

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

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OSSE  
Office of Dispute Resolution  
June 22, 2019

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: June 22, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0100

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: June 18, 2019

Office of Dispute Resolution, Room 423  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (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.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not completing Student’s triennial special education reevaluation by March 2019.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on April 11, 2019<sup>2</sup>, named DCPS as Respondent. The proceedings were set on the non-expedited timeline, normally requiring a final decision within 75 calendar days. The undersigned hearing officer was appointed on April 12, 2019. DCPS' response to the due process complaint was filed, untimely, on April 23, 2019. On May 1, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters, and issued a Prehearing Order. On May 9, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this matter is due by June 25, 2019.

On April 25, 2019, Petitioner, by counsel, filed a motion for summary judgment, to which DCPS filed a response in opposition on April 30, 2019. In the May 1, 2019 prehearing order, I denied the motion for summary judgment.

Petitioner filed her prehearing disclosures on June 12, 2019, attaching proposed Exhibits P-1 through P-23. Respondent DCPS filed its prehearing disclosures on June 11, 2019, attaching proposed Exhibits R-1 through R-15. No written objections to the respective disclosures were filed.

The due process hearing was convened before the undersigned impartial hearing officer on June 18, 2019 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 by telephone and was represented by PETITIONER'S

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<sup>2</sup> All filing dates for party pleadings refer to the date the pleading was received, during regular business hours, by the Office of Dispute Resolution.

COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. Petitioner called INDEPENDENT PSYCHOLOGIST, who was qualified as an expert in clinical psychology and in compensatory education, as her only witness. DCPS called LEA REPRESENTATIVE as its only witness.

Petitioner's Exhibits P-6 through P-23 were admitted into evidence without objection. I sustained DCPS' objections to Exhibits P-1 through P-5. DCPS' Exhibits R-3, R-6 and R-7 were admitted into evidence, including Exhibit R-3 admitted over Petitioner's objection. DCPS' remaining disclosed exhibits were not offered.

At the conclusion of Petitioner's case-in-chief, DCPS' Counsel made an oral motion for a directed finding in DCPS' favor for Petitioner's alleged failure to make a *prima facie* case. I denied the motion. After the presentation of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file post-hearing briefs.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUE AND RELIEF SOUGHT**

The issue for determination, as certified in the May 1, 2019 Prehearing Order, is:

Whether DCPS has denied Student a FAPE by failing to conduct and complete a timely triennial reevaluation and/or determine Student's continued special education eligibility, since on or about March 4, 2016.

For relief, Petitioner requested in her due process complaint that the hearing officer

order DCPS to:

- a) Fund independent comprehensive psychological, occupational therapy, and speech-language pathology evaluations, and any other evaluations these evaluations recommend, at the market rate;
- b) Convene an IEP team meeting within 10 days of receiving the final independent evaluation, to review all independent evaluations, and review and revise Student's IEP, including developing a BIP, as appropriate, ensuring that the parent is included in the IEP team meeting, and that the meeting be scheduled through the parent's counsel;
- c) At the ordered IEP team meeting, DCPS shall discuss and determine appropriate compensatory education to compensate Student for the alleged denials of FAPE or order DCPS to fund an independent evaluation at market rate to determine appropriate compensatory education, and following that evaluation provide for the Petitioner, at her option, to bring a Due Process Complaint in order to present facts at the Due Process Hearing for the assigned hearing officer to fashion an appropriate compensatory education award.

### **FINDINGS OF FACT**

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

1. Student, an AGE child, resides in the District of Columbia with Mother.

#### **Testimony of Mother.**

2. Student is eligible for special education under the IDEA disability classification Developmental Delay. Exhibit R-3.
3. Since Pre-K 3, Student has attended CITY SCHOOL. Exhibit P-9. For the 2018-2019 school year, Student was in GRADE. Exhibit R-3.
4. A developmental evaluation of Student was conducted by Strong Start DC Early Intervention Program in November 2015. Student's cognitive composite score was

in the Average range. Student met IDEA criteria for Developmental Delay because Student had significant delays in adaptive development, communication and social-emotional. Exhibit R-7. Student's initial, and most recent, special education eligibility determination was made on March 4, 2016. Exhibit R-3.

5. Student's May 2, 2018 City School IEP identified Adaptive/Daily Living Skills, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern. The IEP provided for Student to receive 5 hours per week of Specialized Instruction in the general education setting and 120 minutes per month each of Occupational Therapy (OT) and Speech-Language Pathology (SLP) related services, outside general education. Exhibit P-6.

6. At a December 12, 2018 Analysis of Existing Data (AED) meeting, in preparation for Student's triennial special education reevaluation, City School staff provided the parent an Analysis of Existing Data on Student. Exhibit P-8. That day, Mother executed a written consent for DCPS to reevaluate Student with "at least" educational, cognitive, OT and Speech and Language assessments. Exhibit P-7.

7. DCPS completed OT and Speech and Language reevaluations of Student on January 24, 2019 and January 20, 2019 respectively. Exhibit R-6. City School ordered a psychological reevaluation of Student from DCPS but was not able to obtain this assessment due to the unavailability of a DCPS psychologist. As of the due process hearing date, DCPS had not conducted a psychological reevaluation of Student. Testimony of LEA Representative.

8. Beginning February 27, 2019, Petitioner's Counsel repeatedly wrote LEA

Representative by email to request updates on the status of Student's reevaluation.

Exhibits P-12 through P-18.

9. At the time of the May 9, 2019 Resolution Session Meeting (RSM) in this case, DCPS authorized funding for the parent to obtain an Independent Educational Evaluation (IEE) psychological evaluation of Student. Representation of counsel.

10. Independent Psychologist conducted a Comprehensive Psychological Evaluation of Student on May 30, 2019 and issued her evaluation report on June 11, 2019, one week before the due process hearing. Exhibit P-9. Independent Psychologist conducted a classroom observation, but did not speak with Student's educators about Student. LEA Representative has forwarded the IEE Psychological report to DCPS for review by a DCPS psychologist. Testimony of LEA Representative.

11. In the IEE Psychological, Independent Psychologist reported that Student's General Intellectual Ability (GIA) score was in the Low Average range. Student's Verbal Attention score (Low) and Story Recall score (Very Low) were notably discrepant. Student's scores on academic functioning were in the Average range for Reading and Written Language and the Low Average range for Mathematics. Behavior Rating Scales completed by a teacher and Mother, indicated that Student had difficulties with attention and struggled with hyperactivity in the classroom. A teacher's response also resulted in a Clinically Significant aggression scale score. Independent Psychologist reported that overall, testing suggested that Student is a student with Attention Deficit-Hyperactivity Disorder (ADHD) and she recommended that Student receive IEP interventions for Math, Reading and Writing, as well as behavioral support Related

Services. Independent Psychologist also recommended that Student receive a functional behavioral assessment (FBA). Exhibit P-9.

12. At the May 9, 2019 RSM meeting for this case, Student's City School IEP team also conducted an annual IEP review meeting. While some IEP goals and present levels of performance were updated, IEP services were not changed, pending completion of Student's triennial eligibility reevaluation. Testimony of LEA Representative, Exhibit R-3.

13. Over the 2018-2019 school year, Student has made great strides and a lot of progress. Student's End of Year (EOY) standardized test scores are on grade level for Reading. Student is approximately 6 months behind grade level goals for Mathematics. Student has improved tremendously in "processing," but still has difficulties at times with processing due to memory challenges. Student can be very easily distracted and needs 1:1 and small group programming to minimize distractions. Student's classroom behavior has improved and Student is "average" in terms of aggression. Testimony of LEA Representative.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the

appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. In this case, there is no dispute about the appropriateness of Student's IEP or placement. Therefore, Petitioner has the burden of persuasion, which must be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

#### Analysis

Has DCPS denied Student a FAPE by failing to conduct and complete a timely triennial reevaluation and/or determine a student's continued special education eligibility, since on or about March 4, 2016?

In this proceeding, Petitioner alleges that DCPS has denied Student a FAPE by not completing a special education reevaluation within three years of the last eligibility determination date, March 4, 2016. DCPS does not dispute that Student's triennial reevaluation has not yet been completed, but the agency maintains that this is a procedural violation which has not resulted in a denial of FAPE.

The IDEA requires local education agencies to reevaluate students at least once every three years unless the parent and the local education agency deem such reevaluation unnecessary. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2). *Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014). The purpose of a reevaluation, under the IDEA, is to determine whether a child continues to have a qualifying disability and the nature and extent of the special education and related



services that the child needs. *See* 34 CFR § 300.15.

Student's most recent DCPS eligibility determination, following an initial evaluation, was made on March 4, 2016. On December 12, 2018, City School obtained Mother's consent for Student's triennial reevaluation and DCPS proceeded to conduct OT and Speech and Language reassessments in January 2019. However, due to the lack of an available DCPS psychologist, DCPS did not conduct the psychological reevaluation of Student despite repeated follow-up inquiries from Petitioner's Counsel. At the May 9, 2019 resolution session meeting in this case, when DCPS had still not conducted the psychological reevaluation, DCPS issued funding authorization for the parent to obtain an IEE psychological evaluation of Student. The IEE psychological evaluation report was completed on June 10, 2019. As of the June 18, 2019 due process hearing date, DCPS had not yet reviewed the IEE report or convened Student's eligibility team to determine whether Student continued to be eligible for special education. (However, DCPS never stopped providing the Special Education and Related Services prescribed in Student's May 2, 2018 IEP.) I find that Petitioner has established that DCPS failed to timely complete Student's triennial reevaluation, which was due by March 4, 2019.

The failure to timely conduct a triennial reevaluation is considered a procedural violation under the IDEA. *See, e.g., Hart v. District of Columbia*, 323 F. Supp. 3d 1, 3–4 (D.D.C. 2018). A procedural violation “will constitute a denial of a [FAPE] only if it ‘results in loss of educational opportunity’ for the student.” *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015) (alteration omitted) (quoting *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) ). A procedural

violation gives rise to a substantive violation of the IDEA only if the procedural deficiency “(i) [i]mpeded the child’s right to a FAPE; (ii) [s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) [c]aused a deprivation of educational benefit.” *Hart, supra* (quoting 34 C.F.R. § 300.513(a)(2), other internal quotations omitted).

Student’s IEP for the 2018-2019 school year, completed on May 2, 2018, was due for annual review by May 2, 2019. *See* 34 CFR § 300.324(b)(1) (IEP team shall the child’s IEP periodically, but not less than annually.) Student’s IEP team revised the IEP at the Resolution Session Meeting on May 9, 2019. This revision was, of course, not informed by a comprehensive reevaluation, because DCPS had neither conducted a psychological reevaluation nor, before the RSM meeting, authorized an IEE evaluation. (The IEE psychological evaluation authorized at the May 9, 2019 meeting was not completed until June 10, 2019.) It follows that the parent’s opportunity to participate in the May 9, 2019 IEP annual review meeting was significantly impeded by DCPS’ failure to timely complete Student’s triennial reevaluation. Therefore this procedural violation constituted a denial of FAPE.

### Relief

DCPS has already provided most of the substantive relief the Parent sought in her due process complaint. DCPS has conducted OT and Speech and Language reevaluations of Student and has funded the IEE comprehensive psychological evaluation. DCPS has represented that it will convene Student’s IEP team to review the

reevaluations, determine eligibility and update Student's IEP after its psychologist reviews the IEE psychological evaluation report. In this order, I will require DCPS to timely complete these procedures. Petitioner seeks, in addition, an award of compensatory education to compensate Student for the denial of FAPE in this case.

The compensatory education remedy has been discussed in numerous judicial decisions in the District of Columbia. As U.S. District Judge Rudolph Contreras explained in *Lopez-Young v. District of Columbia*, 211 F.Supp.3d 42 (D.D.C. 2016),

When a school district denies a child a FAPE, [hearing officers] have “broad discretion” to fashion a remedy. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (citation omitted); accord *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015). “That equitable authority ... must include the power to order compensatory education.” *Boose*, 786 F.3d at 1056 (citing *Reid*, 401 F.3d at 522–23). Compensatory education is a remedy in the form of educational programs that “make up for prior deficiencies.” *Reid*, 401 F.3d at 522. An award of compensatory education must follow a “fact-specific” inquiry and 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.* at 524. “To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.” *B.D. ex rel. Davis v. District of Columbia*, 817 F.3d 792, 798 (D.C.Cir.2016). (D.D.C. 2016)

*Lopez-Young* at 55. The compensatory education inquiry requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799.

In her testimony, Independent Psychologist, who was qualified as a compensatory education expert, recommended that Student be awarded 50 hours of

tutoring and 30 hours of counseling as compensatory education. Independent Psychologist recommended the hours of tutoring, because she had recommended in the IEE report that Student's Specialized Instruction Services be increased from 5 hours per week to 15 hours per week, including 5 hours for Mathematics outside of general education.<sup>3</sup> I discount this IEP recommendation because (1) Independent Psychologist is not an educator, (2) she did not speak to Student's teachers or school staff about Student's educational needs and (3) LEA Representative testified credibly that Student had made a lot of progress under ■■■ May 2, 2018 IEP and was at grade level in Reading and Writing. Moreover, for compensatory education purposes, Independent Psychologist calculated the period of harm from March 4, 2019, when the triennial reevaluation was due. However even if the reevaluation had been timely completed, Student's IEP team would not have been expected to review the evaluation and revise Student's IEP the same day. *Cf.* 34 CFR § 300.323(c)(1) (After the initial eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days.) Notwithstanding, LEA Representative acknowledged that as of the hearing date, Student was about six months behind grade level in Mathematics. Accordingly, I find that an appropriate compensatory education award would be 25 hours of tutoring in Mathematics, which may be used for other academic areas should that be needed.

I did not find persuasive Independent Psychologist's recommendation for

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<sup>3</sup> The appropriateness of Student's DCPS IEPs is not at issue in this proceeding. I make no findings as to the appropriateness of Student's IEPs or of the recommendations for IEP revisions made by Independent Psychologist.

compensatory education counseling. LEA Representative testified credibly that while Student had been “moody” at the beginning of the school year, Student’s behavior had improved and that Student had become a leader in the classroom. For the same reason, I decline to order DCPS to conduct a functional behavioral assessment of Student, which was also recommended by Independent Psychologist, absent an indication that Student’s in-school behaviors are more of a concern. *See Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child’s behavior or physical status is of concern, evaluations addressing these areas must be conducted.)

**ORDER**

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

**ORDERED:**

1. As compensatory education for the denial of FAPE in this case, not later than 15 business days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain for Student 25 hours of individual academic tutoring from a qualified instructor in Mathematics or such other academic areas as may be warranted;
2. DCPS shall ensure that Student’s triennial reevaluation is completed within 21 business days of this decision and that as soon as practicable thereafter, an IEP team, including the parent, is convened to review the reevaluation and to revise Student’s IEP as appropriate for the 2019-2020 school year<sup>4</sup> and
3. All other relief requested by the Petitioner herein is denied.

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<sup>4</sup> If the parent agrees, the IEP team meeting may be held after the end of DCPS’ summer break.

Date: June 22, 2019

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  
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