

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

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

OSSE
Office of Dispute Resolution
October 06, 2017

<i>Student</i> , ¹)	Case No.: 2017-0199
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 10/6/17
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 9/21/17
("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 had not authorized an independent educational evaluation (“IEE”) at a market rate. DCPS responded that Petitioner did not demonstrate that a higher rate was needed, but that DCPS nonetheless authorized an IEE for 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 7/24/17, the case was assigned to the undersigned on 7/25/17. DCPS filed a response on 8/10/17 and did not challenge jurisdiction. The resolution session meeting was waived on 9/5/17. The 30-day resolution period ended on 8/23/17. A final decision in this matter must be reached no later than 45

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

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days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 10/7/17.

The due process hearing took place on 9/21/17, and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the entire hearing.

Petitioner’s Disclosures, submitted on 9/14/17, contained documents P1 through P12, all of which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 9/14/17, contained documents R1 through R6, all of which were admitted into evidence over objections to R3, R4 and R6.²

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

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

1. *Compliance Case Manager*
2. *Chief Utilization Manager*

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

Issue: Whether DCPS denied Student a FAPE by failing to provide authorization at market rates for a comprehensive psychological IEE, due to Parent’s disagreement with the recent evaluation.³ *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. Within 10 business days, DCPS shall provide funding authorization at reasonable and customary rates for an independent comprehensive psychological evaluation.⁴

² Petitioner’s objection to R2 was withdrawn at the due process hearing.

³ The first part of the Issue (subpart (a) in the 9/5/17 Prehearing Order) was expressly withdrawn with prejudice by Petitioner’s counsel at the due process hearing, along with reference to “occupational therapy”; the withdrawn claim stated: “(a) comprehensively evaluate Student in all areas of suspected disability, including an assistive technology evaluation.”

⁴ Requests for independent occupational therapy and assistive technology evaluations were expressly withdrawn with prejudice by Petitioner’s counsel at the due process hearing; non-substantive conforming grammatical edits have also been made.

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3. Within 15 school days after completion of the evaluation in the paragraph above, DCPS shall convene an IEP team meeting to review the evaluation and revise Student's IEP as appropriate.
4. Compensatory education for any denial of FAPE is reserved until after completion of the evaluation ordered above.⁵

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁶ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁷ Student is *Age, Gender*.⁸ Student has significant physical challenges; among other limitations, Student is considered deaf, has unintelligible speech, and uses sign language.⁹

2. An independent comprehensive psychological evaluation for Student was authorized by DCPS at a maximum rate of \$1360¹⁰ on 6/23/17, in response to Petitioner's disagreement with the evaluation DCPS completed.¹¹ Petitioner's counsel emailed DCPS on 7/12/17 stating that Petitioner's independent evaluator would not conduct the evaluation for the DCPS rate and seeking authorization of \$3200 to \$3500 for a full evaluation.¹² Petitioner's counsel emailed on 7/26/17 that Petitioner is seeking \$3200 for the IEE and that DCPS had issued IEEs in the past for \$3200 and more.¹³ Compliance Case Manager testified that he

⁵Petitioner's counsel stated during the prehearing conference that compensatory education would not be sought at the due process hearing since it would depend on the findings of the evaluation carried out in the future. DCPS objected and does not believe there is a right to reserve any compensatory education.

⁶ 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.

⁷ R1-3.

⁸ R1-3,11.

⁹ Educational Advocate.

¹⁰ The amount authorized on 6/23/17 was \$1360.00, although the DCPS/OSSE rate was \$1360.32. P3-1; P10-19 (*Parent Guide*). For ease of usage, the DCPS rates will be rounded down to \$1360 and \$1525 for discussion herein. Further, all reference to evaluations and IEEs herein mean comprehensive psychological evaluations, unless otherwise specified.

¹¹ R2-20,23; P3-1; Compliance Case Manager.

¹² P8-1.

¹³ R2-24,25.

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would not authorize an IEE for as much as \$3200 or \$3500.¹⁴ Respondent's counsel stated in emails to Petitioner's counsel on 7/26/17 that the \$1360 rate was the "highest rate permitted by D.C.M.R. statute" and that numerous psychologists in this market "accept and utilize this rate, without issue."¹⁵

3. Parent was presented information about various evaluators and was very thorough in selecting Preferred Evaluator as best for her child.¹⁶ As of the date of the due process hearing, Preferred Evaluator had not yet been approved for the IEE.¹⁷ Preferred Evaluator emailed Compliance Case Manager on 8/18/17 stating that her firm charges a discounted rate of \$3000 for IEEs, which is below their regular rate and below competitors who charge up to \$4500.¹⁸ Preferred Evaluator wrote a memorandum "To whom it may concern" on 9/13/17 stating that her practice can no longer conduct IEEs for less than the discounted rate of \$3000 and will not accept a lower DCPS rate.¹⁹ Preferred Evaluator explained that her office had sometimes made exceptions in the past for particularly compelling cases, and was frequently asked to take pro bono or sliding scale cases, but could no longer afford to do so.²⁰

4. On 9/8/17, Compliance Case Manager provided Petitioner a new authorization letter for an IEE at \$2500.²¹ Compliance Case Manager increased the IEE authorization rate in order to provide a "fair amount" in an effort to compromise and resolve the case and not have to go to hearing.²² Compliance Case Manager was certain that psychologists would accept \$2500, since some accept \$1360 and \$1525.²³ Compliance Case Manager's 9/8/17 letter explained that reasonable and documented fees that exceed \$2500 might be allowed on a case by case basis at the discretion of the District of Columbia if the evaluator could justify that the excess costs were "essential for educational and/or diagnostic purposes."²⁴

5. Compliance Case Manager's 9/8/17 letter referred to a *Parent Guide* and its list of evaluators who meet DCPS criteria, but noted that other evaluators may be selected by Parent.²⁵ The *Parent Guide* explained that parents are to make sure that their evaluator accepts the DCPS rate of \$1360.²⁶ The *Parent Guide* listed 7 providers for psychological evaluations.²⁷ The previous version of the *Parent Guide* listed the exact same providers;

¹⁴ Compliance Case Manager.

¹⁵ R2-21,24.

¹⁶ Educational Advocate.

¹⁷ *Id.*

¹⁸ P8-3; Compliance Case Manager.

¹⁹ P9-1.

²⁰ *Id.*

²¹ Compliance Case Manager; R2-36; R3-43.

²² Compliance Case Manager.

²³ *Id.*

²⁴ R3-44.

²⁵ R3-43; P10.

²⁶ P10-5,19.

²⁷ P10-10,32.

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Educational Advocate had noted the insufficiency of the list in the previous *Parent Guide*.²⁸ Educational Advocate was not able to find anyone willing to conduct an IEE at the DCPS rate from the list in the previous version of the *Parent Guide* or from that list now.²⁹

6. Educational Advocate called every listed provider of psychological assessments in the *Parent Guide* on 5/11/17, 6/6/17 and 9/20/17 and obtained consistently negative results each time she called, as described below³⁰:

- a. *First Provider* – Educational Advocate couldn't leave a message at any time.
- b. *Second Provider* – the telephone line was not in service.
- c. *Third Provider* – spoke to Educational Advocate and stated that she had stopped taking the DCPS rate because she had not been paid by DCPS and was now charging \$3500; the Third Provider told Educational Advocate that she might consider a referral from DCPS on a pro bono basis depending on the attorney. Compliance Case Manager spoke to the Third Provider a month ago and understood that she would take cases for DCPS at \$1360, but not on a routine basis; it would depend on the request.³¹
- d. *Fourth Provider* – Educational Advocate left a message each time, but calls were not returned.
- e. *Fifth Provider* – staff told Educational Advocate that the person who usually does the evaluations was out on maternity leave; previously Educational Advocate was told that the person was on leave.
- f. *Sixth Provider* – the telephone line was not in service.
- g. *Seventh Provider* – staff told Educational Advocate that they were not currently taking the DCPS rate and were instead charging \$3500.

7. Educational Advocate spoke to the receptionist for a provider not listed in the *Parent Guide* who charges \$3500 for a comprehensive psychological evaluation and will not take the DCPS rate.³² Another provider not listed in the *Parent Guide* also charges \$3500 for a comprehensive psychological evaluation.³³ Preferred Evaluator's rate for a comprehensive psychological evaluation is generally \$3500, but sometimes is reduced to \$3000.³⁴

²⁸ Educational Advocate.

²⁹ *Id.*

³⁰ Educational Advocate; P10-32.

³¹ Compliance Case Manager.

³² Educational Advocate.

³³ P10-34; Educational Advocate.

³⁴ Educational Advocate; P10-35.

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8. DCPS offered evidence of 12 invoices (and 3 DCPS cover sheets) from 2017 at the DCPS rate of \$1360, including some for multiple evaluations, from a range of private providers.³⁵ The invoices included one from Preferred Evaluator who billed the DCPS rate on 4/21/17.³⁶ Compliance Case Manager didn't know if Preferred Evaluator's invoice at the DCPS rate was an exception or done as a favor.³⁷ Petitioner's counsel asserted by email on 7/27/17 that some psychologists who accept the DCPS rate require the parent or attorney to make a "supplemental payment."³⁸

9. OSSE's maximum comprehensive psychological evaluation cost as of 10/1/2016 was listed as \$1525.³⁹ OSSE calculated its maximum evaluation cost by taking the Bureau of Labor Statistics wage estimate for Clinical, Counseling, and School Psychologists in Elementary and Secondary Schools, multiplied that hourly rate by a 2.75 factor set forth in the D.C.M.R., and then multiplied that rate by the 13 hours required for a comprehensive psychological evaluation.⁴⁰ The 2.75 multiplier and the 13 hours are fixed in the equation; the only input that changes is the hourly rate.⁴¹ Chief Utilization Manager calculates these OSSE rates only for nonpublic schools; it is up to DCPS whether or not it uses the OSSE rates.⁴²

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:

Under 34 C.F.R. 300.502(b), subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an IEE 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 IEE is provided at public expense. *Id.* "Public expense" means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. 34 C.F.R. 300.502(a)(3)(ii).

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

³⁵ R4.

³⁶ R4-6; Compliance Case Manager.

³⁷ Compliance Case Manager.

³⁸ R2-30.

³⁹ R5-61.

⁴⁰ Chief Utilization Manager; R6-66,70.

⁴¹ Chief Utilization Manager.

⁴² *Id.*

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(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 provide authorization at market rates for a comprehensive psychological IEE, due to Parent's disagreement with the recent evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the single issue in this case by demonstrating that she did not have an option to obtain an IEE at the rates DCPS offered, so is entitled to a higher rate. As set out above, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. 300.502(b). The regulations clearly provide that upon request for an IEE, the public agency must provide to the parent “information about where an independent educational evaluation may be obtained,” along with applicable agency criteria. 34 C.F.R. 300.502(a)(2). DCPS seeks to comply with that provision by providing the *Parent Guide* to parents listing qualified providers of IEEs who are willing to accept the DCPS rate.

While DCPS must pay the full cost of the IEE or otherwise ensure that the evaluation is provided at no cost to the parent pursuant to 34 C.F.R. 300.502(a)(3)(ii), Petitioner's counsel does not dispute that DCPS may impose a reasonable cap on the cost of an IEE. *See, e.g.*, Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46689-90 (August 14, 2006) (“public agencies should not be required to bear the cost of unreasonably expensive IEEs”); *Letter to Kirby*, 213 IDELR 233 (OSERS May 4, 1989) (“to avoid unreasonable charges for IEEs, a district may establish maximum allowable charges”); *Letter to Parker*, 41 IDELR 155 (OSERS February 20, 2004) (a district may “publish a list . . . including reasonable cost criteria”). However, the undersigned finds it notable that OSERS goes on to explain in *Letter to Kirby*, 213 IDELR 233, that the maximum allowable charge for an evaluation “cannot simply be an average of the fees customarily charged” in the area by qualified professionals, which would be too low. Instead, the maximum rate must allow parents to choose from among the qualified professionals in the area, so that the maximum rate “only eliminates unreasonably excessive fees.” *Id.* Further, the maximum IEE rate is to be reviewed periodically, and

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exceptions are to be made when there are unique circumstances justifying a higher amount.⁴³ 5-E D.C.M.R. § 3027.5.

The question here is whether Petitioner could obtain a comprehensive psychological evaluation of Student for the \$1360 authorized by DCPS, or even the increased authorization of \$2500. DCPS argues that it certainly was possible to obtain an IEE at \$1360, based on the various invoices it received during 2017 from a range of psychologists at the \$1360 rate. Yet, as shown by the inclusion of an invoice from Preferred Evaluator, the mere fact that providers have sometimes been willing to do IEEs at the DCPS rate in the past does not ensure that they are willing to do so upon request. As included in the evidence and argued by Petitioner's counsel, some of the providers who billed DCPS \$1360 may have also charged an additional amount to the parent or counsel – which would not satisfy the regulatory requirements for IEEs at no cost – or may have conducted the IEE at the DCPS rate only as a favor for particular counsel or parents. This was confirmed by the Third Provider on the *Parent Guide* list, who told Compliance Case Manager that she may sometimes be willing to accept the DCPS rate, depending on the circumstances and individuals involved.

DCPS's assertion that providers are available and willing to conduct IEEs at the DCPS rate should have been conclusively demonstrated by providing a list of where parents can obtain IEEs, as required by 34 C.F.R. 300.502(a)(2). As the court explained in *M.V. v. Shenendehowa Cent. Sch. Dist.*, 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013), the reasonableness of an IEE fee cap can be shown by the existence of several willing providers. Here, however, Educational Advocate credibly testified that she had called all of the providers of psychological services listed in the *Parent Guide* at 3 different times over the past several months and had not found even one who was willing to conduct an IEE at the DCPS rate.⁴⁴ Educational Advocate's calls reached only 2 providers who would conduct IEEs at any rate, and both now charge \$3500. Indeed, it was uncontroverted that the *Parent Guide* list did not contain any providers who stood ready to conduct IEEs at the DCPS rate. That was the case even though the inadequacies of the list of providers in the *Parent Guide* had been raised by Educational Advocate with DCPS prior to this *Parent Guide* being released. Nonetheless, the exact same list was included in this *Parent Guide* without any changes or improvements.

Nor was there evidence by DCPS that \$2500 would be sufficient for an IEE. Significant credible evidence was offered that providers generally seek \$3500 for IEEs. While \$3500 is Preferred Evaluator's desired rate, she made clear in writing that she and her practice were willing to accept a discounted rate of \$3000 for IEEs, but no lower. Happily,

⁴³ While DCPS may make exceptions to its usual rate for special cases, Petitioner's counsel clarified that Petitioner in this case was not seeking an exception to the regular DCPS rate. The undersigned is clear that DCPS would not make an exception for providers seeking a higher rate simply because they charge more than the DCPS rate.

⁴⁴ An actual choice of only one evaluator would not be sufficient in any case. *Cf. Bd. of Educ. of County of Nicholas v. H.A.*, 2011 WL 861163, at *10 (S.D.W. Va. Mar. 9, 2011) *aff'd*, 445 Fed. Appx. 660 (4th Cir. 2011).

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Parent carefully investigated providers and determined that she would like Preferred Evaluator to conduct her child’s IEE. At \$3000, Preferred Evaluator offers the lowest available rate in the record, which DCPS is ordered below to authorize promptly.

DCPS sought to prove that its IEE rate is set appropriately by OSSE based on an annual review of the labor rates for psychologists as determined by the Bureau of Labor Statistics. But the argument that OSSE may have somehow objectively determined the “right” rate does not help DCPS in a market economy where private practitioners are not obliged to take the government rate. Under the IDEA the issue comes down to whether or not there are evaluators who are willing and available to conduct an IEE at the DCPS rate. Petitioner met her burden of proving to this Hearing Officer that such evaluators were not available, which has delayed and prevented Student from obtaining the IEE needed to ensure a FAPE is being provided, which is a substantive violation and itself a denial of FAPE. See 34 C.F.R. 300.513(a)(i),(ii).

Petitioner has chosen to defer any consideration of compensatory education in this decision, awaiting the completion of the IEE that was delayed by the failure of DCPS to authorize the rate needed to obtain an independent comprehensive psychological evaluation. Moreover, this case is only about the rate at which the IEE should be authorized and there is no indication that DCPS will not promptly meet with Petitioner to review the results of the IEE, so the undersigned declines to order such action.

ORDER

Petitioner has prevailed on the issue in this case. Accordingly, within 10 business days, DCPS shall provide authorization to Petitioner in the amount of \$3000 for an independent comprehensive psychological evaluation.

Any and all other claims and requests for relief are dismissed with prejudice, except that this decision is without prejudice to Petitioner’s right, if any, to seek compensatory education for the denial of FAPE found herein.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

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