

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

OSSE
STUDENT HEARING OFFICE
2009 MAR 30 AM 9:00

on behalf of,

Student
(DOB STARS

Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

Hearing: March 9 and 18, 2009
Decided: March 28, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on February 2, 2009, on behalf of a year old student (the "Student") who resides in the District of Columbia and attends

Petitioner was represented by Kimberly Glassman, Esq., and Miguel Hull, Esq. of James E. Brown & Associates, PLLC, and Respondent District of Columbia Public Schools ("DCPS") was represented by Tiffany Puckett, Esq., Assistant Attorney General for the District of Columbia. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations.

The complaint alleges that DCPS denied the Student a free appropriate public education ("FAPE") by failing to complete required triennial evaluations under 34 C.F.R. §300.303 and by failing to develop an appropriate individualized education program ("IEP") for the Student. Petitioner further claims that the Student is entitled to compensatory education as a result of the denials of FAPE. DCPS filed a response on February 13, 2009, asserting that it had conducted or was in the process of conducting all required evaluations, and that the Student's IEP is appropriate and is currently being implemented.

A Prehearing Conference ("PHC") was held on February 13, 2009, and a Prehearing Order was issued February 17, 2009. The parent elected for the hearing to be closed. Five-day disclosures were filed by both parties on or about February 27, 2009. The Due Process Hearing convened on March 9, 2009, and was then recessed and continued pursuant to Section 402 (B) (11) of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP") because it could not be concluded within the time allotted for hearing that day. It was reconvened with consent of both parties on March 18, 2009.

At the hearing, 18 documentary exhibits submitted by Petitioner (identified as "P-1" through "P-18") were admitted into evidence.¹ DCPS presented one documentary exhibit (identified as "DCPS-1") consisting of MDT meeting notes of 2/12/09, which was admitted into evidence without objection. Petitioner presented two witnesses – the Student's Educational Advocate and the parent/Petitioner. DCPS presented one witness – the Special Education Coordinator for

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*.

II. ISSUE(S) AND REQUESTED RELIEF

As discussed and agreed at the Prehearing Conference and the outset of the Due Process Hearing, the following issues were presented for determination:

- a. *Whether DCPS denied the Student a FAPE by failing to complete required triennial reevaluations;*
- b. *Whether DCPS denied the Student a FAPE by failing to develop an appropriate IEP; and*
- c. *Whether the Student is entitled to compensatory education and/or other relief as a result of these alleged denials of FAPE.*

In addition to findings of FAPE denial and compensatory education, as relief, the complaint requested that DCPS be ordered (i) to fund an independent comprehensive psychological evaluation of the Student, and (ii) within 10 days of receiving results of the independent evaluations, to convene a MDT meeting to review all current evaluations, and to review and revise the Student's IEP as needed. *See* P-2, pp. 5-6.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is The Student currently attends where she transferred at the beginning of the 2008-09 school year. P-2; DCPS Testimony.

2. The Student's current IEP is dated October 9, 2008, and was signed by Petitioner on 10/22/08. P-5; DCPS Testimony. The IEP calls for 10 hours per week of specialized instruction. P-5. The setting is designated as "Outside General Education," because the "Student requires small setting for individualized instruction and academic success." *Id.*, p. 5. She has a disability classification of Specific Learning Disability. *Id.*, pp 1-2.

3. The Student's immediately preceding IEP dated January 16, 2008, required 15 hours per week of specialized instruction in a special education setting. P-6. The Student also had an earlier IEP dated March 29, 2007, which called for 7.5 hours per week of specialized instruction, and an IEP before that dated May 25, 2006, calling for 15 hours. P-7; P-8.

¹ With the exception of P-15 and P-16 (graphs presented as demonstrative exhibits), all were admitted without objection. The Hearing Officer directed that P-15 and P-16 be revised in format following objection by DCPS and to more accurately reflect the sources of the exhibits. P-15 and P-16 were then admitted in revised format at the 3/18/09 hearing session.

4. At the October 9, 2008, meeting of the Student's Multi-disciplinary Team ("MDT"), the team informed Petitioner that the Student's weekly hours of specialized instruction would be decreased from 15 to 10 hours. *See* P-2; Parent Testimony. Petitioner did not agree with the change. Parent Testimony.

5. The IEP does not provide any explanation as to why the MDT made this change in hours, *see* P-5, and no written notice containing such explanation has been submitted in the record.² According to the complaint, "the parent was informed by the MDT that {the Student's} hours would be decreased from 15 to 10 based on her results on the DC-BAS[S] testing." P-2, ¶ 5. The testimony at hearing was generally consistent with this allegation, and also indicated that the reduction in hours was based on the Student's overall academic progress. *See* Parent Testimony; DCPS Testimony.³

6. DCPS completed Woodcock-Johnson-III evaluations of the Student in 2006, 2007, and 2008. The results of these tests generally showed that the Student's Age Equivalent scores in Broad Reading, Broad Math, and Broad Written Expression declined or remained the same between 2006 and 2008, thereby increasing the measured academic deficits below the Student's actual age. *See* P-2; P-15. The SEC agreed that the 10/8/08 WJ-III tests administered by DCPS indicated that the Student was performing approximately four years below grade level. DCPS Testimony (cross examination); *see* P-10.

7. According to a Wechsler Intelligence Scale for Children evaluation completed May 10, 2005, the Student's full-scale IQ was 66, which is in the extremely low range. P-9. Based on an August 8, 2005 testing to determine eligibility for Social Security benefits, the Student's full-scale IQ was found to be 60, leading to a diagnosis of Mild Mental Retardation. P-13. However, the Student's IEPs have always classified her only as learning disabled. *See* P-2; P-5 through P-8.

8. DCPS' most recent comprehensive psycho-educational evaluation report on the Student is dated June 20, 2005, when the Student was in the 4th grade; and the date of her first eligibility decision was 9/16/05. *See* P-8; P-9. Since that date, DCPS has conducted additional educational testing of the Student (*e.g.*, Woodcock Johnson-III) as noted above, but has not conducted another comprehensive psycho-educational evaluation. *See* P-2; P-10.

9. On February 12, 2009, subsequent to the filing of the complaint in this case, a further meeting of the Student's MDT was held to "discuss requested evaluations." DCPS-1; P-4. In attendance were the School Psychologist, the SEC/LEA Representative, the Speech/Language Therapist, the Student's Educational Advocate ("EA"), and Petitioner (via telephone). The team agreed that the 6/20/05 psychological evaluation was more than three years old and needs to be updated. *See* DCPS Testimony. The School Psychologist advised that a "comprehensive psychological" should be completed, as well as an occupational therapy ("OT") evaluation. DCPS-1 (MDT Meeting Notes). According to the SEC, a "comprehensive

² Petitioner has not alleged, however, that DCPS failed to comply with the prior written notice requirements under the IDEA (34 C.F.R. §300.503) with respect to such explanation, so the Hearing Officer has made no findings in this regard.

³ The Special Education Coordinator ("SEC") testified that the team considered reports of the DC-BASS results (but not the actual scores themselves), reports from teachers that the Student was making "excellent progress," and the fact that the Student was "requesting more time to spend in general education." DCPS Testimony.

psychological” is much broader than W-J achievement testing and would include all elements of a clinical psychological examination (e.g., social history, behavioral observations, etc.). DCPS Testimony. The MDT also agreed with the EA’s request for an independent psychological and an adaptive assessment, but DCPS apparently has not yet issued an “IEE letter” authorizing an independent evaluation at DCPS expense. DCPS-1; DCPS Testimony.

10. At the 2/12/09 MDT meeting, Petitioner and the Student’s EA requested that the MDT reinstate the pre-October 2008 level of specialized instruction hours (15) in the IEP. The team decided not to do so at this time, but also indicated that more information from the additional evaluations may be relevant to that issue. See EA Testimony.

11. It is undisputed that, as of the filing of the due process complaint and the date of hearing, DCPS had not yet completed an updated comprehensive psychological evaluation of the Student.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see also *Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.3. The standard generally is preponderance of the evidence. See, e.g., *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Violations by DCPS

(1) Whether DCPS denied the Student a FAPE by failing to complete required triennial reevaluations.

3. Petitioner first claims that DCPS denied the Student a FAPE by failing to complete triennial evaluations required under 20 U.S.C. §1414 and 34 C.F.R. §300.303. The Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

4. IDEA states in plain language that an LEA “shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary.” 34 C.F.R. §300.303 (b)(2); see, e.g., *Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted “in accordance with §§ 300.304 through 300.311.” 34 C.F.R. §300.303(a). This includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs....” *Id.* §300.304(c) (6); see also *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

5. In this case, it is undisputed that a comprehensive psycho-educational evaluation of the Student was last completed on June 20, 2005, when the Student was in the 4th grade. The Student is now nearly four years older and in the 8th grade. However, not until February 12, 2009 – after the complaint was filed in this case – did DCPS purport to undertake a complete “reevaluation” under *Letter of Tinsley and Herbin*. As part of that reevaluation, the MDT has now determined that a comprehensive psychological (as well as OT) should be completed.

6. Thus, the record reflects that DCPS has been in violation of IDEA’s triennial reevaluation requirement since at least 9/16/08 (three years from the date of first eligibility decision) and possibly as early as 6/20/08 (three years after the last comprehensive psychological evaluation). Significantly, both of these dates occurred prior to revision of the Student’s IEP on 10/9/08, so DCPS should have conducted a reevaluation before deciding whether to reduce the hours of specialized instruction. *See* discussion below under Issue (2).

7. The failure to complete a warranted evaluation may, in appropriate cases, constitute a substantive deprivation of FAPE. *See, e.g., Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008). As the *Harris* court noted, “[t]he IDEA is replete with provisions emphasizing the necessity of monitoring the IEP for revision purposes,” and thus “such inaction jeopardizes the whole intent of Congress’ objectives in enacting the IDEA.” 561 F. Supp. 2d at 68-69. “In view of the centrality of the role of the IEP in affording appropriate education..., Congress explicitly provided the frequent and thorough monitoring and revising of the program.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*quoting* 20 U.S.C. §1414).

8. Under the circumstances of this case, DCPS’ failure to conduct a timely triennial evaluation, like the failure to act on a request for an independent evaluation in *Harris*, is not a “mere procedural inadequacy,” 561 F. Supp. 2d at 68, but rather constitutes a substantive denial of FAPE.

9. Alternatively, even if DCPS’ failure were viewed only as a “procedural violation” under *Lesesne v. DC*, 447 F.3d 828, 834 (D.C. Cir. 2006), such procedural inadequacies in this case have impeded the student’s right to a FAPE. The student’s MDT team has not had the benefit of an updated comprehensive psychological evaluation when it met to review and revise the current IEP in October 2008. Thus, DCPS’ failure to respond more quickly “has certainly compromised the effectiveness of the IDEA as applied to [the student], and it thereby constitutes a deprivation of FAPE.” *Harris*, 561 F. Supp. 2d at 69. Moreover, the failure has significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the student by effectively frustrating further input from the parent as to how the evaluations may affect the educational needs of the child and/or the development of appropriate programming to address those needs. *See* 20 U.S.C. §1415(f)(E)(ii); 34 C.F.R. §§300.305(a)(2), 300.324(b)(1)(ii)(C), 300.513(a)(2)(i), (ii).

10. Finally, as 34 C.F.R. §300.513(a)(3) and the U.S. Department of Education’s discussion of the rules make clear, “Hearing Officers continue to have the discretion to ... make rulings on matters in addition to those concerning the provision of FAPE, such as the matters mentioned in §300.507(a)(1),” which includes matters relating to the evaluation and reevaluation of a child with a disability. 71 *Fed. Reg.* 46,707 (Aug. 14, 2006). Here, the Hearing Officer would exercise his discretion to find a statutory violation of the triennial reevaluation requirements, regardless whether such violation constitutes a denial of FAPE.

(2) ***Whether DCPS denied the Student a FAPE by failing to develop an appropriate IEP.***

11. Petitioner claims that the Student's "IEP was decreased from 15 hours to 10 hours without any valid basis." P-2, p. 5. Petitioner essentially claims that this was arbitrary and inappropriate since the Student "has made little growth academically from 2006 to 2008 and is falling further behind her peers." *Id.* The Hearing Officer concludes that, for the reasons and to the extent set forth below, Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

12. FAPE is not defined as a potential maximizing education. Generally speaking, a school has met its obligation to provide a FAPE if the IEP is reasonably calculated to enable the child to receive some meaningful educational benefit. *See Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The MDT is the right entity to make this determination, not a hearing officer, unless a complainant proves that the team got it wrong.

13. In this case, there are two basic problems with the MDT's determination as expressed in the 10/9/08 IEP revision. First, as noted above, DCPS failed to conduct a mandated triennial reevaluation of the Student before changing the number of hours of specialized instruction. This was like putting the "cart before the horse," since the results of the reevaluation may well inform the MDT's judgment concerning whether such changes are appropriate. This is especially true here, where the MDT has now found a comprehensive psychological to be specifically warranted for this Student (DCPS-1), the trend in academic testing shows an increasing gap in the Student's age equivalent scores (*see* P-15, P-16), and earlier cognitive testing indicated the possibility of mild mental retardation (P-13).

14. Second, the team provided no written explanation or justification for its latest alteration of hours.⁴ According to the testimony, the main reason for the change was the Student's perceived level of academic progress, as shown in part by DC-BASS scores (which the team apparently did not even have before them at the 10/9/08 meeting). However, the record adduced at hearing does not demonstrate academic progress and does not appear to support the change with any other objective evidence.

15. Accordingly, the Hearing Officer agrees with Petitioner's request in closing argument that the MDT/IEP team should be ordered to revisit the number of hours of specialized instruction to be provided to the Student based on objective evidence concerning her academic progress, as well as the results of the comprehensive psychological evaluation found warranted on 2/12/09.

(3) ***Entitlement to compensatory education.***

16. Petitioner claims entitlement to compensatory education for the period from 10/22/08 to 2/24/09, which it identifies as the period "in which services delay/disruption occurred" under the current IEP. P-17. This corresponds to the time period in which the Student

⁴ The record reveals that in the past few years DCPS has, without apparent explanation or consistency, changed the Student's hours of specialized instruction at least three times – first from 15 to 7.5, then back up to 15, and then back down to 10. P-5 through P-8. At the same time, the evidence appears to show a steady increase in the gap between her actual age and her age-equivalent academic test scores. *See* P-15, P-16.

has been provided with 10 hours of specialized instruction per week rather than the 15 hours weekly provided under the previous IEP. Petitioner seeks an award of 20 total hours of tutoring across the three basic areas covered by the IEP (reading, math and writing). See P-17 (proposed compensatory education plan); EA Testimony.

17. “Under the theory of ‘compensatory education,’ courts and hearing officers may award ‘educational services...to be provided prospectively to compensate for a past deficient program.’” *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). “In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award 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.” 401 F.3d at 524. See also *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student’”).

18. On the present record, the Hearing Officer concludes that the compensatory education plan put forth by Petitioner falls short of meeting the *Reid* standard. The record in this case does not contain “sufficient evidence of [the Student’s] unique educational need to allow the Hearing Officer to craft a compensatory education award that is reasonably calculated to place [the Student] in the position he would have been in but for the denial of FAPE.” *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 555 F. Supp. 2d 130 (D.D.C. 2008). Missing is any individually-tailored assessment of how the proposed award would meet the Student’s compensatory education needs and how it would provide similar educational benefits. See EA Testimony (cross examination).

19. For example, exhibits P-15 and P-16 (on which Petitioner primarily relies) only address declines in academic test scores prior to 10/08/08, and thus have no bearing on the time period covered by Petitioner’s compensatory education claim. Petitioner also has not shown what academic progress the Student would have been expected to make if DCPS had continued to provide her with 15 hours/week of specialized instruction, nor what specifically is required to place the Student in the position she would have been in had she not been denied appropriate services. Cf. *Brown v. District of Columbia*, 568 F. Supp. 2d 44 (D.D.C. 2008) (expert testimony adduced on these issues). Moreover, Petitioner testified that the Student has performed “about the same” in reading, writing and math since her special education hours were reduced in October 2008. Parent Testimony (cross examination).

20. Finally, the claim for compensatory education may well be premature, as suggested by Petitioner’s counsel in closing argument. The MDT/IEP team will be meeting again in the near future to consider the appropriate number of hours in light of the updated comprehensive psychological found warranted on 2/12/09 and other information developed through the reevaluation. If the MDT reaffirms the reduction to 10 hours based on the reevaluation, then the compensatory education issue raised here will essentially be moot. On the other hand, if the MDT restores the 15 hours in a revised IEP, then Petitioner may reassert a claim for compensatory education, to the extent the issue is not addressed and resolved before the MDT.⁵ Alternatively, the MDT may decide it is better simply to reinstate the prior allotment

⁵ The Hearing Officer recognizes that he may not determine that a student is entitled to compensatory education services as a remedy for a FAPE denial, and then delegate to the IEP team the authority to reduce or terminate the award. See *Reid*, 401 F. 3d at 526; see *Board of Education of Fayette County v. L.M.*, 478 F.3d 307, 317-18 (6th Cir.

of 15 hours per week pending completion of the reevaluation, which would obviate any potential harm to the Student and further claims for compensatory education.

C. Other Relief

21. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23.

22. The Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violations adjudicated herein. As requested by Petitioner, the relief includes ordering an independent comprehensive psychological evaluation at DCPS expense, given DCPS’ prior failure to complete such updated evaluation as part of a timely reevaluation under Section 300.303.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. DCPS shall complete an **occupational therapy evaluation** of the Student, as directed by the MDT on 2/12/09, and shall prepare a written report on that evaluation, by no later than **April 28, 2009** (*i.e.*, 30 days from the date of this Order).
2. An **independent, comprehensive psychological evaluation** (which includes cognitive, educational and clinical components, as well as a social history) and an **adaptive Vineland assessment** of the Student shall be completed at DCPS expense, and Petitioner shall submit all written reports of those evaluations to DCPS and the Student’s MDT/IEP team, as soon as practicable and no later than **May 28, 2009** (*i.e.*, 60 days from the date of this Order).
3. Within **20 days** of receipt of the reports on the updated evaluations, DCPS shall convene a **meeting of the Student’s MDT/IEP team** for the purpose of completing the comprehensive reevaluation of the Student that was initiated 2/12/09 pursuant to 34 C.F.R. §300.303. At this meeting, the MDT/IEP team shall (a) review all evaluations, including the above reports of comprehensive psychological evaluation, adaptive assessment, and OT evaluation, (b) review and revise the student’s IEP as appropriate, and (c) consider any other information or purposes deemed appropriate.
4. As part of its review of the IEP at the above meeting, the MDT/IEP team shall specifically revisit the number of hours of specialized instruction to be provided to the Student based on objective evidence concerning her academic progress (including any data submitted by Petitioner), as well as the results of the comprehensive

2007); *Gregory-Rivas v. District of Columbia*, 108 LRP 51949 (D.D.C. 2008). However, this does not preclude the Student’s MDT – as part of reviewing and revising an IEP prospectively – from discussing and determining, as appropriate, whether any additional services are required to meet the unique needs of the student in light of any past failures or denials of services. *See, e.g., Gregory-Rivas*, slip op. at 2-4. An MDT’s inclusion of such “compensatory education plan” in an IEP may well eliminate any harm that would otherwise support compensatory education relief.

psychological evaluation found warranted on 2/12/09. The team also may choose to discuss and determine whether it believes any revisions and/or additional services are needed (*i.e.*, in the form of a "compensatory education plan") in order to address the Student's unique needs in light of the prior reduction in hours that occurred 10/9/08 and/or DCPS' delay in conducting the triennial reevaluation.

5. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Miguel Hull, Esq., via facsimile (202-742-2098), or via email (mhull@jeblaw.biz).
6. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
7. This case shall be, and hereby is, **CLOSED**.

Dated: March 28, 2009

/s/



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).