District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1] **Petitioner,**	)	
	)	**Hearing: January 11, 2019**
v.	)	**Date: January 30, 2019**
	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0300**
District of Columbia Public Schools, Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (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 November 16, 2018. The Complaint was filed by the Student's parent ("Petitioner"). On November 21, 2018, Respondent filed a response. The resolution period expired on December 16, 2018.

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 Education Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title

[1] Personally identifiable information is attached as Appendix A 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.

III. Procedural History

On December 18, 2018, this 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 26, 2018, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination was due on January 30, 2019.

There was one hearing date: January 11, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-47. Objections to Exhibits 45-47 were sustained. Exhibits 1-45 were admitted. Respondent moved into evidence Exhibits 1-36. There were no objections. Exhibits 1-36 were admitted. After the hearing on January 11, 2019, the parties presented closing statements.

Petitioner presented as witnesses: Petitioner; Witness A, an advocate; and Witness D, a psychologist. Respondent presented as witnesses: Witness E, a Local Educational Agency ("LEA") representative; Witness B, a psychologist; Witness F, a special education coordinator; and Witness C, a Director of Specialized Instruction.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the FAPE issues to be determined are as follows:

1. Did DCPS fail to assess the Student in all areas of suspected disability? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related

provisions? If so, did DCPS deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioner contended that DCPS's response to a December, 2017, request to evaluate the Student was inadequate because only limited testing was completed. Petitioner contended that the Student's evaluation should have included additional testing, such as cognitive and behavioral testing.

2. Did DCPS violate "Child Find" when it should have identified, located, and evaluated the Student by November, 2016? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is now eligible for services as a student with Multiple Disabilities (Speech and Language Impairment and Other Health Impairment). The Student is generally well-behaved, but can sometimes become dysregulated and has been diagnosed with Autism Spectrum Disorder by Witness D. The Student has difficulty reading, poor memory, and has been subjected to bullying in school. The Student is self-conscious about his/her academic issues and tries to hide them from peers. Testimony of Witness D; Testimony of Petitioner.

2. The Student went to School A for the 2015-2016 school year. In the Student's final report card for that year, the Student was graded as "competent" in every subject matter area. Additionally, the report card noted that Student was considered to be a model student for the building. For the 2015-2016 school year, on the Scholastic

Reading Inventory ("SRI") assessment, the Student was considered to be "below basic" at the beginning of the year, then "basic" at the end of the year. R-1-1; P-7.

3. For the 2016-2017 school year, the Student went to School B, where the Student's final grades ranged from D (Biology) to B- (French). The report card indicated that the Student got distracted easily and needed to stay more focused. In SRI testing for the 2016-2017 school year, the Student was deemed "below basic" at the beginning of the year, then "proficient" at the end of the year. The Student missed thirty-two days of school during this year. P-4; P-7; R-2-1; Testimony of Witness A.

4. In the spring of 2017, in Partnership for Assessment of Readiness for College and Careers ("PARCC") testing for English Language Arts ("ELA"), the Student scored 685, which is level "1," indicating that the Student "did not meet expectations." This score is in the 17th percentile among students in the District of Columbia on this test. In PARCC testing for math, the Student scored 713, which is level "2," indicating that the Student "partially met expectations." This score is in the 51st percentile among students in the District of Columbia on this test. P-5-1; P-12-1; Testimony of Witness A.

5. The Student continued at School B for the 2017-2018 school year. The Student's behavior took a turn for the worse. On November 1, 2017, Petitioner received a letter from the Student's French teacher indicating that the Student performed poorly on tests and quizzes, was not participating in oral class assignments, did not complete written assignments, did not bring in homework, did not pay attention to the teacher's directions, was extremely talkative and disruptive, and needed to come to tutoring. P-10; Testimony of Petitioner.

6. The Student stopped going to School B after Thanksgiving, 2017, due to a problem with bullying. In or about December, 2017, Petitioner asked Respondent for a safety transfer for the Student. Petitioner asked Respondent for the Student's educational records. Petitioner also asked Respondent to evaluate the Student for special education services. The safety transfer was eventually approved, and the Student moved to School C in or about February, 2018. Petitioner arranged for the Student's absences to be expunged from the Student's record. Testimony of Witness A; P-31; P-24-4.

7. In March, 2018, the Student's English teacher indicated that the Student often sat in class with a vacant look and needed one-on-one assistance to move forward with any reading or written assignment, even though the Student's behavior was "outstanding." P-21-3.

8. In or about March and April, 2018, Respondent conducted at least two observations of the Student. In an observation dated March 1, 2018, Observer A, a speech and language pathologist, did not notice any unusual behavior in the classroom and found that the Student was focused on the tasks in the room. In an observation on April 10, 2018, Witness B found that the Student was listening attentively in the classroom and was not bothered by noise. P-18-1; P-19-1; P-21-5.

9. Witness B attempted to conduct psychological testing of the Student in or about March-April, 2018. However, the Student expressed that s/he did not want to be tested, and Witness B did not insist that the Student be tested. Witness B also tried to conduct a "Connors" test for the Student, which requires questionnaires from the Student's teachers and parent. Petitioner would not participate in the test, so the test was not completed. Testimony of Witness B; R-16.

10. Teacher A managed to test the Student on the Woodcock-Johnson IV Tests of Achievement in or about April, 2018. The Student received scores indicating that s/he was below grade level in broad reading and broad math. Notably, the Student scored extremely low in reading fluency and oral reading. The Student's grade level equivalent was 1.6 in reading fluency and below kindergarten level in oral reading. P-20-1; 21-3.

11. During the course of this evaluation, the Student expressed that s/he did not believe s/he needed special education services. The Student wrote a note to Respondent to this effect on April 19, 2018. R-16.

12. A meeting was conducted on behalf of the Student on or about April 24, 2018. The related service providers, general educator, and case manager at the meeting all agreed that no further testing was needed to determine whether the Student was eligible for services. The Student's geometry teacher indicated that the Student received an "A" grade for the third term, whereas the Student's English teacher indicated that the Student received a "D" grade for third term. The teachers indicated that the Student was on task in class. When determining whether the Student should be deemed eligible for services, the team placed much emphasis on the Student's absences during the year. The team decided that the Student had missed too much instruction to be deemed a Student with a Specific Learning Disability. The team also decided that the Student was not eligible for services as a student with Other Health Impairment. Though Respondent's staff "knew about" the Student's Attention Deficit Hyperactivity Disorder ("ADHD"), the team decided that Petitioner had not provided enough documentary support for it to conclude that the Student could be eligible for services as a student with Other Health

Impairment. The team then initiated a "Section 504" plan for the Student. Testimony of Witness B; Testimony of Witness C; R-18; R-19; R-20; R-22; R-23; P-39.

13. The Student's final grades for the 2017-2018 school year, at School C, were lower than in previous years. The Student received a final grade of "F" in English II, creative writing, and fitness, with a high grade of "B+" in environmental science. The Student was therefore retained in the same grade for the 2018-2019 school year. P-13-P-17; Testimony of Witness D.

14. In the summer of 2018, Witness D conducted a comprehensive psychological evaluation of the Student. Wechsler Individual Achievement Test-3rd testing indicated that the Student scored at the average level in basic reading and written expression, but below average in math. There was significant "scatter" in this testing; the Student's reading comprehension tested at the 1st percentile, with reading fluency and listening comprehension at the 5th percentile. The Student's full-scale IQ was deemed to be 77 through the Wechsler Intelligence Scale for Children-V, with low scores in processing speed. "BRIEF" testing and Childhood Autism Rating Scale testing indicated that the Student should be diagnosed with autism spectrum disorder because of difficulties with inhibition, working memory, and non-verbal communication, among other areas of deficit. Through Connors testing, Teacher A told Witness D that the Student had very elevated academic difficulties and could be rigid. Through Behavior Assessment Scale for Children-2nd Edition testing, Teacher A reported that the Student had serious problems in academics. P-24; Testimony of Witness D.

15. Respondent convened an eligibility meeting on October 24, 2018, and determined that the Student was eligible for services as a student with Other Health

Impairment because of the Student's ADHD. This finding was premised, in part, on Witness D's Connors testing and Witness D's Behavior Assessment Scales for Children-2 testing. P-25; P-28; R-31.

16. An Individualized Education Program ("IEP") was created for the Student on or about December 12, 2018. The IEP determined that the Student was eligible for services as a student with Other Health Impairment. It also determined that the Student was eligible for services as a Student with a Specific Learning Disability. At the time, the Student was failing English, still could not understand basic vocabulary words, was unable to perform algebra, and needed extensive support to complete assignments. The IEP recommended specialized instruction for five hours per week inside general education and five hours per week outside general education, with 120 minutes per month of behavioral support services. P-28; P-29.

VI. 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:

> 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 § 38-2571.03(6)(A)(i).

Neither issue in this case directly involves the Student's existing IEP or program. For both of these issues, the burden of proof therefore lies with Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to assess the Student in all areas of suspected disability? If so, did DCPS violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did DCPS deny the Student a FAPE?

An LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b).

The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner contended that Respondent's evaluation of the Student, in response to the December, 2017, request to evaluate, was inadequate. Petitioner contended that the Student's evaluation should have included both cognitive and behavioral testing. Respondent's own witness, Witness B, agreed. She said that Respondent needed to conduct cognitive testing of the Student in order to completely evaluate the Student by the April, 2018, meeting. She also indicated that she did not necessarily agree with all of the statements of Respondent's staff at the meeting. In particular, Witness B said that she did not necessarily agree with statements to the effect that no further testing of the Student was needed at that time.

Subsequent actions of Respondent, after the April, 2018, meeting, also suggested that the evaluation of the Student was inadequate. After more comprehensive testing, including cognitive testing, Respondent found the Student to be eligible for services in two different categories (Specific Learning Disability and Other Health Impairment). These findings were based directly on the later testing, conducted by Witness D.

Respondent contended that there was no reason to suspect that the Student had social and emotional issues prior to the April, 2018, meeting. Respondent therefore concluded that social and emotional testing was not needed at that time. But the Student was exhibiting emotional issues in school during the 2017-2018 school year. The Student was so upset as a result of peer issues at School B that the Student refused to go to the school by December, 2018. Additionally, the Student's report card for the first term of the 2017-2018 school year indicated that the Student had significant social and emotional issues in school at the time. The Student's geometry teacher said that the Student "lacked initiative" and had "poor behavior." The Student's physics teacher said that the Student

was failing and not completing assignments. The Student's French teacher indicated that the Student was engaging in "poor behavior" and not completing assignments. In fact, the Student's French teacher wrote a note home on November 1, 2017, indicating that the Student performed poorly on tests and quizzes, was not participating in oral class assignments, did not complete written assignments, did not bring in homework, did not pay attention to the teacher's directions, was extremely talkative and disruptive, and needed to come to tutoring.

Respondent argued that Witness B was unable to test the Student. The Student clearly did resist Witness B's entreaties along these lines. Petitioner contended that Witness B should have made sure that the test was conducted, notwithstanding the Student's opposition. Respondent contended that prodding a student to test can invalidate the results. But the record suggests that Witness B could have gotten the Student to test if she had persisted with the Student. Teacher A apparently persisted with the Student by administering Woodcock-Johnson Tests of Achievement-III testing on the Student in April, 2018. Witness D also had no issues testing the Student in a comprehensive manner in the summer of 2018.

Respondent denied the Student a FAPE when it failed to assess the Student in all areas of suspected disability during the evaluation in winter/spring, 2017-2018.

2. Did Respondent violate "Child Find" when it should have identified, located, and evaluated the Student by November, 2016? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions of the IDEA? If so, did DCPS deny the Student a FAPE?

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP. 20 U.S.C. Sects.

1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer, 546 U.S. at 51.

The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find must include any child "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c)(1).

Federal caselaw indicates that these provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the Child Find obligation "extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

Petitioner testified that she asked School A for help with the Student, and that she told staff at School A about the Student's ADHD diagnosis. Petitioner therefore argued that the Student should have been evaluated well before her request for evaluation in December, 2017. However, Petitioner was not specific when she testified about her discussions with the school. She did not indicate when these conversations took place, or with whom. She also did not clearly describe what the Student's problems were at

School A and School B during the 2015-2015 school year and the 2016-2017 school year, except to point out that the Student was distracted.

Petitioner also did not present any other testimony or evidence to corroborate her assertions that the Student was exhibiting signs of disability at that time, with the exception of the 2016-2017 report cards, which indicate that the Student got distracted easily and needed to stay more focused. But these reports cards contain mixed information. While the Student did not perform excellently in school during the 2016-2017 school year, the Student did pass all of his/her academic classes. Additionally, the Student's teachers in English, extended literacy, French, world history, and geography all said that the Student was "a pleasure to have in the class." To find a school district liable for failing to identify a student who should be evaluated for purposes of receiving special education, a "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 to evaluate.*" Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 (2d Cir.), cert. denied sub nom. Mr. P. v. W. Hartford Bd. of Educ., 139 S. Ct. 322, 202 L. Ed. 2d 219 (2018) (citations omitted) (emphasis added); D.K. v. Abington Sch. Dist., 696 F.3d 233 (3rd Cir. 2012) (Child Find does not require a "formal evaluation of every struggling student").

Petitioner also pointed to the Student's standardized test scores in support of her Child Find claim, reflecting in particular on the Student's SRI testing for reading. However, SRI testing for this Student was inconsistent and ultimately unconvincing. For instance, even though SRI testing in October, 2016, indicated that the Student's scores were at the third grade level, SRI testing conducted on May 10, 2017, indicated that the

Student's scores were at the ninth grade level. P-9-4; R-2-1. Given the exceedingly large jump in score, it is likely that: (1) the Student learned important ELA skills during the school year; and (2) the Student did not take the beginning-of-year SRI tests with the requisite fidelity. Moreover, while the Student's PARCC testing did reveal that the Student was not meeting expectations in ELA at School B in 2017, Witness F explained, without rebuttal, that PARCC testing is not necessarily an appropriate measure to determine whether a student has a disability.

In sum, while the record suggests that the Student had some issues at school during the 2015-2016 and 2016-2017 school years, the record also suggests that the Student's issues were manageable in the general education setting. Accordingly, this Hearing Officer finds that Respondent did not have a duty to identify, locate, and evaluate the Student until the Student's problems worsened in or about November, 2017, leading to Petitioner's request for an evaluation in December, 2017. Petitioner's allegations that Respondent violated "Child Find" must therefore be denied.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." 20 U.S.C. Sect. 1415(i)(2)(C)(iii).

Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F.Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student"). A petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F.Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner seeks 300 hours of academic tutoring as compensatory education. Petitioner presented a written, credible compensatory education plan that is consistent with Reid, and she offered testimony in support of this plan through Witness A. However, Petitioner's compensatory education plan refers to a much longer time period of FAPE deprivation that the FAPE deprivation determined herein. Petitioner argued that the period of FAPE deprivation ran from November, 2016, through the present, based on the assumption that Petitioner would prevail on Issue #2. However, this Hearing Officer

did not find for Petitioner on Issue #2. This Hearing Officer Determination found that the Student was denied a FAPE as a result of the allegations in Issue #1 only. This means that the Student should have received an IEP by May, 2018 (150 days after the initial referral to provide the Student with services[2]), and that the period of FAPE deprivation in this case should therefore be deemed to start in May, 2018, and end at the time services were ordered by the IEP of December, 2018. Considering all the factors in Reid, this Hearing Officer will therefore award the Student one hundred hours of compensatory tutoring, to be provided by a certified special education teacher.[3]

Petitioner also seeks a vocational education program, though she did not request any specific program nor a specific number of hours of service. Since "transition" services are required in IEPs for children of the Student's age, and since the Student should have received an IEP by May, 2018, the Student was in fact denied transition services from May, 2018, through to the end of the calendar year, 2018. Since transition services are often in the form of vocational training, this Hearing Officer finds Petitioner's request for compensatory vocational services to be reasonable. The Student shall therefore receive thirty hours of vocational training services as part of the Student's compensatory education award.

VII. Order

As a result of the foregoing, this Hearing Officer hereby orders the following:

[2] In the District of Columbia, the LEA must conduct an initial evaluation to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code Sect. 38–2561.02(a). Once the eligibility determination has been made, the LEA must conduct a meeting to develop an IEP within 30 days. 34 CFR Sect. 300.323(c)(1); G.G. ex rel. Gersten v. District of Columbia, 924 F.Supp.2d 273, 279 (D.D.C. 2013).

[3] This number of hours is less than the number of hours missed by the Student, who should have received at least ten hours of specialized instruction per week from May, 2018, to December, 2018.

1. Respondent shall pay for one hundred hours of tutoring services for the Student, to be provided by a certified special education teacher, at a rate that is usual and customary in the community;

2. Respondent shall pay for thirty hours of vocational training services for the Student, by a qualified, professional provider, at a rate that is usual and customary in the community;

3. Petitioner's other requests for relief are denied.

Dated: January 30, 2019

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
Contact.resolution@dc.gov

VIII. 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: January 30, 2019

Michael Lazan
Impartial Hearing Officer