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Office of the State Superintendent of Education
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Confidential

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| <p>Parent on Behalf of Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”) Respondent.</p> <p>Case # 2017-0226</p> <p>Date Issued: November 4, 2017</p> | <p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: October 23, 2017</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p> |
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, November 4, 2017, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on October 23, 2017, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution, 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006. The parties submitted written closing arguments on November 1, 2017.

BACKGROUND AND PROCEDURAL HISTORY:

The student or “Student” is age _____ and in grade _____.² The student resides with the student’s parents in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of specific learning disability (“SLD”). Student attends a District of Columbia Public Schools (“DCPS”) school (“School A”). DCPS is the student’s local educational agency (“LEA”).

Student’s mother (“Petitioner”) filed the current due process complaint on August 21, 2017, alleging, inter alia, that DCPS denied Student a free appropriate public education (“FAPE”) by failing to propose an appropriate individualized educational program (“IEP”).

The parties participated in a resolution meeting on September 5, 2017, and did not resolve the complaint. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on September 21, 2017, and ended [and the Hearing Officer’s Determination (“HOD”) is due] on November 4, 2017.

The undersigned Impartial Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on the complaint on September 28, 2017, and issued a pre-hearing order (“PHO”) on October 4, 2017, outlining, inter alia, the issues to be adjudicated.

RELIEF SOUGHT:

Petitioner is seeking the following relief: that DCPS be ordered, or agree, to complete and/or fund a speech language assessment and/or an occupational therapy (“OT”) assessment, and convene a multidisciplinary team (“MDT”) meeting to review those assessments and review and revise the student’s IEP as warranted, to increase the student’s hours of specialized instruction in the areas of math, reading, and writing; review and revise the student’s IEP to include appropriate goals and baselines; include counseling and support services for socio-emotional issues and determine any compensatory education that may be due.

DCPS Response to the Complaint: DCPS filed a timely response to the complaint on August 31, 2017. DCPS denies the allegation that it failed to provide the student a FAPE and asserts,

² The student’s current age and grade are indicated in Appendix B.

inter alia, on December 7, 2016, Petitioner requested Student be evaluated to determine his eligibility for special education and related services. On January 14, 2017, DCPS issued prior written notice (“PWN”) to evaluate Student. On March 6, 2017, Petitioner signed consent to evaluate. DCPS completed a comprehensive psychological evaluation and social history report for Student. Petitioner did not request any additional assessments. DCPS is unaware of any need for additional assessments.

On June 1, 2017, the MDT convened to review the assessments. The team determined Student eligible for special education under the disability classification SLD. The team developed an initial IEP for Student requiring 3 hours per week of specialized instruction outside of the general education setting. Student’s IEP was appropriate at the time it was developed. On August 15, 2017, Petitioner through counsel requested independent evaluations: OT and speech language. Petitioner did not request any meetings to discuss the need for additional assessments prior to this request. Petitioner has not disagreed with any assessments conducted by DCPS and is, therefore, not entitled to independent evaluations. DCPS was willing to, and has now, conducted additional assessments that need to be reviewed by an IEP team.

ISSUES:³

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to timely evaluate the student by April 2017 based on a parental request.
2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on June 1, 2017.⁴
3. Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by not conducting a speech language evaluation and OT evaluation by no later than June 2017.⁵

³ The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner asserts the student should have been provided more than 3 hours of specialized instruction per week, counseling and/or behavioral support services and goals, more specific IEP goals to address Student’s need for further vocabulary development, decoding and phonemic awareness and to redress the student’s math deficits, including a graphic organizer, along with the use of chunking and repetition.

⁵ Petitioner’s asserts that although DCPS conducted a May 2017 confidential psychological evaluation, there were no speech and language and OT assessments conducted, despite the student’s delays in processing, decoding, and articulating sounds. Petitioner asserts that by no later than June 2017, a speech language and OT evaluation should have been conducted by DCPS and reviewed with Petitioner.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 46 and Respondent's Exhibits 1 through 20) that were admitted into the record and are listed in Appendix A.⁶ Witnesses' identifying information is listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner had the burden of production on all issues to be adjudicated and held the burden of persuasion on issues #1 and #3. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issues #1, but did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. Respondent held the burden of persuasion on issue #2. Petitioner established a prima facie on issue #2, and Respondent sustained the burden of persuasion on issue #2 by a preponderance of the evidence. Consequently, the Hearing Officer granted Petitioner compensatory education for the denial of FAPE determined.

FINDINGS OF FACT:⁸

1. Student resides with Student's parents in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of SLD. Student attends School A, a DCPS school and DCPS is Student's LEA. Prior to attending School A, the student attended another DCPS school ("School B") during school year ("SY") 2016-2017. (Petitioner's testimony, Petitioner's Exhibit 4-1)
2. Student has attended a number of different schools over the past few years and for a time Student's family was homeless and living in a shelter. As a result, Student missed a significant amount of school and the absences may have contributed to Student's lack of academic progress. (Petitioner's testimony, Witness 2's testimony, Petitioner's Exhibit 7)
3. Student is eager to learn but has difficulty reading, difficulty retaining information, and difficulty doing math. As a result of Student's academic difficulties, the student's parent provided School B a hand written note dated December 6, 2016, requesting School B

⁶ Any items disclosed and not admitted or admitted for limited purposes were noted on the record and summarized in Appendix A.

⁷ Petitioner presented three witnesses: Petitioner, two educational advocates employed by the law firm that is representing Petitioner. Respondent presented two witnesses: a DCPS special education teacher and a DCPS school psychologist.

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

start the process to determine if the student needed special education services. On December 7, 2017, School B acknowledged the request. (Petitioner's testimony, Petitioner's Exhibits 37, 38, 39)

4. In response to the request for evaluation, DCPS reviewed data on the student and on February 2, 2017, prepared an Analysis of Existing Data ("AED") for the student and provided it to Petitioner. (Petitioner's Exhibit 34)
5. On March 6, 2017, DCPS provided Petitioner a Prior Written Notice ("PWN") indicating that it wanted to proceed by conducting formal evaluations of the student to determine the student's eligibility for special education. (Petitioner's Exhibit 31)
6. On March 7, 2017, Petitioner provided DCPS written consent to conduct the requested evaluation. On April 6, 2017, another signed consent to evaluation was provided to DCPS. (Respondent's Exhibit 5, Petitioner's Exhibit 30)
7. The School B psychologist first started trying to assess the student on March 30, 2017. She attempted again on April 3, and April 4, but the student was absent. The school psychologist was able to evaluate the student on May 8, 2017. The DCPS psychologist completed her report on May 29, 2017. (Witness 3's testimony, Respondent's Exhibit 6)
8. Student's cognitive functioning was assessed as being in the Borderline range with a full-scale IQ score of 70. Student's reading and math achievement was in the Borderline range with a standard score of 70 and 75 respectively. Student's written expression was also in the Borderline range. The DCPS psychologist recommended the student be determined eligible for special education with the SLD disability classification. (Respondent's Exhibit 6-1, 6-3, 6-5, 6-6)
9. DCPS completed a social history report for Student that documented Student's family experiencing homelessness from April 2015 through May 2016. The report also documented Student being affected by the recent death of family members. Otherwise, the report noted that Student did not have social, emotional or behavioral concerns, except that Student sometimes becomes disheartened or upset when Student does not understand classwork. (Respondent's Exhibit 7)
10. Student's report card during SY 2016-2017 reflected that Student was operating below graded level in most academic areas during the school year. (Respondent's Exhibit 12)
11. Although Student was operating below basic academically, Student was able to make progress in reading prior to being provided special education services. However, in the area of math, Student made significant progress on a School B administered assessment from the beginning of SY 2016-2017, to mid-year; but Student's math score on that assessment declined by the end of SY 2016-2017. (Petitioner's Exhibits 27, 28)
12. On June 1, 2017, School B convened an eligibility meeting at which the team reviewed the evaluations and determined Student eligible for special education with the SLD

disability classification. The team developed Student's initial IEP with goals in the academic areas of math, reading and written expression. The IEP also included one goal in the areas of emotional, social and behavioral development. The IEP prescribed the student be provided 3 hours per week of specialized instruction outside the general education setting. The IEP did not prescribe any related services. The IEP includes classroom and testing accommodations such as extended time. (Petitioner's Exhibit 5)

13. Aside from the math, reading and written expression goals, there were no other areas mentioned by the parent or other IEP team members for which the student needed goals. There was no mention that homelessness had any negative impact upon the student's social or emotional functioning. Behavioral support was not warranted because the student's behavior was age appropriate in the classroom. Student was able to participate in the classroom and demonstrated no signs of frustration. The student did not have concerns with peers or teachers. There was no request, or reason to assess the student in the area of speech language or OT. However, the student had some difficulty explaining thoughts verbally and in written format. (Witness 3's testimony)
14. The team agreed Student met SLD criteria and would receive specialized instruction in the areas of math, reading and written expression. The team agreed Student needed to be pulled out of the general education classroom by a special education teacher for 3 hours per week. The IEP team members felt that as an initial IEP the level of services were appropriate and if later it was determined Student needed more specialized instruction at Student's next school in SY 2017-2018, a team at the new school could increase the hours. There was no disagreement by any team member about that level of services prescribed in the IEP. There was no request for more specialized instruction or related services by anyone who participated in the IEP development, including Petitioner, prior to the due process complaint being filed. (Witness 3's testimony)
15. Petitioner filed the student due process complaint on August 21, 2017, at the start of SY 2017-2018. Since the complaint was filed, DCPS conducted additional evaluations of the student including an assistive technology ("AT") evaluation, a speech language and OT evaluations. An IEP team has not yet reviewed the evaluations. (Respondent's Exhibits 8, 9, 10)
16. Student has a hard time staying focused in large group and works well in small groups and with direct instruction. It typically takes Student more opportunities to develop a skill and Student has retention concerns. To address the retention concerns, Student's teachers at School A typically review with Student in the general education classroom before moving onto the next instructional topic. Student's current special education teacher acknowledges that the student could benefit from a few more hours of specialized instruction per week when the student's IEP is reviewed. When Student is pulled out of the general education classroom, Student is missing the general curriculum instruction. Consequently, Student's teacher would recommend that any additional specialized instruction considered be provided in the general education setting. (Witness 4's testimony)

17. At School A the student is provided whole group instruction, small group and is pulled out of the general education classroom as the IEP requires. The student has academic areas that require remediation. At times the calculations can be difficult for the student but with the use of a calculator and the small work group, the student can work through the curriculum. Student may be a little bit more distractible but responds to teacher redirection. A graphic organizer is used to visually organize information and is available to the student when appropriate. (Witness 4's testimony)
18. Student has gone through homelessness and would benefit from counseling inside and outside of school. Student has issues with frustration tolerance and is not able to complete class work as fast as the student would like. Counseling might help Student learn strategies to deal with academic frustration. DCPS referred Student for grief and loss counseling, and Student is receiving that counseling at school. (Witness 1's testimony)
19. Petitioner's educational advocate prepared a compensatory education plan that proposed 200 to 300 hours of academic tutoring and 100 to 150 hours of mentoring to address the alleged denials of FAPE. The advocate based the recommendation primarily on Student's academic deficits and what it would require to remediate those deficits, rather than the alleged violations in the due process complaint particularly, the alleged delay in providing services from April 2017 to June 2017, and the alleged insufficiency in hours of specialized instruction. The advocate also asserted that the compensatory education plan calculations include a presumption that Student should have been provided ESY services, which was not alleged in the due process complaint. (Witness 2's testimony, Petitioner's Exhibit 46)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the

child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, as noted in the PHO and at the hearing, Petitioner has both the burden of production and persuasion on the following issues above: #1 & #3. Respondent holds the burden of persuasion on the following issue #2. Petitioner shall establish a prima facie case on issue #2 before the burden of persuasion falls to Respondent.⁹ Petitioner established a prima facie case on both issues on issue # 2. The normal standard in determining the burden of persuasion is the preponderance of the evidence. See, e.g. *N.G. v. District of Columbia* 556 F. Supp. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to timely evaluate the student by April 2017 based on a parental request.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

DCPS is required to complete evaluations of children in 120 days under the IDEA and DC law. 34 CFR § 300.301(c)(ii); D.C. Code § 38-26561.02 (2010) (DCPS shall evaluate within 120 days from the date the child was referred). Evaluation under the IDEA includes assessment procedures as well as the eligibility determination. See 34 CFR §§ 300.15 (definition of evaluation includes § 300.306), 300.306 (procedures for eligibility meeting and decision).

⁹ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

On December 6, 2016, Student's parent made a written request for evaluation to determine the student's eligibility for special education. DCPS acknowledged the request on December 7, 2017, and completed an AED in February 2017 and issued a PWN in March 2017 indicating that it would proceed with formal evaluations. It was not until March 7, 2017, that the parent provided written DCPS with an executed consent for evaluation. Neither Petitioner, nor Respondent offered any explanation for the delay between Petitioner's December 6, 2016, written request and the formal consent to evaluate being provided DCPS.

The evidence demonstrates that DCPS first attempted to formally evaluate the student in late March 2017 but was unable to do so due to the student's absence from school. Another consent to evaluate was provided to DCPS in early April 2017. DCPS was finally able to formally evaluate the student on May 8, 2017, and the evaluation process was completed and the student was determined eligible on June 1, 2017.

Petitioner asserts that the evaluation process should have been completed and the student should have been determined eligible by April 2017. Based upon the plain reading of the regulations, DCPS is required to complete the evaluation process and determine a child's liability within 120 days of the initial referral that occurred on December 7, 2016. Consequently, based upon the evidence that Petitioner provided DCPS the written request on December 6, 2017, the Hearing Officer concludes there was a two-month delay in the student being found eligible and being provided special education services. The Hearing Officer concludes that a result the student was not provided at 24 hour of specialized instruction that Student would have otherwise received had Student's evaluation and eligibility process been completed timely. Therefore, the student was denied a FAPE as a result.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP on June 1, 2017.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

Under the recent Supreme Court decision, *Andrew F. v. Douglas County School District Re-1*, a district must provide "an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances." 137 S. Ct. 988, 999 (2017).

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 173 (3d Cir. 1988)), and the centerpiece for

the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 47. The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians; any re-view of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Removing a child with disabilities “from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily.” 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the “maximum extent appropriate”); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (“The IDEA requires school districts to place disabled children in the least restrictive environment possible.”)

The evidence demonstrates that the IEP team reasonably determined that the student was due specialized instruction in the amount of 3 hours per week outside the general education setting. The student’s current special education teacher credibly testified that the student is able to access the general education curriculum with the amount of services provided. In addition, the DCPS school psychologist credibly testified that based upon the student’s social emotional functioning and behavior in school there was no need for the student to be provided behavior support as a related service. In addition, the IEP team was of the opinion that if it were later determined that the student required more services at the next school, the IEP could be reviewed and more services could be added. Consequently, the Hearing Officer concludes that based on the evidence presented, it was reasonable for the IEP team that met and developed the student’s IEP on June 1, 2017, to prescribe the level of services, goals and accommodations that were in the student’s initial IEP.

Although Petitioner presented educational advocates who testified that the student required more services than the IEP prescribed, the Hearing Officer did not find their testimony convincing. The advocates had never spoken to the psychologist who conducted the evaluation of the student, never participated in any meetings at school about the student, and have not spoken to any of Student’s teachers. The advocates are not aware of how the student is performing in classes at School A. The advocates are not aware of how the student’s instruction is delivered at School A. The advocates have never sent any of the concerns raised about the student or the student’s IEP to School A.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to evaluate the student in all areas of suspected disability by not conducting a speech language evaluation and occupational therapy evaluation by no later than June 2017.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Pursuant to 34 C.F.R. § 300.305 (a):

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--(1) Review existing evaluation data on the child, including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--(i)(A) Whether the child is a child with a disability, as defined in Sec. 300.8, and the educational needs of the child.

Pursuant to 34 C.F.R. § 300.304 (c)(4) an agency must ensure that:

The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Petitioner asserts that although DCPS conducted a May 2017 confidential psychological evaluation, there were no speech and language and OT assessments conducted, despite the student's delays in processing, decoding, and articulating sounds. Petitioner alleges that no later than June 2017, a speech language and OT evaluation should have been conducted by DCPS and reviewed with the parent.

Petitioner presented no evidence that Student required evaluation in the areas of OT and speech language. As DCPS counsel aptly points out in her closing argument, Petitioner presented testimony from witnesses but there was no testimony about concerns that warrant a speech language or OT evaluation. There is no evidence in the record that Student required additional testing as a part of the initial evaluation process. Although the student's existing evaluation may have indicated that the student has the delays Petitioner asserts, there was no evidence that these delays required further evaluation. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award 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." *Reid*, 401 F.3d 516 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Although the Hearing Officer has found a denial of FAPE, the record does not support the requested relief. The advocate's compensatory education proposal does not meet the standard in *Reid*.

As DCPS counsel points out in her closing argument, Petitioner's educational advocate who developed the proposed compensatory education plan was clearly off the mark as to the services requested and the denial of FAPE determined. The Hearing Officer concludes the student missed approximately 20 hours of specialized instruction as a result of the evaluation and eligibility process being delayed. The Hearing Officer will therefore grant Petitioner a nominal amount of tutoring services because to grant nothing would be inequitable.¹⁰

ORDER: 11

1. DCPS shall, within ten (10) school days of the issuance of this order, provide Petitioner authorization for fifteen (15) hours of independent tutoring at the OSSE prescribed rate.
2. All other requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: November 4, 2017

¹⁰ Once a plaintiff "has established that she is entitled to [a compensatory education] award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students." *Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010) (quoting *Reid*, 401 F.3d at 524, 527).

¹¹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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