**District of Columbia**
**Office of the State Superintendent of Education**
Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

| | | |
|---|---|---|
| **Parent, through Student,[1]** | ) | |
| **Petitioner,** | ) | **Room: 111** |
| | ) | **Hearing: June 14, 2018** |
| **v.** | ) | **Hearing Officer: Michael Lazan** |
| | ) | **Case No.: 2018-0098** |
| **DCPS,** | ) | **Issue Date: June 17, 2018** |
| **Respondent.** | ) | |

# HEARING OFFICER DETERMINATION

## I. Introduction

This is a case brought by Petitioner, who is the parent of the student (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 April 3, 2018. A response was filed by Respondent on April 12, 2018. The resolution period ended on May 3, 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" or "IDEA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 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

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

On May 8, 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 May 15, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. There was one hearing date: June 14, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-22. There were no objections. Exhibits 1-22 were admitted. Respondent moved into evidence Exhibits 1-39 and 41-50. There were no objections. Exhibits 1-39 and 41-50 were admitted. Petitioner presented as witnesses: herself and Witness A, a psychologist. Respondent presented as a witness: Witness B, a social worker. At the close of the hearing on June 14, 2018, both sides presented closing arguments. Respondent supplemented its closing argument with citations, which were provided to this Hearing Officer on June 15, 2018.

## IV. Credibility.

Petitioner came across as a responsible, reasonable advocate for her child, and Petitioner's sole witness, Witness A, presented as a thoughtful psychologist. Witness B, while credible, was not as persuasive a witness as either Petitioner or Witness A.

## V. Issues

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

1. Did DCPS violate "Child Find" when it failed to evaluate the Student upon Petitioner's requests during the 2017-2018 school year? 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 Free and Appropriate Public Education ("FAPE")?

2. Did DCPS fail to evaluate the Student upon Petitioner's requests during the 2017-2018 school year? If so, did DCPS violate 34 CFR Sect. 300.301(b)? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to appropriately evaluate the Student prior to the Student's exit from special education in or about the 2016-2017 school year? If so, did DCPS violate 300.305(e)? If so, did DCPS deny the Student a FAPE?

4. Did DCPS fail to provide the Student with an appropriate Individualized Education Program ("IEP") and placement during the 2017-2018 school year? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

Issue #4 was withdrawn at the hearing.

As relief, Petitioner is seeking a comprehensive, independent, psychological evaluation.

## VI. Findings of Fact

1. The Student is an X-year-old who is currently ineligible for services. The Student was eligible for services as a student with Other Health Impairment during the 2016-2017 school year, the 2015-2016 school year, and the 2014-2015 school year, but exited from special education in May, 2017. The Student has issues with elaborating on written language, punctuation, and "writing mechanics," as well as attention, concentration, and executive functioning. The Student has been diagnosed with

Attention Deficit Hyperactivity Disorder ("ADHD"). (Testimony of Witness A; P-15; P-18)

2. The Student attended School A, a non-public special education school, during the 2014-2015 school year. During an eligibility meeting in January, 2014, the Student was reported to have significant behavioral issues and considered to be a "classic" child with ADHD. The Student's writing was "all over the place." Still, according to the Woodcock-Johnson Test of Achievement-III ("Woodcock-Johnson III") conducted with the Student in February, 2014, the Student performed at or near the age equivalent in math, reading, and math. (R-5-2; R-9)

3. The Student continued at School A for the 2015-2016 school year. The Student's IEP dated November 10, 2015, provided for twenty-nine hours of specialized instruction per week, with 240 minutes per month of behavioral support services. Woodcock-Johnson III testing was again conducted in November, 2015. Again the Student was found to be approximately at or near age equivalent in reading, math, and some writing measures. A Functional Behavior Assessment dated November, 2015, indicated that the Student was sometimes defiant, moody, physically aggressive, bossy, noncompliant, verbally aggressive, depressive, off-task, hyperactive, loud, and attention-seeking. (P-3-9; R-12; R-13)

4. On July 21, 2016, an IEP amendment reduced the Student's specialized instruction hours to twenty hours per week. (P-5-1)

5. Prior to the start of the 2016-2017 school year, members of Respondent's staff told Petitioner it was time to transition the Student out of School A. Petitioner felt that the Student might not be ready, but Respondent insisted that the Student needed to be

in one of Respondent's schools to get into college. Respondent also assured Petitioner that it would allow the Student to continue to have an IEP. The Student then moved to School B, a DCPS public school, for the 2016-2017 school year. However, the Student did not benefit from the special education classes at School B because the Student was too advanced for the classes. By September 14, 2016, an IEP had reduced the Student's specialized instructional hours to fifteen hours per week. Then, after thirty days in school, the Student was placed in general education classes, with at least some special education supports. The Student also received extra help and "downtime" to regroup. (Testimony of Petitioner; P-6; R-19)

6. The Student's IEP dated March, 2017, provided goals in mathematics, reading, and writing, and noted that the Student lacked writing proficiency. There was also an emotional, social, and behavioral goal relating to attention. The Student was recommended for just one hour of specialized instruction outside general education, with 120 minutes per month of behavioral support services. (R-34)

7. In or about April, 2017, the Student was assessed through subtests of the Woodcock-Johnson Test of Achievement-IV ("Woodcock IV"), but the evaluator did not measure the Student's written language ability. Additionally, the evaluator did not conduct fluency measures, cognitive testing, measures of attention, or assessments of the Student's executive functioning. The testing found the Student to be in the average range in all tested areas in math and reading. (R-25; P-7; Testimony of Witness A)

8. On May 5, 2017, after a review of Woodcock-Johnson III, "i-Ready" testing, Fountas and Pinnell assessments, writing samples, and behavioral assessments,

including a "Strength and Difficulties Questionnaire," the Student was exited from special education. (P-7, R-26; R-27; R-29; Testimony of Witness A)

9. After the Student was exited from special education, the Student received a "Section 504" plan designating the Student as having ADHD and providing for extended time and check-ins. Petitioner was told that if the Student did not do well, the Student would receive another IEP, if sufficient data supported the IEP. (Testimony of Petitioner; P-8-8)

10. The Student's grades for the 2016-2017 school year were largely "3," with some "2" and "4" grades. (P-9)

11. The Student moved to middle school for the 2017-2018 school year, attending School C, a DCPS public school. At School C, the Student struggled from the start. Petitioner repeatedly asked the school for help, including from Counselor A and Witness B, and inquired about the Student getting a new IEP. Eventually, on December 21, 2017, Petitioner sent an email to the school district requesting an evaluation for special education services. Copied on this email were Counselor A, Witness B, and three other DCPS staff members. However, Counselor A told Petitioner that the school would wait until the end of the school year to determine whether or not it would evaluate the Student, based on the Student's grades and how the Student was doing in class. (Testimony of Petitioner; P-10)

12. School representatives and Petitioner met on January 18, 2018, to address Petitioner's concerns. Petitioner was told, among other things, that the school offered free tutoring after school. (Testimony of Witness B)

13. On January 23, 2018, Petitioner and school representatives met again to review the Student's grades and discuss additional assistance for the Student, including help with homework, "check-ins," and after-school tutoring. At this meeting, the Student's World Geography teacher said that the Student had to be redirected every day and was failing, even with assistance. The Student's Science teacher said that the Student was unable to focus after "drama." The next day, on January 24, 2018, a "Section 504" meeting was held for the Student. Teacher A reported that the Student needed to improve in writing, including punctuation, would benefit from "check-ins," and would also benefit from avoiding typical student "drama." Psychologist A indicated that the Student could benefit from a reading support class. Teacher B indicated that the Student "could use a lot of help," was slow at note-taking, and got the work done as well as s/he could. Teacher C reported that the Student "very much needed" reading support, did not do homework, was often sleepy in class, and had emotional issues in class. The Student's schedule was changed to add a reading support class, tutoring help on Mondays, and on Wednesdays. In addition, the Student was to be provided with a homework checklist in World History and Science, a homework folder, and a one-minute delay to ensure the Student could make it to 6th-period class. Petitioner did not mention the request for evaluation at this meeting. (Testimony of Witness B; P-11-3, R-30; R-38-2)

14. On April 19, 2018, DCPS acknowledged Petitioner's request for a referral to special education. (R-31)

15. At School C, the Student's grades declined. For the first term, the Student received "D" grades in World Geography and Cultures and in Science, a "C-" grade in

Language Arts, and a "C" in Math. In the second term, the Student received another "D" in World Geography and Cultures, another "D" in Science, another "C-" in Language Arts, and a "C+" in Math. In term three, the Student failed Math and Science, and received a "D" in both Language Arts and World Geography and Cultures. (P-12)

## VII. 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.

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

All three remaining claims in this case relate to the duty of school districts to evaluate, and do not directly relate to the Student's IEP or placement. Petitioner therefore bears the burden of persuasion on these issues.

**1. Did DCPS violate "Child Find" when it failed to evaluate the Student upon Petitioner's requests during the 2017-2018 school year? 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?**

**2. Did DCPS fail to evaluate the Student upon Petitioner's requests during the 2017-2018 school year? If so, did DCPS violate 34 CFR Sect. 300.301(b)? If so, did DCPS deny the Student a FAPE?**

Issues #1 and #2 involve similar claims, and are premised on the same set of facts. Accordingly, both issues will be addressed here together.

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 (i.e., a FAPE). 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 v. Weast, 546 U.S. 49, 51 (2005).

The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that "[a]l1 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).

Additionally, a Local Educational Agency ("LEA") in the District of Columbia must conduct initial evaluations to determine a 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." Id. (quoting 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).

Respondent did not conduct an initial evaluation of the Student within 120 days from the date that the Student was referred by the parent, which was in December, 2017. In fact, there is nothing in the record to indicate that any evaluation had been conducted as of the date of the hearing. Instead, as Petitioner pointed out, School C would not evaluate the Student until the end of the 2017-2018 school year. This is what Petitioner was told by Counselor A, after Petitioner sent the request to evaluate the Student to Counselor A and four other DCPS employees, including Witness B.

This inaction by DCPS is a violation of the D.C. Code, 38–2561.02(a), and also a Child Find violation, since the school district failed to "affirmatively" evaluate the Student after Petitioner had "located" and "identified" the Student as having a suspected disability. It is noted that DCPS told Petitioner in May, 2017, that the Student would receive a new IEP if the Student struggled in classes and there was data to prove it. DCPS did not honor its promise to Petitioner and would not consider any data until the end of the school year.

These violations should not be considered to be of a "procedural" nature.[2] The failure to evaluate, and to provide special education services, had an impact on the Student. In January, 2018, the Student's World Geography teacher said that the Student had to be redirected "every day" and was failing, even with assistance. The Student's Science teacher said that the Student had focusing issues. Teacher A, an English teacher, reported that the Student needed to improve in writing, including punctuation, would benefit from "check-ins," and would also benefit from avoiding typical student "drama." Psychologist A indicated that the Student could benefit from a reading support class. Teacher B, a reading support teacher, indicated that the Student "could use a lot of help," was slow at note-taking, and got the work done "as well" as s/he could. Teacher C, a History teacher, reported that the Student "very much needed" reading support, did not do homework, was often sleepy in class, and had emotional issues in class. In January, 2018, the Student was given some services and accommodations, including a reading support class, tutoring on Mondays, a homework checklist in World History and Science, and a homework folder.

Even so, the Student continued to do poorly in the third term of the 2017-2018 school year. In fact, the Student did *worse* in the third term than in the prior two terms of the 2017-2018 school year. The Student did not fail any classes in the first two terms. In term three, however, the Student failed Math and Science, and received a "D" in both Language Arts and World Geography and Cultures.

[2] Violations of this sort do not automatically lead to the conclusion that the school district denied the Student a FAPE. As stated by the D.C. Circuit: "(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights." Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006); Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004); cf. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP).

It must therefore be concluded that, upon Petitioner's referral, the Student required a full evaluation pursuant to the IDEA, so that the Student could receive an appropriate amount of educational services during the 2017-2018 school year. Respondent denied Petitioner educational benefit, and therefore a FAPE, when it violated Child Find and failed to evaluate the Student in the 2017-2018 school year. Petitioner prevails on Issues #1 and #2.

**3. Did DCPS fail to appropriately evaluate the Student prior to the Student's exit from special education in or about the 2016-2017 school year? If so, did DCPS violate 300.305(e)? If so, did DCPS deny the Student a FAPE?**

Except where high school graduation may be at issue, an LEA must evaluate a child with a disability in accordance with 34 CFR before determining that the child is no longer a child with a disability. 34 CFR Sect. 300.305(e)(1).

As set forth in the District of Columbia Municipal Regulations, an evaluation must "draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior." DCMR 5-E 3005.3(a). After reviewing existing information, the LEA must then identify what additional data, if any, are needed to determine whether the child has a particular category of disability, the child's present levels of performance and educational needs, and whether the child needs special education and related services (or in the case of a child's reevaluation, whether the child continues to need special education and related services).

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 are provided to

present relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Witness A testified convincingly, and at length, about how Respondent's psychological assessment prior to the Student's exit from special education in April-May, 2017, did not assess the Student in all areas of suspected disability. In particular, Witness A testified that the assessment failed to test the Student in regard to writing issues, attentional issues, and behavioral concerns. Witness A stated that the Student needed to have a comprehensive psychological evaluation, which should include testing on intelligence quotient, "measures of information," nonverbal ability, visual spatial reasoning, attentional issues, concentration, executive functioning, working memory, and auditory memory. Witness A also said that the Student needed to be evaluated on behavior, with tests such as the "Conners" and/or "BASC." Witness A added that the Student needed to be tested with complete version of the Woodcock-Johnson Test of Achievement, including fluency measures, processing speed measures, and additional testing in reading and written language.

There was no testimony to the contrary by Respondent, which did not call a psychologist to rebut these contentions. Respondent submitted documentation that indicated that it reviewed the Student's writing samples and behavioral assessments at the time. However, Respondent did not explain how it reviewed the writing samples, and the assessment of the Student's behavior was based on a "Strength and Difficulties Questionnaire" that was not explained on the record. Under the circumstances, the testimony of Witness A must be deemed more persuasive than the hearsay statements contained in these documents. Accordingly, DCPS denied the Student educational

benefit, and therefore a FAPE, when it exited the Student from special education without assessing the Student in all areas of suspected disability in April-May, 2017. Petitioner prevails on Issue #3.

**Remedy**

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).

Petitioner seeks a comprehensive psychological evaluation by an independent psychologist at the current market rate. DCPS opposes this request, pointing out that this is not a case involving a request for an Independent Educational Evaluation ("I.E.E."), and that Petitioner did not present any testimony that the Office of State Superintendent of Education ("OSSE") rate is deficient. DCPS also pointed to caselaw in support of its request to award relief in the form of an authorization for a psychological evaluation at the OSSE rate.

DCPS is correct that Petitioner did not request an I.E.E., which would require a hearing officer order to give Petitioner the choice of the evaluator.[3] Here, it is up to the

[3] Federal regulations provide that, subject to certain limitations, a parent has the right to an I.E.E. at public expense if the parent disagrees with an evaluation obtained by the school district. 34 C.F.R. Sect. 300.502(a), (b). If a parent requests an I.E.E. at public expense, the school district must, without unnecessary delay, ensure that either an I.E.E. is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. 34 C.F.R. Sect. 300.502(b)(2)(i)-(ii). If a school district's evaluation is appropriate, a parent may not obtain an I.E.E. at public expense. 34 C.F.R. Sect. 300.502(b)(3); DeMerchant v.

hearing officer's discretion to determine whether Petitioner should have the right to select an evaluator. DCPS argued that this Hearing Officer should exercise this discretion in its favor, siting to M.V. v. Shenendehowa Cent. Sch. Dist., No. 1:11-CV-00701 GTS, 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013), where the court applied a $1,800 cap as a limit on the award for an evaluation.

However, in M.V., it was undisputed that several psychologists or neuropsychologists were willing to perform the evaluation for less than $1,800. There is no such agreement here. Additionally, the equities appeared to favor the school district in M.V., where the parent had an obligation to contact doctors but had only "perfunctorily" attempted to contact them. Here, the equities favor Petitioner. This is not a case where DCPS was late in conducting an evaluation, or had a reasonable excuse to explain its failure to evaluate the Student. Instead, when Petitioner asked DCPS in good faith to evaluate the Student, DCPS in effect said "no." Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 16, (1993)(equities an important factor in determining relief). Accordingly, Petitioner should be able to choose the provider for the comprehensive psychological evaluation, provided that the evaluation is conducted at a rate that is usual and customary in the community.

## VIII. Order

As a result of the foregoing, Petitioner is awarded the right to retain a provider to conduct a comprehensive psychological evaluation of the Student, to be paid for by

---

Springfield Sch. Dist., 2007 WL 2572357, at *6 (D. Vt. Sept. 4, 2007). However, if the parent shows that the District evaluation is inappropriate, or if the District unnecessarily delays in seeking an impartial hearing to contest a parent's request for an I.E.E., the IHO may order that the District provide the requested I.E.E. at public expense. Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289 (N.D. Cal. Dec. 15, 2006) (delay in requesting an impartial hearing resulted in IHO order to fund I.E.E.).

DCPS, provided that the evaluation is conducted at a rate that is usual and customary in the community.

Dated: June 17, 2018

*Michael Lazan*
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

## IX. Notice of Appeal Rights

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

Date: June 17, 2018

Michael Lazan
Impartial Hearing Officer