

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	
v.	)	<b>Hearing: January 16, 2018</b>
	)	<b>Issue Date: February 5, 2018</b>
	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No.: 2017-0295</b>
<b>District of Columbia Public Schools,</b>	)	
	)	
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a student who is currently eligible for services as a student with a Speech and Language Impairment (the “Student”).

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 31, 2017. Petitioner is the parent of the Student. On November 13, 2017, Respondent filed a response. A resolution meeting was held on November 17, 2017. The resolution period expired on November 30, 2017.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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<sup>1</sup>Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

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

### **III. Procedural History**

On December 14, 2017, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on December 20, 2017, summarizing the rules to be applied in this hearing and identifying the issues in the case.

The Hearing Officer Determination (“HOD”) was due on January 14, 2018. Because of the unavailability of counsel and witnesses, a motion for continuance by Petitioner, on consent, was granted on January 9, 2018, extending the HOD due date to February 5, 2018.

There was one hearing date: January 16, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-24. There were no objections. Exhibits 1-24 were admitted. Respondent moved into evidence Exhibits 1-10. There were no objections. Exhibits 1-10 were admitted. At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: Petitioner and Witness A, an advocate. Respondent presented as witnesses: Witness B, a speech and language pathologist, and Witness C, a psychologist.

### **IV. Credibility**

The four witnesses all testified credibly. No material inconsistencies pertaining to the witnesses were found in the record.

## **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education (“FAPE”) issues to be determined were as follows:

1. Did Respondent fail to reevaluate the Student after the parent’s request to evaluate the Student in April, 2017? If so, did Respondent violate 34 CFR 300.303(2)? If so, did Respondent deny the Student a FAPE?

2. Did Respondent fail to provide the Student with a new IEP after the Student’s difficulties in school during the 2016-2017 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.324(b)(1)(ii) and related provisions of the IDEA? If so, did Respondent deny the Student a FAPE?

Issues in the Complaint relating to records were withdrawn at the prehearing conference. As relief, the parent requests that the requested evaluations be completed and an IEP meeting be held to review the evaluations.

## **VI. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with a Speech and Language Impairment. Academically, the Student is below grade level. The Student has difficulty getting words out, staying focused, and completing homework. The Student will mimic negative and positive behaviors and has a difficult time retaining information. The Student enjoys working on computers and listening to stories, and learns best in a small group. (Testimony of Witness A; Testimony of Witness B; Testimony of Petitioner; P-9-2)

2. For the 2015-2016 school year, the Student received services from X Local Education Agency (“LEA”). The Student had difficulty staying on topic and used music to help with this issue. The Student was below grade level in all areas during this school year. (P-10-4; Testimony of Witness A)

3. For the 2016-2017 school year, the Student’s school, the Student again received services in X LEA. At the start of the year, the Student was functioning six months below grade level in math and below grade level in all speech and language indicators. The Student exhibited such behaviors as hitting, pushing, and throwing items, which led X LEA to conduct a Functional Behavior Assessment (“FBA”) and develop a Behavior Intervention Plan (“BIP”). (P-12-1-4)

4. The IEP from X LEA dated September 27, 2016, provided for peer tutoring, repetition of instructions, a picture schedule, use of positive reinforcement, advance preparation for schedule changes, 1.25 hours per week of instruction outside general education, and 2.5 hours per week of instruction inside general education. Speech and language therapy was recommended once per week for thirty minutes. (P-15)

5. In or about autumn, 2016, the Student moved to the District of Columbia to live with Petitioner. The Student began school at School A in or about November, 2016, and was enrolled in DCPS in or about December, 2016. On December 19, 2016, an IEP meeting was conducted by Respondent to review the IEP from X LEA. An IEP was created at this meeting. The December 19, 2016, IEP provided for goals in math, reading, and communication/speech and language, and provided for specialized instruction of 2.5 hours per week in general education and 1.25 hours per week outside

general education, with 120 minutes per month of speech and language pathology.

(Testimony of Witness A; P-5-2; P-6-1; P-10-1; P-14-7)

6. The Student's report card for the second term of the 2016–2017 school year indicated that the Student met expectations in math, was at the “basic” level in writing, and was at the “below basic” level in reading. The Student began to miss school at this time, in part because the Student's grandmother had died. The Student was absent at least twenty-three days by March 17, 2017. For the third marking period, the Student received no marks in any academic areas. (Testimony of Petitioner; P-17)

7. An FBA was completed for the Student on March 9, 2017, by Social Worker A. This FBA indicated that the Student enjoyed reading and computer time, and responded to 1:1 instruction. The FBA also stated that the Student needed modifications in assignments, including through the use of manipulatives and “chunking.” (P-12-4)

8. Petitioner and Respondent tried to obtain evaluative materials from X LEA during the 2016–2017 school year, but X LEA was not responsive. On March 22, 2017, Petitioner asked Respondent to conduct its own evaluation. (P-5-1; Testimony of Petitioner)

9. At the IEP meeting in April, 2017, the IEP team reviewed an FBA indicating that the Student's behaviors had improved and that the Student had “settled down.” Social Worker A from DCPS indicated that the Student did not need a BIP. The IEP team suggested modifications to the Student's classroom, such as social stories, visual aids, repeated directions, a visual schedule, proximity to the teacher, and behavior support services of 120 minutes per month. Petitioner sought evaluations of the Student at this meeting. The team was concerned that any evaluations would be redundant with

the evaluations of X LEA. The Student did not receive any additional specialized instruction as a result of this meeting. (Testimony of Witness A; Testimony of Witness B; P-9-1)

10. For the 2017–2018 school year, the Student continued at School A. The Student received “i-Ready” testing on September 12, 2017. This testing indicated that the Student would benefit from intensive intervention in math. As of November, 2017, the Student was sometimes sleeping in the classroom, off-task, easily distracted, and sometimes spat on the floor. In reading, the Student was able to sound out every letter but could not blend words competently. In math, the Student was unable to use manipulatives because the Student would play with them. Sometimes the Student did not attend class because the Student did not want to go to school. (P-6-1-2; P-19-2)

11. The Student’s report card for the first term of the 2017–2018 school year indicated that the Student was “below basic” in reading and math, could not be rated in writing, and needed frequent prompting to follow directions, work with others, make an effort, follow rules, and respect the property of others. (P-16-1)

12. An IEP meeting was held on November 21, 2017. Petitioner expressed a concern that the Student did not retain information and mentioned that he had been getting telephone calls from School A regarding the Student’s behaviors. At the meeting, Teacher A, the Student’s special education teacher, said she wanted to increase the Student’s “pull-out” hours to five hours per week, to get the Student to grade level. The Student’s general education teacher wanted the Student to receive additional “push-in” hours to help the Student focus. However, the special education coordinator at the meeting indicated that evaluations should be conducted before additional specialized

instruction could be ordered. Witness A asked for behavior support services for the Student as well as a BIP, and the IEP team agreed to add behavior support services. Respondent then agreed to reevaluate the student through a comprehensive psychological evaluation and a speech and language evaluation. The IEP team agreed to provide the Student with four hours per week of specialized instruction outside general education and one hour per week of specialized instruction inside general education. (P-6-1-3; P-7-3-4)

13. The Student's IEP dated November 21, 2017, provided the Student with math goals, reading goals, communication/speech and language goals, and emotional, social, and behavioral development goals. The IEP referenced the September 27, 2016, progress report from X LEA and characterized the Student as having a "severe" language delay. The IEP did not increase specialized instruction, again providing for 1.25 hours per week of specialized instruction outside general education and 2.5 hours per week of specialized instruction inside general education. The IEP also provided for 120 minutes per month of speech and language pathology and indicated that the Student required preferential seating, "directions read," and extended time. (P-13)

14. A consent form for evaluation was signed by Petitioner on or about December 5, 2017. As of the date of the hearing, the Student's evaluations had not been completed. The speech and language evaluation and the psychological evaluation were in the process of being completed. (Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Petitioner)

15. The Student was assessed through Dynamic Indicators of Basic Early Literacy Skills ("DIBELS") testing, "i-Ready" testing, and myLexia testing during the 2016–2017 and 2017–2018 school years. (P-18; P-20-1; P-21; P-22)

## VII. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and the Hearing Officer's own legal research, the Conclusions of Law of the 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:

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.

See D.C. Code Sect. 38-2571.03(6)(A)(i).

Issue #1 involves Respondent's failure to conduct evaluations. Since this issue does not directly relate to the Student's existing or proposed IEP or placement, the burden of persuasion is on Petitioner. Schaffer v. West, 546 U.S. 49 (2005). Issue #2 asserts that the Student's IEP should have been revised during the 2016–2017 school year. Since this issue does directly relate to the Student's existing IEP, the burden of persuasion is on Respondent (provided that Petitioner presented a prima facie case on this issue).

An IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C.

Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. at 1001. The Court made clear that the standard is “markedly more demanding than the ‘merely more than de minimis’ test” applied by many courts. Id. at 1000.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

**1. Did Respondent fail to reevaluate the Student after the parent’s request to evaluate the Student in April, 2017? If so, did Respondent violate 34 CFR 300.303(2)? If so, did Respondent deny the Student a FAPE?**

A public agency must ensure that a reevaluation of each child with a disability is conducted if the public agency determines that the educational needs of the child warrant a reevaluation, or if the child’s parent or teacher requests a reevaluation. 34 CFR Sect. 300.303(a). The reevaluation must occur at least once every three years, unless the

parent and the LEA agree that a reevaluation is unnecessary. Additionally, the reevaluation is limited to one reevaluation per year, unless the parent and the LEA otherwise agree. 34 CFR Sect. 300.303(b)(1). When the parent requests a reevaluation more than once per year but the LEA is not in agreement, the LEA must provide the parent with prior written notice of its refusal to conduct the reevaluation. Analysis and Comments to the Regulations, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006). The District of Columbia Municipal Regulations do not limit the parent to one reevaluation per year. See D.C. Mun. Reg. 5-E Sect. 3005.7. The LEA must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. 34 C.F.R. Sect. 300.300(c)(1)(i).

There is no dispute that Petitioner sought evaluations for the Student in March, 2017, and reiterated that request at the April, 2017, IEP meeting. By that time, the Student had been educated at School A for approximately six months. Neither DCPS nor Petitioner could obtain copies of the evaluations conducted at X LEA during this extended time period, despite considerable effort. The IEP team thus conducted its IEP meeting without any psychological evaluation or speech and language evaluation to reference. It then provided the Student with less than four hours of specialized instruction per week.

During closing argument, Respondent did not provide a reason for its failure to evaluate the Student. During the hearing, Respondent suggested that it was reasonable for the IEP team to decline to evaluate the Student since it did not want to repeat the evaluations of X LEA. However, after six months, the IEP team should have concluded that it would not be able to obtain the X LEA evaluations. There was no testimony to

suggest that Respondent would have any chance to access the X LEA evaluations in the future. By the time of the IEP meeting, Respondent should have initiated its own evaluations of the Student.

During closing argument, Respondent argued that its evaluations are forthcoming and there is therefore no need to litigate this matter. In effect, Respondent argued that its regulatory violation was procedural in nature only. As stated by the D.C. Circuit: “(a)n IDEA claim is viable only if those procedural violations affected the student’s substantive rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006); Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004); cf. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction on the IEP).

However, the record indicated that the lack of evaluations had a direct impact on the Student’s special education hours. At the IEP meeting in November, 2017, the Student’s general education and special education teachers both advocated for more specialized instruction in view of the Student’s difficulties with speech, reading, math, writing, and behavior. The special education teacher wanted the Student to receive more specialized instruction outside general education to help the Student progress to grade level. The general education teacher sought more specialized instruction inside general education so the Student would be able to attend to instruction in a larger general education classroom.

However, at that IEP meeting, the special education coordinator demurred and stated that new evaluations were necessary before additional specialized instruction could be ordered. If the evaluations had been conducted as of November, 2017, the Student

would have received additional specialized instruction. As a result of the foregoing, Respondent denied the Student educational benefit and therefore a FAPE.

**2. Did Respondent fail to provide the Student with a new IEP after the Student's difficulties in school during the 2016–2017 school year? If so, did Respondent violate 34 C.F.R. Sect. 300.324(b)(1)(ii) and related provisions of the IDEA? If so, did Respondent deny the Student a FAPE?**

Districts have a duty to revise IEPs as appropriate. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002). The applicable regulations, at 34 CFR Sect. 300.324, provide that a District must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals, to address the results of any reevaluation, to address information about the child provided to, or by, the parents, to address the child's anticipated needs, or to address other matters.

As indicated in the determination of Issue #1, the Student's own teachers indicated that the Student required more specialized instruction. During the November, 2017, IEP meeting, the Student's special education teacher advocated for additional pull-out services and the Student's general education teacher advocated for additional push-in instruction. After objections from Respondent's special education coordinator, the IEP team denied the request of the teachers but agreed to provide the Student with a modest 1.25-hour-per-week increase in specialized instruction. The agreement was to provide the Student with four hours per week of specialized instruction outside general education and one hour per week of specialized instruction inside general education.

However, the IEP that followed did not reflect even this modest increase; the Student's specialized instructional hours remained at 1.25 hours per week outside general education and 2.5 hours per week inside general education.

There is nothing in the record to rebut the contention of the Student's two teachers that the Student is not functioning appropriately with the current level of services. In fact, Respondent, which bears the burden on this issue, did not present witnesses in defense of the IEP in question. As a result of the foregoing, Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to revise the Student's IEP after the 2016–2017 school year.

### **VIII. Relief**

When school districts deny Students a FAPE, courts and hearing officers have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the court or hearing officer to “grant such relief as [it] determines is appropriate.” The type of relief is not further specified, except that it must be “appropriate.” As the Supreme Court also observed, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act to provide handicapped children with a FAPE. School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

Petitioner is seeking a psychoeducational evaluation and a speech and language evaluation. Respondent's witnesses indicated that Respondent is in the process of completing these evaluations. Respondent argued that an order by the hearing officer directing it to complete the evaluations is therefore unnecessary.

However, as of the date of the hearing, no reason was posited as to why the evaluations had not been completed. Moreover, no IEP meeting had been scheduled for the Student, even though Respondent had more than seventy-five days from the date of the Due Process Complaint to conduct the evaluations and write the evaluation reports.

Consequently, Respondent is ordered to complete the evaluations within ten business days of this determination, and the IEP team is ordered to meet to discuss the evaluations and review the Student's services within twenty business days of this determination.

### **VIII. Order**

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall complete the Student's psychological evaluation and speech and language evaluation and provide both evaluations to the Petitioner within ten business days;

2. Respondent's IEP team shall conduct a meeting within twenty business days to review the Student's psychological evaluation and speech and language evaluation and review the Student's services, in particular the Student's specialized instruction hours.

Dated: February 5, 2018

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Petitioner's Representative: Attorney A, Esq.  
Respondent's Representative: Attorney B, Esq.  
OSSE Division of Specialized Education  
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### **IX. Notice of Appeal Rights**

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 USC §1415(i).

Date: February 5, 2018

*Michael Lazan*  
Impartial Hearing Officer