

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 13, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0079

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: June 1, 2016

Respondent.

Office of Dispute Resolution, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). On April 22, 2016, subsequent to the filing of the due process complaint in this case, Student was determined eligible for special education under the disability category Developmental Delay. In her due process complaint, Petitioner seeks compensatory education relief for Respondent District of Columbia Public Schools’ (DCPS) not determining that Student was eligible for special education when he was previously evaluated in July 2015.

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on March 31, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on April 1, 2016. The parties met for a resolution session on April 11, 2016 and were unable to reach an agreement. My final decision in this case is due by June 14, 2016. On April 19, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 1, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPEECH-LANGUAGE PATHOLOGIST and by DCPS' COUNSEL.

At the beginning of the due process hearing, DCPS' Counsel made an oral motion to dismiss Petitioner's complaint for mootness, because Student has now been determined eligible for special education and offered an Individualized Education Program (IEP). For the reasons stated on the record, I denied the motion.

The Petitioner called as witnesses INDEPENDENT PSYCHOLOGIST, COMP ED PROVIDER, GRANDMOTHER, and EDUCATIONAL ADVOCATE. Independent Psychologist was allowed to testify as an expert witness. DCPS called as witnesses SCHOOL PSYCHOLOGIST, OCCUPATIONAL THERAPIST, and Speech-Language Pathologist. Petitioner's Exhibits P-1 through P-41 were admitted into evidence with the exception of Exhibits P-8, P-26, P-30, P-32 through P-35, P-38, and P-40, which were withdrawn. Exhibits P-24, P-29, and P-36 were admitted over DCPS' objections. DCPS'

objections to Exhibits P-42 and P-43 were sustained. DCPS' Exhibits R-1 through R-18 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. DCPS' Counsel made a brief statement asserting that a functional behavioral assessment will be conducted when Student returns to school after the summer break. Counsel for both parties made 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 following issues for determination were certified in the May 16, 2016 Revised Prehearing Order:

Whether District of Columbia Public Schools (DCPS) denied the student a free appropriate public education (FAPE) by not comprehensively evaluating the student and/or conducting comprehensive evaluations in a timely manner following the initial referral for evaluations in April 2015;

Whether the student was denied a FAPE by the erroneous determination of the initial eligibility team that Student was not eligible for special education services as either a student with a Developmental Delay or Autism Spectrum Disorder and by continuing to identify Student as ineligible despite DCPS' having been provided additional evaluations in February 2016; and

Whether DCPS denied Student a FAPE by not ensuring that an Individualized Education Program (IEP) and services were provided to Student following the initial referral by the parent in April 2015.

On April 22, 2016, subsequent to the parent's filing of her due process complaint in this case, Student was determined eligible for special education and related services under the IDEA disability classification Developmental Delay and a draft initial Individualized Education Program (IEP) has been proposed. (The appropriateness of the draft IEP is not at issue in this case.) For her remaining relief, Petitioner requests

that the hearing officer order DCPS to conduct or fund a functional behavioral assessment (FBA) and ensure that Student's proposed IEP is revised as appropriate, and that Student be awarded compensatory education for the failure of DCPS to provide specialized instruction and related services to Student since he aged out of IDEA Part C early intervention services.

FINDINGS OF FACT

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

1. Student an AGE child resides in the District of Columbia with Mother and Grandmother. Testimony of Grandmother.
2. On April 22, 2016, a DCPS Multi-Disciplinary Team (MDT) determined that Student is eligible for special education and related services under the disability classification Developmental Delay (DD). Exhibit R-5.
3. Since 2014, Student has attended EARLY LEARNING CENTER. Exhibit R-20. Student was enrolled at Early Learning Center, a nonprofit service provider, instead of his neighborhood school, because he was considered a "high risk" child due to his parent's disability. Testimony of Grandmother.
4. On October 27 and 28, 2014, the D.C. Office of the State Superintendent of Education (OSSE) conducted a Strong Start evaluation of Student to assist in determining Student's eligibility for IDEA Part C early intervention services.² Student was referred for the Strong Start evaluation due to concerns of the parent and teacher

² During the due process hearing, both Petitioner's Counsel and DCPS' Counsel appeared to be under the impression that the Strong Start evaluation report had not been offered into evidence. However, the evaluation was admitted without objection as DCPS' Exhibit R-16.

regarding Student's speech and his aggressive behaviors when frustrated. The Strong Start evaluators assessed Student using the Battelle Developmental Inventory, Second Edition (BDI-2) and the Assessment, Evaluation and Programming System for Infants and Children (AEPS), Second Edition. The evaluators also reviewed Student's medical records and conducted an observation of the child. Based upon the BDI-2 scores, Student was reported have show Mild developmental delay in Communication (Standard Score 75) and Adaptive (Standard Score 73). (The Average range on the BDI-2 is 85 to 115.) Based on the AEPS scores, Student was reported to fall below the range for typically developing children in the areas of Communication and Social. The Strong Start evaluators reported that Student met Part C eligibility criteria for Developmental Delay based upon having at least 25% Developmental Delay in three areas, namely Adaptive Development (Mild delay), Communication Development (Mild delay) and Social Emotional Development. Exhibits R-16, R-5.

5. Based upon the Strong Start report, Student was provided an Individual Family Services Plan (IFSP) under Part C of the IDEA. Under the IFSP, Student was slated to receive 1 hour per week of speech-language therapy and 1 hours per week of occupational therapy (OT). Both services were to be provided by Early Learning Center. Exhibit R-3. Student made good developmental progress with the services provided in the IFSP and his participation in programming at Early Learning Center. Exhibit R-5.

6. On April 5, 2015, Student was referred for an initial special education evaluation through the transition process from IDEA Part C (Early Intervention) to Part B (Special Education and Related Services). Exhibit R-7. EARLY STAGES SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation. The psychologist reviewed the October 27-28, 2014 Strong Start evaluation, interviewed

Mother and Grandmother, and conducted the Autism Diagnostic Observation Schedule 2nd Edition (ADOS-2) and the Pervasive Developmental Disorder Behavior Inventory (PDDBI). Early Stages School Psychologist reported that Student demonstrated Average cognitive, communication, social and motor developmental skills; that Student demonstrated some challenging behaviors, including verbal and physical aggression; that it appeared that Student did not meet eligibility criteria for Autism Spectrum Disorder (ASD) and that Student was currently demonstrating adequate developmental skills for him to participate in age appropriate learning activities and make progress in the general education curriculum. Exhibit R-5.

7. In July 2015, Speech-Language Pathologist conducted a supplemental speech and language assessment of Student. For her assessment, Speech-Language Pathologist observed Student in his classroom and interviewed Student's speech-language provider and classroom teacher. She also reviewed the report of an interview conducted by the Early Stages Evaluation Coordinator with Mother and Grandmother. Speech-Language Pathologist administered an Otoacoustic Emissions (OAE) test and the Preschool Language Scales, Fifth Edition (PLS-5) to measure Student's receptive and expressive spoken language skills. Speech-Language Pathologist reported that Student's overall language skills were then within the average range with mildly delayed auditory processing skills and average expressive language skills; that Student demonstrated typical and atypical pragmatic language skills; that his receptive and expressive vocabulary was age appropriate and that no articulation, voice or fluency concerns were present. Exhibit R-3.

8. On July 29, 2015, a DCPS MDT team met to determined Student's initial eligibility for IDEA Part B services. Mother and Grandmother attended the meeting.

The information from Student's October 2014 Strong Start evaluation, the speech-language assessment and the comprehensive psychological evaluation was reviewed. In addition, Occupation Therapist reported on her classroom observation of Student conducted at Early Learning Center on July 2, 2015. Occupational Therapist reported that Student was able to follow classroom routines and directions, that he generally interacted little with his peers and was generally more social with adults. She reported that Student made little eye contact; that Student did not demonstrate neuromuscular or fine motor deficits; that Student did not appear to be overstimulated by the classroom environment, but he engaged in some repetitive behaviors, made atypical sounds and occasionally screamed and looked to see if an adult had noticed. The classroom teacher reported to Occupational Therapist that student knew classroom routines but needed a lot of redirection and that Student would "tantrum" if allowed to get away with it. Occupational Therapist also interviewed Student's OT provider, who felt that Student's behaviors were attention seeking. The OT provider reported that Student engaged in some stereotypical behaviors such as hand flapping and that he would scream, sometimes in protest, but also because he enjoyed the sound. The MDT team determined that Student did not meet IDEA eligibility criteria for ASD, Speech or Language Impairment or Developmental Delay. Exhibit R-4.

9. The eligibility team determined that Student did not exhibit severe developmental delays in physical development, cognitive development, language and communication development, social or emotional development, or adaptive development. Exhibit R-6.

10. The July 29, 2015 eligibility team determined that Student did not meet eligibility criteria for Autism Spectrum Disorder (ASD) because the team concluded that

Student did not display problems which extended beyond speech and language to other aspects of social communication, both receptively and expressively, and because the ASD disability did not impact his educational performance. Exhibit R-6.

11. Student's Speech-Language and OT services under the IFSP were terminated in the fall of 2015 after he aged out of Part C eligibility. Testimony of Grandmother.

12. On November 6, 2015, Petitioner's Counsel requested on behalf of Mother that DCPS fund Independent Educational Evaluation (IEE) speech and language and psychological evaluations of Student, asserting that the parent disagreed with the speech and language and psychological evaluations completed by DCPS in July 2015.

Petitioner's Counsel also requested, *inter alia*, that a neuropsychological evaluation and an updated OT evaluation be conducted. Exhibit P-24. By email of November 19, 2015, an Early Stages evaluation specialist forwarded to Petitioner's Counsel authorization for the requested IEE psychological and speech evaluations. The Early Stages specialist asserted that DCPS could not provide funding for an IEE neuropsychological or audiological processing evaluation because DCPS could only provide IEE funding for evaluations which DCPS had completed and with which the parent disagreed. Exhibit P-25.

13. On February 15 and 20, 2016, Independent Psychologist's associate (IEE EVALUATOR) conducted a comprehensive psychological reevaluation of Student. IEE Evaluator made a classroom observation and conducted cognitive, educational and behavioral assessments. IEE Evaluator administered the Wechsler Preschool and Primary Scale of Intelligence, 4th Edition (WPPSI-IV), selected tests from the BDI-2, the BASC-2 rating scales, the Beery-Buktenica Developmental Test of Visual-Motor

Integration, 5th Edition (VMI), and the Gilliam Autism Rating Scale, 3rd Edition (GARS-3). IEE Evaluator and Independent Psychologist concluded, *inter alia*, that Student demonstrated symptoms consistent with Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5) criteria for Global Development Delay and that he presented with clinical symptoms congruent with ASD. The independent psychologists also reported that Student may meet special education eligibility requirements under the Developmental Delay classification. Exhibit P-17.

14. On February 10, 2016, INDEPENDENT AUDIOLOGIST conducted an IEE speech-language evaluation of Student. Independent Audiologist reported that results from his testing supported a conclusion that Student had an expressive language deficit in verbal language communication for which he needed speech-language therapy. However, Independent Audiologist reported that his expressive language testing of Student rendered results that were two standard deviations poorer than the results on the same assessment tool administered in July 2015, which Independent Audiologist described as surprising. Exhibit P-18.

15. Occupational Therapist conducted an OT assessment of Student on April 11, 2016, which included a review of records, interviews of the classroom teacher, Mother and Student, clinical observations and assessment, analysis of work samples and formal testing. Student's scores on the Peabody Developmental Motor Scales, 2nd Edition (PDMS-2) indicated he was displaying a significant delay in grasping and visual motor skills. On the Child Sensory Profile 2, Mother's responses indicated that Student was exhibiting behaviors "much more than others" in all sensory processing areas except visual processing and body position. The teacher's responses indicated that Student displayed such behaviors more than others in the areas of avoiding, registration and

attention, but the teacher's overall responses indicated that Student exhibited behaviors related to sensory processing just like the majority of other students. Occupational Therapist concluded that Student needed support for fine motor delays. Responses on the sensory profiles indicated to Occupational Therapist that Student's behaviors that impacted his attention and participation in the daycare setting were most likely not related to sensory processing concerns. Exhibit R-10.

16. At an MDT meeting on April 22, 2016, the eligibility team determined that Student met eligibility criteria for Developmental Delay, and not for ASD. Petitioner's Counsel, who attended the meeting, agreed that Student met criteria for DD, but objected that the team did not find that Student met criteria for ASD. On May 12, 2016, DCPS proposed a draft initial IEP for Student. The draft IEP provided for Student to receive 5 hours per week of Specialized Instruction in the general education setting, 2 hours per month of OT in the general education setting and 2 hours per month of OT outside general education. (Neither the correctness of the April 22, 2016 eligibility determination nor the appropriateness of the proposed IEP is at issue in this case.)

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A.

Did DCPS deny Student a FAPE by not comprehensively evaluating him and/or conducting comprehensive evaluations in a timely manner following the initial referral for evaluations in April 2015?

During the [REDACTED] school year Student received early intervention speech-language and OT services at Early Learning Center, pursuant to an Individual Family Services Plan (IFSP) under Part C of the IDEA. Upon reaching three years of age, children are no longer eligible for Part C early intervention services. *See* 34 CFR § 300.25(a). In April 2015, Student was referred for an initial special education evaluation through the IDEA Part C (Early Intervention) to Part B (Special Education and Related Services) transition process. DCPS' Early Stages assessment center proceeded to conduct a comprehensive psychological evaluation, a supplemental speech-language assessment and an OT observation review. An MDT eligibility team met on July 29, 2015 and determined that Student was not eligible for Part B special education services. Petitioner contends that DCPS' initial evaluation of Student's eligibility for Part B services was not sufficiently comprehensive. DCPS responds that its evaluation complied with the requirements of the IDEA.

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

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

and, on the basis of that review and input from the child's parents, identify what

additional data, if any, are needed to determine whether the student is a “child with a disability,” as defined in 34 CFR § 300.8, and the educational needs of the child. *See* 34 CFR § 300.305(a). The regulations further provide that the evaluation conducted by the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability. *See* 34 CFR § 300.304(b)(1). The IDEA does not require that a particular type of evaluation be conducted to establish a child’s eligibility; rather, the evaluation requirements in §§ 300.530 through 300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child. *See* Federal Policy and Guidance – OSEP Memorandum, *Analysis of Comments and Changes*, Attachment 1 (May 4, 2000). The Act leaves the selections of testing and evaluation materials and the procedures to be used for evaluations and reevaluations to the individual states, with the understanding that all IDEA requirements must be satisfied. *See Letter to Shaver*, 17 IDELR 356 (OSERS 1990). For children residing in the District of Columbia, the initial evaluation to determine eligibility for special education services must be conducted “within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.” D.C. Code § 38–2561.02(a).

Student was referred for his initial assessment for special education eligibility on April 5, 2015. Following completion of evaluations in July 2015, an MDT eligibility team met on July 29, 2015 and determined that Student was not a child with an IDEA disability who needed special education and related services. This initial eligibility

determination was timely, being completed within 120 days of Student's referral for evaluation.

As to whether the initial evaluation was sufficiently comprehensive, the July 29, 2015 eligibility team considered the July 2015 psychological, speech-language and OT assessments conducted by Early Stages assessment center as well as the OSSE Strong Start Initial Evaluation/Assessment of Student done on October 27-28, 2014.

Petitioner's expert, Independent Psychologist, felt there were "missing pieces" because the comprehensive psychological evaluation conducted by Early Stages purportedly lacked testing for cognitive levels, academic achievement and social-emotional functioning and because the evaluator did not conduct a classroom observation or interview Student's teacher. Independent Psychologist's opinion is not persuasive because she had not reviewed the Strong Start assessment data, even though it was referenced in the DCPS psychological evaluation. As School Psychologist explained, no testing for cognitive or academic progress was administered in July 2015 because Early Stages School Psychologist obtained Student's scores from the comprehensive Battelle Developmental Inventory, 2nd Edition (BDI-2), administered as part of the October 27-28, 2014 "Strong Start" evaluation. The Strong Start BDI-2 cognitive and social scores for Student were Low Average. Further, for the social-emotional component, Early Stages School Psychologist administered the Pervasive Developmental Disorder Behavior Inventory (PDDBI) behavior rating scales to Grandmother and Mother and conducted the Autism Diagnostic Observation Schedule, 2nd Edition (ADOS-2). Finally, although the Early Stages School Psychologist was not able to conduct a classroom observation or interview Student's teacher due to scheduling conflicts, he relied upon information reported by his Early Stages colleague, Speech-Language Pathologist, who

conducted a classroom observation and interviewed Student's teacher and the speech-language provider on July 2, 2015.

A parent may, of course, disagree with the evaluation conducted by DCPS and may request an Independent Education Evaluation at public expense, which Mother did in this case. *See* 34 CFR § 300.502(b). However, I find that the parent has not met her burden of proving that DCPS denied Student a FAPE by not ensuring that his initial eligibility evaluation in July 2015 was timely and sufficiently comprehensive.

B.

Was Student denied a FAPE by the erroneous determination of the July 2015 initial eligibility team that Student was not eligible for special education services as either a child with a Developmental Delay and/or Autism Spectrum Disorder and by continuing to identify Student as ineligible despite having been provided additional evaluations in February 2016?

Did DCPS deny Student a FAPE by not ensuring that an Individualized Education Program (IEP) and services were provided to Student following the initial referral by the parent in April 2015?

Petitioner next contends that Student was denied a FAPE by the July 29, 2015 eligibility team determination that Student was not a child with an IDEA disability and the continuing failure to determine him eligible until April 22, 2016. DCPS maintains that the July 29, 2015 eligibility team determination that Student was not a child with a disability was correct at the time it was made and disputes that Student has been denied a FAPE.

The term "child with a disability" is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as a child experiencing developmental delays or having one or more defined disabilities, including, *inter alia*, Autism, "and who, by reason thereof, needs special education and

related services.” See 34 CFR § 300.8(a), (b). It is up to each state to develop criteria to determine whether a child has a disability. See U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006). Petitioner contends that Student should have been identified in July 2015 as a child with a Developmental Delay (DD) or with an Autism Spectrum Disorder (ASD).

Developmental Delay

Under District of Columbia regulations, Developmental Delay is defined as, a condition in which a child, three through seven years of age:

(a) experiences severe developmental delays of at least two years below his or her chronological age and/or at least two standard deviations below the mean, as measured by appropriate standardized diagnostic instruments and procedures, in one or more of the following areas:

- 1 Physical development;
- 2 Language and communication development;
- 3 Social or emotional development;
- 4 Cognitive development; or
- 5 Adaptive development; and

(b) due to the delay(s) described above, requires special education and related services.

No child shall be classified as having “Developmental Delay” based solely on deficits in the area of social and/or emotional development.

"Developmental Delay" does not apply to children with the following disabilities:

- (a) autism;
- (b) traumatic brain injury;
- (c) mental retardation;
- (d) emotional disturbance;
- (e) other health impairment;
- (f) orthopedic impairment;
- (g) visual impairment, including blindness;
- (h) hearing impairment, including deafness; or
- (i) speech/language impairment.

5E DCMR § 3001.1.

At the July 29, 2015 initial eligibility meeting for Student, attended by Mother and Grandmother, the eligibility team reviewed, *inter alia*, Early Stages School Psychologist's July 28, 2015 comprehensive psychological evaluation report and Speech-Language Pathologist's July 22, 2015 Supplemental Speech-Language Assessment Report. Student's cognitive development was scored as Low Average on the BDI-2 administered in October 2014. The psychological evaluation report indicated that although Student presented with behavioral challenges, including verbal and physical aggression, refusal to listen to adults and difficulty remaining engaged in individual activities, Student demonstrated adequate social communication and behavioral skills. The Speech-Language assessment indicated that Student's overall language was in the Average range, with mildly delayed auditory processing skills and average expressive language skills. The eligibility team determined that Student did not exhibit severe developmental delays in physical development, cognitive development, language and communication development, social or emotional development, or adaptive development.

Autism Spectrum Disorder

The D.C. Regulations define "Autism" as a developmental disability which:

- (a) Does not include emotional disturbance as defined below;
- (b) Significantly affects verbal and nonverbal communication and social interaction;
- (c) Is often evident before three years old;
- (d) Adversely affects a child's educational performance; and
- (e) May be characterized by:
 - (1) Engagement in repetitive activities and stereotyped movements;
 - (2) Resistance to environmental change or change in daily routines; and

(3) Unusual responses to sensory experiences.

5E DCMR § 3001.1.³ The July 29, 2015 eligibility team determined that Student did not meet eligibility criteria for Autism Spectrum Disorder (ASD) because the team concluded that Student did not display problems which extended beyond speech and language to other aspects of social communication, both receptively and expressively, and because the ASD disability did not impact his educational performance.

Subsequent to the July 29, 2015 ineligibility determination, in February 2016, Petitioner's expert, Independent Psychologist, and her associate, IEE Evaluator, conducted a comprehensive psychological reevaluation of Student. The independent psychological evaluators diagnosed Student with, *inter alia*, Global Developmental Delay and ASD (provisional). When Student was reassessed by the independent evaluators, his BDI-2 scores for early learning skills and personal-social skills were much lower than the Strong Start scores obtained using the same test instruments in October 2014. Student's scores for early learning skills declined from Low Average to Significantly Delayed. There was a 13-point decline in Student's personal social skills scores. School Psychologist reviewed the IEE psychological evaluation in April 2016 and concluded that although the IEE test results were thought to be an "underestimate" of Student's abilities, Student now met criteria for the DD disability due to his lack of progress in social-emotional growth between the October 2014 and February 2016 evaluations. On April 22, 2016, the DCPS eligibility team determined that Student met criteria for special education eligibility under the DD disability classification.

³ Autism is a defined disability term in the IDEA regulations. Autism Spectrum Disorder is not. See 34 CFR 300.8(c)(1). With the May 2013 publication of the American Psychiatric Association's DSM-5 diagnostic manual, all autism disorders were merged into one umbrella diagnosis of Autism Spectrum Disorder.

The Petitioner contends that Student was denied a FAPE by his eligibility team's not finding him eligible under the DD or ASD classification at the July 29, 2015 MDT meeting. Under the IDEA, when a parent requests a due process hearing because she disagrees with her child's identification, evaluation or educational placement, the burden of persuasion rests with the parent. *See, e.g., N.W. v. District of Columbia*, 107 F. Supp. 3d 141, 143-44 (D.D.C. 2015). Accordingly, to establish that the July 29, 2015 eligibility team erred in not finding Student eligible, Petitioner's burden was to prove by a preponderance of the evidence that, at the time of the July 29, 2015 meeting, Student met eligibility criteria for either the DD or ASD disorder. I find that Petitioner has not met that burden.

With regard to the ASD disability, Petitioner's expert, Independent Psychologist, testified that in the February 2016 evaluation, she and her associate found from their observation and other data that Student exhibited significant symptoms associated with Autism. However they made only a provisional diagnosis of ASD because a comprehensive Autism evaluation had not been conducted. Significantly, Independent Psychologist did not opine that in July 2015, Student met IDEA criteria for the ASD disability.

With respect to Student's eligibility under the DD classification, Student was found to meet Developmental Delay criteria at the April 22, 2016 eligibility meeting. According to School Psychologist, this was because Student had not made expected progress in social-emotional growth between the October 2014 and February 2016 assessments. When tested with the BDI-2 in October 2014 in the Strong Start evaluation, Student's early learning skills fell in the Low Average range. When retested in February 2016, Student's BDI-2 scores revealed Significantly Delayed cognitive and

communications skills. Despite Student's having received a much lower BDI-2 score in the 2016 IEE evaluation, Independent Psychologist agreed in her testimony that she could not dispute the conclusions and recommendations of the DCPS Early Stages evaluators because she had "no idea" of what was in the original Strong Start assessment.

In summary, while it is undisputed that Student is now eligible for special education as a child with a developmental disability, that does mean that Student met eligibility criteria when initially evaluated in July 2015. I find that Petitioner has not met her burden of persuasion that Student met eligibility criteria as a child with a development delay or with an ASD at the time of the July 2015 eligibility meeting. It follows that Student was not denied a FAPE by DCPS' not ensuring that he was offered an IEP before he was determined eligible for special education at the April 22, 2016 MDT meeting. *See* 34 CFR § 300.323(c)(1). (Each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.)

Petitioner also faults DCPS for not determining Student eligible for special education promptly upon receipt of the IEE comprehensive psychological and speech-language assessments were completed in February 2016. Because Student was not determined eligible for special education at the July 29, 2015 eligibility team meeting, for any new eligibility assessment, the District's 120-day timeline for initial assessments continued to apply. *Compare Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46640 (Once a child has been fully evaluated, the "initial evaluation," a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a

child would constitute a “reevaluation.”) In this case, I find that Student’s second referral for an eligibility assessment occurred no sooner than February 26, 2016 when Petitioner’s Counsel provided DCPS the first of two IEE evaluation reports on Student. DCPS was therefore required to complete its eligibility redetermination no earlier than June 25, 2016 (120 days from February 26, 2016). DCPS completed Student’s eligibility redetermination on April 22, 2016, well within the 120-day deadline.

ORDER

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

All relief requested by the Petitioner herein is denied.

Date: June 13, 2016

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team