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Office of Review and Compliance
Student Hearing Office
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STUDENT HEARING OFFICE

Confidential

STUDENT, through the legal guardian¹)
)
 Petitioner,)
)
 v.)
)
 THE DISTRICT OF COLUMBIA)
 PUBLIC SCHOOLS)
)
 Respondent.)
)

HEARING OFFICER DETERMINATION

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¹ Personal identification information is provided in Attachment A.

I. JURISDICTION

This hearing was invoked in accordance with the rights established under the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR") (2009); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. PROCEDURAL HISTORY

Petitioners are the parents and next friend a [REDACTED]-year-old, special education student ("Student") who attends a District of Columbia non-public elementary school. Petitioners and the Student reside in the District of Columbia.

On August 14, 2009, Petitioners filed an Administrative Due Process Complaint Notice ("Complaint") pursuant to IDEIA. In their Complaint, Petitioners raise the following issues:

1. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to find her eligible for special education for the 209-2010 school year and/or by dismissing her from special education;
2. Whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to comprehensively evaluate the Student in all areas of suspected disability;
3. Whether DCPS denied the Student a FAPE by failing to consider parental input and failing to allow Petitioners to participate in the decision-making process; and
4. Whether DCPS denied the Student a FAPE by failing to timely respond to Petitioner's written requests for special education and related services.

Petitioners seek relief in the form of an order requiring DCPS to fund the Student's placement at the non-public school for the 2009-2010 school year, and to provide the Student related services and transportation to and from the non-public school.

On August 24, 2009, counsel for DCPS timely filed a Response, and Motion to Dismiss Petitioner's Due Process Complaint Notice. In the Motion to Dismiss counsel for Respondent asserts that the Complaint does not meet the requirements of IDEA because it fails to provide sufficient facts to determine in "what way the standard for FAPE has not been met." The Response asserts that because the Student is not eligible for special education services, DCPS has no obligation to provide her a FAPE and requests that this Hearing Officer dismiss the Complaint with prejudice.

On August 26, 2009, counsel for Petitioner filed an Opposition to DCPS Motion to Dismiss ("Opposition"). The Opposition asserts that issues of eligibility are covered by IDEIA, and that the statute provides that a parent may bring a due process complaint based on matters related to eligibility for special education services. The Opposition requests that this Hearing Officer deny the DCPS Motion to Dismiss.

This Hearing Officer interpreted Respondent's Motion to Dismiss as a Notice of Insufficiency because it rests primarily on the assertion that the Complaint failed to provide sufficient facts to support the claims that DCPS failed to provide the Student a FAPE. On October 2, 2009, this Hearing Officer issued a pre-hearing conference order denying Respondent's Motion to Dismiss.²

The due process hearing convened on December 2, and 3, 2009. At the outset of the due process hearing, the parties' five-day disclosures were admitted into evidence. Several of Petitioners' disclosures were excluded, either as a result of a DCPS objection or by agreement of the Petitioners.³ Both of the DCPS exhibits were admitted into evidence without objection.

Petitioner completed the presentation of their case in chief on December 2, 2009. Counsel for DCPS then moved for a directed verdict. At the outset of the due process hearing on the following day, December 3, 2009, this Hearing Officer denied the motion orally on the record.

DCPS then presented three witnesses in its case in chief. These witnesses testified about the evaluations the IEP team reviewed in determining that the Student was not eligible for special education, including an educational evaluation that DCPS had conducted of the Student on July 24, 2009. These witnesses testified that the DCPS IEP team relied on the educational evaluation in finding the Student ineligible for special education.

DCPS had failed to disclose this educational evaluation prior to the hearing even though it included the evaluator on its witness list.⁴ Most astounding is that counsel for DCPS intended to introduce this undisclosed information through the testimony of the evaluator.

When DCPS counsel asserted that he was unable to locate the evaluation despite diligent efforts, this Hearing Officer informed the parties that she planned to apply the missing evidence inference regarding the evaluation. In explaining the missing evidence inference, this Hearing Officer informed the parties that, because DCPS has superior control over this evaluation, she would infer that the evaluation is damaging to Respondent's case.⁵

² The parties engaged in a pre-hearing conference on September 8, 2009.

³ This Hearing Officer excluded Petitioner Exhibit 22 in response to a DCPS hearsay objection. Petitioners agreed to exclude Exhibits 2, 14, 22, 31, 34, 36-37, 43-44, 47-49, 51-53, 55-58, 60-63, and 65.

⁴ 34 C.F.R. § 200.512 (b). IDEA requires that, at least five business days prior to the due process hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. *Id.* at (b) (1).

⁵ The rule that a fact-finder may draw an inference adverse to a party who fails to preserve relevant evidence within his exclusive control is well established in this jurisdiction. *See, e.g., Washington Gas Light Co. v. Biancaniello*, 183 F.2d 982, 985 (1950). Like the spoliation rule, it derives from the common sense notion that if the evidence were favorable to the non-producing party's case, the party would have taken pains to preserve and produce it. *International Union*

Counsel for DCPS suddenly produced the evaluation in question after a brief break in the hearing. This Hearing Officer then ordered DCPS to call the evaluator to testify in an attempt to discern why DCPS had not disclosed the evaluation previously. The evaluator testified that the evaluation was in her possession at all times.

Over Petitioners' strenuous objections, this Hearing Officer then ruled that she would allow DCPS to admit the evaluation into evidence after the testimony of the DCPS teacher who conducted it. This Hearing Officer explained that she could not simply ignore an evaluation that was pivotal to the IEP team's decision that the Student is eligible for special education.

Petitioners continued to object to the admission of this evaluation because, after DCPS had failed to disclose it, Petitioners had prepared their case on the assumption that the evaluation would not be in evidence. This Hearing Officer ruled that, to cure any prejudice to Petitioners, DCPS must file a motion for continuance to allow Petitioners to prepare a rebuttal case, including testimony from an expert. Counsel for DCPS agreed to file the motion for continuance and the due process hearing was recessed until December 11, 2009.

After the close of business on Friday, December 4, 2009, counsel for DCPS emailed counsel for Petitioners and this Hearing Officer to state that DCPS rested its case. This Hearing Officer responded by holding a status conference on the record on December 7, 2009.

At the status conference, DCPS rested its case on the record. Counsel for DCPS then refused to file the continuance motion, stating that it was no longer necessary. This Hearing Officer ordered counsel for DCPS to file the continuance motion to allow Petitioners to present their rebuttal case. Over Petitioners' objection, this Hearing Officer stated that she would call as a Hearing Officer witness the DCPS teacher who conducted the July 24, 2009, educational evaluation of the Student. This Hearing Officer further informed the parties that she would admit the evaluation as a Hearing Officer exhibit. This Hearing Officer explained that she had to introduce the evaluation and the evaluator's testimony because, although DCPS rested its case on an incomplete record.

At the outset of the due process hearing on December 11, 2009, this Hearing Officer called the DCPS teacher who conducted the educational evaluation of the Student and admitted the evaluation into evidence. Both parties also examined the teacher thoroughly. Petitioners then presented their rebuttal case. The due process hearing concluded that same day.

Counsel for Petitioner and counsel for DCPS submitted their written closing arguments on December 14, 2009.

III. RECORD

Due Process Complaint Notice, filed August 14, 2009;

(UAW) v. NLRB, 459 F.2d 1329, 1335-36, 1338 (1972); *Washington Gas Light Co. v. Biancaniello*, 183 F.2d at 985.

DCPS Response, and Motion to Dismiss Petitioner's Due Process Complaint Notice, filed August 24, 2009;
Petitioners' Opposition to DCPS Motion to Dismiss, filed August 26, 2009;
Prehearing Order, issued October 2, 2009;
Joint Consent Motion for Continuance, filed October 6, 2009;⁶
Interim Order on Continuance Motion, issued October 14, 2009;
Petitioner's Five-Day Disclosure, filed October 30, 2009 (identifying five witnesses and including 66⁷ documents);
DCPS Five-Day Disclosure, filed November 2, 2009 (identifying eight witnesses and including one document);
DCPS Supplemental Five-Day Disclosure, filed November 2, 2009 (identifying eight witnesses and including two documents);
Petitioners Motion for Continuance, filed November 13, 2009;
Interim Order on Continuance Motion, issued November 20, 2009;
DCPS Letter Motion for Continuance, filed December 10, 2009;
DCPS Amended Letter Motion for Continuance, filed December 11, 2009;
Interim Order on Continuance Motion, issued December 14, 2009;
Hearing Officer Exhibit 1, produced by DCPS on December 3, 2009;
Petitioners Written Closing Argument, submitted December 14, 2009; and
DCPS Written Closing Argument, submitted December 14, 2009.

IV. ISSUE PRESENTED

Although Petitioners present four separate issues in their Complaint, all of these issues are subsumed in the paramount issue in this case: whether DCPS denied the Student FAPE by failing to identify the Student as a student with a suspected disability and properly determine whether the Student is eligible for special education pursuant to its "child find" obligations under IDEIA. This "child find" issue includes whether DCPS denied the Student a FAPE by failing to (a) comprehensively evaluate the Student in all areas of suspected disability; (b) consider parental input and failing to allow Petitioners to participate in the decision-making process; and (c) timely respond to Petitioners' written requests for special education and related services.

V. FINDINGS OF FACT

1. The Student is a [REDACTED]-year-old, [REDACTED]-grade, special education student at a District of Columbia non-public elementary school.⁸ Both the Student and Petitioners reside in the District of Columbia.⁹

⁶ This motion was filed twice, on October 6, 2009, and a corrected version on October 7, 2009.

⁷ Petitioner filed the sixty-sixth document on November 5, 2009, after noticing an error in their disclosures.

⁸ Testimony of Student's mother ("Mother").

⁹ *Id.*

2. The Student currently attends a non-public school in the District of Columbia.¹⁰ She previously attended a parochial school for three years.¹¹ The Student attended a DCPS elementary school for pre-kindergarten and kindergarten.¹² When the Student was in kindergarten, her mother noticed that the Student had serious attention issues.¹³ The Student also had emotional outbursts and her personality changed.¹⁴

3. In first grade at the parochial school, the Student worked with a special education teacher individually and in small groups.¹⁵ The Student's general education and special education teachers, as well as the school principal, raised concerns with the Student's mother regarding the Student's progress.¹⁶ The Student was easily distracted, had difficulty following directions, and was easily frustrated.¹⁷ The Student also was impulsive and compulsive.¹⁸

4. The Student did not learn to read in first grade.¹⁹ On the Student's final report card for the 2006-2007 school year, the Student's teachers indicated areas of concern in reading, spelling, and math.²⁰ On the report card, one of the Student's teachers commented that the Student would benefit from professional reading help over the summer.²¹ The grades on her report card reflected her effort more than her actual grade.²²

5. In second grade, the Student was not reading on grade level.²³ Her main issues were attention, decoding, fluency, and comprehension.²⁴ The Student's math reasoning skills were below average because her difficulties with reading fluency impeded her ability to do math word problems.²⁵ In January 2008, DCPS provided the Student one hour per week of Title 1 reading support but reading continued to be a challenge for the Student.²⁶

6. The Student had regular emotional outbursts.²⁷ She was extremely disorganized and had great difficulty carrying out tasks.²⁸ She was easily distracted and required constant

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Petitioners Exhibit 5 (MDT Meeting Notes).

¹⁵ Testimony of Mother.

¹⁶ Petitioners Exhibit 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Petitioners Exhibit 5.

²⁰ Petitioners Exhibit 3 (Report Card).

²¹ Petitioners Exhibit 3.

²² Petitioners Exhibit 5.

²³ Petitioners Exhibit 4 (Referral Form).

²⁴ Petitioners Exhibits 5, 8 (Title 1 Progress Report in Primary Reading).

²⁵ Petitioner Exhibit 5.

²⁶ Petitioners Exhibit 4.

²⁷ Testimony of Mother.

²⁸ *Id.*

guidance.²⁹ The Student exhibited socially immature and attention-seeking behavior at school.³⁰ She also displayed manipulative and intrusive behavior as well as distractibility and non-compliance in the classroom.³¹

7. In January 2008, the principal of the parochial school informed the Student's mother that the Student's educational difficulties warranted requesting that DCPS evaluate the Student to ascertain whether she had a learning disability.³² On January 7, 2008, the principal of the parochial school referred the Student to the DCPS C.A.R.E. Center for determination of whether the Student was eligible for special education.³³

8. On January 8, 2008, Petitioners participated in a meeting of the DCPS multidisciplinary team ("MDT").³⁴ At the meeting, the MDT agreed to conduct psychological, speech-language, and educational evaluations as well as a classroom observation.³⁵ The MDT agreed to conduct a clinical evaluation if warranted.³⁶ Petitioners consented to the evaluations recommended by the MDT.³⁷

9. DCPS conducted the psychological evaluation and visual motor integration assessment on January 29, 2008.³⁸ DCPS completed the educational evaluation on January 20, 2008.³⁹ All three evaluations were analyzed in a single report issued on February 18, 2008.⁴⁰

10. The psychological evaluation revealed that the Student has a high cognitive ability that, as estimated by the Wechsler Intelligence Scale for Children IV ("WISC IV") is in the high average range.⁴¹ The results of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III) showed that, when compared to others at her grade level, the Student's level of academic skills was in the low average range.⁴² However, her level of achievement in terms of overall math proficiency was about one grade level below her actual grade.⁴³ Her performance in reading and math were not commensurate with the levels predicted by her cognitive abilities.⁴⁴

²⁹ *Id.*

³⁰ Petitioner Exhibit 10 (Report of Psychological Evaluation).

³¹ *Id.*

³² Testimony of Mother.

³³ Petitioners Exhibit 4 (Referral).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Testimony of Mother; Petitioners Exhibit 7 (Notice of Intent to Evaluate/Reevaluate).

³⁸ Petitioners Exhibits 7, 10.

³⁹ *Id.* The parties presented no evidence on whether DCPS conducted the speech-language evaluation.

⁴⁰ Petitioners Exhibit 10.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

11. The psychological evaluation included Connors' Parent and Teacher Rating Scales.⁴⁵ The responses of the Student's mother resulted in clinically significant elevations on the oppositional, cognitive problems/inattention, and Connors' attention deficit hyperactivity disorder ("ADHD") index scales.⁴⁶ The teacher's responses indicated clinically significant levels of behavior on the same four scales.⁴⁷ She had issues with organization, self-regulation, and compliance with school rules.⁴⁸ She also had difficulties with appropriate peer relations.⁴⁹ Many of these behaviors are consistent with an ADHD diagnosis.⁵⁰ The psychological evaluation concluded that the Student met the criteria for ADHD, inattentive type.⁵¹ It further concluded that the Student was eligible for special education.⁵²

12. On March 13, 2008, DCPS held an MDT meeting in which the Student's parents, and a second grade teacher, reading specialist, and special education teacher, as well as the principal from the parochial school, participated.⁵³ Also present were the psychologist who conducted the Student's evaluations and a representative of the DCPS local education agency (LEA). The MDT reviewed the Student's evaluations and discussed the psychologist's classroom observations of the Student.⁵⁴ The MDT found the Student eligible for special education as a student with other health impairment, i.e., ADHD, inattentive type.⁵⁵

13. The MDT then developed an IEP and issued an initial placement for the Student in a combination general education and resource classroom at her DCPS neighborhood school.⁵⁶ The IEP provided that the Student would receive 7.5 hours of specialized instruction and would be outside the general education setting for 23 percent of her classes.⁵⁷ The MDT also provided that the Student would receive accommodations and modifications in the classroom, including having directions read aloud, questions read aloud, special seating in proximity to the teacher, and extended time to complete assignments and tests.⁵⁸

14. Petitioners rejected the IEP and placement because they did not believe the proposed placement would offer the Student the special education services the Student required.⁵⁹ Petitioners opted to keep the Student at the parochial school.⁶⁰

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Petitioners Exhibit 11 (MDT Meeting Notes).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; Testimony of Mother; Petitioners Exhibit 12 (Initial Placement Notice), and 13 (MDT Prior Notice).

⁵⁷ Petitioners Exhibit 6 (March 13, 2008, IEP).

⁵⁸ Petitioners Exhibit 12.

⁵⁹ Testimony of Mother.

15. The following school year (2008-2009), the Student was in third grade and continued to struggle academically.⁶¹ She was significantly behind in reading and having trouble in math.⁶² The Student's academic performance had deteriorated from the previous year in that she fell further behind grade level achievement despite that she was receiving accommodations in language arts and mathematics.⁶³ The Student had particular difficulty in written language and could not spell simple words.⁶⁴

16. In the 2008-2009 school year, the Student also was more disruptive in the classroom than in the previous year.⁶⁵ The Student had tremendous difficulty paying attention, could not stay seated, got up during instruction, distracted other students, blurted out during instruction, and would put her head on the desk during instruction.⁶⁶ At the end of the 2008-2009 school year, the principal of the parochial school informed Petitioners that the Student would not be promoted to the fourth grade.⁶⁷

17. On March 16, 2009, Petitioners sent a letter to the DCPS Chancellor Michelle Rhee.⁶⁸ In the letter, the Student's mother informed DCPS that the Student continued to struggle academically.⁶⁹ The letter explained that the Student had been accepted at the non-public school for the 2009-2010 school year and that Petitioners planned to enroll her there.⁷⁰ The mother also requested that DCPS consider funding the Student's placement at the non-public school.⁷¹ Petitioners received no response from DCPS.

18. On May 12, 2009, counsel for Petitioners sent a letter to [REDACTED] Special Assistant to Chancellor Rhee.⁷² The letter referred to the letter to Ms. Rhee, which was enclosed, and stated that the Petitioners were requesting guidance on how to proceed with obtaining special education for the Student.⁷³ Petitioners received no response to this letter.

19. On June 12, 2009, Petitioners provided another referral packet to DCPS.⁷⁴ A letter from Petitioners requesting evaluations and an MDT meeting accompanied the referral packet.⁷⁵ The referral packet included DCPS forms on which Petitioners provided a description

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* The Student's final report card indicated that reading, composition, spelling, and math were areas of concern. Petitioners Exhibit 18.

⁶⁵ *Id.*

⁶⁶ *Id.*; Petitioners Exhibit 18.

⁶⁷ Testimony of Mother.

⁶⁸ Petitioners Exhibit 20.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Petitioners Exhibit 23.

⁷³ *Id.*

⁷⁴ Testimony of Mother; Petitioners Exhibits 25, 28.

⁷⁵ Petitioners Exhibit 28.

of the Student's academic functioning and stated that she had ADHD and a learning disability.⁷⁶ The packet included Petitioners' request for a meeting with DCPS, a report of a classroom observation of the Student, and an example of the Student's work.⁷⁷ It also included the Student's report cards, reading assessment, the Connors Parent Rating Scale, and the February 2008 report of the Student's psychological evaluation.⁷⁸

20. On July 8, 2009, Petitioners filed a due process complaint alleging that DCPS had failed to provide the Student with services, an appropriate IEP, and placement for the 2009-2010 school year.⁷⁹ On July 28, 2009, Dr. [REDACTED] sent a letter to Petitioner's counsel that responded to Petitioners' letter and stated that an IEP meeting was scheduled for that same day.⁸⁰ Petitioners did not receive Dr. [REDACTED] letter until after the IEP meeting.⁸¹

21. On July 24, 2009, a DCPS Special Education Teacher administered a WJ III to the Student.⁸² Although the test should be administered with only the student and the evaluator in the room, the Special Education Teacher allowed the Student's Father to sit in the room and observe.⁸³ The Special Education Teacher was not aware of the time constraints required by the WJ III manual.⁸⁴ The Student exhibited no attention issues during the testing and worked through the test without taking a break.⁸⁵

22. The Student's Father waited in his car during the first forty minutes of the July 24, 2009, WJ III evaluation of the Student.⁸⁶ He then entered the testing room and sat near the doorway, about thirty feet from the Student, while the Student worked on the evaluation.⁸⁷ The Student's father was present for about fifty minutes of the evaluation.⁸⁸

23. While the Student's father observed the WJ III evaluation, he noticed the evaluation was not timed and the Student was provided as much time as she needed to finish each answer.⁸⁹ Sometimes, the Special Education Teacher would prompt the Student to check her answer again.⁹⁰ At times, the Student would stare at the ceiling or look out the window and the Special Education Teacher would redirect the Student.⁹¹ Often the Student would change her answers and the Special Education Teacher provided her feedback by telling her the answer was

⁷⁶ Petitioners Exhibit 25.

⁷⁷ *Id.*

⁷⁸ Petitioners Exhibit 28.

⁷⁹ Petitioners Exhibit 30.

⁸⁰ Petitioners Exhibit 38.

⁸¹ Testimony of Mother.

⁸² Hearing Officer Exhibit 1.

⁸³ Testimony of DCPS Special Education Teacher.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Testimony of Student's Father ("Father").

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

perfect or very good.⁹² At least a dozen times, the Special Education Teacher asked the Student to recheck her work.⁹³

24. The July 24, 2009, WJ III evaluation found that the Student's written expression is within the average to high average range when compared to others in her grade.⁹⁴ The report on the WJ III noted that the Student's "overall ability to express herself is writing is average to advanced; she will probably find grade-level tasks requiring clear expression and organization of sentences easy."⁹⁵ The report stated that the Student's academic achievement is in the average range in broad math, math calculation skills, broad written language, and broad reading.⁹⁶

25. The WJ III testing protocol does not allow the evaluator to prompt, correct, or otherwise influence the student's answers.⁹⁷ Providing the Student feedback on her answers would have been highly inappropriate.⁹⁸ The evaluator is not allowed to coach or prompt students when they are taking the test.⁹⁹ It is very important that the evaluator not indicate whether an answer is right or wrong because the WJ III is designed to compare the test subject to the norm in a highly structured, standardized way.¹⁰⁰

26. Often children with ADHD perform better on the WJ III than they perform in class.¹⁰¹ The WJ III cannot reflect how a student performs in class.¹⁰²

27. The report on the July 24, 2009, WJ III found that the Student's math calculation skill is average, her spelling is limited to average, and her sight-reading is limited.¹⁰³ It found that her fluency with mathematics problems and writing is average and her fluency with reading tasks is limited to average.¹⁰⁴ In written expression, broad math, math fluency, writing fluency, applied problems the WJ III showed the Student was performing at a grade equivalency of about one grade level above her present grade.¹⁰⁵ The WJ III also indicated that the Student's writing samples were equivalent to more than four grades above her present grade.¹⁰⁶

28. At the non-public school, the Student has not demonstrated an ability to spell on third grade level or express herself on the fifth grade level.¹⁰⁷ Her spelling and her written

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Hearing Officer Exhibit 1.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Testimony of Special Education Teacher, Educational Expert.

⁹⁸ *Id.*

⁹⁹ Testimony of Educational Expert.

¹⁰⁰ *Id.*

¹⁰¹ Testimony of Special Education Teacher.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Testimony of Educational Expert.

expression is mid-second grade level.¹⁰⁸ The Student's reading ability is at the beginning third-grade level.¹⁰⁹ Her math ability is at mid-second grade level.¹¹⁰

29. On July 29, 2009, DCPS held another eligibility meeting for the Student.¹¹¹ The Petitioners and their attorney attended the meeting.¹¹² Also attending were a DCPS School Psychologist,¹¹³ DCPS Special Education Specialist, DCPS Compliance Case Manager, DCPS Social Worker, and a DCPS teacher.¹¹⁴ None of the Student's evaluators were present, nor were any of the Student's teachers or staff from the parochial school.¹¹⁵ DCPS never sent a written invitation to the Student's teachers at the parochial school.¹¹⁶

30. At the July 29, 2009, meeting, Petitioners explained that the Student was behind grade level.¹¹⁷ They also informed the MDT that the parochial school wanted to retain the Student in the third grade.¹¹⁸ Petitioners requested that the MDT discuss the Student's academic performance with the staff at the parochial school.¹¹⁹ The DCPS team members responded that they could not consider information that was not in the Student's file.¹²⁰ The MDT did not review the documents Petitioners submitted in the referral packet.¹²¹ None of the MDT members had seen the contents of the referral packet despite that the Special Education Specialist had brought a copy of the referral packet to the meeting.¹²²

31. The MDT reviewed the February 18, 2008 psychological evaluation as well as an July 24, 2009 educational evaluation.¹²³ The MDT also reviewed the Student's report cards from the parochial school. The MDT concluded that the Student's evaluations showed that she functioning is at or above her current grade level academically.¹²⁴

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Petitioners Exhibit 39 (Eligibility Meeting Report).

¹¹² *Id.*

¹¹³ This psychologist was not the same person who conducted the Student's psychological evaluation. *Id.*

¹¹⁴ *Id.*

¹¹⁵ Testimony of Petitioners, DCPS Special Education Specialist,

¹¹⁶ Testimony of Petitioners, DCPS Special Education Specialist, DCPS Compliance Case Manager. The Compliance Case Manager attempted to reach the parochial school staff by telephone twice, once two weeks before the meeting and again one week before the meeting but was unsuccessful.

¹¹⁷ Testimony of Petitioner.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; Testimony of DCPS School Psychologist.

¹²² Testimony of Mother.

¹²³ Petitioners Exhibit 39 (MDT Meeting Notes).

¹²⁴ *Id.*

32. At the MDT meeting, the DCPS School Psychologist was responsible for reviewing the Student's 2008 psychological evaluation.¹²⁵ The first time the School Psychologist had reviewed the psychological evaluation was when she read the report just before the July 29, 2009, MDT meeting.¹²⁶ The School Psychologist found that the 2008 psychological evaluation was a valid and accurate assessment of the Student's cognitive abilities.¹²⁷ However, the School Psychologist found that the finding in the 2008 psychological evaluation that the Student was eligible for special education was no longer valid.¹²⁸ The School Psychologist believes that the Student must first show significant impact based on her response to intervention before being found eligible for special education.¹²⁹

33. After reviewing the Student's report cards, the 2008 psychological evaluation, and the July 2009 educational evaluation, the MDT determined that the Student has the ability and has been successful in school.¹³⁰ The MDT determined that the Student is no longer eligible for special education.¹³¹

34. The Student has benefited educationally and behaviorally since enrolling in the non-public school in August 2009.¹³² The non-public school provides the instruction and supports the Student requires to access the general education curriculum.¹³³

VI. CREDIBILITY DETERMINATIONS

This Hearing Officer found the testimony of most of the witnesses credible with the exception of the DCPS Special Education Teacher and the Special Education Specialist.

The Special Education Teacher's testimony directly contradicted the testimony of the Student's Father. The Special Education Teacher insisted that she provided the Student no assistance or extra time when she administered the Woodcock Johnson on July 24, 2009. The Student's Father was a far more credible witness.

The Special Education Specialist provided contradictory testimony on whether he had reviewed Petitioners' referral packet. He also provided testimony that was contradicted by all of the witnesses who testified, with the exception of the Compliance Case Manager. This testimony was that he attempted to call the parochial school staff during the July 29, 2009, meeting to obtain the input of the Student's teachers. The Special Education Specialist testified that he attempted to call the parochial school on his cell phone during the meeting, but no one except the Compliance Case Manager observed him doing so even though the meeting was held in a very

¹²⁵ Testimony of DCPS School Psychologist.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*; Petitioners Exhibit 39.

¹³² Testimony of Mother, Educational Expert.

¹³³ *Id.*

small room. The Special Education Specialist's testimony in this regard also is contradicted by the MDT meeting notes, which fail to mention any attempts to reach the parochial school during the meeting, and the testimony of the DCPS School Psychologist.

VII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.¹³⁴ Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹³⁵

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.¹³⁶ In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights.¹³⁷

IDEIA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children between the ages of three and twenty-one.¹³⁸ A free, appropriate public education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."¹³⁹

The Hearing Officer's inquiry in this case is twofold. First, has the State complied with the procedures set forth in the Act?¹⁴⁰ Second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?¹⁴¹ If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.¹⁴²

¹³⁴ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹³⁵ 20 U.S.C. § 1415 (i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

¹³⁶ 20 U.S.C. § 1415 (f)(3)(E)(ii).

¹³⁷ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). Accord, *Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA 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").

¹³⁸ 20 U.S.C. § 1412(1); 34 C.F.R. § 300.101.

¹³⁹ *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).

¹⁴⁰ *Rowley*, 458 U.S. at 206.

¹⁴¹ *Id.* at 206-07.

¹⁴² *Id.* at 207.

This case involves an ineligibility determination, and thus there is no IEP.¹⁴³ Therefore, the Court must adapt the second step of the Rowley inquiry and inquire whether the ineligibility determination was proper under IDEA.¹⁴⁴ Plaintiffs argue that July 29, 2009 ineligibility determination by DCPS fails under both the procedural and substantive inquiries. This Hearing Officer agrees.

VIII. DECISION

A. Petitioner Established by a Preponderance of the Evidence that DCPS Violated Its Child Find Obligations Under IDEA .

DCPS must demonstrate that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated."¹⁴⁵ This is known as the "child find" duty. The child find duty applies to parentally placed students in non-public schools in the District of Columbia without regard to where the students reside.¹⁴⁶

1. DCPS Failed to Timely Evaluate the Student.

As soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate her and complete the evaluation process.¹⁴⁷ Once a child has been referred to an IEP team for an eligibility determination, DCPS must conduct an initial evaluation within 120 days from the date the student was referred for an evaluation.¹⁴⁸ Similarly, DCPS also must evaluate a child with a disability before determining that the child is no longer a child with a disability.¹⁴⁹

Here, Petitioners referred the Student to DCPS on March 16, 2009, when they sent the letter to Chancellor Rhee. DCPS did not complete the evaluation process and convene an IEP team meeting until July 29, 2009. Thus, DCPS allowed more than 120 days to elapse, in violation of IDEA.

¹⁴³ See *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 30 (D.D.C. 2008).

¹⁴⁴ *Id.* (citing *Kroot By and Through Kroot v. District of Columbia*, 800 F. Supp. 976, 981 (D.D.C. 1992)).

¹⁴⁵ 20 U.S.C. § 1412(2)(C). See also 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.128(a)(1) and note 1, § 300.220 and note, § 300.300 note 3.

¹⁴⁶ 34 C.F.R. § 300.131.

¹⁴⁷ See *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007) (explaining that once a child is identified the local educational agency "is then obligated to move forward with the requirement of [IDEA] § 1414(a)(1) and determine whether the student is in fact a child with a disability"). See also *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 114 (D.D.C. 2008).

¹⁴⁸ D.C. Code § 38-2561.02

¹⁴⁹ 34 C.F.R. 300.305 (e).

However, this is only a procedural violation and Petitioners failed to prove that the delay in holding the IEP meeting substantively harmed the Student. Thus, Petitioners failed to prove that DCPS denied the Student a FAPE by failing to timely evaluate the Student.

2. DCPS Failed to Comprehensively Evaluate the Student.

As part of an initial evaluation, the IEP team and other qualified professionals, as appropriate, must (1) review existing evaluation data on the child, including evaluations and information provided by the parents of the child.¹⁵⁰ Additionally, the IEP team must review current classroom-based assessments and observations; and observations by teachers and related service providers.¹⁵¹ In evaluating a child suspected of having a learning disability, the IEP team also shall ensure that at least one team member other than the child's regular teacher observes the child's academic performance in the regular classroom setting.¹⁵²

On the basis of that review, and input from the child's parents, the IEP team must identify what additional data, if any, are needed to determine whether the child is a child with a disability and the educational needs of the child.¹⁵³ In interpreting evaluation data to determine eligibility and educational need, DCPS must draw upon information from a variety of sources, including parent input and teacher recommendations.¹⁵⁴ DCPS must ensure that information obtained from all of these sources is documented and carefully considered.¹⁵⁵ Only then can a group of qualified professionals and the parent of the child determine whether the child is a child with a disability.¹⁵⁶

Here, DCPS conducted a thorough and proper evaluation of the Student before finding her eligible in 2008. DCPS conducted a comprehensive psychological evaluation, which included a visual motor integration assessment, Connors rating scale, and classroom observations. This stands in stark contrast to the July 29, 2009, meeting.

At the July 29, 2009, meeting, DCPS relied on a flawed educational evaluation and failed

¹⁵⁰ 34 C.F.R. § 300.305.

¹⁵¹ 34 CFR 300.306 (a); D.C. Mun. Regs. Tit. 5 § 3005.4 (2009).

¹⁵² D.C. Mun. Regs. Tit. 5 § 3005.10 (2009).

¹⁵³ *Id.*; 34 C.F.R. § 300.305.

¹⁵⁴ 34 CFR § 300.306 (c).

¹⁵⁵ *Id.*

¹⁵⁶ 34 CFR 300.306 (a). Further, the IEP team shall prepare a written evaluation (re-evaluation) report, including the following:

- (a) information provided by the parent(s);
- (b) results of assessment procedures considered and used as a basis for making an eligibility determination;
- (c) a statement whether the assessment procedures were valid for the purposes intended and valid for the child;
- (d) whether the child is a child with a disability;
- (e) whether the child needs special education and related services; and
- (f) the signatures of team members participating in the determinations.

D.C. Mun. Regs. Tit. 5 § 3006.5 (2009). Here, DCPS failed to prepare this report.

to consult the Student's teachers or any educator familiar with her academic performance. DCPS arbitrarily tossed aside the conclusions of the 2008 psychological evaluation that had formed the basis of the MDT decision to find the Student eligible for special education one year before. Requiring the Student to fail in response to intervention is not countenanced by IDEA, and this Hearing Officer finds it was just a flimsy excuse to toss aside the conclusions of the 2008 psychological evaluation.

In reviewing the report cards, DCPS failed to notice that the Student had more areas in need of improvement in school year 2007-2008 than in 2006-2007. The notes of the meeting also mischaracterize the report cards by stating that they "show Sayaka is on and above her current grade level."¹⁵⁷

In fact, the Student's 2006-2007 report card noted areas of concern in all areas of reading, in spelling, and in math.¹⁵⁸ Her 2007-2008 final report card indicates concerns in reading fluency and expression.¹⁵⁹ Her 2008-2009 report card showed that she received accommodations in language arts and math, that her performance was unsatisfactory in self-control and working independently.¹⁶⁰ This report card further shows that the Student's teachers at OLV noted concerns about her ability in reading and composition to: demonstrate comprehension skills, read with fluency and expression, express ideas in writing or orally and use correct grammar.¹⁶¹ They noted concern in the Student's ability in math to understand concepts, work accurately, and apply problem-solving skills.¹⁶²

It also appears that the MDT failed to consider the academic and personal supports the Student received at the parochial school, which would also constitute "current information," and rather focused solely on her performance in light of those accommodations. The MDT completely disregarded the Student's ongoing attention difficulties and the ways in which the parochial school assisted her in handling them. The failure to consider this information invalidates the MDT ineligibility decision.¹⁶³

At the very least, the 2008-2009 report card should have prompted the DCPS team members to conduct further evaluations to determine whether Sayaka had a speech-language or executive functioning disability. Instead, the team ignored Sayaka's clear difficulties in her core academic areas, the basic building blocks for academic success. Thus, Petitioners provided by a preponderance of the evidence that DCPS failed to evaluate the Student in all areas of suspected disability.

3. DCPS Failed to Allow Petitioners to Participate in the Decision-Making Process.

¹⁵⁷ Petitioners Exhibit 39.

¹⁵⁸ Petitioners Exhibit 3.

¹⁵⁹ Petitioners Exhibit 17.

¹⁶⁰ Petitioners Exhibit 18.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See N.G.*, 556 F. Supp. 2d at 34-35.

IDEA guarantees parents of disabled children the opportunity to participate in the evaluation and placement process.¹⁶⁴ One of the important policies underlying the need for an accurate written IEP is “to serve a parent’s interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child’s progress and determine if any change to the program is necessary.”¹⁶⁵ Thus, DCPS must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.¹⁶⁶ Procedural inadequacies that seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a free and appropriate public education (“FAPE”).¹⁶⁷

The IEP team for each child with a disability shall include:

- (a) The parents of the child;
- (b) At least one regular education teacher of the child, if the child is or may be participating in the regular education environment, or if the child is being evaluated for SLD;
- (c) At least one special education teacher, or, if appropriate, at least one special education provider of the child;
- (d) A representative of the LEA who is:
 - (1) Qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, and
 - (2) Knowledgeable about the general curriculum and about the availability of resources of the LEA;
- (e) An individual who can interpret the instructional implications of evaluation results;
- (f) Other individuals, at the discretion of the parent or the LEA, who have knowledge or special expertise regarding the child, including related services personnel, if appropriate; and
- (g) The child, if appropriate.¹⁶⁸

When the purpose of the IEP meeting is to evaluate a child and/or determine his or her eligibility for special education services, the IEP team shall include qualified individual(s) with appropriate credentials and expertise to conduct evaluations in the area(s) of the child's suspected disability.¹⁶⁹

Here, at the July 29, 2009, eligibility meeting, DCPS failed to convene a full IEP team. It failed to include the Student’s teachers or other individuals who have knowledge or special expertise regarding the child, including related services personnel. As a result, the IEP team

¹⁶⁴ See 20 U.S.C. § 1414(f), 1415(b).

¹⁶⁵ *Alfano et al. v. District of Columbia*, 442 F.Supp.2d 1, 6 (D.D.C. 2006) (citing *Mewborn v. Gov't of Dist. Of Columbia*, 360 F.Supp.2d 138, 143 (D.D.C. 2005).

¹⁶⁶ 34 C.F.R. § 300.501 (c)(1).

¹⁶⁷ See, e.g., *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992).

¹⁶⁸ D.C. Mun. Regs. Tit. 5 § 3003.1 (2009)

¹⁶⁹ *Id.* at 3003.3.

could not consider the Student's academic performance in the classroom. The IEP team also could not have accurately interpreted the Student's report cards without a representative of the parochial school at the meeting.

Petitioners proved by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to serve their interest in receiving full appraisal of the educational plan for her child.

Thus, Petitioner's proved by a preponderance of the evidence that DCPS violated its child find obligations pursuant to IDEIA. DCPS denied the Student a free, appropriate, public education in failing to find the Student eligible for special education, failing to develop an IEP for the Student, and failing to provide the Student an appropriate educational placement. These are the basic requirements of a free, appropriate, public education, and in this case, Petitioners were forced to fund a private placement for their daughter after DCPS refused to fulfill its obligations pursuant to IDEA.

B. Petitioners Established by a Preponderance of the Evidence that the Student is Eligible for Special Education and are Entitled to Reimbursement.

DCPS presented no evidence to rebut the conclusions of the IEP team in 2008 that the Student was eligible for special education as a student with other health impairment. Thus, this Hearing Officer finds that the Student was eligible for special education in July 2009 and remains eligible.

Parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if the public agency violated the IDEA, the private school placement was an appropriate placement, and the cost of the private education was reasonable.¹⁷⁰ IDEA allows for tuition reimbursement for parents' unilateral placement of a disabled child in a private school if there were sufficiently serious procedural failures by the school district to provide a FAPE, such as the school district's failure to conduct sufficient child-find.¹⁷¹

C. Petitioners Failed to Prove that the Non-Public School is the Least Restrictive Environment.

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP.¹⁷² Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.¹⁷³

¹⁷⁰ *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C. Cir. 1995) (citing *Florence County School District Four v. Carter*, 510 U.S. 7, 15 (1993)).

¹⁷¹ *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 388 (6th Cir. 1998).

¹⁷² 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006).

¹⁷³ *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

Here, DCPS failed to present any evidence that it could provide the Student an appropriate placement in a DCPS school. Nor did DCPS prove that the Student is not making academic progress at the non-public school. Moreover, the testimony clearly established that the Student has educationally benefited at the non-public school.

To the maximum extent appropriate, children with disabilities must be educated with children who are non-disabled.¹⁷⁴ Special classes, separate schooling, or other removal of children from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.¹⁷⁵

In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEA:

- (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
- (2) Private or residential District of Columbia facilities; and
- (3) Facilities outside of the District of Columbia.¹⁷⁶

In a perfect world, Petitioner would receive one-on-one instruction and a multitude of services to address her suspected disabilities. However, IDEIA does not require DCPS to “maximize the potential” of this Student.¹⁷⁷ Rather, it only has to provide a “basic floor of opportunity.”¹⁷⁸

Here, Petitioners failed to prove that the non-public school is the least restrictive environment for the Student. In fact, the Educational Expert, who serves as the Academic Director of the non-public school, testified that the Student would benefit from interaction with non-disabled peers. For this reason, this Hearing Officer cannot place the Student in the non-public school for the 2009-2010 school year.

ORDER

Upon consideration of Petitioner’s request for a due process hearing, the response thereto, and the testimony and exhibits presented at the due process hearing, this 21st day of December 2009, it is hereby

¹⁷⁴ 34 C.F.R. § 300.114.

¹⁷⁵ *Id.*

¹⁷⁶ D.C. Code § 38-2561.02.

¹⁷⁷ *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n. 21, 198, 199).

¹⁷⁸ 882 F.2d at 886.

ORDERED that DCPS shall reimburse Petitioners for the full costs of tuition and related services at the Student's non-public school from the beginning of the 2009-2010 school year until the date of this Order;

IT IS FURTHER ORDERED that DCPS shall convene an MDT meeting within thirty calendar days of this Order to review the Student's evaluations, develop an IEP for the Student, and determine an appropriate educational placement;

IT IS FURTHER ORDERED that DCPS shall include the Student's teachers from the parochial school and the non-public school, as well as all of the professionals who evaluated the Student, in the IEP meeting required by this Order;

IT IS FURTHER ORDERED that DCPS shall fund the Student's placement at the non-public school, including all related services and transportation until the date of the IEP meeting mandated in this Order;

IT IS FURTHER ORDERED that DCSP shall receive one day of delay for every day of delay caused by Petitioner or her counsel; and

IT IS FURTHER ORDERED, that this Order is effective immediately.

By: /s/ Frances Raskin
Frances Raskin, Hearing Officer

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

Copies to:
Michael Eig, counsel for Petitioner
Daniel McCall, counsel for Respondent
DCPS
Student Hearing Office