

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).

cc: Counsel of Record  
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