

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

PETITIONER, on behalf of STUDENT, ¹)	
)	Date Issued: November 24, 2017
Petitioner,)	
)	Hearing Officer: Peter B. Vaden
v.)	
)	Case No: 2017-0233
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Dates: November 16-17, 2017
Respondent.)	
)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner 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.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on August 29, 2017, named District of Columbia Public Schools (DCPS) as Respondent. The undersigned hearing officer was appointed on August 30, 2017. Petitioner (MOTHER) and DCPS met for a resolution session on September 13, 2017, which did not result in an agreement. On September 18, 2017, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be

¹ Personal identification information is provided in Appendix A.

determined and other matters. The final decision in this case was originally due by November 12, 2017. On November 9, 2017, I granted Petitioner's consent request to extend the final decision due date to November 27, 2017.

The due process hearing was convened before this Impartial Hearing Officer on November 16 and 17, 2017 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. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by RESOLUTION SPECIALIST and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements and closing arguments. Mother testified and called as additional witnesses EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses SPECIAL EDUCATION TEACHER 1, SPECIAL EDUCATION TEACHER 2, SCHOOL PSYCHOLOGIST and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1 through P-59 and DCPS' Exhibits R-1 through R-40 were admitted into evidence without objection. After Petitioner rested her case-in-chief, DCPS' Counsel made an oral motion for a partial directed finding, which I denied. 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.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 18, 2017 Prehearing Order, as revised on September 26, 2017:

- Whether DCPS failed to ensure Student was offered an appropriate IEP on June 1, 2017 in that the IEP 1) was not based on comprehensive evaluations and did not fully address Student's needs; 2) Present levels Information and baseline data were insufficient; 3) the hours of support provided were inadequate in light of Student's academic deficits; 4) the IEP does not provide sufficient accommodations; 5) the IEP does not address Student's need for Extended School Year (ESY) services; 6) the IEP does not include adaptive goals as appropriate based on Student's low cognitive scores and functioning and 7) the IEP does not address Student's social-emotional needs;
- Whether DCPS violated the IDEA by not funding an Independent Educational Evaluation of Student requested by the parent in summer 2017;
- Whether DCPS failed to comprehensively evaluate Student in all areas of suspected disabilities following a referral by the parent in April 2017;
- Whether DCPS failed in its child-find obligations by not evaluating Student for special education eligibility at the beginning of the 2016-2017 school year;
- Whether DCPS failed to afford the parent's representatives access to Student's complete education records following a request from counsel in July 2017.

For relief, the parent requested that the hearing officer order DCPS to fund an independent psychological evaluation and/or neuropsychological evaluation of Student, as well as an adaptive assessment, and conduct or fund a speech and language evaluation, occupational therapy (OT) evaluation, assistive technology evaluation, a functional behavioral assessment (FBA), a Vocational II assessment, and an auditory processing evaluation; order DCPS to immediately provide Petitioner's Counsel with a complete copy of Student's full educational record; order DCPS to ensure that Student's IEP is immediately revised to provide for increased instructional supports in all academic areas, as well as update the Student's annual goals to include providing adaptive and social-emotional goals, present levels of performance information and baseline data; and order DCPS to reconvene Student's IEP team to provide for increased instructional supports in all academic areas. The parent also seeks a compensatory education award for the denials of FAPE alleged in the complaint and reserves the right

to seek compensatory education pending the completion of the requested evaluations.

On November 16, 2017, at the beginning of the due process hearing, the parties, by counsel, stipulated that in fall 2017, DCPS had completed some of the assessments requested for Student, including a speech and language evaluation, an OT evaluation, an audiological/auditory processing evaluation and an FBA. DCPS has also authorized funding for the parent to obtain IEE neuropsychological and assistive technology evaluations. Consequently, the parent now requests Independent Educational Evaluation (IEE) funding only for adaptive and Vocational II assessments.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this hearing officer's Findings of Fact are as follows:

1. Student resides with Mother in the District of Columbia. Testimony of Mother. Student is eligible for special education and related services as a student with a Specific Learning Disability. Exhibit R-17.

2. Student has attended CITY SCHOOL, a DCPS public school, since the 2014-2015 school year. This school year, Student is in GRADE. Testimony of Mother.

3. Since the 2015-2016 school year, Student consistently attained Below Basic scores on the Scholastic Reading Inventory (SRI) reading comprehension assessment and Below Grade Level on the i-Ready mathematics assessment. Exhibit P-41.

4. Student's grades at City School for the 2015-2016 school year were D's and F's in all core subjects. Exhibit R-3. In the 2016-2017 school year, Student failed Spanish, received a D in English and C's in Science and History/Geography. Exhibit R-

19.

5. Student's inconsistent school attendance has adversely impacted Student's ability to actively participate in school. Testimony of Assistant Principal. In the 2014-2015 school year, Student had about 45 excused and unexcused absences. In the 2015-2016 school year, Student had about 48 absences. In the 2016-2017 school year, Student had about 41 absences. Exhibit R-1.

6. In the fall of 2016, Student was referred to City School's Response to Intervention (RTI) program out of concern for school attendance. Testimony of Assistant Principal. A Student Attendance Support Plan was developed for Student on November 1, 2016. Exhibit R-5.

7. On or about November 15, 2016, Mother telephoned School Psychologist to object to City School's having Student sign an attendance plan, without Mother's permission. Mother told School Psychologist that she did not want Student in the RTI program for behavior issues, but only for academic purposes. Exhibit R-5. At that time, Mother was not interested in special education testing for Student because she did not think Student had a disability. Testimony of Assistant Principal. Mother was familiar with IDEA special education eligibility procedures because she has an older child who was already receiving special education services. Testimony of Mother.

8. On November 10, 2016, Student completed a Strengths and Difficulties Questionnaire (SDQ), a self-report inventory behavioral screening questionnaire. The resulting score indicated that Student was at low risk for any behavior disorder, including Emotional disorder, Behavioral disorder or Hyperactivity or concentration disorder. Exhibit R-8, Testimony of School Psychologist. Following the SDQ screening, School Psychologist provided limited counseling services to Student. Student was also

receiving behavioral counseling services from COMMUNITY-BASED AGENCY.

Testimony of School Psychologist, Testimony of Mother, Exhibit P-3.

9. As part of RTI, Student was provided with classroom interventions such as small group instruction and Read 180 instruction, as well as one-on-one support from the general education teacher. Exhibit R-12. During the RTI period, Student continued to struggle academically. Testimony of School Psychologist. On or about April 12, 2017, Mother requested that Student be evaluated for special education eligibility. Exhibit P-2.

10. For an April 12, 2017 Analysis of Existing Data, school staff obtained input from Mother and Student's teachers. This input indicated that Student was struggling in all areas of Math, and in the areas of Reading and Writing. Exhibit P-5.

11. On April 14, 2017, School Psychologist conducted a comprehensive psychological evaluation of Student. The purpose was to consider Student's academic and social- emotional concerns. School Psychologist used the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Diagnostic Achievement Battery-Fourth Edition (DAB-4), the Behavior Assessment Scale for Children, 3rd Edition (BASC-3) and the Adaptive Behavior Assessment System for Children Third Edition (ABAS-3). On the WISC-V, Student attained a full scale IQ (FSIQ) score of 70 – at the bottom of the Very Low range. All of Student's WISC-V composite scores were in the Very Low range, except for Fluid Reasoning which was in the Low Average range and Visual-Spatial which was in the Extremely Low range. On the DAB-4, Student's academic achievement scores were all Poor (3rd to 5th percentile) except for Writing which was Below Average. For Behavioral Functioning, School Psychologist requested Mother and one of Student's teachers to complete the BASC-3 and ABAS-3 rating scales. However, only Mother

returned the completed questionnaires. Mother's responses on the BASC-3 indicated that Student's behaviors were in the Average range. Mother's responses on the ABAS-3 indicated that Student's adaptive skills were in the Average range in the Practical domain and in the High Average range in the Social domain. In her April 26, 2017 evaluation report, School Psychologist concluded that Student was demonstrating a Specific Learning Disability in the areas of Reading, Writing and Math. Because the teacher did not return the BASC-3 or ABAS-3 questionnaires, School Psychologist could not rule out the possibility that Student had an Intellectual Disability (ID). Exhibit R-12.

12. On May 31, 2017, an eligibility team at City School determined that Student met all of the criteria for a Specific Learning Disability. Mother agreed with this determination. Exhibits R-13, R-14.

13. At an initial IEP team meeting on June 1, 2017, Mathematics, Reading and Written Expression were identified as areas of concern for Student. The IEP team decided that Student would receive 4 hours per week of Specialized Instruction in the general education classroom. Exhibit R-17. Mother attended the IEP team meeting. Mother agreed with the IEP for Student. Testimony of Special Education Teacher 2.

14. Behavioral Support Services were not provided in the June 1, 2017 IEP because Student was already receiving those services from Community-Based Agency. Testimony of School Psychologist. In the current school year, Student receives in-school counseling services two times per week from Community-Based Agency. Testimony of Mother.

15. Near the end of the 2016-2017 school year, Educational Advocate 1, an employee of Petitioner's Counsel's firm, was meeting with Mother at the family home

concerning Student's sibling's special education program. Mother mentioned that Student had just gotten an IEP. Educational Advocate 1 offered to review the IEP. She was concerned by the content. On July 11, 2017, Educational Advocate 1 wrote Assistant Principal by email to request an IEP team meeting and for Student to be evaluated with a Speech and Language evaluation, an OT evaluation, an Auditory Processing assessment and the ABAS-3. Assistant Principal responded that the school would be available for an IEP meeting in September 2017 and that the advocate's concerns for additional assessments could be discussed at that time. Exhibit P-56.

16. By email of July 17, 2017, the law firm followed up with a formal request for Student's education records and the additional assessments. Exhibit P-55. On July 24, 2017, following receipt of some of the requested education records, Petitioner's Counsel requested additional records including standardized test scores, report cards, attendance records, behavior logs and discipline reports. Exhibit P-54. On September 18, 2017, Educational Advocate 1 followed up with a request for "outstanding" records, including the Brigance assessment, work samples, SDQ data, RTI data, attendance records, achievement data, and the initial referral for testing. Exhibit P-52. On October 12, 2017, Petitioner's Counsel wrote Resolution Specialist itemizing numerous other records still outstanding. Exhibit P-51. The law firm never received all of the requested education records. Testimony of Educational Advocate 1.

17. In the resolution process after Petitioner filed her due process complaint in this case, DCPS proposed to increase Student's special education services with an additional 6 hours per week of Specialized Instruction Services outside of general education. Petitioner's Counsel responded that Mother would authorize any increase in special education instruction that the school would provide, but that Mother did not

agree that the increase was sufficient. Exhibit P-49. DCPS requested that Mother sign a consent form to increase Student's special education services without convening an IEP team meeting. As of the due process hearing date, Mother had not signed the consent form and the additional proposed Specialized Instruction Services had not been added to Student's program. Testimony of Assistant Principal.

18. Special Education Teacher 1 provides special education services to Student in the 2017-2018 school year. His services include the 4 hours per week of inclusion services specified in Student's IEP. In addition, Special Education Teacher 1 works with Student in City School's internet-based Personalized Learning Time (PLT) program two days a week in 3-hour sessions. This PLT class is composed of special education students only and is considered Specialized Instruction. Testimony of Special Education Teacher 1. The PLT services are additional services not prescribed in Student's IEP. Testimony of Assistant Principal.

19. Student's grades for the first term of the 2017-2018 school year were all A's and B's except for a C in Biology. In the term, Student had accrued 13 days absent and 9 tardies. Exhibit R-39. Student has done pretty well in Algebra and received a B in the first quarter term. Student's ELA teacher says that Student is making satisfactory progress. Student's communication skills are satisfactory. Student does "pretty good" with peers in the classroom and usually is engaged in the lesson. Student does some talking in class and has to be redirected. Testimony of Special Education Teacher 1.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 DCPS, the District 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 District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

A. Child-Find

Did DCPS fail in its child-find obligations by not evaluating Student for special education eligibility at the beginning of the 2016-2017 school year?

Mother alleges that DCPS violated its child-find obligations under the IDEA by not ensuring that Student was evaluated for special education eligibility at the beginning of the 2016-2017 school year. DCPS responds that Mother did not request that Student be evaluated until spring 2017 and that in the fall of 2016, City School appropriately attempted RTI interventions before turning to consideration of special education eligibility. The parent has the burden of persuasion on this issue.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005). Under the Act's child-find requirement, the District must "ensure that

‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid*); 20 U.S.C. § 1412(a)(3). “As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the student’s eligibility for special education services “within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment.” *Id.* (quoting former D.C. Code § 38–2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013).

For a child suspected of having a specific learning disability (SLD), the IDEA regulations require that a state must permit the use of a process based on the child’s response to scientific, research-based intervention as criteria for determining whether the child has an SLD. *See* 34 CFR § 300.307(a)(2). The Federal regulations under 34 CFR § 300.309(c) require that if a child has not made adequate progress after an appropriate period of time with RTI, a referral for an IDEA eligibility evaluation must be made. However, the regulations do not specify a timeline for using RTI or define “adequate progress.” U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Questions and Answers On Response to Intervention (RTI) and Early Intervening Services (EIS)*, Question C-5 (OSERS January 2007). The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation. *Memo to State Directors of Special Education*, 56 IDELR 50 (Jan. 21, 2011).

See, also, Office of Special Education and Rehabilitative Services, Letter to Ferrara, 112 LRP 52101 (Feb. 29, 2012) (The implementation of an RTI process is not a reason to fail to respond to a parent's request for an initial evaluation.)

Student's grades at City School for the 2015-2016 school year were D's and F's in all core subjects and Student should have been suspected of having a learning disability by the beginning of the 2016-2017 school year. However, Student had been chronically absent from school since at least the 2014-2015 school year and it was not clear to what extent Student's absences contributed to Student's not achieving adequately. I find that, in the absence of a request by the parent for Student to be evaluated, it was appropriate for City School to use RTI interventions before referring Student for an eligibility evaluation. When Mother requested on April 12, 2017 that Student be evaluated for special education eligibility, City School began the evaluation process almost immediately. Student was determined eligible for special education and related services on May 31, 2017, well within the 120 day legal requirement then in effect. *See D.C. Code § 38-2561.02(a)(1)*. I conclude that Petitioner did not meet her burden of persuasion that DCPS denied Student a FAPE by not evaluating Student for special education at the beginning of the 2016-2017 school year.

B. Initial Evaluation

Did DCPS fail to comprehensively evaluate Student in all areas of suspected disabilities following the referral by the parent in April 2017?

For its initial eligibility evaluation of Student in April 2017, the only formal assessment of Student conducted by City School was the comprehensive psychological evaluation by School Psychologist. Petitioner contends that DCPS should also have conducted an adaptive assessment, a speech and language evaluation, an OT evaluation,

an assistive technology evaluation, an FBA, a Vocational II assessment and an auditory processing evaluation. Petitioner has the burden of persuasion on this issue.

The IDEA regulations provide that the eligibility evaluation conducted by the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parents, that may assist in determining whether the child is a child with a disability. *See* 34 CFR § 300.304(b)(1). The IDEA does not require that a particular type of evaluation be conducted to establish a child's eligibility; rather, the evaluation requirements in §§ 300.530 through 300.536 are sufficiently comprehensive to support individualized evaluations on a case-by-case basis, including the use of professional staff appropriately qualified to conduct the evaluations deemed necessary for each child. *See* Federal Policy and Guidance – OSEP Memorandum, *Analysis of Comments and Changes*, Attachment 1 (OSEP May 4, 2000). The IDEA leaves the selection of testing and evaluation materials and the procedures to be used for evaluations and reevaluations to the individual states, with the understanding that all IDEA requirements must be satisfied. *See Letter to Shaver*, 17 IDELR 356 (OSERS 1990).

School Psychologist's April 2017 Psychological Evaluation of Student was not comprehensive. The purpose of the referral was to address academic and social-emotional concerns. Arguably, the evaluation addressed academic concerns. However, the IEP did not appropriately assess Student's social-emotional issues. Specifically, School Psychologist completed her evaluation and wrote the final report without obtaining responses from a teacher for the BASC-3 and ABAS-3 rating scales. As School Psychologist, herself, noted in the report, Student obtained a Very Low FSIQ score of 70

and without a teacher's completing ABAS-3 adaptive assessment, School Psychologist could not rule out the possibility that Student has an Intellectual Disability. As Educational Advocate 2 stated in her testimony, a teacher's response to the BASC and ABAS questionnaires was also required to determine whether Student has concerns in the area of social, emotional and behavioral development or whether Student required Behavioral Support as IEP related services.

DCPS must ensure that Student has a full, comprehensive, psychological evaluation that includes assessment of Student's cognitive abilities, academic achievement levels, information processing abilities, adaptive behavior and general emotional and behavioral issues. The reevaluations must conform to relevant standards for educational and psychological testing of the profession. DCPS has now authorized funding for the parent to obtain an IEE neuropsychological evaluation of Student. DCPS may elect to rely on the IEE evaluation and not conduct its own psychological reevaluation provided that the IEE evaluation is comprehensive and covers the same concerns.

Since the due process complaint in this case was filed, DCPS has completed several evaluations requested by the parent for Student, including a speech and language evaluation, an OT evaluation, an audiological/auditory processing evaluation and an FBA. DCPS has also authorized funding for the parent to obtain IEE neuropsychological and assistive technology evaluations. I find that Petitioner did not meet her burden of proof that these additional assessments, or the Vocational II assessment, Petitioner still requests were necessary at the time of the initial evaluation to assist in determining whether Student had a qualifying disability or to determine Student's educational needs. *See* 34 CFR § 300.304(c)(2). In sum, I find that DCPS'

initial eligibility evaluation of Student was not adequate because the psychological evaluation was not comprehensive and did not include complete assessment of Student's adaptive functioning.

DCPS' failure to ensure that Student was comprehensively evaluated with an appropriate psychological evaluation was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a denial of FAPE 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 CFR § 300.513(a)(2). In this case, I conclude that Petitioner has met her burden of persuasion that DCPS' failure to ensure that Student's initial evaluation included a competent comprehensive psychological evaluation significantly impeded the parent's opportunity to participate in the decision-making process. Student was therefore denied a FAPE.

C. Initial IEP

Did DCPS fail to ensure Student was offered an appropriate initial IEP on June 1, 2017 in that the IEP 1) was not based on comprehensive evaluations and did not fully address Student's needs; 2) Present levels information and baseline data were insufficient; 3) the hours of support provided were inadequate in light of Student's academic deficits; 4) the IEP does not provide sufficient accommodations; 5) the IEP does not address Student's need for Extended School Year (ESY) services; 6) the IEP does not include adaptive goals as

appropriate based on Student's low cognitive scores and functioning and 7) the IEP does not address Student's social emotional needs.

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). "A focus on the particular child is at the core of the IDEA. The instruction offered must be '*pecially designed*' to meet a child's '*unique needs*' through an '*[i]ndividualized education program.*' 20 U.S.C. §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv)." *Id.*

DCPS holds the burden or persuasion on the appropriateness of the initial IEP. Having concluded that Student's initial eligibility evaluation in spring 2017 was not comprehensive, it follows that the initial June 1, 2017 IEP was not designed to meet Student's unique needs because the IEP team lacked the data it needed to determine Student's academic, developmental, and functional needs resulting from Student's disability. *See* 34 CFR § 300.324(a)(4). Student's IEP team, including the parent, must now consider the updated data from the additional evaluations of Student conducted by DCPS in the fall of 2017, the IEE evaluations to be obtained by the parent and the reevaluation ordered in this decision and revise Student's IEP as appropriate. Pending completion of the new evaluations and consideration by Student's IEP team of the additional information, it would be premature for this hearing officer to address the specific alleged inadequacies of the July 1, 2017 IEP, *i.e.*, Present Levels of Performance and Annual Goals, Special Education and Related Services, Accommodations and

Student's need for ESY services.

D. IEE Evaluations

Did DCPS violate the IDEA by not funding an Independent Educational Evaluation of Student requested by the parent in summer 2017?

On July 27, 2017, Petitioner's Counsel wrote the principal at City School to request that Student be evaluated for special education. Counsel requested comprehensive evaluations, including Speech and Language, OT, Auditory Processing and ABAS assessments. Petitioner's Counsel gave notice that "if the evaluations are not completed within a reasonable period of time, the parent will take appropriate steps to secure independent evaluations at public expense." Under the IDEA, subject to certain conditions, a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency and if the parent requests an independent educational evaluation. *See* 34 CFR § 300.502. In this case the parent's representative requested that DCPS conduct the specified evaluations – not that DCPS provide funding for an IEE evaluation. Although DCPS did agree to fund IEE assessments requested by the parent after the due process complaint was filed, the hearing record does not indicate that the parent requested funding for an Independent Educational Evaluation of Student in summer 2017 or at any time before filing her complaint in this case. Petitioner has not met her burden of persuasion on this claim.

E. Education Records

Did DCPS fail to afford the parent's representatives access to Student's complete education records following a request from counsel in July 2017?

On July 27, 2017, Petitioner's Counsel wrote the principal at City School to

request a copy of all of Student's education records in DCPS' possession. From July through October 2017, Petitioner's Counsel and DCPS officials corresponded by email concerning the records request. At the due process hearing, Petitioner's Counsel maintained that some requested records had not been provided. DCPS maintains that it provided all of the requested records that it was able to locate. The parent has the burden of persuasion on this issue.

The IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. *See* 34 CFR § 300.613(a). In this case, DCPS, by counsel, maintains that it has provided to Petitioner's Counsel all of the requested education records it still has. There are notable gaps, as mentioned by Petitioner's Counsel in an email to Resolution Specialist dated October 16, 2017 ("What about report cards from 14/15 SY, as well as the 1st, 2nd, and 3rd Advisory Report cards for the 15/16 school year, as well as, meeting notes/documents from meetings other than the 5/2017 meeting?")

These additional records requested by Petitioner's Counsel are undoubtedly education records that DCPS should have maintained. However, the record does not establish whether DCPS, due to negligence or otherwise, no longer maintains those records. I will order DCPS to conduct a renewed search of its education records to collect all education records relating to Student during the years that Student has

attended City School and make those records available to Petitioner's Counsel to inspect and review.

Compensatory Education Relief

In addition to seeking a comprehensive reevaluation of Student and revision of Student's IEP, the parent also requests a compensatory education award to compensate Student for the denials of FAPE in this case. "If a hearing officer concludes that the school district denied a student a FAPE, he has 'broad discretion to fashion an appropriate remedy,' which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). Compensatory education consists of prospective educational services designed to 'compensate for a past deficient program.' *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005) (internal quotation marks omitted). A final award relies on 'individualized assessments,' requires a 'fact-specific' inquiry, and must 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. The Hearing Officer should be guided by the principle that, '[t]o 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.* at 798. That 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.' *Id.* at 799." *Butler v. District of Columbia*, Case No. 16-cv-01033 (D.D.C. Aug. 14, 2017).

In this decision, I have found that DCPS denied Student a FAPE by not comprehensively evaluating Student in spring 2017 and by not ensuring that Student's IEP team had the data it needed to determine Student's unique academic,

developmental, and functional needs in order to develop Student's initial IEP. In the days before the due process hearing, DCPS completed or authorized IEE funding for a speech and language evaluation, an OT evaluation, an audiological/auditory processing evaluation, an FBA and neuropsychological and assistive technology evaluations of Student. In addition, I will order that DCPS complete a comprehensive psychological reevaluation with an adaptive behavior component, unless DCPS elects to adopt the findings of the IEE neuropsychological evaluation. None of these evaluations have been considered by Student's IEP team.

In the *Butler* decision, *supra*, the Court pronounced that “[a] hearing officer who finds that he needs more information to make . . . an individualized [compensatory education] assessment has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award or he can order the assessments needed to make the compensatory education determination. In the end, he must solicit the evidence necessary to determine the student's specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits. What [the hearing officer] cannot do is . . . outright reject an award for compensatory services and terminate the proceedings.” *Butler, supra* (citations and internal quotations omitted.)

In this case, neither of the two options described in *Butler* is available. Until Student's IEP team reviews the several evaluations and reevaluations of this student and decides what, if any, revisions to Student's IEP are appropriate, to figure out either what position the student would be in absent the FAPE denial in this case or how to get the student to that position would be an exercise in speculation. Unfortunately, the IDEA procedural regulations do not allow the hearing officer to hold this case open until the

evaluations are completed and the IEP team meets to review Student's IEP. *See* 34 CFR § 300.515(a) (The public agency must ensure that not later than 45 days after the expiration of the 30 day resolution period, a final decision is reached in the hearing.) For this reason, in this case, I will deny the Petitioner's request for compensatory education – without prejudice to her right to seek a compensatory education award in a new proceeding after the additional evaluations are completed and reviewed by Student's IEP team and any needed revisions Student's IEP are made.²

ORDER

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

ORDERED:

1. Within 20 school days of this decision, subject to obtaining Petitioner's consent, DCPS shall conduct a comprehensive psychological reevaluation of Student, to include an adaptive behavior assessment. DCPS shall ensure that this reevaluation conforms to all relevant standards of the profession for educational and psychological testing of students with disabilities. Alternatively, DCPS may elect to accept the findings of the IEE neuropsychological evaluation to be obtained by the parent, provided that the latter evaluation is appropriately comprehensive and includes an adaptive behavior assessment. Upon receipt of this evaluation and the other evaluations and assessments completed by DCPS or for which DCPS has issued IEE funding, DCPS shall promptly reconvene Student's IEP team to review the additional information and to update Student's IEP as appropriate;
2. Petitioner's request for a compensatory education award for the denials of FAPE determined in this decision is denied without prejudice so that the IEE evaluations funded by DCPS and the psychological reevaluation ordered in this decision may be completed and to allow time for Student's IEP team to review these new assessments and the evaluations already

² Anticipating this procedural hurdle over making a compensatory education assessment prior to completion of Student's evaluations and the meeting of Student's IEP team, the hearing officer proposed to Petitioner and Petitioner's counsel at the start of the due process hearing on November 16, 2017 that Petitioner withdraw her complaint without prejudice and refile after the evaluations were completed and the Student's IEP team met. Petitioner declined this option.

completed by DCPS and to revise Student's IEP as appropriate;

3. DCPS shall conduct a renewed diligent search of its records, including but not limited to City School records, to collect all education records relating to Student during the years that Student has attended City School and, within 20 school days of the date of this order, shall make those records available to Petitioner's Counsel to inspect and review and
4. All other relief requested by the Petitioner herein is denied.

Date: November 24, 2017

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

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team