

Hearing Officer Determination

Case No. 2015-0249

Procedural History

Following the filing of the due process complaint on 7/29/15, the case was assigned to the undersigned on 7/30/15. DCPS's response to the complaint was timely filed on 8/5/15 and did not challenge jurisdiction.

The resolution session meeting took place on 9/9/15, after various delays, but the parties did not resolve the case. The 30-day resolution period concluded on 8/28/15. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination ("HOD") by 10/12/15.

The due process hearing took place on 9/18/15. The hearing was closed to the public. Petitioner was represented by *Petitioner's Counsel*. DCPS was represented by *Respondent's Counsel*. Counsel discussed settlement very briefly near the beginning of the hearing without success. Petitioner was present for the first 2 hours of the hearing before leaving for work.

Neither party objected to the testimony of witnesses by telephone. The parties agreed on no stipulations.

Petitioner's Disclosure statement, submitted on 9/11/15, consisted of a witness list of 2 witnesses and documents P1 through P15. Petitioner's Disclosure statement and documents were all admitted into evidence, except for P9 to which Respondent's objection was sustained. Objections were overruled as to P2, P6, P8, P10, P12, P13, P14 and P15.

Respondent's Disclosure statement, submitted on 9/9/15, consisted of a witness list of 7 witnesses and documents R1 through R15. Respondent's Disclosure statement and documents were all admitted into evidence over objection to every document except R3.

Petitioner's counsel presented 1 witness in Petitioner's case-in-chief (*see Appendix A*): *Law Clerk*

Respondent's counsel presented 2 witnesses in Respondent's case (*see Appendix A*):

1. *Resolution Scheduler*
2. *School Psychologist*

Petitioner presented no rebuttal witnesses.

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE (a) by failing to provide authorization for an Independent Educational Evaluation from 5/26/15 when Petitioner's counsel requested an independent comprehensive psychological evaluation until 8/5/15 when DCPS provided authorization, and/or (b) by failing to authorize the IEE at a market rate above the approved OSSE rate.

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Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE by DCPS.
2. DCPS shall fund an independent comprehensive psychological evaluation at current market rates.

At the end of Petitioner case-in-chief, Petitioner's counsel orally moved for partial summary adjudication on Petitioner's entitlement to an IEE. The motion was denied on the record by the undersigned based on Respondent's defense, on which it had not yet been heard, that Petitioner was not disagreeing with a DCPS evaluation but merely a testing instrument and that Petitioner was improperly seeking an IEE for a different evaluation from what it was challenging.

Oral closing arguments were made by counsel for both parties at the end of the due process hearing. Both parties were permitted to submit legal citations after the hearing, which Petitioner's counsel provided by email late on 9/18/15.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact² are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.³ Student is *Age* and in *Grade* during the relevant time period.⁴
2. Student is eligible for special education and related services as a child with Multiple Disabilities (Specific Learning Disability and Other Health Impairment), pursuant to his most recent IEP dated 12/15/14.⁵
3. There is no prior DCPS psychological evaluation of Student in his record, according to a review of the SEDS database and contact with Student's prior school.⁶ An Ohio Mental Health scale assessment was administered by DCPS in October 2014 and relied on in

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Parent; Due process complaint.

⁴ P1-1.

⁵ *Id.*

⁶ School Psychologist.

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Student's current IEP.⁷ The Ohio Mental Health scale assessment is used by social workers, not psychologists, to address socio-emotional issues; School Psychologist has never administered the instrument.⁸ A comprehensive psychological evaluation is much more detailed and comprehensive than an Ohio Mental Health scale assessment, with many instruments.⁹

4. On 3/12/15, Student had a serious incident at school, in which he reportedly said he was going to kill his teacher and sought to attack his teacher with scissors.¹⁰ A Manifestation Hearing Meeting was held on 3/23/15.¹¹

5. At the Manifestation Hearing Meeting, Parent signed a Consent for Initial Evaluation/Reevaluation; School Psychologist began the review of data and other preparatory steps for DCPS to conduct a comprehensive psychological evaluation of Student.¹² School Psychologist convincingly testified that both Petitioner and her counsel knew that the consent was for a comprehensive psychological evaluation and that School Psychologist was moving forward with it.

6. As a result of the 3/12/15 incident, Student faced felony charges in D.C. Superior Court which ordered a Psycho-Educational Evaluation; it was conducted on 4/27/15 with a report completed in May 2015.¹³ That evaluation concluded that Student has an Intellectual Disability ("ID"), with which both DCPS and Petitioner's counsel disagree.¹⁴

7. On 5/26/15, Petitioner's counsel requested by email a comprehensive psychological IEE at public expense due to Petitioner's "disagreement with DCPS' most recent evaluation, assessments, and testing" of Student.¹⁵ Petitioner's counsel asked about the status of the IEE by email on 7/20/15.¹⁶

8. School Psychologist forwarded the 5/26/15 IEE request to DCPS Central Office, but DCPS did not respond to the request until Petitioner filed her due process complaint in this case, at which point DCPS authorized a comprehensive psychological IEE by letter dated 8/4/15, which was transmitted to Petitioner on 8/5/15, and provided a *Parent Guide* dated

⁷ P1-7; School Psychologist.

⁸ School Psychologist.

⁹ *Id.*

¹⁰ P2-3,4.

¹¹ P2-1; the Manifestation Meeting concluded that the 3/12/15 incident was a manifestation of Student's disability, according to Petitioner's counsel.

¹² R7-1; School Psychologist.

¹³ R8-1.

¹⁴ R8-15; School Psychologist.

¹⁵ P3-1.

¹⁶ P4-1.

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Spring 2015 on the cover (and June 2014 at the bottom of each numbered page).¹⁷ The 2-page IEE authorization letter was signed by Resolution Scheduler.¹⁸

9. The IEE authorization letter capped payment for the comprehensive psychological evaluation at \$104.64 per hour with a maximum total cost of \$1,360.32, although it stated that, “Reasonable and documented fees that exceed these rates may be allowed on a case by case basis at the discretion of the District of Columbia, when the evaluator you select can justify that the excess costs were essential for educational and/or diagnostic purposes.”¹⁹

10. Evaluations are approved at a rate that exceeds the DCPS rate cap from time to time; evaluators are able to obtain a determination of whether additional fees will be available either before or after doing the evaluation.²⁰

11. The IEE authorization letter stated that a list of evaluators is provided in the *Parent Guide*, and that parents may “select an evaluator who is not on this list” as long as the evaluator meets certain standards.²¹

12. The *Parent Guide* lists 7 providers for Psychology.²² Although Petitioner’s counsel may have contacted providers earlier, on 9/9/15 Law Clerk made a single call to each of the 7 providers.²³ When Law Clerk reached voicemail, he left a message stating that he was inquiring about a comprehensive psychological evaluation at the DCPS rate.²⁴

13. Resolution Scheduler is responsible for keeping the *Parent Guide* up to date and periodically checks to make sure the list of providers is current.²⁵ In August and September 2015, Resolution Scheduler attempted to contact each of the 7 providers in the *Parent Guide* about their availability for conducting psychological evaluations at the DCPS rate.²⁶

14. *Provider 1* did not answer Law Clerk’s telephone call and he left a message.²⁷ Resolution Scheduler reached *Provider 1* by email and confirmed that *Provider 1* is willing to continue conducting evaluations at the DCPS rate.²⁸ However, Resolution Scheduler acknowledged that the telephone number for *Provider 1* is not correct on the list in the

¹⁷ P5-1; P7.

¹⁸ P5-2.

¹⁹ P5-1,2.

²⁰ Resolution Scheduler.

²¹ P5-1; *see also Parent Guide* at P7-4,9.

²² P7-10.

²³ Law Clerk; P15-1.

²⁴ Law Clerk.

²⁵ Resolution Scheduler.

²⁶ *Id.*; P7-10.

²⁷ P15-1; Law Clerk.

²⁸ Resolution Scheduler.

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Parent Guide and that an email address or other means of reaching Provider 1 is not provided.²⁹

15. *Provider 2* did not answer Law Clerk's telephone call and he left a message.³⁰ Provider 2 did not answer repeated calls from Resolution Scheduler.³¹

16. *Provider 3* did not answer Law Clerk's telephone call and he left a message.³² Provider 3 did not return calls from Resolution Scheduler, but she has often conducted evaluations at the DCPS rate in the past, so may still be available.³³

17. *Provider 4* told Law Clerk that they do accept the DCPS rate.³⁴ Resolution Scheduler also confirmed Provider 4's availability.³⁵

18. *Provider 5* had the same receptionist and director as Provider 4, so Law Clerk concluded they are a single provider.³⁶ Provider 5 confirmed to Resolution Scheduler that he is still available for evaluations at the DCPS rate.³⁷ Resolution Scheduler explained that Provider 4 is female and Provider 5 male, so they are 2 separate evaluators.³⁸

19. *Provider 6's* line was busy when Law Clerk called.³⁹ Provider 6 told Resolution Scheduler that they are only providing services now and no longer conducting evaluations.⁴⁰

20. *Provider 7's* receptionist and Director of Advocacy each told Law Clerk that the DCPS rate is low and their normal rate is \$2,500 to \$3,500, but that they have 2 evaluators who are willing to conduct evaluations at the "reduced" DCPS rate in order to "not turn anyone away," although if those 2 are busy there are no other evaluators available at the DCPS rate.⁴¹ Provider 7 also told Resolution Scheduler that they have providers who are willing to accept the DCPS rate, although the turnaround on "low-priced" evaluations may not be quick.⁴²

²⁹ *Id.*; this Hearing Officer takes administrative notice that Provider 1's email address is not readily available by a Google search of Provider 1's name.

³⁰ P15-1; Law Clerk.

³¹ Resolution Scheduler.

³² P15-1; Law Clerk.

³³ Resolution Scheduler.

³⁴ P15-1; Law Clerk.

³⁵ Resolution Scheduler.

³⁶ P15-1; Law Clerk.

³⁷ Resolution Scheduler.

³⁸ *Id.*

³⁹ P15-1; Law Clerk.

⁴⁰ Resolution Scheduler.

⁴¹ Law Clerk.

⁴² Resolution Scheduler.

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21. Provider 7's Executive Director communicated by email during the evening of 9/17/15 that he has 1 provider who would normally take the DCPS rate, but would not in this case because of the complexity of the case.⁴³ This email was sent to Resolution Scheduler, but no detail was provided about the complexity of Student's case.⁴⁴ There was no suggestion that an exception might be needed for Student's IEE until this email on 9/17/15, the evening before the due process hearing.⁴⁵

22. To seek an amount above the cap on IEE fees, an evaluator needs to state why a higher rate is needed to do the evaluation.⁴⁶ Resolution Scheduler credibly testified that he would reach out to Provider 7 to obtain more information and would forward the communication to his supervisor to see if DCPS could pay more than the standard rate for this IEE.⁴⁷

23. The list of 7 providers in the *Parent Guide* is not comprehensive and other providers accept the DCPS rate.⁵⁰ Resolution Scheduler recently found 4 new providers to add to the list.⁵¹ Resolution Scheduler did not provide information about the new providers to Parent, but would have if anyone had indicated that she was having difficulty finding an evaluator to take the DCPS rate.⁵²

24. Petitioner's counsel repeatedly rejected the \$1,360.32 DCPS rate for the IEE and sought a "market rate" of \$3,000 to \$3,500, without ever stating that Parent could not find evaluators at the DCPS rate, or identifying an evaluator Parent wanted to use at a higher rate, or even stating that Student's case had complexity or other characteristics that should bring it within the exception to the fee cap in the IEE authorization letter.⁵³ Instead, Petitioner's counsel stated that Petitioner "is not willing to accept an IEE limited to the [DCPS] rates.... This is a non-starter. Full stop."⁵⁴

25. The *Parent Guide* references the July 2008 Blackmun Jones Chancellor's Directive as the source of the capped rates, but Resolution Scheduler convincingly testified that he included the rates he was given and that the Chancellor's Directive was not, and should not have been, the source of the rates in the *Parent Guide*.⁵⁵

⁴³ Law Clerk; Resolution Scheduler.

⁴⁴ Resolution Scheduler.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ P11-1; P12-1; P12-2; 13-1.

⁵⁴ P12-1.

⁵⁵ Resolution Scheduler; P7-18.

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26. Due to concerns about Test-Taker Familiarity, repeated evaluations will not be valid unless different instruments are used.⁵⁹

27. School Psychologist explained that IEEs are routinely approved by DCPS, so when Petitioner requested an IEE in May 2015, School Psychologist stopped work on her comprehensive psychological evaluation right away, so there would not be 3 similar evaluations of Student all within a short time, between her DCPS evaluation, the court evaluation, and the IEE.⁶⁰

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"[T]o further Congress' ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as 'the centerpiece of the statute's education delivery system for disabled children.'" *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. 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 IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] 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).

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). In other words, an

⁵⁹ School Psychologist.

⁶⁰ *Id.*

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IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

“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-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue: *Whether DCPS denied Student a FAPE (a) by failing to provide authorization for an IEE from 5/26/15 when Petitioner's counsel requested an independent comprehensive psychological evaluation until 8/5/15 when DCPS provided authorization, and/or (b) by failing to authorize the IEE at a market rate above the approved OSSE rate.*

The heart of this case is simply whether DCPS failed to promptly provide an IEE at public expense as required by the IDEA, following the request of Petitioner's counsel on 5/26/15. For the reasons discussed below, this Hearing Officer concludes that Parent has not met her burden of demonstrating that DCPS denied Student a FAPE due to delay or failure to provide an IEE at public expense.

The basic framework for IEEs is straightforward. Under 34 C.F.R. 300.502(b), with certain limitations Parent has a right to an IEE at public expense if she disagrees with a DCPS evaluation, or disagrees with an evaluation because her child was not assessed in a particular area. *Letter to Baus*, 115 LRP 8855 (OSEP 2/23/15). Once an IEE at public expense is requested, DCPS must without unnecessary delay either (i) file a due process complaint to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense. *Id.*; 34 C.F.R. 300.502(b). DCPS must pay for the full cost of the evaluation or otherwise ensure that the IEE is provided at no cost to Parent. 34 C.F.R. 300.502(a)(3)(ii).

Here, Petitioner did not make clear what she specifically disagreed with when requesting an IEE, merely stating (P3-1), “disagreement with DCPS’ most recent evaluation, assessments, and testing” of Student. But Petitioner did make perfectly clear that she sought an “IEE comprehensive psychological” (*id.*). This was sufficient to put DCPS on notice that if it did not want to fund the IEE, it needed to defend its own comprehensive psychological evaluation, if one existed, or defend whatever other evaluation arguably would make the requested IEE unnecessary to fill in where Student had not been assessed, as set forth in *Letter to Baus*. Contrary to DCPS’s arguments, school districts do not have a right to conduct their own evaluations prior to funding IEEs. *See Memorandum to McDonald*, 113 LRP 49958 (OSEP 3/28/12) (New Jersey must remove the provision in its regulations that “the school district shall first have the opportunity to conduct the requested evaluation” when parent requests an IEE in an area not assessed by the previous evaluation); *Letter to Baus*. Further, providing the IEE or defending the public evaluation must occur without “unreasonable delay,” which would not be consistent with a school district first conducting

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its own evaluation. 34 C.F.R. 300.502(b)(4). Thus, this Hearing Officer concludes that Student was entitled to an IEE.

In this case, upon receipt of Petitioner's 5/26/15 IEE request, DCPS had two options: either initiate a due process hearing to defend its own evaluation or pay for the IEE. *See L.S. ex rel. K.S. v. Abington School Dist.*, 2007 WL 2851268, at *6 (E.D. Pa. 2007). Here, DCPS did not initiate a due process hearing and only provided an IEE authorization letter on 8/5/15, some 70 days after the IEE was requested and after Petitioner's due process complaint was filed, which this Hearing Officer concludes is a procedural violation of the IDEA. *See Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109 (D.D.C. 2011) (failure to timely provide a properly requested IEE is a procedural violation of the IDEA).

But a procedural violation of the IDEA does not, by itself, mean Student was denied a FAPE. *See Schoenbach v. Dist. of Columbia*, 309 F. Supp. 2d 71, 78 (D.D.C. 2004). Only procedural violations which result in deprivation of educational opportunity for the child or seriously deprive parents of their rights to participate in decision-making are actionable. *See Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). In this case, Petitioner did not testify or otherwise demonstrated that the 70-day delay in authorizing her requested IEE either resulted in a loss of educational opportunity for Student or seriously deprived her of parental participation rights. Accordingly, this Hearing Officer concludes that Student was not denied a FAPE by DCPS's delay in authorizing the requested IEE.

Petitioner's greater concern is that when DCPS finally did authorize the IEE, the fee was capped at \$1,360.32, a level Petitioner's counsel considers below market rate. While DCPS must pay the full cost of the IEE pursuant to 34 C.F.R. 300.502(a)(3)(ii), Petitioner's counsel does not dispute that DCPS may impose a reasonable cap on the cost of an IEE. *See, e.g.*, Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46689-90 (8/14/06); *Letter to Anonymous*, OSERS (10/6/02) at R5-1; *Letter to Young*, OSERS (3/20/03) at R11-1,2; *Letter to Parker*, OSERS (2/20/04) at R10-1. That cap is to be reviewed periodically, and exceptions are to be made when there are unique circumstances justifying a higher amount. 5-E D.C.M.R. § 3027.5.

The question is whether Petitioner is able to obtain a comprehensive psychological evaluation of Student for the \$1,360.32 authorized by DCPS. DCPS asserts that it certainly is possible, as it has a list of 7 providers willing to accept the DCPS rate, which is in the *Parent Guide* that DCPS provided Petitioner on 8/5/15. In fact, the DCPS list of 7 may actually be only 3 or 4 evaluators, which is not a great deal of choice, but notably more than the single evaluator Petitioner claims.

DCPS further asserts that its list of providers is not comprehensive, as others are also willing to accept the DCPS rate, noting that it recently found 4 additional providers to add to its list when the *Parent Guide* is next published. While the additional providers were not made public or provided privately to Petitioner, Resolution Scheduler convincingly testified that the names would have been provided if Petitioner had indicated that she was having any difficulty in obtaining an IEE at the DCPS rate. *See, e.g., M.V. v. Shenendehowa Cent. Sch.*

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Dist., 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013) (reasonableness of IEE fee cap shown by existence of several willing providers).

Petitioner, by contrast, argues that the list of 7 providers gave her an actual choice of only 1 evaluator, which was not sufficient. *Cf. Bd. of Educ. of County of Nicholas v. H.A.*, 2011 WL 861163, at *10 (S.D.W. Va. Mar. 9, 2011) *aff'd*, 445 Fed. Appx. 660 (4th Cir. 2011). However, Petitioner's counsel ignores the fact that DCPS may make exceptions to its usual rate for special cases. While Provider 7 noted that Student's case is complex and an IEE cannot be conducted at the standard DCPS rate, there was no evidence that DCPS would not recognize that complexity and provide a higher level of funding. Indeed, the evidence was to the contrary, with Resolution Scheduler stating that he would escalate Provider 7's concerns to his supervisor even though Resolution Scheduler would need to reach out to Provider 7 to obtain additional information to document the need for a higher rate.

Nor did Petitioner's counsel suggest that there was any effort made to find providers not on the DCPS list, even by checking with DCPS. Without ever claiming that Parent could not find evaluators at the DCPS rate, or identifying an evaluator Parent wanted to use at a higher rate, or even stating that Student's case had complexity or other characteristics that warranted a higher rate, Petitioner's counsel repeatedly rejected the \$1,360.32 DCPS rate for the IEE and insisted on a "market rate" of \$3,000 to \$3,500 without explaining why. Petitioner's counsel made various legal arguments asserting that DCPS erroneously set its rate lower than it should have, but under the IDEA the issue comes down to whether or not there are acceptable evaluators available to conduct the IEE for the DCPS rate, and Petitioner did not meet her burden of proving to this Hearing Officer that such evaluators were not available in this case.

ORDER

Petitioner has failed to meet her burden of proof on the issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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

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controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

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