

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 6, 2014

STUDENT, ¹)	
through the PARENT,)	
)	Date Issued: August 5, 2014
<i>Petitioner,</i>)	
)	Hearing Officer: NaKeisha Sylver Blount
v.)	
)	
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

This matter is a consolidation of two DPCs. The DPC in case number 2014-050 was filed on January 30, 2014, and the DPC in case number 2014-0210 was filed on April 30, 2014. Both actions were filed on behalf of the Student, a resident of the District of Columbia, by Petitioner, the Student’s guardian, against Respondent, District of Columbia Public Schools (“DCPS”).

A previous hearing officer was appointed to case number 2014-050. On April 30, 2014, the undersigned was appointed as the Impartial Hearing Officer (“IHO”) 2014-0210. On February 4, 2014, Respondent filed its timely Response to 2014-050, and on May 8, 2014, Respondent filed its timely Response to 2014-0210. In each Response, Respondent denied denying the Student a free appropriate public education (“FAPE”). On May 22, 2014, Petitioner

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

and Respondent jointly filed a “Consent Order,”² amending the DPC in 2014-050 to include the allegations contained in 2014-0210, agreeing to waive the 30-day resolution period in 2014-0210, and agreeing to proceed to a DPH on all issues in both DPCs on the already scheduled DPH date of June 12, 2014. On May 23, 2014, the IHO issued an Order amending 2014-050 to incorporate 2014-0210, pursuant to the parties’ joint request.

On March 23, 2014, the previously appointed hearing officer granted Petitioner leave to file an amended DPC dated March 18, 2014 in 2014-050. An amended Response was filed on March 31, 2014.

The parties held a Resolution Meeting on April 10, 2014 in 2014-050, and on May 19, 2014 in 2014-0210. The parties did not resolve either DPC at either Resolution Meeting. .

The previously appointed hearing officer held a Pre-hearing Conference (“PHC”) in 2014-050 on April 24, 2014. On May 29, 2014, the undersigned IHO held a PHC in 2014-0210 by telephone, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by Tuesday, June 10, 2014 and that the Due Process Hearing (“DPH”) would be held on June 17-28, 2014³. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued May 31, 2014.

Petitioner’s disclosures were timely filed on June 10, 2014. Respondent’s disclosures were timely filed on June 9, 2014. At the DPH, the following documentary exhibits were admitted into evidence without objection: P-6 through P-8 and R-1 through R-14. The following exhibits were admitted over the Petitioner’s objection: R-15, R-16. The following exhibits were admitted over Respondent’s objection: P-1 through P-5, P-9 through P-11, P-13, P-14 and P-18 through P-36.⁴

² While styled as a “Consent Order,” this pleading would be more accurately described a “Consent Notice.”

³ An additional date, _____ was added in order to allow one of Petitioner’s witnesses, who had unexpectedly become unavailable on the scheduled DPH dates due to a health emergency, to testify. While Respondent objected to having this witness testify out of turn, when the IHO offered Respondent the option of rescheduling the entire DPH for July so that all witness could testify in turn, or proceeding with the scheduled DPH dates and allowing Petitioner’s witness to testify out of turn, Respondent opted for the latter.

⁴ Petitioner withdrew exhibit P-17 prior to the start of the DPH, and it was not admitted into evidence.

Hearing Officer Determination

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Parent/Petitioner;
- (b) Parent's Educational Advocate – offered as an expert in the area of special education; not qualified as an expert; however, permitted to provide lay witness opinion testimony consistent with Federal Rule of Civil Procedure 701, which the IHO applied by analogy;
- (c) IEE Evaluator (Psychologist) – offered and qualified as an expert in the area of psychological evaluation and assessment

The following witness testified on behalf of Respondent at the DPH:

- (a) General Education Teacher at District Elementary School;
- (b) School Psychologist at District Elementary School – offered and qualified as an expert in the area of educational evaluations as a school psychologist

The parties gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied the student a free and appropriate public education (“FAPE”) by failing to timely review and consider the parent’s independent comprehensive psychological evaluation in order to determine the student’s special education and related service needs.
- (b) Whether DCPS denied the student a FAPE by failing, to provide the student with an individualized educational program following the May 19, 2014 IEP meeting reasonably calculated to provide the student with educational benefit.
- (c) Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement from April 10, 2014, pursuant to 34 CFR 300.116.
- (d) Whether DCPS denied the student a FAPE by failing to evaluate the student with the recommended neuropsychological evaluation, as required by 34 CFR 300.304(c)(4) and 30 DCMR 3005.9(g).
- (e) Whether DCPS denied the student a FAPE by failing to comply with the parent’s request for an independent educational evaluation of the student consisting of an Adaptive Vineland.
- (f) Whether DCPS denied the student a FAPE by failing to provide the parent with notice of its intent to conduct an evaluation of the student (a minor) prior to conducting the Adaptive Vineland.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that DCPS denied the Student a FAPE and findings in favor of Petitioner on all issues;
- (b) an Order that DCPS fund the parent's independent Adaptive Vineland assessment;
- (c) an Order that DCPS fund the parent's independent neuropsychological evaluation
- (c) an Order that DCPS place and fund the student at High Road of Lanham for the remainder of the 2013-2014 school year, to include ESY and transportation services
- (d) an Order that DCPS provide the student with compensatory education services one-on-one tutoring services.
- (e) an Order that, within five school days upon receipt of the ordered assessment/evaluation, DCPS reconvene the student's MDT/IEP team to review the reevaluation assessment and revise and update the student's IEP, determine the student's LRE and placement, and that (in the alternate to the request that IHO award compensatory education) the MDT/IEP team determine the student's need for compensatory education services.⁵

FINDINGS OF FACT

Background

2. The Student resides with her mother, the Petitioner ("Parent"), in Washington, D.C.

3. The Student has been determined to be eligible for special education and related services under the IDEA.

4. The Student was diagnosed with developmental delays in 2008.⁶ Her current disability classification, as reflected in her most recent finalized IEP dated October 10, 2013 IEP, is "Specific Learning Disability."⁷ The unfinalized IEP from an April 10, 2014 IEP meeting reflects a change in classification to "Intellectual Disability," which the Parent does not support.⁸

5. During the 2013-2014 school year, the Student's general education teacher was General Education Teacher.⁹

⁵ Petitioner had originally also requested an Order that DCPS fund the parent's independent evaluation; and, thus, withdrew that request for relief at the start of the DPH.

⁶ R-8-8.

⁷ P-15.

⁸ Testimony of Parent's Educational Advocate; testimony of School Psychologist; R-13-1

⁹ Testimony of the Petitioner.

Hearing Officer Determination

6. During the 2013-2014 school year, the Student's special education teacher was Special Education Teacher.¹⁰

Reported Potential Neurological Damage

7. the Student suffered trauma. Such traumas can result in traumatic injury, can present immediate and long term challenges, and can impact a student's ability to make academic progress.¹¹ It is possible for a person to not have damage, but still have learning challenges.¹²

8. On January 24, 2014, the Parent obtained a evaluation from Children's National Medical Center.¹³ The subsequent MRI did not detect physical damage; however, the evaluation recommended that the Student receive a evaluation to assist with the appropriate design of educational systems for the Student.¹⁴

Academic Performance, Behavior and Impaired Motor Function

9. The Student is "a very eager and willing learner;"¹⁵ however, as of her October 10, 2013 IEP, the Student was performing below kindergarten level in mathematics. In reading, she was performing "below print concept," meaning she could not identify print in a book and could only identify minimal sight words.¹⁶ She was not able to consistently write her name correctly or copy letters from a model. In communication/speech and language, the Student needed to "learn basic and linguistic concepts and age appropriate vocabulary words."¹⁷

10. The Student struggles with delayed memory.¹⁸ The Student's problems with memory and her inability to read affect the Student's ability to access the general education curriculum.¹⁹ The Student's difficulty with focusing on a given task and working independently also makes it difficult for her to make progress.²⁰

11. Although [the Student] has been receiving specialized instruction in some capacity since 2008, the level of academic progress made has been inconsistent and marginal, at best.²¹

12. The Student's General Education and Special Education teachers indicate that the Student becomes easily distracted, which impacts her learning.²² She usually "attempts to

¹⁰ Testimony of the Petitioner.

¹¹ Testimony of IEE Evaluator.

¹² P-30-3.

¹³ P-37.

¹⁴ P-37.

¹⁵ P-7-5.

¹⁶ P-15-5.

¹⁷ P-15-8.

¹⁸ Testimony of the Petitioner.

¹⁹ P-15-4.

²⁰ P-15-4.

²¹ R-8-12.

²² P-16-2 through P-16-4.

Hearing Officer Determination

complete tasks, but she will give up easily, when confronted with difficult tasks. She often forgets what she is supposed to do and is easily distracted.”²³

13. The Student often seeks attention in ways that are disruptive to the classroom environment.²⁴ The Student’s difficulties with communicating are a significant impetus for her disruptive behaviors.²⁵

14. During the 2013-2014, the Parent regularly²⁶ received calls from the General Education Teacher, notifying the Parent that the Student would not sit down, would not get off the computer at the appropriate time, that she hit someone, or that she was engaged in otherwise disruptive behaviors.²⁷ The General Education Teacher would attempt other interventions prior to calling the Parent. There were times when the Student was engaged in disruptive behaviors and the Parent was not called.

15. While the Student is able to attend to her basic personal care needs, “she still has difficulty tying her shoe laces, maintaining motor control and self-regulation.”²⁸

16. The Student works better in small group settings.²⁹

17. District Elementary School has attempted a number of interventions to aid the Student in making academic progress, but the interventions have had minimal impact.³⁰

18. At the October 10, 2013 IEP meeting, the Parent presented her concerns about the Student’s academic deficits to the IEP team.³¹

²³ R-8-7.

²⁴ P-15-3.

²⁵ “[T]he Student’s difficulties with receptive and expressive language render her somewhat detached from her peers and adults. As [the Student] cannot follow the pace and environment in the same way as her peers, she likely behaves inappropriately as a means to gain attention and express frustration about her cognitive deficits.” P-6-15 *See also*, R-8-7 (“[The Student] often finds herself in difficult and confrontational situations, especially within her peer group, because she does not seem to understand how her words and actions agitate situations both inside and outside of the classroom.”) and (“[The Student] will walk out of class, without permission, especially if she is upset and when unable to effectively communicate her concerns, she gets more agitated and aggressive.”)

²⁶ According to the General Education Teacher, he called the Parent approximately once per month to ask her to calm the Student down. According to the Parent, the calls from the school came much more frequently than once per month. However, even at the approximately once per month the General Education Teacher estimated he made, the hearing officer concludes that such would constitute “regular” calls to the Parent from the school regarding the Student’s behavior.

²⁷ Testimony of the Petitioner.

²⁸ R-8-7.

²⁹ Testimony of the Petitioner.

³⁰ “These measures have produced some growth but there still exists the gap between where [the Student] should be functioning and where she is currently functioning.” *See* DCPS Evaluation at P-7-4. *See also*, DCPS’ Review of the Independent Comprehensive Psychological at R-8-4. (“Presently, [the Student]’s progress is compromised by global deficits in learning, memory and executive functioning, therefore, her response to the interventions and accommodations put in place has been marginal.”)

Current IEP (October 10, 2013)

19. The Student's current IEP is dated October 10, 2013.³² It calls for 15 hours per week of Specialized Instruction outside the general education setting. It also called for the following related services: 3 hours per month of Speech-Language Pathology (outside the general education), 4 hours per month of Occupational Therapy (outside the general education setting), and 60 minutes per month Behavioral Support Services (outside the general education setting), and 60 minutes per month Behavioral Support Services (inside the general education setting).³³

April 10, 2014 IEP Team Meeting

20. Between January 14, 2014 (the day Parent provided the IEE to DCPS) and April 10, 2014 there were various communications between Parent's counsel's office and DCPS attempting to schedule a meeting to review the IEE.³⁴ The schedules of parties from each side repeatedly conflicted. In the interim, the Parent filed one of the two DPCs comprising this consolidated action.³⁵ DCPS confirmed a meeting for February 20, 2014. Parent's Educational Advocate arrived at the school for the meeting (Parent was prepared to participate by phone³⁶) and was told that no meeting was scheduled and that a required team member was not in the building.³⁷

21. The meeting was ultimately scheduled for April 10, 2014, and on the evening of April 8, 2014, the Student's special education teacher notified the Parent that an IEP meeting would follow the already scheduled RSM on April 10, 2014. The next day, Parent's Educational Advocate notified the special education teacher that he and Parent had not realized an IEP team meeting would be convened after the Resolution Session Meeting, and neither of them would be able to stay beyond the hour originally scheduled, due to prior obligations.³⁸

22. On April 10, 2014 the IEP team reconvened following a scheduled Resolution Session Meeting.³⁹

Draft/Unfinalized IEP (April 10, 2014) IEP]

23. There was an IEP team meeting on April 10, 2014, and a draft IEP was developed.⁴⁰ The draft IEP proposed to change the Student's disability classification from "Specific Learning Disability" to "Intellectual Disability (also known as Mental Retardation)".⁴¹

³¹ Testimony of Parent's Educational Advocate; P-16-2.

³² Testimony of Parent's Educational Advocate.

³³ P-15-14.

³⁴ P-20 through P-24; R-5 and R-6.

³⁵ Testimony of Parent's Educational Advocate.

³⁶ Testimony of Parent's Educational Advocate.

³⁷ Testimony of Parent's Educational Advocate; P-24-1; ; R-5-1.

³⁸ Testimony of Parent's Educational Advocate; P-25; P-26.

³⁹ Testimony of Parent's Educational Advocate.

⁴⁰ Testimony of School Psychologist.

⁴¹ R-13-1.

Hearing Officer Determination

24. Having learned less than 48 hour prior to a scheduled RSM that an IEP meeting would immediately follow it, Parent and Parent's Educational Advocate were not able to remain for the entire IEP meeting, due to prior obligations.⁴² As a result, the IEP was not finalized.⁴³

25. The draft April 10, 2014 IEP notes, "[The Student] is making negligible to no progress with regards to her speech goals as they are mostly academically based. [The speech language pathologist] believe[d] that her hours should be reduced. The team decided to have [the Student]'s speech hours remain the same but split the hours between the general education setting and outside the general education setting."⁴⁴ The team also proposed that the Student's hours of specialized instruction go from 15 to 22 hours per week, which the Parent opposed based on the recommendations contained in the independent psychological she had obtained.⁴⁵

IEP Amendment Made on May 5, 2014

26. On May 5, 2014, two amendments were issued to the Student's October 10, 2013 IEP. The Student will receive speech and language services inside the general education setting as well as outside. And the Student will receive a testing accommodation through the Spring 2014 PARCC pilot program.

May 19, 2014 RSM/MDT Meeting

27. On May 19, 2014,⁴⁶ there was an additional RSM/MDT meeting.⁴⁷ As of the DPH, no finalized revised IEP had been issued, including from this meeting.

Psycho-Educational Evaluations

(a) DCPS' Confidential Comprehensive Psychological Re-evaluation (October 30, 2013)

28. DCPS conducted a "Confidential Comprehensive Psychological Re-Evaluation" on the Student, reflected in a report dated October 30, 2013. The re-evaluation was conducted pursuant to a hearing officer's determination.

29. On November 19, 2014, the MDT convened to review the DCPS Psychological Re-evaluation. "The team reviewed the IEP and determined that based on the review of the evaluations and other data that no revisions would be made to the IEP."⁴⁸

(b) Parent's Independent Psychological-Educational Evaluation (January 13, 2014)

30. Parent obtained a DCPS funded independent comprehensive psychological evaluation ("IEE") on November 5, 2013,⁴⁹ and the Parent provided the IEE to DCPS on January

⁴² Testimony of Parent's Educational Advocate; P-25; P-26.

⁴³ R-13-1; Testimony of Parent's Educational Advocate; Testimony of School Psychologist.

⁴⁴ R-13-2.

⁴⁵ Testimony of Parent's Educational Advocate.

⁴⁶ The RSM meeting notes at exhibit show the date of the RSM meeting notes as ____; however, during the DPH, the parties stipulated that the date of the RSM should be May 19, 2014.

⁴⁸ R-3-2.

⁴⁹ R-2.

Hearing Officer Determination

14, 2014. IEE Evaluator concluded that the Student had been classified correctly under the academic accommodation of Specific Learning Disability.⁵⁰

31. The IEE recommends that the Student be placed in “a specialized educational setting that can address her multifaceted cognitive deficits.”⁵¹

32. The IEE recommended a “rule out” of Intellectual Disability, and of Specific Learning Disorder with an Impairment in Reading (possible dyslexia), Specific Learning Disorder with an Impairment of Written Expression, and Specific Learning Disorder with an Impairment in Mathematics.⁵²

33. The IEE Evaluator also made a recommendation for a neuropsychological evaluation, as follows:

“Given the result of [the Student]’s educational evaluation, it is strongly recommended that she immediately undergo a comprehensive neuropsychological evaluation by a board-certified neuropsychologist or by an institution with proven acumen. Specifically one that specializes in the evaluation and treatment of learning disorders in children. For example, given the complexity of the case, [the Student] can be evaluated by Neurodevelopmental Psychologists at Children’s National Medical Center.

Please note that this recommendation is not to be taken lightly. Given the complex nature of [the Student]’s case, [the Student] should not be evaluated by someone who simply has a title ‘neuropsychologist’ or has ‘neuropsychological experience.’ Instead, [the Student] must be evaluated by Psychologist who has exhaustive clinical and academic acumen in neurodevelopmental disorders and learning disorders. These specialists can make clinically prudent recommendations regarding her care.”

34. A written report reviewing the IEE was prepared by School Psychologist on March 10, 2014.⁵³ While the written review did not reach the all the same conclusions as the IEE, the written review notes no disagreement with the methodology of the IEE.

35. In her written review of the IEE, the School Psychologist recommended, based on all available data and the Student’s records that the MDT consider whether the Student’s disability was Traumatic Brain Injury; however, the School Psychologist concluded that the

⁵⁰ P-6-15.

⁵¹ P-6-15.

⁵² P-6-15.

⁵³ R-8.

Hearing Officer Determination

MDT team would not be able to rule in TBI, because it did not have documentation by a physician⁵⁴ of a medically verified traumatic brain injury, which was one of the four eligibility criteria she listed.⁵⁵

36. DCPS disagrees that the Student needs a neuropsychological, because the Student has already met all the criteria for intellectual disability (mental retardation); therefore, she should receive services geared toward that classification. In her testimony, School Psychologist also called into question the IEE's recommendation for a neuropsychological on the grounds that the IEE Evaluator suggested a specific location where the evaluation could be performed.⁵⁶

37. The hearing officer credits the testimony from the IEE Evaluator that a neuropsychological evaluation could clarify the extent of the Student's head injury from when she was three years old, as well as assess the Student's expected level of performance (what level she could be expected to achieve, in light of her neurological state).⁵⁷ The neurological evaluation the Student had at Children's National Medical Center in January 2014 also recommended that the Student have a neuropsychological to assist with educational planning. No information was offered at the DPH to indicate that the IEE Evaluator would personally benefit from the Student's neuropsychological evaluation at Children's National Medical Center, that she had a conflict of interest in making this recommendation, or that Children's National Medical Center was not a sufficiently credible facility to perform the evaluation.⁵⁸ Moreover, the DCPS School Psychologist prepared a detailed written review of the IEE on March 10, 2014, and at no point in her written review did she call into question the credibility or validity of the IEE.

Adaptive Vineland/ABAS-II

38. The IEE recommended that further testing be done to rule out Intellectual Disability as the Student's disability classification.⁵⁹ As a means of following up on that recommendation, the School Psychologist administered the Adaptive Vineland/ABAS-II⁶⁰ by administering surveys to the Parent and to the Special Education Teacher.⁶¹

⁵⁴ The requirement for documentation from a physician is not contained in 34 CFR 300.8(b)(12), or in the Office of State Superintendent for the District of Columbia's *Memorandum Re: Part B Initial Evaluation/Reevaluation Policy (March 22, 2010)*.

⁵⁵ R-8-10 through R-8-11. The other three criteria are: (1) physical, speech, vision, hearing and other sensory impairments; (2) cognitive impairments and (3) abstract thinking impairments.

⁵⁶ Testimony of School Psychologist.

⁵⁷ Testimony of IEE Evaluator.

⁵⁸ The Student has been evaluated at Children's National Medical Center in the past, not only in January 2014, but also in 2007. P-6-4.

⁵⁹ P-6-15.

⁶⁰ "Adaptive Vineland" and "ABAS-II" will be used interchangeably throughout this HOD, because an Adaptive Vineland is a form of ABAS-II assessment. Testimony of DCPS school psychologist School Psychologist.

⁶¹ R-8-4.

Hearing Officer Determination

39. During the April 10, 2014 IEP team meeting, DCPS presented the Parent and Parent's Educational Advocate with the results of the Adaptive Vineland the School Psychologist had recently administered for the Student.⁶²

40. Prior to the April 10, 2014 IEP meeting, the Parent had not been informed in any meaningful way that an Adaptive Vineland assessment was being conducted on the Student.⁶³ While the Parent would not have necessarily refused to provide consent to the a request to evaluate the Student with an Adaptive Vineland, the Parent was never given an opportunity to provide informed and proper consent to the Adaptive Vineland conducted on the Student in conjunction with the School Psychologist's March 10, 2014 review of the IEE.⁶⁴

41. The Parent disagreed with the conclusion that the Student was intellectually disabled (mentally retarded), and during the April 10, 2014 IEP team meeting, the Parent requested an independent Adaptive Vineland.⁶⁵ As of the filing of the second DPC, an independent Adaptive Vineland had not been authorized.⁶⁶

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

I. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to timely review and consider the parent's independent comprehensive psychological evaluation in order to determine the student's special education and related service needs.

Under IDEA, an LEA must ensure that a Student's IEP team reviews evaluations and information provided by the parents of a child with a disability. 34 CFR 300.305(a), The IEP

⁶² Testimony of Parent's Educational Advocate.

⁶³ Testimony of Parent's Educational Advocate; testimony of School Psychologist;

⁶⁴ Testimony of Parent's Educational Advocate.

⁶⁵ Testimony of Parent's Educational Advocate; P-27-1; P-34-1.

⁶⁶ Testimony of Parent's Educational Advocate; P-27-1; P-34-1.

Hearing Officer Determination

team must also revise the IEP, as appropriate, in light of any reevaluation and information provided. 34 CFR § 300.324(b). In this case, the Parent through her counsel forwarded the Student's Independent Confidential Psychological Evaluation ("IEE") to DCPS on January 14, 2012. DCPS reached out to Parent's counsel that same day about scheduling a meeting. The two sides made various attempts to schedule a meeting. Both sides eventually confirmed February 20, 2014. Parent's Educational Advocate arrived for the meeting and Parent was prepared to participate by phone. However, the staff at District Elementary School were unaware that a meeting was to go forward that day, and that a required team member was not in the building. The parties continued to work toward reaching a mutually agreeable date. School Psychologist completed her written review of the IEE on March 10, 2014, and DCPS sent Parent a letter of invitation to meet on March 17, 2014. The parties ultimately convened on April 10, 2014, approximately three months after Parent submitted the IEE to DCPS.

An LEA's failure to timely convene an IEP meeting to revise a child's IEP violates the IDEA. *Cf. Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C.) (J.H. Green, J.) ("Any agency whose appointed mission is to provide for the education and welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a few months in the life of an adult may be insignificant, at the rate at which a child develops and changes, . . . a few months can make a world of difference in the life of that child." *Id.*) The violation is procedural, not substantive. *See, e.g., D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.) *Cf. Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. 2010) (Failure to timely reevaluate is at base a procedural violation of IDEA;) *LeSesne ex rel. B.F. v. District of Columbia*, Civil Action No. 04-620(CKK), 2005 WL 3276205, at 8 (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).

In this instance, DCPS and the Parents agreed at one point to meet on February 20, 2014, and the Parent's Advocate and Parent (by phone) were prepared to go forward and DCPS was not. In light of this missed mutually agreed upon meeting date, and because the School Psychologist's written review of the IEE was not completed until March 10, 2014, the three-month delay in convening Student's IEP team to review her IEE constituted a procedural violation of the IDEA.

A procedural violation of IDEA does not rise to the level of a denial of FAPE unless it negatively affected Student's substantive rights. *See, e.g., Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011) (IDEA claim is viable only if DCPS' procedural violations affected the student's substantive rights.) Here, when the IEP team convened on April 10, 2014, the Parent learned for the first time that an additional evaluation (the Adaptive Vineland) had been conducted on the Student based on information included in the IEE, and that the DCPS was proposing to change the Student's disability classification from Specific Learning Disability to Intellectual Disability, in part based on information included in the IEE and the subsequent Adaptive Vineland. As a result of the Parent's disagreement with the DCPS-conducted Adaptive Vineland, the Parent requested an independent Adaptive Vineland. Had the team met earlier (for example on the scheduled date of February 20, 2014) to review the

Hearing Officer Determination

Student's IEE, the Parent could have conceivably had an independent Adaptive Vineland conducted, submitted to DCPS and reviewed by the team by around April 2014 when IEP team finally met to review the IEE. As a result of DCPS' delay in convening the IEP team, the Parent did not learn of information that would lead her to request an independent assessment for several months. For this reason, DCPS' procedural violation negatively impacted the Student's substantive rights and resulted in a denial of FAPE. *See 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 nine-month delay in reviewing evaluations affected the student's substantive rights because the student's most recent IEP differed from the one previously issued.)

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to timely review and consider the parent's independent comprehensive psychological evaluation in order to determine the student's special education and related service needs.

II. Whether DCPS denied the student a FAPE by failing, to provide the student with an individualized educational program following the May 19, 2014 IEP meeting reasonably calculated to provide the student with educational benefit.

In order to provide a FAPE, an LEA need provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The Supreme Court has held that the standard in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. IDEA does not require LEAs to provide services sufficient to maximize each child's potential. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

No finalized IEP issued from the April 10, 2014 or May 19, 2014 meetings, so other than two minor amendments made on May 5, 2014, the Student's October 10, 2013 IEP remained in place as of the DPH. Maintaining that IEP fails to meet the *Rowley* "basic floor of opportunity" standard because by all accounts the Student has, though a willing learner, has made little to no academic progress from year to year in school, including in the 2013-2014 school year. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is likely to produce progress, not regression.") (citations omitted); *Danielle G. v. N.Y. City Dept. of Educ.*, 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is

Hearing Officer Determination

likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity greater than mere trivial advancement.”).

The primary changes DCPS proposed at the April 10, 2014 IEP meeting were to increase the Student’s hours of specialized services from 15-22 hours per week, and to change the Student’s disability classification from Specific Learning Disability to Intellectual Disability (Mental Retardation). IDEA requires that a Student’s IEP team revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student’s anticipated needs and other matters. *See* 34 CFR § 300.324(b). Here, the undisputed evidence is that the child can barely read a couple of words, and struggles with the most basic levels of mathematics and written expression. She has been promoted from grade to grade without making any meaningful academic progress. Yet as of the DPH, she did not have a revised IEP in place, and only minimal amendments had been made to her October 10, 2013 IEP.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to issue an IEP reasonably calculated to provide Student education benefit following the May 19, 2014 meeting.

III. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement from April 10, 2014, pursuant to 34 CFR 300.116.

“Courts have explained that a child’s educational placement ‘falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP.’” *Johnson v. District of Columbia*, 839 F.Supp.2d 173, 58 IDELR 189 (D.D.C. 2012), *citing Bd. Of Educ. Of Cmty High Sch. Dist. No.*, 218, *Cook Cnty., III v. III State Bd of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996). The “basic floor of opportunity” under IDEA, according to the Supreme Court, is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. IDEA does not necessitate that the services provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) However, Congress, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

As discussed above, the IEP in place for the Student as of the DPH (the October 10, 2013 IEP, as amended on May 5, 2014) does not meet the *Rowley* “basic floor of opportunity” standard. The Student has been making no (or at most “trivial”) academic advancement under the previous IEP and from year to year; yet, at the April 10, 2014 IEP meeting, DCPS proposed seven additional hours of specialized education services per week, a change in disability classification, and other minimal changes that the hearing officer concludes were not reasonably calculated to provide the Student educational benefit. No new location of services was proposed, which does not factor in the IEE’s recommendation that the Student be placed in “a specialized

Hearing Officer Determination

educational setting that can address her multifaceted cognitive deficits.”⁶⁷ In light of the Student’s severe academic delays, limited to no academic progression, complex speech needs, motor skills impairment, minimal response to interventions to date, the hearing officer concludes that the Student needs to be in a specialized setting that can address her multifaceted cognitive deficits.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the student with an appropriate placement from April 10, 2014, pursuant to 34 CFR 300.116.

IV. Whether DCPS denied the student a FAPE by failing to evaluate the student with the recommended neuropsychological evaluation, as required by 34 CFR 300.304(c)(4) and 30 DCMR 3005.9(g).

An LEA must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). In this case, a neuropsychological evaluation could clarify the extent of the Student’s head injury from when she was three years old, as well as assess the Student’s expected level of performance (what level she could be expected to achieve, in light of her neurological state). A neuropsychological was a recommendation included in the Student’s January 2014 neurological evaluation and in the January 2014 IEE, yet it had not been conducted as of the time of the DPH.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to evaluate the student with the recommended neuropsychological evaluation, as required by 34 CFR 300.304(c)(4) and 30 DCMR 3005.9(g).

V. Whether DCPS denied the student a FAPE by failing to comply with the parent’s request for an independent educational evaluation of the student consisting of an Adaptive Vineland.

Pursuant to 34 CFR § 300.502(b), subject to certain limitations, a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense. *Id.* In this case, District Elementary School did neither.

Failure to timely provide an IEE, when properly requested by a parent, is a procedural violation of IDEA. *See Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109 (D.D.C. 2011), meaning that in and of itself, the failure to timely provide an independent Adaptive Vineland does

⁶⁷ P-6-15.

Hearing Officer Determination

not mean the Student was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only when procedural violations of IDEA result in loss of educational opportunity or seriously deprive parents of their participation rights are they actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), citing *C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*).

In this case, the Student's disability classification was proposed to be changed in part due to the DCPS conducted Adaptive Vineland with which the Parent disagreed. The Adaptive Vineland draws in part on a survey administered to the Parent. Therefore, the fact that DCPS did not provide the Parent with an independent Adaptive Vineland resulted in a loss of educational opportunity for the Student and deprived the Parent of her right to meaningfully participate in the process.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to comply with the parent's request for an independent educational evaluation of the student consisting of an Adaptive Vineland.

VI. Whether DCPS denied the student a FAPE by failing to provide the parent with notice of its intent to conduct an evaluation of the student (a minor) prior to conducting the Adaptive Vineland.

An LEA must obtain "informed parental consent" prior to conducting any reevaluation of a student with a disability. *See* 34 CFR 300.300(c)(1); *see also Memorandum Re: Part B Initial Evaluation/Reevaluation Policy*, p. 28 (OSSE, March 22, 2010) ("A [Prior Written Notice ("PWN")] must be provided to the parent within a reasonable amount of time before the date the LEA proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE."). Here, DCPS did not issue a PWN or obtain "informed" parental consent prior to doing an Adaptive Vineland evaluation on the Student. While the Student was not actively involved in the Adaptive Vineland assessment process (the examiner surveyed the Student's Parent and teacher about the Student), it was nonetheless an evaluation of the Student, and the failure to provide the Student the appropriate notice was a procedural violation of IDEA. *See Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109 (D.D.C. 2011).

Only when procedural violations of IDEA result in loss of educational opportunity or seriously deprive parents of their participation rights are they actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), citing *C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*). In this case, the Student's disability classification was proposed to be changed in part due to the DCPS conducted Adaptive Vineland with which the Parent disagreed. The Adaptive Vineland draws in part on a survey administered to the Parent. Therefore, the fact that DCPS did not provide the Parent with an independent Adaptive Vineland resulted in a loss of educational opportunity for the Student and deprived the Parent of her right to meaningfully participate in the process.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the parent with notice of its intent to conduct an evaluation of the student (a minor) prior to conducting the Adaptive Vineland.

Compensatory Education

IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 - 11 (D.D.C. July 2, 2013).

Though he acknowledged during his testimony at the DPH hearing that that math in the proposed compensatory education plan he provided was “a bit off,” Parent’s Educational Advocate based the Parent’s compensatory education request for hours of one-one-one tutoring services on the difference between the number of hours of per week of specialized instruction the Student was receiving at the time the Parent provided the IEE to DCPS (15 hours) and the number of hours of specialized instruction in a full time IEP (27.5 hours), multiplied by the number of weeks (7 weeks) between the scheduled February 20, 2014 IEP meeting that did not go forward and the meeting that actually went forward on April 10, 2014.

The evidence supports an inference that this severely delayed Student with behavioral, motor skills and speech deficits is in need of a full time IEP, and that significant additional academic support is necessary enable her to make meaningful academic progress. Therefore, the hearing officer concludes that the proposed measure for determining compensatory education is appropriate in this case, and will award 10.5 hours of one-one-one tutoring services (the difference between a full-time 27.5 hour IEP and the 17 hours per week of special education and related services the Student received under the October 10, 2013 IEP) multiplied by 7 weeks, for the number of weeks between the scheduled February 20, 2014 IEP meeting that did not go forward and ultimate convened April 10, 2014 meeting during which the IEE was reviewed. The total number of tutoring hours is 73.5.

Summary

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to timely review and consider the parent’s independent comprehensive psychological evaluation in order to determine the student’s special education and related service needs.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to issue an IEP reasonably calculated to provide Student education benefit following the May 19, 2014 meeting.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the student with an appropriate placement from April 10, 2014, pursuant to 34 CFR 300.116.

Hearing Officer Determination

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to evaluate the student with the recommended neuropsychological evaluation, as required by 34 CFR 300.304(c)(4) and 30 DCMR 3005.9(g).

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to comply with the parent's request for an independent educational evaluation of the student consisting of an Adaptive Vineland.

Petitioner met her burden of proving that DCPS denied the Student a FAPE by failing to provide the parent with notice of its intent to conduct an evaluation of the student (a minor) prior to conducting the Adaptive Vineland.

Order

Based on the Findings of Fact and Conclusion of Law above, it is hereby ORDERED that:

- A. Within 5 business days from the issuance of this HOD, DCPS shall issue a written authorization for the Parent to obtain an independent Adaptive Vineland assessment at the expense of the District of Columbia;
- B. Within 5 business days from the issuance of this HOD, DCPS shall issue a written authorization for the Parent to obtain an independent neuropsychological evaluation at the expense of the District of Columbia;
- C. Within 10 school days of the receipt from the Parent and/or her counsel or educational advocate of the independent evaluations referenced in Paragraphs A and B of this Order, DCPS shall reconvene the Student's MDT/IEP team to review and revise the student's IEP as appropriate and determine LRE and placement;
- D. As compensatory education for the denial of FAPE, DCPS shall fund up to 73.5 hours of one-on-one tutoring in subjects agreed to by the Parent and other members of the MDT/IEP team. The tutoring shall occur outside the school day at a reasonable location to be agreed upon by the Parent. Any tutoring hours not used by February 20, 2015 shall be forfeited;
- E. All written communications from DCPS to Petitioner concerning the matters referenced above, including but not limited to the invitation to the MDT/IEP team meeting described in Paragraph C of this Order, shall include copies to Petitioner's counsel of record in this action, via facsimile or electronic mail.

Petitioner's other requests for relief are **DENIED**.

IT IS SO ORDERED

Date: August 5, 2014

/s/ NaKeisha Sylver Blount
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination, in accordance with 20 U.S.C. §1415(i).