

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

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Office of Dispute Resolution
February 10, 2022

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| ADULT STUDENT, ¹ |) | |
| |) | |
| Petitioner, |) | Date Issued: February 10, 2022 |
| |) | |
| v. |) | Hearing Officer: Peter B. Vaden |
| |) | |
| |) | Case No: 2021-0179 |
| |) | |
| DISTRICT OF COLUMBIA |) | Online Video Conference Hearing |
| PUBLIC SCHOOLS, |) | |
| |) | Hearing Dates: December 15, 2021 |
| Respondent. |) | January 25, 2022 |
| |) | February 1, 2022 |
| |) | |

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the adult student Petitioner (STUDENT) 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 his/her due process complaint, Petitioner allege that he/she has been denied a free appropriate public education by the failure of Respondent District of Columbia Public Schools’ (DCPS) to meet its child-find obligations, failure to conduct a comprehensive evaluation and failure to find him/her eligible for special education in June 2021.

Petitioner’s Due Process Complaint, filed on November 4, 2021, named DCPS as Respondent. The parties waived holding a resolution session meeting, but did not

¹ Personal identification information is provided in Appendix A.

curtail the 30-day resolution period. The undersigned hearing officer was appointed on November 9, 2021. On November 19, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On December 2, 2021, Petitioner, by counsel, filed a motion to compel DCPS to permit his/her educational consultant to observe Student in his/her current DCPS educational placement. By order issued December 9, 2021, I denied the motion.

By order issued December 29, 2021, I granted DCPS' motion, opposed by Petitioner, to extend the final decision due date in this case from January 18, 2022 to February 11, 2022.

Due to the social distancing protocols in force in the wake of the Coronavirus outbreak, the due process hearing was held online with Student's consent and recorded by the hearing officer, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on December 15, 2021, January 26, 2022 and February 1, 2022. Student appeared online for his/her hearing testimony and was excused for the remainder of the hearing. Student was represented by PETITIONER'S COUNSEL, LAW STUDENT 1, and LAW STUDENT 2. Respondent DCPS was represented by DCPS' COUNSEL and by SPECIAL EDUCATION COORDINATOR.

Counsel for Petitioner made an opening statement. Student testified and called as additional witnesses INDEPENDENT PSYCHOLOGIST, INDEPENDENT SPEECH-LANGUAGE PATHOLOGIST (Independent SLP) and EDUCATIONAL CONSULTANT.

DCPS called as witnesses SCHOOL Psychologist, Special Education Coordinator, TEACHER and SCHOOL SPEECH-LANGUAGE PATHOLOGIST (School SLP). Petitioner's Exhibits P-1 through P-29 and DCPS' Exhibits R-1 through R-22, R-24, R-25 and R-26 were all admitted into evidence without objection.

At the conclusion of the evidentiary phase, Petitioner's Counsel requested to file a written closing, which was opposed by DCPS. With agreement of counsel, in lieu of receiving written closings, I reconvened the hearing on February 1, 2022 to hear oral closing arguments.

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 issues for determination in this case, as certified in the November 19, 2021 Prehearing Order, are:

- Did DCPS deny Student a FAPE by failing to evaluate Student for special education eligibility prior to the parent's request in September 2020?
- Did DCPS deny Student a FAPE by failing to comprehensively evaluate in every area of suspected disability, specifically for a speech-language impairment?
- Did DCPS deny Student a FAPE by failing to determine him/her eligible as a student with a disability on or about June 14, 2021?
- Did DCPS deny Student a FAPE by not allowing the parent to meaningfully participate in the Analysis of Existing Data (AED) meeting by not providing sufficient advance notice of the AED meeting date, by not providing AED data before the meeting and by not allowing the parent and her expert to fully express

their views?

For relief Petitioner requests that the hearing officer determine that he/she is a student with a disability eligible for special education services and order DCPS to convene an initial IEP meeting to develop an appropriate IEP. The Student also seeks an award of compensatory education services to compensate him/her for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

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

1. Student, an AGE young adult, resides in the District of Columbia with his/her mother (MOTHER). Student currently attends CITY SCHOOL 1, where Student is in GRADE. Testimony of Student. Student has never been determined to be a “Student with a disability” as defined by the IDEA. Testimony of School Psychologist.

2. Due to the COVID-19 pandemic, DCPS schools were closed for most in-person instruction, from mid-March 2020 through the end of the 2020-2021 school year. Hearing Officer Notice. Student returned to in-person classes at the beginning of the 2021-2022 school year. Testimony of Teacher.

3. Before in-person classes were suspended in March 2020, Student’s 2nd term grades for the 2019-2020 school year at City School 1 were B in Spanish, C in Extended Literacy, D in Algebra and C+ in World History. Exhibit R-20.

4. After virtual learning was instituted in spring 2020, Student did not actively participate in his/her online classes. Testimony of School Psychologist, Testimony of Special Education Coordinator. In the 2020-2021 school year, during virtual learning, Student accrued 48 unexcused absences. Exhibit R-19. Student did not like virtual learning because it was “boring” and he/she considered in-person learning to be better. Testimony of Student.

5. Student’s reported end-of-term grades for the 3rd and 4th terms of the 2019-2020 school year were C’s or higher. Student’s final grades for 2020-2021 school year were all P’s (Passed) or B’s. Exhibits R-20, R21. In light of the impact of the pandemic school closings on Student and the reports of City School 1 teachers that Student did not actively participate during the virtual learning period, I do not consider those marks probative of Student’s actual performance or progress.

6. On September 18, 2020, a student attorney from Georgetown University Law Center emailed City School 1, forwarding a request from Mother that Student be evaluated for special education services. Mother wrote that she suspected that Student had a disability that was causing him/her to struggle academically and that Student may need special education to enable him/her to learn. Mother noted specifically that Student was behind where he/she should be and was making minimal progress from year to year in math and reading. Exhibits P-4, P-5.

7. City School 1 convened an Analysis of Existing Data (AED) meeting on October 27, 2020. Mother and her law school representatives attended. Student’s

teachers from the 2019-2020 school year reported that Student struggled in his/her math and engineering classes. The math teacher reported that math was a struggle for Student, that Student never passed any math exams and that even with repetition and reinforcement, Student did not truly understand the mathematical concepts. The 2019-2020 school year engineering teacher reported that Student would say that he/she got it, but then it wouldn't stick, that Student would freeze up and not know what to do and that Student's tests were very poor although he/she did well on some exams. Student's City School 1 teachers in the 2020-2021 school year reported that he/she was making satisfactory progress in English Language Arts (ELA) and math. Over the parent's objection, the AED team decided to extend the timeline for completion of Student's evaluation until performance-based components of the evaluation could be completed in person and more data collected. Exhibits P-9, P-10.

8. On November 18, 2020, Mother, by counsel, made a written request to DCPS for funding for an Independent Educational Evaluation (IEE) psycho-educational assessment of Student. Exhibit P-11. By letter of December 1, 2020, DCPS issued funding authorization for the parent to obtain an IEE comprehensive psychological evaluation of Student. Exhibit P-12.

9. On February 26, 2021, after a meeting of Student's AED team, the City School 1 special education department refused to move forward with a speech evaluation of Student requested by the parent. The AED team determined, based on

existing data, that Student did not meet Speech-Language Pathology (SLP) criteria and the additional assessment was not warranted. Exhibit R-10.

10. Independent Psychologist evaluated Student in January and February 2021. Testing was conducted in four virtual sessions and two in-person sessions, with sessions lasting from 90 minutes to three hours each. In an April 20, 2021 Comprehensive Psychological Evaluation report, Independent Psychologist reported that cognitive testing of Student indicated overall scores in the Borderline range, with Low Average verbal comprehension and working memory and Borderline skills in perceptual reasoning and processing speed, indicating a pattern of strengths and weaknesses more consistent with a specific learning disability. Testing indicated that Student had deficits in listening comprehension and semantic tasks involving antonyms and analogies, which indicated receptive language difficulties. Student's writing samples indicated poor sentence structure and poor mastery of grammar and punctuation. Independent Psychologist reported that Student's reading comprehension was also poor and likely reflected underlying language processing issues. Independent Psychologist concluded that there was sufficient evidence to warrant a diagnosis for Student of Mixed Receptive and Expressive Language Disorder, but that a comprehensive speech and language evaluation was needed. Testing indicated that Student had Average skills for sentence memory, verbal memory, auditory working memory, and pictorial memory. However, Student's poor recall over time indicated he/she may have trouble encoding information efficiently to retrieve it later. In

addition, Student's performance on a narrative memory task was negatively affected by his/her difficulty sustaining attention, likely due to both attentional issues and difficulty processing complex language. On the Brown Attention Deficit Disorder (ADD) scales, Student indicated daily difficulties with memorizing academic material, leaving letters off in writing, and studying information, but not being able to remember it when needed. Student's attention and executive functioning skills were variable. These results indicated to Independent Psychologist that a diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD), Combined Type was warranted for Student. On academic achievement testing, Student's basic decoding and reading fluency were adequate in texts at the elementary level but he/she had difficulty with decoding multi-syllabic words, particularly with more unfamiliar vocabulary. Student's reading comprehension was considerably weaker, likely due to a combination of poor language processing and attentional issues associated with Attention Deficit-Hyperactivity Disorder. Student's basic reading skills and fluency tested at the fifth grade level and reading comprehension fell at the third grade level. In mathematics, Student struggled with basic calculation skills involving multi-step procedures and had poor math fact mastery. His/her math skills ranged from second to sixth grade level and indicated to Independent Psychologist a specific learning disability in mathematics. While Student's handwriting was adequate, his/her visual motor integration was poor. In written expression, Student had neat handwriting and was able to compose simple sentences. However, a classroom teacher reported that Student had difficulty following the

appropriate steps in the writing process and had difficulty writing in sufficient detail, organizing his/her thoughts, expressing complex ideas, and using appropriate grammar and spelling. In her April 20, 2021 report, Independent Psychologist diagnosed Student with Mixed Receptive Expressive Language Disorder (ICD-10-CM F80.2), Attention Deficit/Hyperactivity Disorder Combined Type (ICD-10-CM F90.2), Reading Disorder (ICD-10-CM F81.0), Mathematics Disorder (ICD-10-CM F81.2) and Disorder of Written Expression (ICD-10-CM F81.81). Independent Psychologist recommended that Student should receive special education services with goals to improve his/her language comprehension, oral and written expression, reading comprehension, and math calculation skills. She also recommended that Student receive a speech and language evaluation to determine whether he/she qualified for speech and language therapy.

Exhibit P-15.

11. On May 20, 2021, School Psychologist issued a report of her review of Independent Psychologist's April 20, 2021 IEE psychological evaluation of Student. School Psychologist observed Student in the online virtual setting and interviewed two teachers. School Psychologist did not conduct a formal assessment of Student or interact with Student in person. In her review report, School Psychologist reported that Student had struggled with online learning and his/her teachers reported that Student seemed distracted and required assistance staying on task with virtual learning. However, according to School Psychologist, when attending school in-person, Student had demonstrated the ability to complete his/her assignments independently and effectively

access the curriculum. School Psychologist reported that the data indicated that Student was making adequate academic progress and was passing all of his/her courses. She concluded that although Student may meet diagnostic criteria for Specific Learning Disability (SLD) and Other Health Impairment (OHI) diagnoses, there was insufficient evidence to support special education services for Student as a student with SLD or OHI, as defined by IDEA. Exhibit R-16.

12. On or about June 14, 2021, DCPS convened a multidisciplinary team meeting to determine Student's eligibility for special education. The team determined that Student did not achieve adequately and/or did not make sufficient progress to meet age or State-approved grade level standards in reading comprehension, written expression, mathematics calculation, basic reading and mathematics problem solving. However, the MDT team found that data indicated that Student was making adequate academic progress and was passing all of his/her courses and that Student demonstrated the ability to complete his/her assignments independently and to effectively access the curriculum. The MDT team determined that Student did not meet required criteria for special education eligibility as a student with either an SLD or an OHI impairment. Mother disagreed with this determination. Exhibits R-8, R-11.

13. In the 2020-2021 school year, during virtual learning, Student accrued 48 unexcused absences. Student's attendance has improved in the current, 2021-2022 school year with the return to in-person classes. Exhibit R-19.

14. In August 2021, Mother obtained a comprehensive speech-language

evaluation of Student conducted by Independent SLP. Exhibit P-17. On October 26, 2021 the City School 1 MDT team met to review the independent speech and language assessment and found that additional testing was needed. Exhibit R-14. On December 2, 2021, after completing the additional testing, School SLP found that Student does not present with a disabling condition in the area of Speech or Language Impairment. Exhibit R-18, Testimony of School SLP.

15. In the first term of the current 2021-2022 school year, Student received B's and C's in his/her classes. Exhibit R-22. In English Language Arts (ELA), Student is able to access grade-level material without scaffolding or modification. Student is attentive, inquisitive and contributes to the class. Student advocates well for him/herself. Student is a successful essay writer. Student has a weakness in writing making connections between paragraphs, which is usual for many students. Student is able to read grade-level texts and has strong comprehension. Testimony of Teacher.

16. The 2021-2022 ELA class is an AP language and composition class co-taught by a general education teacher and a special education teacher. There are about 25 students in the class, some of whom are special education students. The special education teacher works with both general education and special education students. During the class period, Student is able to go to the special education teacher's office when he/she needs a quiet space. Testimony of Teacher.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except – not applicable to this case – where there is a dispute about the appropriateness of the student's IEP or placement. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). The Petitioner holds the burden of persuasion in this case.

Analysis

I.

Did DCPS deny Student a FAPE by failing to determine him/her eligible as a student with a disability on or about June 14, 2021?

The primary issue in this case is whether DCPS erred in not finding Student eligible for special education at an eligibility meeting at City School on June 14, 2021. On September 18, 2020, Mother requested City School 1 staff to evaluate Student for special education eligibility. At the time, Mother wrote that Student was struggling academically and was making minimal progress from year to year in math and reading. This was during the period when DCPS schools were closed due to the Covid-19 pandemic. At a meeting on October 27, 2020, the City School 1 Analysis of Existing

Data (AED) team decided to extend the timeline for completion of Student's initial evaluation until performance-based components of the evaluation could be completed in person and more data collected.

On December 1, 2020, DCPS approved Mother's request for funding to obtain an Independent Educational Evaluation (IEE) Comprehensive Psychological Evaluation of Student. Independent Psychologist evaluated Student in January and February 2021 and issued a comprehensive psychological report on April 20, 2021. Independent Psychologist diagnosed Student with, *inter alia*, learning disorders and ADHD, and recommended that Student be provided special education services. However, at an eligibility team meeting on June 14, 2021, the school members of the MDT team determined that Student was not eligible for special education. Petitioner contests this decision.

To be eligible for special education services, a student must be evaluated as having a specified disability and, by reason thereof, needs special education and related services. *See* 34 C.F.R. § 300.8; *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). Determination of eligibility for special education should follow a two-step approach. The multidisciplinary team (MDT) first determines the existence of an IDEA disorder and then whether the student needs special education and related services by reason of that disability. *See Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. CV 16-10724-FDS, 2018 WL 563147, at *2 (D. Mass. Jan. 25, 2018), *appeal dismissed sub nom. Lincoln Sudbury Reg'l Sch. Dist. v. Mr. & Mrs. W.*, No. 18-1524,

2018 WL 6584118 (1st Cir. Aug. 8, 2018). Unless the MDT team decides additional data are needed, the team's determination must be based upon existing data on the child, evaluations and information provided by the parents, current classroom-based assessments and observations and observations by teachers and related service providers. *See* 34 CFR § 300.305(a)(1).

In her April 20, 2021 comprehensive psychological evaluation report, Independent Psychologist diagnosed Student with a learning disability – Reading Disorder, Mathematics Disorder and Disorder of Written Expression – as well as ADHD, combined type, and a Mixed Receptive-Expressive Language Disorder. DCPS does not dispute these diagnoses. Where the parties disagree is whether at the time the June 14, 2021 eligibility determination was made, Student, by reason of his/her impairment, needed special education and related services. *See* 34 CFR § 300.8(a)(1).

Independent Psychologist testified that Student lacked basic arithmetic skills and was reading some 5 years behind grade level. These findings were supported by the reports of Student's 2019-2020 school year math and engineering teachers that in that year, Student struggled in his/her math and engineering classes. The math teacher reported that Student never passed any of the exams and, that even with repetition and reinforcement, Student did not truly understand the mathematical concepts. The engineering teacher reported that Student would say that he/she got it, but then it wouldn't stick and that Student would freeze up and not know what to do. Student's 2020-2021 school year teachers reported that he/she was making satisfactory progress

in online English Language Arts (ELA) and math classes. However, I discount this report because by all accounts, Student did not actively participate in virtual classes.

In May 2021, School Psychologist reported that Student struggled with online learning and that according to Student's teachers, he/she seemed distracted and required assistance staying on task with virtual learning. Notwithstanding, School Psychologist maintained that the data indicated that Student was making adequate academic progress when attending school in person. I found this assertion unpersuasive because at the time School Psychologist issued her report, Student had not attended school in person since DCPS closed all schools in March 2020,

The D.C. Regs. provide that, subject to exclusions not applicable here, an IEP team shall determine that a child has a specific learning disability (SLD) if a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations and the child needs special education and related services. *See* 5–E D.C. Mun. Regs. §§ 3006.3(b), 3006.4(a).

Teacher testified that following Student's return to in-person classes in the current 2021-2022 school year, Student has been able to access grade level material without additional special education supports. I found ELA Teacher's testimony wholly credible. However this is in an inclusion classroom setting co-taught by ELA Teacher and a special education teacher. Whether Student would be so successful in a

traditional general education setting is not known. In any event, the June 14, 2021 eligibility team had to base its decision on data existing at the time of the eligibility meeting. Information on Student's performance in the 2021-2022 school year was, of course, not available to the team. *See* 34 CFR § 300.305(a)(1)

I find that Petitioner has met the burden of persuasion that at the time of the June 14, 2021 eligibility determination, the data established that Student had an SLD, that is, a disorder in, *inter alia*, the processes involved in using language manifested in reading, writing and mathematics and, by reason thereof, needed special education and related services.² DCPS' determination that Student was not eligible for special education was a denial of FAPE.

II.

Did DCPS deny Student a FAPE by failing to evaluate Student for special education eligibility prior to the parent's request in September 2020?

Petitioner alleges in the due process complaint that at least since the end of the 2018-2019 school year, DCPS had cause to suspect that Student was a child with a disability and should have initiated an evaluation to determine whether he/she was eligible for special education services. DCPS denies that before receiving Mother's evaluation request in September 2020, it had cause to suspect Student had a disability.

² In light of my conclusion that Student should have been found eligible for special education as a student with a Specific Learning Disability, it is not necessary to reach the question of whether Student also met IDEA criteria for an Other Health Impairment due to ADHD. *See, e.g., Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 377 (5th Cir. 2018) (IDEA promises—a FAPE—regardless of child's diagnosis.)

As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017),

A school district must “evaluate a student who may have a disability and who may require special education services.” D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any “child suspected of having a disability who may need special education.” 5–E D.C. Mun. Regs. § 3004.1(a) (emphases added); see 34 C.F.R. § 300.111(c)(1) (extending duty to “[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade”). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process “as soon as a student is identified as a potential candidate for special education services.”

Davis, supra, 244 F. Supp. 3d at 49, citing *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (emphasis in original). Once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within [60 days from receipt of parental consent].” See *DL v. District of Columbia*, 109 F. Supp. 3d 12, 16-17 (D.D.C. 2015); D.C. Code § 38–2561.02(a); 5E DCMR § 3005.2. “The ‘child find’ duty extends even to ‘[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. § 300.111(c)(1).” *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010). “School districts may not ignore disabled students’ needs, nor may they await parental demands before providing special instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

At the due process hearing, Petitioner’s expert, Educational Consultant, reviewed

Student's grades and testing records and opined that DCPS should have referred Student for a special education evaluation by the beginning of the 2019-2020 school year. Student's performance on Lexile measures at that time indicated he/she was reading at a 5th grade level – years below Student's actual grade level. The NWEA Measures of Academic Progress (NWEA MAP) taken in January 2020 indicated that Student's math skills were at a 4th grade level. As discussed above, Student's 2019-2020 school year teachers reported that Student never passed any of the math teacher's exams, even with repetition and reinforcement, and did not truly understand the mathematical concepts. The engineering teacher reported that Student would freeze up and not know what to do. When Student was later evaluated by Independent Psychologist in the winter of 2021, Student's reading comprehension fell at the third grade level. Student's math skills ranged from second to sixth grade level. On this evidence, I agree with Petitioner that by the beginning of the 2019-2020 school year, DCPS should have initiated an evaluation of Student as a child "who may have a disability and who may require special education services." *See Davis, supra*.

In this decision, I have found that DCPS erred in not finding Student eligible for special education as a child with an SLD at the June 24, 2021 eligibility team meeting. It follows that if DCPS had initiated an evaluation of Student near the beginning of the 2019-2020 school year, it is probable that Student would have been determined eligible for special education at least by January 2020. *See* D.C. Code § 38–2561.02(a); 5E DCMR § 3005.2. (District must conduct an initial evaluation and make an eligibility

determination within 60 days from receipt of parental consent.)

Failing to timely complete an initial eligibility determination for a student suspected of having a disability, as required by D.C. law, is a procedural violation of the IDEA. *See Simms v. District of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *12 (D.D.C. July 26, 2018), *report and recommendation adopted*, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018). 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 C.F.R. § 300.513(a)(2). I find that this procedural violation was a denial of FAPE because it impeded Student’s right to a FAPE, impeded Mother’s participation rights and caused a deprivation of educational benefit.

See 34 C.F.R. § 300.513(a)(2).

III.

Did DCPS deny Student a FAPE by failing to comprehensively evaluate in every area of suspected disability, specifically for a speech-language impairment?

In her April 20, 2021 IEE psychological evaluation report, Independent Psychologist recommended that Student receive a speech and language evaluation to determine whether he/she qualified for speech and language therapy. DCPS did not act

on this recommendation. In August 2021, Mother obtained a comprehensive speech-language evaluation of Student conducted by Independent SLP. On October 26, 2021 the City School 1 MDT team met to review the independent speech and language assessment and found that additional testing was needed. On December 2, 2021, after completing the additional testing, School SLP found that Student does not present with a disabling condition in the area of Speech or Language Impairment.

Petitioner alleges in the due process complaint that after receiving the recommendation in the IEE psychological evaluation that Student receive a speech and language evaluation, DCPS denied Student a FAPE by not conducting a speech and language assessment. DCPS responds that it had no reason to suspect that Student had a speech-language disability.

The IDEA requires that a local education agency (LEA) must ensure that a child with a disability is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006).

I agree with Petitioner that at least by the time DCPS received the April 20, 2021 IEE psychological evaluation of Student, the District had notice that a speech-language impairment was an area of suspected disability for Student. DCPS' initial failure to

evaluate Student for speech and language needs was a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). In this case, the IEE speech and language evaluation has now been reviewed by Student's MDT team and updated by School SLP. There has been no finding either by an MDT team or the hearing officer that Student needs speech and language services. I conclude that Petitioner has not shown that DCPS' initial omission to conduct a speech and language evaluation of Student, based on Independent Psychologist's recommendation, impeded Student's right to a FAPE, significantly impeded Mother or Student's opportunity to participate in the decision-making process or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). I conclude that DCPS' initial failure to conduct a speech and language evaluation of Student did not rise to a denial of FAPE.

IV.

Did DCPS deny Student a FAPE by not allowing the parent to meaningfully participate in the October 26, 2021 Analysis of Existing Data (AED) meeting by not providing sufficient advance notice of the AED meeting date, by not providing AED data before the meeting and by not allowing the parent and her expert to fully express their views?

DCPS convened an Analysis of Existing Data (AED) meeting on October 26, 2021. Mother, Petitioner's counsel and Independent SLP attended the meeting. In the due process complaint, Petitioner alleges that DCPS denied Student a FAPE because it allegedly did not provide sufficient advance notice of the AED meeting date, did not provide AED data before the meeting and did not allow the parent and her expert to

fully express their views at the meeting.

The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate. *See* 34 CFR § 300.322(a). *See, also*, § 300.305 (Requirements for Review of Existing Evaluation Data.) Assuming for purposes of this claim that the October 26, 2021 AED meeting was an IEP team meeting, Mother and her representatives were present at the meeting and did actively participate. *See Exhibit R-14*. Petitioner has not cited and I do not find any authority for Petitioner's claim that an LEA must provide a specified period of advance notice of the AED meeting or provide AED data before the meeting. Petitioner has not met the burden of persuasion that DCPS denied Student a FAPE by its conduct of the October 26, 2021 AED meeting.

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not finding him/her eligible for special education and related services at the June 14, 2021 City School 1 MDT meeting and by violating its child find obligation under the IDEA to evaluate Student and determine special education eligibility by January 2020. For relief in this case, Petitioner requested that I order DCPS to convene an IEP team meeting to develop an appropriate initial IEP. Petitioner also seeks an award of compensatory education services for the denials of FAPE established in this case.

I will order DCPS to ensure that an appropriate IEP is developed for Student, recognizing that in the 2021-2022 school year, Student is making satisfactory progress

in the inclusion ELA classroom at City School 1 without any pull-out special education services. *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (District must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.)

Student is also entitled to an award of compensatory education. When a hearing officer finds a denial of FAPE he has “broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education 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.” *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

This case presents unusual facts for the compensatory education inquiry, which requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017). Like so many students, Student suffered academically during the period of virtual instruction from March 2020 until the beginning of the 2021-2022 school year. With the return to in-person classes this school year, the evidence establishes that in the ELA class at least, Student is able to access grade-level material without scaffolding or modification. Student is attentive, inquisitive and contributes to the class. Student is able to read grade-level texts and has

strong comprehension. In the first term, Student received B's and C's in his/her classes.

Petitioner's expert, Educational Consultant, proposed that Student be awarded some 491 hours of academic tutoring to compensate Student for not being provided special education services starting in the fall of the 2019-2020 school year. Her premise for this recommendation is that appropriate IEPs for Student would have offered a total of 12 hours per week of special education services divided among Reading, Language Arts (Reading and Written Expression) and Mathematics.

I find this proposal wanting for two reasons. First, in this decision, I have determined that Student should have been offered an initial IEP by January 2020, not earlier in the school year as assumed by Educational Consultant. More importantly, Educational Consultant did not consider Student's relative success in school since he/she was able to return to in-person classes at the start of the 2021-2022 school year. Educational Consultant's opinion that Student needed 12 hours per week of IEP Specialized Instruction Services in order to make appropriate progress flies in the face of the credible testimony of Student's current ELA teacher that Student is able to access grade level material with the same supports provided to all general education students and that Student does not require anything additional.

That said, in the current school year, Student is clearly benefitting from extra attention available in the ELA inclusion classroom, co-taught by a special education teacher, and I find that DCPS should have been offering comparable IEP services to Student since January 2020. As compensatory education for DCPS' failure to provide

such services to Student from January 2020 through the end of the 2021-2022 school year, a period of about 60 school weeks, I will order DCPS to provide Student 120 hours of compensatory education tutoring.

ORDER

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

ORDERED:

1. The Hearing Officer declares that Student is a “Child with a disability” as defined by 34 C.F.R. § 300.8. DCPS shall promptly convene an IEP team, including the parents and their representatives, to develop Student’s initial IEP. DCPS shall ensure that an appropriate initial IEP is developed for Student within 30 calendar days of the date of this decision. It shall be the responsibility of the IEP team to determine the content of the IEP in accordance with 34 CFR § 300.320, *et seq.* and this decision.
2. Within 60 days of the date of this decision, subject to obtaining the adult student’s consent, DCPS shall conduct a new evaluation of Student in accordance with 34 CFR § 300.301, *et seq.* and this decision, and, after which, DCPS shall ensure that Student’s IEP is reviewed and revised, as appropriate.
3. As compensatory education for DCPS’ failure to determine Student eligible for special education by January 2020 and to develop appropriate initial and annual IEPs, DCPS shall provide funding authorization for Student to obtain 120 hours of individual academic tutoring by a qualified tutor and
4. All other relief requested by the Petitioner herein is denied.

Date: February 10, 2022

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
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