

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

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

OSSE
Student Hearing Office
April 03, 2013

Student, ¹	Date Issued: 4/3/13
Petitioner,	Case No: 2013-0040
v.	Hearing Date: 3/13/2013
District of Columbia Public Schools,	Hearing Officer: Michael Lazan
Respondent.	Room: 2009

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner’s Notice of Due Process Complaint (“Complaint”) received by Respondent on January 23, 2013. (IHO-1) This IHO was appointed to hear this matter on January 25, 2013. Respondent filed a Response to the Complaint on February 4, 2013.

A resolution meeting was held in this case on February 8, 2013. The parties did not agree in writing to waive the resolution period or resolve the Complaint. The parties did not agree to shorten the resolution period, which ended on February 22, 2013. The HOD was due on April 8, 2013.

A Prehearing Conference was held on March 5, 2013. A Prehearing Conference Summary and Order was issued on March 8, 2013.

¹ Personal identification information is provided in Appendix A.

Respondent moved to dismiss by papers dated March 4, 2013. Petitioner served opposition papers on March 5, 2013. Oral argument was conducted in regard to the motion on March 8, 2013. A hearing date was held on March 13, 2013. This IHO indicated that he would address the issues in the motion in the HOD. This was a closed proceeding. Petitioner was represented by Alana Hecht, Esq. Respondent was represented by Lynette Collins, Esq. Petitioner entered into evidence exhibits 1-5; Respondent entered into evidence exhibits 1-3. Petitioner presented as witnesses: Chithalina Khanchalern, Advocate; Ida Jean Holman, Advocate (expert witness); Nadia Torney, Principal at School C. Respondent did not present any witnesses. At the end of the hearing day, the parties presented oral arguments. The IHO provided the parties with an opportunity for a written submission on legal issues raised in the proceeding. The parties both submitted written statements on March 18, 2013. (IHO-2, 3)

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, twenty years old, and eligible for services as a student with an intellectual disability. The Complaint involves claims implicating 34 CFR 300.507(a). The Complaint indicates that DCPS failed to evaluate the Student after several requests were made by the Petitioner.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issue to be determined are as follows:

1. Did DCPS fail to conduct an comprehensive adaptive and cognitive assessment to determine if: a) the Student is appropriately classified as eligible as a student with an intellectual disability; b) the Student has an appropriate educational program? If so, did DCPS deny the Student a FAPE by failing to assess the Student in all areas of suspected disability?

As relief, Petitioner seeks a comprehensive adaptive assessment by a private provider at market rate. Petitioner also requests an IEP meeting within 15 days of the assessment to review such assessment. Petitioner also requests an opportunity to file another Due Process Complaint on the same issue for a compensatory education award based on such assessment. Alternatively, Petitioner requests an order that the IEP team meet to determine appropriate compensatory education for the Student.

FINDINGS OF FACT

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

1. The Student is a 20 year old who is eligible for services as a Student with Intellectual Disability. (Exh. IHO-1)
2. The Student struggles in literacy and reading. (Testimony of Torney)
3. The Student also needs assistance in math, but he does better in math. (Testimony of Torney)
4. The Student can perform daily living skills such as travelling on bus back and forth from school. (Testimony of Khanchalern)

5. The Student has experienced difficulties because of a history with lead poisoning.
(Testimony of Holman)

6. The Student attended School A, a non-public school, until 2011. (Exh. IHO-1)

7. Thereafter, the Student was designated for School B, a school which generally services students with intellectual disability. (Testimony of Khanchalern)

8. After an HOD, the Student began attending School C. The Student began at School C in August, 2011. (Testimony of Khanchalern; Testimony of Torney)

9. School C is a vocational school with classes in barbering, cosmetology.
(Testimony of Torney)

10. School C covers the 9th grade to there 12th grade. (Testimony of Torney)

11. There are 27 students in the entire school. (Testimony of Torney)

12. For 2011-2012, at School C, the Student worked with Ms. Weathers in a self-contained class in the morning. (Testimony of Torney)

13. For 2011-2012, in the afternoon, the Student worked on Spanish, Barbering.
(Testimony of Torney)

14. The Student struggled at first in 2011-2012, since it was a new school and the Student had transition issues. (Testimony of Torney)

15. In December, 2011, the Student's representative sent a formal request for an adaptive assessment and reevaluation to the Respondent. (Testimony of Khanchalern; P-2-1)

16. An adaptive assessment works to determines communication issues, self-help skills, cooking skills, independence skills, social skills. (Testimony of Holman)

17. Respondent did not respond to this request for an adaptive assessment and reevaluation. (Testimony of Khanchalern)

18. At the May 16, 2012 IEP meeting, the Student's legal representative requested an adaptive assessment. At this meeting, teachers at the meeting were seeking data on how to assist the Student in the classroom. (Testimony of Khanchalern; P-2-1)

19. Mr. Montgomery did not respond to the Student's legal representative. (Testimony of Khanlchalern)

20. On October 31, 2012, Petitioner's attorney again sought an adaptive assessment of the Student. (P-2-1)

21. Respondent has never conducted the adaptive assessment of the Student and has not reevaluated the Student since the initial request by Petitioner. (Testimony of Khanchalern)

22. For the 2012-2013 school year at School C, the Student is in "regular" classes in the morning, with 45 minute periods, a change every period in terms of content area. (Testimony of Torney)

23. For the 2012-2013 school year at School C, in the morning, classes include Math, Algebra, English, History/Government. (Testimony of Torney)

24. At School C, the teachers work with the Student on reading by reading out loud with him, and by verbalizing his essays. (Testimony of Torney)

25. The teachers at School C are able to do a lot more work with the Student in math during the current year. (Testimony of Torney)

26. At School C for 2012-2013, in the afternoon, the Student receives life skills classes and barbering classes. These classes include work on resume building, interviewing skills, how to build a budget. (Testimony of Torney)

27. School C is implementing the Student's IEP. (Testimony of Khanchalern)

28. The Student's current IEP is appropriate. The IEP goals are appropriate for the Student. (Testimony of Torney)

29. The Student receives extra time, graphic organizers, calculators as per his IEP. (Testimony of Torney)

30. Academically, the Student is doing fine. (Testimony of Torney)

31. The Student has had success at School C. (Testimony of Holman)

32. There are times when the Student's progress at School C has been limited, so the school has to attempt different strategies to engage the Student. (Testimony of Torney)

33. The Student is on the athletics team and is socially appropriate during school. (Testimony of Torney)

34. The Student's self-esteem has suffered because of his classification as intellectually disabled. (Testimony of Torney; Testimony of Holman)

35. The Student has recently been having difficulties with attendance at School C. (Testimony of Holman)

36. The DCPS OSE School Psychology Program Guidebook recommends an adaptive assessment for Students who are being evaluated for intellectual disability unless the MDT team decides otherwise and the reasoning is documented within the psychological assessment. A minimum of two informants (e.g., parent/guardian, teacher) should be interviewed across at least two domains (e.g., social skills, self-care skills) to obtain an adequate profile of adaptive behavior in at least two settings. (P-4-9)

37. This IHO found all of the witnesses credible in this proceeding.

CONCLUSIONS OF LAW

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provide[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). The standard set out by the Supreme Court 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." Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

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 CFR Sect. 300.513(a).

1. Mootness.

Respondent contends that the Petitioner's Complaint is moot, pointing to the fact that the requested assessments have by now been offered, and the fact that Respondent has offered Petitioner 30 hours of compensatory education.

Mootness arises when issues are no longer live and where the parties lack a cognizable interest in the outcome. United States Parole Comm. v. Geraghty, 445 U.S. 388, 395 (1980) If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot. McBryde v. Committee to Review Circuit Counsel Conduct and Disability Orders of the Judicial Conference of the U.S., 264 F.3d 52, 55 (D.C. Cir. 2001).

Here, Petitioner is seeking compensatory education for the time period during which Respondent failed to evaluate the Student. The D.C. Circuit has been clear in establishing that where compensatory education is being requested, a special education case should not be deemed moot. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 833 (D.C. Cir. 2006) In Lesesne, like here, there were allegations that a child with intellectual disabilities was not timely evaluated by DCPS. The IHO dismissed the case, and the District Court affirmed the IHO, finding the case moot. On appeal before the Circuit, the judges found a direct reference in the Complaint to compensatory education for the time period during which Petitioner was not evaluated. The Circuit concluded the case was live and proceeded to address the claim. Id., at 833; see also Flores v. District of Columbia, 437 F. Supp.2d 22, 29 (D.D.C. 2006).

Respondent contends that it offered Petitioner compensatory education, and that such an offer moots out the case. However, Respondent has presented no authority to support the proposition that formulation of a compensatory education award by a school district can moot out a claim of FAPE denial. In fact, it is the responsibility of the IHO to determine an appropriate compensatory award for “educational services...to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive inquiry used to craft an award tailored to the unique needs of the disabled student"). It is noted that, here, Respondent did not explain how it calculated the 30 hours or how the 30 hours of services corresponds to the Reid standards.

2. Petitioner's Right to an Assessment/Reevaluation.

Petitioner contends that should have received an cognitive and adaptive assessment from Respondent to determine if he was inappropriately classified and to determine an appropriate program for him. Petitioner also contends that Respondent should have conducted a reevaluation of the Student in connection to the assessment. (IHO-1, Pars. 22, 23)

A. Request for Assessment

There is no dispute that Petitioner sought such assessment through correspondence of legal counsel. Petitioner takes the position that he is entitled to such assessment upon request. Petitioner points to regulatory language indicating that there is a "right to request" an assessment

if the IEP team and other qualified professionals determine that no additional data are needed to determine whether a child continues to be a child with a disability. 34 CFR Sect. 300.305(d)(1). The regulation states: "(t)he public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents." 34 CFR Sect. 300.305(d)(2).

While a review of the regulation appears to support Petitioner's position, the caselaw does not support for Petitioner's position. As Respondent points out, the caselaw indicates that a parent does not have the right to a particular assessment. Long v. District of Columbia, 780 F. Supp.2d 49, 60 (D.D.C. 2011); Idea Public Charter School v. Belton, 2007 WL 2071668 (D.D.C. 2007); Mackey v. Board of Educ., 373 F. Supp.2d 292, 299 (S.D.N.Y. 2005). However, on the facts here, I agree with Petitioner that Respondent should have conducted an adaptive and cognitive assessment of the Student. As Petitioner points out, Respondent's own guidelines require that an adaptive assessment be conducted for students with an intellectual disability. The DCPS OSE School Psychology Program Guidebook recommends an adaptive assessment for Students who are being evaluated for Intellectual Disability unless the MDT team decides otherwise and the reasoning is documented within the psychological assessment. There is nothing in the record to indicate that the MDT team has "decided otherwise" and has documented this in a psychological assessment. Moreover, there is nothing in the record to suggest that these guidelines are not in effect or have been rendered superfluous by any intervening event.

B. Reevaluation.

After completing such assessment, Petitioner contends that Respondent should have conducted a reevaluation of the Student.

The IDEA indicates that a local educational agency ("LEA") shall ensure that a reevaluation of each child with a disability is conducted if: 1) the LEA determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or 2) if the child's parents or teacher requests a reevaluation. 28 U.S.C. Sect.1414(a)(2); 34 C.F.R. Sect.300.303; see also 5 DCMR Sect. 3005.7. Reevaluations must be conducted in accordance with the basic IDEA provisions governing evaluations. 28 U.S.C. Sect.1414(a)(2)(A); 34 C.F.R. Sect.300.303(a). An LEA is accordingly required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 C.F.R. Sect.300.304(b).

The LEA must also ensure that the assessment and evaluation materials that are utilized to assess the child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; are used for purposes for which

the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of such assessments. The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner requested a reevaluation in this matter in December, 2011. Under the application caselaw and the applicable regulation, Petitioner was entitled to a reevaluation upon request. Cartwright v. District of Columbia, 267 F.Supp.2d 83 (D.D.C. 2003)(parent's right to a reevaluation does not require a showing of need); Herbin v. District of Columbia, 362 F. Supp.2d 254 (D.D.C. 2005)(same) The record reveals, and I have found, that Respondent did not conduct a reevaluation of the Student after the request by Petitioner, in violation of applicable law and regulation. 34 CFR Sect. 300.303(a)(2).

3. FAPE Denial.

The failure to conduct a particular assessment or the failure to conduct an evaluation or reevaluation should be characterized as a procedural violation. Lesesne, 447 F.3d at 834 (failure to evaluate); Kruvant v. District of Columbia, 99 Fed. App'x 232, 233 (D.C. Cir. 2004) (same). The question here is whether Respondent's failure to conduct this assessment, and the failure to conduct a reevaluation, impacted this student in such a way that it impeded the Student's right to educational benefit, i.e., amounted to FAPE denial.

In support of his argument, Petitioner cites to Suggs v. District of Columbia, 679 F. Supp.2d 43 (D.D.C. 2010). In Suggs, the court explained that a finding of FAPE denial in this context should be based on the adequacy of a student's IEP. In remanding the case back to the

hearing officer to determine whether the Student had been harmed by the failure to evaluate, Judge Paul L. Friedman noted that "the IEP is the primary means of ensuring that each child with disabilities receives a FAPE." See also D.R. v. Gov't of the District of Columbia, 637 F.Supp.2d 11 (D.D.C. 2009)(IEP that had been in effect was inappropriate and denied student services; failure to evaluate deemed to create FAPE denial); compare Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010)(no FAPE denial where Student's participation, behavior, and availability had improved notwithstanding lack of evaluation). Judge Friedman noted that an IEP may not be reasonably calculated "if, for example, a child's social behavior or academic performance has deteriorated under his current academic program." Suggs, 679 F. Supp.2d at 51. Judge Friedman also noted the importance of a finding on whether a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. Id. at 52. Judge Friedman also noted the importance of determining whether a student has made progress under the current IEP. Id.

The record here suggests that the lack of an adaptive assessment did not have an impact on the Student's IEP. In fact, Petitioner does not point to any deficiencies in the IEP whatsoever. Petitioner did not include the IEP as an exhibit here. Instead, Petitioner presented Ms. Torney, who indicated that the Student's IEP was appropriate. Ms. Torney also indicated that School C is implementing the IEP with such modifications as extra time, graphic organizers, calculators.

An analysis of the Student's placement also reveals that the Student is receiving a FAPE. Petitioner points to no evidence that the Student's academic performance or social and emotional performance in school suffered as a result of the lack of an adaptive assessment. Petitioner also does not point to any particular service or environment that the Student lacks in his current

environment. Ms. Torney indicated that, academically, the Student is doing fine. She also indicated that the Student is on the athletics team and is socially appropriate during school. Dr. Holman testified in a consistent manner with Ms. Torney. Dr. Holman indicated that the Student has had success at School C.

Ms. Torney did indicate that the Student had some difficulties with transition when he first began attending School C. However, there is nothing in the record to link this difficulty to the lack of an adaptive assessment. Ms. Torney also indicated that there are times when the Student's progress is limited. In these instances, as Ms. Torney related, the school has to attempt different strategies to engage the Student. However, Ms. Torney was not specific on these points, and her testimony did not convince this IHO that the lack of an adaptive assessment limited the Student's ability to benefit from School C. Reid, 401 F.3d at 519 (quoting Rowley, 458 U.S. at 203) (“The IEP must, at a minimum, ‘provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’”).

Dr. Holman expressed that the Student has experienced diminished self-esteem as a result of his classification as a student with an intellectual disability. However, Petitioner provides no authority that this kind of argument can result in a finding of FAPE denial where the Student is performing satisfactorily in school and has an appropriate IEP. Cf. Watson v. Kingston City Sch. Dist., 325 F. Supp.2d 141 (N.D.N.Y. 2004)(parent sought private school in part because of potential stigma of being placed in special education classes in District; District's program found to offer FAPE).

Dr. Holman also expressed that the Student's post-graduate activities may suffer were he to be classified as a student with an intellectual disability. However, Petitioner does not clearly explain how a future employer would learn of the Student's classification as a student with an

intellectual disability. Petitioner also presents no authority that such a claim can rise to the level of FAPE denial against a school district. Dr. Holman also expressed that the Student's attendance has been an issue as of late. However, this issue was not raised in the prehearing conference, and Dr. Holman did not connect this point up to the lack of an adaptive assessment. It is noted that the Student was not called to testify here to support this or any of the other contentions in the Due Process Complaint.

As a result of the foregoing, I find that Respondent did not deny the Student a FAPE when it failed to provide the Student with an cognitive and adaptive assessment.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that Petitioner's claims are hereby dismissed with prejudice.

Dated: April 3, 2013

Michael Lazan
Impartial 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 USC §1415(i).

Date: April 3, 2013

Michael Lazan
Impartial Hearing Officer