

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
August 01, 2022

Confidential

Parent on behalf of Student,¹)	Case No. 2022-0090
)	
Petitioner)	Hearing Date: July 13, 14, and 22, 2022
)	
v.)	Conducted by Video Conference
)	
)	Date Issued: August 1, 2022
District of Columbia Public Schools,)	
)	Terry Michael Banks
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of a [REDACTED]-year-old student ("Student") attending School A. On May 13, 2022, Petitioners filed a Due Process Complaint alleging that the District of Columbia Public Schools ("DCPS") denied the student a free appropriate public education ("FAPE") by failing to conduct a timely and comprehensive triennial evaluation of Student, failing to provide appropriate Individual Education Programs ("IEP"), failed to allow the parent to participate in the development of an IEP, and failed to provide Petitioner access to Student's educational records. On May 24, 2022, DCPS filed *District of Columbia Public Schools' Response to Parent's Administrative due Process Complaint* ("Response"), denying that it had denied Student a FAPE in any way.

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

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

PROCEDURAL HISTORY

Petitioner filed her *Complaint* on May 13, 2022. On March 7, 2022, DCPS filed its response to the *Complaint* (“*Response*”) denying that it had denied Student a FAPE as follows:

1. At the time Student’s 2020-21 and 2021-22 IEPs were developed, they were reasonably calculated to enable Student to make progress. The IEP team relied on various sources of information in developing the IEPs including teacher observations, curriculum progress monitoring, and a variety of classroom-based assessment tools. Student was enrolled in School A’s Autism Program until the 2021-22 school year, in which BSS, S/L, and OT services are included in the program. In addition, previously prescribed BSS were terminated in 2017 due to Student’s improved behavior.
2. On or about May 1, 2020, DCPS completed Student’s triennial review. Student’s next triennial review is due in May 2023.
3. In December 2021, DCPS completed a psychological reevaluation of Student at Petitioner’s request. Additionally, DCPS authorized Petitioner to obtain an independent evaluation (“IEE”) for S/L that was reviewed by DCPS in December 2021. Student is not eligible for OT services; thus, there was no deadline for completing an OT evaluation. Student’s A/T needs are reviewed at each IEP meeting.
4. DCPS did not deny Petitioner the opportunity to participate in the April 20, 2021 IEP meeting. DCPS sent Petitioner an invitation to the meeting and she was contacted on the day of the meeting.
5. DCPS provided records to Petitioner on multiple occasions in response to her requests. DCPS was not aware of any unfulfilled requests as of the date the *Complaint* was filed.

The parties participated in a resolution meeting on June 8, 2022 that did not result in a settlement. A prehearing conference was conducted by video conference on June 9, 2022 and the *Prehearing Order* was issued that day.

The due process hearing was conducted on July 13, 14, and 22, 2022 by video conference. The hearing was open to the public. Petitioner filed disclosures on July 6, 2022 containing a witness list of six witnesses and documents P1- P103. DCPS filed no objections to the disclosures and Petitioner’s exhibits P1 – P103 were admitted into evidence. DCPS also filed disclosures on July 6, 2022 containing a witness list of eight witnesses and documents R-1 through R-64.-Petitioner filed objections later that day. During Respondent’s direct case, Respondent’s Exhibits R1-R64 were offered and admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, and Witness B.

Witness A was admitted as an expert in Special Education and Witness B was admitted as an expert in occupational therapy (“OT”) and assistive technology (“A/T”). Respondent presented as witnesses in chronological order Witness C, Witness D, Witness E, Witness F, and Witness G. Witness C was admitted as an expert in special education and Applied Behavior Analysis (“ABA”) Witness D was admitted as an expert in special education and ABA methodology. Witness E was admitted as an expert in speech and language pathology (“SLP”), and Witness G was admitted as an expert in OT. At the conclusion of Respondent’s direct case, Petitioner provided rebuttal testimony. At the conclusion of testimony, counsel for the parties provided oral closing arguments.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to conduct a timely and comprehensive triennial reevaluation of Student and/or by failing to reevaluate Student pursuant to Petitioner’s request and the IEP team’s agreement during the summer of 2021 to conduct a more comprehensive psychological evaluation and to conduct an occupational therapy (“OT”) evaluation, an assistive technology (“A/T”) evaluation, a comprehensive psychological evaluation, and a speech and language (“S/L”) evaluation.
2. Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on May 1, 2020, February 10, 2021, April 20, 2021, January 5, 2022, and March 29, 2022. Specifically, Petitioner alleges that the IEPs (a) were not based on comprehensive evaluations, (b) failed to include OT goals and services, (c) failed to include adaptive goals, (d), failed to include S/L services or behavioral support services (“BSS”), or specify the frequency and duration of those services, and (5) failed to consider A/T for the student.
3. Whether DCPS denied Student a FAPE by failing to provide Petitioner an opportunity to participate in the development of the April 20, 2021 IEP.
4. Whether DCPS denied Student a FAPE by failing to provide Petitioner full access to Student’s educational records. Specifically, Petitioner alleges that DCPS has not provided a 2018 OT evaluation.

FINDINGS OF FACT

1. Student is X years-old and attended School A in grade G during the 2021-22 school year.²

² Petitioner’s Exhibits (“P:”) 16 at Bates page 227. The exhibit number is followed by the exhibit page number and the electronic page number in the disclosure in parentheses, i.e., P:16 (227).

2. Student was diagnosed with Autism Spectrum Disorder (“ASD”) in February 2014.³

3. On October 27, 2015, when Student attended School B, DCPS completed an Occupational Therapy Assessment Report. At that time, s/he was classified as a student with Developmental Delay, and received 26 hours per week of specialized instruction, four hours per month of S/L services, two hours per month of OT services, and 30 minutes per month of consultative services for OT and behavioral support services (“BSS”).⁴ On the Bruininks-Oseretsky Test of Motor Proficiency (“BOT-2”), Student was Average in Upper Limb Coordination and Fine Motor Integration, Below Average in Fine Motor Precision, Fine Motor Control, and Manual Coordination, and Well Below Average in Manual Dexterity.⁵ Student’s sensory processing skills were evaluated by the Sensory Processing Measure. Her/his scores were “Typical” for Visual, Hearing, Body Awareness, Balance and Motion, and Overall, “Some Problems” in Social Participation and Touch, and “Definite Dysfunction” in Planning and Ideas, which measures the ability to conceptualize, plan, and organize movements to complete novel tasks.⁶ Examiner A found Student’s strengths to be emerging independence in self-care skills (particularly feeding and toileting), bilateral coordination skills, emerging pre-writing skills, positive response to structure, object manipulation (throwing, catching), and global sensory processing. His/her areas of need were completing age-appropriate visual motor tasks (cutting paper, writing tasks), bilateral hand skills, and decreased body awareness and motor planning skills to complete multi-step tasks and move through space with a purpose.⁷

Difficulty in the area of fine motor and visual motor skills will impact [Student] in the areas of manipulating classroom materials, self-care skills, writing and scissors skills. Difficulty in the area of motor planning and problem solving may present difficulty in independence for completing classroom routines and academic activities.⁸

4. As a result of a settlement of a due process complaint,⁹ Student was placed at School A in February 2017.¹⁰

5. On April 12, 2017, when Student was in grade E at School A, DCPS completed a Comprehensive Psychological Reevaluation. Examiner B reported that Student was diagnosed with being on the autism spectrum in 2014 and was placed at School A in February 2017 as the result of a settlement agreement with DCPS. Student was in School A’s Autism Program, which used a consultation model to embed related services into each classroom rather than to provide direct related services. Since her/his arrival, Student had presented with disruptive behavior, elopement, physical aggression towards peers and adults, uncontrollable crying, and noncompliance that required physical intervention.¹¹ Student’s classroom included seven students and seven staff members.¹² On the first

³ P28:1 (322).

⁴ P26:1 (302).

⁵ *Id.* at 4-5 (305-6).

⁶ *Id.* at 5-6 (306-7).

⁷ *Id.* at 7 (308).

⁸ *Id.*

⁹ Respondent’s Exhibits (“R:”) 55 at Bates page 356. The exhibit number is followed by the electronic page number in the disclosure in parentheses, i.e., R55 (356).

¹⁰ P28:1 (322).

¹¹ P27:1-2 (311-12).

¹² *Id.* at 4 (314).

day of testing, Student was unable to complete the Reynolds Intellectual Assessment Scales (“RIAS-2”) despite “genuine effort.” On the second day, s/he was able to complete testing on the Comprehensive Test of Nonverbal Intelligence (“CTONI”). Student scored in the Below Average range in Pictorial Scale (84), and in the Poor range in the Geometric Scale (78) and Full Scale (79). “In sum, [Student’s] current intellectual functioning is below age level and continues to suggest and reflect [her/his] need for intensive academic support.”¹³ On the Woodcock-Johnson Tests of Achievement (“WJ-IV”), Student scored in the Low range in Letter-Word Identification (72), Calculation (74) and Writing Samples (75), and Very Low in Spelling (66).

The Gilliam Autism Rating Scale (“GARS-3”) was administered to confirm the presence of ASD. S/he received an Autism Index score of 106, which indicated a Very Likely Probability of ASD. “This suggests the [s/he] most likely requires substantial support, individual attention, and intensive academic and behavioral programming. Examiner B concluded that Student met the eligibility criteria for a disability classification of ASD.”¹⁴ She recommended a number of strategies to address Student’s academic deficits and also recommended behavioral support to address issues related to inattention, hyperactivity, defiance, and aggression.¹⁵

6. On May 10, 2017, DCPS issued a Final Eligibility Determination Report in which it determined that Student remained a child with a disability, ASD.¹⁶

7. On September 19, 2017, when Student was in grade C at School A, DCPS conducted an IEP Annual Review with a classification of ASD.¹⁷ The Consideration of Special Factors provided that Student’s behavior impeded learning. It indicated that a functional behavior assessment (“FBA”) was developed to address Student’s aggression and property destruction that occur when Student is prevented from accessing a preferred item or activity and when s/he is asked to terminate a preferred item or activity. This section reveals that physical restraint is sometimes necessary to maintain control of Student. It also reported that Student was in the Autism Program at School A, in which BSS is “built into programming.” This section also reports that Student receives daily communication instruction with is embedded within the instructional program. “Throughout the school day, [Student] is consistently accessing communication and social skills instruction. [Student’s] communication deficit and articulation greatly impact [her/his] intelligibility which make it difficult for [Student] to communicate with others... [S/he] has made significant gains since beginning intervention services; however, [her/his] delays continue to impact [her/his] learning and ability to express [her/himself] effectively. Finally, the section devoted to A/T reported that “No devices have been explored at this time.”¹⁸

In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) reported that Student was performing one grade below his/her grade level. S/he was reported to have difficulty completing addition and subtraction problems.¹⁹ In Reading, Student was reported to be reading at a level one grade below his/her grade level. S/he was able to find the characters, setting,

¹³ *Id.* at 6 (316).

¹⁴ *Id.* at 8-9 (318-19).

¹⁵ *Id.* at 10 (320).

¹⁶ P47:1 (466).

¹⁷ P9:1 (103).

¹⁸ *Id.* at 3-4 (105-6).

¹⁹ *Id.* at 5 (107).

main idea, and details in texts that are late-two-years below her/his grade level. His/her needs include increasing the ability to respond to comprehension questions.²⁰ Student was also reported to be performing one grade below grade level in Written Expression. His/her weaknesses were reported to be spelling and expressive writing.²¹

In Adaptive/Daily Living Skills (“Adaptive”), the PLOP indicated that uses the restroom independently, can manipulate zippers, buttons, and snaps independently, unpacks and packs his/her backpack with limited prompting, can set up her/his lunch with prompting but often spills food while eating. S/he was reported to have made progress working at his/her desk independently, but continues to require the support of a 1:1 instructor to maintain attention to tasks.²²

In Communication/Speech and Language, the PLOP reported that Student follows simple, one-step directions but often becomes distracted when attempting to follow more complex directions. When initiating conversations, s/he can be overbearing, yelling to gain desired attention or speaking before gaining his/her communication partners’ attention. S/he also may walk away while his/her partner is speaking. Due to his/her frequent communication errors, Student can be difficult to understand and s/he becomes frustrated.²³

In Emotional, Social, and Behavioral Development (“Behavior”), the PLOP indicated that Student made “significant” progress in decreasing rates of maladaptive behavior throughout the day, with no occurrences of aggression or property destruction “throughout the last few months of school.” S/he requires frequent verbal and visual reminders to stay on task. S/he needs to improve his/her ability to be patient while awaiting preferred items, activities, and individuals.²⁴

In Student’s last IEP at School B, the IEP included goals in Motor Skills/Physical Development.²⁵ However, this area of concern was not included in this IEP.

The IEP team prescribed 30 hours per week of specialized instruction outside general education.²⁶ Classroom accommodations included, but were not limited to, short work duration, visual schedules, consistent and concise instructions, warnings before transitions, countdowns to terminate preferred activities, redirection, Read-Aloud for assessments, clarification/repetition of directions, preferential seating, extended time, and frequent breaks.²⁷

8. On July 24, 2018, when Student was rising to grade F at School A, DCPS conducted an Annual Review meeting.²⁸ The Math PLOP indicated that on a July 12, 2018 Measures of Academic Progress (“MAP”) assessment, Student’s score placed her/him in the 8th percentile. The PLOP stated that Student “currently demonstrates [grade C] mathematics skills.” S/he completes addition and subtraction, independently completes word problems using addition and subtraction with up to four

²⁰ *Id.* at 7 (109).

²¹ *Id.* at 8 (110).

²² *Id.* at 10 (112).

²³ *Id.* at 12 (114).

²⁴ *Id.* at 14 (116).

²⁵ P7:13-15 (72-74).

²⁶ P9 at 17 (119).

²⁷ *Id.* at 17 and 19 (119, 121).

²⁸ P10: 1 (124).

numbers, and can answer questions about data sets by referring to bar graphs. However, s/he has difficulty completing addition and subtraction problems fluently and without the use of paper and pencil. S/he also needs to learn to identify and count bills and coins.²⁹ In Reading, on a May 13, 2018 assessment, Student scored in the 18th percentile. The PLOP reported that Student demonstrated grade level (grade C) reading skills. S/he made progress with reading comprehension, but needed to improve in responding to comprehension questions.³⁰ In Written Expression, Student was reported to have early grade C writing skills. S/he could independently and accurately spell 100 simple words, encodes novel words independently, and verbally expresses ideas for writing, but needs prompting to write his/her thoughts. S/he had made slow progress in spelling, needs to learn strategies to organize his/her thoughts while writing, and needs to understand and use proper sentence structure.³¹

In Adaptive, Student was reported to have made “great” progress in working at her/his desk independently for up to three minutes at a time. S/he engaged with classmates in small groups appropriately throughout the day. However, s/he requires 1:1 support to keep her/him on task when s/he is expected to work independently for longer periods of time (10-15 minute). Student needed to learn how to respond to personal information questions (*e.g.*, address, phone number, emergency contact information), and to learn to use computer software.³² In Communication, Student was reported to engage occasionally in extended conversations about preferred topics. S/he asks questions to gain information and responds to questions. S/he continued to exhibit the rude interaction described in the previous IEP. S/he also continued to have difficulty with articulation and the resultant frustration when not being understood.³³ In Behavior, Student was again reported to have had no occurrences of aggression or property destruction “for multiple, consecutive school months.” S/he receives frequent verbal and visual reminders to remain on task.³⁴

Student’s services remained 30 hours of specialized instruction outside general education.³⁵ His/her accommodations were increased to provide a human scribe, speech-to-text, a human signer or external A/T for statewide accommodations.³⁶

9. On May 17, 2019, DCPS conducted an IEP Annual Review meeting.³⁷ The Consideration of Special Factors reported that Student had maintained low rates of aggression and property destruction. During the school year, s/he had one occurrence of aggression and 13 occurrences of property destruction. “Due to these low rates, crisis management procedures have been removed from [Student’s] Behavior Intervention Plan and IEP goals that aim to fade these supports and accommodations in the upcoming school year... Behavioral support services are built into programming of the autism program.”³⁸ In Math, on an April 11, 2019 MAP assessment, Student scored in the 2nd percentile with relative strengths in Measurement and Data and Geometry and a weakness in Operations and Algebraic Thinking. Student was reported to be demonstrating early grade

²⁹ *Id.* at 5 (128).

³⁰ *Id.* at 7 (130).

³¹ *Id.* at 8-9 (131-32).

³² *Id.* at 11 (134).

³³ *Id.* at 14 (137).

³⁴ *Id.* at 16 (139).

³⁵ *Id.* at 17 (140).

³⁶ *Id.* at 20 (143).

³⁷ P11:1 (147).

³⁸ *Id.* at 3 (149).

level math skills. S/he had shown improvement in addition and subtraction skills, had learned bill and coin combinations up to \$20 and handled cash transactions at the classroom store. Student had difficulty with higher level algebraic thinking and difficulty identifying and solving multiplication and division problems.³⁹ In Reading, Student's score on an April 24, 2019 MAP assessment placed her/him at the 4th percentile. Student was reported to be reading at a late grade C level. S/he was able independently to identify the characters and setting, main idea, details, and sequences in grade C level texts. S/he was reported to have made "great" progress with reading comprehension, but needed to learn to respond to higher level comprehension questions.⁴⁰ In Written Expression, Student was reported to be performing at a grade C level. S/he was capable of independently and accurately spell 150 sight words. With scaffolding and a graphic organizer, s/he could organize and write up to two sentences about preferred topics., and independently edit one sentence for capitalization, punctuation, or spelling mistakes. S/he had difficulty encoding unfamiliar words that include digraphs or blends, and writing about non-preferred topics.⁴¹

In Adaptive, Student was reported to handle a variety of school routines independently: daily check-in and check-out, handling his/her belongings, handling and disposing of meal materials, and manipulating fasteners, but had difficulty tying shoelaces. S/he made progress becoming familiar with computer programs and functions (Word, Powerpoint, Excel), but his/her typing speed was 5 words/minute.⁴² In Communication, Student was reported to communicate using complete sentences to request preferred items/activities, respond to questions, make comments, and engage in interactions. S/he was reported to be making slow progress in articulation.⁴³ In Behavior, the PLOP repeated the report of his/her lowered rate of maladaptive behavior. S/he now works up to 25 minutes before needing a break. S/he still needs intensive support (1:1, 2:1) to remain on task. Student was described as interacting appropriately with peers and adults throughout the day while having difficulty with higher level social skills.⁴⁴

Student's services and classroom accommodations remained unchanged.⁴⁵

10. In May 2019, School A issued an Annual Educational Report on Student.⁴⁶ Student's classroom environment in the Autism Program is described as follows:

Each student's curriculum and daily schedule is individualized to focus on the specific content areas and skills where he or she demonstrates need. Instruction occurs in one-to-one, two-to-one, and small group settings based on the individual needs of the student and the instructional content. A technology rich environment facilitates access to the curriculum and supports a dynamic and interactive learning environment.

Speech and language therapy and occupational therapy are delivered through a consultative model resulting in embedded instruction of language, communication,

³⁹ *Id.* at 5 (151).

⁴⁰ *Id.* at 7 (153).

⁴¹ *Id.* at 9 (155).

⁴² *Id.* at 11 (157). .

⁴³ *Id.* at 14 (160).

⁴⁴ *Id.* at 16 (162).

⁴⁵ *Id.* at 19, 21 (165, 167).

⁴⁶ P30:1 332.

motor, and social skills objectives throughout the school day in a variety of natural settings and contexts. Other related services are provided as determined by the student's IEP. Functional Assessment is conducted as needed to develop programming to replace and reduce each student's maladaptive behaviors...⁴⁷

Student's educational team in the Autism Program included a special education teacher, a senior assistant teacher, four ABA instructors, an OT, an S/L pathologist, the program coordinator, and the program director.⁴⁸

11. On June 12, 2019, School A issued Student's final report card for the 2018-19 school year. Based on grade level standards, Student's final grades were as follows: Reading/Language Arts – B, Written Expression – C, Math – B, Social Studies – B, and Science – B.⁴⁹

12. On a "spring 2019" grade F Partnership for Assessment of Readiness for College and Careers ("PARCC") math assessment, Student scored 693, placing him/her at Level 1. "Students who scored in Level 1 did not yet meet expectations for [grade F] learning standards."⁵⁰ On a spring 2019 PARCC ELA assessment, s/he scored 650, also Level 1.⁵¹

13. On June 11, 2019, DCPS issued an IEP Progress Report at the end of the 2018-19 school year.⁵² Teacher B reported that Student's two Math goals had not yet been introduced, s/he was progressing on one Reading goal while another had not been introduced, was progressing on his/her Written Expression goal, that six Adaptive goals had not been introduced, and that Student was progressing on one Behavior goal while another had not been introduced.

14. On March 9, 2020, DCPS convened a triennial evaluation review meeting, in which Petitioner participated by telephone. School A's staff concurred with Examiner B that no additional evaluations needed to be conducted.⁵³ On May 1, 2020, the team reconvened with both parents in attendance. The team determined that Student continued to meet the criteria for ASD. Petitioner "was impressed with how far [Student's] come. She was impressed with how much work [Student] could do."⁵⁴

15. On April 17, 2020, DCPS issued an IEP Progress Report at the end of the third reporting period of the 2019-20 school year.⁵⁵ Teacher D reported that in Math, Student was progressing on both goals, in Reading, Teacher E reported that Student was progressing on two goals, in Written Expression, Teacher E and Teacher F reported that Student was progressing on the goal, in Adaptive, Teacher B reported that no data for one goal was recorded, but Student had mastered one goal and was progressing on a third goal, in Communication, Teacher B reported no progress on three goals, and in Behavior, she reported progress on one goal and none on a second.

⁴⁷ *Id.* at 4 (335).

⁴⁸ *Id.* at 3 (334).

⁴⁹ P63:1 (534).

⁵⁰ P72:1 (562).

⁵¹ P73:1 (565).

⁵² P78:2 (633).

⁵³ R8 (81).

⁵⁴ R9 (82).

⁵⁵ P81:2 (671).

16. On April 24, 2020, when Student was in grade A at School A, Examiner B completed a Psychological Triennial Reevaluation Form Due Diligence Report for DCPS.⁵⁶ In addition to reviewing Student's past evaluations, Examiner A reported on Student's current academic performance. In Reading, Student's Reading teacher reported that s/he had made "great progress" in in reading comprehension. "[S/he} consistently completes comprehension activities to identify the main idea and details," but has needs in making inferences, story elements, cause and effect, main idea and summarizing. In Written Expression, s/he was reported to have made progress with expressive writing with preferred topics and editing single sentences, but has difficulty encoding unfamiliar words that include digraphs. In Math, s/he was reported to be performing about one and one-half grades below grade level. S/he had difficulty identifying and solving multiplication and division problems, with higher level algebraic thinking and operations, solving equations using the addition commutative property, and solving equations using the addition associative property. In Adaptive Daily Living, Student was reported to be able to complete a variety of school routines independently or with verbal reminders to remain on task. S/he handles toileting independently. While s/he handles buttons, zippers, and snaps well, s/he has difficulty tying her/his shoelaces independently. S/he works at his/her desk independently and has become more independent working in a group setting. However, s/he requires support of a one-on-one instructor or group leader to engage in appropriate group behaviors, such as raising her/his hand and completing work. In Emotional, Social, Behavioral Functioning, Student was reported to have made "significant" progress in maintaining low rates of maladaptive behavior, but s/he still requires frequent and visual reminders and reinforcement. S/he "Consistently" participates in classroom activities and follows classroom and school rules, "Usually Demonstrates" following directions and established routines, "Sometimes" demonstrates effort, motivation, persistence, and organizational skills, and "Rarely Demonstrates" completing and turning in homework.⁵⁷

On a Northwestern Education Association ("NWEA") reading assessment in May 2019, and on a math assessment in December 2019, Student scored two grades below his/her grade level. A Running Records reading comprehension assessment in January 2020 determined her/him to be performing three grades below grade level.⁵⁸

17. On May 1, 2020, DCPS issued a Final Eligibility Determination Report.⁵⁹ Petitioner participated in the meeting in which the report was developed.⁶⁰ In Adaptive, it was reported that Student completes a variety of school routines independently including daily check-in and check-out, handling meal materials at lunch, manipulating clothing fasteners, and toileting, but has difficulty tying her/his shoelaces. S/he had made progress becoming familiar with computer programs and functions, but her/his typing speed was slow, 5 words per minute and needed support to use the computer for non-preferred tasks. S/he was reported to be able to work independently at his/her desk for up to 11 minutes and had become more independent working in a group setting.⁶¹ In Math, it was reported that her/his latest assessment score placed him/her in the 2nd percentile at her/his grade level, with strengths in Measurement and Data and Geometry and weaknesses in Operations and Algebraic Thinking. S/he was reported to demonstrate skills equivalent to those one grade below grade level.⁶² In Reading,

⁵⁶ P32: (341).

⁵⁷ *Id.* at 4-6 (345-47).

⁵⁸ *Id.* at 7 (348).

⁵⁹ P48:1 (483).

⁶⁰ *Id.* at 3 (485).

⁶¹ *Id.* at 5 (487).

⁶² *Id.* at 6 (488).

Student's latest assessment scores placed him/her at the 4th percentile at his/her grade level. S/he was reported to read a variety of texts aloud and complete comprehension activities. His/her needs were improving in responding to higher level comprehension questions and answering critical response questions.⁶³ In Written Expression, Student was reported to be performing two grades below grade level. S/he was capable of spelling 150 sight words, and with support could write two sentences about preferred topics, and one sentence about texts s/he had read. S/he has difficulty encoding unfamiliar words that include digraphs or blends.⁶⁴ In Communication, Student was reported to use complete sentences to request preferred activities, to ask and respond to questions, make comments, and engage in interaction with peers and adults. His/her articulation was poor, but improving slowly.⁶⁵ In Behavior, Student was reported to be able to work 15-25 minutes before needing a break. S/he was described as interacting eagerly and appropriately with peers and adults. Student made progress gaining attention of a desired communication partner appropriately. However, s/he had difficulty with higher level social skills.⁶⁶ Motor Skills was described as "This is no longer an area of concern."⁶⁷

18. On May 1, 2020, DCPS conducted an IEP Annual Review meeting.⁶⁸ The Consideration of Special Factors was not substantively changed from the previous IEP. In Math, a December 2019 MAP assessment placed Student at the 3rd percentile, consistent with performance at a grade C level, indicating no progress from the December 2018 assessment.⁶⁹ In Reading, Student was reported to be capable of reading grade level texts. S/he needed to demonstrate improvement in making inferences, recognizing story elements, cause and effect, main ideas, and in summarizing. Student was reported to engage actively in classroom discussions relating to texts. On an October MAP assessment, Student scored in the 10th percentile, consistent with a reading level three grades below grade level. Running Records assessments in January 2020 found her/his comprehension level to be three grades below grade level. Based on classroom observation, it was determined that Student qualified for Read Aloud based on weaknesses in grade level decoding skills.⁷⁰ In Written Expression, a Six Traits Writing Checklist indicated that Student was performing three grades below grade level. S/he was reported to use a graphic organizer to compose three to five-sentences paragraphs. Although s/he writes simple sentences but struggles to structure them correctly.⁷¹ As to each area of concern, the report indicated that "No additional assessments were warranted in this area."

In Communication, the PLOP reported that Student had difficulty joining group conversations and tolerating rejection if s/he is unable to join a group.⁷² Adaptive was no longer included as an Area of Concern. In Behavior, Student was reported to have engaged in one occurrence of aggression and no instances of property destruction. S/he was able to work up to 20-30 minutes independently without taking a break. The PLOP reported that beginning in September 2019 Student began transitioning into a less restrictive environment in School A's Multiple Learning Needs ("MLN") Program with 1:1

⁶³ *Id.* at 7 (489).

⁶⁴ *Id.* at 8 (490).

⁶⁵ *Id.* at 9 (491).

⁶⁶ *Id.* at 10 (492)>

⁶⁷ *Id.*

⁶⁸ P12:1 (171).

⁶⁹ *Id.* at 4 (174).

⁷⁰ *Id.* at 6-7 (176-77).

⁷¹ *Id.* at 9 (179).

⁷² *Id.* at 10 (180).

support from the Autism Program.⁷³

Student's services remained unchanged,⁷⁴ but Read Aloud was added as a classroom accommodation.⁷⁵ During the 2019-20 school year, received instruction from a 1:1 instructor and in groups of 4-7 with her/his 1:1 instructor in close proximity.⁷⁶

19. Witness A testified that the May 1, 2020 IEP was inappropriate due to a lack of PLOPs in S/L, Adaptive, OT, and no documentation of Student's need for A/T. Adaptive goals were discontinued despite Student's failure to master them. Witness A also opined that Student required BSS because the IEP indicated that s/he exhibited maladaptive behaviors.

20. On May 5, 2020, School A issued an Individual Continuity of Learning Plan for Student.⁷⁷ The Plan indicated that Student would continue to receive services from his/her providers through remote learning facilities:

Each student's integrated team of teachers, associates, therapists and specialists will utilize a variety of formats customized to the needs of each student and their families including distance instruction, tele-therapy and tele-intervention. This will include meetings held on digital platforms as well as low-tech strategies that can provide for an exchange of curriculum-based resources, instructional packets and projects. For students who do not have the prerequisite skills to learn from group instruction or require intensive staffing to participate in any level of instruction, including remote, special education teachers and supervisor will provide individualized programming, training, and consultation to willing and available caregivers. In addition to asynchronous content, these students will access instruction by participating in an individualized schedule, broken up throughout the day and embedded into meaningful activities...

Students will be provided instruction in individual and/or group formats with consideration given to their individualized education plan to actualize instruction that will aim to address their educational requirements, unique learning needs, and aids and accommodations within the boundaries of technology, phone calls, and permanent products.

School A also issued an Individualized Distance Learning Plan ("IDL"), modifying the goals in Student's IEP to address the change to remote learning facilities.⁷⁸ The IDLP provided that Student would receive 30 hours per week of classroom instruction outside general education and that S/L and OT consultation services would be provided.⁷⁹

⁷³ *Id.* at 12 (182).

⁷⁴ *Id.* at 14 (184).

⁷⁵ *Id.* at 16 (186).

⁷⁶ P31:1-2 (337-38).

⁷⁷ P19:1 (257).

⁷⁸ P20:1 (262).

⁷⁹ *Id.* at 4 (265).

21. On June 15, 2020, DCPS issued an IEP Progress Report at the end of the 2019-20 school year.⁸⁰ Teacher B reported that in Math and Reading, one goal had been “just introduced” and one other had not yet been introduced, two Written Expression goals had not been introduced, and the Communication and Behavior goals (one each) had not been introduced. As to each of the goals that had not been introduced, teacher B provided: “Due to COVID-19 pandemic this IEP goal was not addressed as part of the student’s Individualized Continuity of Learning Plan during the State Mandated School Closure.”

22. On February 10, 2021, when Student was in grade D at School A, DCPS issued an Amended IEP for Student to change his/her accommodations.⁸¹ DCPS proposed to add (1) Read Aloud for ELA assessments and remove small group testing, test administered over several days, (2) Human Scribe, Speech-to-text, Human signer, or External Assistive Technology for Selected Responses on ELA/Literacy Assessments, (3) Human Scribe, Speech to Text, Human Signer, or External Assistive Technology for Responses on Non-ELA/Literacy Assessments, (4) Human Scribe, Speech to Text, Human Signer, or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments, and (5) Answers Recorded in Test Book. DCPS’ decision was made based on data collected during the second quarter of the school year.⁸²

23. On April 13, 2021, Teacher B sent Petitioner a draft IEP, Educational Report, and BIP for the IEP meeting scheduled for 10:00 a.m. on April 20, 2021 by email.⁸³ At 9:02 a.m. on April 20, 2021, Witness C sent Petitioner the link for the virtual IEP meeting scheduled for 10:00 that morning.⁸⁴ Petitioner responded at 6:15 p.m. that afternoon, “Got it, thanks.”⁸⁵

24. On April 20, 2021, DCPS issued an IEP Progress Report at the end of the third period of the 2020-21 school year.⁸⁶ Teacher C reported no progress on two Math goals and two Reading goals due to Student’s inconsistent participation in virtual learning, and two Written Expression goals, two Communication goals, and one Behavior goal had not been introduced.

25. On April 20, 2021, DCPS conducted an IEP Annual Review meeting. Petitioner was listed as not being in attendance.⁸⁷ The Consideration of Special Factors was not substantively changed from the two previous IEPs.⁸⁸ In Math, on March 4, 2021, Student was administered the grade C (three grades below Student’s) EASY CBM common core state standard’s assessment. S/he scored in the 27th percentile of grade C students. Her/his strengths included solving multi-digit addition problems, skip counting by 5’s, 10’s, and 100’s, identifying and describing shapes, comparing numbers, and measuring length to the nearest inch. His/her weaknesses were multi-digit subtraction problems and single-step word problems.⁸⁹ In Reading, Student was administered the grade F (two grades below

⁸⁰ P82:1 (684).

⁸¹ P103:1 (826).

⁸² *Id.* at 17 (842); R19 (179).

⁸³ R48 (339). DCPS’ Parent Contact log indicates that it first emailed Petitioner an invitation to the April 20, 2021 IEP meeting on March 16, 2021. (R45 (324)).

⁸⁴ R49 (340).

⁸⁵ *Id.*

⁸⁶ P85:1 (708).

⁸⁷ P14:1 (191).

⁸⁸ *Id.* at 2-3 (192-3).

⁸⁹ *Id.* at 4 (194).

Student's) Cubed Narrative Language Measure on March 18, 2021. S/he scored 9/14 on story questions and 3/9 on vocabulary.⁹⁰ In Written Expression, on March 25, 2021, given a teacher-dictated sentence to write (up to five words), Student used appropriate spacing in 1 out of 4 opportunities and used appropriate end punctuation in 2 out of 4 opportunities.⁹¹

In Communication, the PLOP reported that Student typically speaks quickly and has difficulty articulating a variety of phenome sounds, which affects intelligibility with adults. S/he has made progress with certain sounds through structured articulation practice.⁹² In Behavior, it was reported that Student did not attend from March 2020 to September 2020 due to COVID-19 school closures and family issues. Since January 2021, his/her attendance in virtual learning "has been spotty," attending 1-3 groups per week and one one-on-one session per week.⁹³

Student's services remain unchanged at 30 hours per week of specialized instruction outside general education.⁹⁴ His/her accommodations continued to include Read Aloud and reflected the removal of previous accommodations in the February 10, 2021 Amended IEP.⁹⁵ During the 2019-20 school year, received instruction from a 1:1 instructor and in small groups with her/his 1:1 instructor in close proximity.⁹⁶

26. Witness A opined that the April 20, 2021 IEP was inappropriate because A/T was not considered, there were no goals in Adaptive or OT, there were no updated evaluations, no BSS hours were specified, and Petitioner never received an invitation to the meeting,

27. On June 14, 2021, School A issued Student's report card for the 2020-21 school year.⁹⁷ In English Language Arts, s/he was reported to be "In progress toward meeting the grade-level standards" ("I") in nine academic categories, "Not yet making progress or making minimal progress toward meeting the grade-level standards." ("N") in four categories, and four concepts were "Not introduced" ("NI"). In Math, s/he earned an "I" in one category, N's in two categories, and NI's in seven categories. In Science and Social Studies, s/he earned I's. Student was reported to "Consistently" turn-in homework (asynchronous), Usually Demonstrates: effort, motivation, and persistence, following directions, following established routines, following classroom and school rules, and exhibiting organizational skills, including managing materials, and Sometimes participates in classroom activities (synchronous).⁹⁸

28. On June 17, 2021, DCPS issued an IEP Progress Report at the end of the 2020-21 school year.⁹⁹ Teacher C reported that in Math, the two goals had been just introduced, in Reading, one goal had been just introduced and the other had not yet been introduced, in Written Expression, one goal had been just introduced, two Communication goals had not been introduced, and one Behavior goal

⁹⁰ *Id.* at 6 (196).

⁹¹ *Id.* at 8 (198).

⁹² *Id.* at 9-10 (199-200).

⁹³ *Id.* at 12 (202).

⁹⁴ *Id.* at 14 (204).

⁹⁵ *Id.* at 16 (206).

⁹⁶ P33:2 (353).

⁹⁷ P68:1 (552).

⁹⁸ *Id.* at 2-3 (553-54).

⁹⁹ P86:1 (716).

had been just introduced.

29. On July 8, 2021, a Multidisciplinary Team (“MDT”) meeting was convened to discuss academic and behavioral progress. Petitioner’s Attorney D acknowledged receipt of 1200 pages of records from DCPS.¹⁰⁰ Attorney A suggested the need for psychological, S/L, A/T, and OT evaluations “so that we can appropriately program for [Student]...” Witness F stated that DCPS would want to convene another meeting with the service providers in those areas present to discuss the need for further evaluations.¹⁰¹ The team discussed School A’s plan to transition from the Autism Program to the MLN program, a small group program with a less restrictive student to teacher ratio and in which related services are provided directly.¹⁰² Witness A’s meeting notes indicated that a meeting would be scheduled regarding evaluations.¹⁰³ That meeting was conducted on August 5, 2021.¹⁰⁴

30. Witness A testified that she asked for an OT evaluation at the July 8, 2021 meeting because Student had received OT services in the past, but these services had been discontinued without an evaluation. She asked for a S/L evaluation because Student had significant deficits and had been evaluated in the past. She asked for an A/T evaluation because Student’s IEP provided a human scribe and speech-to-text, indicating a need for A/T. Witness A testified that at the August 5, 2021 meeting, Petitioner requested a psychological evaluation due to concerns about Student’s behavior and adaptive functioning. Witness A opined that an adaptive evaluation was necessary because Student was last tested in 2012. She opined that a A/T evaluation was necessary because one was recommended in the October 2021 independent S/L evaluation, because Petitioner requested it, because Student was receiving A/T through accommodations, and because s/he was performing below grade level.

31. On August 9, 2021, DCPS issued a Prior Written Notice (“PWN”) proposing to conduct a psychological evaluation.¹⁰⁵ Petitioner provided written consent for the evaluation that day.¹⁰⁶

32. On August 13, 2021, DCPS issued an authorization for Petitioner to obtain an independent S/L evaluation.¹⁰⁷

33. On September 17, 2021, when Student was beginning grade G at School A, Examiner B completed a Comprehensive Psychological Reevaluation of Student for DCPS.¹⁰⁸ No classroom observation was conducted as School A was providing virtual learning due to the COVID-19 pandemic, but testing was done in-person.¹⁰⁹ On the RIAS-2, Student scored in the Moderately Below Average range on the Nonverbal Intelligence Index (70) and Significantly Below Average on the Verbal Intelligence Index (61), the Composite Intelligence Index (61), and on the Composite Memory Index (54). “In sum, [Student] lacks age-appropriate skills necessary to complete day-to-day classroom tasks involving analytical reasoning, visual discrimination, and spatial/visualization-related tasks... In

¹⁰⁰ P92:1 (764).

¹⁰¹ *Id.* at 2 (765).

¹⁰² *Id.* at 2-3 (765-76).

¹⁰³ *Id.* at 6 (769).

¹⁰⁴ P93:1 (771).

¹⁰⁵ R21 (183).

¹⁰⁶ R32 (226).

¹⁰⁷ P97:1 (801).

¹⁰⁸ P34:1 (358).

¹⁰⁹ *Id.* at 5 (362).

the classroom [Student] may have difficulty with retention of information when there are increased demands on [her/his] working memory skills.”¹¹⁰ On the Wechsler Intelligence Scale for Children (“WISC-V”), Examiner B measured Student’s processing speed, his/her ability to identify, register, and implement decisions about visual stimuli. S/he scored in the Extremely Low range (66). On the WJ-IV, Student scored in the Very Low range in Reading (67), Mathematics (56), Academic Skills (60), Spelling (55), and Brief Achievement (60).¹¹¹

Evaluation of Student’s social-emotional functioning was attempted through the Behavior Assessment System for Children (“BASC-3”), with rating scales sent to Petitioner and Teacher A. However, the responses were not returned to Examiner B before the completion of her report.¹¹²

Based on the test results and interviews of Petitioner and Teacher A, Examiner B concluded that Student was performing at his/her potential and continues to be eligible for services as a student with ASD:

Academically, [Student] continues to be below grade level and age level across subject areas. [Her/his] academic skills, as measured by the WJ-IV, measured in the low to very low range. [Student’s] decoding and oral reading were low, while [his/her] reading comprehension, math reasoning, calculation, and spelling skills fell in the very low range. In sum, [Student’s] academic achievement is generally commensurate with [her/his] cognitive abilities, suggesting that [s/he] is currently performing at [his/her] potential. In the area of social emotional functioning, [Student] continues to present a number of maladaptive behaviors including noncompliance, inappropriate language, and loud vocalizations, primarily engaging in these behaviors to gain access to preferred items/activities or when access to preferred items is terminated/denied...

Combined with a history of communication delays, [Student] presents a profile typically aligned with autism spectrum disorder. These characteristics have been present from early childhood and have impaired [her/his] daily functioning and adversely impacted [her/his] ability to access grade-level curriculum. Taken together, it would appear that the available data continue to support eligibility for special education services with a disability classification of ASD.¹¹³

Examiner B provided twelve paragraphs of recommendations including, but not limited to, the use of visual and oral language directions, repetition of information, computer-assisted instruction, use of manipulative for building conceptual understanding of math operations, and a checklist of items to review and complete for writing tasks.¹¹⁴

34. On or about October 20, 2021, Examiner C completed an independent Comprehensive Speech-Language Evaluation of Student.¹¹⁵ Teacher A completed a checklist provided by Examiner C

¹¹⁰ *Id.* at 6-7 (262-64).

¹¹¹ *Id.* at 7-9 (264-66).

¹¹² *Id.* at 10 (367).

¹¹³ *Id.* at 11-12 (368-69).

¹¹⁴ *Id.* at 12 (369).

¹¹⁵ P35:1 (372).

and reported that Student has poor vocabulary and sentence structure, displays an illogical flow of stories, uses vague language, has trouble making speech sounds, has trouble saying what s/he is thinking, needs to hear directions more than once, becomes overwhelmed with auditory activity, has trouble understanding school vocabulary, has poor reading comprehension, has difficulty reading and fine motor tasks, and has poor organization skills, but s/he expresses his/her feelings appropriately.¹¹⁶

Examiner C administered the Clinical Evaluation of Language Fundamentals (“CELF-5”) to measure his/her receptive and expressive language abilities. On the Following Directions subtest, Student exhibited Moderate-to-Severe deficits, on the Word Classes, Formulated Sentences, and Recalling Sentences subtests s/he exhibited Severe deficits, and on the Sentence Assembly and Semantic Relationships subtests, s/he was unable to respond sufficiently to establish a baseline score. Thus, Examiner C was unable to determine a Core Language Score, Student’s Receptive Language Index, or Expressive Language Index. On the Language Memory Index, which probes memory dependent language tasks, Student’s score of 55 was in the 0.1 percentile, indicating a severe deficit.¹¹⁷ On the Structured Writing exercise, Student “continued to struggle transferring thoughts to written form.”¹¹⁸ On the Gray Oral Reading Tests (“GORT-5”), Student was Below Average in Rate, Accuracy, and Fluency, and Poor in Comprehension.¹¹⁹ On the Peabody Picture Vocabulary Test, which measures receptive vocabulary acquisition, Student’s score (84) was one point below the Average range. On the Expressive Vocabulary Test, her/his score (69) reflected a significant deficiency in vocabulary recall, vocabulary familiarity, synonyms, antonyms, and overall lexical development.¹²⁰ On the Clinical Assessment of Articulation and Phonology, although s/he was 80-90% intelligible, his/her scores fell within the “significant range.” “The longer the sentence or phrase, the more [his/her] intelligibility decreases.”¹²¹ Examiner C concluded that Student requires direct, school-based speech therapy:

Overall, [Student’s] auditory skills, semantic and morphosyntactic knowledge, working memory, written expression, expressive language, intelligibility, reading, and reading comprehension are significantly impacting [her/his] access to [his/her] educational curriculum. [Student] presents with a severe, mixed receptive and expressive language disorder. Based on the review of records, standardized testing, teacher report, behavioral observations, informal observations, it is determined that school based direct speech therapy is recommended at this time...¹²²

Examiner C recommended that Student receive 60 minutes per week of direct services outside of general education, that an OT evaluation be conducted “to further evaluate fine motor and sensory concerns,” that an updated psychoeducational evaluation be conducted, and that an A/T evaluation be conducted “to further assess classroom accommodation, tolls, strategies, low-tech and high-tech solutions to support [Student] accessing [his/her] educational curriculum and independence in the classroom.”¹²³

¹¹⁶ *Id.* at 4 (375).

¹¹⁷ *Id.* at 5-8 (376-79).

¹¹⁸ *Id.* at 8 (379).

¹¹⁹ *Id.* at 9 (380).

¹²⁰ *Id.* at 10 (381).

¹²¹ *Id.* at 10-11 (381-82).

¹²² *Id.* at 13 (384).

¹²³ *Id.*

35. On December 14, 2021, DCPS issued a PWN proposing to add S/L as a new service after reviewing the independent S/L evaluation.¹²⁴

36. On December 14, 2021, DCPS issued a Final Eligibility Determination Report determining that Student remained eligible for services classified as ASD.¹²⁵ In Math, it was reported that on June 8, 2021, Student solved 9 out of 10 one-step word problems correctly. His/her strengths were solving multi-digit addition problems, skip counting by 5's, 10's, and 100's, identifying and describing shapes, comparing numbers, and measuring to the nearest inch. Her/his weaknesses included multi-digit subtraction and solving single-step word problems. In Reading, on February 23, 2021, s/he answered 3 out of 5 comprehension questions about a grade F passage correctly but used information from the text to support her/his answer in none of three opportunities. On February 25, 2021, s/he was administered the LETRS phonics and word reading survey. S/he correctly read 15/18 closed syllable words, 15/24 close syllable words with digraphs and blends, 7/18 -vce words, 14/18 vowel-r words, and 14/18 words with vowel teams. Student was administered the grade F (two grades below Student's) Cubed Narrative Language Measure on March 18, 2021. S/he scored 9/14 on story questions and 3/9 on vocabulary. In Written Expression, on a "probe" on June 7, 2021, Student used correct capitalization, punctuation, and spelling in 2 out of 6 opportunities. S/he "shows a weakness in consistent use of writing mechanics including: using correct capitalization and punctuation, spelling and spacing." In Communication, Student demonstrates some advanced language skills such as making simple inferences and predictions, speaks quickly, and has difficulty articulating a variety of phoneme sounds, affecting intelligibility with adults. In Behavior, Student was reported to have returned to in-person classes for two days per week. There were no instances of aggression or property destruction. S/he is learning "to emit a functional communication response, tolerate denial, relinquish [his/her] reinforcers, and engage in contextually appropriate behavior."¹²⁶

37. On January 5, 2022, DCPS issued an Amended IEP to add direct S/L services. The IEP team prescribed one hour per week of S/L services outside general education.¹²⁷ Petitioner agreed that the amendment could be effectuated without an IEP meeting.¹²⁸

38. Witness A opined that the proposed amendment was inappropriate because it did not include OT, S/L, Adaptive, or BSS services, was not based on comprehensive evaluations, and did not consider A/T despite Student's limited communication skills.

39. On January 24, 2022, Examiner B completed an Adaptive Behavior Assessment Report on Student.¹²⁹ Examiner B administered the Adaptive Behavior Assessment System ("ABAS-3"), which evaluates whether an individual displays functional skills necessary for daily living without the assistance of others. Teacher A and Petitioner completed rating scales. Respondents scores range from no higher than Below Average to Low to Extremely Low in all of the domains that were explored: Conceptual (Communication, Functional Academics, Self-Direction), Social (Leisure, Social), Practical (Community Use, School/Home Living, Health and Safety, Self-Care), and General Adaptive

¹²⁴ R22, R23 (185, 187).

¹²⁵ R27 (195).

¹²⁶ *Id.* (199-204).

¹²⁷ P15:1, 14 (209, 222).

¹²⁸ R5 (76).

¹²⁹ P36:1 (387).

Composite.¹³⁰ Examiner B concluded that Student’s level of adaptive functioning was consistent with her/his cognitive ability and achievement, and that s/he needed “significant levels of adaptive behavior support at both home and school.”¹³¹

40. Examiner B also completed the Behavior Assessment System for Children on January 24, 2022, with Petitioner and Teacher A again serving as respondents.¹³² Petitioner’s responses indicated that Student was At-Risk in Leadership and in Functional Communication, poor expressive and receptive communication skills. Teacher A also rated Student At-Risk in Functional Communication and Learning Problems, indicating that Student had difficulty comprehending and completing schoolwork in a variety of academic areas.¹³³

41. In February 2022, School A issued an Occupational Therapy Present Level of Performance for Student.¹³⁴ Student was reported to have received periodic OT consultation services to target handwriting, typing, classroom routines, and clothing management in the Autism Program. In July 2021, Student “fully transferred” to the MLN Program, where OT services are provided on an individual basis consistent with his/her IEP. Student was reported to demonstrate relative strength in completion of classroom routines and typing skills; s/he could type 17 words per minute with 100% accuracy, “which I sufficient to meet academic demands.”¹³⁵ Due to variable attendance and limited participation during virtual learning, s/he was reported to have made limited progress across all OT-related areas. Student’s weaknesses included material management and handwriting legibility. “Per teacher report and therapist observation, [Student’s] desk area is often disorganized (e.g., excess materials, loose papers), and [s/he] requires prompting to sort needed and unneeded materials, reduce clutter, and then maintain that organization throughout [his/her] school day.”¹³⁶

42. On March 16, 2022, School A issued Student’s report card at the end of the third quarter of the 2021-22 school year. His/her Instructional Levels were indicated to be grade F (three grades below grade level) in Reading/Language Arts and grade E (five grades below grade level) in Math. S/he earned the following grades based on grade level standards: Reading/Language Arts – D, Written Expression – D, Math – D, Social Studies – F, Science – D.¹³⁷

43. On March 29, 2022, School A issued a Justification for Discontinuation of Behavior Intervention Plan.¹³⁸ The report indicated that School A had developed behavior intervention plans (“BIPs”) on March 13, 2017, May 17, 2019, April 22, 2020, and April 13, 2021 to address physical aggression and property destruction. Upon his/her transition to the MLN program, Student’s BIP interventions were not implemented in favor of a classroom management program that was put in place to evaluate the effectiveness of less restrictive interventions.

From August 25, 2021 through December 13, 2021, [Student] participated in 24 days

¹³⁰ *Id.* at 2 (388).

¹³¹ *Id.* at 3 (389).

¹³² P37:1-2 (391-92).

¹³³ *Id.*

¹³⁴ R17 (167).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ P71:1 (560).

¹³⁸ R36 (238).

of on-site instruction. While participating in on-site instruction, [Student] engaged in 0 occurrences of aggression and property destruction on 23 of the 24 days. [Student] engaged in one isolated instance of property destruction during this timeframe that was easily redirected via the classroom management system. Data collected from February 14, 2022 through March 18, 2022 indicate that aggression and property destruction remained at zero levels across 23 consecutive days with just the universal programming in place.

Based on this information, a formal Behavior Intervention Plan is not required for [Student] at this time...¹³⁹

44. On March 29, 2022, DCPS issued an IEP Progress Report at the end of the third reporting period of the 2021-22 school year.¹⁴⁰ Teacher G reported that Student was progressing on two Math goals, Teacher H and Teacher J reported that Student was progressing on two Reading goals, Teacher J reported that Student was progressing on the Written Expression goal, Speech Pathologist A reported that three Communication goals had been just introduced, and Teacher A reported that Student was progressing on the Behavior goal.

45. On March 29, 2022, DCPS conducted an IEP Annual Review meeting.¹⁴¹ The Consideration of Special Factors indicated that Student's behavior did not impede his/her or others' learning in the classroom. It also added that s/he needed A/T supports: white boards, graphic organizers, and a word processor.¹⁴² In Math, Student scored at the 2nd percentile on a September 9, 2021 MAP assessment. This indicates a grade C performance level, four grades below Student's grade level. Her/his score of 182 compares to her/his score of 172 on October 24, 2019 and 181 on December 9, 2019. On a December 13, 2021 Easy CBM assessment, s/he scored in the 2nd percentile of grade level peers.¹⁴³ In Reading, on a November 23, 2021 MAP assessment, Student scored at the 2nd percentile, commensurate with grade C performance. His/her score of 181 compares to his/her score of 172 on April 23, 2019 and 178 on October 15, 2019. A Critical Reading Inventory was conducted on February 8, 2022. When given a grade level text, Student answered comprehension questions with 45% accuracy; minimal grade level expectation is 70% accuracy. The Bader Reading and Language Inventory and Fountas and Pinnell Word Lists administered to Student at two grade levels below his/hers. S/he read from the Bader Inventory with 95% accuracy and from the F&P with 80% accuracy. "Based on the assessment data, Student does not qualify for the read aloud accommodation."¹⁴⁴ In Written Expression, based on a Six Traits Writing Checklist, Student is performing five grades below grade level. S/he is consistently and independently able to write three or more sentences on a topic and has begun sequencing events in writings. His/her weaknesses were in writing conventions (punctuation, capitalization, compound sentences) and sentence fluency. Student was reported to be incapable of writing a paragraph with a topic sentence, one compound sentence, and 80% correct punctuation and capitalization in four attempts.¹⁴⁵

¹³⁹ *Id.* at 238.

¹⁴⁰ P90:1 (750).

¹⁴¹ P16:1 (227).

¹⁴² *Id.* at 3 (229).

¹⁴³ *Id.* at 4 (230).

¹⁴⁴ *Id.* at 6-7 (232-33).

¹⁴⁵ *Id.* at 9-10 (235-46).

In Communication, it was reported that while communication support was imbedded into the program in School A's Autism Program, Student transitioned to the MLN Program in July 2021. In the MLN Program, such services are not imbedded. Thus, speech services were added to Student's IEP on January 5, 2022. His/her goals involved articulation and pragmatic language.¹⁴⁶

Student's services were at 29 hours per week of specialized instruction outside general education, one hour per week of S/L services outside general education, and one hour per month of OT consultation services.¹⁴⁷ Classroom accommodations were also supplemented: clarification/repetition of directions, calculation device on non-calculator sections, human scribe, speech to text, human signer or external assistive technology for responses on assessments, small group testing, and frequent breaks.¹⁴⁸

46. Witness A opined that the March 29, 2022 IEP was inappropriate because it did not indicate any evaluation of A/T equipment, goals were changed without mastery of prior goals, there was no BSS, no Adaptive goals, no OT and it was not based on evaluative data.

47. On May 20, 2022, Witness A developed a Compensatory Education Proposal ("Proposal").¹⁴⁹ The Proposal asserted that due to the denials of FAPE set forth in the Issues Presented above, Student has failed to make adequate adaptive, academic, communication, and behavioral progress. Witness A asserted that Student was deprived the benefit of an OT evaluation for 31.2 weeks (October 27, 2021 – July 13, 2022) and of an A/T evaluation for 37.8 weeks (August 31, 2021 – July 13, 2022). Witness A further asserted that the inappropriate IEPs during the 2020-21 and 2021-22 school years constituted a total of 80 weeks of a denial of FAPE.¹⁵⁰ Witness A opined that "it is reasonable to determine that with appropriate research-based academic and behavioral interventions and services in place, timely reevaluations, monitoring and adjustments to [her/his] IEPs, [Student] should have been able to make a year's worth of progress in a single year."¹⁵¹ Witness A proposed that Student be awarded the following compensatory education services: 480 hours of tutoring (6 hours x 80 weeks), 400 hours of ABA therapy, 48 hours of S/L therapy, 48 hours of OT, and round-trip transportation expenses for evaluations, tutoring, and therapy.¹⁵²

48. On June 9, 2022, DCPS issued an authorization for Petitioner to obtain an independent A/T evaluation.¹⁵³

49. On June 13, 2022, DCPS issued a PWN proposing to administer an OT evaluation of Student.¹⁵⁴

50. Petitioner testified that she did not receive an invitation to the April 20, 2021 IEP meeting. She had concerns about Student's behavior because s/he punched her/his brother once over a

¹⁴⁶ *Id.* at 11 (237).

¹⁴⁷ *Id.* at 14 (240).

¹⁴⁸ *Id.* at 16-17 (242-43).

¹⁴⁹ P99:1 (806).

¹⁵⁰ *Id.* at 6 (811).

¹⁵¹ *Id.* at 7 (812).

¹⁵² *Id.*

¹⁵³ P98:1 (803).

¹⁵⁴ R26 (193).

fish sandwich and punched her once when Student did not want to go to school. Petitioner testified that Student's handwriting is illegible, s/he cannot write his/her name, does not pay attention to her/his buttons, and can barely say her/his name. On cross-examination, Petitioner confirmed that the email address used by Witness B to send her the invitation for the April 20, 2021 IEP meeting was Student's other mother's email address, who resides with Petitioner and Student. In response to my questions, Petitioner testified that she selected School A as the placement for Student in 2017 because s/he had behavioral issues at School B, and Petitioner thought School A would be better at handling an autistic child. She conceded that School A handles Student's behavior well. Academically, Petitioner conceded that Student's articulation has improved at School A, but stated that it is not challenging Student. "[S/he's] not learning anything. [S/he'] still on ABCs – they weren't teaching [him/her] anything... [S/he] needs a better setting. [S/he] needed more in-person learning... [S/he] still can't write [her/his] name or tie [her/his] shoes."

51. Witness B testified that Student should have been evaluated before OT services were terminated. His review of the records indicated that Student was having difficulty with motor planning and performing tasks. Witness B was skeptical of the efficacy of a human scribe because that does further Student's writing capability. Witness B declined to opine as to specific goals that should be in Student's IEP in the absence of a current evaluation. He also opined that Student's deficits warrant an A/T evaluation. Witness B testified that an A/T evaluation is warranted anytime there is a deficit. "Is there something I can correct? If I can do it without A/T, that's the first option. If not, then I'll consider it." When asked what information an A/T evaluation would provide, Witness B testified that it would inform as to the devices that would be beneficial to the student. On cross-examination, Witness B conceded that he was unaware that Student was provided binders to help her/him remain organized, graphic organizers, adaptive paper, a word processor, or that an OT provider was monitoring Student's typing speed. On redirect, when asked how OT relates to handwriting, Witness B stated that "we're not handwriting teachers," but there may motor planning, visual planning, or fine motor issues involved. He also opined that speech-to-text would not be effective for Student because of his/her articulation deficits. In response to my question, Witness B conceded that he was unaware of Student's OT deficits in the absence of a current evaluation.

52. Witness C, the Director of the Elementary/Middle School Autism Program, testified that in that program, Student was in a class of 6-7 students. During the 2019-20 school year, each student was supported by an ABA instructor – seven students and seven ABA instructors. Student needed that level of support due to her/his history of aggression and property destruction. To the extent the amount of BSS services are not specified on the IEP, it is because behavioral services are an integral part of the consultative program. The staff employed a Delay and Denial Tolerance strategy; data was collected all-day, every day by the ABA instructors. The ABA instructors were responsible for implementing Student's BIP. This level of support was required because "our students have intensive and individualized needs. Without these strategies, we would have seen high rates of dangerous behavior." Witness C testified that related services hours were not included on the services page of the IEP because those services are embedded into the daily program. Student's improved behavior led to the decision to "fade" behavioral services and to transition him/her to a somewhat less restrictive environment in the MLN program. Witness C opined that Student did not require the 400 hours of ABA in Petitioner's Proposal, because s/he has made steady behavioral progress and is ready for a less restrictive environment. She also disputed the need for 480 hours of tutoring. She opined that "any student would benefit from intensive tutoring, but [s/he's] accessing the curriculum." Witness C

testified that compensatory S/L services are unwarranted because a S/L pathologist is assigned to each classroom and the staff implements the pathologists' recommendations throughout the school day. OT services were provided in a similar manner. Witness C opined that Student did not require any additional A/T because s/he was accessing the curriculum. The only concern Witness C had about Student accessing the curriculum was during virtual learning, when Student's attendance was inconsistent.

53. School A describes its provision of related services through embedded programming in the Autism Program as follows:

In addition to course instruction, communication, language, emotional/behavioral, social skills and school readiness are an integral part of each student's individual curriculum. Skills in these areas are embedded into all scheduled activities throughout the school day. Embedding these skill areas across instructional environments helps to increase learning opportunities and facilitate generalization.¹⁵⁵

54. Witness D, Senior Program Coordinator of School A's MLN Program, testified that instead of the 1:1 support that students receive in the Autism Program, in the MLN Program they are instructed in small groups of 3-5 students in a class of 11 students. Related services are provided directly, consistent with the student's IEP. Student began transitioning to the MLN program in the summer of 2019, one class per day. S/he fully transitioned in July 2021. The purpose of the transition was to afford Student a less restrictive environment. Witness D testified that since Student has been in the MLN Program, s/he has not engaged in the behaviors that necessitated his/her prior BIPs. Behavior in MLN classes are governed by a classroom management system, a rewards system. Student has access to A/T: a Chromebook, graphic organizers, and visual schedules. Student missed considerable school days during the 2021-22 school year because Petitioner was reluctant to send her/him to school due to concerns about COVID-19.

55. Witness E, Director of the Speech and Language Therapy Department at School A, testified that S/L services are provided through a consultative model in the Autism Department. Students are assessed to determine their areas of need by the staff of eight pathologists. They develop goals, review progress monthly, and work with the classroom staff on students' goals. The ABA instructors are trained by the pathologists and also go through intensive language training. In the MLN program, S/L services are provided in pull-out sessions. Witness E opined that Student is making progress with her/his articulation in MLN and does not need the 48 hours of therapy recommended in Witness A's Proposal. She also testified that the consultative model is endorsed by the American Speech-Language-Hearing Association.

56. Witness F was Student's OT service provider when Student was in the Autism Program. Student's original areas of need included handwriting/letter formation, scissors skills, activities involving use of her/his hands, body awareness, posture, computer skills, and independently dressing. Witness F met monthly with the teacher and program coordinator to go over Student's progress. For handwriting, they experimented with various adaptive paper to determine which produced the greatest legibility. Data was collected at least weekly. Student's handwriting is now "not ideal, but s/he is

¹⁵⁵ R42 (273).

writing sentences.” Scissors skills and bilateral coordination are no longer concerns, his/her posture has improved, and s/he is cleaning up after lunch. In keyboarding, s/he has improved from five to seventeen words per minute. At the end of [grade G], we want 20 words per minute, so [s/he’s] more or less on track.” Student’s facility with a computer mouse has improved; s/he now handles it with one hand instead of two. While handwriting is an issue, most assignments are done on computers. Student uses a binder to organize her/his work. An OT now “pushes in” to his/her classroom periodically to ensure that Student is accessing the curriculum, but s/he does not receive direct services. Witness F asserted that Student can tie his/her shoes. She testified that research shows that the consultative model is equally effective as direct services.

57. Witness G, a DCPS Public Monitoring Specialist who has attended Student’s IEP meeting on behalf of DCPS since 2018, testified that there is no record of Student having been administered an OT evaluation in 2018.

58. In response to my question, Witness A, Petitioner’s educational advocate, testified that School A is an appropriate placement for Student.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s legal research, the Conclusions of Law 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:

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.¹⁵⁶

In this case, one of the issues is the appropriateness of Student’s IEPs. Under District of Columbia law, DCPS bears the burden as to this issue. Petitioner bears the burden as to all other issues.¹⁵⁷

¹⁵⁶ D.C. Code § 38-2571.03(6)(A)(i).

¹⁵⁷ *Schaffer v. Weast*, 546 U.S. 49 (2005).

Whether DCPS denied Student a FAPE by failing to conduct a timely and comprehensive triennial reevaluation of Student and/or by failing to reevaluate Student pursuant to Petitioner’s request and the IEP team’s agreement during the summer of 2021 to conduct a more comprehensive psychological evaluation and to conduct an OT evaluation, an A/T evaluation, a comprehensive psychological evaluation, and a S/L evaluation.

IDEA regulations require that LEA evaluate children with disabilities in all areas of suspected disabilities:

Each public agency must ensure that... the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities...¹⁵⁸

The regulations also require reevaluations if a teacher or parent requests them, and at least once every three years:

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.¹⁵⁹

Triennial Evaluation

Petitioner alleges that DCPS failed to conduct a timely and comprehensive reevaluation of Student. DCPS completed a triennial review on May 10, 2017 when it issued a Final Eligibility Determination Report. It issued the next Final Eligibility Determination Report on May 1, 2020. Since this occurred less than three years from the previous determination, it was timely.

Petitioner alleges that the triennial reevaluation was not comprehensive because “the only evaluation conducted was a records review by the DCPS psychologist.”¹⁶⁰ In his opening argument, Petitioner’s counsel argued that the reevaluation was not comprehensive because DCPS did not conduct a S/L evaluation despite Student’s speech deficits, an OT evaluation because there had been no OT evaluation since 2015 despite the removal of Motor Skills from Student’s IEP in 2017, and no

¹⁵⁸ 34 C.F.R. §300.304 (c)(4).

¹⁵⁹ 34 C.F.R. §300.303.

¹⁶⁰ P1:18 (19).

A/T evaluation.

The purposes of triennial reevaluations are to determine if the child continues to require services and to inform the IEP team of the child's educational needs;

[A]s part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.¹⁶¹

If the LEA determines that no additional evaluations are necessary, it is not required to conduct them unless they are specifically requested by the parent.¹⁶²

At the triennial evaluation review meeting on March 9, 2020, in which Petitioner participated by telephone, School A's staff concurred with Examiner B that no additional evaluations needed to be conducted. On May 1, 2020, the team reconvened with both parents in attendance. Petitioner selected School A as a placement for Student because she believed that School A was uniquely suited to handling autistic children. One aspect of the School A Autism Program was its provision of related services in a consultative model rather than direct services. During the 2019-20 school year, Student received Adaptive, Communication, and Behavior support throughout the day through the consultative model, and a occupational therapist was also part of his/her educational team. The team determined that it had enough data to determine that Student remained eligible for services, and had enough experience with him/her to develop appropriate related services goals. Petitioner not only had no disagreement with this approach, she "was impressed with how far [Student's] come. She was impressed with how much work [Student] could do" at the Final Eligibility Determination meeting on May 1, 2020. At that meeting, the team specifically determined that Motor Skills was no longer an area of concern. I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to conduct a comprehensive triennial evaluation in the spring of 2020.

¹⁶¹ 34 C.F.R. §300.305(a).

¹⁶² 34 C.F.R. §300.305(d)(2).

Summer of 2021

At a meeting on July 8, 2021, Witness A requested an OT evaluation, a S/L evaluation and an A/T evaluation. On August 9, 2021, DCPS obtained Petitioner's consent to conduct a psychological reevaluation, and on August 13, 2021, DCPS authorized Petitioner to obtain an independent S/L evaluation. Upon Examiner C's October 20, 2021 issuance of her Speech-Language Evaluation in which she recommended direct services, DCPS issued a PWN on December 14, 2021 proposing to add direct S/L services to Student's IEP. By this time, Student had transitioned to the MLN Program in which, unlike in the Autism Program, related services are provided directly instead of in a consultative model. Although Examiner C recommended that DCPS conduct an A/T evaluation and an OT evaluation, DCPS did not immediately take steps to do so. In February 2022, School A issued an Occupational Therapy Present Level of Performance for Student in which s/he was reported to have made limited progress across all OT-related areas, particularly material management and handwriting legibility.

I conclude that Petitioner has not met her burden of proving that DCPS failed to conduct timely psychological or S/L evaluations upon Petitioner's request. These evaluations were conducted within a reasonable period of time after Petitioner's request on July 8, 2021. Throughout Student's years in School A's Autism Program, it was not apparent that s/he needed OT, S/L, or A/T evaluations. Student's related services needs were being collaboratively addressed by a team that included an occupational therapist and a S/L therapist, and their reports indicated that s/he was making slow but deliberate progress over time. In Communication, Petitioner conceded that Student could barely say her/his name when s/he entered School A, but the PLOPs reveal that ■■■ was making steady progress in his/her articulation; ■■■ was able to engage in conversations with peers and adults, particularly related to preferred topics. In OT, Student was reported to be able to manage his/her materials, handle cleanup after lunch, manipulate clothes fasteners, tie his/her shoes, and follow school rules and routines. As for A/T, Student had access to certain forms of A/T including a Chromebook, graphic organizers, and visual schedules.

However, once Student transitioned to the MLN Program in July 2021, s/he would no longer receive consultative support in related services. I conclude that upon receipt of Examiner C's evaluation in which she provided cogent reasons for OT and A/T evaluations, DCPS should have conducted these evaluations or granted authorization for independent evaluations no later than December 14, 2021, when it proposed adding S/L services upon Examiner C's recommendation. DCPS did not issue an authorization for an independent A/T evaluation until June 9, 2022, and did not agree to conduct an OT evaluation until June 13, 2022. The failure to authorize these evaluations by December 14, 2021 constitutes a denial of FAPE.

Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs on May 1, 2020, February 10, 2021, April 20, 2021, January 5, 2022, and March 29, 2022. Specifically, Petitioner alleges that the IEPs (a) were not based on comprehensive evaluations, (b) failed to include OT goals and services, (c) failed to include adaptive goals, (d), failed to include S/L services or BSS, or specify the frequency and duration of those services, and (5) failed to consider A/T for the student.

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*.¹⁶³ 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.'"¹⁶⁴ 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..."¹⁶⁵ 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 from grade to grade."¹⁶⁶

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.¹⁶⁷ 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*.'"¹⁶⁸ 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.¹⁶⁹

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:

¹⁶³ 458 U.S. 176, 187 (1982).

¹⁶⁴ *Id.* at 189-90, 200

¹⁶⁵ *Id.* at 200.

¹⁶⁶ *Id.* at 203-04.

¹⁶⁷ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹⁶⁸ *Id.* at 997.

¹⁶⁹ *Id.* at 1000-01 (citations omitted).

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.”¹⁷⁰

May 1, 2020, February 10, 2021, and April 20, 2021

Petitioner alleges that these IEPs were inappropriate for specific reasons. She contends that the IEPs were deficient were not based on comprehensive evaluations, (b) failed to include OT goals and services, (c) failed to include adaptive goals, (d), failed to include S/L services or BSS, or specify the frequency and duration of those services, and (5) failed to consider A/T for the student. In the previous section, I concluded that DCPS was not derelict in conducting or authorizing evaluations until it failed to proposed to conduct or authorize OT and A/T by December 14, 2021. With respect to OT goals and services, adaptive goals, S/L services, BSS, and A/T, Petitioner’s argument ignores the fact that she selected School A because of the unique program it offered autistic students. First and foremost, in the Autism Program, Student was in the most restrictive educational environment possible short of a residential placement. S/he was in a class of seven students with a special education teacher, a senior teaching assistant, seven ABA specialists, and with an occupational therapist and a S/L therapist assigned to the classroom to provide consultative services. Thus, Student was receiving full-time specialized instruction outside of general education with a staff to student ratio greater than 1:1. Petitioner was aware that related services in the Autism Program were provided on a consultative basis.

The issue is whether, despite receiving the maximum possible amount of specialized instruction outside general education, the IEPs are inappropriate because of lack of specificity as to the amounts of related services Student was receiving. Witness E testified that the consultative model is endorsed by the American Speech-Language-Hearing Association, and Witness F testified that research shows that the consultative model is equally effective as direct services. Neither of Petitioner’s experts questioned the efficacy of the consultative model. Rather, Witness A stressed the facts that there were no OT goals in the IEPs and that the specific amounts of direct services were not provided in the IEPs. As Witness C testified in response, specific amounts of related services could not be provided in the IEPs because the services were provided collaboratively throughout the school day. While there were no OT goals, OT services were provided collaboratively. Throughout his/her time at School A, Student’s motor skills improved to the point that s/he was writing sentences, s/he could manipulate clothing fasteners, tie his/her shoes, improved his/her typing speed to the point that it was “more or less” age appropriate. When Student entered School A, s/he had a well-earned history of physical aggression and property destruction. The records reveal that with the 1:1 Support Student received from ABA instructors, his/her behavior improved rapidly. By July 24, 2018, 17 months after entering School A, s/he was reported to have had no occurrences of aggression or property destruction for multiple consecutive months. In the following year, the staff determine that it would be in Student’s best interest to begin to lessen the restrictiveness of his/her environment by transitioning him/her to the MLN Program where s/he would no longer have 1:1 support of ABA instructors. On March 29,

¹⁷⁰ 137 S.Ct. at 1000-01.

2022, School A discontinued Student's BIP due to a lack of maladaptive behaviors. In Adaptive, by May of 2019, Student was reported to handle a variety of school routines independently: daily check-in and check-out, handling his/her belongings, handling and disposing of meal materials, and manipulating fasteners, but had difficulty tying shoelaces. S/he was able to work up to 25 minutes at his/her desk independently without needing a break. In her January 24, 2022 Adaptive Behavior Assessment Report, Examiner B concluded that Student's level of adaptive functioning was consistent with her/his cognitive ability and achievement. In Communication, by December 2021, Student demonstrated some advanced language skills such as making simple inferences and predictions. S/he spoke quickly, and carried on conversations with peers and adults, asked questions and responded to questions, particularly with respect to preferred topics. Student continued to have difficulty articulating a variety of phoneme sounds, affecting her/his intelligibility with adults. Finally, with respect to A/T, Petitioner's Witness B conceded that he was unaware of a particular A/T that would benefit Student in the absence of an evaluation, but his first choice would be to correct Student's deficits without A/T. An evaluation would only provide suggested equipment that might be beneficial. In fact, School A provided Student access to A/T, particularly a Chromebook with which s/he was reported to make steady progress learning how to use software and increasing his/her typing speed. S/he also had access to speech-to-text, graphic organizers, and Read Aloud.

Again, Petitioner makes no claim that the academic portions of the IEP, the goals and full-time specialized instruction outside general education in Student's core subjects, are inappropriate. Witness A, Petitioner's educational advocate, testified that School A remains an appropriate placement for Student. I conclude that in light of the consultative manner in which School A provided related services to students in its Autism Program, of which Petitioner was both aware and supportive when she enrolled Student, and in light of the progress Student made in related services while in the Autism Program, DCPS has met its burden of proving that the three IEPs were reasonably calculated to enable Student to make progress appropriate in light of her/his circumstances.

January 5, 2022 and March 29, 2022 IEPs

In the analysis of the first issue, I concluded that DCPS did not deny Student FAPE by failing to conduct OT or A/T evaluations until December 14, 2021. However, with Examiner C's recommendation that DCPS conduct those evaluations, and with Student having transitioned to the MLN Program where related services are provided directly instead of collaboratively, DCPS should have agreed to conduct these evaluations or authorized independent evaluations. In addition, the move to the MLN Program means that Student will not receive the embedded behavioral support that s/he received in the Autism Program. Consequently, Student's IEP must address his/her needs for direct adaptive and behavioral services. Therefore, I conclude that the January 5, 2022 and March 29, 2022 IEPs are inadequate, thereby denying Student a FAPE, due to their having been developed without adequate evaluative data and their failure to address direct OT, adaptive, and behavioral services, areas of concern for which Student received collaborative services in the Autism Program.

Whether DCPS denied Student a FAPE by failing to provide Petitioner an opportunity to participate in the development of the April 20, 2021 IEP.

IDEA regulations require that parents are included on every IEP team.¹⁷¹ The regulations compel the local education agency to take particular steps to ensure parents' participation in IEP meetings and to document their efforts to ensure that participation.

Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place...

(c) If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls...

(d) Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.¹⁷²

Petitioner alleges that DCPS proceeded with an IEP meeting on April 20, 2021 with inviting her. The record reveals that DCPS sent Petitioner invitations to the April 20, 2021 IEP meeting on March 16, 2021¹⁷³ and April 13, 2021.¹⁷⁴ DCPS sent Petitioner a link to the meeting an hour before the meeting.¹⁷⁵ Petitioner testified that she did not receive invitations to the meeting, but she replied "Got it, thanks," referring to the link, later in the day after the meeting had concluded.

DCPS failed to take steps to ensure Petitioner's participation in the meeting. The regulations contemplate confirming that Petitioner received the invitation and planned to attend. If she left the impression that she did not intend to attend, the regulations require a documented effort to attempt to convince her attendance. Here, DCPS did not receive confirmation that Petitioner received the first two invitations or the link prior to the meeting. The log reveals no effort to reach Petitioner after sending the link prior to proceeding with the meeting. Under these circumstances, DCPS had an obligation to postpone or reschedule the IEP meeting until Petitioner's intention as to attending could be ascertained.

Nevertheless, I do not find that Student was denied a FAPE under these circumstances. First,

¹⁷¹ 34 C.F.R. §300.321.

¹⁷² 34 C.F.R. §300.322.

¹⁷³ R45 (324).

¹⁷⁴ R48 (339).

¹⁷⁵ R49 (340).

DCPS had a consistent record of inviting Petitioner to MDT and IEP meetings, and she had a consistent record of attending. Second, the record suggests that she received the invitations, as DCPS used the correct email address. Third, Petitioner responded to receiving the link after the meeting had concluded. Fourth, as discussed above, Student's IEP was not likely to have significant changes from the previous IEP. Since Student was in the Autism Program, s/he would receive full-time specialized instruction outside general education, and related services would be provided through the collaborative model. Fifth, once Petitioner realized that the meeting had already taken place, she raised no objection until months later upon retaining counsel. Finally, I ruled in the previous section that the IEP was reasonably calculated to enable Student to make progress appropriate in light of her/his circumstances.

Whether DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's educational records. Specifically, Petitioner alleges that DCPS has not provided a 2018 OT evaluation.

The regulations require the local education agency to allow parents to examine their student's records:

Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child;

and

(2) The provision of FAPE to the child.¹⁷⁶

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

The right to have a representative of the parent inspect and review the records.¹⁷⁷

Petitioner alleges that DCPS has failed to provide her access to Student's 2018 OT evaluation. Witness G testified that DCPS has no record that Student was administered an OT evaluation in 2018.

¹⁷⁶ 34 C.F.R. §300.501.

¹⁷⁷ 34 C.F.R. §300.613.

Such an evaluation was not referenced in subsequent evaluations that I reviewed. Petitioner offered no documentation that she gave consent to an OT evaluation in 2018. Therefore, I conclude that Petitioner has failed to make a *prima facie* case that DCPS failed to provide her access to a 2018 OT evaluation of Student.

RELIEF

For relief, Petitioner requested, *inter alia*, (1) an order requiring DCPS to conduct or fund OT and A/T evaluations and reconvene an IEP meeting to revise the IEP as necessary, (2) an order requiring DCPS to revise the IEP to include adaptive goals, A/T, social/emotional goals and services, OT goals and services, specifying the frequency and duration of these services, (3) an order requiring DCPS to continue funding of a therapeutic non-public day school but to identify an alternate location of service if the current school is unable to implement the student's revised IEP, (4) an order requiring DCPS to provide access to all of Student records including Student's 2018 IEP, 2018 evaluations, and any records pertaining to the review of the 2018 evaluations, (5) compensatory education services, and (6) attorneys' fees.

On June 9, 2022, DCPS issued an authorization for Petitioner to obtain an independent A/T evaluation, and on June 13, 2022, DCPS issued a PWN proposing to administer an OT evaluation of Student. Thus, Petitioner has already received the requested evaluations. As the completed evaluations are not in the record, I will not order A/T or OT services. I also will not order DCPS to maintain Student's placement at School A as placement was not an issue presented in this matter.

As for Petitioner's request for compensatory education services, "whether" a successful petitioner is entitled to compensatory education is not discretionary to a Hearing Officer. In the very first paragraph of *Reid v. District of Columbia*,¹⁷⁸ the court stated that where there has been a violation of IDEA, "a court fashioning 'appropriate' relief, as the statute allow, may order compensatory education, i.e., replacement of educational services the child should have received in the first place... We... adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA."¹⁷⁹

However, where a petitioner offers no credible support for a proposed compensatory education proposal, a Hearing Officer is justified in failing to make an award. In *Gill v. District of Columbia*,¹⁸⁰ the petitioner requested 150 hours of compensatory education services. The support for the award was the petitioner's testimony that the child needed "tutoring one-on-one to provide reading, writing, and math skills... to be able to engage in basic 'daily activities, communication, and social skills.'" The court upheld the hearing officer's ruling that the proposed award was not supported by the record.

Here, the Plaintiffs' request for an award contained "neither reasoning to support this [exact hourly request] nor factual findings showing that the [request] satisfied [W.G.'s] needs..." Ms. Ortega's testimony may have provided a basis for

¹⁷⁸ 401 F.3d 516 (D.C. Cir. 2005).

¹⁷⁹ *Id.* at 518.

¹⁸⁰ 751 F.Supp.2d 104 (D.D.C. 2010).

why *some* compensatory education might be justified and/or necessary. Ms. Ortega testified that W.G. was not being instructed in the life skills that he needed as a child with MR and ED, in violation of his IEP. She explained the need for “tutoring one-on-one to provide reading, writing, and math” skills... Despite this testimony, and despite *Reid's* admonishment against arbitrary or formulaic approaches to compensatory education awards, the Plaintiffs' request of 150 hours was arbitrary and unsupported. The request appears untethered to W.G.'s educational deficit or to the necessary and reasonable education reasonably calculated to elevate W.G. to the approximate position he would have enjoyed had he not suffered the denial of FAPE for four months.¹⁸¹

The *Reid* court rejected compensatory education plans proposed both by the parents and the Hearing Officer that were based on a day-for-day-lost formulation. “[W]e agree with the Ninth Circuit that ‘[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA.’”¹⁸²

The court required that the determination of appropriate compensatory education services must be based on a “fact-specific” record to determine what the student actually lost as a result of the denial of FAPE. 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.¹⁸³

Thus, a record must be developed to demonstrate (1) what educational harm Student suffered as a result of the alleged denial of FAPE, and (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE.

Petitioner offered no credible evidence of the type and amount of compensatory services Student requires to put her/him in the position s/he would be had there been no denial of FAPE. Witness A proposed that Student be awarded 480 hours of tutoring (6 hours x 80 weeks), 400 hours of ABA therapy, 48 hours of S/L therapy, 48 hours of OT, and round-trip transportation expenses for evaluations, tutoring, and therapy. In support of the proposal, Witness A asserted that “it is reasonable to determine that with appropriate research-based academic and behavioral interventions and services in place, timely reevaluations, monitoring and adjustments to [her/his] IEPs, [Student] should have been able to make a year's worth of progress in a single year.” In light of Student's severe cognitive

¹⁸¹ *Id.* at 111-112, citing *Reid*, 401 F.3d at 524 (“[T]he 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.”).

¹⁸² *Reid*, 401 F.3d at 524.

¹⁸³ *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). *See also*, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

deficits, this prediction is inherently suspect. As Petitioner did not question the adequacy of the specialized instruction prescribed in the IEP, the justification for tutoring is unwarranted. 400 hours of ABA therapy is equally unwarranted for the period beginning with the January 5, 2022 IEP amendment. There was no testimony as to how much Communication support received during the fall of the 2021-22 school year when Student was transferred to the MLN Program, and in the absence of an OT evaluation, the amount of direct services s/he requires is speculative.

Therefore, I will order DCPS to fund an independent evaluation to determine the type and amount of compensatory education services that would bring Student to the academic level s/he would have attained but for DCPS' failure to provide direct OT, adaptive, and BSS, based on the findings and recommendations in the pending OT evaluation and the failure of DCPS to provide direct adaptive services and BSS on Student's IEP as of January 5, 2022.

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, the closing arguments of the parties' counsel, it is hereby

ORDERED, that DCPS shall fund an independent educational evaluation with the specific purpose of determining (1) what educational harm Student suffered by being denied direct OT, adaptive, and behavioral support services on his/her IEP since January 5, 2022, and (2) the appropriate type and amount of compensatory education services Student requires to reach the level s/he would have reached in these areas but for the denial of services. DCPS shall fund any additional evaluations necessary for the evaluator to make the desired recommendations. The evaluation should discuss Student's expected annual growth in these areas of concern with and without services, the bases for his/her opinion as to Student's growth, and specific reasons for the proposed services to address the denial of services.

IT IS FURTHER ORDERED, that within fifteen (15) business days of receipt of the independent evaluation, DCPS shall schedule an IEP team meeting through Petitioner's counsel to update the IEP, and to consider the need for additional compensatory education services for the inappropriate IEPs developed on January 5, 2022 and March 29, 2022.

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
Terry Michael Banks
Hearing Officer

Date: August 1, 2022

Copies to: Attorney A, Esquire
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OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED] DCPS
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