

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

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: December 20, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0257

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: December 11-12, 2019

Respondent.

Office of Dispute Resolution, Room 112  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (GRANDMOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner seeks relief for DCPS’ alleged failure to develop appropriate Individualized Education Programs (IEPs) for Student in March 2018 and February 2019 and for other alleged denials of a free appropriate public education (FAPE).

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on October 11, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on October 16, 2019. On November 1, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On November 7, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on December 11 and 12, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Grandmother appeared in person at the hearing and was represented by PETITIONER'S COUNSEL of LAW FIRM. MOTHER was also present on the first day of the hearing. Respondent DCPS was represented by RESOLUTION SPECIALIST and by DCPS' COUNSEL. A Spanish language interpreter was present for the due process hearing to interpret for Grandmother.

Counsel for the parties made opening statements. Grandmother testified at the hearing through the interpreter and called as additional witnesses SENIOR DIRECTOR and EDUCATIONAL ADVOCATE. DCPS called as witnesses SPECIAL EDUCATION TEACHER, CASE MANAGER, Resolution Specialist, and SCHOOL SOCIAL WORKER. Petitioner's Exhibits P-1 through P-99 were admitted into evidence, except for Exhibits P-56, P-62 and P-93 which were withdrawn and Exhibits P-86 and P-87, to which I sustained DCPS' objections. DCPS' Exhibits R-1 through R-24 were all admitted into

evidence without objection. At the conclusion of Petitioner's case-in-chief, DCPS' Counsel made an oral motion for a partial directed finding in DCPS' favor, which motion I denied. Counsel for the respective parties made oral closing arguments.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the July 18, 2019 Prehearing Order, are:

- A. Did DCPS deny Student a FAPE by failing to provide appropriate IEPs in February 2018 and February 2019 in that the IEPs were not based on comprehensive evaluations, lacked sufficient Special Education and Behavioral Support Services, lacked Written Expression goals, had inappropriate baselines and present levels of performance and did not provide for Extended School Year (ESY) services?
- B. Did DCPS deny Student a FAPE by failing to conduct appropriate Functional Behavior Assessments and provide appropriate Behavior Intervention Plans in the 2017-2018 and 2018-2019 school years?
- C. Did DCPS deny Student a FAPE by failing to implement Student's Behavioral Support Services in the 2018-2019 school year?
- D. Has DCPS denied Student a FAPE by failing to provide the parent's representatives access to Student's education records?

For relief, the Petitioner requests that DCPS be ordered to provide Student appropriate compensatory education and to provide copies of all requested education records to Petitioner's counsel.

**FINDINGS OF FACT**

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

1. Student, an AGE youth, resides with Grandmother in the District of Columbia. Testimony of Grandmother.
2. Spanish is the primary language used at home. Testimony of Grandmother. As of April 2018, Student was considered an English Language Learner and Student's English language proficiency scores were at Emerging to Developing levels. Exhibit P-72.
3. Student attended CITY SCHOOL from STARTING GRADE through LAST GRADE in the 2018-2019 school year. (Exhibit P-9.) For the 2019-2020 school year, Student is enrolled in PUBLIC CHARTER SCHOOL, an independent local education agency, where Student is in CURRENT GRADE. Exhibit P-82.
4. Student is eligible for special education under the IDEA disability classification Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder) and was initially determined eligible at an eligibility committee meeting at City School on March 22, 2017. Exhibit P-13. Previously Student had a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) to accommodate the ADHD condition. Exhibit P-79.
5. For the initial March 2017 eligibility determination, DCPS conducted

formal psychological and social work assessments. Exhibits P-9 and P-10. The DCPS social worker conducted a classroom observation and interviewed Mother and Student's teachers. She strongly recommended that a multi-disciplinary team (MDT) meeting be convened to discuss Student's academic needs and to determine whether Student qualified for special education. The DCPS psychologist interviewed Mother, Student's teacher and an outside agency social worker stationed at City School. She also conducted educational testing, Kaufman Test of Educational Achievement, Third Edition (KTEA-3) and the Behavior Assessment System for Children, Third Edition (BASC-3) rating scales. She attempted to administer cognitive testing (Kaufman Assessment Battery for Children, Second Edition (KABC-II) but Student was non-responsive. She was unable to obtain Student's cognitive functioning score. The KTEA achievement testing indicated that Student's reading skills were below average. Student tested in the lower extreme range on the math computation subtest and in the Below Average range in math problem solving. The DCPS psychologist recommended that the totality of the evaluation data were supportive of Student's meeting IDEA criteria for OHI. Exhibit P-9.

6. Student's April 3, 2017 initial IEP identified Mathematics, Reading and Emotional, Social and Behavioral Development as areas of concern. The IEP provided for 9 hours per week of Special Education Services outside the general education setting and 1 hour per week for Reading in general education. The IEP also provided for 120 minutes per month of Behavioral Support Services in the general education setting.

Exhibit P-13.

7. As of January 29, 2018, Student was reported to have mastered the initial IEP Mathematics goals, to be progressing on the Reading goals and to have shown no progress in the social-emotional area. Exhibit P-39.

8. The City School IEP team met for Student's annual IEP review on March 7, 2018. Mother attended the meeting by telephone. The classroom teacher reported that although Student's test scores had not improved, Student's academics were improving in the classroom. Student was reported to be progressing with regard to behavior and the IEP team agreed to move Student to consultation Behavioral Support Services. Student's IEP Special Education Services were increased to 12 hours per week, including 4 hours outside general education and 8 hours in general education. Behavioral Support Services were changed to 30 minutes per month of Consultation Services. Mother reported that she was happy with the progress Student was making. Exhibits P-14, P-15.

9. At the end of the 2017-2018 school year, Student was reported to be progressing toward all March 7, 2018 IEP academic goals, but, for the second quarter of the school year, was reported to be regressing on the IEP behavioral goal. In the February 6, 2019 IEP progress report, School Social Worker reported that on the Strengths and Difficulties Questionnaire given to the teacher, Student scored in the high range for behavioral difficulties and for hyperactivity and concentration difficulties, which was an increase from the beginning of the school year. Exhibit P-43.

10. On the NICHQ Vanderbilt Assessment Scale, used to review symptoms of ADHD, the responses of Student's City School teacher indicated that when not on medication, Student "Often" or "Very Often" exhibited characteristics of ADHD in most rating categories and that even when on medication, Student had been displaying more defiant, disruptive behaviors. Exhibit P-8.

11. Student's City School IEP team met for the annual IEP review on February 6, 2019. Mother attended the meeting by telephone. Educational Advocate attended in person. The IEP team noted that Student's English language proficiency, in conjunction with Student's disability, made it difficult for Student to access the general education curriculum. The February 6, 2019 IEP again identified Mathematics and Reading, as well as Social, Emotional and Behavioral Development, as areas of concern for Student. For social-emotional, the Social Worker wrote that Student's incidents of defiance, disruption and inappropriate behaviors were impairing Student's performance. Direct Behavioral Support Services were reinstated at 120 minutes per month. Special Education Services were increased to 14 hours per week, including 6 hours outside general education and 8 hours in general education. The IEP added Extended School Year (ESY) services for Student. Exhibit P-17.

12. There was conflict in the testimony about Educational Advocate's input at the meeting. Educational Advocate testified that she had concerns about the IEP annual goals and that she recommended more Special Education Services, up to full-time services, and that following the meeting, she sent a copy of her IEP meeting notes to

Special Education Teacher and to Case Manager. Special Education Teacher, who also attended the meeting, testified that Educational Advocate did not speak at the meeting, except to state at the end of the meeting that the change to direct Behavioral Support Services and the increase in Special Education were what she was going to recommend. Case Manager similarly testified that Educational Advocate stated at the end of the meeting that she had intended to ask about direct Behavioral Support Services and increased Special Education Services hours. Both DCPS witnesses denied receiving emails from Educational Advocate after the meeting. The DCPS IEP meeting notes, Exhibit R-10, do not reflect any disagreement concerning the IEP or other input from Educational Advocate. Neither party offered any written communications from Educational Advocate into evidence. I find, from the preponderance of the evidence, that at the February 6, 2019 IEP meeting, Educational Advocate did not voice any disagreement with the IEP that was developed and that Educational Advocate did not give notice in writing to DCPS, after the meeting, that she disagreed with the IEP.

13. Student did not attend the DCPS summer 2019 ESY program. Testimony of Special Education Teacher.

14. Before Student's initial April 3, 2017 IEP was developed, Student's Student's i-Ready mathematics scores were 397 at the beginning of year and 392 in the middle of the year. In the middle of the school year, Student received a reading level of "J" (1<sup>st</sup> Grade) on the Text Reading and Comprehension (TRC) assessment. Exhibit P-13.

15. For the 2017-2018 and 2018-2019 school years, on the i-Ready mathematics assessment, Student's scores were:

<u>Aug. 2017</u>	<u>Feb. 2018</u>	<u>May 2018</u>	<u>Aug. 2018</u>	<u>Jan. 2019</u>	<u>May 2019</u>
417	422	427	407	446	438

Over the same period, on the Scholastic Reading Inventory (SRI) Lexile measure,

Student's scores were:

<u>Aug. 2017</u>	<u>Nov. 2017</u>	<u>Jan. 2018</u>	<u>May 2018</u>	<u>Sep. 2018</u>	<u>Nov. 2018</u>	<u>Jan. 2019</u>	<u>May 2019</u>
375	306	360	411	347	306	435	527

Exhibits R-8, R-16, R-17, R-2, R-9, R-19.

16. For the 2018-2019 school year, School Social Worker provided Student's IEP Behavioral Support Services, at first in the form of consultative services and with direct services after the IEP was revised in February 2019. School Social Worker filled out services tracker forms for the services she provided Student, but for February and June 2019, the service trackers were not finalized and added to Student's education records. School Social Worker was not aware of these omissions at the time. Testimony of School Social Worker.

17. Beginning in October 2019, Law Firm requested DCPS to provide copies of Student's education records. City School and DCPS Central Office provided all such records in Student's school file and the Special Education Data System (SEDS) maintained by the school or by DCPS. Testimony of Special Education Teacher,

Testimony of Resolution Specialist.

18. In December 2019, Law Firm referred Student to LEARNING CENTER for assessments. Learning Center administered a battery of reading, math and written language assessments. Student's achievement levels tested 3 to 5 grade levels below Student's current school grade. Student scored lowest in Reading Comprehension, Auditory Conceptualization and Math Word Problems. Written Language was a relative strength, but Student still tested several years below Student's current grade level.

Exhibit P-12. Learning Center recommended 800 to 1,000 hours of instruction services for Student in Reading, Comprehension and Mathematics, to be provided by Learning Center. Testimony of Senior Director.

**CONCLUSIONS OF LAW**

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

**Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall

establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- A. Did DCPS deny Student a FAPE by failing to provide appropriate IEPs in March 2018 and February 2019 in that the IEPs were not based on comprehensive evaluations, lacked sufficient Special Education and Behavioral Support Services, lacked Written Expression goals, had inappropriate baselines and present levels of performance and did not provide for ESY services?

Petitioner alleges that Student's City School March 7, 2018 and February 6, 2019 IEPs were inappropriate because of alleged shortcomings in Student's initial 2017 eligibility evaluation; because there were no Written Expression annual goals; because the IEP baselines and present levels of performance were inappropriate; and because Special Education, Behavioral Support and Extended School Year (ESY) services were insufficient or not provided. DCPS responds that the respective IEPs were appropriate as of the time the IEPs were developed. I find that, through the testimony of Educational Advocate, Petitioner established a *prima facie* case that the IEPs were not appropriate. Therefore, the burden of persuasion on this issue falls on DCPS.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*See also Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) ("[The *Endrew F.*] standard calls for evaluating an IEP as of 'the time each IEP was created' rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated." *Z. B.* at 517.)

#### Comprehensiveness of Evaluation Data

Petitioner contends that neither the March 7, 2018 IEP nor the February 6, 2019 IEP was developed based upon sufficient data because DCPS' initial February 24, 2017 psychological evaluation of Student was not comprehensive. *See Endrew F., supra*, 137 S.Ct. at 999 ("Understanding the particulars of a child's current skills and needs is critical to developing an individualized educational plan.") Specifically, Educational

Advocate opined that the initial February 24, 2017 DCPS psychological evaluation of Student was not comprehensive because due to Student's unresponsiveness, the DCPS psychologist was not able to complete a cognitive assessment and because the psychologist did not evaluate Student's writing skills. Petitioner argues that because these data were not provided in Student's 2017 initial psychological evaluation, the City School IEP teams did not have sufficient information to determine the nature and extent of the Special Education and related services that Student needed. *See* 34 CFR § 300.15. (Petitioner does not challenge the adequacy, *per se*, of Student's initial eligibility evaluation, because the 2017 evaluation was completed outside of the IDEA's two-year statute of limitations period. *See* 34 CFR § 300.511(e).<sup>2</sup>)

Historically, DCPS has used evidence of a discrepancy between academic achievement and intellectual ability to "diagnose" a child's Specific Learning Disability (SLD).<sup>3</sup> But, even with respect to the SLD disability classification, U.S. Department of

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<sup>2</sup> *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

34 CFR § 300.511(e).

<sup>3</sup> For many years, federal regulations required parents to demonstrate a child's need for special education under the SLD classification by showing a "severe discrepancy" between actual achievement and intellectual ability. *See Michael P. v. Department of Educ.*, 656 F.3d 1057, 1060 (9<sup>th</sup> Cir.2011). After enactment of the 2004 amendments to the IDEA, federal regulations were revised to allow LEAs the option of using an identification process that determines if a child responds to research-based interventions or of using a severe discrepancy model. *See* Department of Education,

Education guidance does not require the use of a cognitive functioning assessment. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 (August 14, 2006) (“The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions.” *Id.* at 46510.) In the present case, Student’s IDEA disability classification, OHI-ADHD, is not in dispute and there was no probative evidence that Student’s IEP teams needed an assessment of Student’s cognitive functioning in order to develop an educational program for the ADHD impairment.

With regard to the DCPS psychologist’s not assessing Student’s Written Expression achievement in the initial evaluation, decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). Case Manager explained in his testimony that Written Expression was not a concern for Student. IDEA evaluations depend upon the exercise of professional judgment by the child’s educators, which is entitled to a reasonable

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*Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46647 (August 14, 2006); *Daniel P. v. Downingtown Area School Dist.*, 2011 WL 4572024, 3 (E.D.Pa., Oct. 3, 2011) (Revised IDEA forbids a state from mandating a severe discrepancy model, but still allows the use the severe discrepancy model in addition to permitting the use of a Response to Intervention model.)

degree of deference. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), *report and recommendation adopted sub nom. Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), citing *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005). I find that DCPS has met its burden of persuasion that the psychologist's not completing a cognitive assessment or a Written Expression assessment in the 2017 initial psychological evaluation of Student did not impair the 2018 and 2019 IEP teams' understanding of the particulars of Student's then-current skills and needs. *See Andrew F., supra.*

#### Written Expression Goals

The IDEA requires that each child's IEP must include annual goals which meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. *See* 34 CFR § 300.320(a)(2)(i). Neither the March 7, 2018 IEP nor the February 6, 2019 IEP included Written Expression annual goals for Student. Case Manager testified that Written Expression was not a challenge for Student at the time the IEPs were developed.

Educational Advocate opined in her hearing testimony that the Student needed IEP goals and services for Written Expression challenges. However, when Educational Advocate attended the February 6, 2019 IEP team meeting at City School, she did not inform the IEP team that she thought Student needed Written Expression goals or

services or that she disagreed with the IEP. Moreover, Learning Center, which Law Firm commissioned to assess Student in December 2019, proposed to provide extensive supplemental instruction services to Student in reading and mathematics, but not in Written Expression. On this evidence, I find that DCPS has met its burden of persuasion that at the time the March 7, 2018 and February 6, 2019 IEPs were developed, Student did not require annual goals or specific services for Written Expression needs resulting from Student's OHI-ADHD disability.

#### Baselines and Present Levels of Performance

Petitioner contends that the baselines and present levels of performance (PLOPs) in the March 7, 2018 IEP and February 6, 2019 IEP were inadequate. With regard to the baselines, the IDEA requires that IEPs include present levels of performance, but does not require baselines for students. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424-25 (8th Cir. 2010) (Plaintiff has not cited any case in which any court has read such an implied requirement for baseline data into the law.) In the present case, Petitioner has not challenged the adequacy of the Present Levels of Academic Achievement and Functional Performance recited in Student's IEPs. Petitioner's argument appeared to be that the IEP annual goals did not appear to correlate to the baselines. This argument was unpersuasive. For example the March 7, 2018 IEP describes Student's struggle with solving word problems and provides an Annual Goal to solve mathematics word problems correctly. In the February 6, 2019 IEP, the reading baseline identified Student's challenge with identifying the main idea and includes an Annual Goal for

identifying more than one main idea. Moreover, as noted above, Educational Advocate did not request changes to the IEP baselines at the February 6, 2019 IEP team meeting. However, assuming that Educational Advocate were correct that the baselines did not match up to the related Annual Goals in Student's IEPs, I find that this purported procedural inadequacy should not be deemed a denial of FAPE and did not keep the IEP, from being "reasonable" for Student. *See* 34 CFR § 300.513(a)(2); *Andrew F.*, 137 S.Ct. at 999.

#### Special Education and Behavioral Support Services

Petitioner's fundamental claim in this case is that the March 7, 2018 and February 6, 2019 IEPs did not provide sufficient Special Education and Behavioral Support Services to enable Student to make appropriate progress. Student's initial April 5, 2017 IEP provided for Student to have 9 hours per week of Special Education Services outside the general education setting and 1 hour per week for Reading in general education. The March 7, 2018 IEP provided for Student to receive 12 hours per week of Special Education Services, including 4 hours outside the general education setting. The February 6, 2019 IEP increased Special Education to 14 hours per week, including 6 hours outside general education.

Citing Student's scores on the i-Ready (mathematics) and SRI Lexile (reading) standardized assessments, administered at the beginning, middle and end of each school year, Educational Advocate opined that the Special Education Services in the 2018 and 2019 IEPs were inadequate and that Student needed full-time Special

Education outside the general education setting. DCPS' witnesses, Special Education Teacher and Case Manager from City School, maintained that Student made appropriate academic progress under the 2018 and 2019 IEPs.

March 7, 2018 IEP

Student's i-Ready and Scholastic Reading Inventory Lexile scores, beginning in August 2017 were as follows:

	2017-18 BOY	2017-18 MOY	2017-18 EOY	2018-19 BOY	2018-19 MOY	2018-19 EOY
i-Ready	417	422	427	407	446	438
Lexile	375	360	411	347	435	527

As of the March 7, 2018 annual IEP review meeting date, Student's i-Ready and SRI Lexile scores were two years below proficiency expectations for Student's then-current grade levels, but these scores reflected significant progress over Student's standardized test scores (i-Ready - 397, TRC Reading - 1<sup>st</sup> Grade) obtained before the initial April 2, 2017 IEP was developed. At the March 7, 2018 IEP team meeting, Student's teacher stated Student was making progress in all areas and Mother stated that she was happy with Student's progress. With this background to the March 7, 2018 IEP team's decisions, I find that DCPS has shown that the IEP team's increasing Student's Special Education Services from 10 hours to 12 hours per week, while providing more of those services in the general education setting, was reasonably calculated to enable Student to continue to make appropriate progress.

At the March 7, 2018 IEP review meeting, the IEP team determined that Extended School Year (ESY) services were not required for the provision of FAPE to Student. “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008), adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)). See, also *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’”)

Special Education Teacher testified that the IEP team decided at the March 7, 2018 meeting that Student did not need ESY services because Student had always made academic growth after school breaks. Petitioner’s expert, Educational Advocate, opined to the contrary that Student qualified for ESY based on Student’s i-Ready mathematics score of 407 at the beginning of the 2018-2019 school year. However, Student’s i-Ready score from fall 2018 was, of course, not available to the March 7, 2018 IEP team. Student’s i-Ready score actually increased from 397 in the middle of the 2016-2017 school year to 417 at the beginning of the 2017-2018 school year. On this issue, I found Special Education Teacher to be more credible than Educational Advocate and I find that DCPS has shown that the decision not to include ESY services in the March 7, 2018

IEP was appropriate. (The February 6, 2019 IEP team did decide that Student met criteria for ESY. However, for reasons not explained at the due process hearing, Student did not attend DCPS' summer 2019 ESY program.)

At the March 7, 2018 IEP review meeting, the IEP team changed Student's Behavioral Support Services from 120 minutes per month of direct services to 30 minutes per month of consultation services. Special Education Teacher testified that there were no significant behavior concerns for Student in the 2017-2018 school year. The IEP recites that Student was working hard at paying attention and following through on tasks, which was a "marked difference" from the prior school year. The responses, by Student's homeroom teacher and Mother, on Strengths and Difficulties Questionnaires also showed that Student was improving in social-emotional functioning both in the classroom and at home. The school social worker reported that at the March 7, 2018 meeting, the IEP team discussed how well Student was doing completing work and engaging in classroom lessons. On this evidence, I find that DCPS has shown that the IEP team's decision to discontinue direct Behavioral Support Services in the March 7, 2018 IEP, and to institute consultative services, was appropriate. In sum, I conclude that DCPS has met its burden of persuasion that the March 7, 2018 IEP was reasonably calculated to enable Student to make appropriate progress.

February 6, 2019 IEP

At the middle of the 2018-2019 school year, Student's i-Ready and SRI Lexile scores showed little progress for Student, indicating Student was then testing three

years below grade expectations. At the February 6, 2019 IEP review meeting, the IEP team added two hours of pull-out Special Education Services per week in hopes of seeing more progress. Educational Advocate opined in her testimony that this increase in Special Education Services was not enough to expect that Student would make appropriate progress.<sup>4</sup> I agree. At that point in time, Student was actually falling further behind same-aged peers. Neither of the City School educators who testified for DCPS, Special Education Teacher and Case Manager, offered a cogent explanation for how, after falling an additional school year behind typically developing peers, Student would be expected to make appropriate educational progress with an increase of only two hours per week of Special Education Services. I find that DCPS did not meet its burden of persuasion as to the appropriateness of this decision.

With regard to behavioral services, on the recommendation of School Social Worker, the February 6, 2019 IEP team restored Student's Behavioral Support Services to 120 minutes per month of direct services, because Student had been inconsistent in progressing toward social-emotional goals, and was distracted and had to be redirected in class. At the IEP team meeting, Educational Advocate said that she was pleased with this decision. I find that DCPS has established that restoring Student's direct Behavioral

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<sup>4</sup> It is troubling that Educational Advocate did not make known her concerns about the level of proposed services at the February 6, 2019 IEP team meeting. *See Endrew F., supra*, 137 S. Ct. 988 at 994 (Core of the IDEA is the collaborative process between the parents and the school officials to fashion the IEP.) But the responsibility for ensuring that an appropriate IEP is developed lies with the District not the parent's representatives. *See* 34 CFR § 300.323(a).

Support Services in the February 6, 2019 IEP was appropriate.

In sum, I conclude that DCPS has met its burden of persuasion that the March 7, 2018 IEP was appropriate for Student, but DCPS did not show that the provision of only 14 hours of Special Education Services in the February 6, 2019 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

- B. Did DCPS deny Student a FAPE by failing to conduct appropriate Functional Behavior Assessments and provide appropriate Behavior Intervention Plans in the 2017-2018 and 2018-2019 school years?

Petitioner faults DCPS for never having conducted a Functional Behavior Assessment of Student or developed a Behavior Intervention Plan (BIP). Functional Behavior Assessment or "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017). The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). *See, also*, Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a BIP, when

warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011). DCPS maintains that Student's behavior at school was never of such concern that an FBA or a BIP was needed. Petitioner has the burden of persuasion on this claim.

Petitioner offered scant evidence that Student required a Behavior Intervention Plan at school. Educational Advocate opined that the parent and teacher responses to the BASC-3 rating scales, administered with the February 2017 initial psychological evaluation, indicated clinically-significant or at-risk scores for some scales. The clinically significant scores all came from Mother's responses, which the psychologist recommended be taken "with some caution" as the parent tended to rate Student's behavior in an overly negative and inconsistent fashion. School Social Worker testified that an FBA was not necessary for Student at City School because Student's challenging behaviors were fairly inconsistent and not serious enough to cause concern. Case Manager likewise testified that there were no serious behavior concerns for Student at school. I conclude that Petitioner has not met her burden of persuasion that Student's behaviors at school impeded the education of Student or that of other children to the extent that an FBA or a BIP was warranted.

C. Did DCPS deny Student a FAPE by failing to implement Student's Behavioral Support Services in the 2018-2019 school year?

Student's City School IEPs provided for Student to receive 30 minutes per month of consultation Behavioral Support Services for the first part of the 2018-2019 school

year and 120 minutes per month of direct Behavioral Support Services after February 6, 2019. Educational Advocate testified that from her review of Student's education records, it did not appear that Student received the full 120 minutes per month of Behavioral Support Services specified in the February 6, 2019 IEP for the months of February or June 2019.

In *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), the court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.'" *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

*Middleton, supra*, 312 F. Supp. 3d at 144. The Petitioner has the burden of persuasion on the failure to implement claim. *See id.*

Petitioner's witnesses did not have any first-hand knowledge of whether Student had received Behavioral Support Services in the 2018-2019 school year. School Social Worker provided Student's IEP Behavioral Support Services, at first in the form of consultative services and then with direct services, after the IEP was revised in February

2019. School Social Worker testified that she provided all of Student's IEP Behavioral Support Services and filled out service tracker forms for those services. However, unbeknownst to her, the February and June 2019 Behavioral Support service trackers were not finalized and added to Student's education records. I found School Social Worker to be a credible witness. I conclude that Petitioner did not establish that there was a material failure to implement Student's IEP Behavioral Support Services in the 2018-2019 school year.

- D. Has DCPS denied Student a FAPE by failing to provide the parent's representatives access to Student's education records?

Lastly, Petitioner alleges that DCPS denied Student a FAPE by not providing Law Firm access to Student's education records. DCPS must permit parents and their legal representatives to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. *See* 34 CFR §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006).

Beginning in October 2019, Law Firm requested DCPS to provide copies of Student's education records. Special Education Teacher and Resolution Specialist testified credibly at the due process hearing that City School and DCPS Central Office provided all such records still maintained in Student's City School file and the Special Education Data System (SEDS) accessible by DCPS. For the 2019-2020 school year, Student is enrolled in a public charter school local education agency, which is

responsible for maintaining Student's current education records. I find that Petitioner has not shown that DCPS has failed to provide to Law Firm copies of any of Student's education records currently maintained by the agency.

### Remedy

In this decision, I have determined that in light of Student's scant progress under the March 7, 2018 City School IEP, DCPS did not meet its burden of persuasion that its February 6, 2019 IEP, with two additional hours per week of Special Education Services, was reasonably calculated to enable Student to make educational progress. Since Student did not re-enroll in DCPS for the 2019-2020 school year, the period of denial of FAPE was from February 2019 through the end of the 2018-2019 school year. Petitioner seeks an award of compensatory education as a remedy for Student.

"An award of compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial, and it accordingly must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019) (internal quotations and citations omitted.)

Petitioner's expert, Educational Advocate, opined that as early as March 2018, Student should have been placed in a full-time special education setting because Student was then performing some two years below grade level. I did not find this opinion credible. Both Special Education Teacher and Case Manager testified that Student was

making some progress in the mostly general education setting provided in Student's IEPs. Their testimony was supported by Student's improved scores over time on the SRI Lexile tests. Aside from Educational Advocate's conclusory opinion, there was no credible evidence that a full-time self-contained setting was Student's least restrictive environment. *See, e.g., Z. B., supra*, 888 F.3d at 528 ((To the maximum extent appropriate, public schools provide students with disabilities an education in the least restrictive environment possible.)

Educational Advocate recommended, *inter alia*, that Student be awarded 500 hours of Learning Center services as well as 312 hours of individualized tutoring as compensatory education. *See Exhibit P-99*. In her hearing testimony, Educational Advocate explained that she assumed the period of harm from DCPS' denial of FAPE to Student to have begun at the start of the 2017-2018 school year for a total approximately 19 school months. However, my determination is that the denial of FAPE in this case ran for approximately four months, after the February 6 2019 IEP was developed through the end of the 2018-2019 school year.

In her compensatory education proposal, Educational Advocate wrote that Student needed 312 hours of specialized tutoring outside the school setting to support Student's academics deficits in Reading, Mathematics and Written Expression. (Educational Advocate provided no justification in her testimony for also awarding Student Learning Center services as compensatory education.) Inasmuch as my determination is that Student was denied a FAPE for some 4 months, approximately

one-fifth the period assumed by Educational Advocate in her compensatory tutoring proposal, I will award Student 66 hours of individual academic tutoring for DCPS' failure to ensure that Student's IEP was appropriately revised on February 6, 2019 to address Student's inadequate academic progress.

**ORDER**

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, not later than 15 school days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain for Student 66 hours of individual academic tutoring from a qualified instructor and
2. All other relief requested by the Petitioner herein is denied.

Date: December 20, 2019

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

**NOTICE OF RIGHT TO APPEAL**

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

Case No. 2019-0257  
Hearing Officer Determination  
December 20, 2019

cc: **Counsel of Record**  
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**OSSE - SPED**  
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