

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
March 29, 2021

<i>Student</i> , ¹)	Case No.: 2021-0006
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/29/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date (using Microsoft Teams):
("DCPS"),)	3/12/21
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to DCPS’s failure to timely and comprehensively reevaluate in all areas of suspected disability or provide necessary input for an independent comprehensive psychological evaluation. DCPS responded that it had reevaluated Student appropriately and had no legal obligation to provide teacher input for an independent evaluation.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 1/15/21, the case was assigned to the undersigned on 1/19/21. Respondent filed a response on 1/26/21, and did not challenge jurisdiction. The 30-day resolution period ended on 2/14/21. A resolution

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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meeting held on 2/26/21 was not successful. Petitioner's Motion for Summary Judgment and Respondent's Motion to Dismiss were both denied on 3/5/21. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 3/31/21.

A prehearing conference was held on 2/24/21 and the Prehearing Order was issued on 3/1/21 addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 3/12/21 and was closed to the public. Petitioner was represented by *Petitioner's counsel*. DCPS was represented by *Respondent's counsel*. Petitioner participated by telephone throughout the hearing.

Petitioner's Disclosures, submitted on 3/5/21, contained documents P1 through P38, which were all admitted into evidence over objection to many documents. Respondent's Disclosures, also submitted on 3/5/21, contained documents R1 and R2 and R4 through R8, all of which were admitted into evidence over an objection.²

Petitioner's counsel presented 1 witness in Petitioner's case-in-chief (*see Appendix A*): *Psychologist* (qualified without objection as an expert in Clinical Psychology, including Evaluations and Programming)

Respondent's counsel did not present any witnesses in Respondent's case.

The sole issue³ to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to complete an evaluation requested by Parent and/or comprehensively evaluate in all areas of suspected disability, when DCPS refused to complete the teacher portions of the independent comprehensive psychological evaluation. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested⁴ by Petitioner is:

² Citations herein to Petitioner's documents are indicated by a "P" followed by the exhibit number, a hyphen, and the exhibit page (or pages separated by commas). By contrast, Respondent's documents are consecutively Bates numbered throughout, so are referenced by an "R" followed by the exhibit number, followed immediately by a "p" (for page) and the Bates number with any leading zeros omitted.

³ Petitioner withdrew a second issue without prejudice at the beginning of the due process hearing, which was set forth in the Prehearing Order as: "Whether DCPS denied Student a FAPE by failing to provide Parent access to complete education records despite numerous written requests."

⁴ Along with withdrawing the second issue, at the beginning of the due process hearing Petitioner also withdrew the following requested relief: "Within 5 business days, DCPS shall provide a copy of Student's complete education records for 2020/21 to Petitioner via counsel's email."

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1. A finding that Student has been denied a FAPE.
2. Within 5 business days, DCPS shall complete the teacher portions of the independent comprehensive psychological evaluation.
3. DCPS shall provide appropriate compensatory education for any denials of FAPE as determined by (a) this Hearing Officer,⁵ (b) Student's IEP team after discussion and determination, or (c) an independent compensatory education evaluation funded by DCPS at market rates.⁶

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁷ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁸ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began at the beginning of 2020/21.⁹

2. IEPs. Student's IEP disability classification is Other Health Impairment ("OHI") due to asthma, which will continue "until updated testing is available."¹⁰ Psychologist has conducted much of a comprehensive psychological evaluation of Student; Psychologist doesn't understand the impact of asthma on Student's education, unless it impacts social-emotional functioning; Psychologist wonders whether Student has specific learning

⁵ Petitioner's counsel stated on the record at the beginning of the due process hearing that Petitioner was not seeking an award of compensatory education in this HOD, as the comprehensive psychological evaluation needs to be completed before an accurate determination of compensatory education may be made.

⁶ So far as Petitioner's request for compensatory education depends on the findings of an evaluation that may be completed in the future, that portion of the compensatory education request is reserved pending the completion of Student's evaluation and a determination of eligibility for additional special education and related services.

⁷ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁸ P8-1; P15-1.

⁹ Psychologist; P8-1. All dates in the format "2020/21" refer to school years.

¹⁰ P15-9; P6-1; P7-1; P8-1.

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disabilities in reading, math and written expression, but needs to complete the evaluation to add a disability and written expression supports.¹¹

3. Student's 10/16/18 IEP provided for 5 hours/week of specialized instruction in reading and 5 hours/week in math, along with 60 minutes/month of occupational therapy ("OT") services, all outside general education.¹² Student's 10/15/19 IEP provided the same level of services, except that OT was reduced to 30 minutes/month of consultation in place of direct services.¹³ Student's 5/26/20 IEP increased specialized instruction to 10 hours/week inside general education and 10 hours/week outside general education, divided evenly between reading and math; OT remained at 30 minutes/month of consultation.¹⁴

4. Cognitive. The last cognitive assessment prior to Psychologist's independent educational evaluation ("IEE") had been dated 11/13/14, when DCPS administered a Reynolds Intellectual Assessment Scales ("RIAS") to measure cognitive ability; at that time Student had a Composite Intelligence Index ("CIX") of 78; a Verbal Intelligence Index ("VIX") of 81, a Nonverbal Intelligence Index ("NIX") of 81, and a Composite Memory Index ("CMX") of 100.¹⁵ Psychologist considers Student capable of making appropriate progress if provided sufficient special education services and support, including proper goals and academics tailored to Student's needs.¹⁶

5. Reading. On 8/30/17, in reading Student's SRI score was 95.¹⁷ In 2018 Student's SRI score was 256.¹⁸ On 9/9/19, Student's SRI score was 390; on 1/13/20, it was 417; on 9/24/20 it was 497; on 2/4/21 it was 546, which is 6 to 7 years below Student's grade and at the 1st percentile compared to peers.¹⁹ Compared to Student's academic knowledge, Student's performance was significantly lower than predicted in reading, suggesting the possibility of a learning disability in reading, along with other significant academic weaknesses.²⁰

¹¹ Psychologist.

¹² P6-1,9.

¹³ P7-1,9.

¹⁴ P8-1,12.

¹⁵ P15-2; Psychologist.

¹⁶ Psychologist.

¹⁷ P8-8; P10-11.

¹⁸ P8-7.

¹⁹ P8-7; P15-2; P18-1,2; P25-3. The Due Diligence Report inexplicably stated that Student's 5/29/19 SRI score was 566, apparently an error that indicated Student was still at least 4 years below grade. P15-7.

²⁰ P15-8.

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6. Math. Math continued to be Student's "strongest academic area of learning."²¹ On 9/10/19 and 2/5/20, Student's iReady scores indicated that Student was 5 or 6 years below grade in math.²²

7. Grades. Student's grades in Terms 1 and 2 of 2020/21 were all "Fs" and Student's Grade Point Average ("GPA") was 0.00.²³ Student's IEP Progress Report for Term 2 of 2020/21 stated that there was no progress on any goal.²⁴

8. IEEs. On 9/4/20, DCPS authorized 3 IEEs for Student: comprehensive psychological, occupational therapy, and speech-language; DCPS requested that the IEEs be completed within 45 days.²⁵ Parent and her counsel referred the comprehensive psychological evaluation to Psychologist.²⁶ Along with other assessments, Psychologist's comprehensive psychological evaluation included a behavioral assessment as a routine part of the evaluation and because some areas in the Behavior Assessment System for Children, Third Edition ("BASC-3") assessment in the 2017 psychological triennial reevaluation were elevated and there were previous indications of Attention Deficit Hyperactivity Disorder ("ADHD").²⁷

9. Rating Scales. In the comprehensive psychological evaluation, rating scales are necessary to appropriately diagnose and determine the programming Student needs and pursue all areas of suspected disability.²⁸ Psychologist needed Student's current teachers to complete Psychologist's teacher interview form and two sets of rating scales: the BASC to focus on possible behavior issues, and an ADHD test to rule ADHD in or out.²⁹ Psychologist considered the teachers' rating scales critical to her evaluation, as some diagnoses, including ADHD, require information from 2 settings (commonly school and home) to confirm that a problem is not just the result of a single environment.³⁰

10. Psychologist initially contacted LEA Representative, who was the special education coordinator at Public School, on 11/9/20 by email to reach Student's teachers, explaining that she had been referred the IEE to complete Student's comprehensive psychological evaluation and asking for a special education teacher and a general education teacher to complete 3 forms by 11/23/20: a Teacher Interview Form, a Teacher BASC, and a Teacher

²¹ P8-5; P16-3.

²² P8-4; P12-1,2.

²³ P25-1,2; P15-7.

²⁴ P27.

²⁵ R1p1.

²⁶ Psychologist.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

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ADHD Test (“ADHDT”).³¹ The subject line for the lengthy string of emails was “Request for teacher rating scales for [Student] due 11/23/20 at 12 noon.”³²

11. Psychologist received no response from LEA Representative or Public School, so on 11/23/20 Psychologist followed up on her request for teachers to complete the rating scales for Student.³³ On 11/24/20 at 10:02 AM, LEA Representative stated he had just received the request and would send it out to teachers.³⁴ On 11/24/20 at 1:43 PM, LEA Representative stated that the rating scales had been sent out to Student’s teachers and sought to “reassure” Psychologist that this was the first request for the rating scales; LEA Representative had followed up with “several” of Student’s teachers, who were working on the documents.³⁵

12. On 12/7/20 at 5:44 PM, Petitioner’s counsel asked for updates.³⁶ On 12/7/20 at 5:52 PM, LEA Representative stated that the “team of teachers” sent back the completed teacher surveys on 11/24/20.³⁷ On 12/7/20 at 6:10 PM, Psychologist stated that she had not received any teacher rating scales for Student from teachers or LEA Representative and reattached the forms.³⁸ On 12/7/20 at 6:28 PM, LEA Representative said he would follow up with the team the next day.³⁹ On 12/7/20 at 6:56 PM, a DCPS teacher emailed the Teacher Interview Form to Psychologist.⁴⁰ On 12/7/20 at 7:05 PM, Psychologist responded to the teacher asking if he could complete the BASC and ADHDT forms, but at 7:09 the teacher responded that he had just been given the 1 form, so at 7:12 PM Psychologist re-sent the other forms, but never received completed forms back.⁴¹

13. On 12/11/20, Petitioner’s counsel asked for updates.⁴² On 12/14/20, Petitioner’s counsel set a deadline of 12/18/20 to receive the outstanding rating scales or Petitioner would file a lawsuit.⁴³ On 12/15/20, LEA Representative responded that “DCPS staff/teachers are not required to complete any outside assessments,” but had “extended the courtesy of assisting” with the requested assessments, because Public School puts students first.⁴⁴ On 12/16/20, Petitioner’s counsel reiterated the 12/18/20 deadline to avoid a

³¹ P33-5; Psychologist.

³² P33-3; P32-1,2.

³³ P33-4; Psychologist.

³⁴ P33-3.

³⁵ P33-2.

³⁶ P33-1,2; P32-7.

³⁷ P32-6.

³⁸ P34-1.

³⁹ P35-1.

⁴⁰ P36-2.

⁴¹ P36-1,2; Psychologist.

⁴² P32-5.

⁴³ P32-4.

⁴⁴ P32-3,4.

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lawsuit.⁴⁵ On 12/17/20, LEA Representative emailed that DCPS “followed all protocols/procedures per DCPS policy” and the threat of a lawsuit had no merit.⁴⁶

14. Both sides apparently felt they were serving Student’s best interests; LEA Representative noted that “we tend to forget about what’s important[,] the student!”; Petitioner’s counsel asked for completion of the forms “soon . . . for [Student’s] sake.”⁴⁷ Psychologist testified that it is typical for teachers to fill out the rating scales and uncommon not to get the forms back from teachers; special education coordinators at schools usually help.⁴⁸

15. If Public School had told Psychologist that teachers did not have enough information or could not complete the rating scales, Psychologist would have gone to Previous Public School and contacted Student’s teachers from 2019/20, although she trusts the input of current teachers over the fading memories of teachers from prior years.⁴⁹ Psychologist observed other students online during the last year and expected Public School to have sufficient experience with Student in the current virtual educational setting.⁵⁰ Student has been at Public School long enough for teachers to be able to complete rating scales, even in the virtual learning environment.⁵¹ The 12/8/20 analysis of existing data stated that Student was failing all classes, had not turned in any work, had low participation and logs out of class early.⁵² Teachers can see disruptive behavior virtually when students get up or shut off devices, yell out comments, refuse to answer, or the like.⁵³ When reevaluated in 2014, Student had a significant history of excessive absences due in part to asthma.⁵⁴ In 2020/21, as of 12/5/20, Student had been present 50 days and absent 8; Student’s history of asthma was noted.⁵⁵

16. Reevaluation. On 12/11/20, DCPS issued a prior written notice stating that Student’s team would review assessment data to determine eligibility; a records review led the team to determine that Student continued to qualify for special education services based on OHI.⁵⁶ The last prior eligibility meeting was 12/13/17, based on a 2017 psychological triennial evaluation.⁵⁷ A DCPS school psychologist completed a “Due Diligence Report” on 12/5/20.⁵⁸ Student was scheduled for a virtual assessment on 11/2/20, but did not make self

⁴⁵ P32-2.

⁴⁶ P32-1; R5p20.

⁴⁷ R5p20; P32-6.

⁴⁸ Psychologist.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² P16-2.

⁵³ Psychologist.

⁵⁴ P10-1,11.

⁵⁵ P15-2.

⁵⁶ R4p14.

⁵⁷ R4p14; P15-1.

⁵⁸ P15-1.

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available; DCPS relied on 2019 IEP present levels of performance (“PLOPs”).⁵⁹ The due diligence report process could not conduct duplicative tests following the IEE, which was too close in time.⁶⁰ The 12/5/20 “due diligence report” did not contain new data and was not sufficient for appropriate programming for Student; it was not sufficiently comprehensive for Student; it did not include a cognitive assessment or a social-emotional section.⁶¹ The report was not a reevaluation of all areas of suspected disability.⁶²

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The

⁵⁹ P15-5.

⁶⁰ P15.

⁶¹ Psychologist; P15.

⁶² Psychologist.

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IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue: *Whether DCPS denied Student a FAPE by failing to complete an evaluation requested by Parent and/or comprehensively evaluate in all areas of suspected disability, when DCPS refused to complete the teacher portions of the independent comprehensive psychological evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner prevails on this issue for the reasons set forth below. The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780

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F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student’s parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student’s parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a).

Here, Student’s prior eligibility meeting was on 12/13/17, following Student’s 2017 psychological triennial evaluation, so a new triennial was due by late 2020. For that purpose, a DCPS school psychologist completed a “due diligence report” on 12/5/20, noting that Student had been scheduled for a virtual assessment on 11/2/20, but was not available, so DCPS relied on 2019 IEP PLOPs. Nor could the school psychologist conduct duplicative testing following Psychologist’s independent comprehensive psychological evaluation, as assessments must be administered after a sufficient interval in order to have validity. This Hearing Officer concurs with Psychologist that the 12/5/20 due diligence report did not contain new data and was not sufficient for appropriate programming for Student. The DCPS report was not sufficiently comprehensive and did not reevaluate all areas of suspected disability, lacking both a cognitive assessment and a social-emotional section. While DCPS is apparently satisfied with continuing to rely on OHI due to asthma as Student’s classification, Psychologist raised well-founded concerns about Specific Learning Disability (“SLD”) and the need for programming to be extended to written expression, along with behavioral concerns. Thus, the undersigned concludes that DCPS’s 12/5/20 due diligence report was not sufficient to comply with IDEA requirements.

The next question is whether the independent comprehensive psychological evaluation was sufficient to meet the requirements for a triennial reevaluation. It is clear in the absence of teacher rating scales that the evaluation was not sufficient. Indeed, Psychologist has not been able to complete the evaluation in the absence of the rating scales. In *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 144 (D.D.C. 2016), the court found that DCPS’s “failure to conduct a new comprehensive psychological evaluation of [the student] means that her IEP might not be sufficiently tailored to her special and evolving needs.” That is clearly the case here.

Student’s needs are substantial, but are not being met. Student’s grades in the first half of the current school year at Public School were all “Fs” – a GPA of 0.00 – and Student’s most recent quarterly IEP Progress Report revealed that Student made no progress on any goal. Unfortunately, this is not surprising where math continued to be Student’s strongest academic area, despite being 5 or 6 years below grade in math, and 6 to 7 years below grade in reading, even though Psychologist considers Student capable of making appropriate progress with suitable services and supports.

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Public School should have completed the rating scales if it had information about Student, and it certainly never claimed otherwise. Psychologist expected Public School to have sufficient experience, for Student had been at Public School long enough for teachers to be able to complete rating scales, even in the virtual learning environment. Moreover, if Public School had told Psychologist that teachers did not have enough information or could not complete the rating scales, Psychologist could have pursued options with Student's teachers from 2019/20.

Accordingly, to comply with DCPS's triennial requirements, this Hearing Officer concludes that Public School teachers should have promptly provided the rating scales needed by Psychologist to complete the comprehensive psychological evaluation. IDEA regulations do not expressly require LEAs to provide teacher input for independent evaluations, but do require that independent evaluations meet the same criteria as the public agency uses when doing evaluations itself. 34 C.F.R. § 300.502(e)(1). DCPS certainly includes rating scales as part of its comprehensive psychological evaluations, so DCPS cannot refuse to provide rating scales for Student, since DCPS is the source of Student's teachers and thus the best option for obtaining the necessary information. *See also* 34 C.F.R. § 300.304(c)(7) (evaluations must use assessment tools and strategies that provide relevant information to assist in determining educational needs).

The need for DCPS to complete the teacher rating scales for an independent evaluation is reinforced by the logic of the U.S. Department of Education, Office of Special Education Programs ("OSEP") in *Letter to Mamas*, 42 IDELR 10 (OSEP 2004). OSEP explained that in the context of an IEE more may be required, so that even in the absence of a general entitlement for parents or their representatives in the *Mamas* situation to observe their children in a current or proposed placement, more was required in *Mamas* and if the evaluation required observing the child in the educational placement the evaluator may need to be provided access. So here too, in the context of the IEE for Student, if the comprehensive psychological evaluation required teacher rating scales – which is not contested – the evaluator needs to be given access to them.

DCPS has committed a procedural violation at a minimum, *Z.B.*, 888 F.3d at 524, but determining whether there are substantive effects can be more challenging. As noted above, in matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a).

Here, the undersigned is clear that DCPS's failure to conduct an appropriate triennial evaluation itself, or to provide the necessary rating scales for the IEE, did have substantive impacts on Student. Teachers' responses to the BASC rating scales were required to determine whether Student has concerns to be addressed in the area of social, emotional and behavioral development, and whether Student required Behavioral Support as related services. The ADHDT rating scales were needed to determine whether Student suffers from ADHD, while the fully completed evaluation was necessary for determining Student's proper diagnosis and disability category, which Psychologist expected to be SLD, leading to

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additional services for written expression and possibly much more, given Student's substantial deficits. Thus, this Hearing Officer concludes that DCPS's violation both impeded Student's right to a FAPE and caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(i),(iii). This denial of FAPE results in the remedies discussed next.

Remedies

Having analyzed and resolved the single issue in this case, what remains is to consider appropriate remedies to make up for the denial of FAPE. As an initial matter, DCPS is ordered below to have appropriate general education and special education teachers complete the three forms that Psychologist has been seeking for Student since last November. The suitably completed forms are to be returned to Psychologist and Petitioner's counsel within 5 business days from the date of this HOD.

Consistent with the request of Petitioner in this case, the undersigned does not attempt at this time to calculate and award the compensatory education required to put Student in the place in which Student would have been but for the denial of FAPE. Until Psychologist receives the necessary rating scales, she cannot determine Student's proper diagnosis and disability classification and recommend suitable programming for Student, which Student's team needs to conclude what programming is needed.

Upon completion of the independent evaluation, the IEP team (including Parent) is encouraged as part of the IEP team meeting to not only adjust the programming in Student's IEP as needed, but also to collaborate and determine the type and amount of compensatory education needed to make up for the fact that the independent evaluation could not be completed in November 2020, but instead is being completed some 4 or 5 months later.⁶³

In the circumstances of this case, the undersigned has carefully considered the alternatives and is convinced that encouraging future agreement on compensatory education by Student's IEP team is appropriate and the best option available here for addressing Student's unique needs as a matter of equity, for "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

⁶³ Petitioner's counsel strongly urged this Hearing Officer not just to encourage but to order the IEP team to determine the compensatory education due to Student during the IEP team meeting that will occur to adjust Student's programming. DCPS's counsel took a contrary position. After careful review of the helpful memoranda submitted by both sides, and analysis of relevant caselaw in this jurisdiction, the undersigned has concluded that it is appropriate to encourage – but not order – the IEP team (including Parent) to collaborate on an appropriate compensatory education plan for Student.

Hearing Officer Determination

Case No. 2021-0006

ORDER

Petitioner has prevailed on the single issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- 1) DCPS shall have at least one of Student’s general education teachers and one of Student’s special education teachers complete the three forms provided by Psychologist (the Teacher Interview Form, BASC Rating Scales, and ADHDT Rating Scales) and return the appropriately completed forms to Psychologist and Petitioner’s counsel within 5 business days.
- 2) Within 10 business days after Psychologist completes the independent comprehensive psychological evaluation, DCPS shall convene Student’s IEP team (including Parent) to review the report and modify Student’s IEP as appropriate; Student’s IEP team shall then collaborate and seek to determine the compensatory education necessary to restore Student to the position in which Student would have been but for the denial of FAPE. All meetings with Petitioner are to be scheduled through Petitioner’s counsel.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).

Copies to:

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