

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

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

Date Issued: December 31, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0242

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: December 15 and 20, 2016

Respondent.

Office of Dispute Resolution,  
Rooms 2004, 2006  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not ensuring that he was comprehensively reevaluated beginning in the 2015-2016 school year, failing to offer Student appropriate Individualized Education Programs

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

(IEPs) for the 2015-2016 and 2016-2017 school years and failing to implement Student's IEP in the spring of 2016.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 11, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 12, 2016. The parties met for a resolution session on October 25, 2016 and were unable to reach an agreement. My final decision in this case was originally due by December 25, 2016. On December 21, 2016, I issued an order granting DCPS' consent motion to extend the due date for the final decision to January 4, 2017. On November 9, 2016, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Independent Hearing Officer on December 15 and 20, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

The Petitioner testified and called as additional witnesses CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, COMMUNITY HEALTH NURSE, FAMILY ADVOCATE, and ADMISSIONS DIRECTOR from NONPUBLIC SCHOOL. DCPS called as witnesses PROGRAM MANAGER, HHIP COORDINATOR and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-51 and DCPS' Exhibits R-1 through R-22 and R-24 through R-38 were all admitted into evidence without objection. Petitioner's objection to Exhibit R-23 was sustained. Counsel for the respective parties made opening statements and closing arguments. There was no request to file post-

hearing briefs.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the November 9, 2016

Prehearing Order:

- a. Whether DCPS failed to comprehensively evaluate this student in light of the student's deficits and/or failed to agree to conduct comprehensive reevaluations of the student, including a neuropsychological assessment at a September 29, 2016 MDT meeting;
- b. Whether DCPS failed to provide the student with an appropriate IEP during the 2015-2016 school year by failing to develop an appropriate IEP on or about October 7, 2015 and/or by failing to revise that IEP in light of the student's deteriorating medical conditions, due to the IEP's not being based on comprehensive evaluations, due to the hours of specialized instruction being insufficient in light of the student's extensive deficits, and due to DCPS' failure to update the student's IEP in light of student's deteriorating medical condition and frequent seizures that impeded the student from attending school and accessing his education or to provide the student with his least restrictive environment;
- c. Whether DCPS failed to develop and/or provide the student with an appropriate IEP or Placement and/or Location of Services on or about September 29, 2016, at which time the parent requested that a more restrictive setting be provided to the student to meet his academic needs in light of both his low academic functioning and his medical needs, and his need for a self-contained program, and because the September 29, 2016 IEP was not based on comprehensive reevaluations;
- d. Whether DCPS failed to fully implement the student's IEP during the 2015-2016 school year between February 2016 and the end of the school year in that, because the school was unable to address the student's seizure disorder, the parent was left with no option other than to keep the student home and the student was not provided with the services outlined in his IEP. Instead, the student only received two hours weekly of home instructional services during this time period and was denied any access to peers or an education in his least restrictive environment.

For relief, the parent requests that DCPS be ordered to immediately revise the

student's IEP to provide for a full time self-contained educational setting (27.5 hours per week), a dedicated nurse, and transportation; that DCPS be ordered to provide the student with a location of services capable of implementing the revised IEP and/or fund the private placement of the student; and that Student be awarded compensatory education for the denials of FAPE alleged in the complaint. Petitioner sought as additional relief that DCPS be ordered to fund independent neuropsychological, speech and language and occupational therapy evaluations of Student. Prior to the due process hearing, DCPS issued funding authorizations for the independent assessments.

### **FINDINGS OF FACT**

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

1. Student an AGE youth resides in the District of Columbia with Mother. Testimony of Mother. Student was born with sickle cell anemia. When Student was ■■■ years old, he was determined eligible for special education, as a child with an Other Health Impairment due to sickle cell disease. Testimony of Mother.
2. For the 2016-2017 school year, Student is enrolled in CITY SCHOOL 2 in the GRADE. From kindergarten through the 2015-2016 school year, Student was enrolled in CITY SCHOOL 1. Testimony of Mother.
3. In a letter dated September 21, 2016, Student's pediatrician at CITY HOSPITAL 1 set out Student's current medical diagnoses, which include chronic sickle cell disease, seizure disorder, asthma and vision loss in the right eye. Exhibit P-18.
4. The Woodcock-Johnson III Normative Update Tests of Achievement were administered to Student January 2012, when Student was in GRADE X. On Oral Language and Oral Expression, Student received 1<sup>st</sup> grade equivalent scores. In

Reading, Math and Written Language, Student's WJ-III scores were all at or below kindergarten grade equivalence. Exhibit P-10.

5. In an Evaluation Summary Report compiled in October 2015 at City School 1, Student's overall performance in math, based on the iReady diagnostic assessment, was at kindergarten level. He was unable to count objects or recognize numerals beyond the number 10. On the Text Reading Comprehension (TRC) assessment, Student's independent reading level was at 2<sup>nd</sup> grade equivalent. In written expression, Student was reported to be able to write the letters of the alphabet, but needed to learn the correct formation of letters, how to write his first and last name legibly and to print simple sentences. Neither the Evaluation Summary Report nor any other hearing evidence indicates that Student's intellectual or cognitive abilities have ever been assessed or that he has ever been administered a comprehensive psychological assessment. Exhibit P-9.

6. Student's special education eligibility, as a child with OHI - Sickle Cell Anemia, was most recently confirmed on October 7, 2015 at City School 1. The eligibility team reportedly reviewed medical data, ST Math (Visual Math Instructional Software), myON (individualized digital reading texts), DIBELS (Dynamic Indicators of Basic Early Literacy Skills) and LEXIA (technology-based differentiated literacy instruction) to make its determination. Exhibit P-11.

7. Student's IEP was reviewed by his City School 1 IEP team on October 7, 2015. In the October 7, 2015 IEP, Mathematics, Reading, and Written Expression were identified as Student's areas of concern. The IEP provided for Student to receive 10 hours per week of Specialized Instruction outside the general education setting. There was no provision for Related Services, Classroom Accommodations or for a dedicated

aide. The IEP stated erroneously that Student had not been identified as blind or visually impaired. Exhibit P-4.

8. Student has a history of reported Cerebrovascular Accidents (strokes) in 2013 and in approximately April 2015 which left temporary weakness in his right arm. Exhibit P-30.

9. On December 10, 2015, Student was taken to CITY HOSPITAL 2 following a fainting incident at the City School 1 school gym. His motor and neurological exams were normal and he was discharged the same day. Exhibit P-31. A similar fainting incident occurred at school on December 14, 2015 and Student was taken to City Hospital 2. The physician wanted to admit Student for further studies, but Mother eloped with him from the hospital because she was not happy with the care he received there. Exhibit P-30. On January 4, 2016, following another fainting occurrence at City School 1, Student was again taken to City Hospital 2 and was admitted for two days. Exhibit P-30.

10. On January 11, 2016, Student had a seizure at City School 2 and was taken to City Hospital 2. He was put on new medications and discharged the same day. Exhibit P-29. Student again had seizures at school on January 20, 2016 and January 29, 2016 and was taken to City Hospital 2 on these occasions. On both occasions, he was discharged followed examination by the physician. Exhibits P-28, P-27.

11. Following the January 29, 2016 seizure incident, the staff at City School 2 suggested that Student stay home because of the seizure activities and Mother complied with the suggestion. From around the beginning of March 2016 to June 2016, DCPS provided student Home and Hospital Instruction Program (HHIP) services at his home, with a teacher providing one hour of services, twice a week. Testimony of Mother.

12. Student returned to City School 1 on April 5, 2016. He had another seizure event and was taken to City Hospital 2 for evaluation. Student was referred for a psychiatric evaluation due to suspicion of non-epileptiform seizures (events which mimic epileptic seizures). Student was discharged on April 7, 2016 with diagnoses of (Axis I) Unspecified mood disorder, Unspecified anxiety disorder, Learning Disorder, rule out Nonepileptiform seizures, and (Axis III) sickle cell disease, epilepsy, stroke and asthma. The City Hospital 2 psychiatrist recommended, *inter alia*, that Student have a neuropsychological assessment. Exhibit P-26.

13. In the 2015-2016 school year, Mother provided Student's City Hospital 1 and City Hospital 2 records to City School 1 nursing staff. Testimony of Community Health Nurse.

14. Student "graduated" from City School 1 at the end of the 2015-2016 school year and matriculated to City School 2. Testimony of Mother. When Student enrolled in City School 2, there was no psychological evaluation in his DCPS records. Testimony of Assistant Principal.

15. On September 3, 2016, Assistant Principal convened a meeting at City School 2 to develop a "Safety Plan" for Student. Mother, Educational Advocate and Family Advocate participated. Mother explained that her concern was to instruct the school nurse and other school staff instructions on how to respond when Student had seizures at school. A safety plan was adopted which provided explicit instructions for what to do if Student exhibited seizure-like behaviors at school, namely,

1. Teacher will place student in rescue position;
2. Teacher will clear items away from student;
3. Teacher will contact main office for nurse;
4. Main office will contact parent during any seizures or Mother's sister if parent unable to be reached;

5. Teacher will clear classroom of other students;
6. Nurse will contact the paramedics if student is confused after a seizure for more than 30minutes or if in an epileptic seizure lasts for more than 5 minutes.

Exhibits P-7, P-8. Mother did not believe that City School 2 would be able to implement the plan safely because Student's classroom was on the third floor and Mother was concerned that the school nurse, whose office was on the first floor, would not be able to get to Student in time to administer his anti-seizure medications at the onset of his seizures. Testimony of Mother.

16. At the September 3, 2016 safety plan meeting, Educational Advocate requested that Student be provided a dedicated nurse, that he be evaluated with comprehensive psychological, occupational therapy and speech-language assessments and that an "emergency" IEP team meeting be convened. Testimony of Educational Advocate, Testimony of Assistant Principal. Assistant Principal responded that the purpose of the meeting was to develop safety plan, not to revise Student's IEP. An IEP team meeting had been scheduled for September 22, 2016, but had to be rescheduled to September 29, 2016 because Student suffered a seizure on September 22<sup>nd</sup>. Testimony of Educational Advocate.

17. On September 29, 2016, Student's IEP team met at City School 2 to review his IEP. Mother and Educational Advocate attended the meeting. The team noted that there were no new assessments or evaluations of Student to review and that as a result of his seizures in the school setting, Student was often absent from school. Student has missed the fall 2016 school reading assessment due to his absences. Educational Advocate requested Occupational Therapy (OT), speech and language assessments and a neuropsychological evaluation of Student. Assistant Principal responded that classroom

observations would first be conducted to determine if Student needed formal OT and speech and language evaluations. The team agreed that a comprehensive psychological evaluation would be completed. A full-time medical aide and a more restrictive educational setting were also requested by Educational Advocate for Student. Assistant Principal undertook to follow DCPS protocols as to these requests. Exhibit R-13.

18. In a review of present levels of performance at the September 29, 2016 IEP meeting, the math teacher reported that Student was demonstrating kindergarten level skills. The teacher reported that Student was functioning very low in the area of reading. Student was reported to have severe deficits in writing to include letter formation, organizational writing, sentence structure and ability to write expressively and to draw on his own experience when writing. Exhibit P-6.

19. The September 29, 2016 IEP stated erroneously that Student had not been identified as visually impaired. The IEP identified Mathematics, Reading and Written Expression as areas of concern. For Special Education Services, the IEP provided that Student would receive 12 hours per week outside general education, divided among mathematics (6 hours), reading (4 hours) and Written Expression (2 hours). Extended School Year (ESY) services were not provided. Exhibit R-12.

20. Although a draft IEP provided at the September 29, 2016 IEP meeting indicated that Student required a dedicated aide, the final IEP stated that Student did not require the support of a dedicated aide. At the meeting, Assistant Principal stated that following the September 3, 2016 safety plan meeting, a referral had been made to DCPS' central office for consideration of a dedicated aide for Student. However, there was resistance from DCPS' central office out of concern over potential liability for how the dedicated aide would respond to Student's seizure episodes. At the IEP meeting,

Educational Advocate continued to press for a dedicated nurse for Student. Exhibit P-6.

21. A DCPS staff member attempted to observe Student at City School 2 for purposes of a least restrictive environment study. Student was absent and could not be observed. Based upon a review of Student's records, a DCPS LRE coordinator has made a recommendation that Student be placed in a more restrictive environment. There has been no follow up on the recommendation because Student has not been attending school. Testimony of Assistant Principal.

22. Student's in-school seizures have not been controlled in the current 2016-2017 school year. Testimony of Mother. Prior to the December 15, 2016 due process hearing, Student missed about 55 out of 75 school days. When he was present, Student would typically attend only 1 or 2 classes because of his seizure disorder. Testimony of Assistant Principal. DCPS has not provided HHIP home school services to Student this school. Testimony of Mother.

23. In the current school year, Student was taken to City Hospital 2 for concerns for seizures events on September 22, 2016, October 3, 2016, and October 17, 2016. On each hospital visit, he was discharged the same day. Exhibits P-22, P-21 and P-20.

24. On November 2, 2016, DCPS issued funding authorization for the parent to obtain independent educational evaluations (IEE) of Student, including a neuropsychological evaluation, a speech and language evaluation and an OT evaluation. Exhibit R-36. At the beginning of the due process hearing on December 15, 2016, DCPS' counsel represented that these IEE funding authorizations were valid and could still be used by the parent.

25. Nonpublic School is a full time therapeutic day academy with services for

students struggling due to low cognitive abilities. Student has been offered admission to the program, subject to DCPS' providing a dedicated full-time nursing assistant at school and medical support for school transportation. Student would be placed in a classroom with a certified special education teacher and a teaching assistant. Currently there are 6 students in the class. The other students' disabilities are Multiple Disabilities (specific learning disorders and high functioning autism), OHI - Attention Deficit Hyperactivity Disorder and school anxiety. The school has a Licensed Practical Nurse on staff who serves a total of 98 students. Throughout the school building, there are staff available who can dispense medications. Admissions Director has interviewed Mother and Student and reviewed Student's education records. School staff were most concerned with Student's safety plan. School staff determined that they had sufficient information to conclude that the program would benefit Student. Testimony of Admissions Director.

26. Nonpublic School is located in suburban Virginia. It holds a current certificate of approval issued by the D.C. Office of the State Superintendent of Education. The annual tuition fee is \$ [REDACTED]. There are no nondisabled students enrolled. Testimony of Admissions Director.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

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 DCPS, the District 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 District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### Analysis

#### A.

Has DCPS failed to comprehensively evaluate this student in light of the student's deficits and/or failed to agree to conduct comprehensive reevaluations of the student, including a neuropsychological assessment at a September 29, 2016 multidisciplinary team meeting?

Parent contends that DCPS has violated the IDEA by failing to ensure that Student has been comprehensively reevaluated in light of his academic deficits and health impairments. DCPS does not dispute that Student requires a comprehensive reevaluation, but explains that, in the current school year, Student has missed so much school because of his seizure disorder, it has been unable conduct needed evaluations.

The IDEA provides that a special education reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parents or teacher requests a reevaluation. *See District of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 93–94 (D.D.C. 2014). *See, also*, 34 CFR §

300.303(a); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006).

The IDEA regulations, 34 CFR § 300.305(a), provide that, as part of an initial evaluation and any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including—

- (i) Evaluations and information provided by the parents of the child;
- (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) Observations by teachers and related services providers

and, on the basis of that review and input from the child's parents, identify what additional data, if any, are needed to determine whether the student is a child with a disability and the educational needs of the child. *See* 34 CFR § 300.305(a).

In interpreting evaluation data, for the purpose of determining if a child is a child with a disability and the educational needs of the child, the District must—

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

*See* 34 CFR § 300.306(c). The IDEA does not require that a particular type of evaluation be conducted to establish a child's eligibility; rather, the evaluation requirements in §§ 300.530 through 300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child. *See* Federal Policy and Guidance – OSEP Memorandum, *Analysis of Comments and*

*Changes*, Attachment 1 (May 4, 2000).

Student has been afflicted with chronic sickle cell disease since birth. He is visually impaired with loss of vision in one eye. Mother testified that Student has had an IEP since he was ■ years old. A DCPS October 2014 Analysis of Existing Data form (Exhibit P-16) indicates that Student was determined eligible for special education in December 2012 based upon his sickle cell disease. Since at least January 2012, Student's math skills have not progressed beyond kindergarten level. On the Text Reading Comprehension (TRC) assessment, last administered in October 2015 Student's independent reading level was at 2nd grade equivalent, years behind grade level expectations. His writing skills are similarly delayed. On October 7, 2015, the City School 1 eligibility team confirmed Student's special education eligibility. Since January 2016, Student has suffered from a seizure disorder which causes him to experience chronically recurring seizure episodes in school. Since March 2016, initially at the instance of City School 1 administrators, Student has not regularly attended school. DCPS provided Student limited HHIP home instruction for 2 hours per week in the spring of 2016.

I find that Petitioner has not comprehensively evaluated Student during the 2014-2015 or 2015-2016 school years. DCPS' October 2015 review of Student's special education eligibility, based Student's medical data and computer-based math and reading assessments, was not a comprehensive reevaluation. Notably, it did not include a psychological evaluation of Student. In *James v. District of Columbia*, 2016 WL 3461185 (D.D.C. June 21, 2016), the court held that DCPS' failure to provide a comprehensive psychological reevaluation requested by the parent was a denial of a FAPE:

The role of an evaluation “is to contribute to the development of a sound IEP.” *Harris v. District of Columbia*, 561 F.Supp.2d 63, 67 (D.D.C.2008). “[C]ontinual evaluations [a]re necessary, and parents must have the ability to seek redress for a school’s failure to sufficiently monitor a child’s progress under the IEP . . . .” *Id.* at 68 (citing [*Honig v. Doe*, 484 U.S. 305, 311-312, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)]). The court in *Harris* found that a failure to act on a request for an evaluation of a child “is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA.” *Id.* at 69. The same is true here. The failure to conduct a new comprehensive psychological evaluation of V.J. means that her IEP might not be sufficiently tailored to her special and evolving needs. This potentially compromises the effectiveness of the IDEA’s protections as they pertain to V.J.

*James, supra.* In *Jones*, DCPS’ omission was only that it did not conduct a comprehensive psychological reevaluation of Student when requested by the parent. In the present case, there is no evidence that DCPS has *ever* assessed Student with a comprehensive psychological evaluation, despite his chronic, debilitating health issues, persistent school absences, very low academic achievement since at least 2012 and the explicit recommendation of the City Hospital 2 psychiatrist in April 2016 that Student should have a neuropsychological assessment.

The failure to conduct a required IDEA evaluation is a procedural violation of the Act. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district’s failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a denial of FAPE 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 CFR § 300.513(a)(2). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016).

I find that DCPS' failure to ensure that Student was comprehensively reevaluated for the October 2015 eligibility determination, and since then, has impeded the parent's opportunity to meaningfully participate in IEP meetings. More importantly in this case, it has impeded Student's right to a FAPE, because without comprehensive and timely updated reevaluations of Student, the IEP teams at City School 1 and City School 2 have lacked sufficient data to determine the scope of Student's disabilities or to appropriately revise his IEPs to address his needs for school health services and his inadequate educational progress. *Compare N.K. v. N.Y. City Dep't of Educ.*, 961 F.Supp.2d 577, 586 (S.D.N.Y.2013) (holding that the IEP team had sufficient evaluative data despite the failure to conduct an evaluation). This was a denial of FAPE.

B.

Did DCPS fail to provide the student with an appropriate IEP during the 2015-2016 school year by failing to develop an appropriate IEP on or about October 7, 2015 and/or by failing to revise that IEP in light of the student's deteriorating medical conditions, due to the IEP's not being based on comprehensive evaluations, due to the hours of specialized instruction being insufficient in light of the student's extensive deficits, and due to DCPS' failure to update the student's IEP in light of student's deteriorating medical condition and frequent seizures that impeded the student from attending school and accessing his education or to provide the student with his least restrictive environment?

Did DCPS fail to develop and/or provide the student with an appropriate IEP or Placement and/or Location of Services on or about September 29, 2016, at which time the parent requested that a more restrictive setting be provided to the student to meet his academic needs in light of both his low academic functioning and his medical needs, and his need for a self-contained program, and because the September 29, 2016 IEP was not based on comprehensive reevaluations?

Petitioner next contends that DCPS' IEPs for Student developed on October 7, 2015 at City School 1 and on October 29, 2016 at City School 2 were inappropriate for

Student because they were not based on comprehensive reevaluations and because City School 1 did not revise Student's IEP after he developed the seizure disorder in January 2015. Petitioner also contends that the IEP's provided inadequate specialized instruction services and, in the 2016-2017 school year did not meet Student's need for a more restrictive setting. DCPS maintains that IEPs were appropriate based upon that data that was then available to the IEP teams. In closing argument, Petitioner's counsel contended that the October 29, 2016 IEP team at City School 2 did the best it could with limited data, because Student had been "unavailable" for evaluations for most of the current school year due to his absences from school and fatigue resulting from his sickle cell disease and seizure disorder.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Rowley*, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the "appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so." *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)); *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034 (finding that the IDEA does not require that IEPs "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children," only that they be "reasonably calculated to enable the child to receive educational benefits"); *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) ("While

the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.”).

*Moradnejad*, 177 F.Supp. 3rd at 274-75.

Student’s October 7, 2015 IEP, developed at City School 1, provided Student 10 hours per week of Specialized Instruction outside the general education setting. The October 29, 2016 IEP increased the services to 12 hours per week. Neither IEP provided for Related Services or school health services. As noted above in this decision, since at least January 2012, Student’s math skills had not progressed beyond kindergarten level. In October 2015, Student’s independent reading level was measured at a 2nd grade equivalent, years behind his then current grade level expectations. His writing skills were similarly delayed. After March 2016, Student stopped regularly attending school because of his seizure disorder. I find that DCPS’ failure to ensure that Student was comprehensively reevaluated to assess the causes of his lack of academic progress and to identify his need for related services, school health services and accommodations resulted in the October 2015 and October 2016 IEP teams’ lacking sufficient data to informedly consider Student’s special education needs. For the same reason, neither IEP team had sufficient information to determine whether Student’s educational placement, primarily in the general education setting, was appropriate for him. I conclude that neither IEP was reasonably calculated to enable Student to receive educational benefits. DCPS also failed to ensure that Student’s IEP was revised after he stopped attending classes in March 2016. This violated the IDEA’s requirement that the IEP be reviewed in response to new information. *See D.S. v. District of Columbia*, 699 F. Supp. 2d 229 (D.D.C. 2010) (“Because the IEP must be ‘tailored to the unique needs’ of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690

(1982), it must be regularly revised in response to new information regarding the child's performance, behavior, and disabilities." *Id.* at 234 (citing 20 U.S.C. §§ 1414(b)-(c).)

C.

Did DCPS fail to fully implement the student's IEP during the 2015-2016 school year between February 2016 and the end of the school year in that, because the school was unable to address the student's seizure disorder, the parent was left with no option other than to keep the student home and the student was not provided with the services outlined in his IEP?

After Student began having multiple seizure episodes at City School 1 in January 2016, the school Special Education Coordinator recommended that Student be home-schooled because he had been missing a lot of school due to the seizures. Mother followed the recommendation and from about the beginning of March 2015 through the end of the school year, Student did not return to his classes at City School 1. Student's IEP was not revised to reflect this change.

After March 2016, Student was only provided HHIP home instruction services for two hours per week. Petitioner contends that this was a failure to implement Student's October 7, 2015 IEP. However, rather than a failure to implement the IEP, developed before the onset of Student's seizure episodes, DCPS' failure here was in not ensuring that Student's IEP team met to consider his health issues and revise his IEP as warranted. If Student's educational placement needed to be changed from the school setting specified in his IEP, DCPS was required to ensure that his IEP team was convened to review and revise his IEP as appropriate. *See* 34 CFR § 300.324(b)(ii). The failure to revise the IEP was a procedural violation of the IDEA, which I find impeded Student's right to a FAPE and caused a deprivation of educational benefit. This was a denial of FAPE. *See* 34 CFR § 300.513(a)(2).

## Remedy

In this decision, I have concluded that Student has been denied a FAPE by DCPS' failure to ensure that he has been comprehensively evaluated since before his October 7, 2015 IEP was developed, by DCPS' failure to ensure that appropriate IEPs were developed at IEP meetings on October 7, 2015 and October 29, 2016 and by the failure of Student's IEP team to review and revise his IEP and educational placement following the onset of Student's seizure disorder in the middle of the 2015-2016 school year. For a remedy, Petitioner requests that DCPS be ordered to fund Student's full time special education placement at Nonpublic School and that Student be provided with a full-time dedicated nurse. Petitioner also seeks an award of compensatory education for Student.

Unfortunately, until Student is comprehensively and appropriately reevaluated, it is premature to order changes to Student's IEP or educational placement. As noted in this decision, academically, Student is years behind in school for reasons unexplained by the hearing evidence. Nor does the evidence suffice for this hearing officer to determine which alternative, on the continuum of educational placements, would meet Student's needs for special education and related services, with or without a dedicated aide or nurse. *See* 34 CFR § 300.115. In order for Student's IEP to be "sufficiently tailored to [his] special and evolving needs," *James, supra*, the first step is to have Student competently reevaluated.

DCPS has issued funding authorization for the parent to obtain IEE neuropsychological, OT and speech and language assessments of Student. However, considering the impact on Student of DCPS' failure to appropriately respond to his medical and academic issues over the past two school years, I find that a more comprehensive evaluation remedy is warranted. DCPS' expert, Program Manager,

opined that in order to make an informed decision to support Student's health and academic needs, Student's IEP team needs updated medical, neurological, neuropsychological data. This expert agreed that it would be appropriate for Student to be evaluated at an institution that is equipped to conduct a comprehensive, integrated, special education evaluation, including a neuropsychological assessment, and which would be also able to draw upon its medical and neurological expertise as needed. DCPS' expert agreed that the Kennedy Krieger Institute (KKI) would be capable of providing such an evaluation and Petitioner's counsel stated in closing argument that the parent would consent to Student's being evaluated by KKI. I find that as an initial remedy, it is appropriate to order DCPS to fund Student's educational evaluation at KKI or a similar institution capable of comprehensively evaluating Student and making education recommendations, taking into account Student's medical, neurological and neuropsychological history and concerns. Upon completion of Student's reevaluation, DCPS shall promptly convene Student's IEP team to revise his IEP as appropriate and determine his ongoing educational placement.

Pending completion of Student's reevaluation, so that Student may return to school without delay, I will order DCPS to provide Student a full-time dedicated aide, who has the necessary health care training and skills to respond to Student's seizure episodes at school and to administer emergency seizure medications.

Petitioner has also requested a compensatory education award for Student. Where a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. 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 school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005)).

Until Student has been appropriately reevaluated and the extent of special education and related services he now requires can be determined, there is insufficient evidence to craft an appropriate compensatory education remedy. Therefore, I will deny without prejudice Petitioner's request for a compensatory education award. In the event that Petitioner and DCPS are unable to agree upon appropriate compensatory education for Student hereafter, Petitioner may file a new due process complaint to seek further compensatory education relief for the denials of FAPE I have found in this decision.

### **ORDER**

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

ORDERED:

1. DCPS is ordered, subject to obtaining consent from the parent, to obtain a new comprehensive educational evaluation of Student, conducted at public expense by Kennedy Krieger Institute a similar institution capable of comprehensively evaluating Student and making education recommendations, taking into account Student's medical, neurological, neuropsychological and academic history and concerns. DCPS shall fund the evaluation at the prevailing market rate and shall not limit payment to any fee schedule issued by DCPS or OSSE. Subject to the availability of the institution, said evaluation shall be conducted within 30 calendar days of this issuance of this order. DCPS shall assist Mother to schedule the evaluation and to transmit Student's medical and education records and shall provide transportation for the evaluation. DCPS shall not be held responsible for any reasonable delay in complying with this evaluation requirement, to the extent that it has not been able to obtain consent from the parent for the evaluation or cooperation from the parent in scheduling and conducting the evaluation;

2. In the alternative, the parent may elect to proceed with obtaining the IEE neuropsychological, OT and speech and language evaluations for which DCPS has heretofore issued funding authorization. If the parent elects to obtain the IEE evaluations, DCPS shall not be obliged to have Student evaluated by Kennedy-Krieger Institute or another third party institution;
3. Upon receipt of the completed evaluation reports from the aforesaid institution or independent evaluators, DCPS shall promptly convene Student's IEP team to determine, based upon the new evaluations and any other relevant data, Student's special education and related services needs and his appropriate educational placement and to revise Student's IEP as appropriate;
4. Pending completion of Student's reevaluation and IEP revision, in order that Student may return to school without delay, DCPS shall, within 15 school days of the issuance of this decision, ensure that a full-time dedicated aide is available for Student on days that he attends school. DCPS shall ensure that the dedicated aide has appropriate health care training and skills to respond to Student's seizure episodes at school, pursuant to his safety plan, and to administer emergency seizure response medications as prescribed for Student;
5. Petitioner's requests for prospective placement at a nonpublic school and for compensatory education for the denials of FAPE determined in this decision are denied without prejudice; and
6. All other relief requested by the Petitioner herein is denied.

Date: December 31, 2016

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  
Office of Dispute Resolution  
Chief Hearing Officer  
OSSE Division of Specialized Education  
DCPS Resolution Team**