

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
May 27, 2016

<i>Student</i> , ¹)	Date Issued: 5/27/16
through her <i>Parent</i> ,)	
<i>Petitioner</i>)	Case No.: 2016-0059
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 5/11/16 & 5/12/16
("DCPS"),)	Hearing Location: ODR Room 2004
Respondent)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, 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”) because Student’s Individualized Education Program (“IEP”) was not adequate for her academic and behavioral needs and she had not been comprehensively reevaluated. DCPS responded that Student’s IEP was appropriate, her Triennial Reevaluation was comprehensive, and she was receiving educational benefit.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to 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 3/15/16, the case was assigned to the undersigned on 3/16/16. Respondent’s timely response to the complaint was filed on

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

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3/21/16 and did not challenge jurisdiction, apart from the ability of Hearing Officers to enforce the D.C. Code as it relates to Issue 3 below.

Student, an adult, signed an educational power of attorney on 4/8/16 naming Parent as her agent, and filed a motion to substitute Parent as Petitioner on 5/3/16, which was granted by Order of the undersigned on 5/10/16.

The resolution session meeting took place on 4/8/16, but the parties neither settled the case nor terminated the 30-day resolution period, which ended on 4/14/16. 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 5/29/16.

The due process hearing took place on 5/11/16 and 5/12/16, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Parent was present during the first day of the hearing and listened by telephone to a portion of the second day. Student did not attend or testify at the hearing.

Petitioner’s Disclosures, submitted on 5/4/16, contained documents P1 through P41, which were admitted into evidence without objection.

Respondent’s Disclosures, submitted on 5/4/16, contained documents R1 through R41, which were admitted into evidence over objections to R1, R2, R3, R4, R6, R7, R8, R9, R10, R11, R12, R13, R34; following objections to handwritten notations on R19, a redacted version of R19 was admitted into evidence without objection.

Petitioner’s counsel presented five witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Clinical/School Psychologist*, qualified over objection as an expert in School Psychology and Conducting and Interpreting Psychological Assessments
2. *Educational Advocate*, qualified over objection as an expert in Educational and Psychological Assessment and Measurement
3. *Paralegal*
4. *Compensatory Education Planner*, qualified over objection as an expert in Special Education Assessments and Development and Implementation of IEPs
5. Parent

Respondent’s counsel presented four witnesses in Respondent’s case (*see* Appendix A):

1. *Social Worker at Public School*, qualified without objection as an expert in School Social Work

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2. *Special Education Coordinator* at Public School, qualified over objection as an expert in Special Education and Least Restrictive Environment (“LRE”) Determinations
3. *Case Manager* at Public School
4. *School Psychologist* at Public School, qualified without objection as an expert in School Psychology

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 2/3/16, as her IEP lacked (a) sufficient hours of specialized instruction outside general education and a separate therapeutic special education day school, given her lack of educational progress and evaluations; (b) an appropriate disability classification; (c) specific and measurable goals and baselines; (d) appropriate accommodations and modifications; and (e) updated present levels of performance.

Issue 2: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability by August 2015 by failing to conduct (a) cognitive testing, (b) social emotional testing, (c) a neuropsychological assessment, (d) a speech and language assessment, (e) an educational assessment which included normative data and age equivalencies, and (f) a functional behavioral assessment (“FBA”) and implement a revised behavior plan.

Issue 3: Whether DCPS denied Student a FAPE by failing to provide finalized drafts of the IEP within five days after the 2/3/16 meeting.

Petitioner seeks the following relief²:

1. A finding that Student was denied a FAPE.
2. DCPS shall fund the following independent assessments: (a) cognitive, (b) social emotional, (c) neuropsychological, (d) speech and language, and (e) FBA.
3. DCPS shall convene an IEP team meeting within 10 school days after receiving the assessments in the previous paragraph to review and revise Student’s IEP to include: (a) an appropriate disability classification, (b) appropriate goals and baselines, (c) appropriate accommodations and modifications, (d) full-time specialized instruction outside general education, and (e) a separate therapeutic special education day school.

² At the DPH, Petitioner’s counsel expressly withdrew the request that “DCPS shall fund placement in a separate therapeutic special education day school.”

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4. DCPS shall fund compensatory education for any denial of FAPE from August 2015 to the present for evaluation failures and 2/3/16 to the present for the IEP denial of FAPE.
5. Any other relief that is just and appropriate.

The parties were permitted to submit legal citations after the hearing, which Petitioner did on a timely basis on 5/13/16.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁴ An adult, Student is *Age* and in *Grade* at Public School, which she is repeating for the third time due to not passing any Math class.⁵

2. Student is classified as having a Specific Learning Disability ("SLD").⁶ In 2014, Student had been classified as having Multiple Disabilities ("MD"), with Speech Language Impairment ("SLI") in addition to SLD.⁷ Student's IEP team, including Student and Parent, agreed with SLD as Student's disability on 2/9/15.⁸ Petitioner sought the addition of Other Health Impairment ("OHI") to return Student to an MD classification, based on her frequent health issues.⁹

3. The diagnostic impressions from Student's Neuropsychological Evaluation in 2012 included a Developmental Mixed Expressive and Receptive Language Disorder and Learning Disability in Reading Comprehension, Learning Disability in Written Expression and Math-Based Learning Disability.¹⁰ WISC-IV testing of Student's cognitive functioning indicated that her full-scale IQ is 72 or 75, which is borderline range, although Student's

³ 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.

⁴ Parent.

⁵ *Id.*

⁶ P10-1; P9-1.

⁷ P8-1; P17-1,7.

⁸ Case Manager; School Psychologist; R22; R24-2; R27-2.

⁹ P11-1.

¹⁰ P15-17.

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teachers consider her “very capable.”¹¹ On the WRAML-2, Student’s verbal memory score was 64, a 1st percentile rank.¹² Student has a history of mild seizures, controlled by medication, tremors in her hands and gastrointestinal problems.¹³

4. The Psychological Triennial Reevaluation dated 2/5/15 noted that it would determine whether Student was MD or whether SLD “is a more appropriate fit at this time,” and concluded that Student met the criteria for SLD.¹⁴ The Triennial relied on a Woodcock-Johnson III (“W-J III”) evaluation and classroom reports and data, in addition to a document review.¹⁵ School Psychologist performed the records review and found no other testing was needed for the Triennial; in particular, no new cognitive assessment was needed as there was no change in disabilities and cognitive abilities usually do not change.¹⁶ The concerns in Student’s earlier neuropsychological evaluation continue.¹⁷ The W-J III on 1/15/15 found that in Broad Math Student was in the low average range and about five years behind; in Broad Reading she was in the low average range and about three years behind; and in Broad Written Language she was in the low average range and about two years behind.¹⁸ Student completed the GAIN-Short Screener on 1/20/16.¹⁹

5. The IEP at issue is dated 2/3/16 and provides for 10 hours/week of specialized instruction inside general education and 10 hours/week of specialized instruction outside general education, along with 120 minutes/month of Behavioral Support Services (“BSS”) outside general education, 60 minutes/month of Speech-Language Pathology outside general education and 45 minutes/month of Occupational Therapy (“OT”).²⁰ Student’s 2/9/15 IEP provided for the same services except OT was 60 minutes/month.²¹ Student’s 2/11/14 IEP was the same as 2015 except that Speech-Language Pathology was 120 minutes/month.²²

6. Unaware of the earlier Triennial Reevaluation in 2015, Parent made a formal request through counsel on 7/8/15 for a comprehensive triennial reevaluation of Student with comprehensive psychological, FBA (to address behaviors and attendance), speech-language, and OT evaluations.²³ Parent’s request was faxed to the Principal of Public School, the Director of Special Education of DCPS, and the Office of Legal Counsel for DCPS.²⁴

¹¹ P12-1; P13-5,8; P15-4.

¹² P15-10; Educational Advocate.

¹³ P17-1,6; R27-2; Parent.

¹⁴ P17-1,8.

¹⁵ School Psychologist; P17-6; Special Education Coordinator; Educational Advocate.

¹⁶ School Psychologist.

¹⁷ Social Worker.

¹⁸ P10-4,6,7; R19; Special Education Coordinator.

¹⁹ P10-10.

²⁰ P10-12.

²¹ P9-11.

²² P8-15.

²³ P29-5; Educational Advocate.

²⁴ P29-1,2,3.

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Educational Advocate raised evaluations at the 2/3/16 IEP team meeting.²⁵ At the RSM on 4/8/16, DCPS agreed to conduct comprehensive psychological, FBA, speech-language and OT evaluations, as well as to update Student's attendance plan.²⁶ Student does not want additional testing and has not made herself available for testing.²⁷

7. FBAs are generally not used for attendance issues and are difficult to complete if a student is not present and there is no data.²⁸ Public School is attempting to complete an FBA of Student now, but is having problems because of Student's lack of attendance for needed observations.²⁹ An attendance support plan is used for attendance problems; if that doesn't help other options are used.³⁰ The Attendance Office created an attendance plan for Student at the beginning of 2015/16³¹ which was revised on 4/11/16.³²

8. Student's attendance issues began as soon as she arrived at Public School, early in 2014; Student she missed 9 of her first 20 days.³³ In 2014/15, Student was absent 73 days, of which 58 were unexcused.³⁴ By midyear 2015/16, Student missed 39 days, of which 17 were unexcused; by 4/8/16, school personnel stated that she had accumulated 70 absences, of which 48 were unexcused.³⁵ When Student does go to school, she often does not go to her classes.³⁶

9. Student's teachers have frequently noted the harmful impact of Student's absences on her academic performance and the need for her to show up, complete work and submit her assignments.³⁷ Student often missed school for medical reasons; even medically-

²⁵ Educational Advocate; R30-2.

²⁶ R35-3.

²⁷ Special Education Coordinator.

²⁸ Social Worker.

²⁹ *Id.*

³⁰ *Id.*

³¹ All dates in the format "2015/16" refer to school years.

³² Social Worker; R35-3.

³³ P8-12.

³⁴ P18-1.

³⁵ P10-10; P12-1; Social Worker.

³⁶ Parent; Social Worker; School Psychologist.

³⁷ Social Worker; P10-4 (failing due to missing assignments; "frequently absent from class"; "excessive absences"); P10-7 ("Absences have been the main cause" of her failing grades; "she consistently misses class and fails to make up" assignments); P17-3 ("her attendance is keeping her from being more successful in the classroom"); P17-4 (absences have minimized gains in speech-language); P17-5 (the main concern of Student's teacher is the number of times Student is absent from class); P16-4 (grade decreased by 20 percentage points between quarters due to absences); P9-3 ("F" in Geometry because not completing assignments; "needs to be in class as often as possible"); R18-1 ("attendance has been a problem"); R18-2 (doesn't attend school or class regularly); R35-3.

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excused absences push her behind academically.³⁸ Student began attending school regularly on 3/23/16 and did not miss a day from March 2016 until the record ended in early May 2016; during that period, Student was tardy only once.³⁹

10. Student gets extra time to complete assignments, can get after school help, and credit recovery is available, but she doesn't take advantage of any of these.⁴⁰ Special Education Coordinator recently spoke with Student about a challenging assignment and offered to provide one-on-one assistance, but Student failed to show up in Special Education Coordinator's office as she had said she would.⁴¹ Student is encouraged to attend "Power Hour," which is after school tutoring to provide help in classes she missed or where she needs additional help, but Student does not show up.⁴² Handwriting is tiring for Student, so she has been provided options to type, and has a tablet available to take notes, but does not use these accommodations.⁴³ Student's grades do not reflect what she is capable of because of her poor attendance and lack of engagement.⁴⁴

11. Special Education Coordinator believes Student has the intellect and capabilities to pass her classes and accrue the credits she needs.⁴⁵ Student has received just over a third of the ■ credits required to graduate and is making slow progress.⁴⁶ Math is Student's hardest subject, but she is able to keep up when she attends class consistently and participates.⁴⁷ Student's teachers think she would be capable of doing the work if she made herself available.⁴⁸

12. The 2/3/16 IEP team meeting was attended by both Parent and Student in person.⁴⁹ Student began by stating that "I think I'm good this year," but expressed concern that teachers tell her she is doing well, but then give her poor grades.⁵⁰ Student's teachers explained that she does well when she shows up, but her attendance is a problem and she often wanders the halls or checks in with the school psychologist even though it is "imperative" that she spend that time in class.⁵¹

³⁸ P10-10; Social Worker.

³⁹ R26-7,8.

⁴⁰ R35-2.

⁴¹ Special Education Coordinator.

⁴² Special Education Coordinator; P10-10; P16-4; P17-5.

⁴³ P17-4; R13-1 (received Apple iPad); Special Education Coordinator.

⁴⁴ R35-2; Special Education Coordinator.

⁴⁵ Special Education Coordinator.

⁴⁶ P17-1; P20-1; P21-1.

⁴⁷ P17-2; R17; P17-4; Social Worker.

⁴⁸ R35-3.

⁴⁹ R30-1.

⁵⁰ *Id.*

⁵¹ *Id.*

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13. Educational Advocate arrived about 45 minutes late to the IEP meeting, after most of the meeting had taken place and the team had moved on to Student's transition plan; Educational Advocate began making numerous demands about issues already covered, which upset the cooperative tone of the meeting.⁵² Student had not previously met Educational Advocate; Student was upset by the interactions at the meeting and was "shut down" by Educational Advocate; Student and Parent said they did not know Educational Advocate and Student refused to meet with Educational Advocate after the meeting.⁵³ Public School sought proof of representation and Paralegal responded with a letter of representation (not included in the disclosures) which did not identify Educational Advocate or anyone by name.⁵⁴

14. Student stated after the 2/3/16 meeting that she was not sure she wanted to be represented by counsel and instructed Special Education Coordinator to hold off responding to her counsel's office.⁵⁵ Special Education Coordinator received permission and responded to Student's counsel on 2/18/16, explaining that Special Education Coordinator had encouraged Student to contact counsel directly and asking counsel to be back in touch with Special Education Coordinator after sorting out issues of representation with Student.⁵⁶ Student's counsel emailed on 3/4/16 (just after 3:00 p.m.) that she had talked with Student that day and did continue to represent her; Special Education Coordinator sent the finalized IEP and Triennial Reevaluation on 3/8/16.⁵⁷

15. Educational Advocate stated at the 2/3/16 meeting that Student had too many classes and needed an abbreviated schedule, even if that increased the length of her [REDACTED] education.⁵⁸ The IEP team rejected that approach in an effort to permit Student to graduate on time if she curbed her absences.⁵⁹ Student confirmed at the 2/3/16 meeting that she wants to graduate on time; if she can't, Parent credibly testified that Student is discouraged and thinks of dropping out of school.⁶⁰ Public School told Student in 2015/16 that she can graduate next year with her peers by carrying a higher load of classes, using evening credit recovery and taking summer classes.⁶¹ Parent knows that graduation next year is not possible for Student.⁶² Public School staffers expect Student to complete [REDACTED] and

⁵² Social Worker; Special Education Coordinator; P31-1.

⁵³ Social Worker; School Psychologist; P32-1; Special Education Coordinator.

⁵⁴ Special Education Coordinator; P31-1 (transmittal email).

⁵⁵ P32-1.

⁵⁶ *Id.*

⁵⁷ P34-2; P34-1.

⁵⁸ Educational Advocate; R30-2; Special Education Coordinator.

⁵⁹ R30-2; Special Education Coordinator; Social Worker.

⁶⁰ R30-2; Social Worker; Parent; Compensatory Education Planner

⁶¹ Special Education Coordinator; Social Worker.

⁶² Parent.

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██████████ at Public School; Student recently told Special Education Coordinator that she wants to finish at Public School and not elsewhere.⁶³

16. Educational Advocate objected to baselines in the 2/3/16 IEP that were very general, such as Student “does not have very strong research skills” and “struggles with solving quadratics,” and which did not provide the basis for goals.⁶⁴ Educational Advocate sought to increase accommodations, especially for memory deficits, but Special Education Coordinator convincingly testified that Student’s memory concerns were being addressed throughout the IEP.⁶⁵ Accommodations for repetition and simplification of instructions are not in Student’s 2/3/16 and 2/9/15 IEPs, although they were in her 2/11/14 IEP; they are common accommodations that should have been included according to Educational Advocate.⁶⁶ Student is receiving the accommodations she needs as listed in Other Classroom Aids and Services in her current IEP, which provide that Student is to have rest breaks and reduced work as long as skill practice is maintained.⁶⁷ Student’s IEP recommended consistent practice as the best method for improvement in Math, given her difficulty retaining information.⁶⁸

17. Educational Advocate raised concerns about a lack of updates for Present Levels of Performance, asserting that all of her issues should have been corrected during the 2/3/16 IEP meeting; Social Worker was present for the 2/3/16 meeting and explained that Student’s Present Levels were updated from the GAIN Short Screener, working with Student, and other records.⁶⁹

18. The IEP team agreed that Student’s IEP was appropriate.⁷⁰ Educational Advocate would have been able to get more changes in Student’s IEP if she had been at the entire 2/3/16 meeting and worked through the issues with the six school personnel who attended in person.⁷¹

19. When present at school in 2015/16, Student has had no behavior challenges, except in the month prior to the due process hearing, when she was less cooperative and exhibited some defiance and aggression.⁷² Student is doing well with her BSS; she has gained confidence and is able to advocate for herself and even help other students.⁷³

⁶³ Special Education Coordinator.

⁶⁴ Educational Advocate; P10-5,8.

⁶⁵ Educational Advocate; Special Education Coordinator; P10-4,6,7,8,10,13.

⁶⁶ P8-17; P9-13; P10-14; Educational Advocate.

⁶⁷ P10-12; Special Education Coordinator.

⁶⁸ P10-4.

⁶⁹ Educational Advocate; Social Worker; P10-10.

⁷⁰ R35-3; Educational Advocate.

⁷¹ Educational Advocate; Special Education Coordinator; P10-1.

⁷² Social Worker; Educational Advocate (no behavioral challenges).

⁷³ Social Worker; R33-21; R30-2.

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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").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Once a child who may need special education services is identified and found eligible, DCPS 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); *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).

As discussed below, 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, Respondent 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.

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

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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.

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence 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. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on 2/3/16, as her IEP lacked (a) sufficient hours of specialized instruction outside general education and a separate therapeutic special education day school, given her lack of educational progress and evaluations; (b) an appropriate disability classification; (c) specific and measurable goals and baselines; (d) appropriate accommodations and modifications; and (e) updated present levels of performance.*

Petitioner failed to meet her burden of proving a denial of FAPE on this issue, for Student's IEP was reasonably calculated to enable Student to receive educational benefits and advance toward her annual goals pursuant to 34 C.F.R. 300.320(a)(4). The service hours and support in her IEP were not increased despite her challenges at school, but Student failed to attend classes and did not avail herself of the services and assistance that Public School was offering pursuant to her IEP.

To determine whether a FAPE has been provided through an IEP, a Hearing Officer must determine:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

A.M. v. Dist. of Columbia, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. The measure and adequacy of the IEP are determined as of the time the IEP was offered to Student. See, e.g., *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008).

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Here, the suitability of Student's IEP and the adequacy of Public School⁷⁴ is analyzed by considering the concerns raised by Petitioner about Student's amount of specialized instruction, disability classification, goals and baselines, accommodations and modifications, and present levels of performance. *See* 34 C.F.R. 300.320(a)(1),(2),(4),(6); *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

Specialized Instruction

Student is not doing well academically at Public School, as she is repeating Grade for the third time due to not being able to pass a Math class. At the same time, Student is making some progress and has earned just over one-third of the █ credits needed to graduate from Public School. Student has been eager to graduate with her peers, so has taken more classes than she can handle. Public School has enabled this by encouraging or allowing her to think she might be able to catch up with her peers and graduate much sooner than is realistic. As a student with a disability, Student finds her classes difficult and Math especially challenging.

Student misses a lot of school, both because of health issues and because she chooses not to attend. In 2014/15, Student was absent 73 days, of which 58 were unexcused, while this year she accumulated 70 absences by 4/8/16, of which 48 were unexcused. But even when she shows up for school, Student often wanders the halls and does not go to class. Thus, she does not benefit from the 10 hours/week of specialized instruction Public School offers her outside general education and the 10 hours/week of specialized instruction Public School offers her inside general education. Student's teachers have frequently noted the harmful impact of her absences on her academic performance, and the critical need for Student to show up, complete work and submit assignments. Moreover, it appears Student can attend regularly if she chooses to, as shown by Student going to school every day from late March 2016 to early May (when the record ended).

In addition to her many absences, Student failed to take advantage of the extra time she is given to complete her assignments and the after-school tutoring that is available to her, all of which are the choices of █ Student that are not caused by her disability. Thus, this Hearing Officer concludes that it was not a denial of FAPE for Student's 2/3/16 IEP to continue at the same level of specialized instruction, which has not been demonstrated to be insufficient, if only Student would take advantage of it. Thus, the undersigned further concludes that there is no need for Student's IEP to include a separate therapeutic special education day school.

⁷⁴ Petitioner expressly withdrew her request that "DCPS shall fund placement in a separate therapeutic special education day school," but did not expressly withdraw the reference to Student's IEP lacking a "separate therapeutic special education day school" in Issue 1. However, that placement assertion is rejected by the conclusion of the undersigned below that Student's current service hours are appropriate.

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Disability Classification

Student's IEP team, including Student and Parent, agreed that SLD was Student's disability on 2/9/15. Student had previously been classified as having Multiple Disabilities, with Speech Language Impairment in addition to SLD. Petitioner asserted that Other Health Impairment should be added to return Student to a Multiple Disabilities classification, due to her frequent health issues. However, Petitioner did not present sufficient documentary evidence or expert testimony to persuade this Hearing Officer that OHI should be added. Nor did Petitioner demonstrate any impact from such a change, for a student's identified needs, not her disability category, determine the services that must be provided to her. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label"); *M.M. v. Lafayette Sch. Dist.*, 2012 WL 398773, at *17 (N.D. Cal. 2012), *aff'd in part, rev'd in part on other grounds and remanded*, 767 F.3d 842 (9th Cir. 2014).

Goals and Baselines, Accommodations and Modifications, Present Levels of Performance

Petitioner also challenged the 2/3/16 IEP for lack of specific and measurable goals and baselines,⁷⁵ appropriate accommodations and modifications,⁷⁶ and updated present levels of performance,⁷⁷ based on the testimony of Educational Advocate and her inability to change the draft IEP at the 2/3/16 meeting, where Educational Advocate believed all of these issues should have been corrected. However, the un rebutted testimony was that Educational Advocate arrived about 45 minutes late to the 2/3/16 meeting. At that point a majority of the meeting had already taken place and the team had moved on to Student's transition plan. Despite her late arrival, Educational Advocate began making numerous demands about already covered issues, which caused upset not only to school personnel but

⁷⁵ Every IEP must include a written statement for the student "that is developed, reviewed, and revised" at the IEP team meeting, which must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children); . . .

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability. . . .

³⁴ C.F.R. 300.320(a).

⁷⁶ 34 C.F.R. 300.320(a)(6) (a "statement of any individual appropriate accommodations").

⁷⁷ See 34 C.F.R. 300.320(a)(1), above.

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to Student, who had not previously met Educational Advocate and was “shut down” by Educational Advocate in the meeting. Both Student and Parent stated that they did not know Educational Advocate, and Student refused to meet with Educational Advocate after the meeting.

In this situation, Educational Advocate specifically objected to baselines in the draft IEP that were very general, such as Student “does not have very strong research skills” and “struggles with solving quadratics,” and which did not provide the basis for goals. Although improvements could no doubt be made, the undersigned concludes that any shortcomings in the IEP’s goals and baselines do not rise to the level of an IDEA violation.

Educational Advocate sought to increase accommodations for Student, especially to address memory deficits and to add repetition and simplification of instructions. However, Special Education Coordinator convincingly testified that Student’s memory concerns were being addressed throughout the IEP, pointing to relevant language on P10-4,6,7,8,10,13. Student’s IEP recommends consistent practice as the best method for improvement in Math, given her difficulty retaining information. Special Education Coordinator credibly testified that Student is receiving the accommodations she needs, including rest breaks and reduced work as long as skill practice is maintained.

Educational Advocate also raised concerns about the need for updated Present Levels of Performance in the IEP, but Social Worker persuasively testified from her participation in the 2/3/16 meeting that Student’s Present Levels were updated from the GAIN Short Screener, from working with Student, and from other records.

It is clear to this Hearing Officer that Educational Advocate would have been able to get more of her suggested changes into Student’s IEP if she had been present when those sections were discussed and had worked through the issues with the six school personnel who attended. But Student’s IEP must nonetheless be sufficient to provide a basic floor of opportunity, which this Hearing Officers holds that it is. *See Tice By & Through Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (“a reviewing court should be reluctant indeed to second-guess the judgment of education professionals . . . nor . . . disturb an IEP simply because we disagree with its content. Rather, we must defer to educators’ decisions as long as an IEP provided the child ‘the basic floor of opportunity that access to special education and related services provides’” (quoting *Rowley*, 458 U.S. at 201)).

Conclusion

In sum, based on all of the evidence, this Hearing Officer does not disagree with the IEP team’s conclusion that Student’s IEP was appropriate, and concludes that any flaws were not sufficient to violate IDEA and deny Student a FAPE. The IEP was reasonably calculated to provide the services needed by Student at the time it was developed. *A.M.*, 933 F. Supp. 2d at 204. An IEP is not required to, and cannot, guarantee any particular outcome or any particular level of academic success. *See, e.g., Holman v. Dist. of Columbia*, 2016 WL 355066, at *2 (D.D.C. Jan. 28, 2016).

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Issue 2: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disability by August 2015 by failing to conduct (a) cognitive testing, (b) social emotional testing, (c) a neuropsychological assessment, (d) a speech and language assessment, (e) an educational assessment which included normative data and age equivalencies, and (f) a functional behavioral assessment and implement a revised behavior plan.*

Petitioner failed to meet her burden on the issue of comprehensive evaluation of Student. Petitioner's counsel clarified at the hearing that Petitioner's concern was the lack of adequate assessments during the Triennial Reevaluation, which counsel had not seen or realized was early in 2015, rather than the later formal request for reevaluation by counsel on 7/8/15.

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if Student's parent or teacher requests a reevaluation, or if the Local Educational Agency ("LEA") determines that the needs of the student warrant a 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). The IDEA does not require a public agency to administer every test requested by a parent, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993). Here, the Triennial Reevaluation of Student in early 2015 relied on a Woodcock-Johnson III assessment and classroom reports and data, in addition to a document review. The IEP team determined that no other assessments were needed for the Triennial, and Petitioner failed to convince this Hearing Officer that this determination was in error and that the evaluations sought by Petitioner were necessary.

Similarly, the request for specific assessments made by Petitioner's counsel on 7/8/15 required DCPS, prior to conducting any additional assessments, to convene Student's IEP team, including Parent, to again review existing evaluation data, and determine on the basis of that review what additional data, if any, were needed to determine Student's educational needs. 34 C.F.R. 300.305(a). DCPS argued that it inexplicably did not receive Petitioner's request, despite documentary evidence that it was faxed to Public School principal, the Director of Special Education of DCPS, and the Office of Legal Counsel for DCPS. This Hearing Officer concludes that DCPS's failure to determine whether Student needed additional assessments in July 2015 is a procedural violation of the IDEA. But in the circumstances of this case, Petitioner did not persuade this Hearing Officer that the lack of attention to the request at that time, less than six months after the Triennial Reevaluation, caused any educational harm to Student or impacted her substantive rights, as required by 34 C.F.R. 300.513(a). See *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (failure affecting a child's education is a denial of a FAPE, citing *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)); *Smith v. Dist. of Columbia*, 2010 WL 4861757, at *4,5 (D.D.C. 2010) (no relief warranted where petitioner "has not

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shown that DCPS' failure to conduct the reevaluations here sooner affected substantive rights" or that the child's "education would have been different" but for the violation).

Issue 3: *Whether DCPS denied Student a FAPE by failing to provide finalized drafts of the IEP within five days after the 2/3/16 meeting.*

Petitioner failed to meet her burden on the final issue concerning delivery of the 2/3/16 IEP to Petitioner's counsel. The law is now clear in the District of Columbia that copies of an agreed upon IEP must be provided to parents within five business days after the IEP meeting, pursuant to the Special Education Student Rights Act of 2014, D.C. Code § 38-2571.03.⁷⁸ Here, the claim is that DCPS failed to provide the IEP to Petitioner's counsel, not to Parent or Student, which the undersigned concludes was not an actionable violation under the circumstances.

As discussed above, Educational Advocate arrived quite late for the 2/3/16 meeting and began making demands about issues that had already been covered. This upset Student, who had not previously met Educational Advocate, and who was "shut down" by Educational Advocate at the IEP meeting. Both Student and Parent stated that they did not know Educational Advocate, Student refused to meet with Educational Advocate after the IEP meeting, and Student told Special Education Coordinator that she was not sure she wanted to be represented by counsel.⁷⁹ As a result of this drama, DCPS sought proof of representation from counsel. Paralegal promptly sent a letter of representation, which did not identify Educational Advocate (or anyone) by name. Student instructed Special Education Coordinator to hold off responding to her counsel's office. Special Education Coordinator finally received permission from Student to proceed and communicated with Student's counsel on 2/18/16, explaining the situation and asking counsel to respond after sorting out the representation issue with Student. Petitioner's counsel finally emailed

⁷⁸ D.C. Code § 38-2571.03, which took effect on 3/10/15, provides in relevant part:

(4)(A) No later than 5 business days after a meeting at which a new or amended IEP has been agreed upon, the public agency shall provide the parents with a copy of the IEP. If an IEP has not yet been completed by the 5th business day after the meeting or additional time is required to comply with subchapter II of Chapter 19 of Title 2, the public agency shall provide the parent with the latest available draft IEP and a final copy upon its completion; provided, that the final copy of the IEP shall be provided to the parents no later than 15 business days after the meeting at which the IEP was agreed upon.

See also 34 C.F.R. 300.121. This right to obtain updated IEPs is tantamount to a regulation clarifying what is required to participate meaningfully in Student's education. *See Cano-Angeles v. Puerto Rico (Dept. of Educ.)*, 2015 WL 6133130, at *4 (D.P.R. 2015) ("hearing officers [are to] consider both state and federal law to ensure that the [IDEA] is properly being implemented").

⁷⁹ As an adult, Student was the decision-maker at this point, as she did not sign the educational power of attorney naming Parent as her agent until 4/8/16.

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Special Education Coordinator on 3/4/16 that she had talked with Student and did continue to represent Student. In response, Special Education Coordinator sent the finalized IEP and Triennial Reevaluation on 3/8/16, the second business day after receiving clarification of the representation issue.

While a claim that the finalized IEP was not timely provided to Parent or Student may have been at least a technical violation of D.C. Code § 38-2571.03(4)(A), that claim was not asserted. This Hearing Officer concludes that DCPS's delay in providing the IEP to Student's counsel was due to counsel's own delay in clarifying her representation of Student, which cannot be used as the basis for claiming a violation by DCPS.

ORDER

Petitioner has failed to meet her burden of proof on the issues in this case. Accordingly, **it is hereby ordered** that any and all 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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