

**District of Columbia**  
**Office of the State Superintendent of Education**

Office of Dispute Resolution  
1050 First Street, N.E., Washington, DC 20002  
(202) 698-3819 www.osse.dc.gov

OSSE  
Office of Dispute Resolution  
April 22, 2022

---

<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 3/8/22; 4/1/22; 4/4/22</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No. 2021-0187</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

---

**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Multiple Disabilities (Specific Learning Disability, Other Health Impairment). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 12, 2021. The Complaint was filed by the Student’s parent (“Petitioner”). On November 23, 2021, Respondent filed a response. A resolution meeting was held on January 24, 2022, without an agreement being reached. The resolution period expired on December 12, 2021.

---

<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

## **II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 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 (“DCMR”), Title 5-E, Chapter 30.

## **III. Procedural History**

Petitioner moved to amend the Complaint on December 22, 2021. An order was issued granting the amendment on January 5, 2022. The amended Complaint was filed on January 6, 2022. On February 17, 2022, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On February 23, 2022, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On March 21, 2022, Petitioner moved to extend the deadline for a Hearing Officer Determination (“HOD”) to April 22, 2022. This motion was granted by an order of this Hearing Officer issued on March 22, 2022.

The matter proceeded to trial on March 8, 2022, but Petitioner had an issue with a witness. The parties then agreed to try the case on April 1, 2022, and April 4, 2022. The matter proceeded to trial on those dates. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After completion of testimony and evidence, the parties presented oral closing statements on April 6, 2022. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-67, exclusive of exhibit P-37. Respondent objected to exhibits P-21 through P-24. These objections were overruled. Exhibits P-1 through P-67, exclusive of P-37, were admitted.

Respondent moved into evidence exhibits R-1 through R-44, exclusive of R-30 and R-39, without objection. Petitioner presented as witnesses, in the following order: Witness A, a neuropsychologist (expert in neuropsychology, psychology, and special education programming and placement); Witness B, a speech and language pathology and assistive technology therapist (expert in speech and language and assistive technology); Petitioner; and Witness C, an advocate (expert in special education as it relates to IEP programming). Respondent presented as witnesses: Witness D, a speech and language pathologist (expert in school-based speech and language); Witness E, a social worker (expert in school-based social work); Witness F, a special education teacher (expert in special education); Witness G, a social worker (expert in school-based social work); and Witness H, a special education coordinator (expert in special education programming and placement).

#### **IV. Issues**

As identified in the Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

**1. Did Respondent fail to conduct a comprehensive evaluation of the Student as of November, 2019? If so, did Respondent violate 34 C.F.R. Sect. 300.303, 34 C.F.R. Sect. 300.304, and related provisions? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioner alleged that Respondent denied the Student a FAPE because the psychological assessment and the speech and language assessment that were conducted were not comprehensive enough, and because no assistive technology assessment was conducted. For these issues, the burden of persuasion is on Petitioner.

**2. Did Respondent fail to provide the Student with appropriate Individualized Education Programs (“IEPs”) on or about December 4, 2019, November 18, 2020, and November 8, 2021? If so, did Respondent act in**

**contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEPs: 1) contained insufficient hours of specialized instruction; 2) contained insufficient behavioral interventions and no Behavior Intervention Plan (“BIP”); 3) were based on insufficient evaluative data; and 4) contained inappropriate goals and baselines. Petitioner also contended that the Student’s December 4, 2019, IEP failed to contain speech and language services, that the November 18, 2020, IEP failed to contain extended school year (“ESY”) services, and that the November 8, 2021, IEP also failed to contain ESY services. Claims relating to occupational therapy were withdrawn at the hearing. As relief, Petitioner seeks compensatory education and related relief.

**V. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Specific Learning Disability, Other Health Impairment). The Student has reading, writing, and math deficits, and especially struggles in the content and mechanics of writing. Testimony of Witness A; P-38. The Student cannot access the general education curriculum without “significant help.” P-32-426. The Student’s extensive working memory issues cause difficulty in multi-tasking. Testimony of Witness A; P-32-426. The Student has had difficulty dealing with the death of his/her mother, which continues to impact him/her in school and at home. Testimony of Witness A; Testimony of Petitioner. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). P-40-531. The Student can be difficult to communicate with and sometimes gives one-word answers without providing details.

Testimony of Petitioner. The Student has long-standing behavioral issues. At times, the Student stays up late (or all night) playing games, which sometimes causes the Student to sleep in class. Testimony of Witness C; Testimony of Witness D. The Student is frequently dysregulated and has issues with impulse control, picking fights, antagonizing peers, throwing pencils, and interrupting the teacher on a consistent basis. Testimony of Witness E. The Student also spends a lot of time on his/her phone when s/he attends school. Testimony of Witness G. Nevertheless, the Student was described by a teacher in the 2019-2020 school year as very sweet, “bouncy,” nice, and not disrespectful. The Student is a hands-on learner who struggles with schoolwork. Testimony of Witness F.

2. In a psychological evaluation conducted in 2014, the Student scored in the average range cognitively, but had a low score in working memory, which was his/her “standout weakness” in the testing. In achievement-based testing, the Student scored in the low range in broad reading, in the low average range in writing, and in the average range in mathematics. Behavioral rating scales indicated significant issues with the Student’s attention, aggression, learning problems, and related issues, including working memory. P-38-488.

3. The Student was next assessed through achievement-based testing in January, 2017, by which time his/her scores had dropped. The Student’s “standard score” in broad reading was 66, a drop of eleven points. The Student’s “standard score” in writing (through a writing sample) was 71, a drop of fifteen points. The Student’s standard score in broad mathematics was 58, a drop of thirty-two points. P-38-488.

4. The Student's mother died in 2017, which greatly affected him/her and continues to greatly affect him/her, both in school and at home. Testimony of Petitioner; Testimony of Witness A; Testimony of Witness E.

5. The Student attended Public School A for the 2018-2019 school year. Public School A uses various incentives to keep students on task, such as a point system and behavior ladders. Testimony of Witness E. An IEP meeting was held for the Student on November 14, 2018. The "Consideration of Special Factors" section of the IEP stated that the Student often "tries to throw things" when the teacher is not looking, has side conversations during instruction in some classes, and has struggled to make it to all of his/her classes on time now that s/he is transitioning to different classes on his/her own. The IEP also reported that, according to beginning-of-year ("BOY") assessments, the Student was performing at the first grade level in math and at the second grade level in reading. The IEP included an "Area of Concern" for "Communication: Speech and Language," which reported that the Student sometimes stuttered and needed help with receptive and expressive speech. The IEP also reported that the Student struggled with responding appropriately to peers and demonstrated defiance with adults. By the date of the IEP, the Student had already received thirty behavioral "referrals" during the 2018-2019 school year, including a seven-day suspension. This IEP recommended that the Student receive twelve hours per week of specialized instruction: five hours for reading outside general education, five hours for math outside general education, and two hours inside general education. The IEP also recommended sixty minutes per month of speech language pathology, and 120 minutes per month of behavioral support services. P-10.

6. During the 2018-2019 school year, the Student received seven “F” grades. Otherwise, the Student’s grades were in the “C” and “D” range, except for one “B-” in World Geography and Culture. P-63-634; Testimony of Witness A. The Student refused to do work during much of this school year. Testimony of Witness D.

7. The Student continued to attend Public School A for the 2019-2020 school year. Staff at Public School A met in October, 2019, to review the Student’s data. i-Ready diagnostic testing, administered at the start of the 2019-2020 school year, indicated that the Student was functioning at “level 2” in mathematics and “level 4” in measurement and data, which indicated improvement from previous measures. P-13-174. In reading and writing, the Student’s performance was far below grade level. The Student was involved in several behavioral “infractions” in or about September to October, 2019, struggled with focus, avoided classwork, and frequently touched other students without permission. A psychological evaluation was therefore ordered for the Student. P-32-428; Testimony of Witness A.

8. An eligibility and IEP meeting was held for the Student on October 16, 2019. The Student was described as having a “good heart,” being reflective, creative, and kind, and it was mentioned that the Student loved working with his/her hands. But the Student’s test scores showed that his/her math and reading levels had dropped, and that s/he was no longer at a third grade level in reading. An “FBA-2” assessment was recommended, to “pick apart” why the Student had behaviors in school, followed by a plan to support the Student. P-59-620; Testimony of Witness C. An FBA-2 consists of data collection, observation, and conversations with the subject student, among other things. The FBA-2 is used to develop BIPs for students. Testimony of Witness C. The

IEP team recommended a comprehensive psychological evaluation, a speech assessment, and a motor skills assessment for the Student. P-59-621.

9. The Student's IEP dated October 16, 2019, repeated the language from the "Consideration of Special Factors" section of the prior IEP, as well as repeating goals in written expression, communication/speech and language, and emotional, social and behavioral development. The IEP provided the Student with ten hours per week of specialized instruction outside general education, two hours per week of specialized instruction inside general education, sixty minutes per month of occupational therapy outside general education, sixty minutes per month of speech-language pathology outside general education, and 120 minutes per month of behavioral support services outside general education. The IEP indicated that the Student was struggling in mathematics, reading, and writing, and was functioning at the first or second grade level in most subjects. P-11; Testimony of Witness A.

10. The Student was assessed again through a confidential psychological triennial re-evaluation, with a corresponding report dated November 22, 2019. The report mentioned that the Student was dealing with grief due to the recent death of his/her mother. Behavior Assessment Scales for Children-2 ("BASC-2") testing indicated that the Student was depressive, internalized problems, and had problems with adaptive functioning, among other related issues. On the Woodcock-Johnson Test of Achievement-4 (WJA-4), the Student scored in the low range in broad reading, with a score in the extremely low range for reading comprehension. In math, the Student scored in the extremely low range. The DCPS evaluator indicated that, overall, the Student "appears to have made very little progress. At times [s/he] tries hard but does not appear



to be able to sustain the effort for long and is very easily distracted. Additionally, [his/her] lack of reading improvement appears to be impacting [him/her] across areas.”

P-38.

11. A speech and language re-evaluation of the Student was administered by Witness D in October and November, 2019, and a corresponding report was issued on November 14, 2019. The Student presented with average receptive and expressive skills and average vocabulary skills on the Clinical Evaluation of Language Fundamentals-5 (“CELF-5”). The Student showed gains in functioning compared to previous assessments, including additional strengths in articulation, voice, and language pragmatics. On the Receptive Language Index and on the Expressive Language Index, the Student’s skills were in the mild/borderline range. Concerns were mentioned in regard to the Student’s ability to follow directions and assemble sentences, and accommodations such as graphic organizers and/or sentence starters, modeling, and repetition of oral instructions were suggested. No direct services were suggested. Witness D attempted to observe the Student in class on October 24, 2019, but the observation was discontinued because the Student was sleeping in class. A second observation of the Student was conducted on November 14, 2019, in an English class. The Student arrived late, was not actively engaged, placed his/her head on the desk, did not complete activities, and did not follow along or take notes. P-36; Testimony of Witness D.

12. A Functional Behavioral Assessment (“FBA”) of the Student was written by Witness E on November 29, 2019. The FBA reviewed the Student’s behaviors in detail and determined that the Student was attending class without materials, engaging in off-task behaviors, disrupting the classroom, arriving late, being absent, showing

inappropriate displays of affection, running in the classroom, directing profanity to peers, and refusing to comply with directions. The FBA also mentioned that the Student was misusing school equipment, eloping into hallways, engaging in inappropriate physical contact with students, and throwing objects. The FBA underscored that the Student's behaviors was "severe," and that the Student completed little to no classwork. The FBA also reported on four observations of the Student, which were conducted on October 16, 2019, October 24, 2019, October 30, 2019, and November 21, 2019. The Student was off-task forty percent of the time on October 16, 2019, 100 percent of the time on October 24, 2019, and fifty percent of the time on November 21, 2019. However, the observation on October 30, 2019, in the Student's reading intervention class, which had a total of ten students, found that the Student was on task during the whole period. The FBA hypothesized that the Student's behavior was a function of work avoidance, most likely due to his/her learning disability, and of his/her desire to obtain attention. The FBA recommended, among other things, a BIP and a safety plan, which would involve the school nurse to ensure that the Student's medical needs would be addressed. P-39; Testimony of Witness E.

13. An IEP meeting was held for the Student on December 4, 2019. Appearing at the meeting were Witness D, Witness E, Petitioner, and other DCPS staff. The IEP team indicated that the Student was staying up late and playing games, and that these actions impacted the Student's academic work. The team also indicated that the Student was hyperactive, aggressive, impulsive, and had issues following directions. The team felt that the Student's hyperactivity and attention issues were causing "big blockages" to the Student being in the classroom, that the Student had self-regulation and

self-control issues, that the Student could not “calm [his/her] brain” to attend to his/her academics, and that the Student was experiencing traumatic grief. The team also discussed the Student’s gains in speech and language. P-60-623-624; Testimony of Witness B.

14. The December 4, 2019, IEP stated that the Student was sleeping in class, not doing work in mathematics due to his/her behavior, and still working on prerequisite skills. The IEP stated that the Student was in a reading resource class with a 14:1 student-to-teacher ratio but was performing on a first grade level. The Student was reportedly able to generate a topic and write two to three sentences with limited details, and s/he struggled with correct grammar and punctuation. The IEP also reported that the Student was struggling with peer interactions, defiant with adults, and had been “referred” nine times during the year. It stated that the Student resorted to negative coping strategies, such as hitting or pushing, when faced with learning or social challenges, and that the Student needed help, such as redirection, to manage his/her feelings in the classroom. The IEP recommended five hours per week of specialized instruction outside general education, five hours per week of specialized instruction in math outside general education, and five hours per week of specialized instruction in reading outside general education, with 120 minutes per month of behavioral support services and sixty minutes per month of occupational therapy. This specialized instruction mandate constituted an increase of five hours of specialized instruction per week. No speech and language-pathology services were recommended. P-12.

15. While school was “in-person” during the 2019-2020 school year, the Student was not engaged in the work and, to some observers, did not appear to care.

Teachers tried to make classes as “hands-on” as possible for the Student, who “struggled uniquely,” sleeping a lot in class, and sometimes walking out of class. Testimony of Witness F. The Student’s behavior improved somewhat after the formulation of the FBA because the FBA led to more targeted behavioral interventions for the Student. DCPS staff felt that the Student would improve if s/he took medication to help address his/her ADHD. Testimony of Witness F. The Student was also referred to a Grief Counseling Center, which, until the onset of the COVID-19 pandemic, worked with the Student on addressing the death of his/her mother. Testimony of Witness E.

16. After the start of the COVID-19 pandemic, which forced schools to provide virtual instruction, the Student was difficult to contact. The Student’s attendance was “horrible” and s/he “basically never came” to class, even though Public School A staff repeatedly called the Student on the phone, emailed him/her, and tried to contact Petitioner. School staff dropped off work at the Student’s home, but when they came back to get it, the Student had not done any of the work. Testimony of Witness F. At the start of the pandemic, Witness E had one or two counseling sessions with the Student and tried to talk to him/her about using online programs. After the school returned to in-person classes part of the time, the Student attended a few counseling sessions. To help the Student attend virtual learning, DCPS arranged for the Student to go to Center A to better access virtual learning. However, the Student was asked not to come back to Center A in or about February, 2021. The Student was also referred to Agency A, a social services agency that helps students with truancy issues, in or about February, 2021. The Student did not participate in interactions with this agency. R-43; Testimony of Witness E. Also about this time, DCPS referred the Student to Center B, an organization

outside DCPS, to address his/her attendance issues. Center B tried to engage Petitioner, tried to engage the Student while s/he was in school, and tried “lunch groups.” However, the Student did not come to school enough for these efforts to help. Testimony of Witness E. Also about this time, several team meetings at Public School A attempted to address the Student’s issues. The school tried to put interventions in place, such as modified work and “lots and lots” of positive reinforcement from teachers, administration, and the entire school staff, including social incentives and gift cards. The Student was not responsive to these interventions. Testimony of Witness F.

17. For the 2019-2020 school year, the Student received grades ranging from “B” to “F.” In English, the Student received grades ranging from “C” in the third term to “D” in the fourth term. In math, the Student’s grades were mostly in the “C” and “D” range, with four “F” grades, a “B+” grade, and a “B” grade. The Student’s grades got worse during the year. P-63-635; Testimony of Witness A.

18. The Student continued at Public School A for the 2020-2021 school year. An IEP meeting was held for the Student on November 18, 2020. The team discussed the Student’s attendance issues. DCPS felt that the Student did not use the hours of services that were already provided to him/her, and that increasing his/her hours would not made any difference. The team also discussed extended school year (“ESY”) services. However, it was hard to determine if the Student had experienced the “regression” required for ESY services because s/he was not attending school. The team wanted additional data to see if the Student would qualify for ESY services. At least some of the team met again at a later point to discuss this issue. These team members determined that

the Student was not eligible for ESY services because there was no data to show his/her regression. Testimony of Witness F.

19. The Student's November 18, 2020, IEP used the same language as the prior IEP with respect to "Consideration of Special Factors" for behavior. In math, the IEP reported that the Student did not complete work and slept in class. In reading, the IEP reported that the Student was making progress, but in written expression, it reported that the Student had not produced any meaningful work samples. The emotional, social and behavioral development section of the IEP indicated that the Student was more likely to stay on task in a small group setting, had various behavior problems including touching other children and instigating arguments, and was resistant to participating in counseling through video. This IEP recommended five hours per week of specialized instruction in reading outside general education, five hours of specialized instruction in math outside general education, and five hours of specialized instruction outside general education. The IEP also recommended 120 minutes per month of behavioral support services and sixty minutes per month of occupational therapy, both outside general education. P-13.

20. The Student made virtually no progress during the 2020-2021 school year and received "F" grades for every subject in every term except "graded advisory" and "Elective MS." P-63-635; Testimony of Witness C.

21. The Student changed schools and has been attending Public School B for the 2021-2022 school year. The Student has continued to have problems with tardiness and attendance, and the Student has tended to be more engaged with his/her cellphone than with group discussions. The Student has not always responded to prompts to put the

phone away. The Student has been quiet and reluctant to engage in the classroom.

Witness G has pushed into the Student's first period English class to conduct group counseling sessions and teach strategies and coping skills, including those relating to trauma. This English class has "maybe" five to seven students in it. Testimony of Witness G; Testimony of Witness H.

22. An IEP meeting was held for the Student on November 8, 2021. The resulting IEP used the same language as prior IEPs with respect to "Consideration of Special Factors" for behavior. The IEP reported that, according to some teachers, the Student is pleasant, but it also reported that the Student is below level in all academic areas. The IEP recommended fifteen hours per week of specialized instruction outside general education, with 120 minutes per month of behavioral support services and fifteen minutes per month of occupational therapy on a consultation basis. R-4. Petitioner agreed with the goals in the IEP and did not object to the hours of specialized instruction in the IEP. The team felt that the Student would not qualify for ESY because s/he was able to recoup the skills, and that the Student's main problem was attendance. The team also talked about placing the Student in a summer youth employment program.

Testimony of Witness H.

23. The Student met with Witness A, Witness C, Petitioner, and Attorney A in or about February, 2022. The Student met with Witness C again later for an assessment. The Student was observed to try hard at work, and s/he was willing to get help from Witness C, but s/he showed executive functioning issues, had difficulty with multi-step problems, did not check his/her work, and had difficulty transitioning between tasks. The Student's eye contact was somewhat limited, and though the Student was reciprocal in

conversation, his/her answers were brief and s/he did not initiate conversation. The Student showed some insight into why s/he gets into trouble, and s/he discussed goals for the future, including relating to sports and music. Testimony of Witness A; Testimony of Witness C.

24. During the course of this litigation, there have been meetings at Public School B to discuss the Student's attendance. One such meeting included Witness G, Petitioner, the Student, an advocate for the Student, Witness H, and the Student's case manager. Testimony of Petitioner; Testimony of Witness G. In February, 2022, the Student was offered Saturday school for tutoring to help with his/her reading and math skills. The Student has not attended. Witness H has tried to give the Student extra help after school, especially on writing, if she can locate the Student at the end of the school day. The Student started a "behavior tracker" on March 28, 2022, which requires him/her to have teachers sign the tracker to help document his/her attendance. The Student did this for two days and then refused to do it again. An IEP was recently written for the Student that includes attendance goals. Testimony of Witness H.

25. Throughout the past several years, the Student's test scores have indicated that the Student has made little academic progress. The Student's reading inventory testing indicated that s/he has been at the "below basic" range from March 1, 2018, to September 16, 2020, and that the Student's highest score, 451, corresponded to the earlier testing on March 1, 2018. P-49-586; Testimony of Witness C. The Student's scores in a reading comprehension assessment indicated that the Student has been at the "below basic" level from August 30, 2019, to September 30, 2021. P-50-589; Testimony of Witness A. The Student's math level, on the i-Ready measure, was at the first grade



“overall placement” level in the 2017-2018 school year. The Student’s math level increased to the third grade “overall placement” level by May 21, 2019, but then regressed to the second grade “overall placement” level by January 14, 2020. P-47.

## VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, the burden of persuasion is on Petitioner. On Issue #2, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case.

**1. Did Respondent fail to conduct a comprehensive evaluation of the Student as of November, 2019? If so, did Respondent violate 34 C.F.R. Sect. 300.303, 34 C.F.R. Sect.300.304, and related provisions? If so, did Respondent deny the Student a FAPE?**

Petitioner alleged that Respondent denied the Student a FAPE because the psychological assessment and the speech and language assessment that were conducted were not comprehensive enough, and because no assistive technology assessment was conducted.

The IDEA requires school districts to ensure that students are “assessed in all areas of suspected disability” and to base a student’s IEP on the most recent evaluation. 20 U.S.C. Sects. 1414(b)(3)(B), (c)(1); 34 C.F.R. Sect. 300.304(c)(4). The child’s reevaluation must consist of two steps. First, the child’s evaluators must “review existing evaluation data on the child,” including any evaluations and information provided by the child’s parents, current assessments and class-room based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Based on their review of that existing data, the evaluators must “identify what additional data, if any, are needed” to assess whether the child has a qualifying disability and, if so, “administer such assessments and other evaluation measures as may be needed.” Sect. 300.305(a)(2), (c). The Local Educational Agency (“LEA”) is required to “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” Sect. 300.304(b). All the methods and materials used must be “valid and reliable” and “administered by trained and knowledgeable personnel.” Sect. 300.304(c)(1). These regulations have the effect of ensuring an evaluation both confirms the student’s potential disabilities and examines whether he or she needs services. Davis v. District of Columbia, 244 F.Supp.3d 27, 49 (D.D.C. 2017).

Mainly through the testimony of Witness A, Petitioner pointed out that the Student’s 2019 psychological evaluation did not include cognitive testing, and that the Student’s last cognitive tests revealed subtests that were “uneven.” Petitioner argued that the Student had not been on grade level for a long while, that the Student should have been making more progress, and that cognitive testing would have shined a light on the

reasons why the Student had not made progress. Petitioner also argued that a “narrow band” assessment of the Student’s adaptive functioning should have been conducted, since the 2019 psychological evaluation indicated that the Student’s adaptive functioning was in the clinically significant range. Petitioner further noted that no IEP programming had been written for the Student’s adaptive functioning issues. Petitioner also argued that the Student needed an updated executive functioning assessment because a Behavior Rating Inventory of Executive Function (“BRIEF”) assessment of the Student, conducted in 2014, had noted how the Student had previously experienced executive functioning difficulties. Petitioner also argued that there was reason to believe that the Student could be autistic, and that, at least, an autism rating scale needed to be conducted to rule out or confirm autism in light of the Student’s deficits in peer relations, communication, and sensory needs.

Petitioner also argued that the Student’s speech and language evaluation was not comprehensive enough, pointing out, through Witness B, that the assessment of Witness D did not address the Student’s needs in reading and writing or the overlap with the Student’s cognitive ability, and that additional subtests of the Student could have clarified his/her deficits in receptive and expressive language and in following directions.

Petitioner specifically suggested that Respondent should have used the Gray Oral Reading Test (“GORT”) to gather further data, noting that the Student had gone months without services and had made no progress on speech and language goals in the then-current IEP. Petitioner also argued, again through Witness B, that the Student needed assistive technology testing, because academic data and psychological data suggested the

need for this assessment, and because Witness F indicated that she did use computers or tablets with the Student.

An IDEA claim on procedural violations is viable only if those violations affected the student's substantive rights. Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C.Cir.2004) (although DCPS failed to satisfy its responsibility to assess the student, the parents did not show that any harm resulted from that error). Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006)

Petitioner's contention that the Student needed additional cognitive testing seems reasonable on its face, but Petitioner did not clearly explain to this Hearing Officer exactly why cognitive testing was necessary for the Student. Nor did Petitioner present any authority to support the principle that cognitive testing should be conducted by a school district during every triennial evaluation merely because a student is not functioning on grade level, or because the student's earlier cognitive testing revealed some "scatter" in the scores. Petitioner did not meet the burden to show that cognitive testing was necessary to evaluate this Student.

Petitioner's contention that the Student needed adaptive testing was based on a psychological evaluation conducted in 2019, which resulted in the administration of the BASC-2, which included adaptive skills subscales. The BASC-2 testing indicated that, in the adaptive skills area, "it is evident that [the Student] is not meeting expectations..." With respect to adaptive functioning, the BASC-2 indicated that the Student had great

difficulties with new tasks, roles, or locations after transitioning, struggled with peer relationships, was oversensitive to comments and actions, responded without thinking, stirred up commotion to avoid assigned activities, struggled to work independently for more than a few minutes, was often so distracted that it was difficult to get him/her to answer when called upon, and struggled to contain him/herself in the classroom when s/he was not seriously engaged in the class activity.

DCPS contended that there were no adaptive concerns for this Student, which is inconsistent with the conclusions reached by their own psychologist through the administration of the BASC-2. However, Petitioner's contention that the Student needs an adaptive assessment did not include a clear explanation as to why the Student needs additional testing beyond the scales that were already administered in the BASC-2.

Witness A said that the BASC-2 explored these issues a "little bit" and suggested the administration of the Adaptive Behavior Assessment System ("ABAS") test or Vineland testing to address social functioning issues, community engagement issues, and language skills. However, the BASC-2 testing does review the Student's social functioning issues, and DCPS conducted a speech and language assessment of the Student in November, 2019, to evaluate the Student's language skills. Moreover, Witness A did not fully and convincingly explain what she meant by community engagement issues, which appear to relate to social functioning.

Petitioner also argued that the Student needed an updated executive functioning assessment because a BRIEF assessment conducted in 2014 noted that the Student had previously experienced executive functioning difficulties. However, Petitioner, through Witness A, was not specific in regard to the executive functioning issues that the Student

was experiencing, or how additional measures to address executive functioning would have an impact on the Student's education in November, 2019. Petitioner also argued that the Student needed to be assessed with respect to autism, since Witness A concluded, in her recent in-person assessment of the Student, that the Student's deficits in peer relations, communication, and sensory needs triggered a suspicion that the Student was autistic. However, Witness A did not say that there was anything in the record to suggest that the Student needed to be tested for autism in 2019, nor is there a hint of a suspicion that the Student might have been autistic in any of the documents that were presented to this Hearing Officer by both sides.

Relying on the testimony of Witness B, Petitioner also contended that the speech and language evaluation of the Student by Witness D was inadequate because it did not address the Student's needs in reading and writing. However, the psychological evaluation from November, 2019, did address these issues through testing on the WJA-4. Petitioner argued that speech and language issues can involve reading and writing, a point that is not controverted. However, it is not clear why a speech and language evaluation should address reading and writing issues when a psychological evaluation already addressed these issues. Petitioner also contended that the speech and language evaluation did not address the overlap with the Student's cognitive issues, but a speech and language evaluation does not have to address every issue that a child has. This Hearing Officer found the speech and language evaluation by Witness D to be thorough and well-written.

Petitioner suggested that additional subtests could have been provided to the Student to further clarify the Student's deficits in receptive and expressive language and in following directions. Petitioner specifically suggested that Respondent should have

used the GORT measure to gather further data, noting that the Student had gone months without services and had made no progress on speech and language goals in the then-current IEP. However, Witness B explained that the GORT measure related to reading and writing, which were already covered by the Student's psychological evaluation. In fact, Witness D's evaluation included a considerable amount of testing, including on the CELF-5, the Receptive One-Word Picture Vocabulary Test-4th Edition (ROWPVT-4), the Expressive One-Word Vocabulary Test-4th Edition (EOWPVT-4), and the CELF-5 Observational Rating Scale (Teacher) (ORS), as well as an "oral peripheral examination," teacher reports, and a classroom observation. These claims are therefore without merit.

Finally, Petitioner contended that the Student needed an assistive technology evaluation, pointing to the testimony of Witness B. However, Witness B did not explain which assistive technology might have been helpful to the Student, or exactly why an assistive technology evaluation was necessary. More convincing on this issue was Witness D, who testified that, at the time, no one at Public School A thought that assistive technology would be helpful in addressing the Student's issues at school. In sum, Petitioner was not able to show that the reevaluation of the Student in November, 2019, denied the Student a FAPE. This claim must be denied.

**2. Did Respondent fail to provide the Student with appropriate IEPs on or about December 4, 2019, November 18, 2020, and November 8, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEPs: 1) contained insufficient hours of specialized instruction; 2) contained insufficient behavioral interventions and no BIP; 3) were based on insufficient evaluative data; and 4) contained inappropriate goals and baselines.

Petitioner also contended that the December 4, 2019, IEP failed to contain speech and language services, that the November 18, 2020, IEP failed to contain ESY services, and that the November 8, 2021, IEP failed to contain ESY services and sufficient occupational therapy services.

1. December 4, 2019, IEP.

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Andrew F., the Court held that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. at 1001. The Court made clear that the standard is “markedly more demanding than the ‘merely more than *de minimis*’ test applied by many courts.” Id. at 1000. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. at 1002. As stated by the District of Columbia Circuit Court of Appeals: “the key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress.” Z. B. v. District of Columbia, 888 F.3d 515, 524 (D.C. Cir. 2018)

In the psychological evaluation of the Student that was conducted just weeks before the December 4, 2019, IEP meeting, the evaluator stated that overall, the Student



“appears to have made very little progress. At times [s/he] tries hard but, does not appear to be able to sustain the effort for long and is very easily distracted. Additionally, [his/her] lack of reading improvement appears to be impacting [him/her] across areas.”

This evaluator was not the only one who concluded that the Student was not making any progress in the current program. When Witness D tried to observe the Student, she found that the Student was sleeping in class so soundly that she had to observe the Student a second time. During the second observation, the Student arrived late, was not actively engaged, placed his/her head on the desk, did not complete class activities, and did not follow along or take notes. Additionally, the FBA by Witness E, which was issued in November, 2019, found that, among other things, the Student was often absent, attending class without materials, engaging in off-task behaviors, disrupting the classroom, showing up late, showing inappropriate displays of affection, running around in the classroom, directing profanity to peers, refusing to comply with directions, misusing school equipment, eloping into the hallway, engaging in inappropriate physical contact with students, and throwing objects. The FBA underscored that the Student’s behaviors were “severe,” that s/he completed little to no class work, and that s/he needed a plan to address these issues.

These kind of details suggest that the Student had no interest in school at all and was effectively an incorrigible juvenile. And yet, the record contains multiple references to the effect that the Student is kind and pleasant. According to Witness F, the Student’s teacher at Public School A, the Student was very sweet, very pleasant, and nice, not disrespectful. According to Witness E, the Student told her that the work was too hard. Witness F said that the Student struggled a lot in school and was a hands-on learner,

suggesting that the Student might have been able to do better in school if only s/he had a different kind of program. Indeed, in Witness E's observation of the Student in a small group reading class, the Student was on task one hundred percent of the time. The IEP team should therefore have concluded that this Student needed a substantially different program than the program that s/he had received during the 2018-2019 school year, with small group instruction and hands-on learning. The IEP team should also have considered that the Student might have needed less challenging instruction in order to be better engaged in school. The IEP team did make changes to the Student's program, but still left the Student in large general education classes, including some with reading, such as science and social studies. But the Student was reading at only a first grade level.

The team also kept the same IEP goals for written expression and emotional, social and behavioral development, even though the Student made little to no progress on these goals. Though DCPS has the burden on this issue (since Witness C provided enough testimony to meet Petitioner's requirement to present a *prima facie* case), DCPS did not clearly explain why it kept these goals in the Student's IEP at this time except to say that the Student had not mastered them. See *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016) ("the wholesale repetition" of goals and objectives "indicates an ongoing failure to respond to [a student's] difficulties").<sup>2</sup>

Moreover, the IEP did not provide the Student with any new behavioral interventions. The team noted that the Student was doing poorly and indicated that the

---

<sup>2</sup> This Hearing Officer does not find that the other goals on this IEP were defective. Witness C's conclusion that the IEP repeated mathematics and reading goals is incorrect. Moreover, this Hearing Officer does not find Petitioner's claim that all of the Student's IEPs had inadequate baselines to be persuasive, since baselines are not required.

Student's attention and hyperactivity caused "big blockages" to him/her being in the classroom, that the Student had self-regulation and self-control issues, and that the s/he could not "calm [his/her] brain." Nevertheless, the team did not create a BIP, despite Witness E's recommendation to do so. The Student accordingly misbehaved during the 2019-2020 school year and did not make meaningful progress in reading, mathematics, or written expression that year. Respondent argued that a BIP is not required under the IDEA, but caselaw suggests that a BIP or a similar plan in the IEP should be employed by a school district when it needs new ideas on how to manage a particular student's behavior. Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2008) (in ruling the district failed to provide an FBA/BIP for a student, the court stated, "the quality of a student's education is inextricably linked to the student's behavior").

Respondent also contended that Petitioner was responsible for some of the Student's issues, and that Petitioner and the Student did not take advantage of services that were offered during the school year through outside agencies. However, as DCPS itself pointed out, IEPs must be judged on the services that were offered at the time that the IEP was created, to avoid "Monday morning quarterbacking." It is the IEP that is the "centerpiece of the Act." Honig v. Doe, 484 U.S. 305, 311 (1988). These services were not mentioned in any of the Student's IEPs. Moreover, the Student apparently did attend the program that was provided by the Grief Counseling Center, at least until the onset of the COVID-19 pandemic.

Parenthetically, this Hearing Officer does not agree with Petitioners that the IEP denied the Student a FAPE because it lacked speech and language therapy. The speech and language evaluation by Witness D indicated that the Student presented with average

receptive and expressive skills and average vocabulary skills on the CELF-5, and that the Student showed gains in functioning compared to previous assessments, including additional strengths in articulation, voice, and language pragmatics.<sup>3</sup> However, this Hearing Officer does find that the December 4, 2019, IEP offered an insufficient amount of specialized instruction, contained inappropriate behavioral goals and written expression goals, and failed to address the Student's behavioral needs, thereby denying the Student a FAPE.

2. November 18, 2020, IEP.

Petitioner made the same claims with respect to the November 18, 2020, IEP as he did with the December 4, 2019, IEP, except that Petitioner did not contend that the November 18, 2020, IEP should have recommended speech and language therapy, and he did contend that the IEP should have recommended ESY services.

The November 18, 2020, IEP had some of the same issues as the prior IEP. This IEP had the same recommendations for specialized instruction as the December 4, 2019, IEP: five hours per week of specialized instruction in reading outside general education, five hours of specialized instruction in math outside general education, and five hours of specialized instruction outside education. The IEP also had the same mandates of 120 minutes per month of behavioral support services and sixty minutes per month of occupational therapy consultation. No BIP was written in connection to this IEP. This

---

<sup>3</sup> In regard to Petitioner's contention that the IEP was based on sufficient evaluative data, I have already found that the evaluation of the Student was appropriate. Therefore, I find that all the IEPs at issue were based on sufficient evaluative data.

IEP also repeated the emotional, social and behavioral goals<sup>4</sup> from the prior IEPs that resulted in no progress, and repeated the Student's reading and written expression goals. Again, DCPS did not clearly explain why it felt these goals needed to be repeated in this IEP except to say that they were not mastered.

DCPS argued that the Student refused to attend school during the COVID-19 pandemic, and the evidence indicates that DCPS is at least partially correct on this point. Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 2007 WL 5023652 (D.N.M. Jan. 10, 2007), aff'd in part sub nom. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116 (10th Cir. 2008) (school district made an exceptional number of attempts to contact both the student and her mother, including phone calls and certified letters to the parents and attempts to conduct a home visit). However, the record suggests that the Student's absenteeism is related to the Student's disability. In fact, DCPS just wrote an IEP with attendance goals, and the record strongly suggests that at least part of the Student's reluctance to go to school after in-person classes resumed was work avoidance, as Witness E concluded in her FBA. See, e.g., Springfield Sch. Comm. v. Doe, 623 F. Supp. 2d 150, 159 (D. Mass. 2009).

Finally, with respect to Petitioner's request for ESY services, this Hearing Officer does not agree with Petitioner that the Student should have been found eligible for ESY services because the Student's Reading Inventory scores had regressed over the summer of 2018, from 413 to 134. In the summer of 2019, the Student regressed only slightly in the Reading Inventory measure, from 315 to 272, and both scores are in the below basic

---

<sup>4</sup> Petitioner also contended that the IEP did not provide the Student with sufficient work completion goals. However, as DCPS pointed out, the IEP did provide a work completion goal in the "Measurable Annual Transition Goals" section of the IEP. P-13-188

range. Additionally, no testing of the Student was conducted prior to the summer of 2020 for comparison. While the Student's Reading Inventory scores are very low, "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." Johnson v. District of Columbia, 873 F. Supp. 2d 382, 386 (D.D.C. 2012).

Nevertheless, DCPS denied the Student a FAPE through the IEP dated November 18, 2020, by providing insufficient specialized instruction, goals, and behavioral interventions.

3. November 8, 2021, IEP.

Petitioner also claimed that this IEP did not contain sufficient hours of specialized instruction, that it did not include behavioral interventions or a BIP, that it contained inappropriate goals and baselines, and that it failed to provide ESY services. This IEP was written by staff at Public School B, which the Student currently attends and where s/he continues to have considerable academic difficulties. The Student has had problems with tardiness and attendance, and the Student has tended to be more engaged with his/her cellphone than with group discussions. There is no evidence that the Student has made any meaningful improvement in reading. To the contrary, testing from September 30, 2021, indicated that the Student remains at the below basic level. Nevertheless, the services in this IEP were basically the same as the prior IEPs: fifteen hours per week of specialized instruction outside general education, with 120 minutes per month of behavioral support services and fifteen minutes per month of occupational therapy on a consultation basis (forty-five minutes less than the prior IEPs). The record suggests that

this means the Student attends large general education classes for at least part of the day, even though the IEP acknowledges that the Student does better in a small class setting.

P-14-201.

Moreover, no new behavioral interventions were included in this IEP, and no BIP has been developed for the Student to this day, even though the Student has had issues with peer interactions, has been defiant with adults, and has touched people without permission at Public School B. It must be noted that, during the course of this hearing, DCPS finally began to provide the Student with additional behavioral supports at Public School B, including a behavior tracker. As already noted, DCPS has also included attendance goals in the Student's latest IEP. No such language was included in the November 8, 2021, IEP. Respondent suggested that Public School B was new to the Student, and that school staff had to learn about him/her before providing him/her with a program. However, Public School B could have contacted Public School A if it needed information about the Student. Respondent also argued that it was pointless to increase the Student's hours of services because the Student refused to do schoolwork. However, the record provides examples of the Student's willingness to do work when it is not too difficult for him/her and when it is provided in a small group.

Finally, though not mentioned by counsel, Witness H stated that Petitioner agreed with the goals in the IEP and did not object to the hours of specialized instruction on the IEP. However, there is nothing in the record to suggest that Petitioner was knowledgeable about special education, and a parent's agreement to an IEP does not inoculate a school district from liability in this kind of case. Letter to Lippsitt, 52 IDELR

47 (OSEP 2008). As a result, DCPS denied the Student a FAPE through the IEP dated November 8, 2021.<sup>5</sup>

### **RELIEF**

As relief, Petitioner seeks compensatory education in the form of 250 hours of academic tutoring, with transportation to and from the tutoring service and access to virtual services, together with fifty hours of mentoring. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

Hearing officers may award “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 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”). A Petitioner

---

<sup>5</sup> This Hearing Officer does not agree with Petitioner that the goals in the November 8, 2021, IEP were inadequate. A review of the goals indicates that at least most of the goals were not repeated from prior IEPs. This Hearing Officer also agrees that the Student did not require ESY services in this IEP for the reasons stated earlier in this HOD.



need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Petitioner’s request for 250 hours of academic tutoring relies on Witness C, who apparently calculated that the Student missed 440 hours of instruction from December, 2019, to present, then approximately halved that amount (because, she said, tutoring is more intensive than school classes with a group of children). Respondent objected to this approach. Though the approach may not be perfect, Witness C, an expert in special education as it relates to programming, did present a detailed proposal explaining the nature of the FAPE deprivation. This Hearing Officer finds Petitioner’s proposal of 250 hours of tutoring to be relatively modest, given the scope of FAPE denial here. This Hearing Officer also agrees with Petitioner that the request for fifty hours of mentoring for this child, who has had quite a difficult time over the past several years, is reasonable. However, since Petitioner’s request for access to virtual instruction is not supported by the record, the request for access to virtual instruction will be denied.

## **VII. Order**

As a result of the foregoing:

1. Respondent shall pay for 250 hours of academic tutoring for the Student, to be provided by a certified special education teacher at a reasonable and customary rate in the community, together with transportation to and from the tutoring through a MetroCard;
2. Respondent shall pay for fifty hours of mentoring for the Student, to be provided by a licensed psychologist or social worker with at least five years of experience in mentoring, together with transportation to and from the tutoring through a MetroCard;

Hearing Officer Determination  
Michael Lazan, Hearing Officer  
Case # 2021-0187

3. All other requests for relief are hereby denied.

Dated: April 22, 2022

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
OSSE

[REDACTED]/DCPS  
[REDACTED]/DCPS

### **VIII. Notice of Appeal Rights**

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 days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Date: April 22, 2022

*Michael Lazan*  
Impartial Hearing Officer