

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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**Confidential**

<b>Parent on behalf of Student</b>	)	<b>Case No. 2020-0098</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: July 7-8, 2020</b>
	)	<b>Conducted by Video Conference</b>
<b>v.</b>	)	
	)	<b>Date Issued: August 3, 2020</b>
<b>District of Columbia Public Schools</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioners are the parents of an X-year-old student (“Student”) School A. On April 30, 2020, Petitioners filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing, *inter alia*, to conduct timely triennial reevaluations of Student, failing to provide appropriate Individualized Education Programs (“IEP”), and failing to provide Petitioner access to Student’s education records. On May 11, 2020, DCPS filed its *Response to the Administrative Due Process Complaint Notice*, and a *Revised Response* on May 13, 2020, denying each of the claims in the *Complaint*.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### PROCEDURAL HISTORY

Petitioners filed the *Complaint* on April 30, 2020 alleging that DCPS denied Student a FAPE by (1) failing to conduct timely triennial occupational therapy and comprehensive psychological reevaluations of Student by April 30, 2018, (2) failing to provide Student an appropriate IEP for the 2017-18 school year by failing to prescribe extended year services (“ESY”), (3) failing to provide Student an appropriate IEP for the 2018-19 school year by failing to prescribe a full-time IEP, by repeating Student’s goals, baseline information, and present levels of performance (“PLOP”) from previous IEPs in the IEPs developed on September 27, 2018 and February 28, 2019, and (4) failing to provide Petitioners access to Student’s education records that were requested on January 21, 2020, February 11, 2020, February 19, 2020, February 25, 2020, April 27, 2020, April 28, 2020, and April 29, 2020.

On May 13, 2020, DCPS filed its *Revised Response* to the *Complaint*, asserting that (1) there is no information in the student record regarding records requests or provisions, (2) DCPS proposed formal reevaluation of Student in October 2018 based on Student’s lack of progress, (3) DCPS proposed a full-time program in February 2019, (4) DCPS conducted Speech, Occupational Therapy, and Psychological reevaluations in April and May 2019, (5) DCPS proposed a Learning Support Program in May 2019, (6) the November 2017 IEP is beyond the scope of the Statute of Limitations, and (7) Student’s parents rejected ESY for Student’s IEP. During the prehearing conference, Respondent’s counsel conceded that DCPS had received requests for access to Student’s records, and stated that DCPS had responded to those requests, but could not be specific as to each request listed in the *Complaint*.

The parties participated in a resolution meeting on May 18, 2020 that did not result in a settlement. The resolution period ended on May 30, 2020. A prehearing conference was conducted by video conference on June 2, 2020, and the Prehearing Order was issued that day. The Prehearing Order was issued shortly after the hearing. Later that day, by email, [REDACTED] requested changes to the Prehearing Order. The Hearing Officer responded to [REDACTED] email, and a copy of the exchange of emails was included in the record of this proceeding. I issued an Amended Prehearing Order on June 15, 2020 to clarify the start and end times of the hearing, to provide the verbatim defense offered by DCPS in its *Revised Response* to the allegation regarding the failure to provide access to records, to offer DCPS a limited possibility of providing rebuttal testimony, and to require Bates numbers in the disclosures.

The due process hearing was conducted on July 7-8, 2020 by video conference and was closed to the public. Petitioner’s disclosure statement included a witness list of seven individuals and Exhibits P1-P78. No objections were filed, and Petitioner’s Exhibits P1-P78 were admitted into evidence. Respondent’s Disclosures contained a witness list of seven witnesses and documents R-1 through R-59. There were no objections and Respondent’s Exhibits R1-R59 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Petitioner/father, Petitioner/mother, and Witness D. Respondent presented

Witness E, Witness F, Witness G, and Witness H. Petitioner offered Witness A as an expert in occupational therapy, Witness B was offered as an expert in special education, and Witness D was offered as an expert in child psychology without objection. Respondent offered Witness F as an expert in school psychology, Witness G was offered as an expert in speech and language pathology, and Witness H was offered as an expert in special education programming and administration. Petitioners' counsel did not object to any of the proffered expert testimony. At the conclusion of the testimony, the parties' counsel agreed to submit written closing arguments on or before July 17, 2020. On July 17, 2020, Respondent filed *District of Columbia Public Schools' Closing Argument*, and on July 18, 2020, Petitioner filed *Closing Argument by the Petitioner for [Student]* along with 5 articles in support of Petitioner's compensatory education plan.

## ISSUES

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

1. Whether DCPS failed to conduct timely triennial occupational therapy and comprehensive psychological reevaluations of Student by April 30, 2018.
2. Whether DCPS failed to provide Student an appropriate IEP for the 2017-18 school year by failing to prescribe extended year services ("ESY").
3. Whether DCPS failed to provide Student an appropriate IEP for the 2018-19 school year by failing to prescribe a full-time IEP, and repeated Student's goals, baseline information, and present levels of performance ("PLOP") from previous IEPs in the IEPs developed on September 27, 2018 and February 28, 2019.
4. Whether DCPS denied Petitioner access to Student's education records that were requested on January 21, 2020, February 11, 2020, February 19, 2020, February 25, 2020, April 27, 2020, April 28, 2020, and April 29, 2020.

## FINDINGS OF FACT

1. Student is X years old and was in grade C at School A during the 2019-2020 school year.<sup>2</sup>
2. On June 16, 2015, Examiner A completed a Supplemental Educational Assessment Report of Student.<sup>3</sup> On the Bayley Scales of Infant Development ("Bayley-III"), and two domains of the Battelle Developmental Inventory ("BDI-2"), Student scored Borderline in Language skills, Low Average in Cognitive and in Personal-Social and Adaptive skills, and Average in Motor Skills.<sup>4</sup> Student's cognitive score of 70 reflected "significantly delayed performance when compared to the results of [his/her] same-aged

<sup>2</sup> Petitioner's Exhibit ("P:") 1 at page 11 and 17. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P1:11, 17.

<sup>3</sup> P49:111.

<sup>4</sup> P49:112

peers.”<sup>5</sup>

3. DCPS developed Student’s initial IEP on August 24, 2015. Student was in Grade L at School B, and was classified with a Developmental Delay.<sup>6</sup> In Adaptive/Daily Living Skills, Student’s baselines were (1) difficulty following directions related to his/her daily routine, (2) difficulty maintaining his/her attention to complete tasks, (3) engages in tantrum behavior when transitioning between preferred and non-preferred activities, and (4) difficulty maintaining attention to tasks in small group settings. The goals were (1) when provided with a visual schedule, to follow directions 80% of the time over five consecutive data sessions, (2) complete multi-step tasks without leaving the designated area 80% of the time over five consecutive data sessions, (3) Student will transition between activities without engaging in tantrum behavior 80% of the time over five consecutive days, and (4) in small groups, Student will maintain his/her attention to the activity for three minutes at a time 80% of the time over five consecutive data sessions.<sup>7</sup> In Cognitive, Student’s baselines were (1) unable to sort objects based on a common attribute, (2) unable to attend to a story in order to identify key vocabulary terms within it, (3) and unable to match objects to a given numeral from 1-10. The goals were (1) to sort 10 objects based on a common attribute with 80% accuracy, (2) identify 4/5 key vocabulary terms within the story by pointing to the pictures or verbally responding, and (3) given a set of objects, Student will match the objects to a given numeral from 1-10.<sup>8</sup>

In Communication/Speech and Language (“S/L”), the baselines were (1) rarely pointing to pictures of objects as directed, (2) failure to use nouns and verbs, (3) failure to follow one-step directions in an evaluation, and (4) rare use of spoken language. The goals were (1) to point to or touch 20 novel common objects, 10 novel actions words, 10 novel descriptive words, 5 novel pronouns, and 5 novel prepositions, (2) label pictures of the same, (3) in structured small group activities, Student will follow two-step directions with 80% accuracy, and (4) in 10-minute small group activities, Student will produce utterances at least three words long in 80% of targeted opportunities.<sup>9</sup> In Motor Skills/Physical Development, the baselines were that s/he used a digital pronate grasp on crayons, not able to copy simple block designs or remove a twist-off bottle cap, unable to coordinate finger movements, and unable to close a circular scribble. The goal was to complete 4/5 grade L level fine motor activities (drawing shapes, completing puzzles, coloring, gluing, tracing, cutting, and pre-writing).<sup>10</sup> The IEP team prescribed 2 hours per week of specialized instruction in general education, 2 hours outside general education, 2 hours per month of occupational therapy (“OT”) in general education, and 2 hours per month of speech-language pathology (“SLP”) outside general education.<sup>11</sup>

4. DCPS convened an IEP Annual Review on February 23, 2016<sup>12</sup> and

<sup>5</sup> *Id.* at 413.

<sup>6</sup> P4:46.

<sup>7</sup> *Id.* at 48-9.

<sup>8</sup> *Id.* at 49-50.

<sup>9</sup> *Id.* at 50-51.

<sup>10</sup> *Id.* at 52.

<sup>11</sup> *Id.* at 53.

<sup>12</sup> P5:58.

December 6, 2016.<sup>13</sup> In the December 2016 IEP, Student's specialized instruction was increased to 3 hours per week in general education and 3 hours per week outside general education.<sup>14</sup>

5. On June 12, 2017, DCPS issued an IEP Progress Report for the 2016-17 school year. Student was Progressing on his/her Adaptive goal, was progressing on three Cognitive goals and had Mastered one, was Progressing on all three S/L goals, and was Progressing on one Motor Skill goal and had mastered the other.<sup>15</sup>

6. DCPS convened an IEP Annual Review on November 16, 2017, when Student was in grade H at School A.<sup>16</sup> In Adaptive/Daily Living Skills, the Present Levels of Academic Achievement and Functional Performance ("PLOPs") revealed that Student was demonstrating progress with following the routines in the classroom and transitioning throughout the day, was able to sit during circle time activities, was not always focused and engaged in the activity and instructions, was able to follow many one-step directions but had difficulty following two-step directions without verbal prompting. S/he had begun to adopt undesirable behaviors from his/her peers including laying on the floor, avoiding work, and running from teachers. The single baseline was that s/he struggled with multi-step directions and required several prompts and redirections to pay attention to tasks. The goal was to be able to follow multi-step directions with 80% accuracy with decreasing cues over time.<sup>17</sup> In Cognitive, the PLOPs included the score of 70 on the 2015 BDI-2, that s/he was showing some progress with sorting objects by color and shape, and that s/he was "a little more eager to participate during whole group and small group activities." The baselines were (1) s/he inconsistently identifies numerals 1-10, (2) s/he recognized only one letter in his/her first name, and (3) s/he was unable to stay focused during small group read-alouds. The goals were (1) given a set of objects, Student would match the objects to a given numeral from 1-10, (2) be able to identify and recite 15 letters of the alphabet, especially those in his/her name, and (3) be able to interact during read-alouds by pointing to the correct picture or answer simple questions with less prompting over time.<sup>18</sup>

In S/L, the baselines were (1) Student demonstrated emerging ability to expand his/her mean length utterance from 2 to 4 words, (2) has shown progress in following 1-2 step routine classroom directions given minimal prompting, and (3) beginning to produce more single words and 2-3-word utterances more spontaneously. The goals were (1) to label to or touch 20 novel common objects, 10 novel actions words, 10 novel descriptive words, 5 novel pronouns, and 5 novel prepositions, (2) in structured small group activities, Student would follow two-step directions with 80% accuracy, and (4) in 10-minute small group activities, Student would produce utterances at least three words long in 80% of targeted opportunities.<sup>19</sup>

<sup>13</sup> P6:60.

<sup>14</sup> *Id.* at 76.

<sup>15</sup> P12:145-48.

<sup>16</sup> P7:81.

<sup>17</sup> *Id.* at 83.

<sup>18</sup> *Id.* at 83-4.

<sup>19</sup> *Id.* at 85.

In Motor Skills, the PLOPs included the ability to utilize an appropriate grasp on a standard pencil with minimum verbal cues, “decreased ability” to write his/her name from memory, good upper body strength, and is easily distracted. The baselines were (1) s/he could imitate the first four pre-writing strokes with minimum verbal cues, and (2) could copy the first 3 letters of his/her name with moderate verbal cues. The goals were (1) will imitate the last five pre-writing strokes (diagonal lines, square, intersecting line and triangle) while maintaining a functional grasp, and (2) copy the letters in his/her first name with minimum verbal and visual cues.<sup>20</sup> Services were unchanged from the previous IEP,<sup>21</sup> and ESY was not recommended.<sup>22</sup>

7. Petitioner/mother gave written consent for Student’s reevaluations on November 16, 2017.<sup>23</sup>

8. On June 6, 2018, DCPS issued an IEP Progress Report for the first two reporting periods of the 2017-18 school year. The Adaptive goal was reported as Just Introduced. The first and third Cognitive goals were Just Introduced, and for the second, there was No Progress. In S/L, there was No Progress on the first goal, Student was Progressing on the second, and Mastered the goal of producing utterances of at least three words. In Motor Skills, Student was Progressing on the first goal, and had No Progress on the second.<sup>24</sup>

9. On June 12, 2018, DCPS issued the Progress Report for the third and fourth reporting periods. On the Adaptive goal, s/he had No Progress in the third period, but was Progressing in the fourth. In Cognitive, s/he was progressing on all three goals by the fourth period. In S/L, Student was Progressing on goals of labeling objects with which ■■■ should be familiar and had Mastered the goals of (1) given verbal and visual cues, completing most tasks, and (2) producing utterances that are at least three words long. In Motor Skills, Student was progressing on the goals of (1) imitating the last five pre-writing strokes, and (2) copying the letters in his/her first name.<sup>25</sup>

10. For the 2018-19 school year, Student’s grades were as follows: Below Basic in Reading, Writing & Language, Speaking and Listening, Math, Social Studies, and Science, Basic in Health and Physical Education, and Proficient in Music and Art. S/he had 9 unexcused absences.<sup>26</sup>

11. DCPS conducted its next IEP Annual Review on September 27, 2018 when Student was in grade A at School A.<sup>27</sup> In Adaptive, the PLOPs were largely the same as in the previous IEP. The baseline and goal were unchanged from the previous IEP.<sup>28</sup> In Cognitive, the PLOPs were largely the same as in the previous IEP, and the goals were

<sup>20</sup> *Id.* at 86.

<sup>21</sup> *Id.* at 87.

<sup>22</sup> P38-312.

<sup>23</sup> P42:342; Testimony of Witness H.

<sup>24</sup> P13:150-53,

<sup>25</sup> P14:155-58.

<sup>26</sup> P60-520.

<sup>27</sup> P8:93.

<sup>28</sup> P8:95.

identical to those in the previous IEP.<sup>29</sup> In S/L, the PLOPs included that s/he enjoyed learning, follows simple directions, listened readily, recognized his/her name, followed classroom rules, and demonstrated growth in his/her ability to communicate. The baselines and goals were identical to those in the previous IEP.<sup>30</sup> In Motor Skills, the PLOPs noted that Student was able to copy pre-writing strokes with 80% accuracy, continued to work on copying prewriting strokes and his/her name, alternated his/her grasp from mature to gross, and required hand over hand assistance with certain letters. The baselines and goals were identical to those in the previous IEP.<sup>31</sup> Student's specialized instruction was increased from three to four hours per week of specialized instruction inside general education, and from three to six hours per week outside general education.<sup>32</sup>

12. On January 30 2019, DCPS issued an IEP Progress Report for the first two reporting periods of the 2018-19 school year. In Adaptive, Student was Progressing on the goal of following multi-step directions. In Cognitive, s/he was Progressing on the goals of (1) matching objects 1-10 and (2) identifying and reciting 15 letters of the alphabet (s/he could do 24). The goal of interacting appropriately during read-alouds was Just Introduced. In S/L, s/he was Progressing on the goal of labeling pictures, and had Mastered the goals of (1) following two-step, related directions, and (2) producing utterances of at least three words. In Motor Skills, Student was Progressing on the goal of imitating the last five pre-writing strokes, and had Mastered the goal of copying the letters in his/her first name.<sup>33</sup>

13. On February 28, 2019, DCPS reconvened an IEP Annual Review meeting.<sup>34</sup> In Adaptive, the PLOPs were largely the same as in the previous IEP. The baseline and goal were unchanged from the previous IEP.<sup>35</sup> In Cognitive, the PLOPs were largely the same as in the previous IEP, and the goals were identical to those in the previous IEP.<sup>36</sup> In S/L, the PLOPs included that s/he enjoyed learning, followed simple directions, listened readily, recognized his/her name, followed classroom rules, and demonstrated growth in his/her ability to communicate. The baselines and goals were identical to those in the previous IEP.<sup>37</sup> In Motor Skills, the baselines and goals were identical to those in the previous IEP.<sup>38</sup> The IEP team increased Student's special education services to 22 hours outside general education.<sup>39</sup> The team also prescribed extended year services, including four hours of specialized services outside general education per day, and two hours each of OT and SLP per month.<sup>40</sup>

14. Petitioner/father and Student's grandmother, Witness C, attended the February 28, 2019 IEP team meeting. It was Witness C's first such meeting. She was unaware of Student's disability classification and was surprised to learn that Petitioner/mother did not

<sup>29</sup> *Id.* at 95-96.

<sup>30</sup> *Id.* at 96-97.

<sup>31</sup> *Id.* at 98.

<sup>32</sup> *Id.* at 99.

<sup>33</sup> P16:165-168.

<sup>34</sup> P9:103.

<sup>35</sup> *Id.* at 105.

<sup>36</sup> *Id.* at 105-6.

<sup>37</sup> *Id.* at 106-7.

<sup>38</sup> *Id.* at 108.

<sup>39</sup> *Id.* at 109.

<sup>40</sup> *Id.* at 113-14.

believe Student was making academic progress.<sup>41</sup> It was also Petitioner/father's first IEP team meeting.<sup>42</sup> Teacher A reported that Student was performing well below expectations:

[Student] is suffering, [s/he] is significantly behind, [s/he's] been in my classroom for 6 months now, and not one iota of growth. I'm extremely concerned for [her/him], in addition to academically, because now it is starting to enter [him/her] inside. And [s/he] is starting to show that. [S/he] is unable at this point to complete any work, to the level of expectation of mid-year [grade A]. Right now [s/he] – and I'm adding to it, [s/he] is most likely maybe mid-year [grade H]... Closer to the beginning year of [grade H]... And it's really at the surface right now. Because [s/he] has internalized that [s/he] is unable to keep up with the pace of this [grade A] classroom... and when I go [to] the email, I don't know maybe a week ago, saying that this particular meeting might be in a month or so, I asked if there was any way to move it up because the last 6 months have been a disservice. [S/he] has not made any progress. [S/he] is still where [s/he] was as a [grade H] child. And if we waste another month, it's going to hurt [him/her] even more... [S/he] is so far behind, and we are setting [her/him] up for failure... It's painful as a teacher, and this is my 20<sup>th</sup> year of teaching, to see [him/her] sitting in the classroom. Because [s/he's] not able to ascertain or grasp what [s/he] needs to grasp...<sup>43</sup>

Teacher B, Student's special education teacher, concurred with Teacher A's assessment,<sup>44</sup> and urged that Student be placed in a small class environment:

At this point with [Student], [s/he] had made a lot of progress, from where [s/he] was at the beginning of the year, I've seen a lot of growth. With [him/her] being in this fast pace, [grade A] class, I really don't think it's beneficial for [him/her]. I think [s/he] needs a smaller class, where it is, there's two people in there, and they're working on things, on [his/her] level, and what [s/he] can do, so that [s/he] can still make that growth. Because [s/he] has made a lot of growth in 6 months and that's just with me pushing and pulling out sometimes. So, if [s/he] was there all day, you know imagine how much [s/he] could do... So, as of right now, [s/he's] definitely struggling, and with [him/her] getting ready to go to [grade C], which is where they're reading chapter books, three-digit subtraction/addition problems, I know that [s/he's] not ready.<sup>45</sup>

Student was not immediately placed in a full-time, specialized instruction outside of general education program due to objections from Petitioner/father, who wanted additional testing to be conducted.<sup>46</sup>

15. At a Multidisciplinary Team (“MDT”) meeting on April 11, 2019, Petitioners

<sup>41</sup> P42:341-43.

<sup>42</sup> *Id.* at 344.

<sup>43</sup> *Id.* at 346.

<sup>44</sup> *Id.* at 347-48.

<sup>45</sup> *Id.* at 348.

<sup>46</sup> Testimony of Witness H

requested that Student be reevaluated.<sup>47</sup> The team agreed to conduct Psychological, Speech/Language, and OT Assessments, but rejected Attorney C's request for a Functional Behavior Evaluation due to the lack of behavior concerns.<sup>48</sup> Petitioner/father objected to the February 2019 IEP, and through Attorney C, requested the implementation of the September 27, 2018 IEP, specifically objecting to full-time specialized instruction outside of general education.<sup>49</sup>

16. On April 25, 2019, Witness G completed a Speech and Language Re-Evaluation.<sup>50</sup> At the time, Student was in grade A at School A. On the Goldman Fristoe Test of Articulation ("GFTA-3"), Student's standard score of 90 reflected below average production of speech.<sup>51</sup> His/her informal fluency was normal for classroom communication.<sup>52</sup> S/he was below average in both Receptive and Expressive One Word Picture Vocabulary.<sup>53</sup> Student scored in the Severe range for Auditory Comprehension, Expressive Communication, and Total Language. "In the classroom, [Student] may struggle with following along [with] text that is orally presented with visual cues. [Student] may have difficulties answering basic Wh-questions. [Student] may not be able to formulate oral sentence structures complex enough to convey [his/her] knowledge. [Student] cannot distinguish each sound (phoneme) yet to be a strong beginner reader."<sup>54</sup> Student's hearing, voice, and pragmatics were age appropriate.<sup>55</sup> Witness G opined:

[Student] continues to present with a communication deficit with weaknesses in receptive and expressive language, vocabulary, and articulation. [Student] would continue to benefit from services to address [his/her] ability to produce each letter sound orally, to answer questions about text, to label objects, and to categorize objects. Services to address these skills would benefit [Student] academically. [Student] has not demonstrated sufficient language growth using the pull-out model from the regular education classroom. [Student] may benefit from a different model of learning to foster overall academic achievement.<sup>56</sup>

17. On April 26, 2019, DCPS issued an IEP Progress Report for the first three reporting periods of the 2018-19 school year.<sup>57</sup> In Adaptive, Student was reported as Progressing on the goal of following multi-step directions, needing numerous verbal cues to keep up with the class and having a hard time recognizing visual cues independently. In Cognitive, s/he was Progressing on the goals of (1) matching objects 1-10, and (2) interacting appropriately during read-alouds. S/he had Mastered the goal of identifying and reciting 15 letters of the alphabet. In S/L, s/he was Progressing on the goal of labeling pictures, and had

<sup>47</sup> P39:316.

<sup>48</sup> *Id.* at 317.

<sup>49</sup> *Id.*; Testimony of Witness G.

<sup>50</sup> P50:417.

<sup>51</sup> *Id.* at 420.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 421.

<sup>54</sup> *Id.* at 422.

<sup>55</sup> *Id.* at 423.

<sup>56</sup> *Id.* at 424.

<sup>57</sup> P45:376.

Mastered the goals of (1) following two-step, related directions, and (2) producing utterances of at least three words. In Motor Skills, Student was Progressing on the goal of imitating the last five pre-writing strokes, and had regressed to Progressing on the goal of copying the letters in his/her first name.<sup>58</sup>

18. Through the middle of the 2018-19 school year, Student's Dibel's Reading Comprehension ("TRC") scores were PC, "Far below" grade level.<sup>59</sup>

19. On May 13, 2019, Examiner B completed an Occupational Therapy Re-Assessment Report.<sup>60</sup> Examiner B reported that Student had prior occupational therapy ("OT") evaluations on February 24, 2015, and May 21, 2015.<sup>61</sup> On the Beery-Buktenica Developmental Test of Visual-Motor Integration ("Beery-6th"), Student was Very Low in Motor Coordination, Low in Visual Perception, and Below Average in Overall Visual-Motor Skill.<sup>62</sup> On the Bruininks-Oseretsky Test of Motor Proficiency ("BOT-2"), Student was Below Average in Fine Motor Precision, Fine Motor Integration, and Fine Manual Control, and Average in Manual Dexterity, Upper-Limb Coordination, and Manual Coordination.<sup>63</sup> Examiner B opined:

[Student] uses an immature right-hand grasp pattern during writing tasks and needs verbal prompts to initially use [his/her] left hand to stabilize the paper. [S/he] uses top to bottom letter formation and is able to recall the first 4 letters of the alphabet on [his/her] own, by singing the alphabet song. Without highlighted lines, [Student] demonstrates difficulty anchoring letters on the writing line. When given bolded lines, [s/he] is able to anchor letters more accurately. When provided with bolded lines, [Student] demonstrates even sized letters and numbers and is able to space [his/her] letters appropriately. [S/he] demonstrates difficulties with copying a sentence from a near point visual model, making [his/her] overall written product difficult to read...

[Student] presents with limitation of skills in the areas of fine motor, visual motor, visual perception and motor coordination. These limitations are known to adversely impact [his/her] academic performance primarily in the areas of Reading, Math, and Written Expression. [His/her] motor delays may impact achievement in the academic setting, particularly in the area of written work production.<sup>64</sup>

20. On May 23, 2019, Witness F completed a Comprehensive Psychological Re-Evaluation of Student.<sup>65</sup> Witness F had observed Student for two school years, and tested him/her over three sessions. On the Woodcock-Johnson IV Tests of Cognitive Abilities ("WJ-IV"), Student scored in the Very Low range in General Intellectual Ability, which included

<sup>58</sup> P17:170-73.

<sup>59</sup> P45:368.

<sup>60</sup> P51-427.

<sup>61</sup> *Id.* at 432.

<sup>62</sup> P51-430.

<sup>63</sup> *Id.* at 431.

<sup>64</sup> *Id.* at 433.

<sup>65</sup> P52-436.

subtests on Oral Vocabulary, Number Series, Verbal Attention, Letter-pattern Matching, Phonological Processing, Story Recall, Visualization, General Information, Concept Formation and Numbers Reversed. S/he scored in the Average range on Concept Formation and Visualization.<sup>66</sup> In Short-Term Working Memory, Student demonstrated very low attentional control and short-term memory compared to his/her peers. “[His/her] low sequential memory is negatively impacting [his/her] ability to decode words. This also [con]tributes to [Student’s] struggle in terms of retaining phonics skills and in making adequate progress in areas of reading.”<sup>67</sup> The Verbal Attention test was above his/her ability level. “[His/her] performance suggests that [s/he] will have difficulty processing information presented orally and require significant support with accessing the grade level curriculum.” The Numbers Reversed test was also above student’s ability level. <sup>68</sup> The Cognitive Efficiency cluster of tests were above his/her ability level, suggesting very low cognitive efficiency that will impact his/her access to general education.<sup>69</sup> On the Test of Nonverbal Intelligence (“TONI-4”), Student earned a Full Scale Index score of 88, Below Average, two points below the Average range.<sup>70</sup> “This performance is slightly different from the norm, by still within expectations. <sup>71</sup> [Student’s] performance suggests that [s/he] is capable of learning to read, write, and calculate at levels expected of students [his/her] age. However, [s/he] may struggle to keep up in the general education classroom.”<sup>72</sup>

The Young Children’s Achievement Test (“YCAT”) assesses the academic skills of children between the ages of four and seven years/eleven months. Student scored in the Very Poor range in General Education and Mathematics, Poor in Reading, Writing, and Spoken Language, and Very Poor in Early Achievement Composite. <sup>73</sup> According to Witness F:

[Student] has made poor progress in area of academic reading, math and writing this school year. Based on record review, [s/he] has struggled to meet grade expectation since [grade L]. In 2017, Gold Assessment data indicates Below level performance in areas of social emotional, physical, language, literacy, math and cognition, January DIBELS data indicates a Print Concepts (PC) TRC reading level and an overall reading performance displayed well below benchmark. iReady EWI testing information form 2/1/2018 indicates emerging [grade H] level skills. Similarly, [Student] displayed a PD TRC level on 1/10/2019 and Emerging [grade H] level skills on the iReady assessment on 2/1/2019. In the classroom, [Teacher A] has provided tier 2 reading intervention (double dose of Foundations 5 days per week). [Student] has also received specialized instruction, speech and occupational therapy. Despite intervention, [s/he] continues to perform significantly below expectation and has not made adequate academic progress this school year. The IEP team has increased [Student’s] hours to 22 hours of specialized instruction per week and is considering a self-contained classroom setting in order to provide

<sup>66</sup> *Id.* at 440.

<sup>67</sup> *Id.* at 441.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 442.

<sup>70</sup> *Id.* at 442-3.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 443.

<sup>73</sup> *Id.*

[Student] better access to the classroom curriculum.

[Student] continues to present with significant delays in areas of communication. [S/he] also demonstrates low average cognitive skills that impact [his/her] ability to access the general education classroom curriculum. Based on referral concerns and evaluation findings, this evaluator suspects a learning disability in areas of Oral Expression, Listening Comprehension, Written Expression, Basic Reading Skill, Math Calculation, and Math Problem Solving...<sup>74</sup>

Based on this Early Achievement Composite score, [Student] performed at a 4 years 6 month age equivalent overall. Based on [Student's] response to scientific researched based strategies [s/he] has not made adequate progress to meet DCPS grade level standards. [S/he] also exhibits a pattern of strengths and weaknesses in performance and achievement. Based on evaluation findings and according to IDEA and OSSE guidelines, [Student] continues to meet eligibility for specialized instruction and related services as an SLD student...<sup>75</sup>

21. DCPS reconvened an IEP Annual Review team meeting on May 30, 2019.<sup>76</sup> Mathematics was added as an Area of Concern. The PLOPS included that Student can count to 10, can add numbers 1-3 with the support of pictures and manipulatives, and struggles with grade level assignments like place value and adding and subtracting within 20. iReady testing on February 1, 2019 placed him/her at the emerging grade H level. The baselines were (1) difficulty adding numbers 1-10, and (2) difficulty counting and writing numbers past 10. The goals were (1) add and subtract numbers within 10, and (2) given a starter number between 1 and 40, to be able to count sequentially up to 120, correctly saying and writing the next 10 numbers that follow.<sup>77</sup> Reading was also added as an Area of Concern. The PLOPs included that Student is able to track text from left to right using books with no more than four words in it. His/her TRC Assessment in May 2019 was PC, "far below grade level." The baselines were (1) difficulty comprehending grade level text that is read aloud to him/her, and (2) s/he does not know any of his/her letter sounds and cannot segment and blend words. The goals were (1) to be able to retell key details from the beginning, middle, and end of a story read aloud, and (2) when given a list of the alphabet, to recognize and produce all 26 letter sounds.<sup>78</sup> Written Expression was added as an Area of Concern. The PLOPs included that on his/her graded Text Focused Question Tracker, Student receives the lowest score of 1, bi-weekly, since the beginning of the year, takes a long time to write his/her name or to complete simple tasks, often becomes frustrated and breaks down when asked to complete difficult assignments, can hold a pencil appropriately but does not produce all 26 upper and lowercase letters on demand. The baseline was having difficulty writing words and sentences. The goals were (1) given a sentence stem describing an opinion, Student will complete the sentence and draw a supporting picture, and (2) after a poem, nursery rhyme, or grade level text read aloud,

<sup>74</sup> *Id.* at 445.

<sup>75</sup> *Id.* at 447.

<sup>76</sup> P10:116.

<sup>77</sup> *Id.* at 118-19.

<sup>78</sup> *Id.* at 119-20.

given a sentence stem describing a topic from the story, Student will complete the sentence and draw a supporting picture.<sup>79</sup>

In S/L, the PLOPs reported that current testing (PLS 5<sup>th</sup>) placed Student in the severe range in Auditory Comprehension, and Expressive Communication, s/he had moderate deficits in vocabulary, delayed articulation, and “choppy” fluency. The baselines and goals were unchanged from the previous IEP.<sup>80</sup> In Motor Skills, the first baseline and goal from the previous IEP were unchanged. Two new baselines were added: (2) Student is able to copy his/her first and last name with a visual model, and (3) from Examiner B’s OT Report, without highlighted lines, Student demonstrates difficulty anchoring letters on the writing line. When given bolded lines, s/he is able to anchor letters more accurately. When provided with bolded lines, Student demonstrates even sized letters and numbers and is able to space [his/her] letters appropriately. S/he demonstrates difficulties with copying a sentence from a near point visual model, making his/her overall written product difficult to read. The new goals were (2) Student will write the letters in his/her first and last name with minimum verbal and visual cues, and (3) Student will copy 2-3 sentences, demonstrating adequate readability letters, anchoring letters on the writing line, and spacing words appropriately.<sup>81</sup> Specialized instruction services, including ESY, were unchanged from the previous IEP.<sup>82</sup>

22. At the May 30, 2019 IEP Annual Review, Petitioner/mother requested that Student be placed in the Early Learning Support (“ELS”) classroom at School A.<sup>83</sup> Despite the full-time IEP, Student had remained in Teacher A’s general education classroom consistent with Petitioner/father’s request.<sup>84</sup> Student’s classification was changed to Specific Learning Disability.<sup>85</sup> The team denied Attorney C’s request for an Adaptive Evaluation because Student “does not present with delays in areas of socialization or daily living skills. [S/he] is primarily impacted by [his/her] delays in areas of cognitive functioning... which impacts [his/her] access to the general education curriculum across all academic areas.”<sup>86</sup>

23. For the 2018-19 school year, Student’s grades were as follows: Below Basic in Reading and Writing & Language, Basic in Speaking and Listening, Math, Social Studies, Science, Music, Health & Physical Education, and World Languages. Student had 11 unexcused absences.<sup>87</sup>

24. Student’s grades through the second term of the 2019-20 school year were as follows: Below Basic in Writing and Language, Basic in Reading and Speaking and Listening, and Proficient in Math, Social Studies, Music, Art, Health & Physical Education, and World Languages. Student had two unexcused absences.<sup>88</sup>

<sup>79</sup> *Id.* at 120-21.

<sup>80</sup> *Id.* at 121-22.

<sup>81</sup> *Id.* at 123-24.

<sup>82</sup> *Id.* at 125, 129.

<sup>83</sup> P40:321.

<sup>84</sup> Testimony of Witness H.

<sup>85</sup> P40:323.

<sup>86</sup> *Id.* at 324.

<sup>87</sup> P61:533.

<sup>88</sup> P62:542.

25. DCPS reconvened an IEP Annual Review team meeting on February 13, 2020, when Student was in grade C.<sup>89</sup> The Mathematics PLOPs reported that Student was at a pre-grade H level in Early Numeracy, and at a grade H level in Arithmetic Fluency, two years below his/her current grade level. iReady Assessment data also placed him/her at a grade H level. The first baseline was virtually the same as in the previous IEP. The two new baselines were (2) Student can independently count up to 10 and identify the next number in a sequence, but struggles to identify the placement of numbers in a sequence, and (3) s/he can create equations with numbers up to 5 and is currently working on recognizing addition equations up to 10. The new goals were (1) given 20 addition and 20 subtraction problems involving one-digit numbers, Student will calculate the answer, (2) given a number line up to 100 with missing numbers, Student will correctly say and write the missing numbers that follow in the sequence, and (3) given an illustrated and solved true or false addition or subtraction equation involving single-digit numbers, Student will write or state if the equation is true or false with 80% accuracy.<sup>90</sup> In Reading, the first baseline was unchanged from the previous IEP. The second, new baseline was that Student can recognize three 3 sight words (I, see, and a). The two new goals were (1) after independently reading a text at his/her instructional level, Student will retell key details from the beginning, middle and end of the story, and (2) when presented with 10 familiar high-frequency word cards, Student will read 60% of the words by sight with 80% accuracy.<sup>91</sup> In Written Expression, the PLOPs reported that Student had mastered letter formation and could correctly print all upper and lowercase letters with 80% accuracy, but was below grade A in organization of ideas. The baseline and second goal were unchanged from the previous IEP. The new first goal was, given a writing prompt to write about a familiar topic, a graphic organizer, and visuals, Student will dictate or write 1-2 sentences that give facts about the topic.<sup>92</sup>

In S/L, the PLOPs reported that data collected for the 2020 school year revealed strengths in voice, fluency articulation, and vocabulary. Student “consistently demonstrated the ability to answer simple questions about orally presented text. [S/he] demonstrates emerging ability to give 3 details for a story or list... [S/he] uses language to talk about recent events, to maintain a conversation, to ask for help, and to tell on [his/her] friends...” The two new baselines were (1) Student demonstrates emerging ability to expand [his/her] mean length utterance to 7 words or more, and (2) Student has the ability to answer What and Where questions with 80% accuracy. The two new goals were (1) Student will construct oral simple sentences for a given vocabulary word given sentence starter progressing to independent, and (2) in small group activity, Student will answer Why, When, How, and Where questions about materials presented in video or print form with 80% accuracy.<sup>93</sup> In Motor Skills, the PLOPs revealed that Student is able to imitate a left diagonal line with 100% accuracy, a right diagonal line with 100% accuracy, an ‘X’ with 66% accuracy, and a square with 100% accuracy. S/he can write his/her first name, but will initially omit a letter and correct it independently. The baselines were (1) able to imitate a left diagonal line with 100% accuracy, a right diagonal line with 100% accuracy, an ‘X’ with 66% accuracy, and a square with 100% accuracy, (2) able to write his/her first name, but will initially omit a letter and

<sup>89</sup> P11:131.

<sup>90</sup> *Id.* at 133-34.

<sup>91</sup> *Id.* at 134-35.

<sup>92</sup> *Id.* at 136.

<sup>93</sup> *Id.* at 137-38.

correct it independently, and (3) using adaptive paper, Student demonstrates good letter formation with 76% accuracy and is able to anchor letter on the writing line with 84% accuracy. The goals from the previous IEP were unchanged.<sup>94</sup> Student's specialized instruction was not changed from the previous IEP,<sup>95</sup> but ESY was not recommended.<sup>96</sup>

26. Petitioners and Student's grandmother, Witness C, attended the February 13, 2020 IEP team meeting. Throughout the 2019-2020 school year, Student was in Witness E's full-time, self-contained ELS classroom.<sup>97</sup> "The parent reports that [Student] is speaking clearer... Dad says that he feels that school is doing an excellent job. Grandmother says [Student's] speech and motor skills have gotten better... Speech is 100% better, it is an improvement: motor skills, when I see [redacted], I see different, I don't do homework."<sup>98</sup> The IEP team denied Petitioners' request for two additional hours of OT services per month, because "The Speech Therapist and the Occupational Therapist are not in agreement with an increase in hours because [Student] has made progress with the current prescription of services."<sup>99</sup>

27. On February 14, 2020, DCPS issued an IEP Progress Report for the first two reporting periods of the 2019-20 school year. In Mathematics, Reading and Written Expression, Student was Progressing on both goals, respectively. In S/L, s/he had Mastered the goals of (1) labeling pictures and (2) producing utterances of at six words to request, comment, or ask questions, and was Progressing on following two-step, related directions. In Motor Skills, Student was Progressing on the goals (1) imitating the last five pre-writing strokes and (2) writing the letters of his/her first and last name. The goal of demonstrating adequate readability of letter by copying 2-3 sentences was Just Introduced.<sup>100</sup>

28. Student's Dibel's reading comprehension scores remained "Well Below" grade level on testing at the middle of the 2019-20 school year.<sup>101</sup> iReady testing on January 31, 2020 showed Student performing at grade H levels in mathematics.<sup>102</sup>

29. Petitioner's counsel made general records requests on November 12, 2019,<sup>103</sup> December 12, 2019,<sup>104</sup> February 25, 2020,<sup>105</sup> and April 28, 2020.<sup>106</sup> On April 28, 2020, Witness H replied, indicating that "Many of these documents have been requested and provided as you have been representing the family since last school year."<sup>107</sup> On April 29, 2020, Petitioners' counsel sent DCPS a list of documents that had not yet been provided.<sup>108</sup>

<sup>94</sup> *Id.* at 138-39.

<sup>95</sup> *Id.* at 140

<sup>96</sup> *Id.* at 143.

<sup>97</sup> Testimony of Witness E and Witness H; P41: 330-31.

<sup>98</sup> P41:330, 335.

<sup>99</sup> P41:333.

<sup>100</sup> P19:182-87.

<sup>101</sup> P46:380.

<sup>102</sup> P47:385.

<sup>103</sup> P68:571.

<sup>104</sup> P69:576.

<sup>105</sup> P70:587-88.

<sup>106</sup> *Id.* at 587.

<sup>107</sup> *Id.* at 586.

<sup>108</sup> *Id.* at 585.

## CONCLUSIONS OF LAW

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

In special education due process hearings occurring pursuant to IDEA ([20 U.S.C. § 1415\(f\)](#) and [20 U.S.C. § 1439\(a\)\(1\)](#)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: 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. The burden of persuasion shall be met by a preponderance of the evidence.<sup>109</sup>

The second and third issues presented in this case involve the appropriateness of Student's IEP. As to these issues, Respondent bears the burden of persuasion.<sup>110</sup>

### **Whether DCPS failed to conduct timely triennial occupational therapy and comprehensive psychological reevaluations of Student by April 30, 2018.**

The regulations require schools to reevaluate disabled students every three years unless the parent and the local education agency ("LEA") agree that such is not necessary:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ [300.304](#) through [300.311](#)—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.<sup>111</sup>

<sup>109</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>110</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>111</sup> 34 C.F.R. §300.303. See *Wimbish v. District of Columbia*, 381 F.Supp.3d 22, 27 (D.D.C. 2019).

The courts treat violations of this provision as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it “(1) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.”<sup>112</sup>

Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid. On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE.<sup>113</sup>

In *Hellgate* and *Amanda J.*, school districts were found to have committed procedural violations by failing to evaluate students in all areas of suspected disability. This failure deprived the parents of meaningful participation in the IEP meetings.<sup>114</sup>

In *James v. District of Columbia*,<sup>115</sup> the district court stated, “If the IEP team determines that a reevaluation is not necessary because no additional data is needed to determine either the child's disability status or the child's educational needs, the local educational agency shall notify the child's parents of that determination and the reasons for it, as well as the parent's right to request a reevaluation anyway... The local educational agency must conduct a reevaluation if the child's parents request one.”<sup>116</sup>

Here, it is undisputed that Student underwent an Educational Assessment on June 16, 2015. DCPS conducted no psychological or educational assessment within three years of the this assessment. Section 300.303 of the regulations mandates triennial evaluations unless the parent concurs that such are not necessary. In this case, DCPS concedes that Petitioner/mother did not concur that reevaluations were unnecessary, and she gave written consent for reevaluations on November 16, 2017.<sup>117</sup> Thus, DCPS was compelled to complete the reevaluations by June 16, 2018.

The second part of the analysis is whether the failure to reevaluate Student impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process, or caused the deprivation of educational benefits. Here, the record reveals that Student’s father resisted having Student placed in a full-time, out of general education environment without the benefit of additional testing. At the IEP Annual Review meeting on February 28, 2019, DCPS team members recommended that Student be placed in the full-time, self-contained ELS classroom. While the IEP was drafted to reflect this recommendation, Student was not immediately placed in the ELS classroom due to resistance from Petitioner/father, who wanted additional testing before making this change.

<sup>112</sup> 20 U.S.C. §1415(f)(3)(E)(ii).

<sup>113</sup> *N.B. and C.B. v. Hellgate Elementary School District*, 541 F.3d 1202, 1208 (9th Cir. 2008), citing *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 890 (9th Cir. 2001).

<sup>114</sup> *Hellgate*, 541 F.3d at 1209.

<sup>115</sup> 194 F.Supp. 3d 131 (D.D.C. 2018).

<sup>116</sup> *Id.* at 138-39, citing 20 U.S.C. §§ 141(c)(4)(A) and (B).

<sup>117</sup> P42:342; Testimony of Witness H.

This position was reiterated by Attorney C at the MDT meeting on April 18, 2019. Student was reevaluated on May 23, 2019. The results of that psychoeducational evaluation revealed scores in the Very Low range in General Intellectual Ability, very low attentional control and short-term memory compared to his/her peers, scores in the Very Poor range in General Education and Mathematics, in the Poor range in Reading, Writing, and Spoken Language, and in the Very Poor range in Early Achievement Composite. Thereafter, Petitioners allowed Student to be placed in the ELS classroom for the 2019-20 school year.

I conclude that Petitioners have met their burden of persuasion that DCPS denied Student a FAPE when it failed to conduct a timely educational or comprehensive psychological evaluation of Petitioner by June 16, 2018, despite having received consent to evaluate from Petitioner/mother in November 2017. In February 2019, Petitioner/father objected to Student being placed in a highly restrictive environment in the ELS classroom without additional testing. Once Student was reevaluated, and his/her deficits were reaffirmed, Petitioner/father dropped his objections to the restrictive placement. The evidence could not be clearer that Petitioner/father was denied a meaningful opportunity to participate in the February 28, 2019 IEP Annual Review by DCPS' failure to conduct a triennial educational or comprehensive psychological evaluation prior to that meeting. Thus, Student's transition from ten hours of specialized education, to full-time specialized education was delayed, at the least, from February 28, 2019 until the beginning of the 2019-20 school year.

**Whether DCPS failed to provide Student an appropriate IEP for the 2017-18 school year by failing to prescribe extended year services (“ESY”).**

Petitioners contend that Student was denied a FAPE by DCPS' failure to prescribe ESY for the summer of 2018. Petitioners note that Witness H testified that ESY was not considered due to her misunderstanding that such services were unavailable to students in grade H. Petitioners argue that Student's low standardized testing scores and poor academic performance warranted ESY services to minimize regression over the summer.

In *Johnson v. District of Columbia*,<sup>118</sup> the court held that ESY is required only when regression will “substantially thwart the goal of meaningful progress:”

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...” Plaintiff's expert did suggest that the student has not made academic progress and would benefit from ESY... but that is not sufficient to establish that it is “necessary” to a FAPE... *MM*, 303 F 3d at 538 (finding that “the mere fact of likely regression is not a sufficient basis” to establish the need for ESY). Furthermore, “all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required

<sup>118</sup> 873 F. Supp.2d 382 (D.D.C. 2012).

under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’ ”<sup>119</sup>

As in *Johnson*, Petitioners here fail to point to any evidence in the record that would support the finding that ESY services were necessary. “Unfortunately, the record does not establish either that the student was making gains, or that gains would be significantly jeopardized (or even partially jeopardized) without the reinforcement that a summer program would provide. ESY services are not recommended in any of the IEPs, and there is no indication that the parent suggested ESY or disagreed with the recommendation of no ESY.”<sup>120</sup> In the last Progress Report of the 2017-18 school year, Student was progressing on his/her Adaptive goal, was progressing on all Cognitive goals, was progressing or had mastered all S/L goals, and was progressing on both Motor Skills goals. Nothing in the Progress Report,<sup>121</sup> the November 16, 2017 IEP,<sup>122</sup> nor the Meeting Notes that day (“ESY is not being recommended at this time”)<sup>123</sup> reflects any concern about the likelihood of regression.<sup>124</sup> Therefore, I conclude that DCPS has met its burden of persuasion that it did not deny Student a FAPE by failing to offer ESY during the summer of 2018.

**Whether DCPS failed to provide Student an appropriate IEP for the 2018-19 school year by failing to prescribe a full-time IEP, and repeated Student’s goals, baseline information, and present levels of performance (“PLOP”) from previous IEPs in the IEPs developed on September 27, 2018 and February 28, 2019.**

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>125</sup> The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>126</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...<sup>127</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance

<sup>119</sup> *Id.* at 386, citing *M.M. ex rel. D.M. v. School District of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002) and *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 68-69 (D.D.C. 2008)(adopting the standard from *M.M.*)

<sup>120</sup> 873 F.Supp.2d at 386.

<sup>121</sup> P14.

<sup>122</sup> P7.

<sup>123</sup> P38:312.

<sup>124</sup> Petitioners’ Disclosure lists Meeting Notes on April 11, 2018 at P39 at which 2018 ESY might have been discussed, but those notes were actually dated April 11, 2019.

<sup>125</sup> 458 U.S. 176, 187 (1982).

<sup>126</sup> *Id.* at 189-90, 200

<sup>127</sup> *Id.* at 200.

from grade to grade.”<sup>128</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>129</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.’”<sup>130</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>131</sup>

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>132</sup>

In my analysis of the first issue presented, I concluded that DCPS denied Student a FAPE by failing to conduct a triennial educational or comprehensive psychological evaluation of Student by June 16, 2018. This effectively denied Petitioner/father a meaningful opportunity to participate in the subsequent IEP Annual Review on February 28, 2019. DCPS’ witnesses concede that Petitioner required full-time services no later than the Annual Review on February 28, 2019, but they did not implement the full-time services prescribed in the February IEP due to objections from Student’s father to the more restrictive environment without additional testing. However, once Student was reevaluated in May of 2019, Petitioner/father apparently withdrew his opposition to full-time services, as Student was placed in the ELS classroom at the beginning of the following school year.

<sup>128</sup> *Id.* at 203-04.

<sup>129</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>130</sup> *Id.* at 997.

<sup>131</sup> *Id.* at 1000-01 (citations omitted).

<sup>132</sup> 137 S.Ct. at 1000-01.

I have already concluded that DCPS denied Student a FAPE by failing to conduct a triennial evaluation by June 2018, which contributed to Petitioner/father' rejection of a full-time placement in February 2019. The only remaining question is whether the denial of FAPE should extend to the September 17, 2018 IEP Annual Review meeting. There, the Adaptive PLOPs were largely the same as in the previous IEP and the baseline and goal were unchanged from the previous IEP. In Cognitive, the PLOPs were largely the same as in the previous IEP, and the goals were identical to those in the previous IEP. In S/L, the baselines and goals were identical to those in the previous IEP. And in Motor Skills, the baselines and goals were identical to those in the previous IEP. The fact that baselines and goals were repeated does not necessarily mean that the IEP was inappropriate. It may mean that the student was making progress, but simply had not yet met attainable goals. In fact, the 2017-18 year-end IEP Progress Report revealed that Student was progressing on or had mastered all of the his/her goals.<sup>133</sup> Nevertheless, the IEP team increased Student's specialized instruction from six to ten hours: from three to four hours per week of specialized instruction inside general education, and from three to six hours per week outside general education.

However, Teacher A's brutally frank comments at the February 28, 2019 IEP Annual Review meeting,<sup>134</sup> with which Teacher B concurred, reveal that Student was unable to keep up with his/her general education classmates from the beginning of the school year. Thus, I conclude that the failure to reevaluate Student prior to the development of the September 27, 2018 IEP constituted a denial of FAPE in that it deprived Petitioners of current data regarding Student's capabilities and performance that would have more fully informed their decision-making at that IEP meeting.

**Whether DCPS denied Petitioner access to Student's education records that were requested on January 21, 2020, February 11, 2020, February 19, 2020, February 25, 2020, April 27, 2020, April 28, 2020, and April 29, 2020.**

Petitioners offered no testimony that DCPS failed to provide records or that they were in any way prejudiced by any failure on the part of DCPS to provide records that had been requested. Therefore, I conclude that there has been no denial of FAPE as to this issue.

**RELIEF**

For relief, Petitioner requested (1) an order requiring DCPS to fund compensatory education services; (2) an order requiring DCPS to provide Petitioner access to Student's education records; and (3) attorneys' fees.

Petitioners submitted a compensatory education proposal,<sup>135</sup> as well as additional materials post-hearing to support their request for 360 hours of tutoring services, 36 hours of counseling, and 16 hours of independent mentoring services. Hearing Officers may not award compensatory education services based solely on the amount of services an LEA failed to provide.

<sup>133</sup> P12.

<sup>134</sup> P42:346.

<sup>135</sup> P78-714

[W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

More specifically, as the Fourth Circuit has explained, "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet "the essence of equity jurisdiction" is "to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it..." In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that "there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA..."<sup>136</sup>

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.<sup>137</sup>

The proposal and materials submitted by Petitioners do not address the central questions of (1) how much academic growth can be reasonably be expected of Student with an appropriate IEP, and (2) what kind and amount of services would put Student in the academic position s/he would have been in had s/he been placed in a full-time specialized instruction program on September 27, 2018. More recently, in *B.D. v. District of Columbia*,<sup>138</sup> the D.C. Circuit suggested that assessments addressed at determining the nature and amount of service to address the appropriate compensation for a specific student could ameliorate the fact-specific requirement. "Nothing in the Hearing Officer's Decision required updating or supplementing the compensatory education award upon completion of the new

<sup>136</sup> *Reid v. District of Columbia*, 401 F.3d 516, 523-24, (D.C. Cir. 2005), citations omitted.

<sup>137</sup> *Id.*, 401 F.3d at 524.

<sup>138</sup> 817 F.3d 792 (D.C. Cir. 2016).

assessments.”<sup>139</sup> To that end, I will order a limited amount of compensatory education services as well as an assessment funded by DCPS to determine the nature and amount of additional services necessary to compensate Student for the denial of FAPE found herein.

### ORDER

Upon consideration of the *Complaint*, DCPS’ *Response*, the exhibits from the parties’ disclosures that were admitted into evidence, the testimony presented during the hearing, and post-hearing submissions by the parties’ counsel, it is hereby

**ORDERED**, that

- (1) DCPS shall fund a total of 100 hours of independent tutoring services for Student in Reading, Mathematics, and Written Expression, with no restrictions as to the time of day or deadlines for the completion of such services.
- (2) DCPS shall fund an independent evaluation to determine (1) how much academic growth can be reasonably be expected of Student with an appropriate IEP, and (2) what kind and amount of services would put Student in the academic position s/he would have been in had s/he been placed in a full-time specialized instruction program on September 27, 2018.
- (3) Within thirty (30) days of receipt of the independent evaluation, DCPS shall convene an Multidisciplinary Team meeting to review the evaluation and to revise the IEP as necessary, including a determination of an appropriate amount compensatory education services for the lack of full-time specialized instruction for Student for the 2018-19 school.
- (4) All other requests for relief are denied.

### APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

  
Terry Michael Banks  
Hearing Officer

Date: August 3, 2020

<sup>139</sup> *Id.* at 799.

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