

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

OSSE
Office of Dispute Resolution
October 13, 2017

STUDENT, ¹)	
through the GUARDIAN,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2017-0240
v.)	
)	Date Issued: October 13, 2017
District of Columbia Public Schools)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on September 1, 2017 by Petitioner (Student’s parents), residents of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On September 12, 2017, Respondent filed its Response which had been due on September 11, 2017, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on September 18, 2017. The DPC contains discipline related allegations; therefore, the case must proceed on the expedited timeline and the DPH had to occur by October 3, 2017 (twenty school days after the DPC was filed). The final decision was due by October 12, 2017 (ten school days after the DPH concluded on September 27, 2017).

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on September 12, 2017, during which the parties discussed and clarified the issues and the requested relief. The PHC was summarized in the Pre-Hearing

¹ Personal identification information is provided in Appendix A.

Conference Summary and Order (the “PHO”) issued on September 16, 2017, which ordered that five-day disclosures would be filed by September 20, 2017 and that the DPH would be held on September 27, 2017.

The DPH was held on September 27, 2017 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. DPCS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were filed by a date the parties mutually agreed to constitute timely disclosure. At the DPH, Petitioner’s exhibits P-1 through P-26 were admitted into evidence without objection. Respondent’s exhibits R-1 through R-47 were admitted into evidence without objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Educational Advocate²

Respondent called the following witness at the DPH:

- (a) LEA Representative

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH:

- (a) Whether DCPS denied Student a FAPE by failing to comply with the “Child Find” IDEA regulations beginning September 1, 2015.
- (b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on June 13, 2017, in that: (1) Parents were not included in the development of the IEP; (2) the IEP was not based on appropriate and adequate evaluations and evaluative data, (3) the IEP failed to state that Student’s behaviors impede Student’s learning and to provide for adequate behavioral support.
- (c) Whether DCPS denied Student a FAPE by failing to comply with the disciplinary regulations during the 2016-2017 school year, when suspending Student on a regular basis and failure to convene a MDR that included Parents.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that Student has been denied a FAPE;

² Qualified as an expert in special education programming with Respondent taking no position as to the designation.

- (b) an Order that DCPS fund at market rate an independent comprehensive psychological evaluation, to include Autism and adaptive behavior assessment, conducted by an evaluator of the parent's choice;
- (c) an Order that DCPS fund at market rate an independent speech/language and occupational therapy assessments;
- (d) an Order that DCPS conduct a functional behavioral assessment (not a screener);
- (e) an Order that Parent be permitted to obtain an independent compensatory education evaluation, and then seek an order awarding appropriate compensatory education based on the evaluation report.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent and attends District School.³
2. Currently and during the 2016-2017 school year, Student attended District School. During the 2014-2015 and 2015-2016 school year, Student attended City School.
3. Since at least 2013 through the present time, Student has consistently exhibited problematic behaviors in school, resulting in Parent receiving regular calls from the school to either pick Student up, sit with Student, or notifying Parents that Student had been suspended.⁴
4. In approximately November 2013, Student was determined eligible for special education and related services under the disability classification "Speech or Language Impairment." At the time, Parent and Student's teachers agreed that Student presented with academic and behavioral challenges; however, no psychological evaluation was administered to Student. Rather, Student was determined to be eligible based solely on a speech-language evaluation.⁵ Student received an occupational therapy ("OT") evaluation in November 2013 (though the report is dated later) as well, but was determined to be ineligible for OT services.⁶
5. Student's initial IEP was developed on January 8, 2014, and provided Student with communication/speech and language goals and two hours per week of speech language pathology services outside the general education setting. It provided no specialized instruction.⁷
6. DCPS conducted a Confidential Psychological Evaluation for Student in December 2014 that concluded that Student's cognitive functioning fell in the below average range, and academic abilities fell in the low average/average range (lower in math). Based on teacher and Parent's reports, the evaluator found that Student presents with significant difficulty

³ While "Parents" refers in this decision to the Petitioners, "Parent" refers to Student's parent who testified at the DPH. Testimony of Parent.

⁴ Testimony of Parent.

⁵ R-2.

⁶ R-2.

⁷ P-3; -4.

concentrating, impulse control and aggression issues. The evaluator concluded that Student's "deficits academically and socially are more likely explained by ADHD."⁸

7. In December 2014, DCPS conducted a functional behavior assessment ("FBA") for Student, finding Student's behavior to be "such that [Student] presents a significant distraction to [the] educational milieu and is significantly unavailable for instruction,"⁹ and that Student "continues to struggle significantly with managing [Student's] behavior and attending/attempting classroom instruction as well as exhibiting appropriate interactions with others."¹⁰

8. In December 2014, Student was exited from special education services when Student's participating IEP team members determined that Student did not meet the required criteria for speech or language impairment.¹¹ Parent made several requests since that time that Student be again determined eligible for special education services.¹²

9. In addition to the comprehensive psychological reevaluation Student had in December 2014, Student also had a DCPS-conducted comprehensive psychological reevaluation on May 31, 2017. The two evaluations reflect a precipitous drop in Student's IQ scores, such as would be difficult (if at all possible) to reconcile, absent an intervening event such as a head trauma.¹³

10. Student has not had any head injuries in at least the past two years.¹⁴

11. On or around June 16, 2017, Student was again determined eligible for special education services, this time under the disability classification "Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder)" ("OHI/ADHD").

12. Student has an IEP dated June 13, 2017 under the disability classification OHI/ADHD. It includes goals in math; reading; written expression; and emotional, social and behavioral development. It provides ten hours of specialized instruction per week outside the general education setting, and 120 minutes per month of behavioral support services outside the general education setting. The IEP indicates that Student's behavior does not impact Student's learning or the learning of others.¹⁵

⁸ P-6-18 and P-6-19; R-2-029 and R-2-030.

⁹ R-3-32.

¹⁰ R-3-033.

¹¹ R-6-061.

¹² Testimony of Parent; R-14.

¹³ Testimony of Educational Advocate; P-6-9; P-9-11; R-2-020; R-20-111. From the 2014 evaluation to the 2017 evaluation, Student's verbal intelligence score dropped from 80 to 66 and Student's nonverbal intelligence dropped from 85 to 48.

¹⁴ Testimony of Parent.

¹⁵ P-11.

13. The June 13, 2017 IEP indicates that Parent participated in the meeting by phone. However, Parent was not notified of the meeting ahead of time, and while the team called Parent at the start of the meeting, Parent told the team that Parent was not in a position at that time to participate in the meeting. Parent did not participate in the meeting in any meaningful way.¹⁶

14. DCPS suspended Student during the 2016-2017 school year¹⁷ on multiple occasions. By at least February 2017, Student had been suspended well in excess of ten school days.¹⁸ On several occasions during the 2016-2017 school year, Student was constructively suspended from school; yet, Parent was not provided any paperwork documenting the suspensions.¹⁹

15. DCPS convened Student's first manifestation determination review ("MDR") meeting on June 14, 2017, following an incident when Student slapped a younger student on the playground, refused to report to the office when directed to do so, and hit and kicked a staff member attempting to get Student to comply with instructions. Parent was not present at the MDR and did not receive notice in advance of the meeting.²⁰

16. In September 2017, DCPS authorized Parent to obtain an independent comprehensive psychological evaluation at the current OSSE rate of \$1525.16. Some evaluators occasionally conduct evaluations at this rate; however, at the time Parent was seeking to obtain the evaluation for Student and as of the time of the DPH, none of the evaluators on the list of evaluators DCPS provides to parents who desire to know of evaluator options was accepting evaluation requests at the OSSE rate. Rather, they were generally charging approximately \$3500.²¹

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide Student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief, except that once Petitioner has established a prima facie case, Respondent shall carry the burden of persuasion on issues regarding the appropriateness of an IEP or placement (issue (b)). The burden of persuasion shall be met by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party with the burden of persuasion must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

¹⁶ Testimony of Parent; P-11-1.

¹⁷ Stipulation of the parties.

¹⁸ Testimony of Parent; R-20-107.

¹⁹ Testimony of Parent.

²⁰ R-35-183; R-36.

²¹ Testimony of Educational Advocate; testimony of LEA Representative.

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 student'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).

(a) Whether DCPS denied Student a FAPE by failing to comply with the "Child Find" IDEA regulations beginning September 1, 2015.

Pursuant to 34 C.F.R. §§ 300.111 and 300.131, an LEA is responsible for identifying, locating and evaluating all children with disabilities who reside in its jurisdiction, regardless of the severity of their disability, and who are in need of special education and related services ("Child Find" obligations). An LEA's Child Find obligations are triggered as soon as a child is identified as a potential candidate for services. *Long v. District of Columbia*, 56 IDELR 122 (D.C.D.C. 2011). Here, DCPS had reason to believe that Student was a potential candidate for special education services at least as early as September 1, 2015.

Student had previously been determined eligible in 2013, but was not given a comprehensive psychological evaluation prior to the initial eligibility determination. Student's first comprehensive psychological evaluation in December 2014 concluded that Student's cognitive functioning fell in the below average range, and academic abilities fell in the low average/average range (lower in math). Based on teacher and Parent's reports, the evaluator found that Student presents with significant difficulty concentrating, and that Student has impulse control and aggression issues. The evaluator concluded that Student's "deficits academically and socially are more likely explained by ADHD." Though the evaluation confirmed that Student was likely eligible for special education services under the disability classification OHI, Student was exited from special education under the original speech-language eligibility classification without being determined eligible for any other category.

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. See 34 C.F.R. 300.513(a). In this case, Student continued to struggle academically and behaviorally after being exited from special education, and specifically during the relevant time period of September 2015 through the present, which impeded Student's right to a FAPE and caused a deprivation of educational benefit.

- (b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP on June 13, 2017, in that: (1) Parents were not included in the development of the IEP; (2) the IEP was not based on appropriate and adequate evaluations and evaluative data, (3) the IEP failed to state that Student's behaviors impede Student's learning and to provide for adequate behavioral support.**

An "IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). While an LEA is not required to maximize a student's educational potential, it also cannot "discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

In order for an IEP to be appropriate, the LEA must have complied with IDEA's administrative procedures. Pursuant to 34 C.F.R. § 300.322, an LEA "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate." The record includes some letters of invitation to Parent regarding the June 2017 IEP meeting; however, the letters are not signed (though there is a designated area for Parent to sign acknowledging receipt), and there was not documentary or testimonial evidence establishing that the letters were mailed to or otherwise provided to Parent. One of the letters of invitation for the June 13, 2017 IEP meeting is dated June 13, 2017, though the other is date June 1, 2017. The undersigned finds to be credible Parent's testimony that she had been unaware of the meeting prior to being called on the phone during the meeting. For these reasons, it is more likely than not that Parent was not given an opportunity to participate in the June 2017 IEP meeting.

An IEP must be reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) ("Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.")

Early in the June 2017 IEP, the team checked the box that Student's behavior does not impede Student's ability to access the curriculum. The evidence belies this perspective, as Student has struggled behaviorally for a number of years, to such an extent that it has rendered Student substantially unavailable for learning. Later in the IEP, Student is provided with emotional/social goals. However, Student's behavior is sufficiently problematic that there is not

room for ambiguity regarding the fact that Student's behavior impacts learning. Perhaps for some students the mischaracterization regarding the impact of behavior could be a mere procedural error. However, as Student entered the current school year with the June 2017 IEP, the undersigned concludes that it is more likely than not that the failure to immediately alert a reader who may just be getting to know Student of the academic impact of Student's behavior impeded Student's right to a FAPE and caused a deprivation of educational benefit.

Moreover, Student's IQ is not clearly known. There is an extreme divergence between Student's IQ as reflected in the 2014 psychological evaluation compared to the IQ reflected in the 2017 evaluation. Without understanding the reason for the disparity and/or at least which number is an accurate reflection of Student's current IQ, it is more likely than not that Student's programming is not reasonably calculated to provide educational benefit, which would impede Student's right to a FAPE and cause a deprivation of educational benefit, along with impeding Parent's ability to participate due to lack of clear data. DCPS does not meet the burden of persuasion on this issue.

(c) Whether DCPS denied Student a FAPE by failing to comply with the disciplinary regulations during the 2016-2017 school year, when suspending Student on a regular basis and failure to convene a MDR that included Parents.

Once a student eligible for special education services has been suspended for more than ten days in a school year, the LEA must conduct a manifestation determination review ("MDR") to determine whether the conduct in question was a manifestation of the student's disability, including because it "was caused by, or had a direct and substantial relationship to, the child's disability" or because the behavior was "the direct result of the LEA's failure to implement the IEP." 34 CFR § 300.530(e). In reaching the determination, the team must review "all relevant information in the student's file, including the child's IEP, and teacher observations, and any relevant information provided by the parents." Here, Student had been suspended far more than ten days during the 2016-2017 school long before the June 2017 MDR. The undersigned finds to be credible Parent's testimony that Parent did not receive notice of the meeting prior to the meeting. As Parent was not a participant in the meeting, Parent could not contribute anything to the information the team considered. Ultimately, the team determined Student's behavior to have been a manifestation of the disability. However, Parent's opportunity to participate in the decision-making process was impeded; therefore, Parent meets the burden of proof on this issue.

ORDER²²

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- A.** Within 10 school days of this Order, DCPS shall fund at market rate²³ an independent comprehensive psychological evaluation;

²² Compensatory education is not yet ripe in this action, as the evaluations this decision orders have not yet been completed.

²³ The evidentiary record demonstrates market rate for the independent comprehensive psychological evaluation to be approximately \$3500.

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- B. Within 10 school days of this Order, DCPS shall fund an independent comprehensive speech/language evaluation;²⁴
- C. Within 20 school days of this Order, DCPS shall conduct a functional behavior assessment (not merely a behavioral screener).

All other relief Petitioner requested in the complaint is **DENIED**.

SO ORDERED.

Date: October 13, 2017

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
Respondent's Attorney (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).

²⁴ Though Student's most recent DCPS conducted speech-language evaluation demonstrates that Student's speech-language abilities fell within the expected parameters for Student's age, an independent speech-language evaluation is being ordered based on Student's previous eligibility for speech services. The record does not reflect that OT is an area of suspected disability for Student at this time, and an independent OT evaluation is not ordered herein. The independent speech/language evaluation shall be funded at the OSSE rate. While the DPC requests funding at market rate, the evidence does not demonstrate that the typically utilized OSSE rate is insufficient for the speech-language evaluation.