

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Parent on behalf of Student¹)	Case No. 2020-0174
)	
Petitioner,)	Hearing Date: November 17, 2020
)	Conducted by Video Conference
v.)	
)	Date Issued: December 14, 2020
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On September 30, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to conduct timely evaluations to determine Student’s eligibility for special education services, and failing to provide access to Student’s educational records. On October 9, 2020, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint* (“*Response*”), denying that Student had been denied FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on September 30, 2020 alleging that DCPS denied Student a FAPE by (1) failing timely to conduct initial evaluations to determine Student's eligibility for special education services; (2) failing to evaluate Student in all areas of suspected disability; and (3) failing to provide Petitioner access to Student's education records.

On October 9, 2020, Respondent filed its *Response*. DCPS averred, *inter alia*, that (1) Petitioner signed a consent to evaluate on March 9, 2020. Upon the inception of COVID-19 restrictions, on April 17, 2020, DCPS issued a Prior Written Notice ("PWN") indicating that the Individualized Education Program ("IEP") Team would reconvene within 20 school days of the official start of school. On July 30, 2020, DCPS announced that school would be virtual for the first term of the 2020-21 school year, through November 6, 2020; (2) DCPS is completing comprehensive psychological and speech and language evaluations virtually and will convene a Multidisciplinary Team meeting to determine Student's eligibility upon completion of the evaluations; (3) DCPS is unaware of any requests or need for evaluations prior to January 24, 2020, and (4) as Student is not now eligible for special education, s/he is not eligible for compensatory education services. DCPS' *Response* did not address the allegation regarding the failure to provide access to records.

The parties participated in a resolution meeting on October 16, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on October 28, 2020, and the Prehearing Order was issued that day.

The due process hearing was conducted on November 17, 2020 by video conference. The hearing was open to the public. Petitioner's Disclosures, dated November 6, 2020, contained a witness list of four witnesses and included proposed Exhibits P1-P35. There were no objections and Petitioner's Exhibits P1 – P35 were admitted into evidence. Respondent's Disclosures, filed November 10, 2020, contained a witness list of six witnesses and proposed Exhibits R-1 through R-10. Petitioner filed no objections, but Respondent's counsel deferred offering her exhibits into evidence. During the hearing, Respondent's exhibits R2, R4, R5, R7, R8, and R9 were offered and admitted into evidence.

Petitioner presented as witnesses in chronological order: Petitioner and Witness A. Witness A was offered as an expert in Special Education without objection. Respondent presented Witness B. Respondent offered Witness B as an expert in Special Education without objection. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows:

- (1) Whether DCPS failed timely to conduct initial evaluations to determine Student's eligibility for special education services;
- (2) Whether DCPS failed to evaluate Student in all areas of suspected disability; and
- (3) Whether DCPS failed to provide Petitioner access to Student's education records.

FINDINGS OF FACT

1. Student is X years old and attended School A for grade F during the 2020-21 school year.²

2. At the end of the grade B, the 2016-17 school year, Student earned Proficient grades in all courses, and there were no reported behavioral issues. Homeroom Teacher B reported: "[Student] has been an absolute joy and a great part of our classroom community this school year. [Student] ended the school year on level in reading as [s/he] now reads at a Level [B]."³

3. During the 2017-18 school year, Student served six days of out-of-school suspensions and eight days of in-school suspensions. During the 2019-20 school year, s/he served twelve days of in-school suspensions.⁴ On September 27, 2019, Student was temporarily removed from the classroom for refusing to comply with staff instructions.⁵

4. On September 3, 2019, when Student was beginning grade E, his/her overall i-Ready Mathematics score was 415, placing him/her at a grade C level, two grades below grade level. His/her score on the i-Ready assessment on January 31, 2020 was 448, placing her/him at a grade D level, one grade below grade level.⁶

5. On January 10, 2020, Student was temporarily removed from the classroom due to his/her repeated refusal to take an assessment and profane language.⁷ On January 31, 2020, School A imposed a two-day on-site suspension for Student's disruptive and physically aggressive behavior, as well as profane language.⁸

² Petitioner's Exhibit ("P:") 11 at page 1, electronic page 74. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P11:1 (74); Petitioner's testimony. *See* n. 2, *infra*.

³ P6:1 (52). The *Complaint* states that Student attended school in Prince George's County, Maryland for Grades A, B, and C. (P1:8 (14)). However, the DCPS report card printed on August 1, 2017, is entitled "[Grade B] report card" by DCPS School B for the previous school year. Petitioner's Exhibit 13, the Analysis of Existing Data, dated March 5, 2020, indicates that Student was in Grade E. This is consistent with Petitioner's testimony that Student is now in Grade F. But if Student was in grade E on March 5, 2020, s/he would have been in grade B in the spring of 2017. Thus, the report card dated August 1, 2017 labeled "[grade B] report card," provides grades for the previous grade B year, 2016-17.

⁴ P5 (47).

⁵ P4:1 (40).

⁶ P7:1 (57).

⁷ P4:5-6 (44-45).

⁸ *Id.* at 3 (42).

6. Citing a referral for an initial evaluation on January 24, 2020, on March 5, 2020,⁹ DCPS convened an IEP Team to conduct an Analysis of Existing Data (“AED”) meeting.¹⁰ At the time, Student was in grade E. In mathematics, Student’s middle of the year iReady overall score on January 31, 2020 was 448, placing him/her one grade below grade level performance; a score of 500 was required to be on grade level.¹¹ Student’s scores on the Scholastic Reading Inventory Assessment revealed that Student was performing two grades below grade level in September 2019, and s/he was “still reading significantly below [his/her] grade level peers in testing on January 24, 2020.”¹² In Emotional, Social, and Behavioral Development, Student “has difficulty following school and class rules. [S/he] is disrupt[ive] in class, has difficulty focusing and completing work, as well as staying in [her/his] seat. [Student] is disrespectful to adults, elopes from class and uses profanity to express [her/his] frustration. [S/he] has missed school a total of 17 days and has been late 42 times. [Student] needs support self-regulating [his/her] emotions.”¹³

7. Student’s father signed his consent for evaluations on March 9, 2020.¹⁴ That day, DCPS issued a Prior Written Notice (“PWN”) indicating that it would proceed with the evaluation process. The types of evaluations were not specified.¹⁵ Petitioner signed her consent on July 23, 2020.¹⁶

8. On April 23, 2020, DCPS completed an FBA of Student.¹⁷ The concerning behaviors were described as follows:

Historically, [Student’s] behaviors in school have included challenges with getting started and finishing tasks, difficulty controlling emotions, argumentative with adults, refusing to comply with adult requests or rules, verbal/physical aggression towards peers and adults, defiance and elopement. These behaviors have been moderate in nature resulting in work refusal, low work completion, multiple office referrals, and a referral for evaluations...¹⁸

The SDQ [Strength and Difficulties Questionnaire] was administered to [Student’s] teachers, Teacher A in March 2019. Teacher A’s questionnaire; indicated that [Student] scores very high for behavioral difficulties (6), and for the impact of any difficulties on the student’s life (4). [S/he] scored very low for kind and helpful behavior (3). [S/he] scored slightly raised for overall stress (15) and for difficulties getting along with other children (3). [Student] scored close to average for emotional distress (1) and for hyperactivity and concentration difficulties (5). [S/he] show the following diagnostic

⁹ P12:1 (79).

¹⁰ P13:1 (81).

¹¹ *Id.*

¹² *Id.* at 2 (2).

¹³ *Id.* at 3 (3).

¹⁴ Respondent’s Exhibit (“R:”) 2 at page 1, electronic page 4. The exhibit number is followed by the electronic page number, i.e., R2:1 (4); P14:1 (85).

¹⁵ P15-1 (87).

¹⁶ P17:1 (99).

¹⁷ R7:1 (26).

¹⁸ *Id.*

predictions: Any Disorder = High Risk; Emotional Disorder = Low Risk; Behavior Disorder = High Risk; and Hyperactivity and Concentration Disorder = Low Risk.¹⁹

Examiner A noted that due to COVID-19 restrictions, it was not possible to observe Student in the classroom,

...a necessary component in determining a hypothesis regarding the probable function of the problem behavior. Teacher interviews and questionnaires suggest that [Student] is more likely to be engaged and appropriate in the classroom setting when [s/he] is engaged in less demanding activities, when [s/he] is doing a preferred activity and when [s/he] is in a one-on-one situation. The possible function of [his/her] behavior appears to be to gain an activity or something tangible, gain attention from adults and to escape demands placed on [redacted].²⁰

In light of the inability to observe student, Examiner A recommended that the FBA be completed when in-person classes resume.²¹

9. For the 2019-20 school year, when Student was in grade E, s/he earned Proficient grades in Music and Health & Education and Basic in all other courses, Reading, Writing & Language, Speaking and Listening, Math, Social Studies, Science, Art, and World Languages through the third term. Student “did not participate in Distance Learning on Teams with a teacher” during the 4th term. The grades for “Work Habits, personal and social skills” indicate that Student had behavioral issues. Homeroom Teacher C marked “Rarely” in each of the 12 positive behavioral attributes. Student was absent 21 days during the school year, nine of which were unexcused.²²

10. On September 2, 2020, Witness B of School A responded to Petitioner Attorney B’s records request²³ of July 27, 2020. Witness B’s email indicated that some of the requested documents were attached, but Student’s “discipline records, report card, attendance records, and assessment data are forthcoming.” As for the uncompleted educational assessment, Witness B stated, “... [d]ue to school closures caused by the COVID-19 pandemic, school psychologists have struggled to complete components of the evaluations that require in-person contact. To the best of my knowledge, DCPS is in the process of creating a virtual platform to resolve this issue.”²⁴ Attorney B responded later that day: “Thanks for providing these records. Could we also receive copies of [her/his] report cards, [her/his] standardized test scores (i-Ready, DIBELS, etc...), attendance records, and any discipline records. We would like to have access to records for at least the past 3-4 years...”²⁵ On September 3, 2020, Witness B responded to Attorney B: “Please reach out to DCPS records for records spanning back 3-4 years. I only have access to [Student’s] file from last

¹⁹ *Id.* at 3 (28)

²⁰ *Id.* at 4 (29).

²¹ *Id.* at 8 (33).

²² P11:1 (74).

²³ P23:7 (131).

²⁴ *Id.* at 6 (130).

²⁵ P23:5 (129).

school year.”²⁶ In response to Attorney B’s subsequent request for a contact at “DC Records,”²⁷ Witness B advised Attorney B to send the records request to dcps.spedrecordrequests@k12.dc.gov.²⁸

11. On September 8, 2020, Petitioner’s Attorney B filed a request for records with “SPED Record Requests”²⁹ for “things like standardized test scores, report cards, attendance logs, discipline records etc... The school doesn’t seem to be able to access anything prior to [grade E] – we would like an opportunity to review some of [her/his] earlier records.”³⁰ On September 10, 2020, DCPS Records responded to Attorney B’s request of September 8th: “The student’s current school can provide (and the chains reads that they did) provide any special education records. For non-special education records from a previous school year, please contact the student’s former school of attendance. Our records indicate the student previously attended [School B].”³¹ At a multidisciplinary team (“MDT”) meeting on September 17, 2020, Witness B informed Petitioner that School A did not have Student’s records from School B and suggested that Petitioner contact DCPS Central Office to get them.³² On September 15, 2020, Attorney B filed a comprehensive request for access to Student’s records with School B.³³ On September 23, 2020, School B responded: “We have searched our records and do not have the requested files for [Student]. Our standard operating procedure is to forward files to the student’s next school.”³⁴

12. At the MDT meeting on September 17, 2020, School Psychologist A informed Petitioner and her representatives that DCPS was not conducting in-person evaluations and would not fund independent evaluations. Petitioner requested that DCPS conduct occupational therapy (“OT”), assistive technology (“A/T”), and speech language (“S/L”) evaluations. Witness B requested that Petitioner’s counsel provide DCPS documentation of the need for these evaluations.³⁵

13. On October 7, 2020, DCPS issued a second AED report.³⁶ The same i-Ready scores that were reported by the March 5, 2020 IEP Team were repeated; since Student had been promoted, those scores placed her/him two grades below grade level.³⁷ In Reading, data from the Scholastic Reading Inventory, conducted on September 21, 2020, placed Student on a grade B reading level, four grades below grade level.³⁸ In Emotional, Social, and

²⁶ P23:4 (128).

²⁷ *Id.*

²⁸ *Id.* at 3 (127).

²⁹ [DCPS.spedrecordrequests@k12.dc.gov](mailto:dcps.spedrecordrequests@k12.dc.gov).

³⁰ P29:1 (145).

³¹ P29:1 (145).

³² P19:1 (107).

³³ P32:1 (157). *See also*, September 23, 2020 email from Attorney B’s Legal Assistant to School B. P33:1 (162).

³⁴ P33:1 (162).

³⁵ P19:2 (108) and testimony of Witness A and Witness B. The exhibit, Witness A’s Meeting Notes, does not support Witness A’s testimony that Petitioner’s representatives requested an A/T evaluation at this meeting. *See also* P23:2 (126) where, one week before the MDT meeting, Petitioner’s counsel requests only OT and S/L evaluations. However, Witness A’s testimony is corroborated by DCPS’ subsequent PWN indicating that it would conduct an A/T evaluation.

³⁶ P20:1 (113).

³⁷ *Id.*

³⁸ *Id.* at 2 (114).

Behavioral Development, the same comments from the March IEP Team were repeated.³⁹

14. On October 16, 2020, DCPS issued a second PWN indicating that it would proceed with the evaluation process by conducting educational, psychological, speech-language, occupational, and assistive technology evaluations.⁴⁰

15. On October 9, 2020 and October 16, 2020, Student declined to participate in the evaluation interview by Evaluator A.⁴¹

16. The District of Columbia implemented restrictions due to the COVID pandemic that made it difficult to complete evaluations that require in-person contact. The staff at School A did not have access to the technological tools that would have allowed them to complete evaluations virtually.⁴²

17. DCPS issued a *Special Education Programs & Resources Guide for Families* (“*Resources Guide*”) for School Year 2020-2021. The *Guide* provided, *inter alia*, the following:

School Year 20-21 Shifts Due to Virtual Learning

What does and does not change as a result of virtual learning?

DCPS will continue to provide supports and services to students with disabilities during virtual learning. We will continue to find children eligible for IEP supports and services, conduct assessments and evaluations and provide regular progress reports. Special education teachers and related service providers will continue to provide instruction and intervention, and implement each child’s IEP.⁴³

The *Resources Guide* indicates that DCPS will convene an IEP Team and seek the parent’s consent to evaluate within 30 days of a request, make a determination as to eligibility within 60 days thereafter, and the parent will be able to sign an IEP 30 days thereafter.⁴⁴

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

³⁹ *Id.* at 4 (116).

⁴⁰ R4:1 (7); P22:1 (122).

⁴¹ R5:1, 6 (9, 14).

⁴² Testimony of Witness B.

⁴³ P34:4 (168).

⁴⁴ *Id.* at 5 (169).

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁴⁵

The issues in this case do not involve the appropriateness of IEPs or placements. Therefore, Petitioner has the burden of persuasion on all issues in dispute.

Whether DCPS failed timely to conduct initial evaluations to determine Student's eligibility for special education services.

IDEA requires local school districts to make affirmative efforts to identify students who may have disabilities. The Act requires states to ensure that

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.⁴⁶

When a child is suspected of having a disability, the local educational agency ("LEA") must ensure that "the child is assessed in *all* areas of suspected disability."⁴⁷ A local educational agency is deemed to have knowledge that the child may suffer from a disability where (1) "the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;" (2) "the parent of the child has requested an evaluation of the child . . .;" or (3) "the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency."⁴⁸ The District may not "await parental demands before providing special instruction," but must "[i]nstead ... ensure that '[a]ll children with disabilities residing in the [District] ... who are in need of special education and related services are identified, located, and evaluated.'"⁴⁹

Local and IDEA regulations require local education agencies to evaluate students suspected of having disabilities within 60 days of a parental request:

⁴⁵ D.C. Code §38-2571.03(6)(A)(i).

⁴⁶ 20 U.S.C. §1412(a)(3)(A).

⁴⁷ 20 U.S.C. §1414(b)(3)(B).

⁴⁸ 20 U.S.C. §1415(k)(5)(B).

⁴⁹ *Scott v. District of Columbia*, 2006 WL 1102839, at *8 (D.D.C. March 31, 2006).

- (b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.
- (c) Procedures for initial evaluation. The initial evaluation—
- (1)(i) Must be conducted within 60 days of receiving parental consent for the evaluation...⁵⁰

Under District of Columbia regulations, the “LEA shall make reasonable efforts to obtain parental consent within thirty (30) days from the date the student is referred for an assessment or evaluation.”⁵¹

Here, DCPS introduced virtually no evidence as to the impact restrictions imposed by the local government due to COVID-19 on the provision of special education services. In its *Response to the Complaint*, which is not evidence, DCPS asserted that DCPS announced that school would be virtual for the first term of the 2020-21 school year, through November 6, 2020 and DCPS is unaware of any requests or need for evaluations prior to January 24, 2020. Thus, its position appears to be that until DCPS reopens schools to in-person classes, it has the right to toll provisions of IDEA that impose deadlines. The only relevant evidence offered by DCPS was the testimony of Witness B, who testified that COVID restrictions made it difficult to complete evaluations that require in-person contact, and that School A did not have access to technology that would facilitate completion of evaluations.

However, Petitioner introduced DCPS’ *Resources Guide* for the 2020-21 school year, in which DCPS committed to observing IDEA timelines for the determination of eligibility. The *Resources Guide* referenced the Office of the State Superintendent of Education’s (“OSSE”) *IDEA, Part B Provision of FAPE: Guidance Related to Remote and Blended Learning*. (“*Guidance*”), issued on July 21, 2020.⁵² The *Guidance*, cited on page 6 of DCPS’ *Resource Guide*,⁵³ was issued to address the school system’s response to the pandemic. The *Guidance* tangentially noted that the pandemic had caused school closures, but assured parents that “An LEA continues to have the obligation to provide FAPE to a student with a disability during extended closures resulting in distance or blended-learning models arising from a local or national emergency. LEAs should continue to provide, to the greatest extent possible, the special education and related services identified in students’ individualized education programs (IEPs) and any needed modifications or alternatives to make the curriculum and services accessible to students with disabilities.”⁵⁴

In order to establish a procedural violation of the “child find” requirement, the claimant “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding

⁵⁰ 34 C.F.R. §300.301 (b) and (c)(1)(i)

⁵¹ D.C. Mun. Regs. Title 5, §3005.2(a).

⁵² https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/COVID-19%20-%20Guidance%20Related%20to%20Distance%20and%20Blended%20Learning%207.20.20.pdf.

⁵³ P34:6 (170).

⁵⁴ https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/COVID-19%20-%20Guidance%20Related%20to%20Distance%20and%20Blended%20Learning%207.20.20.pdf at 4.

to evaluate.”⁵⁵ In *N.G. v. District of Columbia*,⁵⁶ the court overruled a Hearing Officer’s determination that the LEA did not violate child find because the student’s education was not adversely affected. The court noted that “this Court has held on numerous occasions that as soon as a student is identified as a *potential* candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process.⁵⁷ The court found that due to the child’s diagnoses of depression and ADHD, and a history of inappropriate types of behavior, “it is unreasonable to conclude that N.G. could not even have been ‘suspected’ of having a disability so as to implicate the District’s Child Find obligation.⁵⁸ In *Integrated Design and Electronics Academy Public Charter School v. McKinley*,⁵⁹ the court held that the LEA was on notice no later than the day the parent gave consent to evaluate in light of student’s prior suicide attempt.⁶⁰ In *G.G. ex rel. Gersten v. District of Columbia*,⁶¹ the court held that DCPS was on notice of the student’s suspected disability when the parents first requested an IEP, and that the parents were entitled to private school reimbursement from the date the eligibility determination should have been made to the date an IEP was developed.⁶² In *El Paso Independent School District v. Richard R.*,⁶³ the court upheld a Hearing Officer who found a child find violation where the school district failed to initiate evaluation of a student even though he had failed proficiency exams three consecutive years.⁶⁴

Here, DCPS clearly failed to meet the timeline required by the child find regulations. On March 9, 2020, Student’s father gave written consent for evaluations. DCPS issued a PWN that day, but did not specify the type of evaluation it intended to conduct. It completed a portion of an FBA on April 23, 2020, but that assessment could not be completed due to the inability to complete an in-class observation of Student. At an MDT meeting on September 17, 2020, Psychologist A informed Petitioner and her representatives that DCPS was not conducting in-person evaluations, but would not fund independent evaluations. After a second AED meeting on October 7, 2020, a week after the *Complaint* was filed, DCPS issued another PWN on October 16, 2020, indicating that it would proceed with the evaluation process by conducting education, psychological, speech-language, occupational, and assistive technology evaluations. As of the date of the hearing, none of the evaluations had been completed.

As noted above, an LEA has the obligation to identify students with disabilities even in the absence of requests for testing by parents. The record in this case does not clearly establish, by a preponderance of the evidence, that Student should have been identified prior the referral on January 24, 2020. The record does not include Student’s academic records for school years 2017-18 or 2018-19, and no disciplinary records at all. Moreover, prior to the filing of the *Complaint*, there are no records of standardized testing other than i-Ready scores

⁵⁵ *School Board of the City of Norfolk v. Brown*, 769 F.Supp.2d 928, 942-43 (E.D.Va. 2010), citing *Board of Education of Fayette County, Kentucky v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007).

⁵⁶ 556 F.Supp.2d 11 (D.D.C. 2008). *See also*, *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C. 2011).

⁵⁷ 556 F.Supp.2d at 25.

⁵⁸ *Id.* at 26-27.

⁵⁹ 570 F.Supp.2d 28 (D.D.C. 2008).

⁶⁰ *Id.* at 34-35.

⁶¹ 924 F.Supp.2d. 273 (D.D.C. 2013).

⁶² *Id.* at 279-82.

⁶³ 567 F.Supp.2d 918 (W.D.Tex. 2008).

⁶⁴ *Id.* at 950-51.

at the beginning of the 2019-20 school year and Reading Inventory scores from September 2019. In order to be found eligible for special education services, a student must have a recognized disability that has an adverse effect on the student's educational performance.⁶⁵ For the 2016-17 school year, Student earned Proficient grades in his/her core subjects and posed no behavior problems. There are no available report cards for the 2017-18 or 2018-19 school years, and minimal standardized testing. The record reveals that Student's behavior has deteriorated since the glowing reports in 2016-17, but there are no disciplinary records in the record. Student's grades were Basic in his/her core subjects in the 2019-20 school year. His/her January 2020 i-Ready math scores placed her/him one grade below grade level, and his/her Reading Inventory score in September 2019 placed her/him two grades below grade level. However, this record is too meager to establish, by a preponderance of the evidence, that prior to the referral in January 2020, Student should have been suspected to be a child with a disability. The record contains no complete, longitudinal history of Student's academic performance, disciplinary record, and standardized test results.

I conclude that Petitioner has met her burden of proving that DCPS has failed to meet its child find obligations. DCPS offered no evidence as to why evaluations were not completed within 60 days of receipt of parental consent. Witness B testified that COVID restrictions made it difficult to complete evaluations that require in-person interaction, and that School A did not have the necessary technology to conduct virtual testing. However, DCPS offered no testimony from an expert that testing could not be conducted in this environment. In fact, DCPS offered no evidence of measures it was taking to complete evaluations while pandemic restrictions are in place. DCPS issued its *Resources Guide*, and OSSE issued its *Guidance*, and neither document suggested that DCPS would not continue to comply with IDEA deadlines. Assuming, *arguendo*, that DCPS could make a case that conducting evaluations during the early months of the pandemic would have been problematical, it cannot justify the delay once Petitioner gave her consent on July 23, 2020. That date is contemporaneous to the issuance of OSSE's *Guidance*, which is cited in DCPS' *Resources Guide*. Both organizations indicated in those documents that IDEA timelines would be honored. Finally, DCPS offered no explanation for denying Petitioner's request to secure independent evaluations at the MDT meeting on September 17, 2020, a date almost 60 days after Petitioner gave her consent to evaluate, in light of DCPS' position that it was not conducting any in-person assessments at that time.⁶⁶

Whether DCPS failed to evaluate Student in all areas of suspected disability.

Petitioner testified that she had long been concerned about Student's lack of academic progress and behavioral issues. In fact, she testified that she requested that Student be tested in the fall of 2019.⁶⁷ However, there is no correspondence of any kind in the record to substantiate Petitioner's assertion. Witness B, School A's Special Education Director, testified credibly that she was unaware of concerns about Student's potential eligibility until January 2020. Thus, when Petitioner's father provided consent to evaluate in March 2020, and when Petitioner gave her consent in July 2020, there is no dispute that the parties

⁶⁵ See 34 C.F.R. §300.8(a)(4) and (a)(9).

⁶⁶ P19:2 (108).

⁶⁷ Petitioner's testimony and P19:1 (107).

contemplated DCPS conducting a comprehensive psychological evaluation and an FBA. The record indicates that Petitioner's Attorney B requested additional assessments for the first time on or about September 2, 2020, less than one month before the filing of the *Complaint*: S/L, OT, and A/T evaluations. At a meeting on September 17th, Attorney B reiterated her request for the additional assessments. Witness B testified that the team did not turn down the request, but asked for documentation of the need for these assessments.⁶⁸ Shortly after the *Complaint* was filed on September 30, 2020, DCPS issued a PWN on October 16, 2020, indicating its intent to conduct educational, psychological, speech-language, occupational, and assistive technology evaluations.

I ruled on the first issue that DCPS violated IDEA by failing to meet the child find deadline to complete evaluations after receiving parental consent. The record does not support that DCPS ever disputed the need for a comprehensive psychological evaluation or an FBA. To the extent this claim suggests otherwise, the record does not support it. As for the OT, S/L, and A/T evaluations, Petitioner offered no evidence of the need for these assessments other than the testimony of Witness A, who opined potential problems Student might have that might be determined through these assessments. However, nothing in the current record clearly supports the need for these three assessments at this time. Therefore, I conclude that while DCPS has failed to meet its child find obligation to conduct a timely comprehensive psychological evaluation and a timely FBA, its failure to agree to conduct OT, S/L, and A/T evaluations prior to the filing of the *Complaint* did not constitute a failure to evaluate Student in all areas of suspected disability.

Whether DCPS failed to provide Petitioner access to Student's education records.

The regulations require the local education agency to allow parents to examine their student's records:

(a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.⁶⁹

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532,

⁶⁸ See P19:2 (108).

⁶⁹ 34 C.F.R. §300.501.

or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.⁷⁰

Petitioner's Attorney B first requested access to Student's records on July 27, 2020. Witness B responded with some of the records and assured Attorney B that more records were forthcoming. When Attorney B asked for records going back 3-4 years, Witness B replied that School A only had records from the 2019-20 school year, and suggested that Attorney B "reach out to DCPS Records." When Attorney B did so, requesting "things like standardized test scores, report cards, attendance logs, discipline records etc.," DCPS Records informed her that she had to contact Student's prior school of attendance, School B, for non-special education records. But when Attorney B contacted School B, she was assured that all such records had been sent to School A.

DCPS' position is that it supplied Petitioner with all of Student's education records that it could locate. Respondent's counsel argued that all of Student's records that exist have been provided to Petitioner. Counsel further argued that Petitioner should have asserted that DCPS failed to *retain* Student's records, but she made no such claim. DCPS' argument is specious at best. School A informed Petitioner that it supplied all the records in its possession. DCPS Records informed Petitioner that School B would have all of Student's non-special education records prior to the current school year, but School B insisted that it forwarded them to School A. DCPS provided no academic records for the 2017-18 or 2018-19 school years. It provided no notices of disciplinary actions despite the fact that during the 2017-18 school year, Student served six days of out-of-school suspensions and eight days of in-school suspensions. During the 2019-20 school year, s/he served twelve days of in-school suspensions.

I conclude that Petitioner has met her burden of proving that DCPS failed to provide her access to Student's education records. This prevented Petitioner from having a meaningful participation in the eligibility proceedings. It also prevented the Hearing Officer from making a determination as to whether DCPS should have determined Student's eligibility prior to the referral on January 24, 2020.

RELIEF

For relief, Petitioner requested *inter alia*, (1) funding for occupational therapy and speech and language evaluations, (2) an order for DCPS to convene an eligibility meeting

⁷⁰ 34 C.F.R. §300.613.

within ten (10) days of receipt or completion of the evaluations, (3) an order requiring DCPS to provide access to Student's education records, (4) compensatory education, (5) a finding that the parent has the right to file a complaint for a denial of FAPE, presently unknown to Petitioner, due to DCPS' failure to provide access to Student's records for two years, and (6) and attorney's fees.

Education Records

DCPS has made it clear that it cannot locate all of Student's records. While Petitioner is entitled to an order requiring DCPS to provide access to these records, it is unlikely that the Order will have the desired effect. However, the records are desired to facilitate the initiation of evaluations to determine Student's eligibility for services. The order below accomplishes that goal.

Compensatory Education Services

Petitioner has requested an award of compensatory education services and a finding that the parent has the right to file a complaint for a denial of FAPE, presently unknown to Petitioner, due to DCPS' failure to provide access to Student's records for two years.

Petitioner's Witness A conceded that an appropriate amount of compensatory education services cannot be determined until Student's evaluations are completed. Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.⁷¹

The Hearing Officer also does not believe he has the authority to issue an order affording Petitioner "the right to file a complaint for a denial of FAPE." Presumably that order would authorize Petitioner to seek the compensatory education services that, at this point, neither entitlement nor the nature and amount have been established. The right to pursue remedies under IDEA emanates from the statute, not from Hearing Officers. However, for purposes of *res judicata*, the issue of compensatory education services was not adjudicated in this proceeding.

Finally, Hearing Officers have no role in the award of attorneys' fees.

⁷¹ *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). See also, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and *Petitioner's Legal Memorandum*, it is hereby

ORDERED, that

- (1) Unless DCPS has completed comprehensive psychological, speech and language, occupational therapy, and assistive technology evaluations as of the date of this Order, at Petitioner's request, DCPS shall fund independent evaluations for any that remain uncompleted. DCPS shall complete the evaluations as to which Petitioner does not request funding for independent evaluations.
- (2) Within fifteen (15) days of the completion of comprehensive psychological, speech and language, occupational therapy, and assistive technology evaluations, and the delivery of the completed evaluations to the other party, DCPS shall convene a Multidisciplinary Team meeting to review the evaluations and to determine Student's eligibility for special education services.
- (3) DCPS shall provide Petitioner access to all of Student's education records, particularly quarterly and year-end report cards, results of standardized tests, and disciplinary records for the 2017-18, 2018-19, 2019-20, and 2020-2021 school years.
- (4) All other items of relief are denied.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: December 14, 2020

Copies to: Attorney A, Esquire
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Attorney C, Esquire
OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
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