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

Parent, on behalf of Student[1],	Hearing Officer: Gary L. Lieber
Petitioner,	Case No: 2012-0765
v.	Hearing Date: January 10, 2013
District of Columbia Public Schools,	Appearances: Alana Hecht, Esq. for Petitioner
Respondent.	Lynette Collins, Esq. for Respondent

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STUDENT HEARING OFFICE
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HEARING OFFICER'S DETERMINATION

Introduction and Procedural Background

This case was brought as a due process complaint pursuant to the Individual's with Disabilities Act ("IDEA"), as amended 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E-30 of the District of Columbia Municipal Regulations. Petitioner is the mother of Student, now [redacted].[2] Petitioner alleges that Student was denied Free Appropriate Public Education ("FAPE") when Respondent failed to reevaluate Student following several requests to do so in late 2011 and during the first half of 2012. Student is currently classified as a child with a disability under the classification of Mental Retardation ("MR"). It is Petitioner's contention that Student has been misclassified and

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[1] Personal identification information is provided in Appendix A.
[2] At the time the Complaint was filed, Student was 17. Personal identification information is provided in Appendix A and that Appendix must be removed prior to public distribution.

that an appropriate evaluation would undoubtedly demonstrate that and that in fact she should be denominated under the classification of Other Health Impairment ("OHI") or a Learning Disability ("LD").

The Due Process Complaint was filed on November 7, 2012 (Amended Hearing Officer's Exhibit A).[3] Respondent District of Columbia Schools ("DCPS") filed a response to the Due Process Complaint on November 19, 2012, in which it denied that the Respondent had failed to timely reevaluate the Student and that it was in the process of a reevaluation (H.O. Exh. B). On November 26, 2012, the parties conducted a Resolution Meeting which did not result in an agreement that would dispense with the need for the Due Process Complaint Hearing (H.O. Exh. E). On December 6, 2012, the undersigned conducted a prehearing conference and on December 11, 2012, a Prehearing Order was issued which, *inter alia*, set the date for the Due Process Hearing as January 10, 2013 (H.O. Exh. C & D).[4] The five-day disclosures were timely filed on January 3, 2013.

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[3] The Hearing Officer's Amended Exhibits shall be referred to as H.O. Exh. ___; Petitioner's Exhibits as P. Exh. ___; and Respondent's Exhibits as R. Exh. ___.

[4] This Hearing Officer inadvertently failed to transmit the signed Prehearing Order to the parties. Unfortunately, neither counsel brought the fact of that omission to the Hearing Officer's attention until the beginning of the Hearing. Copies of the Order were distributed at that time. Neither counsel experienced any concern over the failure to have the Order in advance of the Hearing and, clearly, neither party was prejudiced by the Hearing Officer's failure to timely serve the Order.

The Due Process Hearing was conducted on January 10, 2013. The Hearing was closed to the public and was electronically recorded. Both parties were represented by counsel.[5]

The Record of Evidence

The Petitioner called the following witnesses: senior educational advocate (qualified as an expert in the area of "special education programming"), a special education teacher at Student's current school, and an educational advocate/paralegal. Respondent called no witnesses.

The following exhibits were admitted: Hearing Officer's Exhibit A through F; Petitioner's Exhibits 1 through 4 and 7 through 9; Respondent's Exhibit 1.

Jurisdiction

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. §1415, the statute's implementing regulations at 34 C.F.R. §300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR") at 5-E §3029 and 5-E §3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415 (f)(3)(E) and 34 C.F.R. §300.513.

[5] A death in the family prevented the Petitioner and Student from attending the Hearing. Petitioner's counsel chose to proceed in their absence.

Prior Hearing Officer's Determination

There are two prior Hearing Officer Determinations involving the same parties. On February 12, 2011, Hearing Officer Vaden issued his decision in Case No. 2010-1547 and on December 7, 2011, Hearing Officer Vaden issued his decision in Case No. 2011-1023. Those cases involve issues unrelated to this case. The undersigned has taken judicial notice of certain facts contained within the Findings of Fact of those HOD's and citations to such references shall be set forth herein where applicable.

Statement of the Issue and Relief Requested

As narrowed at the hearing, the issue in this case is:

1. Whether Respondent committed a procedural violation of IDEA by failing to timely reevaluate Student following requests made on behalf of the Student?

Petitioner requests as a remedy that the Hearing Officer order Respondent to fund an Independent Educational Evaluation ("IEE"). Petitioner also requests that the Order remedying the violation of the failure to reevaluate include the right of Petitioner to file a due process complaint seeking compensatory education if the ordered evaluation demonstrates that the Student has been misclassified. Petitioner asserts that this is necessary to foreclose the possibility that if not provided for under this case number, that Petitioner would be prevented from seeking such relief after the reevaluation was conducted because the compensatory education remedy would be an outgrowth of the facts of this case and thus, arguably, subject to defenses of

res judicata/collateral estoppel or waiver if not sought and obtained in this proceeding.

Findings of Fact

1. Student was [redacted] at the time this due process complaint was filed. Student is now [redacted] (H.O. Exhs. A & B).

2. Student was identified in 2002 as a child with a disability requiring special education services under the classification of Mental Retardation ("MR"). The classification of Mental Retardation is also known as Intellectual Disability or ID (Testimony of Educational Advocate/Paralegal; HOD, 2010-1547, Findings of Fact ¶¶2 & 5; HOD 2011-1023, Findings of Fact ¶3; Testimony of Special Education Teacher).

3. Student attends Private High School where she is in her last semester and is on schedule to graduate perhaps as the valedictorian of her class. By all accounts, Student has made significant strides with respect to academics and daily life skills. She hopes to attend college following her high school graduation. She receives special education benefits and services consistent with her latest IEP (Testimony of Special Education Teacher; HOD 2011-1023 Findings of Fact ¶¶21-22 and p. 13).

4. A psychological reevaluation was conducted of Student and a report issued on November 5, 2008. Among the battery of tests given were certain tests demonstrating cognitive ability and intelligence. This was the Student's last reevaluation (H.O. Exh. F; Testimony of Educational Advocate/Paralegal).

5. The Report of this reevaluation also indicated that she had been exposed to lead poisoning. Petitioner asserts that her exposure to lead poisoning may be a proximate cause of her actual disability which Petitioner contends should be reclassified as a Learning Disability ("LD") or Other Health Impairment ("OHI") (H.O. Exh. F, p. 2; Testimony of Educational Advocate/Paralegal; Testimony of Senior Educational Advocate, qualified as expert witness in special education programming).

6. By letter dated December 8, 2011, Counsel for the Petitioner requested to Respondent's Office of Special Education that Student be reevaluated for special education and related services pursuant to 34 C.F.R. §§300.301-300.311 and DCMR Title 5-E §3021.1. Counsel further stated in this letter "<u>the evaluation requested at this time is an Adaptive Assessment, to include a Vineland Assessment</u>. The Parent is making this request due to her concerns that the student's classification is currently mislabeled as ID." P. Exh. 1 (emphasis in original). The letter further stated:

> In deference to the District of Columbia Public Schools' (DCPS) efforts to conduct the evaluations, the parent will wait for DCPS to complete the evaluations of the student. However, if the evaluations are not completed within a reasonable time, the parent will take the appropriate steps to secure independent evaluations at public expense. *Id.*

7. The letter was sent by facsimile and a record was produced showing that it was received. *Id.* at P. Exh. 1-4. No response from DCPS was received (Testimony of Educational Advocate/Paralegal).

8. On February 27, 2012, an IEP meeting was held regarding Student. In attendance by phone or in person were the Parent, the Educational Advocate/Paralegal, the school's Special Education Teacher and several representatives of Respondent. Among other issues discussed at this meeting was whether Student was properly classified as MR/ID. Respondent's representatives agreed to reevaluate Student to determine whether she was properly classified (P. Exh. 3; Testimony of Educational Advocate/Paralegal).

9. Notwithstanding the commitment given, Respondent took no action to schedule or conduct such reevaluation (Testimony of Educational Advocate/Paralegal).

10. By email dated May 16, 2012, Petitioner's counsel again communicated with a representative of Respondent. Counsel's email stated, "[p]lease find attached the requests we made for evals on behalf of [Student] and [Student's sibling]" (P. Exh. 4). Respondent did not respond to this request (Testimony of Educational Advocate/Paralegal).

11. There are significant differences between the levels of intelligence and adaptive and daily life skills between students classified as MR/ID and a student classified as Learning Disabled ("LD") or a student classified as Other Health Impairment ("OHI"). Furthermore, the educational approaches and services provided differ significantly between students classified with MR/ID and those classified as LD or OHI (Testimony of Senior Educational Advocate qualified as expert witness qualified as expert witness in special education programming; P. Exh. 8, p. 5-11).

12. A student classified as MR/ID may have difficulty obtaining entry or access to special education programs geared for students classified with other disabilities (Testimony of Senior Educational Advocate qualified as expert witness in special education programming).

Analysis and Legal Conclusions

The Individuals with Disabilities Education Act provides that States and Territories, including the District of Columbia, that receive federal educational financial assistance must establish policies and procedures to ensure that they extend a "Free Appropriate Public Education" to children with disabilities. Free Appropriate Public Education or FAPE is defined as "special education and related services that have been provided at public expense, under public supervision and direction and without charge" 20 U.S.C §1401(9); see also 34 C.F.R. § 300.39 and DCMR Title 5-E § 3001.1. The term "child with a disability" is defined to mean a child with any one of a certain named type of condition or impairment "that by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); see also, 20 U.S.C. §1401(3)(i) and (ii); D.C. Code § 38.2561.01(14) and DCMR Title 5-E § 3001. It is the duty of the State and its constituent local school authorities to identify and evaluate children with disabilities and then ultimately develop an education plan for such student which is called an Individualized Educational Plan or IEP. 20 U.S.C. §1414; 34 C.F.R. §§ 300.320 through 324. The Public Agency is required to review the child's progress periodically, but not less than annually

and to revise the IEP accordingly so as to meet the stated goals in concert with the child's progress under the IEP. 34 C.F.R. § 300.324(b)(1) through (b)(2).

It is further well-established that IDEA is satisfied when a child receives access to an education that is intended to "confer some educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 200 (1982). Stated otherwise, the statute does not impose upon the Public Agency a duty to provide the best possible education but rather the opportunity to succeed within the context of the child's disability and the educational setting that is available. Thus, the court in *Rowley* stated, "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit" to a child with a disability. *Id.* at 201.

The burden of proof in a due process hearing is borne by the party that initiated that action. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); DCMR Title 5-E, Chapter 5-E §3030.14.

As noted earlier, Respondent called no witnesses and proferred no evidence. Instead, in closing argument, counsel indicated that there could be no violation of IDEA because Petitioner failed to meet her burden of proof that Student had been harmed. In this respect, counsel for DCPS relied upon the fact that the record evidence presented by Petitioner was uncontroverted that Student had made what might be described as remarkable strides educationally notwithstanding her disability.

Respondent's contention is flawed at least on two grounds. First, the District of Columbia statute provides that "a reevaluation, . . . shall be conducted at least once every three years, or more frequently if conditions warrant reevaluation" (DCMR Title 5-E, Chapter 5-E §3005.7). IDEA provides similarly that a reevaluation shall occur "at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary" (20 U.S.C. §1414(a)(2)(B)(ii) and 34 CFR §300.303(b)(2)). The last evaluation that was taken with respect to Student was November 5, 2008 (H.O. Exh. F; Testimony of Educational Advocate/Paralegal). The due process complaint in this case was filed on November 7, 2012 --- more than four years after the last evaluation conducted by Respondent. Moreover, there is no evidence that Respondent has taken any tangible steps to reevaluate Student. This is a clear violation of the requirement to conduct an evaluation no less than once every three years unless the parent waives the right to have an evaluation conducted. To the contrary, the Parent requested the evaluation on several occasions.

Alternatively, the undersigned concludes that Respondent unlawfully delayed conducting a reevaluation. In this case, the first request was made on December 8, 2011 (P. Exh. 1). A second request was made at the IEP meeting on February 27, 2012 (P. Exhs. 2 & 3). A third request was made on May 16, 2012 (P. Exh. 4). While Respondent's officials seemed to commit to conducting a reevaluation during the IEP hearing, there was no follow through (P. Exh. 3 pp. 3-7; Testimony of Educational Advocate/Paralegal).

It is well established that a request from a parent to a Local Education Agency ("LEA"), such as Respondent here, triggers a legal duty to conduct a reevaluation without an examination of the reasonableness of the request[6] (*Cartright v. Dist. of Columbia,* 267 F. Supp. 2d 83 (D.D.C. 2003). There is no set time limit in the statute setting forth when the reevaluation must be completed. However, the courts have held that the reevaluation must be conducted "'in a reasonable period of time' or 'without undue delay' as determined in each individual case." *Herbin v. Dist. of Columbia,* 362 F. Supp 2d. 254, 259 (D.D.C. 2005) "[D]elay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development." *Id.* at 260, quoting *Spiegler v. Dist. of Columbia,* 866 F.2d 461, 466-67 (D.C. Cir. 1989).

Here, there can be no dispute that the delay has been unreasonable. Indeed, no evidence was presented that Respondent has done anything despite the passage of eleven months from the date of the first request to the filing of the Due Process Complaint. In *Herbin,* the court affirmed the Hearing Officer who had ruled a four month delay was not unreasonable. However, the factors present there are not present here: the existence of a last evaluation much

[6] The undersigned allowed testimony demonstrating the reasons why the request for the reevaluation was made. The reasons were substantial (Testimony of Senior Educational Advocate and Educational Advocate/Paralegal). A misclassification between MR/ID and OHI or LD is likely to be significant. See *e.g., Bell v. Board of Educ. of the Albuquerque Public Sch.,* 52 IDELR 161, at * 22 (D. N.M. 2008) ("As a general matter, mental retardation differs from a specific learning disability.")

closer in time to when the request was made (a few months in contrast to the four years here) and a finding that the delay was not entirely due to DCPS' lack of diligence. *Herbin*, 362 F. Supp. 2d at 260-262.

For each of the above stated reasons, the Respondent unlawfully failed to conduct a reevaluation as requested. As such, I also deem the Petitioner to be the prevailing party in this action.

Remedy

As remedies, the Petitioner seeks that the undersigned order an Independent Educational Evaluation ("IEE") at public expense and that following the conclusion of the reevaluation, that the Order in this case provide for a procedure by which the Petitioner can seek compensatory education for the failure to timely conduct the reevaluation.

The undersigned shall order that an Independent Educational Evaluation be conducted. In this respect, an IEE is appropriate given the lengthy delay and, in fact, failure to effectively respond to the series of requests. Furthermore, it is noteworthy that in the original request of December 8, 2011, Petitioner through counsel agreed to have Respondent conduct the evaluation but noted . . . "if the evaluations are not completed within a reasonable time, the parent will take appropriate steps to secure independent evaluations at public expense" (P. Exh. 1-1). The Petitioner also requested an IEE in the Due Process Complaint (H.O. Exh. A, p. 7). Respondent did not specifically object

to this form of remedy (H.O. Exh. B)[7]. Given these facts, this Hearing Officer shall order that an IEE be performed at public expense.

Additionally, the Petitioner requests that if a procedural violation of IDEA is found[8] due to the failure to timely reevaluate, that this Hearing Officer provide Petitioner with the automatic right to seek a remedy of compensatory education by a time certain following the completion of the IEE. Petitioner asserts that in the absence of such a provisional remedy, Petitioner will be confronted with an agreement that she has waived her right to a compensatory education remedy or that a claim for compensatory education will be denied pursuant to the doctrines of *res judicata* or collateral estoppel because that remedy was not obtained in this case.

I shall deny the request for a compensatory education remedy because it is premature. As just noted, not all procedural violations constitute a violation of FAPE. *See n. 7 supra.* While the record contains significant evidence supporting the grounds for the need for a reevaluation and the distinction between MR/ID and LD and OHI and the consequences of such a misclassification on both this Student and disabled students in general, such evidence is not controlling and, frankly, was of limited relevance <u>in this proceeding</u>. Rather, the parties must await the results of the IEE and the

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[7] Although the IEE here was requested as a remedy in connection with a due process complaint and not as a separate request, the decision to order an IEE at public expense is consistent with the regulatory scheme established when the parent independently requests an IEE. *See* 34 C.F.R. § 300.592(b)(2).

[8] This is a procedural violation of IDEA. Not all procedural violations are a denial of a Free Appropriate Public Education. "When the reevaluation would not have any significant effect on a student's educational program and opportunities, the violation would be harmless." *Bell v. Board of Educ.*, 52 IDELR 161, at *22.

subsequent consideration of the results of that evaluation by Respondent. For this reason, a procedure to provide for a subsequent request for compensatory education is both premature and unnecessary.[9]

ORDER

Based upon the Findings of Fact and Conclusions, the entire record herein including the testimony and exhibits and with due consideration to the arguments of counsel, it is hereby

ORDERED

1. That the parent shall obtain an Independent Educational Evaluation at public expense not to exceed the published OSSE cost guidelines. The parent shall provide a copy of the completed, independent assessment report to DCPS by no later than February 22, 2013. The copy of the completed, independent assessment shall be provided by the parent (or her representative) to Benjamin Persett, Program Manager for Respondent by

[9] There is no basis for Petitioner's contention that a subsequent request will be met by a serious argument that she has waived her right to seek compensatory education or that such a remedy would be denied under the doctrine of *res judicata*/collateral estoppel. Such a form of relief is now not ripe as it is dependent upon a finding that the Student's educational program and opportunities have been harmed by the failure to evaluate. Notwithstanding Petitioner's counsel's and witnesses' belief that the Student has been harmed, that determination must await the results of the IEE. As such, the request is premature and given that a waiver of a right under IDEA should not be lightly considered, the contention that a waiver argument would be seriously entertained in a subsequent proceeding is legally unsound. For the same reason, *res judicata* and collateral estoppel are not applicable. The cases cited by Petitioner in her post-hearing brief are clearly distinguishable. In those cases, the subject of compensatory education relief was ripe since the assessments had been completed. See *e.g.*, *Mary McLeod Bethune Day Acad. Public Charter Sch.v. Bland*, 534 F. Supp. 2d 109, 115-116 (D.D.C. 2008)(failure to implement IEP warranted compensatory education remedy); *Stanton v. Dist. of Columbia*, 680 F. Supp. 2d 201 (D.D.C. 2010)(compensatory education based on current evaluations). Thus, this is not a case, as discussed in those cases and others cited by Petitioner, where the issue is whether a petitioner's evidence is sufficiently substantive to permit a quantitative compensatory award or whether petitioner should be allowed to supplement the record. Rather, this is simply a case where the assessment and possibly revised IEP have not yet been completed leaving the question of compensatory education for another day.

facsimile 202.645.8828 and Lynette Collins, counsel for Respondent, by email lynette.collins@dc.gov.

The IEE shall consist of a Comprehensive Adaptive Evaluation and Cognitive Assessment that will provide any and all formal assessments to determine whether Student is currently properly classified or whether she should be reclassified in another category or categories of disability, and a description and analysis of her educational programming needs and present levels of academic performance. Additionally, the IEE should consider the effect of the Student's asserted exposure to lead on her disability and classification.

2. Within fourteen calendar days of submission of the completed, IEE report, DCPS shall convene an IEP team meeting to consider that report and to determine whether the student has been misclassified and whether the Student's IEP should be modified.

3. Any delay in meeting any of the deadlines in this Order because of an act or acts of the Parent and/or her representatives, will extend the deadlines set herein by the number days attributable to the Parent and/or the Parent's representatives' actions. DCPS shall document any delays caused by the Parent and/or the Parent's representatives.

4. This case shall be, and is, hereby closed.

IT IS HEREBY ORDERED.

Date: 1-17-13

Gary L Lieber

Impartial Hearing Officer

Copies to: All Counsel of Record
District of Columbia Public Schools
Student Hearing Office, OSSE
Chief Hearing Officer, OSSE

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 District of Columbia 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. §1451(i)(2)(B).