

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

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

OSSE  
Office of Dispute Resolution  
October 02, 2017

---

<i>Student</i> , <sup>1</sup>	)	Case No.: 2017-0197
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 10/2/17
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 9/15/17
("DCPS"),	)	Hearing Room: 2006
Respondent.	)	

---

**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because DCPS has not provided reimbursement for an independent educational evaluation (“IEE”) at the market rate paid for it. DCPS responded that Petitioner did not qualify for an IEE, but that it nonetheless reimbursed Petitioner at a higher rate than usual.

**Subject Matter Jurisdiction**

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

**Procedural History**

Following the filing of the due process complaint on 7/19/17, the case was assigned to the undersigned on 7/20/17. DCPS filed a response on 7/27/17 and did not challenge jurisdiction, apart from the lack of jurisdiction over policy or systemic issues. Along with the complaint, Petitioner also filed a Motion to Expedite this non-discipline case, which

---

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

## Hearing Officer Determination

Case No. 2017-0197

DCPS opposed. The Motion to Expedite was formally granted on 7/29/17, although steps were taken by the undersigned on 7/20/17 to find the earliest prehearing conference and due process hearing dates feasible. An eligibility meeting and a resolution session meeting were held on 8/17/17, as a result of which the issues that needed to be expedited were moot, as discussed below. As a consequence, the hearing no longer needed to be expedited and the parties requested a delay in the hearing date from 8/21/17 to 9/15/17. The 30-day resolution period ended on 8/18/17. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 10/2/17.

The due process hearing took place on 9/15/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout most of the hearing.

Petitioner’s Disclosures, submitted on 9/8/17, contained documents P1 through P11, all of which were admitted into evidence over objections to P2, P4, P6 and P11.<sup>2</sup> Respondent’s Disclosures, submitted on 9/7/17, contained documents R1 through R17, all of which were admitted into evidence over objections to R1-R6, R9, R13-R15 and R17.

Petitioner’s counsel presented 1 witness in Petitioner’s case-in-chief (*see Appendix A*): *Psychologist*.

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see Appendix A*):

1. *Special Education Director* (qualified over objection as an expert in Special Education Eligibility, Programming, and Placement)
2. *Compliance Case Manager*

The issue to be determined in this Hearing Officer Determination is:

**Issue:** Whether DCPS denied Student a FAPE by failing to issue authorization or reimbursement for an independent comprehensive psychological evaluation, which was obtained due to Petitioner’s disagreement with DCPS’s analysis of existing data which found that Student was not eligible to receive special education and related services.<sup>3</sup> *Petitioner has the burden of persuasion on this issue.*

---

<sup>2</sup> Respondent’s objection to P1 was withdrawn at the due process hearing.

<sup>3</sup> This issue was previously Issue 3 in the 8/2/17 Prehearing Order. As stated in the 9/2/17 Amended Prehearing Order, during the 8/31/17 prehearing conference, counsel for DCPS made an oral motion to dismiss Issues 1 and 2 due to mootness, as a result of the eligibility meeting between the parties on 8/17/17; Petitioner’s counsel stated that he did not disagree with the facts underlying the motion and did not oppose the motion; thus, Issues 1 and 2 were dismissed as moot.

## Hearing Officer Determination

Case No. 2017-0197

Petitioner seeks the following relief<sup>4</sup>:

1. A finding that Student was denied a FAPE.
2. Within 10 business days, DCPS shall fully reimburse Petitioner at market rates for the costs of the December 2016 independent comprehensive psychological evaluation.
3. Any other just and appropriate relief.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact<sup>5</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>6</sup> Student is *Age*, *Gender* and in *Grade* at Public School.<sup>7</sup>
2. Student was the subject of a 1/31/17 due process complaint alleging a failure to evaluate after parental request and failure to find Student eligible for special education and related services, among other things; the 1/31/17 due process complaint did not include a claim for IEE reimbursement.<sup>8</sup>
3. DCPS received a referral for an initial evaluation of Student on 10/7/16 and planned as the next step to review the educational and behavioral data to determine whether to proceed with assessments.<sup>9</sup>

---

<sup>4</sup> An additional paragraph (numbered 2 in the 9/2/17 Amended Prehearing Order) was expressly withdrawn by Petitioner's counsel at the due process hearing; that withdrawn request for relief stated: "DCPS shall convene (a) an eligibility meeting, to be immediately followed (if Student is found eligible for special education and related services) by (b) an IEP team meeting to develop an IEP for Student; the meetings shall review and consider all available data, including the December 2016 independent comprehensive psychological report and Addendum."

<sup>5</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>6</sup> P11-1; P3-1.

<sup>7</sup> P11-1; R14-1.

<sup>8</sup> R12-1,3.

<sup>9</sup> P3-1.

## Hearing Officer Determination

Case No. 2017-0197

4. A 10/19/16 email from Student's community support worker reported on a meeting in which Special Education Director allegedly stated that Student would not qualify for an IEP due to lack of academic concerns; Special Education Director disputed that she had made that statement; it was not an eligibility meeting for Student, which would have included a formal letter of invitation and signatures at the beginning of the meeting.<sup>10</sup>

5. An analysis of existing data was sent to Parent on 12/5/16 following a Multi-Disciplinary Team ("MDT") meeting attended by 11 people on 12/1/16 to review the analysis of existing data.<sup>11</sup> The analysis of existing data contained all the information needed by the MDT team to determine how to proceed.<sup>12</sup> DCPS sent a prior written notice dated 12/1/16 stating that after the analysis of existing data, with formal and informal assessments, the team agreed not to proceed further with the evaluation process.<sup>13</sup>

6. Parent made no request for an IEE or for IEE reimbursement at the 12/1/16 meeting, an 1/9/17 meeting, an 8/17/17 meeting or any other time.<sup>14</sup> There was no request for an IEE prior to this lawsuit.<sup>15</sup> Special Education Director learned for the first time after the 8/17/17 eligibility meeting that Petitioner was seeking reimbursement for an IEE.<sup>16</sup>

7. Psychologist billed Petitioner \$300 on 11/8/16 for a Diagnostic Evaluation and \$3200 on 11/15/16 for Psychological Testing, which were the dates on which the services were performed.<sup>17</sup> Parent has not paid anything for the evaluation; Parent's counsel covered the entire cost of the IEE.<sup>18</sup>

8. Psychologist testified that \$300 is the going rate in the D.C. area for a Diagnostic Evaluation to determine which tests should be administered and \$3200 is the going rate in the D.C. area for a comprehensive psychological evaluation.<sup>19</sup> Psychologist stated that she has occasionally conducted comprehensive psychological evaluations at the "OSSE rate" of \$1360, if there was room in her schedule, as a way of helping people who can't afford the market rate; Psychologist has done so about 3-4 times in 2-1/2 years.<sup>20</sup> The practice of which Psychologist is a part loses about \$700 for each comprehensive psychological evaluation at the OSSE rate.<sup>21</sup>

---

<sup>10</sup> P2-1; Special Education Director.

<sup>11</sup> R10-1; R11-1.

<sup>12</sup> Special Education Director.

<sup>13</sup> P9-1; Special Education Director.

<sup>14</sup> Special Education Director.

<sup>15</sup> Compliance Case Manager.

<sup>16</sup> Special Education Director.

<sup>17</sup> Psychologist; P4-1,2; P11-1.

<sup>18</sup> Compliance Case Manager; Psychologist.

<sup>19</sup> Psychologist.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## Hearing Officer Determination

Case No. 2017-0197

9. In a “spirit of resolution,” DCPS sent an IEE authorization letter to Petitioner in the amount of \$2500.<sup>22</sup> The authorization letter can be used for reimbursement since the evaluator has already been paid.<sup>23</sup> DCPS generally provided \$1360 for IEE comprehensive psychological evaluations, an amount that recently was raised to \$1525.<sup>24</sup> Psychologists can obtain payment above the OSSE rate by demonstrating that extra work was involved in a particular evaluation.<sup>25</sup>

### Conclusions of Law

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

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

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

**Issue:** *Whether DCPS denied Student a FAPE by failing to issue authorization or reimbursement for an independent comprehensive psychological evaluation, which was obtained due to Petitioner’s disagreement with DCPS’s analysis of existing data which found that Student was not eligible to receive special education and related services. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet his burden because the IEE was not the result of a disagreement with a DCPS evaluation, as required to obtain an evaluation at public expense.

---

<sup>22</sup> Compliance Case Manager; P10-1.

<sup>23</sup> Compliance Case Manager.

<sup>24</sup> Compliance Case Manager; Psychologist.

<sup>25</sup> Compliance Case Manager.

## Hearing Officer Determination

Case No. 2017-0197

Under 34 C.F.R. 300.502(b),<sup>26</sup> subject to certain limitations, 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. The Eleventh Circuit Court of Appeals emphasized in *G.J. v. Muscogee County Sch. Dist.*, 668 F.3d 1258, 1266 (11th Cir. 2012), that the right to a publicly funded IEE “does not obtain” until there is an evaluation with which the parent disagrees. *Accord F.C. v. Montgomery County Pub. Sch.*, 2016 WL 3570604, at \*3 (D. Md. 2016) (disagreement with evaluation of public agency is “prerequisite” for IEE at public expense); *Tyler V., ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-IJ*, 2011 WL 1045434, at \*4 (D. Colo. 2011) (to receive reimbursement, the IEE “must have been performed due to a disagreement” with an evaluation by the public agency); *R.L. ex rel. Mr. L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 234 (D. Conn. 2005) (desire for IEE as “additional source of information” and “not because they disagreed with any of the defendant’s evaluations” is not sufficient for reimbursement).

Here, Petitioner did not obtain the IEE because of a disagreement with an evaluation of the public agency and could not have done so because the IEE was completed on 11/15/16, some two weeks in advance of the evaluation by DCPS. The uncontroverted evidence is that DCPS received a referral for an initial evaluation of Student and proceeded to review the educational and behavioral data to determine whether to proceed with further assessments. The analysis of existing data, including formal and informal assessments, was not reviewed until an MDT meeting on 12/1/16; DCPS sent a prior written notice that same day.

Petitioner’s counsel’s advocacy emphasized a string of cases holding that disagreement with the public agency’s evaluation need not be expressed prior to the IEE. However, Petitioner’s cases support the key point that there must actually be a public agency evaluation – or even an IEP – preceding the IEE which was the reason for it. Petitioner’s counsel begins with *P.R. v. Woodmore Local Sch. Dist.*, 256 Fed. Appx. 751, 752, 755 (6th Cir. 2007), in which disclosure of the IEE and desire for reimbursement was

---

<sup>26</sup> (b) Parent right to evaluation at public expense.

(1) 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. . . .

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency’s evaluation is appropriate, the parent still has the right to an independent educational evaluation but not at public expense.

34 C.F.R. 300.502(b)(1)-(3).

## Hearing Officer Determination

Case No. 2017-0197

made in an amended due process complaint, which was not a problem where parents obtained the IEE due to disagreement with the school district's evaluation. In *Hudson By & Through Tyree v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987), the public agency evaluation "predated the disagreement" which resulted in an independent evaluation. In *Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1169 (7th Cir. 1994), the appellate court held that parents can initiate an IEE before notifying the school district, but confirmed that there must be an evaluation with which parents disagree. See also *Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999) (failure to express disagreement and long delay in requesting reimbursement did not prevent reimbursement of IEEs to challenge IEPs); *Raymond S. v. Ramirez*, 918 F. Supp. 1280, 1291 (N.D. Iowa 1996) (failure to express disagreement did not prevent reimbursement of IEE to challenge IEP).

In these cases, parents were not able to simply initiate evaluations on their own and expect the costs to be covered at public expense in the absence of disagreement with a public agency evaluation, as Petitioner's counsel seeks here. This fits the regulatory scheme in which public agencies can file a due process complaint to defend the appropriateness of their own evaluations, which would of course be impossible if IEEs were permitted regardless of whether the public agency had conducted an evaluation. See 34 C.F.R. 300.502(b)(3). Here, Petitioner's counsel attempts to rely on a 10/19/16 email in which Special Education Director allegedly stated that Student would not qualify for an IEP. But Special Education Director credibly denied ever making that statement and in any case the email was not reporting on an eligibility meeting, Student's IEP team was not present, and the analysis of existing data had not yet occurred.

In short, the regulation means what it says in providing IEEs at public expense only "if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. 300.502(b)(1). Here, Petitioner did not disagree with a DCPS evaluation, but proceeded with an IEE prior to DCPS completing its evaluation. Thus, this Hearing Officer concludes that Petitioner is not entitled to recover the cost of its IEE at public expense.

### **ORDER**

Petitioner has not prevailed on the issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

**IT IS SO ORDERED.**

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.  
Hearing Officer

**Hearing Officer Determination**

Case No. 2017-0197

**NOTICE OF RIGHT TO APPEAL**

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

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

Contact.resolution@dc.gov