

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3rd Floor  
Washington, DC 20002

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

Date Issued: September 27, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2018-0161

v.

Hearing Date: September 18, 2018

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 112  
Washington, D.C.

Respondent.

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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 (DCMR). In her Due Process Complaint, Petitioner contends that Respondent District of Columbia Public School (DCPS) has denied Student a free appropriate public education (FAPE) by not complying with the order in a prior Hearing Officer Determination for DCPS to fund an Independent Educational Evaluation (IEE) psychological evaluation of Student at a rate that is usual and customary in the community.

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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 June 25, 2018, named DCPS as respondent. The case was assigned to the undersigned hearing officer on June 26, 2018. The parties did not meet for a resolution session. On July 24, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. My final decision in this case was originally due by September 8, 2018. Due to the temporary unavailability of a DCPS witness, by order of August 31, 2018, I granted DCPS' unopposed motion to schedule the due process hearing on September 18, 2018 and to extend the final decision due date to October 2, 2018.

The due process hearing was held before this impartial hearing officer on September 18, 2018 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 appeared by telephone and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by RESOLUTION MANAGER and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner called EDUCATIONAL ADVOCATE and CLINICAL PSYCHOLOGIST as witnesses. DCPS called as witnesses COMPENSATORY EDUCATION ANALYST and Resolution Manager. Petitioner's Exhibits P-1 through P-7 were admitted into evidence without objection. DCPS' Exhibits R-6 through R-9, R-12 through R-14, R-17, R-19 through R-23, R-25, R-26 and R-29 were admitted into evidence without objection. Exhibits R-15, R-27 and R-28 were admitted over Petitioner's objections. Petitioner's objection to Exhibit R-24 was sustained. Exhibits R-1 through R-5, R-10, R-11, R-16 and R-18 were withdrawn. Counsel for the respective 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 DCMR tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The following issue for determination was certified in the July 24, 2018

Prehearing Order:

Whether DCPS has denied Student a FAPE by not complying with Hearing Officer Michael Lazan's June 27, 2018 order to provide funding for Student to have an independent comprehensive psychological evaluation at a rate that is the usual and customary rate in the community.

For relief, the Petitioner requests that the hearing officer order DCPS to comply with the terms of the June 27, 2018 HOD by issuing an authorization for an independent psychological evaluation to be conducted by Clinical Psychologist at her usual and customary rate, which is \$3,500.

### **FINDINGS OF FACT**

#### **June 27, 2018 Hearing Officer Determination**

Earlier this year, Petitioner filed a prior due process complaint on behalf of Student in Case No. 2018-0098, assigned to Impartial Hearing Officer Michael Lazan. The issues for determination identified in Mr. Lazan's prehearing order were, whether DCPS denied Student a FAPE by failing to evaluate Student upon the parent's request in the 2017-2018 school year and whether DCPS denied Student a FAPE by not appropriately evaluating Student, before exiting Student from special education in the 2016-2017 school year. In the June 17, 2018 Hearing Officer Determination, Hearing Officer Lazan found in favor of the parent on both issues. In his decision, Hearing

Officer Lazan found that Petitioner should be able to choose an independent provider for a comprehensive psychological evaluation of Student, “provided that the evaluation is conducted at a rate that is usual and customary in the community.” See Exhibit P-1.

#### Additional Findings of Fact

After considering all of the evidence received at the September 18, 2018 due process hearing, as well as the arguments of counsel, this hearing officer’s additional Findings of Fact are as follows:

1. The Hearing Officer Determination in Case No. 2018-0098 was issued on June 17, 2018. Hearing Officer Lazan ordered that “Petitioner is awarded the right to retain a provider to conduct a comprehensive psychological evaluation of the Student, to be paid for by DCPS, provided that the evaluation is conducted at a rate that is usual and customary in the community.” In the decision Hearing Officer Lazan did not determine what rate was “usual and customary.” Exhibit P-1. Until recently, DCPS followed rates approved by the D.C. Office of the State Superintendent of Education (OSSE) for reimbursement of IEE evaluations, which were adjusted annually based upon data from the U.S. Bureau of Labor Statistics. As of October 1, 2017, the OSSE rate for psychological evaluations was \$1,618.11. Testimony of Resolution Manager.

2. On or about June 20, 2018, DCPS’ RESOLUTION SPECIALIST 1 issued a written funding authorization to the parent to obtain an IEE Comprehensive Psychological Evaluation of Student, at the expense of the District of Columbia, at a maximum total cost of \$1,618.11. Exhibit R-20. A list of potential evaluators was provided with the authorization. The parent was permitted to engage an evaluator on the list, or another provider who met DCPS’ standards for a comprehensive psychological evaluation. Exhibits R-25, R-20.

3. On June 20, 2018, Petitioner's Counsel responded by email to DCPS that Clinical Psychologist had testified in the prior hearing that the usual and customary rate in the area was \$3,500 – not the “OSSE-capped rate.” On June 28, 2018, RESOLUTION SPECIALIST 2 sent Petitioner's Counsel, by email, a corrected authorization letter, which apparently clarified that the evaluator needed to submit the invoice for the assessment to DCPS by email, but which did not change the compensation rate. Resolution Specialist 2 requested Petitioner's Counsel to let him know if she needed help identifying a psychologist who would complete the IEE psychological evaluation at the DCPS authorized rate. Exhibit R-19.

4. In April 2018, Resolution Manager had a survey conducted of area psychological evaluation providers as to what rates they would accept to conduct IEE psychological evaluations funded by DCPS, and determined that the average rate was less than \$2,400. Seven of the surveyed providers indicated they would accept \$2,500 or less to conduct the evaluation. In May or June 2018, Resolution Manager contacted his counterparts in local education agencies (LEAs) in nearby jurisdictions in Maryland and Virginia, including Arlington and Fairfax Counties and the City of Alexandria. The maximum payment authorized by any of these LEAs for comprehensive psychological evaluations was \$2,400.00. Based on these data, DCPS increased its authorized rate for IEE comprehensive psychological evaluations to \$2,500. On August 13, 2018, DCPS issued a new funding authorization letter to Mother, authorizing her to obtain a Comprehensive Psychological Evaluation of Student, at District of Columbia expense, at a maximum total cost of \$2,500.00. Exhibit R-13. DCPS provided in its funding authorization letters to the parent that “[r]easonable and documented fees that exceed these rates may be allowed on a case by case basis at the discretion of the District of

Columbia, when the evaluator you select can justify that the excess costs were essential for educational and/or diagnostic purposes.” Exhibits R-13, R-20.

5. DCPS publishes an annual publication titled, *Parent Guide to Independent Services (Parent Guide)*. That publication lists 16 local psychological providers in the Washington, D.C. area who may accept the DCPS maximum evaluation rate for conducting a psychological assessment. The guide explains that a parent may engage a provider not on the list, so long as the provider selected is qualified to conduct the assessment and will accept the DCPS prescribed rate. Exhibit P-3. In August 2018, Educational Advocate contacted most of the psychological evaluation providers in the *Parent Guide*. Most of the providers informed Educational Advocate that they would not conduct psychological evaluations of students for the maximum compensation authorized by DCPS. About four of the providers indicated to Educational Advocate that they would accept \$2,500 for conducting a psychological evaluation, but not on a consistent basis. Educational Advocate did not ask DCPS staff for help in finding a psychologist to conduct an IEE psychological evaluation of Student. Testimony of Educational Advocate.

6. Clinical Psychologist practices in Rockville, Maryland. She charges \$3,000 for conducting a comprehensive psychological evaluation, plus \$510 if a school observation is required. Clinical Psychologist conducted an informal survey of several colleagues in Montgomery County, Maryland and was informed that these psychologists charge \$3,125 to \$4,125, or more, for conducting a comprehensive psychological evaluation. As a *pro bono* service to the Washington, D.C. community, Clinical Psychologist has sometimes accepted the DCPS payment rate for conducting psychological evaluations of children in the under-served population of the community.

Testimony of Clinical Psychologist.

**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 for specified exceptions not applicable to this case. The burden of persuasion shall be met by a preponderance of the evidence.

*See D.C. Code § 38-2571.03(6).*

**Analysis**

Did DCPS deny Student a FAPE by not complying with the June 27, 2018 HOD order to provide funding for Student to have an independent comprehensive psychological evaluation at a rate that is the usual and customary rate in the community?

In his June 27, 2018 Hearing Officer Determination in Case No. 2018-0098, Hearing Officer Michael Lazan ordered that "Petitioner is awarded the right to retain a provider to conduct a comprehensive psychological evaluation of the Student, to be paid for by DCPS, provided that the evaluation is conducted at a rate that is usual and customary in the community." DCPS promptly issued a funding authorization letter for the parent to obtain an Independent Educational Evaluation (IEE) comprehensive psychological evaluation of Student, at District of Columbia expense, at a maximum total cost of \$1,618.11. Petitioner's Counsel immediately objected that in the hearing before Mr. Lazan, Clinical Psychologist had testified that the usual and customary rate

in the area was \$3,500 – not the “OSSE-capped rate.” Subsequently, DCPS increased the Maximum Total Cost it would pay for a comprehensive psychological assessment to \$2,500 and, on August 13, 2018, issued a new funding authorization to the parent with the higher rate. Petitioner claims that DCPS has denied Student a FAPE by not allowing more than \$2,500 for the IEE psychological evaluation. Petitioner has the burden of persuasion on this claim.

As I explained to counsel in the July 24, 2018 prehearing conference, there is no specific provision in the IDEA addressing enforcement of hearing officer decisions. Case law has indicated that a party must appeal directly to state or federal court to compel enforcement of a final decision made by a due process hearing officer. *See, e.g., Robinson v. Pinderhughes*, 810 F.2d 1270, 1272 (4th Cir. 1987). However, if an LEA’s non-compliance with a hearing officer order results in failure to provide FAPE, this failure may constitute a separate, actionable, violation of the IDEA. *Cf. Sellers by Sellers v. School Bd. of City of Manassas*, 141 F.3d 524, 531 (4<sup>th</sup> Cir. 1998) (Simple failure to provide a child with a free appropriate public education constitutes a violation of the statute.) Therefore, the Petitioner’s burden in this case was to show that DCPS’ failure to authorize more than \$2,500 for the parent to obtain an IEE comprehensive psychological evaluation of Student, subsequent to the June 27, 2018 HOD, constituted a denial of FAPE to Student.

In his June 27, 2018 decision, Hearing Officer Lazan did not determine what rate was usual and customary for a comprehensive psychological evaluation in the Washington, D. C. community. Nor did Petitioner satisfactorily prove the usual and customary rate at the due process hearing in this case. In an analogous context, applications for attorney fees in IDEA cases, the U.S. District Court for the District of

Columbia has explained, that with respect to the prevailing market rate in the relevant community, “the [fee] applicant must produce satisfactory evidence—in addition to her attorney’s own affidavits—that her requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A fee applicant therefore must come forward with specific, concrete evidence to support her petition.” *Lee v. District of Columbia*, 298 F. Supp. 3d 4, 9-10 (D.D.C. 2018) (citations and internal quotations omitted.) Petitioner’s only evidence of the usual and customary rate in the community for comprehensive psychological evaluations came from Clinical Psychologist. This witness testified to her informal query of several colleagues in Montgomery County, Maryland, who related that they charge \$3,125 to \$4,125 for such evaluations. I find that this anecdotal data was not “specific, concrete evidence” to establish the usual and customary rate charged for comprehensive psychological evaluations in the broader Washington, D.C. community.

Even if Petitioner had established a usual and customary rate charged for comprehensive psychological evaluations in the community, she has not shown that DCPS’ authorization of \$2,500 for the IEE assessment denied Student a FAPE. With regard to an LEA’s right to limit the amount it pays for an IEE under 34 CFR § 300.502, the U.S. Department of Education has explained,

It is the Department’s longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs. . . . In order for an evaluation to be at public expense, § 300.502(e)(1) requires that the criteria under which an IEE is obtained, including the location of the IEE and the qualifications of the examiner, be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent that those criteria are consistent with a parent’s right to an IEE. . . . Although it is appropriate for a public agency to establish reasonable cost containment criteria . . . , a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection

of an evaluator whose fees fall outside the agency's cost containment criteria.

U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46689, -690 (August 14, 2006). *See, also, Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 980 (5th Cir. 2016) (IDEA allows schools to enforce reasonable cost criteria for IEEs as long as parents in unique circumstances have the opportunity to request exemption.)

In the present case, DCPS set its maximum total cost of \$2,500 for an IEE comprehensive psychological assessment after making a survey of psychological providers in the community and making inquiries to LEAs in neighboring jurisdictions as to their rate criteria. At the due process hearing, DCPS identified at least seven independent providers in the community that would conduct a comprehensive psychological evaluation for a cost at or below \$2,500. I find, therefore, that the maximum total cost of \$2,500 set by the District was not unreasonable.

DCPS also provided in its funding authorization letters to the parent that “[r]easonable and documented fees that exceed these rates may be allowed on a case by case basis at the discretion of the District of Columbia, when the evaluator you select can justify that the excess costs were essential for educational and/or diagnostic purposes.” Therefore, if the parent felt there were unique circumstances in Student’s case, she had the opportunity to request exemption from DCPS’ cost cap. Neither Petitioner’s Counsel nor Clinical Psychologist informed DCPS of unique circumstance that would warrant exceeding the maximum total cost authorized by DCPS. Nor did the parent take DCPS up on its offer to Petitioner’s Counsel to help identify a psychologist who would complete the IEE psychological evaluation at the DCPS authorized rate. I conclude,

therefore, that Petitioner has not met her burden of persuasion that DCPS denied Student a FAPE by not agreeing to fund an IEE comprehensive psychological evaluation of Student at a rate exceeding \$2,500.

**ORDER**

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

All relief requested by the Petitioner herein is denied.

Date: September 27, 2018

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  
Student Hearing Office  
Chief Hearing Officer  
OSSE Division of Specialized Education  
DCPS Resolution Team