DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent,[1] on behalf of,
Student,

Petitioner,

Date Issued: January 19, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a seventeen[2] [redacted], who is attending School A. The student's current individualized education program (IEP) lists Intellectually Disabled (ID) as his primary disability and provides for him to receive his educational programming in a private special education day school.

On November 7, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to evaluate the student after several requests were made by the parent. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, independent evaluations; within fifteen (15) days of the receipt of the completed evaluation, an IEP Team meeting to review the evaluations and revise the student's IEP in accordance with the findings and recommendations of the evaluations; and compensatory education.

On November 26, 2012, the parties participated in a Resolution Meeting and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on December 8, 2012, following the conclusion of the 30-day resolution period, and ends on January 21, 2013. The Hearing Officer Determination (HOD) is due on January 21, 2013.

[1] Personal identification information is provided in Appendix A.
[2] The student was sixteen (16) years old when the Due Process Complaint was filed.

On November 18, 2012, Respondent filed an untimely Response to the Complaint. In its Response, or orally during the prehearing conference, the Respondent asserted that DCPS is not required to test all children for whom evaluations are requested; formal assessment is not the only means of evaluating a student; the student was well evaluated, especially at the February 13, 2012 IEP Team meeting; there is no disagreement regarding the student's programming; the student had a substantial number of unexcused absences during the 2011-2012 school year which would be a contributing factor in any alleged harm; the student was placed on an attendance plan; the student was not denied a FAPE; and the request for compensatory education as a remedy is inappropriate because it is inequitable to reserve relief for an alleged harm.

On December 10, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. The Hearing Officer issued the Prehearing Order on December 12, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On January 7, 2013, Petitioner filed Disclosures including eight (8) exhibits and eight (8) witnesses.[3] On January 7, 2012, Respondent filed Disclosures including one (1) exhibit and four (4) witnesses.

The due process hearing commenced at approximately 9:11 a.m.[4] on January 14, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-8 were admitted without objection. Respondent's Exhibits 1 was admitted without objection.

Following closing arguments, Petitioner's counsel requested to submit a brief on the Hearing Officer's authority to order compensatory education in a failure to evaluate case. The Hearing Officer requested that both parties submit, by 12:01 a.m. January 16, 2013, a list of cases for the Hearing Officer to review. The hearing concluded at approximately 12:11 p.m.

On January 15, 2013 Petitioner submitted a Post-Trial Brief. On January 17, 2013, Respondent submitted a Response to Hearing Officer's Inquiry.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

[3] A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.
[4] Counsel for Petitioner and Respondent were present at 9:00 a.m., the scheduled time to begin the hearing, however engaged in a brief discussion regarding continuing the hearing because both counsel were ill.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS was required to conduct adaptive functioning and cognitive assessments of the student following requests by the parent on December 8, 2011, February 13, 2012 and May 16, 2012 and, if so, whether the failure to conduct the evaluations constitutes a denial of a FAPE?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is classified as an ID student. (Petitioner's Exhibit 2; Principal's Testimony)
3. The student's January 28, 2010 Psychological Evaluation recommended changing the student's classification from ID to Emotional Disturbance (ED). (Petitioner's Exhibit 2)
4. The student is social and active in extra-curricular activities with nondisabled peers. (Student's Testimony)
5. The student is social, compliant, polite and not disruptive. (Principal's Testimony)
6. The student has low attention, is distractible and needs to be encouraged to complete his work. (Principal's Testimony)
7. The student is functioning in the extremely low range in reading, math, written language and oral language. (Petitioner's Exhibit 2)
8. The student has scattered academic skills. (Principal's Testimony)
9. The student has had peaks and valleys in his academic performance. (Principal's Testimony)
10. The student needs significant remediation for his academic deficits. (Petitioner's Exhibit 2)
11. The student's placement in a separate school is appropriate for the student. (Petitioner's Exhibit 2)
12. The IEP, which was current when the student entered School A, contained appropriate counseling goals and appropriate services. (Principal's Testimony)
13. School A is a nonpublic day school which offers full academic and vocational programming for students aged 13-22. (Principal's Testimony)
14. School A offers both certificate and diploma programs. (Principal's Testimony)
15. School A is an appropriate location of services for the student. (Stipulated Fact)
16. The student began School A at the beginning of the 2011-2012 school year. (Student's Testimony; Principal's Testimony)

17. On December 8, 2011 and May 16, 2012 the parent, through counsel, requested an adaptive evaluation, including a Vineland. (Petitioner's Exhibit 1)
18. School A has tried different strategies in the student's educational programming. Some strategies have worked and others have not. (Principal's Testimony)
19. School A is aware of the student's strengths and weaknesses. (Principal's Testimony)
20. School A has provided accommodations to address the student's weaknesses. (Principal's Testimony)
21. The student is learning at School A. (Student's Testimony)
22. The student has a passing grade in all subject areas at School A. (Student's Testimony; Principal's Testimony)
23. School A is providing the student a FAPE. (Principal's Testimony)
24. The student's IEP Team met on February 13, 2012. (Petitioner's Exhibit 2; Advocate's Testimony; Principal's Testimony)
25. The parent participated in the February 13, 2012 IEP Team meeting by telephone. (Petitioner's Exhibit 2)
26. On February 13, 2012, the student's IEP Team discussed the student's academic and cognitive scores and discussed whether the student was misclassified. (Paralegal's Testimony; Principal's Testimony)
27. The student's February 13, 2012 IEP Team discussed whether the student should participate in School A's functional class. (Petitioner's Exhibit 2)
28. The student's February 13, 2012 IEP Team felt they needed a better understanding of the student and his abilities. (Paralegal's Testimony; Principal's Testimony)
29. The math, reading, written language and social/emotional goals on the student's February 13, 2012 IEP are appropriate for the student. (Petitioner's Exhibit 2)
30. The hours of specialized instruction and related services on the student's February 13, 2012 IEP are appropriate for the student. (Stipulated Fact)
31. The February 13, 2012 IEP Team decided that the student needed an adaptive assessment, specifically the Vineland Adaptive Behavior Scale (Vineland). (Petitioner's Exhibit 2; Paralegal's Testimony; Principal's Testimony)
32. DCPS has not completed an adaptive evaluation of the student. (Principal's Testimony)
33. Lead poisoning falls under the category of Other Health Impaired (OHI). (Advocate's Testimony)
34. Lead poisoning can be severe enough to lead to severe cognitive disabilities. (Advocate's Testimony)
35. The Paralegal provided creditable testimony in relation to the February 13, 2012 IEP Team meeting. The Paralegal's testimony regarding the functioning of the student, the functioning of ID students in general, classification and programming was not creditable. First, the Paralegal was not qualified as an expert. Next, the Paralegal made comments such as "classification impacts programming," which is contrary to the IDEA regulations (*see Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006)); and "he wouldn't get it if he were [ID]," which is generally overly broad and conceivably erroneous.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit.

Districts must reassess a special education student at least once every three years, and not more frequently than one time per year, unless the parents and district agree otherwise. 20 U.S.C. § 1414(a)(2)(b). A reevaluation occurs "if the local educational agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation ... or if the child's parents or teacher requests a reevaluation." 20 U.S.C. § 1414(a)(2)(1). Reassessment requires parental consent. 20 U.S.C. § 1414(c)(3).

In the present case, the student is classified as an ID student. The student is functioning in the extremely low range in reading, math, written language and oral language and needs significant remediation for his academic deficits. The student is also social, active in extra-curricular activities with nondisabled peers, compliant, polite and not disruptive. The student has low attention, is distractible and needs to be encouraged to complete his work.

The student began School A at the beginning of the 2011-2012 school year. School A is a nonpublic day school which offers full academic and vocational programming for students aged 13-22. School A offers both certificate and diploma programs. It was uncontested that the student's placement in a separate school is appropriate for the student and the parties agreed that School A is an appropriate location of services for the student.

On February 13, 2012, the student's IEP Team met at School A. The parent participated in the February 13, 2012 IEP Team meeting by telephone. The student's IEP Team reviewed the student's academic and cognitive scores and discussed whether the student was misclassified. The February 13, 2012 IEP Team was unable to determine whether the student should participate in School A's functional class however agreed on math, reading, written language and social/emotional IEP goals for the student. There was no evidence presented which suggested that the student's IEPs, including the student's February 13, 2012 IEP, which have been in effect while the student has attended School A, were inappropriate for the student. In fact, the Principal testified that the student's IEP, which was current when the student entered School A, contained appropriate counseling goals and appropriate services. Likewise, the parties stipulated that the hours of specialized instruction and related services on the student's February 13, 2012 IEP are appropriate for the student.

While the student's February 13, 2012 IEP Team agreed on IEP goals and services for the student, the IEP Team felt that School A needed a better understanding of the student and his abilities because School A had tried different strategies in the student's educational programming and some strategies worked while others had not. The February 13, 2012 IEP Team decided that the student needed an adaptive assessment, specifically the Vineland. In addition to the IEP Team's determination that a Vineland assessment should be administered to the student, the parent, through counsel, requested an adaptive evaluation, including a Vineland, on December 8, 2011 and May 16, 2012. Following the requests of the parent and the IEP Team, DCPS has not completed an adaptive evaluation of the student.

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. District of Columbia,* 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)). Notwithstanding this standard, the IDEA still requires written parental consent to conduct the reevaluation. *See* 20 U.S.C. § 1414(c)(3). Here, there was no evidence presented confirming that the parent signed a written consent for DCPS to evaluate the student. The parental requests for reevaluation were sent by the parent's attorney and did not contain the parent's written

consent for DCPS to conduct the requested assessments. The notes from the February 13, 2012 IEP Team meeting indicate that a consent form would be sent to the parent via the student however there is no evidence that the parent signed the written consent form.

Even if the parent provided written consent for DCPS to conduct the assessment, a DCPS failure to reevaluate the student does not necessarily entitle the student to relief. A failure to timely reevaluate is, at base, a procedural violation of IDEA. *See Lesesne ex rel. B.F. v. District of Columbia,* Civil Action No. 04-620 (CKK), 2005 WL 3276205 (D.D.C. July 26, 2005) (characterizing cases "where a student is seeking a reevaluation, but is already in a placement" as involving procedural violations of IDEA). "[P]rocedural violations of IDEA do not, in themselves, inexorably lead a court to find a child was denied FAPE." *Schoenbach v. District of Columbia,* 309 F. Supp. 2d 71, 78 (D.D.C. 2004); 20 U.S.C. § 1415(f)(3)(E)(ii).

An IDEA claim is viable only if the procedural violations of procedural affected the student's substantive rights. *See Lesesne ex rel. B.F. v. District of Columbia,* 447 F.3d 828, 834 (D.C. Cir. 2006). The plaintiff bears the burden of proving a violation of substantive rights. *See Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying parents relief because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"). "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of D.C.,* 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) (finding that the defendant's delay affected the student's substantive rights because the student's most recent IEP differed from the one previously issued).

In the present matter, the Petitioner argued that the failure of DCPS to conduct the adaptive assessment has violated the student's substantive rights by delaying School A's ability to effectively program for the student. This argument is not compelling. School A is aware of the student's strengths and weaknesses and has provided accommodations to address the student's weaknesses. The student is learning at School A and has passing grades in all subject areas. Although the student has scattered academic skills and has had peaks and valleys in his academic performance, School A has identified strategies that are effective with the student and was able to develop appropriate reading, math, written language and social/emotional/behavioral IEP goals for the student. Further, the School A Principal, testifying on behalf of Petitioner, stated that School A is providing the student a FAPE.

The Petitioner also argued that the failure of DCPS to conduct the adaptive assessment has violated the student's rights by not allowing the student to be appropriately classified. The Petitioner specifically argued that the student should be classified as OHI because of the student's exposure to lead. This argument is also not compelling. First, there was no evidence presented which suggests that the student has lead poisoning. Next, if the student does have lead poisoning, lead poisoning can be severe enough to lead to severe cognitive disabilities, in other words, ID. Further, the student's January 28, 2010 Psychological Evaluation recommended changing the student's classification from ID to ED and the student's February 13, 2012 IEP Team discussed and addressed the implications of this recommendation.

Finally, there was no evidence presented which demonstrates that the student's educational program would have been different had the adaptive assessment been timely completed and the student's classification changed. "Educational placement," as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board,* 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board,* 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board,* 372 F.3d 674, 676 (4th Cir. 2004)). Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006).

The student's February 13, 2012 IEP Team, including the student's parent, agreed on academic and social/emotional/behavioral goals and services for the student; the parties agreed that the hours of specialized instruction and related services on the student's February 13, 2012 IEP are appropriate for the student; the parties agreed that School A is an appropriate location of services for the student; and while School A has used "trial and error" in identifying strategies that are effective for the student, the student is receiving educational benefit and a FAPE. The educational program designed for the student was correctly based on the student's unique needs and IEP, not on the student's category of disability.

The Hearing Officer concludes that the failure of DCPS to conduct a reevaluation within a reasonable period of time after the request by the student's parent and the student's IEP Team, assuming *arguendo* that the parent did provide written consent for the evaluation, did not impede the student's right to a FAPE; did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the her child; and did not cause a deprivation of educational benefit.

The Petitioner failed to meet its burden with regard to the issue presented.

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

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 USC §1415(i).

Date: January 19, 2013

Melanie Byrd Chisholm
Hearing Officer