

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

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

Date Issued: October 31, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0191

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: October 19-20, 2016

Respondent.

Office of Dispute Resolution, Room 2006  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student was denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to ensure that Student was provided appropriate Individualized Education Programs (IEPs) and educational placements and by DCPS’ failure to conduct a comprehensive reevaluation of Student when a request was made in March 2016.

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

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 17, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 18, 2016. The parties met for a resolution session on September 1, 2016 and were unable to reach an agreement. My final decision in this case is due by October 31, 2016. On September 15, 2016, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other procedural matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on October 19-20, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner participated in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

The Petitioner testified and called as witnesses MENTOR, EDUCATIONAL ADVOCATE 1, NONPUBLIC SCHOOL PRINCIPAL and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses COMPLIANCE CASE MANAGER, SPECIAL EDUCATION DIRECTOR and LEA Representative. Petitioner's Exhibits P-1 through P-60 and P-62 through P-64 were admitted into evidence, including Exhibits P-4 through P-11, P-40 through P-44, P-55 through P-58 and P-64 which were admitted over DCPS' objections. I sustained DCPS' objection to Exhibit P-61. Exhibit P-64 is the curriculum vitae of Nonpublic School Principal. DCPS objected to admission of this document because it was disclosed the day after the parties' 5-day disclosures were due. I found that DCPS suffered no prejudice from the untimely disclosure, but limited this witness' testimony to those specific areas described in Petitioner's witness list which had been timely

disclosed. DCPS' Exhibits R-1, R-2 and R-4 through R-17 were admitted into evidence, including Exhibit R-11 admitted over DCPS' objection. Exhibit R-3 was not offered. Counsel for the respective parties made opening statements. At the conclusion of Petitioner's case-in-chief, counsel for DCPS made an oral motion to strike, which I denied after finding that Petitioner had established a *prima facie* case that the IEPs at issue were not appropriate for Student. Counsel for both parties made closing arguments. There was no request to file post-hearing briefs.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The following issues for determination were certified in the September 15, 2016

Prehearing Order:

A. Whether DCPS failed to provide Student with an appropriate IEP and Placement from the 2014-2015 and 2015-2016 school years to the present to address Student's minimal progress under the hours of instruction designated on her IEPs, and where Student's placement and level of instruction have remained substantially the same since 2013, despite her lack of progress, substantial deficits, and the concerns raised by her parent regarding her placement and location of services and

B. Whether DCPS failed to comprehensively reevaluate Student in all areas of suspected disabilities and to timely convene a meeting to review Student's reevaluations following a request for reevaluations by the parent in March 2016.<sup>2</sup>

For relief, the Petitioner requests that DCPS be ordered to convene Student's IEP team to revise her IEP based on her latest reevaluations and to address her appropriate

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<sup>2</sup> At the beginning of the hearing on October 19, 2016, Petitioner's Counsel withdrew an additional issue, whether DCPS failed to provide the parent access to all of Student's education records following a request made on March 21, 2016,

placement; that the hearing officer order that Student's IEP and Placement be amended to reflect her need for full-time instruction in a separate special education day school; and that DCPS be ordered to fund Student's nonpublic placement at Nonpublic School for the 2016-2017 school year. In addition, Petitioner seeks a compensatory education award to compensate Student for the denials of FAPE alleged in the complaint, or alternatively, an order for DCPS to fund a third party compensatory education assessment.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student an AGE youth resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education and related services as a child with an Intellectual Disability (ID). Exhibit P-16.

2. Student was initially determined eligible for special education as a pre-kindergartner at CITY SCHOOL 1. Her initial disability classification was Speech-Language Impairment (SLI). Since the initial eligibility determination, Student has always been placed in a self-contained classroom. A DCPS school psychologist conducted a psychological reevaluation of Student in fall 2011. On the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), Student demonstrated abilities falling in the Low Average to Extremely Low range. Her nonverbal reasoning abilities were in the Extremely Low range. Student's Working Memory tested in the Low Average range. Her Processing Speed Index was in the Borderline range. On the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2), Student obtained a Full Scale Composite score in the Below Average range. On the WISC-IV,

Student was unable to complete two verbal subtests due to her receptive and expressive language difficulties. Therefore, her Full Scale IQ could not be obtained. Exhibit P-9. Student was also administered the Young Children's Achievement Test to evaluate her educational development. Her scores were all 3<sup>rd</sup> percentile or below. Her Early Achievement composite score was below the 1<sup>st</sup> percentile. Exhibit P-7. On October 24, 2011, the City School 1 eligibility committee confirmed SLI as Student's primary disability. Exhibit P-41.

3. Student's IEP was revised at City School 1 on October 3, 2013. This IEP provided for full-time, 25 hours per week, Specialized Instruction outside general education and provided, as Related Services, 240 minutes per month of Speech-Language Pathology, 240 minutes per month of Occupational Therapy (OT) and 120 minutes per month of Behavioral Support Services. Exhibit P-29.

4. Student was reevaluated by DCPS in November 2013. On the Reynolds Intellectual Assessment Scales (RIAS), Student demonstrated cognitive abilities falling in the Below Average to Significantly Below Average Range. On the CTONI-2, Student obtained scores in the Very Poor range. On the Woodcock-Johnson Tests of Achievement (WJ-III), Student's scores fell in the Very Low range. The school psychologist concluded that Student met criteria as a student with a Specific Learning Disability (SLD) in reading, mathematics and written expression. Exhibit P-4. On February 5, 2014, the City School 1 eligibility committee changed Student's primary disability classification to SLD. Exhibit P-27. Her Special Education and Related Services were left unchanged. Exhibit P-26.

5. Student's IEP Progress Report for the period ending March 28, 2014 stated that Student was progressing on all of her February 5, 2014 IEP Annual Goals,

except for one Speech and Language goal, which had not been introduced. Exhibit P-24.

6. On May 9, 2014, Student's IEP was revised at an annual review meeting at City School 1. Her annual goals and present levels of performance were updated. Her Special Education and Related Services were left unchanged. Exhibit P-23.

7. For the 2014-2015 school year, Student transferred to CITY SCHOOL 2. As of January 23, 2015, four of Student's five mathematics annual IEP goals had not been introduced. Student was reported to be progressing on four of six reading goals. Two reading goals had not been introduced. Student was reported to be progressing on her single written expression goal. Exhibit P-21.

8. Student's IEP was amended on March 30, 2015 to add Extended School Year (ESY) services. Exhibit P-22.

9. On May 4, 2015, Student's IEP was revised at an annual review meeting at City School 2. The IEP sections, Present Levels of Academic Achievement and Functional Performance, description of how the disability affects access to the general education curriculum and description of how disability affects progress in the general education curriculum were largely copied, verbatim, from the May 9, 2014 IEP. Exhibit P-20. Student's annual goals were updated. Her Special Education Services, OT and Behavioral Support Services were left unchanged. Speech-Language Pathology Services were reduced from 240 minutes per month to 3 hours per month. Exhibit P-20.

10. On her report card for the 1<sup>st</sup> quarter of the 2015-2016 school year, Student's grades on core academic subjects were all Basic or below. Exhibit P-49.

11. As of November 13, 2015, three of Student's four mathematics annual IEP goals and her single written expression annual goal had not been introduced. She was

reported to be progressing on her reading annual goals and to have mastered or to be progressing on all of her Related Services goals. Exhibit P-19.

12. On March 15, 2016, Student's IEP was revised at an annual review meeting at City School 2. The new IEP was amended on March 24, 2016. Student's annual goals and present levels of performance were updated from the May 4, 2015 IEP. Her Special Education Services were left unchanged from the prior IEP. The IEP provided, as Related Services, 120 minutes per month of Speech-Language Pathology, 120 minutes of OT and 120 minutes per month of Behavioral Support Services. Exhibits P-17, P-18.

13. In November 2015, at the end of the first term of the 2015-2106 school year, City School 2 special education staff felt that Student needed to be reevaluated due to less than expected academic progress. Because of staff health issues, the reevaluation was not pursued. Testimony of LEA Representative.

14. In March 2016, Mentor contacted LEA Representative on behalf of Mother. She wrote that Mother was concerned that even though Student continued to perform at around kindergarten level, she was being promoted at the end of each school year. At the March 24, 2016 IEP meeting, Mother requested that Student be reevaluated by a psychologist to determine if her current special education placement was appropriate. LEA Representative agreed that Student should be reevaluated and said that she would initiate the reevaluation process. Testimony of Mentor, Exhibit P-54. The reevaluation was not started until June 1, 2016 because SCHOOL PSYCHOLOGIST was out on medical leave. Testimony of LEA Representative.

15. In her June 27, 2016 psychological reevaluation report, School Psychologist reported that, although Student's 2014-2015 end-of-year Report Card indicated that she was approaching grade level expectation in several core subjects, she

was actually performing at kindergarten and first grade level in most subjects. Exhibit P-1, P-46. Notably, Student was reading at Level C (end of kindergarten) on the Fountas & Pinnell scale. Student's classroom teacher informed School Psychologist that Student was functioning academically at a kindergarten level and that Mother had expressed concerns about Student's matriculating to a [REDACTED] grade. School Psychologist assessed Student's cognitive functioning using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) and the Test of Nonverbal Intelligence 4rd Edition (TONI-4). Student's scores on the WISC-V were all in the Extremely Low range. Her scores on the TONI-4, which was provided in an oral format, were in the Poor range for an age equivalency some five years below Student's actual age. School Psychologist administered the WJ-IV to measure Student's academic achievement. Her overall performance measured in the Very Low range, pre-kindergarten to early 1<sup>st</sup> grade, for all areas of academic functioning. Ratings scales response obtained on the Gilliam Autism Rating Scale-Third Edition (GARS-3) indicated Probable or Very Likely characteristics of Autism Spectrum Disorder with a severity level requiring minimal support (teacher) and substantial support (Mother). School Psychologist administered the Adaptive Behavior Assessment System Third Edition (ABAS-3) to assess for disorders with daily functioning associated with developmental delays, autism, ADHD and other learning and behavior disorders. On the rating scale completed by Mother, Student's scores were in the Extremely Low range. On the teacher's response, Student's profile was in the Low to Average range. School Psychologist noted that the adaptive scores yielded on the ABA-3 and GARS-3 measures completed by the teacher did not align with school records and previous evaluations of Student's age-appropriate adaptive function and that the teacher's measure may have been an overestimation of Students' overall

cognitive and adaptive functioning. School Psychologist deduced that the teacher's responses on the GARS-3 and the ABAS-3 may not have been reflective of Student's adaptive abilities as compared to non-disabled children. School Psychologist concluded that Student was determined to meet classification of a student with an ID and that the data did not support criteria for Autism Spectrum Disorder. Exhibit P-1. The psychological reevaluation was completed on June 27, 2016. The reevaluation report was not provided to Petitioner's Counsel until August 4, 2016. Exhibits P-1, P-52.

16. On May 20, 2016, DCPS conducted a Speech and Language reevaluation of Student. Exhibit P-3. On May 23, 2016, DCPS completed an OT reevaluation of Student. Exhibit P-2.

17. On September 1, 2016, DCPS sent Mother a Prior Written Notice (PWN), notifying her that DCPS had determined that Student met criteria as a student with an ID disability and that she continued to be eligible for special education services. Exhibit R-1.

18. Following the Resolution Session Meeting for this case on September 1, 2016, Mother and Petitioner's Counsel agreed with the DCPS representatives to immediately convene an eligibility meeting. Following review of the June 27, 2016 DCPS psychological evaluation and other data, Petitioner's Counsel stated that Mother would tentatively agree to changing Student's disability classification to ID, but added that Mother was requesting an independent educational evaluation. Exhibit R-2.

19. On September 23, 2016, Student's IEP team convened to develop a revised IEP for Student. Mother, Educational Advocate and Petitioner's Counsel attended the IEP meeting. The IEP team developed a revised IEP with 25 hours per week of Specialized Instruction, 120 minutes per month of Behavioral Support Services, 120

minutes per month of OT and 30 minutes per month of speech consultation services. The parent did not agree with the amount of OT and speech-language services provided. Petitioner's Counsel requested Independent Educational Evaluation (IEE) comprehensive psychological and OT reevaluations. The IEP was to be finalized on September 26, 2016. Exhibit P-15

20. By letter of October 5, 2016, DCPS' Deputy Chief for Specialized Instruction notified Mother that DCPS had identified City School 4 as Student's new location of services and that City School 4 would be able to implement Student's IEP and provide the Specialized Instruction and related services to which Student was entitled. Exhibit R-15. City School 4 has a self-contained Independent Learning Support (ILS) program for students with ID. The ILS curriculum includes math, reading, life skills, social studies and science. The ILS classroom currently has 5 or 6 students taught by a special education teacher and a paraprofessional. Testimony of Special Education Director. Mother has been invited to visit the program, but has not yet done so. Testimony of Compliance Case Manager.

21. Nonpublic School is a small special education day school in the District of Columbia. It currently serves 34 students, most of whom have Intellectual Disabilities. Class size is limited to 7 students taught by 4 adults. The school uses, *inter alia*, an intensive, evidence based, reading support program. The school offers speech-language, OT, Physical Therapy and Behavioral Support services. Nonpublic School focuses on functional daily skills through a functional living course and life skills course, which may include job training. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). The tuition is set at \$245.00 per day based on the OSSE approved rate. Charges for Related Services are

additional. Nonpublic School has offered Student immediate admission based upon its review of her education records and evaluations and an interview with Mother.

Testimony of Principal.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer 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 child'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**

1. Did DCPS fail to comprehensively reevaluate Student in all areas of suspected disabilities and to timely convene a meeting to review Student's reevaluations following a request for reevaluation made by the parent in March 2016?

Student was reevaluated for a triennial evaluation in February 2014. At that time, her special education eligibility was confirmed under the Specific Learning Disability (SLD) classification. In the 2015-2016 school year, Mother was concerned by

the rate of Student's progress and whether she should matriculate to the next level school. At a March 24, 2016 IEP team meeting, Mother requested that Student be reevaluated by a psychologist to determine if her current special education placement was appropriate. LEA Representative agreed. However the reevaluation was not started until June 1, 2016 and the report was not provided to the parent until August 4, 2016. Student's eligibility team was convened on September 1, 2016 to review the reevaluation. Student's disability classification was changed from SLD to ID at the meeting. By that time, Student had already matriculated to City School 3. Petitioner contends that DCPS denied Student a FAPE by not timely completing the reevaluation upon her request in March 2016. Petitioner holds the burden of persuasion on this issue.

The IDEA provides that a special education reevaluation may occur not more than once a year and must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parents or teacher requests a reevaluation. *See District of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 93–94 (D.D.C. 2014). *See, also*, 34 CFR § 300.303(a); U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46648 (August 14, 2006).

The IDEA does not set a timeline for completing reevaluations outside of the triennial reevaluation requirement. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, the *Herbin* decision concluded that “[r]evaluations should be conducted in a ‘reasonable

period of time,' or 'without undue delay,' as determined in each individual case.” *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 IDELR 1127, 1129 (1995)).

DCPS’ witness, LEA Representative, explained that, even before Mother requested a reevaluation in March 2016, the City School 2 special education team felt that Student should be reevaluated after the end of the first term of the 2015-2016 school year. However, Student’s reevaluation was delayed then, and after the parent’s March 2016 request, due to school staff health issues. While some delay in completing a student’s reevaluation due to staff health issues would not be unreasonable, I find that the lapse of time in completing the reevaluation process for Student, from November 2015 when school staff determined she should be reevaluated, to the September 2016 eligibility meeting, was undue delay.

The failure to timely conduct an IDEA reevaluation is a procedural violation of the Act. *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). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016). In this case, the change in Student’s disability

category from SLD to ID meant that Student would require different programming than she had been receiving, with emphasis on life skills for students with an Intellectual Disability. Certainly, Student's reevaluation should have been completed by the end of the 2015-2016 school year, and Student should have been offered a revised IEP and an appropriate program for her ID disability before the start of the 2016-2017 school year. I find that DCPS' delay in completing Student's reevaluation process until September 2016 impeded Student's right to a FAPE and resulted in a deprivation of educational benefit.

Mother also contends that DCPS' reevaluation of Student was not sufficiently comprehensive because it did not include a neuropsychological evaluation. The IDEA regulations provide that the 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 parent, 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 (May 4, 2000). The Act leaves the selections 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).

I find that Mother did not establish that DCPS' 2016 reevaluation of Student, which included comprehensive psychological, OT and Speech-Language reevaluations, was not sufficiently comprehensive. In September 2016 Petitioner's Counsel requested an IEE comprehensive psychological and OT reevaluations for Student. A parent may disagree with the evaluation conducted by DCPS and may request an Independent Education Evaluation (IEE) at public expense. *See* 34 CFR § 300.502(b). Because Mother's request for an IEE evaluation was made after her complaint was filed in this case, whether she has a right to an IEE at public expense is not ripe for decision.

2. Did DCPS fail to provide Student with an appropriate IEP and placement from the 2014-2015 and 2015-2016 school years to the present, to address Student's minimal progress under the hours of instruction designated on her IEPs, and where Student's placement and level of instruction have remained substantially the same since 2013, despite her lack of progress, substantial deficits, and the concerns raised by her parent regarding her placement and location of services?

Student has been receiving full-time special education services in a self-contained classroom setting since kindergarten. Her disability classification was initially Speech-Language Impairment. In February 2014, Student's disability classification was changed to SLD. After the complaint in this case was filed, her disability classification was changed again to ID. Despite receiving years of special education and related services, Student, who now attends a DCPS [REDACTED] school, continues to perform at kindergarten and first grade levels in most subjects. Petitioner contends that Student's IEPs for the 2014-2015 and 2015-2016 school year were inappropriate because they did not address her scant academic progress since kindergarten. DCPS responds that despite the extent of Student's disability, her grades and assessment scores show she had made progress under the DCPS IEPs. DCPS holds the burden of proof on this issue.

*In Moradnejad v. District of Columbia*, No. 14-1159, 2016 WL 1275577 (D.D.C.

Mar. 31, 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’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.

*Rowley*, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)); *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034 (finding that the IDEA does not require that IEPs “maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children,” only that they be “reasonably calculated to enable the child to receive educational benefits”); *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) (“While the District of Columbia is required to provide students with a public education, it does not guarantee any particular outcome or any particular level of education.”).

*Moradnejad, supra.*

Petitioner has not alleged that DCPS failed to comply with the IDEA’s IEP procedural requirements. Therefore, I turn to the second prong of the *Rowley* inquiry – were DCPS’ IEPs reasonably calculated to enable Student to receive educational benefits. Petitioner’s complaint was filed on August 17, 2016. The IDEA establishes a filing deadline, requiring a due process hearing be requested “within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.” See U.S.C. §§ 1415(f)(3)(C); *Damarcus S. v. District of*

*Columbia*, No. CV 15-851, 2016 WL 2993158 (D.D.C. May 23, 2016). Student's May 9, 2014 and the May 4, 2015 IEPs were in effect during the 2 years preceding the August 17, 2016 due process request in this case.

Petitioner's expert, Educational Advocate 1, opined that the May 9, 2014 IEP was inappropriate because Student had not made progress under prior IEPs and the 2014 IEP offered no change in the delivery of services. It may not be determined that an IEP was inappropriate when developed based only upon a student's failure to make expected progress. Courts have consistently underscored that the "appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so." *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citations omitted).

DCPS' expert, LEA Representative, testified that she had been a member of the May 9, 2014 IEP team and that the IEP team felt that the IEP was appropriate when developed. Petitioner's Expert is correct that the 2014 IEP provided no change in the mode of services. All of Student's IEPs, including the May 9, 2014 IEP, have provided for full-time Specialized Instruction in a self-contained classroom setting. However the May 9, 2014 IEP team did change Student's disability classification from Speech-Language Impairment to Specific Learning Disability and incorporated in the IEP the findings of the November 15, 2013 psychological reevaluation. Petitioner's experts did not identify any specific deficiency with the 2014 IEP. On this evidence, I find that DCPS carried its burden of persuasion the May 9, 2014 IEP was reasonably calculated to provide educational benefits at the time it was developed.

Educational Advocate 1 opined likewise that Student's May 4, 2015 IEP was inappropriate because the IEP services were left unchanged despite Student's lack of

progress under the 2014 IEP. Here, the expert's opinion is supported by the evidence. Large parts of the 2015 IEP were copied verbatim from the 2014 IEP, including Present Levels of Academic Achievement and Functional Performance, the description of how Student's disability affects access to the general education curriculum and the description of how her disability affects progress in the general education curriculum. Even the District of Columbia Common Core Standards were copied from the prior IEP, even though the standards were for Student's grade in the prior school year.

An IEP is not necessarily inappropriate simply because it repeats Present Levels of Performance from a prior year IEP. Not every student progresses as anticipated. However, if annual goals have not been met and the Present Levels must be repeated, the IEP team may be required to address the lack of progress in the revised IEP. *See Schroll v. Bd. of Educ. Champaign Cmty. Unit. Sch. Dist. #4*, No. 06-2200, 2007 WL 2681207, at 4-5, 2007 (C.D.Ill. Aug. 10, 2007) ("An IEP is not inappropriate simply because it does not change significantly on an annual basis[, but] . . . if the student made no progress under a particular IEP in a particular year, . . . the propriety of an identical IEP in the next year may be questionable.") *See, also*, 34 CFR § 300.324(b) (Child's IEP team must review IEP periodically to determine whether the annual goals for the child are being achieved.)

As of January 23, 2015, four of Student's five May 9, 2014 IEP mathematics goals and two of four IEP reading goals had not even been introduced. Student was still performing on a kindergarten to 1<sup>st</sup> grade academic level. Notwithstanding, the May 4, 2015 IEP team made no changes to Student's Special Education Services, OT or Behavioral Support Services. Speech-Language Pathology Services were reduced from 240 minutes per month to 3 hours per month. Neither did the IEP team propose

additional classroom accommodations, aids or services. On this evidence, I conclude that DCPS has not met its burden of persuasion that May 4, 2015 IEP was reasonably calculated to enable Student to receive educational benefits.

### Remedy

In this decision, I have determined that Petitioner established that Student was denied a FAPE by the failure of DCPS to timely reevaluate Student following Mother's request in March 2016, and that DCPS did not meet its burden of persuasion that the May 4, 2015 IEP was reasonably calculated to enable Student to receive educational benefits. For relief, Petitioner requests, *inter alia*, that DCPS be ordered to fund Student's prospective placement at Nonpublic School and that Student be awarded compensatory education.

The D.C. Circuit Court of Appeals recently explained the compensatory education remedy in its decision in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has "broad discretion to fashion an appropriate remedy," which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education "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." 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial. An appropriate compensatory education award must "rely on individualized assessments," and the equitable and flexible nature of the remedy "will produce different results in different cases depending on the child's needs." *Id.* In some cases, the award may consist of "only short, intensive compensatory programs targeted at specific problems or deficiencies," while in others the student may require "extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE." *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made.

*B.D.*, 817 F.3d at 797–98.

At the due process hearing, Petitioner offered no competent evidence of what would fully compensate Student for her lost progress in this case. Neither of Petitioner’s experts observed Student in the classroom or formally assessed her academic potential or achievement. Student has belatedly been identified as having an ID disability. With that information, it is crucial to know what progress would have been expected for Student had she been provided appropriate IEP services after May 9, 2016.

Educational Advocate 2 made compensatory education recommendations based on growth trajectories of a nationally representative sample of students with various disabilities, including SLD and ID. Even if these data were assumed reliable, they are based on an extrapolation from an amorphous nationwide student sampling. As the D.C. Circuit made clear in *Reid, supra*, an appropriate compensatory education award “must be based upon a fact-specific, individualized assessment of the student’s needs.” *Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citing *Reid*, 401 F.3d at 524.) I find that the testimony of Petitioner’s experts, based on a nationwide sampling of students with disabilities, was not fact-specific and sheds no light on how much more progress this individual student may have lost from DCPS’ failures to ensure that she was provided an appropriate IEP in May 2015 and that she was timely reevaluated in spring 2016. Therefore I find these experts’ compensatory education proposal unpersuasive. As explained below, I will grant, as an alternative, Petitioner’s request to have an independent compensatory education evaluation conducted.

Petitioner also seeks an order for DCPS to fund Student’s immediate placement at Nonpublic School for the remainder of the 2016-2017 school year. The D.C. Circuit has explained that “an award of private-school placement is not, like [compensatory

education], retrospective relief designed to compensate for yesterday's IDEA violations, but rather prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Prospective private school placement, or other removal of students with disabilities from the regular educational environment, may occur only if the nature or severity of the disability is such that education in a regular public school, cannot be achieved satisfactorily. See 34 CFR § 300.118(a)(2)(ii). In *Jenkins v. Squillacote*, 935 F.2d 303 (D.C.Cir.1991), the D.C. Circuit explained that "if there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Id.* at 305 (internal citations and quotations omitted).

Prior to the due process hearing in this case, Student's eligibility team changed her disability classification from SLD to ID based upon the DCPS June 27, 2016 psychological reevaluation. DCPS has offered Student a placement in a program for ID students at City School 4. City School 4 Special Education Director testified that Student's most recent IEP can be implemented in the ILS program at the public school. Neither the parent nor Petitioner's experts have availed themselves of the opportunity to visit the proposed classroom, which is expressly authorized by the D.C. Special Education Student Rights Act of 2014, D.C. Code § 38.2571.03. Although the appropriateness of DCPS' proposed placement of Student in the ILS program at City School 4 is not at issue in this case, I conclude that Petitioner has not offered credible evidence that the nature or severity of Student's disability is such that her education in a public school ILS program cannot be achieved satisfactorily. Therefore, I conclude that

the requested award of private school placement, at DCPS expense, is not warranted.

In order to determine an appropriate compensatory education award for Student, I find that a full compensatory education assessment is needed. In *B.D., supra*, the D.C. Circuit encouraged the use of assessments to inform the crafting of a compensatory education remedy. “In carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment. . . . If further assessments are needed . . . the district court or Hearing Officer should not hesitate to order them . . . .” *B.D.* at 7. As explained above there is insufficient evidence in this case for the hearing officer to conclude what position Student would be in absent DCPS’ FAPE denial. Therefore, I will order DCPS to engage a qualified independent expert to assess what academic progress should have been expected for Student based upon the extent of her disability, what services Student should have been provided from the time of the May 4, 2015 IEP and where Student would be expected to be now academically, had she been provided an appropriate IEP at that time. Based on that assessment and taking account also of DCPS’ failure to complete a timely reevaluation before the start of the 2016-2017 school year, the expert will be charged with recommending what compensatory education Student now requires in order to put her in the position she would have been in, but for DCPS’ denials of FAPE. The expert’s recommendation must be promptly reviewed by Student’s IEP team and considered by DCPS. If, informed by the assessment and recommendation, Petitioner and DCPS are unable to agree on an appropriate compensatory education award, Petitioner may file a request for a new due process hearing on this issue. In such event, I foresee that an expedited due process hearing would be warranted under Office of Dispute Resolution, *Standard Operating Procedures*, § 1008(B).

**ORDER**

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

**ORDERED:**

1. Petitioner's request for DCPS funding of Student's prospective placement at Nonpublic School is denied;
2. Petitioner's request for a compensatory education award is denied without prejudice. DCPS shall, within 21 calendar days, engage a qualified independent professional, who is neither an employee of DCPS nor an individual who regularly testifies for parents at due process hearings, to assess Student and, in accordance with this decision, discern Student's compensatory education needs resulting from DCPS' denials of FAPE as found in this decision and to recommend an appropriate compensatory education award. If DCPS and Petitioner are unable to agree upon an appropriate compensatory education award, Petitioner may request another, expedited, due process hearing to seek compensatory education relief, informed by the recommendations of the independent evaluator and
3. All other relief requested by the Petitioner herein is denied.

Date: October 31, 2016

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  
Chief Hearing Officer  
OSSE Division of Specialized Education  
DCPS Resolution Team