

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

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
April 3, 2023

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 3/15/23; 3/20/23
v.)	Hearing Officer: Michael Lazan
)	Case No. 2022-0225
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently ineligible for services. 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 December 31, 2022. The Complaint was filed by the Student’s parent (“Petitioner”). On January 10, 2023, Respondent filed a response. A resolution meeting was held on January 12, 2023, without an agreement being reached. The resolution period expired on January 30, 2023.

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.

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

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-A, Chapter 30.

III. Procedural History

On January 27, 2023, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On February 1, 2023, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On February 3, 2023, two corrected prehearing conference orders were issued. On February 22, 2023, Respondent moved for a continuance and to extend the timelines for the Hearing Officer Determination (“HOD”). On March 8, 2023, the motion was granted by a written order, and the timelines for the HOD were extended to April 3, 2023, without objection.

The matter proceeded to trial on March 15, 2023, and March 20, 2023. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-78. Respondent objected to exhibits P-1 through P-5, P-58, P-60, P-61, P-70, and P-77. The parties agreed to exclude exhibits P-58, P-60, P-61, and P-70. Exhibits P-1 through P-57, P-59, P-62 through P-69, and P-71 through P-78 were admitted. Petitioner presented as witnesses, in the following order: Witness A, a teacher and advocate (expert in Individualized Education Program (“IEP”) case management, IEP programming, special education eligibility, and special education as it relates to compliance with policies and procedures); Petitioner; Witness B, director of a center for movement arts; Witness C, an advocate and pediatric neuropsychologist (expert in psychology/neuropsychology and evaluations for special education); and Witness D, a paralegal.

Respondent presented as witnesses: Witness E, a teacher at School A; Witness F, a teacher at School A; Witness G, a social worker at School A; Witness H, a school psychologist at School A (expert in school psychology, school evaluations, and the interpretation of data for eligibility purposes); and Witness I, a special education teacher (expert in special education and eligibility determination).

After the completion of testimony and evidence on March 20, 2023, the parties presented oral closing statements. The parties provided a final list of legal citations on March 24, 2023 (Petitioner), and March 27, 2023 (Respondent), without objection.

IV. Issues

As identified in the prehearing conference order and in the Complaint, the issues to be determined in this case are as follows:

- 1. Did DCPS violate 38 D.C. Code Sect. 2561.02(a)(1)(A) when it failed to timely evaluate the Student after the request for an evaluation in June 2022? If so, did DCPS deny the Student a Free Appropriate Public Education (“FAPE”)?**
- 2. After the Student’s neuropsychological evaluation was provided to DCPS in or about August 2021, did Respondent violate “Child Find” requirements and related authority when it: 1) failed to comprehensively evaluate the Student; 2) failed to determine the Student to be eligible for services; and 3) failed to provide the Student with an IEP? If so, did Respondent deny the Student a FAPE?**
- 3. Did DCPS fail to provide Petitioner with the Student’s educational records after a request for records was sent to DCPS in November 2021? If so, did DCPS violate 34 CFR Sect. 300.501, 5-A DCMR Sect. 2600, and related authority, and deny the Student a FAPE?**

As relief, Petitioner seeks an IEP that requires specialized instruction and service hours in speech and language pathology, occupational therapy, and assistive technology, and goals to address the Student’s deficits in cognitive functioning based on evaluative data. Petitioner also seeks access to all Student records, including but not limited to the

standardized testing results and report cards for school years 2018-2019, 2019-2020, and 2020-2021. Petitioner also seeks compensatory education.

V. Findings of Fact

1. The Student is an X-year-old student who is currently ineligible for services. The Student attends School A, a DCPS public school. The Student communicates well with other students and is generally in a good mood. In general, the Student functions like an average student. Testimony of Witness I. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and requires a behavior support plan in the school setting. Testimony of Witness A; P-56. The Student can have issues with, among other things, attention, processing large amounts of information, tantrums, executive functioning, and social problem solving. The Student would benefit from social skills development and social skills groups and support. Testimony of Witness A; P-59. In the current school year, the Student does well in reading and performs satisfactorily in math, though s/he needs to work on some areas in math. The Student does not complete his/her homework writing assignments every night because s/he can get frustrated or overwhelmed, but the Student performs satisfactorily in writing. Testimony of Petitioner.

2. On August 23, 2019, a clinical psychologist at Hospital A diagnosed the Student with Disruptive Behavior Disorder, Not Otherwise Specified. The Student then received outpatient behavioral health treatment at Hospital A. In 2019, the Student was diagnosed with ADHD, Combined Presentation. Following the diagnosis, the Student saw a therapist to help him/her regulate behaviors and emotions, follow directions, and reduce aggression. P-68-3.

3. On January 13, 2020, DCPS conducted a psychological evaluation of the Student. The evaluation included testing on the Behavior Assessment Scale for Children, Third Edition (“BASC-3”) and the Wechsler Preschool and Primary Scale of Intelligence (“WPPSI”). On the BASC-3, the Student scored in the clinically significant range in hyperactivity and externalizing problems, and at the at-risk range in aggression and overall behavioral data. The Student’s Full Scale IQ was 101, at the 53rd percentile. The evaluation indicated that the Student was easily distracted and would throw tantrums twice a week for five to fifteen minutes per occurrence, during which time s/he would cry or be defiant. P-64; Testimony of Witness A.

4. On January 24, 2020, DCPS held an eligibility meeting for the Student. DCPS determined that the Student was not eligible for services because his/her disabilities did not have an adverse impact on his/her educational performance. P-44-1.

5. During the 2020-2021 school year, the Student attended School A. On October 18, 2020, a plan was written for the Student pursuant to Section 504 of the Rehabilitation Act of 1973 (“Section 504”). The plan provided the Student with check-ins, frequent breaks throughout the day, drinks of water, a behavior chart, goals, and deep breathing exercises. The accommodations were recommended to address the Student’s issues with concentration, emotional regulation, frustration, and anxiety. P-6.

6. The Student’s report card for the 2020-2021 school year included many final grades of “3” (meeting standards) and “4” (exceeding standards). The report card also included grades of “2” (approaching standards) for the first term in math, reading, and writing and language, and a grade of “1” in writing and language for the second term. The Student made meaningful progress during this year both academically and

behaviorally. The report card indicated that the Student needed prompting in some areas, such as in following directions, handing in work on time, completing homework, putting in effort, adjusting to new situations, and taking turns. P-10.

7. On August 13, 2021, a neuropsychological evaluation of the Student was conducted by a postdoctoral fellow and a supervising neuropsychologist at Hospital A. The evaluators used the Wechsler Intelligence Scale for Children, Fifth Edition (“WISC-V”), on which the Student tested in the average range for Full Scale IQ. The Student was also determined to have a weakness in executive functioning, inhibition, attention and flexibility, and expressive and receptive language, including difficulty in understanding large amounts of language and pragmatic language issues. The Student was diagnosed with Autism Spectrum Disorder and ADHD. The report said that the Student’s communication and executive functioning deficits may prevent him/her from benefitting from the standard academic setting. The report also indicated that the Student had working memory deficits, attentional deficits, a lack of inhibition, and a lack of mental flexibility. The report indicated that the Student could get stuck on assignments, had difficulty with longer sentences, and had issues with social functioning, including deficits in social communication and reciprocity, unusual behaviors, sensory-avoidant behaviors, and difficulty giving immediate responses. The evaluators recommended speech therapy, cognitive behavioral therapy, and an IEP providing for Applied Behavioral Analysis and a structured, stimulating classroom setting with a low student-teacher ratio for students with age-appropriate intelligence. The “Unstuck and On Target!” curriculum was suggested, as were a variety of accommodations such as visual supports, structured

response formats, frequent brief breaks, use of a white board, positive praise, reduced distractions, and related measures. Testimony of Witness C; P-59.

8. During the 2021-2022 school year, the Student continued to attend School A. On or about October 13, 2021, DCPS conducted a meeting to review the Student's eligibility for services under Section 504 and determined that the Student had moderate limitations in concentration, communication, reading, and thinking, but that the Student was not eligible for services because s/he did not have a physical or mental impairment that substantially limited a major life activity. P-46. In or about November 2021, Petitioner sent emails to Respondent seeking records such as report cards and testing. Testimony of Witness D; R-38.

9. The Student received "3" and "4" grades in all academic subjects for every term during the 2021-2022 school year. The Student consistently completed homework independently, but still needed prompting in areas such as following directions. P-15. The Student completed the DIBELS reading assessment three times during the 2021-2022 school year. The Student's beginning-of-year (BOY) assessment score was 325. His/her middle-of-year (MOY) assessment score was 389, which is at the benchmark. His/her end-of-year (EOY) assessment score was 447. P-48-5; P-21-1. On June 10, 2022, i-Ready testing in reading put the Student at the Grade A level, though the Student had nearly completed Grade B. P-25.

10. The Student continued to attend School A for the 2022-2023 school year. On or about August 31, 2022, the Student was referred to the Committee on Special Education by the school guidance counselor. Testimony of Witness I. On September 16, 2022, the Student's reading was assessed through the Reading Inventory, which indicated

that the Student read below grade level. On September 20, 2022, the Student's reading was assessed through the DIBELS, which indicated that the Student read on grade level. P-20-2. On September 19, 2022, when the Student was starting Grade C, s/he tested at the Grade B level in math, according to the i-Ready measure. On the i-Ready measure in reading, the Student tested at the Grade B level. P-22; P-23; Testimony of Witness A.

11. An Analysis of Existing Data ("AED") meeting was held for the Student on September 28, 2022. The team determined that the Student needed to be evaluated. Petitioner signed consent for the Student to be evaluated. R-23; R-24. A strengths and difficulties questionnaire was completed for the Student through two of the Student's teachers, Witness E and Witness F, on October 4, 2022. For most areas, the teachers reported that the Student was in the average range, with no behavioral concerns with respect to learning. R-32 at 199.

12. Witness G, a DCPS social worker, conducted an observation of the Student in his/her math class on October 4, 2022. The Student followed instructions, worked independently, and completed the assigned problems. The Student was asked to demonstrate the strategy for one of the answers on the board for the other students. The Student was helpful and did not present any behavioral concerns during this observation. Witness G conducted a second observation on October 4, 2022, for a period of thirty minutes during class recess. The Student was observed to interact appropriately, including taking turns and sharing equipment. However, during the recess, the Student became agitated and hit a padded wall with both fists, kicked the wall, and knocked his/her head against the padded wall. The Student was then able to calm him/herself.

This behavior lasted a few minutes and then the Student returned to recess and another activity station. Testimony of Witness G; R-32 at 199.

13. An occupational therapy evaluation of the Student was conducted on October 4, 2022, and October 5, 2022. The corresponding report, issued on November 2, 2022, suggested that the Student already had the skills to engage in his/her academic environment and did not need occupational therapy. The evaluator interviewed Witness F, who reported that the Student typically expressed his/her wants/needs, followed the rules of the classroom, and could execute multi-step directions in class. The evaluator also interviewed Witness E, who described the Student's handwriting as "legible" and "beautiful," though Witness E noted that the Student occasionally had letter reversals. The evaluator also conducted an observation in the Student's math class. The Student worked independently, raised his/her hand, and waited to be called upon. As the Student waited, s/he was observed to scribble on an eraser, fidget with "Chapstick" and a pocket-sized container of hand sanitizer, and attempt to cut a pencil with scissors. However, the Student complied immediately when asked to put the items away. P-66.

The Student was evaluated by Witness H of DCPS on October 26, 2022. This psychological evaluation, as explained through a report dated November 9, 2022, consisted of the WISC-V; Woodcock-Johnson IV Tests of Achievement ("WJ IV ACH"), Standard Form A—Select Tests; Conners Fourth Edition ("Conners-4"), Parent and Teacher Long Form; Behavior Rating Inventory of Executive Functioning, Second Edition ("BRIEF-2"), Parent and Teacher Rating Form; Social Responsiveness Scale, Second Edition ("SRS-2"), Parent and Teacher Rating; and clinical interviews and observations. The Student was deemed to have a Full Scale IQ of 101. Academically,

the Student was functioning in the average range in all areas except math, where s/he was functioning in the low average range. The Student's academic skills were, overall, consistent with earlier testing. The Student's visual spatial skills were in the average range, also consistent with earlier testing. The Student's nonverbal skills were an area of relative strength, and the Student was better with visual tasks. The Student's working memory was in the low average range. In reading, the Student was in the average range. In math, there was more variability. The Student could add and subtract without regrouping but had difficulty with multi-step word problems. On the SRS-2, the Student revealed mild deficits in social awareness and social communication. Behavioral scales indicated a wide range of issues at home, but virtually none in school. Interviews with Teacher E and Teacher F revealed no concerns about the Student in the classroom, though issues with letter reversal and frustration were mentioned. In an interview, the Student said s/he was doing well that year, and Witness H found that the Student was bubbly and had a lot to share. The Student said that reading was his/her strength and that math was an area of relative difficulty. Witness H also conducted observations of the Student in math, reading, and during recess. In math class, the Student displayed leadership and worked with peers in a small group. The Student fidgeted but was able to complete the assignment and was engaged during the lesson. In reading, the Student was engaged and did not have any notable behavioral or attention problems. During recess, the other students gravitated to the Student and s/he was observed to scold another student who used profanity. P-68; Testimony of Witness H.

14. On October 18, 2022, October 24, 2022, October 28, 2022, November 2, 2022, and November 4, 2022, a comprehensive speech evaluation of the Student was

conducted. As expressed in a report issued on November 7, 2022, the evaluator found that the Student's core receptive and expressive language ability was in the average range, as were the Student's vocabulary, articulation, voice, and fluency. The Student scored below average on the Clinical Evaluation of Language Fundamentals-5 ("CELF-5") Receptive Language and Language Content indexes, in particular the "word classes" and "linguistic concepts" subtests. The "word classes" subtest evaluates a student's ability to understand relationships between words based on meaning, features, function, or place or time of occurrence. The "linguistic concepts" subtest measures a student's ability to interpret spoken sentences that contain a variety of basic concepts and require logical operations (i.e., categorization, inclusion/exclusion, orientation, and time). The evaluator also gave a checklist to a teacher, Witness E, who said that the Student demonstrated appropriate pragmatic language skills in the school setting. P-67.

15. On November 16, 2022, an eligibility meeting was held to determine if the Student was eligible for IDEA services. The team determined that the Student was not eligible for services because there was no adverse educational impact, and the Student did not need special education services. P-48. On November 29, 2022, Petitioner was formally notified that the Student was not eligible for services. R-33.

16. On December 5, 2022, Petitioner wrote DCPS a letter indicating disagreement with the eligibility determination. Petitioner requested an IEP for the Student recommending speech language pathology services, occupational therapy services, behavior support services, and baselines. P-71-1.

17. A Section 504 plan was written for the Student on December 20, 2022. The plan included accommodations such as check-ins throughout the school day,

extended time, frequent breaks, and occupational therapy goals. P-7. Petitioner was offered behavioral support services as part of the Section 504 plan, but Petitioner declined the services because the Student was already receiving outside therapy.

Testimony of Witness G.

18. On January 20, 2023, on i-Ready testing in math, the Student scored at the Grade B level. P-27; Testimony of Witness A. On January 23, 2023, on i-Ready testing in reading, the Student's score did not improve from the testing on September 19, 2022, and was still at Grade B level. P-26-4. On January 26, 2023, on another i-Ready test in reading, the Student scored in the early Grade C range. P-28.

19. During the current school year, the Student is doing well in his/her English language arts class. The Student participates and has no concerns academically. The Student is a leader in the classroom and likes to make sure that others are behaving. Interactions with peers have generally been positive. No behavioral concerns have been reported. Testimony of Witness E. In math, the Student is one of the leaders of the nineteen students in his/her class. The Student has shown more ability to use words than many others in the class. There are no concerns about the Student's academics or behavior in math class, though s/he has mild difficulties with reciprocal conversations and can get a bit upset with other classmates and yell at them once in a while. The Student is performing at grade level. No concerns have been communicated to Petitioner. Testimony of Witness F; P-68-14. For the first two terms of the current school year, the Student received grades of "3" in virtually almost all academic areas. Comments on the Student's report card indicated that the Student produces solid work during math class. P-19-4.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed in 2014. The law states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a *prima facie* case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The issues here do not directly relate to the appropriateness of the Student’s program or placement. As a result, as indicated in the prehearing conference order, which was agreed to by the parties, the burden of persuasion is on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS violate 38 D.C. Code Sect. 2561.02(a)(2)(A) when it failed to timely evaluate the Student after the request for an evaluation in June 2022? If so, did DCPS deny the Student a FAPE?

D.C. Code Section 38–2561.02 is entitled “Assessment and placement of a students with a disability—General.” In Section (a)(2)(a), beginning on July 1, 2018, the Local Educational Agency (“LEA”) is required to “assess and evaluate any student who may have a disability and who may require special education services within 60 days from the date that the student’s parent or guardian provides consent for the evaluation or assessment.” This section continues by stating that “The LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation.” The section also states that “a referral for an evaluation or assessment for special education services may be oral or written. An LEA shall document any oral referral within 3 business days of receipt.”

The Complaint states that “Sometime on June 16, 2022, undersigned counsel submitted a formal request for the school to conduct a comprehensive psychological evaluation for the student.” Complaint, at 19. The burden of persuasion is on Petitioner, but no proof was submitted that Petitioner requested an evaluation of the Student in June 2022. Indeed, Petitioner did not so argue during closing argument. The record instead reveals that the request to evaluate the Student came from a School A guidance counselor on August 31, 2022, and that Respondent received parental consent at an AED meeting on September 28, 2022. The eligibility decision was then made at the eligibility meeting on November 16, 2022, in timely fashion. Accordingly, this claim must be dismissed.

2. After the Student’s neuropsychological evaluation was provided to DCPS in or about August 2021, did Respondent violate “Child Find” requirements and related authority when it: 1) failed to comprehensively evaluate the Student; 2) failed to determine the Student to be eligible for services; and 3) failed to provide the Student with an IEP? If so, did Respondent deny the Student a FAPE?

The Child Find provisions of the IDEA (“Child Find”) require each state to have policies and procedures in effect to ensure that all children with disabilities who reside in the state and who need special education services are identified, located, and evaluated. 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find obliges a school district to oversee any child suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. Sect. 300.111(c)(1); Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Child Find is an “affirmative obligation.” Montuori v. District of Columbia, No. CV 17-2455 (CKK), 2018 WL 4623572, at *6 (D.D.C. Sept. 26, 2018). The District of Columbia Circuit Court of Appeals has stated that the Child Find obligation is among the IDEA’s “most

important” requirements for an LEA. D.L. v. District of Columbia, 860 F.3d 713, 717 (D.C. Cir. 2017).

Petitioner alleged that the Student’s neuropsychological evaluation was provided to DCPS in or about August 2021, and that DCPS failed to respond, thereby violating Child Find. However, there is no proof that this evaluation was sent to DCPS until approximately September 2022, when Witness H prepared a “checklist” in attempting to determine if the neuropsychological evaluation was thorough and complete.

After DCPS received the Student’s neuropsychological evaluation, it proceeded appropriately. An AED meeting was held on or about September 28, 2022, during which the team (consisting of school staff and Petitioner, with counsel) agreed to conduct a comprehensive evaluation of the Student, including assessments in math, reading, writing, speech, cognitive behavior, autism, ADHD, and dyslexia. A complete evaluation consisting of three formal evaluations followed, along with a range of other assessments, observations, and interviews. First, a “Strengths and Difficulties Questionnaire” was completed for the Student through data from the Student’s teachers. This document indicated that the Student’s behaviors were average, and that there were no behavioral concerns with respect to learning. Next, when Witness G conducted an observation of the Student in math class on October 4, 2022, the Student followed instructions, worked independently, and completed the assigned problems.

On October 4, 2022, and October 5, 2022, an occupational therapy evaluation of the Student was conducted. In the ensuing report issued on November 2, 2022, the evaluator suggested that the Student already had the skills to engage in his/her academic environment and did not need occupational therapy. The evaluator interviewed Witness

F, who reported that the Student typically expressed his/her wants and needs, followed the rules of the classroom, and could execute multi-step directions in class. In another interview, Witness E spoke of similar experiences. The evaluator also conducted an observation in the Student's math class, where the Student worked independently, raised his/her hand, and waited to be called upon. Although the Student was also observed to fidget, s/he complied immediately when asked to put items away.

To assess the Student's academics, cognitive levels, and behavioral issues, a comprehensive psychological evaluation was conducted on October 26, 2022. The ensuing report, dated November 9, 2022, indicated that, academically, the Student was functioning in the average range in all areas except math, where s/he was functioning in the low average range. The Student's academic skills were, overall, consistent with earlier testing. The Student showed mild deficits in social awareness, but virtually no behaviors were reported at school and the Student him/herself said that s/he was doing well that year. An observation by Witness H found that the Student displayed leadership and worked with a small group of peers. In reading, the Student was engaged and did not have any notable behavioral or attention problems. During recess, other students gravitated to the Student, and s/he was observed to scold another student who used profanity. During testing, the Student put forth his/her best effort, though at times s/he was distracted and needed breaks.

Finally, on five dates in October and November 2022, a comprehensive speech evaluation of the Student was conducted. The ensuing report, dated November 7, 2022, determined that the Student was functioning within normal limits. The evaluator found that the Student's core receptive and expressive language was in the average range, as

were his/her vocabulary, articulation, voice, and fluency. Thereafter, at the November 16, 2022, eligibility meeting, the team determined that the Student was not eligible for special education services. This meeting was held within sixty days of the August 31, 2022, referral date and therefore complied with D.C. Code Sect. 2561.02(a)(2)(A).

Petitioner did not clearly explain why the evaluation was late, incomplete, or inappropriate during closing argument. Instead, Petitioner focused on the need for the Student to be determined to be eligible for services as a student with both Autism and a child with Other Health Impairment. There is no dispute that the Student is a student with a disability. The Student has been diagnosed with Autism Spectrum Disorder and ADHD. The issue is whether the Student was adversely affected by his/her disabilities in the school environment, as required by the applicable regulations. “Other Health Impairment” is an appropriate classification if a student has limited strength, vitality, or alertness with respect to the educational environment which *adversely affects the child’s educational performance*. 34 C.F.R. Sect. 300.8(c)(9)(emphasis added). Autism means a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which *adversely affects a child’s educational performance*. 34 C.F.R. Sect. 300.8(c)(1)(i)(emphasis added).

When determining if a disability “adversely affects a child’s educational performance”² under the IDEA eligibility rules, states can set some of their own rules. 34 C.F.R. Sect. 300.8(a)(2)(ii). In the District of Columbia, a disabled student is not

² Neither the IDEA nor federal regulations define “adversely affects a child’s educational performance.” Greenland Sch. Dist. v. Amy N., No. 02-cv-136, 2003 WL 1343023, at *8 (D.N.H. Mar. 19, 2003), *aff’d*, 358 F.3d 150 (1st Cir. 2004). But the core of educational performance is “academic performance.” Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010).

eligible for services if the only services needed are “related services” (with one exception, speech and language therapy). 5-A D.C.M.R. Sect. 3010.3, 3010.5. The regulations underscore that “(t)he IEP Team shall develop an IEP only for an eligible child with disabilities who requires special education services. A determination by the IEP team that a child is a child with a disability, but does not require special education services, does not preclude a child’s eligibility for services or protections under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sect. 794 and implementing regulations at 34 C.F.R. Part 104.” 5-A D.C.M.R. Sect. 3010.7.

Petitioner, during her testimony, did not stress the Student’s needs for related services. Instead, Petitioner argued that the Student needed 1:1 instruction and smaller classrooms with a special education teacher, which was also the testimony of Petitioner’s expert witness, Witness C. However, neither Petitioner nor Witness C nor any other witnesses for Petitioner could explain away the credible testimony of two of the Student’s teachers, both of whom said that the Student was doing very well in class, academically and behaviorally. The Student participated well in English language arts, was a leader in the classroom, and had no reported behavioral concerns. The Student’s English language arts grades were consistently in the “3” and “4” range, indicating that the Student was functioning at or about grade level. In math, the Student was one of the leaders of the nineteen students in the class. The Student showed more ability to use words than many others in the class, and there were no concerns about his/her academics or behavior, though the Student had mild difficulties with reciprocal conversations and could get a bit upset with other classmates. Again, the Student’s grades were in the “3” and “4” range, except for the first term of the 2021-2022 school year.

The testimony of the Student's teachers is consistent with the statements that these teachers made to Witness H and the DCPS occupational therapist during the Student's evaluations. This testimony is also consistent with the observations conducted by Witness G, Witness H, and the DCPS occupational therapist, during which the Student performed academically and behaved well in class. Indeed, the teachers' testimony is also consistent with the testimony of Petitioner, who said that the Student was doing okay in school, and with the statements of the Student, who said that s/he was doing well during that school year.

Petitioner also pointed to the Student's i-Ready scores, some of which indicated that the Student was functioning below grade level, particularly in math. However, the record indicates that the Student has made good progress at School A. Petitioner pointed out that on June 10, 2022, the Student's i-Ready testing in reading put the Student at the Grade A level, though the Student had nearly completed Grade B. However, the record reflects that the Student made gains during this period, since the Student's score increased forty points on the i-Ready measure, from a score corresponding to the beginning of Grade A to a score corresponding to the end of Grade A. Additionally, the DIBELS reading testing during the 2021-2022 school year showed that the Student's score increased from 325 (at the beginning of the year) to 389 (in the middle of the year), to 447 (at the end of the year). On September 20, 2022, when the Student's reading was assessed through DIBELS, the Student tested on grade level, which is what Witness H reported in her psychological evaluation report of November 6, 2022.

Petitioner also focused on i-Ready testing from January 20, 2023, where the Student tested at the Grade B level in math, though the Student was in Grade C.

However, the Student's i-Ready math scores reflected an increase from the testing on September 19, 2022, and there is nothing in the record to suggest that this increase was *de minimis*. Petitioner also focused on the January 23, 2023, i-Ready testing in reading, which showed that the Student's score had not improved since the testing on September 19, 2022, and was still at Grade B level. However, on January 26, 2023, i-Ready testing in reading was again conducted, and the Student scored in the early Grade C range. Petitioner suggested that this additional testing was suspicious, but the Student's teacher, Witness E, credibly said that this discrepancy was probably attributable to the fact that he was not there to oversee the Student's testing accommodations on January 23, 2023.

Petitioner also pointed to the neuropsychological evaluation from Hospital A, which indicated that the Student had issues with social functioning, including deficits with social communication and reciprocity, unusual behaviors, sensory-avoidant behaviors, and difficulty giving immediate responses. The evaluators recommended speech therapy, cognitive behavioral therapy, and an IEP providing for an Applied Behavioral Analysis and a structured, stimulating classroom setting with a low student-teacher ratio for students with age-appropriate intelligence.

However, the authors of Hospital A's report were not called as witnesses. Instead, Petitioner called Witness C, a neuropsychologist, to explain the report and testify in support of Petitioner. Witness C explained that the Student's disabilities adversely affected his/her educational performance and that the Student needed specialized instruction. Witness C mentioned a low student-teacher ratio in a small structured classroom in math to address his/her working memory weaknesses and tantrums. Witness C said that this kind of arrangement was needed, at least in part, to "chunk"

material for the Student and provide him/her with visual cues. Witness C also indicated that the Student needed math goals and social and emotional goals.

Witness C's advocacy for a smaller math class for the Student, with a special education teacher in the classroom at least part of the time, was different from the position that Petitioner took after the Student's eligibility meeting. The dissent letter sent by Witness A after the eligibility meeting did not even mention the Student's alleged need for specialized instruction in a smaller classroom setting. Moreover, this Hearing Officer found Witness C's testimony to be speculative. The Student's teachers testified from experience, and they indicated that the Student was one of the better students in the class, both academically and behaviorally, and had no working memory issues. The math teacher, Teacher F, did say that, occasionally, the Student might need time to cool down. However, Teacher F also expressed that, overall, the Student's interaction with him was "amazing, always positive" and that the Student was performing on grade level.

Petitioner also suggested that the Student needs speech-language pathology, which was the testimony of Witness A. However, Witness A does not have any credentials in speech-language pathology, and DCPS's evaluation of the Student included a speech-language pathology report that indicated that the Student's core receptive and expressive language skills were in the average range, as were his/her vocabulary, articulation, voice, and fluency. The Student did score below average on the CELF-5 Receptive Language and Language Content indexes, in particular the "word classes" and "linguistic concepts" subtests. But there is nothing else in the record to show that the Student had any real weaknesses in language and, indeed, Petitioner did not emphasize this point during closing argument.

The caselaw favors the school district on these facts. Where a Section 504 plan provides enough accommodations and modifications to allow a student to make meaningful progress, courts deny requests for eligibility. In Day v. Kipp DC Pub. Charter Sch., No. 19-CV-1223-RBW-ZMF, 2021 WL 3507602, at *9–10 (D.D.C. Jan. 20, 2021), the school district created a Section 504 plan to address a student’s issues, which included (unlike the Student) falling test scores, grades, and a declining emotional state. The student in that case also had difficulty finishing assigned tasks, working within time limits, initiating non-preferred tasks, and working independently. The evaluations indicated that the student’s behaviors significantly and negatively impacted his/her ability to learn each day. Even so, the court determined that the student was not eligible for services, ruling that special education “is mandated only when a disabled child needs it to access their education—in other words, when special education is the solution to the child’s problem, and not some other accommodation or treatment.” The court added that the IDEA only requires schools to provide a “basic floor of opportunity” for disabled children through special education and other services, rather than to “maximize” the potential of handicapped children. The right to special education attaches only if a child *needs* it to reach that basic floor of opportunity. The court credited the testimony of a director of student support and other special education experts and deferred to the conclusions of the school witnesses because the Section 504 plans were effective.

In sum, the record suggests that the Student is receiving a FAPE at School A through the current Section 504 plan and related accommodations.³ This Hearing Officer

³ At one point in her testimony, Petitioner attested to the effect that the Student’s therapy and additional services have helped the Student to the point where s/he can function in the classroom.

therefore finds that DCPS did not violate its Child Find responsibilities, did not improperly determine the Student to be ineligible, and did not fail to provide the Student with an IEP.

3. Did DCPS fail to provide Petitioner with the Student’s educational records after a request for records was sent to DCPS in November 2021? If so, did DCPS violate 34 C.F.R. Sect. 300.501, 5-A D.C.M.R. Sect. 2600, and related authority, and deny the Student a FAPE?

The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to ‘examine,’ or ‘inspect and review’ all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 20 U.S.C. Sect. 1415(b)(1); 34 CFR 300.501(a); 5-A D.C.M.R. Sect. 2600.1. The term “education records” means the type of records covered under the definition of “education records” in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 USC 232g). 34 CFR Sect. 300.611-300.625.

In or about November 2021, Petitioner sought educational records from Respondent. Emails in the record indicate that DCPS responded to Petitioner’s requests for documents on November 17, 2021, and December 6, 2021. R-38 at 31. Witness D responded to the emails by pointing out that DCPS did not provide some of the Student’s earlier records, including report cards for the 2020-2021 school year. DCPS’s witnesses did not clearly explain how it responded to Petitioner’s continued records request, pointing out that the operative statutory language in 20 U.S.C. Sect. 1415(b)(1) requires school districts only to give parents an opportunity to inspect and review their child’s educational records (i.e., go to the school and physically look at the records).

Petitioner argued that it was entitled to copies, but failed to provide any legal support for this position. More tellingly, Petitioner failed to show that the school district's failure to completely respond to the records request had any impact on the Student's education, or on Petitioner's right as a parent to participate in the Student's education. Nor did Petitioner explain how the failure to completely respond to the records request had any impact on Petitioner's presentation in this litigation.

A federal magistrate opined on a similar case where a parent contended that DCPS's failure to produce education records amounted to FAPE denial under the IDEA. As explained by the magistrate: "Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing." The magistrate continued: "Rather, she paints in the broadest of strokes, asserting that the evidence 'would have provided the basis for services' and that they 'related to the identification, evaluation, and educational placement' of [the subject student]." Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by the student's parents or IEP team).

Petitioner did not specifically link her requests for educational records to the Student's education at School A, to Petitioner's participation in the Student's education at School A, or to Petitioner's participation at the hearing. Accordingly, this claim must be dismissed.

VII. Order

As a result of the foregoing:

The complaint is hereby dismissed with prejudice.

Dated: April 3, 2023

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 3, 2023

Michael Lazan
Impartial Hearing Officer