

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

ODR
Office Of Dispute Resolution
September 23, 2014

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
)	
<i>Petitioner,</i>)	
)	
v.)	
)	Date Issued: September 22, 2014
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

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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 July 9, 2014 by Petitioner (Student’s grandparent²), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 18, 2014, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on July 28, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by August 12, 2014 and that the due process hearing (“DPH”) would be held on August 19, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued August 8, 2014.

¹ Personal identification information is provided in Appendix A.

² Petitioner may at times be referred to as “Parent” for purposes of this HOD, for ease of discussion, and because she is Student’s legal guardian.

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Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-6,³ P-8 through P-13, and P-16 through P-30 were admitted without objection. Petitioner's exhibits P-7 and P-14 and P-15 were admitted over Respondent's objection. Respondent's exhibits R-4 and R-15 were admitted without objection. Respondent's exhibits R-1 through R-3, R-5 through R-14 and R-16 were admitted over Petitioner's objection.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Grandmother (Legal guardian/Petitioner);
- (b) Student;
- (c) Psychological Expert-Parent (Qualified as an expert in clinical psychology including comprehensive psychological and vocational evaluation)
- (d) Learning Center Director (Director of private learning center; offered as an expert; not qualified as an expert, but permitted to give lay opinion testimony consistent with Federal Rule of Civil Procedure 701).

Respondent did not call witness testify at the DPH.

The parties 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 the student a free appropriate public education ("FAPE") by failing to provide assessments at the parent's request on February 5, 2013 and March 12, 2013 or, in the alternative, by failing to comprehensively re-evaluate the student in all areas of suspected disability in the 2012-2013 school year.
- (b) Whether DCPS denied the student a FAPE by failing to implement the student's IEPs throughout the 2012-2013 school year (including the IEP finalized on or about February 22, 2012, which was in place at the beginning of the 2012-2013 school year, as well as the IEP finalized on February 5, 2013). Specifically, the DPC raises the following issues with the implementation of the student's IEPs throughout the 2012-2013 school year:
 - 1. whether DCPS failed to provide the student 23 hours per week of specialized instruction in an outside the general education setting as called for in the IEP dated approximately February 22, 2012.

³ Respondent had initially objected to P-1 through P-6, documents from the administrative record. However, the hearing officer admitted these documents solely as part of the administrative record, and not as evidence; therefore, Respondent withdrew the objection to these documents being admitted for that limited purpose.

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2. whether DCPS failed to provide the student 26.5 hours per week of specialized instruction in an outside the general education setting as called for in the IEP dated February 5, 2013.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that DCPS denied the student a FAPE by failing to provide assessments upon the request of the parent or, in the alternative, by failing to comprehensively reevaluate the student in all areas of suspected disability at the parent's request and by failing to implement the student's IEP;
- (b) an Order that DCPS fund independent comprehensive psychological, speech-language, and vocational level II evaluations, and any other evaluation these evaluation recommend, at market rate⁴;
- (c) an Order that DCPS convene an IEP team meeting(s) within 15 days of receiving the final independent evaluation to review all independent evaluations and review and revise the student's IEP, as appropriate;
- (d) an award of compensatory education in the form of daily instruction 4 hours per day, 5 days per week for a period of 10 - 12 weeks of instruction (200 - 240 hours). In the alternative, Petitioner requested that the hearing officer fashion an appropriate compensatory education award, provided there is sufficient basis in the record to do so. Also in the alternative, Petitioner requested that the hearing officer issue an Order that DCPS fund an independent evaluation at market rate to determine appropriate compensatory education and that, following that evaluation the Petitioner, at her option, could bring a due process complaint in order to present facts at the due process hearing for the assigned hearing officer to fashion an appropriate compensatory education award.

FINDINGS OF FACT

Background

1. Student resides with her grandmother and legal guardian ("Parent"/"Petitioner") in Washington, D.C.
2. During the 2013-2014 school year, Student attended District School #2.⁵
3. During the 2012-2013 and 2011-2012 school years, Student attended District School #1.⁶
4. Student's biological mother (not Parent/Grandmother/Petitioner) originally enrolled Student at District School #1.⁷

⁴ The DPC requested an occupation therapy assessment; however, that request was withdrawn during the DPH.

⁵ Testimony of Parent.

⁶ Testimony of Parent.

⁷ Testimony of Parent.

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5. Student's February 5, 2013 IEP ("2013 IEP") called for 26.5 hours per week of specialized instruction in an outside the general education setting. This IEP was in place from the date of finalization through the end of the 2012-2013 school year (and beyond, until a new IEP was finalized for Student).⁸ The IEP immediately prior to the 2013 IEP, which was in place for until February 5, 2013, called for 23 hours per week of specialized instruction in an outside the general education setting.⁹

6. District School #1 was not able to implement Student's 2012 IEP or 2013 IEP.

7. Once Student came into Petitioner's custody, Petitioner kept Student enrolled at District School #1 through the end of the 2012-2013 school year, notwithstanding the fact that District School #1 could not implement Student's 2012 or 2013 IEPs.

8. In March 2013, DCPS issued a Prior Written Notice advising Parent to enroll Student at Student's neighborhood school. Parent invoked her stay put rights to keep Student enrolled at District School #1.

9. During the 2013 IEP meeting, the team agreed that Student would receive a comprehensive psychological evaluation. DCPS provided the consent to evaluate form to Parent and/or her legal representative. In February and March 2013, Parent's legal representative and DCPS engaged in various electronic mail discussions about the consent to evaluate form, including Parent's concerns about the fact that the consent to evaluate form did not list the evaluations that would be conducted, and DCPS's request to convene a follow up meeting to discuss the evaluations that would be conducted. DCPS did not receive a signed consent to evaluate form from Parent between the 2013 IEP meeting and the end of the 2012-2013 school year.

10. Parent signed and provided to DCPS a form consenting to re-evaluate Student on October 31, 2013.

11. Student received a psychological triennial reevaluation on October 23, 2013.

12. A Vocational Level II assessment is more formal than a Vocational Level I assessment. A Vocational Level II assesses a student's interests as well as his/her aptitude.¹⁰

13. Student received a vocational assessment on September 18, 2013, which focused on Student's career interests and independent living skills. Due to limitations from her disability, Student was not able to complete the full vocational assessment that was attempted with her. While the hearing officer credits Psychological Expert-Parent's testimony that norm-referenced, rather than criterion referenced, Vocational Level II assessments are available and would provide more additional data, based on Psychological Expert-Parent's description of a Vocational Level II as assessing interests and aptitude, the hearing officer concludes that the assessment Student received on September 18, 2013 was a Vocational Level II.

⁸ P-13-10.

⁹ P-14-1.

¹⁰ Testimony of Psychological Expert-Parent.

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14. Student's most recent speech-language evaluation is from September 21, 2007. No evidence was offered at the DPH from which the hearing officer can conclude that Student requires an additional speech-language assessment.

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 the 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. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief 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).

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).

I. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to provide assessments at the parent's request on February 5, 2013 and March 12, 2013 or, in the alternative, by failing to comprehensively re-evaluate the student in all areas of suspected disability in the 2012-2013 school year.

Pursuant to IDEA, a local education agency ("LEA") such as DCPS must conduct a reevaluation of a student with disability when the parent or teacher requests a reevaluation. Reevaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Once the parent has requested reevaluation, the IEP team and other qualified professionals must first review existing evaluation data and, based that review and input from the parent, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006). The review of existing data is the beginning of the reevaluation process. *See Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). If the IEP team determines no additional assessments are needed, the parent still has the right to request additional assessments to assess the student's educational needs. 34 CFR § 300.305(d)(1)(ii). The LEA must obtain informed parental consent prior to conducting any additional assessments needed for a reevaluation. 34 CFR § 300.305(a).

IDEA does specify a timeframe within which an LEA must conduct a reevaluation after a parent's request. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). Rather, "[r]evaluations should be conducted in a 'reasonable period of time,' or

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‘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)); see also, *Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010).

In this case, DCPS was required to reevaluate Student when Parent made the request in February 2013. In attempting to schedule a follow up meeting to review existing data, DCPS was attempting to begin the reevaluation process. Assuming that DCPS convened a meeting to review existing data in around March 2013¹¹ and determined no additional assessments were necessary, Parent would have still had the right to request additional assessments to determine Student’s educational needs. However, on the one hand, DCPS did not receive a signed consent form to conduct assessments between February 2013 and the end of the 2012-2013 school year, and on the other hand, DCPS began conducting assessments in September 2013, even though it did not receive signed consent from Parent until October 31, 2013. In light of the team’s determination that no additional assessments were needed, the lack of signed consent between February 2012-2013 school year, and lack of evidence to the contrary, the hearing officer does not find the period of time it took DCPS to begin conducting the assessments to be an unreasonable delay in this instance.

Even if had been an unreasonable delay, a failure to timely reevaluate (as opposed to conducting an initial evaluation) is a procedural violation of IDEA. Procedural violations of IDEA do not, in themselves, inexorably lead a court to find a child was denied FAPE. *Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010) (citations and internal quotations omitted.) Rather, Petitioner would be required to show either that the procedural violation (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). The record does not support either of these findings.

Petitioner did not meet her burden of proof on this issue.

II. Whether DCPS denied the student a FAPE by failing to implement the student’s IEPs throughout the 2012-2013 school year (including the IEP finalized on or about February 22, 2012, which was in place at the beginning of the 2012-2013 school year, as well as the IEP finalized on February 5, 2013). Specifically, the DPC raises the following issues with the implementation of the student’s IEPs throughout the 2012-2013 school year.

By Petitioner’s own testimony, she allowed Student to remain enrolled at District School #1 throughout the 2012-2013 school year, despite the fact that it was not able to implement

¹¹ The primary evidence of a March 2013 meeting comes from notes taken by counsel for Petitioner. These notes were admitted into evidence at P-15, over Respondent’s objection; however, the fact that they were directly and exclusively prepared by counsel for Petitioner, do not contain any authenticating elements (such as time/date stamps), and no witness testified regarding them greatly means the hearing officer can assign them extremely little if any weight.

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Student's IEP. Additionally, when DCPS issued a Prior Written Notice proposing a new placement in March 2013, Petitioner invoked a "stay put" so that Student could remain at District School #1. Because Petitioner willingly allowed Student to remain at District School Number #1 even though it could not implement Student's IEP, DCPS cannot be said to have denied Student a FAPE on this basis.

- a. *whether DCPS failed to provide the student 23 hours per week of specialized instruction in an outside the general education setting as called for in the IEP dated approximately February 22, 2012.*

As discussed above, Petitioner did not meet her burden of proof on this issue.

- b. *whether DCPS failed to provide the student 26.5 hours per week of specialized instruction in an outside the general education setting as called for in the IEP dated February 5, 2013.*

As discussed above, Petitioner did not meet her burden of proof on this issue.

Order

Petitioner did not meet her burden of proving that DCPS denied the student a ("FAPE") on either of the issues alleged.

Accordingly, all relief Petitioner requested in the complaint is **DENIED**.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: September 22, 2014

/s/ NaKeisha Sylver Blount
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).