

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

FATHER and MOTHER,
on behalf of STUDENT,¹

Date Issued: August 18, 2020

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0117

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: August 5 and 6, 2020

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In their due process complaint, Petitioners allege that Student has been denied a free appropriate public education by the failure of Respondent District of Columbia Public Schools (DCPS) to find Student eligible for special education beginning December 2019 and by initially refusing to fund in independent Assistive Technology assessment of Student.

Petitioners’ Due Process Complaint, filed on June 15, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on June 16, 2020. On June

¹ Personal identification information is provided in Appendix A.

26, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On June 29, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this case is due by August 29, 2020.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on August 5 and 6, 2020. Mother appeared on line for the hearing and was represented by PETITIONERS' COUNSEL, PETITIONERS' CO-COUNSEL 1, and PETITIONERS' CO-COUNSEL 2. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL. Several law student interns, associated with Petitioners' attorneys, audited the hearing.

Counsel for the parties made opening statements. Petitioners called as witnesses Mother and EDUCATIONAL ADVOCATE. DCPS called as witnesses REGULAR EDUCATION TEACHER, SOCIAL WORKER, SCHOOL PSYCHOLOGIST 2, and LEA REPRESENTATIVE. Petitioners' Exhibits P-1 through P-25 were admitted into evidence without objection. Exhibit P-26 was admitted into evidence, including PDF pages 223 through 229 admitted over DCPS' objections. DCPS' objections to Exhibits P-

27 through P-34, audio recordings offered by Petitioner, were sustained.² DCPS' Exhibits R-8 through R-19, R-25 through R-29, R-31 through R-36, R-40 through R-44, R-47 through R-59, R-68 through R-101, R-102, R-104 through R-107, R-120 and R-124 were all admitted into evidence without objection.

At the conclusion of Petitioners' case-in-chief, DCPS made a motion to strike, which in part (eligibility) I denied and in part (AT evaluation), I took under advisement.

After the taking of the evidence, the parties were granted leave until August 14, 2020 to submit written closing argument. Counsel for both parties timely filed written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as clarified in the July 3, 2020 Revised Prehearing Order, are:

- a. Whether DCPS denied Student a free appropriate public education (FAPE) by failing to fund an Independent Educational Evaluation (IEE) assistive technology assessment after parents' requests in November and December 2019;
- b. Whether DCPS denied Student a FAPE by failure to use the appropriate standard when determining Student's eligibility for special education services on December 12, 2019 and May 20, 2020; by failure to determine Student eligible

² Over DCPS' objection, I granted leave to Petitioners to submit a transcript of specified excerpts from the audio recordings, as rebuttal evidence, with their closing memorandum.

for special education on December 12, 2019 and by failure to determine Student eligible for special education on May 20, 2020.

For relief Petitioners request that the hearing officer order DCPS to fund an IEE Assistive Technology evaluation of Student to be administered by an evaluator chosen by the parents; order DCPS to convene a new eligibility meeting where DCPS will determine Student eligible for special education services or, in the alternative, convene a new eligibility meeting where DCPS will use the appropriate eligibility standard to determine Student's eligibility for special education services; and that Student be awarded appropriate compensatory education for the denials of FAPE alleged in the complaint or that the issue of compensatory education be reserved to be determined after the additional evaluations are completed.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument and legal memoranda of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia. During the 2019-2020 school year, until schools were closed due to the Coronavirus emergency, Student attended CITY SCHOOL 2 where Student was in the GRADE. Student was determined not eligible for special education and related services at an eligibility meeting at CITY SCHOOL 1 on June 3, 2019 and at meetings at City School 2 on or about September 26, 2019, December 16, 2019 and June 3, 2019. Exhibits R-10, R-12,

R-16, R-33 through R-35.

2. Student has previously been determined eligible for special education by DCPS under the Developmental Delay classification when Student was in kindergarten. Student was reevaluated and exited from special education in 2015 when Student was in EXIT GRADE. Exhibit R-31.

3. On March 15, 2019, Student's pediatrician wrote City School 1 that Student met criteria for Attention Deficit Disorder (ADD), primarily inattentive type. Exhibit P-1.

4. On May 14, 2019, Student's psychiatrist issued a "To whom it may concern" statement that Student was currently being treated for Attention Deficit - Hyperactivity Disorder (ADHD) and High Functioning Autism Spectrum Disorder. Exhibit P-4.

5. On May 3, 2019, City School 1 developed a Section 504 Plan for Student. (Section 504 of the Rehabilitation Act of 1973). The 504 Plan, as updated in June 2019, stated that Student had trouble sustaining attention for prolonged time intervals, occasionally rushing through tasks and forgetting to submit assignments, trouble consistently regulating emotions, responses and reactions; had some visual processing weaknesses and experienced migraines. The 504 Plan provided for accommodations and strategies in school, including, *inter alia*, work breaks, use of visual timer, preferred seating, check-ins to outline multiple steps with the academic tasks, teacher check-ins, water breaks, extra time for writing assignments, fidgets and access to chewing gum,

prompts to slow down and pace self while working on tests, redirection to cue Student to return to task, end of day checklist and check in for homework materials, teacher reminders for submission of homework assignments, use of designated break space when Student displayed frustration, highlighting and underlining most important information on page, use of grid paper for math, slow pace of instruction when using visual models and allow opportunities for repetition, access to noise-cancelling headphones, and visual aides to outline necessary steps embedded in directions.

Exhibit P-3.

6. At the request of the parents, Student was evaluated for special education eligibility in spring 2019. Mother reported then that Student had been diagnosed with Attention Deficit - Hyperactivity Disorder (ADHD). SCHOOL PSYCHOLOGIST 1 conducted a comprehensive psychological evaluation. She reported that Student did not appear to fit the IDEA eligibility criteria for a Specific Learning Disability (SLD), Autism Spectrum Disorder (ASD) or Other Health Impairment - ADHD (OHI-ADHD). Exhibit R-31. On June 3, 2019, the eligibility team at City School 1 determined that Student was not eligible for special education. Mother disagreed with this determination. Exhibit R-40.

7. At the end of the June 3, 2019 meeting, Mother stated that she was requesting an Independent Educational Evaluation (IEE) of Student. Exhibit R-40. On June 12, 2019, DCPS issued funding authorization for the parents to obtain an IEE

comprehensive psychological evaluation and occupational therapy evaluation of Student. Exhibit R-42.

8. An IEE neuropsychological evaluation of Student was conducted in July 2019. In the July 31, 2019 evaluation report, LICENSED PSYCHOLOGIST reported that Student has overall age appropriate cognitive functioning skills; that Student's core language skills are age appropriate; that Student demonstrated solid learning and memory scores; that Student's reading skills are solid and Student's mathematics scores were variable. Licensed Psychologist reported that Student had areas of vulnerability in the neuropsychological profile that placed Student at risk in the future and weaknesses with regards to social functioning, attention and executive functioning skills, and written expression. Licensed Psychologist diagnosed Student with ASD, ADHD-Combined Presentation, and a Specific Learning Disorder with impairment in Written Expression. Licensed Psychologist recommended that Student receive an Individualized Education Program (IEP) under the Autism classification. She also recommended, *inter alia*, that Student receive Occupational Therapy (OT) services and an AT consultation. Exhibit P-12.

9. Student matriculated to City School 2 for the 2019-2020 school year. On September 9, 2019, City School 2 updated Student's Section 504 Plan. The updated plan specified ADHD as Student's Section 504 disability. The plan identified as Specific Challenges to be addressed, Caring for Oneself, Working and Concentrating. The plan specified as accommodations for Student, Actively engage student in the sharing,

participation, and discussion process early on; Address concerning behaviors and reactions privately; Assign leadership tasks; Designated break space when student displays frustration; Timely home-school communication about atypical behavior; Flash pass for Student to use when experiencing anxiety and no more than 5 minutes with a staff member to calm self and refocus; Access to a water bottle; Ability to snack in class; Permission to wear hat/sunglasses in school; Ability to go to school nurse as needed for Gatorade/medication; Unrestricted use of bathroom; Allow to make up missed work without penalty; Highlighting of most important information on page; Use of graph paper in math; Small group instruction in math class when appropriate or as needed; Slow pace of instruction and allow opportunities for repetition when using visual models; Built in work breaks; Use of visual timer; Preferential seating; Checklists to outline multiple steps within academic tasks; Extra time for writing assignments; Fidgets, access to gum; Advance parent communication about tests and projects; Chunking larger assignments with a draft/outline prior to final submission and communication of all dates for each part; Prompts to slow down and pace while working and taking tests; Redirection to cue student to return to task; End of day checklist and teacher/student check in for homework materials; Teacher reminders for homework submission; Weekly organization with staff to clean out binder and locker and go over tools to keep Student organized; Access to noise cancelling headphones for tests; Extra time for writing components of tests; Small group testing; Frequent breaks for testing; Pull-out social skills group to learn and practice pro-social skills to improve ability to

develop healthy peer relationships; and Meet with staff member to learn and practice three coping strategies to increase Student's ability to manage stressful interpersonal interactions with peers and adults. Exhibit P-13.

10. On September 25, 2020, an eligibility team was convened at City School 2 to review the July 31, 2029 IEE neuropsychological report on Student and reconsider Student's eligibility for special education. Mother attended the meeting. The school special educator shared that Student was currently passing all classes and was in a math class above grade level; that Student had A's in all classes; that Student was at a 1260 Lexile reading level, well above grade level; that in class, Student did not demonstrate challenges with decoding words, volunteered to verbally answer comprehension questions and gave detail that fully answer the questions. The school social worker observed that in Math and Geography, Student did blurt, rather waiting for a pause when speaking with peers. The social worker observed that Student was talkative and wanted to engage and was also responsive to redirection. The social worker agreed that Student needed support with eye contact. The social worker shared that inattentiveness, social skills, and anxiety were assessed by Student's teachers and Student was rated in the inattentive range by almost all teachers; that no teachers observe anxiety in the classroom, and in the classroom Student was in the target range in social skills. The social worker shared that despite the ratings, the strategies Student was using to maintain focus were working, as teachers reported that Student's attention was focused in class. No eligibility team member disputed that Student presented as a student on

the Autism Spectrum according to the data in the IEE. The school members on the team did not see an impact of Student's disability on Student's ability to perform academically. The team acknowledged that Student continued to require supports with slowing down, executive functions, and social skills. The school members of the team decided that data that did not indicate academic impact and a need for specialized instruction for Student at the time. Mother disagreed with the team's decision. Exhibit R-12.

11. On or about October 28, 2019, a DCPS Assistive Technology (AT) Specialist developed an Assistive Technology Collaboration Summary and Implementation Plan for Student. Student's Section 504 team had sought an assistive technology collaboration to find supports to help Student complete more written output. Student was reported to have difficulty in the areas of typing and fine motor. Student presented with poor and slow handwriting, making it difficult for Student to complete assignments. Exhibit P-17.

12. Educational Consultant was engaged by the parents in September 2019. She conducted classroom observations of Student at City School 2 on October 4, 2019 and November 8, 2019. Exhibit P-19. On November 9, 2019, by email to LEA Representative, Educational Consultant requested an "IEP/eligibility meeting" for Student. She wrote that she felt very strongly that Student met IDEA eligibility criteria under Multiple Disabilities as a child with both ADHD and ASD. Exhibit R-56.

13. On December 12, 2019, City School 2 convened an eligibility meeting for

Student. Mother and Educational Consultant attended the meeting. At the beginning of the meeting, Mother requested funding for an IEE AT evaluation of Student. Exhibit R-71. At the time, DCPS did not approve this IEE request. Testimony of LEA Representative.

14. At the December 12, 2019 meeting, for the eligibility decision, the team considered existing data, teacher input, parent input, observations, Educational Consultant's observational report and other information. Student's ELA teacher stated that in class, Student participates, asks questions when Student does not understand; that Student did receive organizers (given to all students) to organize/keep track of characters in the text; that Student annotates text, and volunteers to read in class. She concluded that Student did not require additional supports to access the curriculum in ELA. The math teacher stated that Student was doing better in the current advisory and was more open to getting help/assistance; that Student used to shut down, but not in the current advisory; that Student had been given a class role as an attention getting signal, and this has been helpful to participation; that Student had been keeping up with course work; that overall, there had been progress and Student behaviorally progressed and that Student still called out and spoke Student's mind during teaching, but was getting work done and was not disruptive when working with partners. The science teacher stated that Student did not follow expectation to show work and details were not present on paper, so Student benefits from prompts to add extra details; that Student had been doing better at the beginning of the school year, but was currently more

reactive to students who are distracting in class; that Student was good with redirection and responded well to being asked to help other students; that Student's behaviors were typical behaviors; that Student was not rude or disrespectful and that Student did not require specialized instruction. The geography teacher stated that Student was successfully accessing content, wanted to learn, was excited to participate, answered questions in writing and verbally was engaged. The school members of the team agreed as to the presence of ADHD and ASD in Student. However they did not agree there was an adverse effect on Student's educational performance and they did not observe that Student's challenges with executive functions were impacting Student's ability to access the general education curriculum. Over Mother and Educational Consultant's dissent, the team concluded that Student was not eligible for special education due to Student's disability's not having an adverse impact on Student's educational performance.

Exhibits R-71, P-21.

15. At the time of the December 12, 2019 eligibility meeting, according to the teachers, Student needed support in the classroom with staying focused and staying engaged with academic tasks. Student tended to rush through work, so sometimes Student needed prompting to slow down or go back to add more detail to written assignments. Sometimes, Student needed to have breaks. Testimony of School Psychologist 2.

16. At a parent-teacher conference in January 2020, Student's math teacher told Mother that Student was not able to grasp multi-step problems or equations. The

math teacher said that Student was receiving 1:1 assistance two times a week in 30 minute sessions. Testimony of Mother.

17. Students grades for Term 3, January through March 2020, were all A's and B's except for a D+ in Spanish Language. Exhibit R-109. DCPS schools have been closed, with some distance learning provided, since March 16, 2020 due to the Coronavirus emergency. Hearing Officer Notice.

18. During the distance learning period at the end of the 2019-2020 school year, Team GRIT was formed for each service area. SPECIAL EDUCATION TEACHER, as a member of the distance learning team, worked with the ELA teacher to provide on-line support to all students who needed it. Student was invited to participate because Student was not submitting or completing some on-line work. As a Section 504 Plan accommodation, Special Education Teacher would use a designated time for Student to check in to see if Student had turned in work. Testimony of LEA Representative.

19. On May 26, 2020, DCPS issue a Prior Written Notice to the parents providing notice that the IEP team [*sic*] had reviewed existing data on Student and that the teachers and related service providers did not agree with the parents that there was a need for specialized instruction for Student. The Prior Written Notice reported that, according to teachers, data had not changed since the previous eligibility meeting for Student in December 2019. DCPS refused to move forward with a new eligibility evaluation of Student after analyzing existing data. The parents disagreed with this decision. Exhibits R-77 through R-79.

20. On June 29, 2020, DCPS issued funding authorization for the parents to obtain an IEE AT evaluation of Student. Exhibit R-84.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6). The Petitioners hold the burden of persuasion in this case.

Analysis

I.

Did DCPS deny Student a FAPE by failure to use the appropriate standard when determining Student's eligibility for special education services on December 12, 2019 and May 20, 2020; by failure to determine Student

eligible for special education on December 12, 2019 and by failure to determine Student eligible for special education on May 20, 2020?

The primary issue in this case is whether DCPS erred in not finding Student, who has Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder (ADHD), eligible for special education at an eligibility meeting at City School 2 on December 12, 2019.

To be eligible for special education services, a student must be evaluated as having a specified disability, including, *inter alia*, autism, an other health impairment or multiple disabilities, and who, by reason thereof, needs special education and related services. *See* 34 C.F.R. § 300.8; *Capital City Public Charter School v. Gambale*, 27 F.Supp.3d 121, 124 (D.D.C.2014). Determination of eligibility for special education should follow a two-step approach. The multidisciplinary team (MDT) first determines the existence of an IDEA disorder and then whether the student needs special education and related services by reason of that disability. *See Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. CV 16-10724-FDS, 2018 WL 563147, at *2 (D. Mass. Jan. 25, 2018), *appeal dismissed sub nom. Lincoln Sudbury Reg'l Sch. Dist. v. Mr. & Mrs. W.*, No. 18-1524, 2018 WL 6584118 (1st Cir. Aug. 8, 2018).

In a May 14, 2019 written statement provided to DCPS, Student's psychiatrist stated that Student was currently being treated for ADHD and High Functioning Autism Spectrum Disorder. Autism is an IDEA disability. *See* 34 C.F.R. § 300.8(c)(1). ADHD may also qualify a student as Other Health Impaired (OHI). *See* 34 C.F.R. §

300.8(c)(9).³ DCPS does not dispute Student’s mental health diagnoses, but at the December 12, 2019 eligibility meeting at City School 2, the school representatives determined that Student was not eligible for special education services because, they concluded that Student’s autism and ADHD disorders did not adversely affect Student’s educational performance.

Student matriculated to City School 2 for the 2019-2020 school year. In September 2019, City School 2 developed an updated Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) for Student. The plan identified ADHD as Student’s Section 504 disability, listed Caring for Oneself, Working, and Concentrating as specific challenges to be addressed, and prescribed numerous accommodations and strategies to address those challenges.

According to the testimony of General Education Teacher, School Psychologist 2 and LEA Representative, by the time of the December 12, 2019 eligibility meeting, the 504 Plan was working “just fine” (testimony of General Education Teacher) for Student and Student was able to access the general education curriculum. The eligibility team decided that Student was not demonstrating an academic deficit and did not need

³ Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as . . . attention deficit hyperactivity disorder and
- (ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9).

additional specialized instruction services under the IDEA. The eligibility analysis used by the team was flawed.

If a child has a qualifying IDEA disability and needs special education services as a result, the LEA must find the child eligible under the IDEA. In the Act, Congress defined “special education” to mean,

[S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1401(29). “Specially designed instruction” has been further defined in the federal IDEA regulations to mean,

[A]dapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The accommodations in Student’s September 9, 2019 updated Section 504 Plan, which DCPS’ witnesses testified enabled Student to access the curriculum, included, *inter alia*,

- Teachers’ actively engaging student in the sharing, participation, and

- discussion process early on;
- Designated break space when student displays frustration;
- Flash pass for Student to use when experiencing anxiety and no more than 5 minutes with a staff member to calm Student and refocus;
- Allowing Student to make up missed work without penalty;
- Highlighting of most important information on page;
- Use of graph paper in math;
- Small group instruction in math class when appropriate or as needed;
- Slow pace of instruction and opportunities for repetition when using visual models;
- Built in work breaks;
- Use of visual timer;
- Preferential seating;
- Checklists to outline multiple steps within academic tasks;
- Extra time for writing assignments;
- Chunking larger assignments with a draft/outline prior to final submission and communication of all dates for each part;
- Prompting of Student to slow down and pace while working and taking tests;
- Redirection to cue student to return to task;
- End of day checklist and teacher/student check in for homework materials;
- Teacher reminders for homework submission;
- Extra time for writing components of tests; Small group testing and
- Frequent breaks for testing.

By January 2020, Student was also receiving 1:1 assistance two times a week in math.

Many of Student's 504 Plan accommodations, notably small group instruction and 1:1 assistance in math, extra time for writing assignments and chunking of larger assignments, were adaptations of the content, methodology, or delivery of instruction to address Student's unique needs that result from Student's ASD and ADHD disabilities. These accommodations were in fact examples of special education/specially designed instruction as defined by the IDEA. *See* 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(b)(3),

supra.

That is, by the time of the December 12, 2019 eligibility meeting, City School 2 was already providing Student Section 504 accommodations which also met the IDEA's definition of special education to meet Student's unique needs resulting from Student's ADHD (and presumably ASD) disabilities. Even if the same services could be provided under a Section 504 Plan, an LEA does not have discretion to opt to provide those services through a 504 Plan instead of under an IDEA IEP. As the Eighth Circuit Court of Appeals explained in *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996),

Although an individual who is eligible for services under IDEA may also qualify for assistance under the Rehabilitation Act of 1973, the school district must comply with both statutes. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in a variety of programs and activities receiving federal aid. Both § 504 and IDEA have been interpreted as requiring states to provide a free appropriate public education to qualified handicapped persons, but only IDEA requires development of an IEPs and specifically provides for transition services to assist students prepare for a post-high school environment. Under the statutory scheme, the school district is not free to choose which statute it prefers . . . If a student is eligible under IDEA, appropriate services, including transition benefits, shall be provided. That some of those services may also be mandated by the Rehabilitation Act does not mean they are not "specially designed instruction" under IDEA.

Yankton at 1376 (citations to former code sections omitted). *See, also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 35 (D.D.C. 2008) (Evidence that student does well in a highly structured environment, with extremely small classes, a high level of direction and supervision, access to crisis counseling, ongoing psychological services, and

medication therapy support conclusion that without such supports, student's disabilities would certainly adversely impact her educational performance.) *Compare D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1142 (C.D. Cal. 2010) (Where student's needs were being met through non-special education services – modifications like extra time between classes and to turn in work, an extra set of textbooks, and permission to sit on a chair rather than the floor – student is not eligible for IDEA.)

That Student was able to perform well in the general education setting with the accommodations provided in City School 2's Section 504 Plan does not mean that Student does not have an IDEA disability or that Student's disabilities do not adversely impact Student's educational performance. To the contrary, the reported success of the 504 Plan shows that Student's disabilities did adversely impact Student's educational performance such that Student needed special education.

I conclude that Petitioners have shown by a preponderance of the evidence that at the time of the December 12, 2019 eligibility meeting, Student had IDEA disabilities and that Student needed special education by reason of those disabilities.⁴ Therefore, City School 2's December 12, 2019 ineligibility determination was not proper under the

⁴ The hearing officer makes no determination of what disability classification is most appropriate for Student. The IDEA does not require that a child's disability classification be identified in the IEP, so long as the child's special education and related services needs are met. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her)

IDEA. This was a denial of FAPE. Because I find that Student should have been found eligible at the December 12, 2019 eligibility meeting, it is unnecessary to address whether DCPS denied Student a FAPE by failure to determine Student eligible for special education on May 20, 2020.

II.

Did DCPS deny Student a FAPE by failing to fund an Independent Educational Evaluation (IEE) assistive technology assessment after the parents' requests in November and December 2019?

At the December 12, 2019 eligibility team meeting, Mother requested DCPS to fund an Independent Educational Evaluation (IEE) Assistive Technology (AT) assessment of Student. DCPS did not approve this IEE request until after the due process complaint was filed in this case. Petitioners contend that DCPS' initially not funding the independent AT assessment was a denial of FAPE. I disagree.

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. An independent evaluation is one "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). The limited right arises only after the agency has procured an evaluation with which the parent "disagrees." 34 C.F.R. § 300.502(b). The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which

the agency must, “without unnecessary delay,” either provide – or file a due process complaint to establish that its evaluation is “appropriate.” *See* 34 C.F.R. § 300.502(b)(2).

As explained in *F.C. v. Montgomery Cty. Pub. Sch.*, No. CV TDC-14-2562, 2016 WL 3570604 (D. Md. June 27, 2016), in order “to trigger the right to an IEE at public expense” under § 300.502(b), there must be a school division “evaluation” with which the parents disagree. *See F.C.*, 2016 WL 3570604, at 5. For purposes of the IEE right, the term “evaluation,” as used in 34 C.F.R. § 300.502(b) means,

[P]rocedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” *See* 34 C.F.R. § 300.15. Sections 300.304 and 300.305 set forth the required procedures for conducting such an evaluation. Evaluators must (1) use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent”; (2) use multiple measures and assessments; (3) use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”; (4) “[r]eview existing evaluation data on the child,” including information from parents, classroom or state assessments of the child, and teacher observations; and (5) identify whether and what additional data needs to be obtained and reviewed.

F.C., *supra*, at 3. *See, also, Jones-Herrion v. District of Columbia*, No. CV 18-2828 (RMC), 2019 WL 5086693 (D.D.C. Oct. 10, 2019) (“[A]n ‘evaluation’ or ‘re-evaluation’ is the process during which [diagnostic] assessments occur. Thus, the [IDEA] envisions that an evaluation or re-evaluation will make use of multiple assessments to fully evaluate the child’s needs. Evaluations must take into account a holistic perspective of

the child's needs. *Id.* at 3. (Citations and internal quotations omitted.)

Student's last IDEA evaluation, conducted under the procedures described in 34 C.F.R. §§ 300.304 through 300.311, was done by DCPS in the spring of 2019 when Student attended City School 1. At the end of June 3, 2019 City School 1 eligibility meeting, Mother exercised her right to obtain an IEE at public expense. On June 12, 2019, DCPS issued funding authorization for the parents to obtain IEE psychological and occupational therapy evaluations of Student. The parents obtained the IEE neuropsychological evaluation in July 2019. (It does not appear that the parents obtained an IEE occupational therapy evaluation of Student before the due process hearing.)

On or about October 28, 2019, a DCPS AT Specialist developed an Assistive Technology Collaboration Summary and Implementation Plan for Student. Student's Section 504 team had sought the AT collaboration to find supports to help Student complete more written output. This was an assessment conducted in the context of Student's 504 Plan. It was not an IDEA evaluation which could trigger the right to an IEE at public expense under 34 C.F.R. § 300.502(b).

In sum, DCPS did conduct an IDEA evaluation of Student in spring 2019. Mother expressed her disagreement with the DCPS evaluation and requested funding for an independent reevaluation at public expense, which DCPS honored on June 12, 2019. The parents were not entitled to another IEE reevaluation in December 2019 because DCPS has not conducted another IDEA evaluation of Student. Petitioners have not met

their burden of persuasion on this claim.

In light of my determination on this issue, DCPS' motion to strike Petitioners' Independent Educational Evaluation claim is denied as moot.

Remedy

For relief in this case Petitioners have requested, *inter alia*, that the hearing officer order DCPS to convene a new eligibility meeting where DCPS will determine Student eligible for special education services or, in the alternative, convene a new eligibility meeting where DCPS will use the appropriate eligibility standard to determine Student's eligibility for special education services; and that Student be awarded appropriate compensatory education for the denials of FAPE alleged in the complaint or that the issue of compensatory education be reserved to be determined after the additional evaluations are completed.

As the U.S. District Court explained in *B.B. ex rel. Bruner v. Perry Twp. Sch. Corp.*, No. 1:07CV0323DFH-JMS, 2008 WL 2745094 (S.D. Ind. July 11, 2008), "Neither the [IDEA] nor the implementing regulations discuss the types of relief a hearing officer can award. The [IDEA] states that a court can grant 'such relief as the court determines is appropriate.' 20 U.S.C. § 1415(i)(2)(C)(iii). Other courts have found that a hearing officer's ability to award relief is coextensive with that of a court's. *See, e.g., Cocores v. Portsmouth, N.H., School District*, 779 F.Supp. 203, 205–06 (D.N.H. 1991) (finding that hearing officer has authority to award compensatory education); *S-1 v. Spangler*, 650 F.Supp. 1427, 1431–33 (M.D.N.C.1986) (finding that hearing officers have the authority

to order LEA to reimburse parents), *vacated as moot*, 832 F.2d 294 (4th Cir.1987); *see also Ivan P. v. Westport Board of Education*, 865 F.Supp. 74, 80 (D.Conn.1994) (discussing June 17, 1994 Policy Letter issued by Department of Education, Office of Special Education and Rehabilitation Services stating that hearing officers have the same authority to award the same forms of relief that courts have).” *B.B.*, 2008 WL 2745094 at 12.

In *N.G.*, *supra*, U.S. District Judge Emmet Sullivan exercised the Court’s authority to decide that the student’s disabilities adversely impacted her educational performance such that she needed special education. *Id.*, n. 11. Here, weighing the hearing evidence, I exercise the same authority to determine that Student’s ASD and ADHD disabilities adversely affect Student’s educational performance and that Student is a “Child with a disability” within the meaning of 34 C.F.R. § 300.8(a). It is not necessary to order DCPS to convene a new eligibility meeting for that purpose.

Petitioners also request that Student be awarded appropriate compensatory education for the denials of FAPE alleged in the complaint or that the issue of compensatory education be reserved to be determined after additional evaluations are completed. “An award of compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial, and it accordingly 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.” *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1,

2019) (internal quotations and citations omitted.)

In this case, from the start of the 2019-2020 school year, Student was provided special education services in the form of Section 504 Plan accommodations. By the accounts of the City School 2 educators, with those accommodations, Student was able to access the curriculum and to make good educational progress in the general education setting. Since Student was already receiving special education type services under the 504 Plan, it is not evident from the hearing evidence that Student would now be in a different position, had Student been determined eligible for special education in December 2019 and been provided an appropriate IEP in place of, or in addition to, the 504 Plan. I will, therefore, grant Petitioners' alternative request to reserve the issue of compensatory education to be determined after Student's initial IEP is developed and any additional evaluations, if needed, are completed.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. The Hearing Officer declares that Student is a "Child with a disability" as defined by 34 C.F.R. § 300.8. DCPS shall promptly convene an IEP team, including the parents and their representatives, to develop Student's initial IEP. DCPS shall ensure that an appropriate initial IEP is developed for Student within 30 calendar days of the date of this decision. *See* 34 C.F.R. § 300.323(c)(1) (Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days.)
2. Petitioners' claim for compensatory education due to the failure of DCPS to determine Student eligible for special education in December 2019 shall be

reserved for subsequent resolution. DCPS shall ensure that the initial IEP team considers, *inter alia*, whether compensatory education is needed to provide the educational benefits that likely would have accrued had Student been determined eligible for special education in December 2019. The IEP team's decision on Student's need for compensatory education shall not be binding on the parents or DCPS; and

3. All other relief requested by the Petitioners herein is denied.

Date: August 18, 2020

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
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