

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

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Office of Dispute Resolution  
September 07, 2019

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

Date Issued: September 7, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0168

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: September 4 and 5, 2019

Office of Dispute Resolution, Room 423  
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 the Petitioner (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 (“D.C. Regs.”). In her due process complaint, Petitioner seeks relief for DCPS’ alleged failure to timely identify Student as a student with a disability and its failure to offer Student an appropriate initial Individualized Education Program (IEP).

Petitioner’s Due Process Complaint, filed on July 1, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on July 2, 2019. On July

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<sup>1</sup> Personal identification information is provided in Appendix A.

18, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On July 16, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on September 4th and 5th, 2019 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. Mother and Student appeared in person on the first day of the hearing and were represented by PETITIONER'S COUNSEL of LAW FIRM. Respondent DCPS was represented by DCPS' COUNSEL 1, assisted by DCPS' COUNSEL 2 and DCPS COUNSEL 3.

Counsel for the parties made opening statements. Mother and Student testified at the hearing and called as additional witnesses INDEPENDENT OT and EDUCATIONAL ADVOCATE. DCPS called as witnesses SCHOOL PSYCHOLOGIST, LEA REPRESENTATIVE, CASE MANAGER and SCHOOL SOCIAL WORKER. Mother was recalled as a rebuttal witness. Petitioner's Exhibits P-1 through P-56 were admitted into evidence, except for Exhibits P-3, P-49 and pages 2 through 5 of Exhibit P-48, which were withdrawn. Exhibits P-10, P-13, P-22 through P-27, P-33 through P-35, P-39, P-40, and P-56 were admitted over DCPS' objections. (Over DCPS' objection, I granted Petitioner's request to adopt and offer DCPS' Exhibit R-20 as Petitioner's Exhibit P-56.) DCPS' Exhibits R-1 through R-31 were all admitted into evidence without objection. Counsel for the respective parties made oral closing arguments.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the July 18, 2019 Prehearing Order,<sup>2</sup> are:

- a. Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student for special education eligibility by the end of the 2016-2017 school year;
- b. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive initial evaluation in spring 2019, to include psychological testing, to address the student's attention issues in order to rule out ADHD, as recommended by a court evaluation; an adaptive assessment to rule out Borderline Intellectual Functioning, as recommended by a court evaluator and/or to address Student's adaptive functioning and needs; a Speech and Language evaluation; an Occupational Therapy evaluation and/or a comprehensive vocational evaluation;
- c. Whether DCPS denied the student a FAPE by failing to develop an appropriate initial IEP for Student on May 21, 2019 and

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<sup>2</sup> The prehearing order contains scrivener's errors, including the addition of a failure to implement the IEP claim which was not asserted by the Petitioner and the omission of a claim that DCPS refused to allow the parent's educational advocate to conduct an observation of the student in the classroom setting. Petitioner's Counsel confirmed at the due process hearing that Petitioner had not made a failure to implement claim. Neither party advised the hearing officer of the misstatement or omission before the due process hearing. Therefore, I will not consider the claim for failure to allow the classroom observation. See July 18, 2019 Prehearing Order, ¶ 16 ("The parties and their counsel will be held to the matters agreed upon, ordered, or otherwise set forth in this Order. If either party believes this Hearing Officer has overlooked or misstated any item, the party is directed to advise this Hearing Officer of the omission or misstatement within three business days (and provide a copy to opposing counsel). The Hearing Officer will address the party's concern promptly.")

d. Whether DCPS denied the student a FAPE by its failure to provide Student's education records to the parent's representatives, and thereby preventing the parent from meaningfully participating in Student's education.

For relief, Petitioner requests that the hearing officer order DCPS to immediately amend Student's IEP to provide the Student with pullout services for mathematics and placement in a small structured therapeutic setting; order DCPS to develop a plan to integrate Student back into the school setting; order DCPS to develop a safety plan for Student; order DCPS to conduct and/or fund a comprehensive psychological evaluation of Student, that addresses ADHD, and to conduct an adaptive assessment, as well as an occupational therapy evaluation, vocational evaluation, speech and language evaluation and upon completion of comprehensive evaluations, to reconvene Student's multidisciplinary team. The Petitioner also requested that Student be awarded compensatory education for denials of FAPE that allegedly occurred as a result of DCPS' failure to comply with its "child find" obligation and for other denials of FAPE alleged in the complaint, and that DCPS be ordered to fund a compensatory education evaluation.

### **FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

#### **Testimony of Mother.**

2. Student is eligible for special education under the IDEA disability

classification Emotional Disturbance (ED) and was initially determined eligible at an eligibility committee meeting at CITY SCHOOL 2 on April 26, 2019. Exhibit R-6.

3. Student was enrolled at City School 2 for the 2017-2018 and 2018-2019 school years. Previously Student was enrolled at CITY SCHOOL 1. Student is currently enrolled in CITY SCHOOL 3. Testimony of Student.

4. Student has had a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) since elementary school. The 504 Plan was developed to address behavioral difficulties. Testimony of Mother, Exhibit R-18. In elementary school, Student received outside counseling services. Testimony of Mother. As of December 2017, Student's file at City School 2 indicated that Student was being treated for Attention Deficit-Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Exhibit P-28. Student's May 23, 2017 Section 504 Plan included Behavior Management de-escalation strategies. Exhibit P-27.

5. Student has been seeing a psychiatrist at least since August 2018 with reported diagnoses of ADHD and Post-Traumatic Stress Disorder (PTSD). Exhibit P-13.

6. On December 20, 2018, the Superior Court for the District of Columbia ordered a psychoeducational evaluation of Student after Student had been charged with assault on a police officer and possession of a prohibited weapon, pertaining to an alleged incident on August 22, 2018. The Court-ordered evaluation report was completed by COURT EXAMINER on January 25, 2019. Student told Court Examiner that Student's grades were likely D's and F's because Student frequently missed classes,

spent time on the cell phone and had difficulty concentrating with other students around. Exhibit P-13.

7. Student's scores on cognitive assessments on the Court-ordered psychological were in the Very Low range. Student's broad scores on educational achievement assessments were in the Low Average to Average range except for in the Low range for Broad Mathematics. However, Student's overall scores on cognitive and achievement measures were likely impacted by Student's observed fatigue. Court Examiner cautioned that Student's scores must be interpreted with caution and may underestimate Student's abilities. Exhibit P-13.

8. As to Student's Emotional, Behavioral and Personality Functioning, Court Examiner reported that Student presented with an array of symptoms of mixed severity that are best explained by co-morbid diagnoses of Cyclothymic Disorder and other Specified Disruptive, Impulse-Control and Conduct Disorder. Court Examiner also diagnosed Student with Specific Learning Disorder with impairment in mathematics. Court Examiner stated that further evaluation was needed before ruling in or ruling out diagnoses of ADHD and Borderline Intellectual Functioning. Exhibit P-13.

9. On January 18, 2019, an attorney for the parent at Law Firm submitted a request to City School 2 for Student to be evaluated for special education eligibility. On January 29, 2019, FORMER CASE MANAGER attempted to set an Analysis of Existing Data (AED) meeting for Student, but the Law Firm attorney did not respond until March 15, 2019. Exhibit P-37.

10. On April 11, 2019, Former Case Manager completed an Analysis of Existing Data (AED) report on Student. The AED report relied primarily on the January 25, 2019 Court-ordered psychoeducational assessment of Student. The AED report also reported that Student was failing geometry, English, and written expression due to chronic absences. Exhibit P-4.

11. On April 24, 2019, School Social Worker completed a Functional Behavior Assessment (FBA) of Student. (The report is incorrectly dated April 28, 2019.) City School 2 educators interviewed for the FBA reported that Student engaged in an excessive use of profanity, in addition to agitating peers and being easily distracted. These behaviors were noted to be acute in intensity and lasted for no less than 30 minutes. Student was allegedly known to threaten peers in the process. Student was reported to often present in an agitated manner and not to comply with simple directions from adults. Student was reported to miss days of school each week and when Student did arrive, it was usually around the 1:10 p.m. lunch period. On the educators' responses to Strengths and Difficulties Questionnaires (SDQs), these scoring inventories were consistent with previous secondary reporting sources finding Student contending with emotional dysregulation issues. Marked clinical features of Student's ADHD issues were also prevalent throughout these questionnaire instruments. Exhibit R-14.

12. On April 26, 2019, School Psychologist completed a written review of the January 25, 2019 psychoeducational evaluation of Student completed by Court Examiner. School Psychologist also reviewed Student's school records and interviewed

school staff. He concluded that no additional cognitive, achievement or social-emotional behavioral assessments of Student were required. From his record review, School Psychologist concluded that Student had a total of 124 school absences in the 2018-2019 school year, of which 113 were unexcused. He noted that Student's absence tally could be reflective of missing an entire school day or missing two classes in one day, which would be considered a "daily absence" according to the DCPS attendance policy. He noted that since the 2015-2016 school year, Student's scores on the i-Ready math assessment were consistently below grade level. Student's scores on the SRI reading assessment were reported to be at the Basic (minimally competent) level. School Psychologist concluded that Student did not meet criteria for the educational classification of Specific Learning Disability (SLD) because, due to Student's not being present for class, there was a "lack of appropriate instruction" in reading, mathematics and writing. He determined that Student did meet criteria for ED due to an inability to build or maintain satisfactory interpersonal relationship with peers and teachers, as well as inappropriate types of behaviors or feelings under normal circumstances. Exhibit R-17.

13. At an eligibility meeting at City School 2 on April 26, 2019, the eligibility team determined that Student was eligible for special education as a student with an Emotional Disturbance. Exhibit R-5. No one at the meeting requested further assessments to supplement the psychoeducational evaluation conducted by Court Examiner. Testimony of School Psychologist.

14. On May 21, 2019, Student's City School 2 IEP team convened to develop Student's initial IEP. Mathematics, Reading, Written Expression and Emotional-Social-Behavioral Development were identified as Student's areas of concern. Case Manager, who drafted the academic and post-secondary transition areas of the IEP, was unaware of Court-ordered psychoeducational assessment of Student, so none of the cognitive, academic achievement or behavioral data from the Court-ordered assessment was considered by Student's IEP team or included in the May 21, 2019 IEP Present Levels of Academic Achievement and Behavioral Development. Exhibit R-10, Testimony of Case Manager. The May 21, 2019 IEP provided for Student to receive 9 hours per week of Specialized Instruction in the general education setting and 240 minutes per month of Behavioral Support services. The IEP also included a post-secondary transition plan, which included no input from Student, because Student was not present in school for Case Manager to interview. At the May 21, 2019 IEP team meeting, Mother or her representative advocated that Student needed pull-out services in Mathematics and needed support for sensory issues and expressed concern that the IEP math goals seemed difficult. The school representatives' decision for Student to receive 9 hours per week of Specialized Instruction in the general education setting was made because Student had not previously had an IEP and Case Manager considered it important to establish a baseline before placing Student in a more restrictive environment. Exhibits R-10, R-11, Testimony of Case Manager.

15. For the 2019-2020 school year, Mother received a telephone call from

DCPS stating that City School 2 had put in paperwork for Student not to return to City School 2. The parent was offered City School 3 and another school as locations of service for Student. The parent enrolled Student at City School 3. Initially, at City School 3, Student was placed in a special education resource classroom. Testimony of Mother. After 2 days, Student was moved to the regular classroom setting, because the May 21, 2019 IEP did not provide for Student to be placed outside of general education. Student liked the placement in the special education setting because there were other students with disabilities and Student received more attention than in the regular classroom setting. Testimony of Student.

16. Beginning when Student was at City School 1, Mother asked for Student to be evaluated for special education eligibility because of concern that Student was not on grade level. She renewed that request when she enrolled Student at City School 2. Both schools declined to evaluate Student for special education eligibility – until the spring of 2019. Testimony of Mother. There was hearsay testimony from School Social Worker that Mother had at one time opposed evaluating Student for special education eligibility. The school official to whom Mother allegedly made that statement did not testify and the assertion was not supported by documentary evidence that DCPS had sought to conduct an evaluation, such as a Prior Written Notice. I conclude that Petitioner has established by the preponderance of the evidence that at least by the beginning of the 2017-2018 school year, Mother had requested that Student be evaluated for special education eligibility.

17. Student's 2017-2018 and 2018-2019 school years at City School 2 were not successful for Student. Student failed almost all courses both school years. Exhibits P-15, P-16. Student was reported to have accrued 111 days of unexcused absences for the 2018-2019 school year. Exhibit P-16. In the current 2019-2020 school year, Student is repeating Grade for the third time. Testimony of Mother.

18. During the first quarter of the 2017-2018 school year, City School 2 staff took Student to the psychiatric unit at CITY HOSPITAL following an incident at school. Student was admitted for a short time. Testimony of Student, Exhibit R-18. The hospital staff told Mother that Student has post-traumatic stress disorder (PTSD) and ADHD and a little personality disorder. Mother took the City Hospital discharge notice to City School 2, but told City Hospital that it could not communicate with the school. Testimony of Mother. Student testified about being sent to City Hospital's psychiatric unit several times a year. I did not find that testimony credible.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law 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 that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement

proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### Analysis

A. Did DCPS deny Student a FAPE by its failure to timely and comprehensively evaluate Student for special education eligibility by the end of the 2016-2017 school year?

B. Did DCPS deny Student a FAPE by failing to conduct a comprehensive initial eligibility evaluation in spring 2019 to include psychological testing to address Student's attention issues in order to rule out ADHD, as recommended by a court evaluation; an adaptive assessment to rule out Borderline Intellectual Functioning, as recommended by a court evaluator and/or to address the student's adaptive functioning and needs; a Speech and Language evaluation; an Occupational Therapy evaluation and/or a comprehensive vocational evaluation?

Petitioner alleges that DCPS denied Student a FAPE by not conducting an initial special education eligibility evaluation before the spring of 2019 and by not conducting a comprehensive evaluation at that time. I agree.

#### Child Find

Under the IDEA's child-find requirement, the District of Columbia must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid ex*

*rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005); 20 U.S.C. § 1412(a)(3). “As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). “The ‘child find’ duty extends even to ‘[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. § 300.111(c)(1).” *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010); *Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 157–58 (D.D.C. 2016).

In this case, there was no probative evidence that prior to January 2019, the parent made a written request for Student to be evaluated. Mother asserts, however, that DCPS had cause to suspect that Student had an IDEA disability as early as the 2016-2017 school year. The hearing record is scant concerning Student’s educational progress prior to the 2017-2018 school year. However, the record establishes that Student’s Section 504 team had knowledge of Student’s ADHD and ODD diagnoses made prior to the 2018-2019 school year and I found credible Mother’s testimony that she had requested that Student be evaluated for special education eligibility since Student was at City School 1. Moreover, the record establishes that since enrolling at City School 2 at the beginning of the 2017-2018 school year, Student has had continuous behavior and attendance issues and has failed academically. I conclude that at least by the beginning of the 2017-2018 school year, DCPS had cause to suspect Student was a potential candidate for special education services and had a duty to evaluate Student for

special education eligibility.

A school's failure to comply with child find may constitute a procedural violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *See, also, G.G. ex rel. Gersten v. District of Columbia.*, *supra*, 924 F. Supp. 2d at 280 (School district's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE 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 CFR § 300.513(a)(2).

In this case, it is undisputed that Student is a student with an IDEA ED disability and possibly an Other Health Impairment (ADHD) as well. I find that it is more likely than not that Student's qualifying disabilities were present before the 2017-2018 school year started. For example the record establishes that Student was diagnosed with ADHD and ODD before Student enrolled at City School 2 and that Student's conduct problems date back at least to when Student attended City School 1. I conclude that had DCPS timely performed its child-find duty, Student would likely have been identified as eligible for special education services by the beginning of the 2017-2018 school year and an appropriate IEP with special education and related services should have been offered. DCPS' failure to complete Student's initial eligibility evaluation until late in the

2018-2019 school year was, therefore, a denial of FAPE.

Comprehensiveness of April 2019 Eligibility Evaluation

The IDEA requires, generally, that when a Student has been evaluated for special education eligibility and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. § 300.304(b)(1–3), (c)(4, 6). I agree with Petitioner that DCPS' April 2019 eligibility evaluation of Student did not meet this standard.

Instead of conducting its own psychological evaluation in spring 2019, DCPS elected to rely upon the Court-ordered psychoeducational evaluation of Student completed in January 2019. Court Examiner had found, *inter alia*, that Student presented with an array of symptoms of mixed severity that were best explained by co-morbid diagnoses of Cyclothymic Disorder and other Specified Disruptive, Impulse-Control and Conduct Disorder. Court Examiner also diagnosed Student with a Specific Learning Disorder with impairment in mathematics. Significantly, Court Examiner emphasized that her assessment of Student's cognitive abilities and academic achievement may have underestimated Student's abilities, due to Student's observed fatigue during testing. Court Examiner also stated that further evaluation was needed before ruling in, or ruling out, diagnoses of ADHD and Borderline Intellectual

Functioning. (School Psychologist testified, erroneously, that Court Examiner had ruled out ADHD or Borderline Intellectual Functioning impairments for Student.) I find that in light of these acknowledged limitations, the Court-ordered psychoeducational evaluation was not sufficiently comprehensive to identify all of Student's needs for purposes of Student's initial special education eligibility evaluation.

Petitioner's expert, Independent OT, also testified at the hearing that Student needs an occupational therapy evaluation to follow up on "red flags" in the Court-ordered psychological evaluation, such as very low scores on visual-spatial and processing measures, and opined also that Student requires a vocational evaluation. Educational Advocate testified that a speech-language evaluation was requested for Student because of Student's low reading comprehension scores and because Student was reading well below grade level. These opinions were not effectively rebutted by DCPS.

In light of the acknowledged limitations in the Court-ordered psychoeducational evaluation of Student and the opinions of Petitioner's experts that Student requires OT, speech and language, and vocational evaluations, I conclude that DCPS' April 2019 initial eligibility evaluation of Student was not sufficiently comprehensive to meet the evaluation requirements of 34 CFR § 300.301 *et seq.* As note above, the failure to adequately evaluate a student is a procedural error. In this case, I find that this error impeded Student's right to a FAPE and impaired the parent's opportunity to participate in the IEP decision-making process. This was a denial of FAPE.

C. Did DCPS deny Student a FAPE for the failure to develop appropriate initial IEP for Student on May 21, 2019?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*See also Z. B. v. District of Columbia*, 888 F.3d 515, 517 (D.C. Cir. 2018) (In *Endrew F.*, Supreme Court held that the IDEA requires education "reasonably calculated to enable a child to make progress in light of the child's circumstances"—a standard markedly more demanding than requiring merely some educational benefits.) Through the testimony of Educational Advocate, Petitioner made a *prima facie* showing that the May 21, 2019

initial IEP was not adequate for Student. Therefore, the burden of persuasion as to the appropriateness of the IEP falls on DCPS.

Here, for a plethora of reasons, DCPS did not meet its burden. Most striking was the evidence that the May 21, 2019 IEP team did not consider the Court-ordered psycho-educational evaluation of Student or the review of that evaluation by DCPS' own school psychologist. (Case Manager, who drafted the IEP, testified that he did not have access to the psychological evaluation or the review by DCPS' school psychologist.) Without these evaluations and the data they contained, the May 21, 2019 IEP team could not have developed an IEP "*specially* designed" to meet Student's "*unique* needs." Moreover, Case Manager did not satisfactorily explain the IEP team's decision to offer Student nine hours per week of Specialized Instruction in the general education setting. He testified that this placement was offered because he did not want to prejudice Student and there was a need to establish a baseline for Student's needs. This justification falls far short of providing a "cogent and responsive" explanation for the IEP team's placement decision. *See Endrew F., supra.*

Another concern is that the Post-Secondary Transition Plan in the May 21, 2019 IEP was developed without interviewing Student or conducting a vocational assessment because, according to Case Manager, Student was not at school when he was drafting the IEP. Student's chronic school attendance issues are well-documented, but that cannot justify drafting a post-secondary transition plan without Student's involvement. *See U.S. Department of Education, A Transition Guide to Postsecondary Education and*

*Employment for Students and Youth with Disabilities* (OSEP 2017). (“Transition services are integral to FAPE under IDEA. A primary purpose of IDEA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” *Id.*, p. 8.) In light of these shortcomings,<sup>3</sup> I conclude that DCPS has failed to establish that the initial May 21, 2019 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Andrew F.*, *supra*, 137 S.Ct. at 1002.

D. Did DCPS deny Student a FAPE by its failure to provide Student’s education records to the parent’s representatives, and thereby preventing the parent from meaningfully participating in the student’s education?

DCPS must permit parents to inspect and review any education records, that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. *See* 34 CFR §§ 300.501 (a), 300.613(a). *See, also, Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.) Beginning January 10, 2019, Law Firm employees began requesting the

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<sup>3</sup> The Parent also made a showing that the IEP was inadequate for want of appropriate present levels of performance and annual goals and because the IEP states that Student’s behavior does not impede Student’s learning or that of other students. Because I find that DCPS has not offered a cogent and responsive explanation otherwise for why the May 21, 2019 IEP was appropriate for Student, it is not necessary to address all of the IEP shortcomings alleged by the parent.

principal at City School 2 to provide a copy of Student's entire academic file. LEA Representative testified that he had provided Student's education records to Petitioner's Counsel, except for records predating Student's matriculation to City School 2, to which he did not have access.

DCPS, as Student's local education agency, is charged with complying with the parent's request to inspect education records. *See* 34 CFR § 300.613(a). Petitioner has not established that she attempted to obtain Student's education records from DCPS (as opposed to from City School 2). If Petitioner seeks additional education records for Student, not received from City School 2, she should make an appropriate request directly to DCPS.

### Remedy

The first priority in this case is for Student to be comprehensively reevaluated as required by 34 CFR § 300.301 *et seq.* to gather functional, developmental and academic information sufficient to identify all of Student's special education needs and to determine the content of Student's IEP in all areas of suspected disability. Upon completion of the reevaluation, Student's IEP team must be reconvened to review the data and to revise Student's IEP, as appropriate, pursuant to 34 CFR § 300.324. At the conclusion of the due process hearing on September 5, 2019, counsel for DCPS and counsel for the parent agreed that pending completion of Student's reevaluation and the revision of Student's IEP, Student would be placed in an appropriate DCPS special education classroom, such as a Behavior and Education Support (BES) program, for

most of the school day. I will so order.

Educational Advocate proposed a compensatory education remedy for the denials of FAPE in this case. As U.S. District Judge Rudolph Contreras recently explained in *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019),

“When a hearing officer ... concludes that a school district has failed to provide a student with a FAPE, it has ‘broad discretion to fashion an appropriate remedy,’ which ... can include compensatory education.” *B.D. v. District of Columbia*, 817 F.3d 792, 797–98 (D.C. Cir. 2016) (quoting *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). An award of compensatory education “aims to put a student ... in the position he would be in absent the FAPE denial,” *id.* at 798, and it accordingly “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place,” *id.* (quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)).

*Collette, supra*. The compensatory education inquiry requires figuring out both (1) what position a student would be in absent a FAPE denial and (2) how to get the student to that position. *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017) (citation and internal quotation omitted.)

Educational Advocate’s proposed compensatory education plan would address DCPS’ failure to timely and comprehensively evaluate Student so as to have appropriate IEPs in place for the 2017-2018 and 2018-2019 school years. Educational Advocate opined that if Student had had appropriate IEPs from the beginning of the 2017-2018 school year, Student should have made one year’s academic growth over the two school years. To get Student back to that position, Educational Advocate recommends that

Student be awarded 200 hours of tutoring in English Language Arts and 100 hours of tutoring in mathematics. I find this recommendation to be reasonably calculated to provide the educational benefits that likely would have accrued from the services DCPS should have supplied Student in the first place. *See B.D., supra*, 817 F.3d at 798. Educational Advocate's compensatory education calculation was not challenged by DCPS. Therefore, I will order the requested academic tutoring as compensatory education for Student.

Educational Advocate also recommended 72 hours of compensatory education counseling services because Student was not offered IEP Behavior Support Services before the May 21, 2019 IEP was completed. This recommendation does not take into account that Student was offered counseling at City School 2 under the Section 504 Plan. However, due to school absences, Student failed to attend most of the counseling sessions. I also decline to award credit recovery classes for Student to make up failed courses, which was recommended by Educational Advocate. DCPS offers a credit recovery program available to all secondary school students. I will order DCPS to provide information to the parent about credit recovery programming available to Student.

### **ORDER**

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

1. Within 10 school days of the date of this decision, DCPS shall schedule a

special education evaluation planning meeting of Student's MDT team, including the parent and her representatives, to determine what evaluations are needed to identify all of Student's special education needs and to determine the content of Student's IEP in all areas of suspected disability. Subject to obtaining the parent's consent, these evaluations shall include, but not be limited to, a comprehensive psychological reevaluation to assess Student in the academic, behavioral-social-emotional, and cognitive domains; testing for ADHD; an OT evaluation; speech and language screening; a vocational assessment and, if warranted, an adaptive functioning assessment. DCPS shall make diligent effort to secure Student's participation in and cooperation with the reevaluations. However, DCPS shall not be deemed at fault, if completion of the reevaluation is delayed or prevented due to the parent's not ensuring that Student attends scheduled evaluation sessions;

2. Promptly upon completion of the reevaluation of Student, DCPS shall convene Student's IEP team to comprehensively revise Student's IEP as appropriate, pursuant to 34 CFR § 300.320, *et seq.*;
3. Within 5 school days of the date of this decision and during the pendency of Student's reevaluation and the IEP revision process, DCPS shall place Student in appropriate special education classes, outside of general education, for at least 20 hours per week. DCPS shall have reasonable discretion to decide the location of services where it is able to accommodate Student's needs. This is without prejudice to the discretion of Student's IEP team, including the parent and her representatives, to ultimately determine Student's appropriate educational placement, which will not necessarily be a special class;
4. As compensatory education for the denials of FAPE in this case, not later than 15 school days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain for Student 300 hours of individual academic tutoring from a qualified instructor in ELA and Mathematics;
5. Within 15 school days of the date of this decision, DCPS shall provide the parent, in writing, information about credit recovery programming available to Student and
6. All other relief requested by the Petitioner herein is denied.

Date: September 7, 2019

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  
Office of Dispute Resolution  
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