

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
1050 First Street, N.E., Third Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
December 10, 2020

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2020-0167
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 12/10/20
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
("DCPS"),	)	11/19/20, 11/23/20 & 12/4/20
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of a timely speech-language evaluation and an Individualized Education Program (“IEP”) providing speech-language services and a certificate track. DCPS responded that the IEP was appropriate and that there was no denial of FAPE.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

**Procedural History**

Following the filing of the due process complaint on 9/18/20, the case was assigned to the undersigned on 9/21/20. Respondent filed a response on 9/29/20, and did not challenge jurisdiction. A resolution meeting was held on 10/1/20, which did not resolve the dispute or shorten the 30-day resolution period, which ended on 10/18/20. A final decision

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 16-day continuance, which requires a Hearing Officer Determination (“HOD”) by 12/18/20.

The prehearing conference was held on 11/4/20 and the Prehearing Order was issued that same day addressing the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 11/19/20, 11/23/20 and 12/4/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in most of the hearing.

Petitioner’s Disclosures, submitted on 11/11/20, contained documents P1 through P64, which were all admitted into evidence over objection to certain documents. Respondent’s Disclosures, submitted on 11/12/20, contained documents R1 through R22, of which only R1, R5, R6, R7, R8, R9, R10, R11, R14, R15, R16, R17, R18, R20 and R22 were offered into evidence; all documents offered were admitted into evidence without objection.<sup>2</sup>

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Private Speech-Language Pathologist* (qualified without objection as an expert in Speech-Language Pathology)
2. Parent
3. *Educational Advocate* (qualified over objection as an expert in Psychology, Neuropsychology, and IEP Development)

Respondent’s counsel presented 4 witness in Respondent’s case (*see* Appendix A):

1. *Superintendent of Schools* (qualified over objection as an expert in Educational Planning)
2. *School Speech-Language Pathologist at Residential School* (qualified without objection as an expert in Speech-Language Services)
3. *Nonpublic Monitoring Specialist* (Residential)
4. *Teacher* at Residential School (qualified over objection as an expert in Special Education Planning and Programming)

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<sup>2</sup> Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages separated by commas). By contrast, Respondent’s documents are consecutively Bates numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted.

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Petitioner's counsel did not present any rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether DCPS denied Student a FAPE by failing to comprehensively evaluate and/or timely conduct a Speech and Language assessment of Student, which had been promised by DCPS since May 2017 and should have at least been completed during Student's April 2019 triennial reevaluation. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP between July 2019 and present by (a) failing to include Speech and Language as a related service, and/or (b) placing Student on a Diploma Track rather than a Certificate Track. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 10 days, DCPS shall amend Student's IEP to (a) place Student on a Certificate Track rather than a Diploma Track, (b) add 1 hour/week of Speech and Language services along with goals, (c) update Student's transition plan, and (d) update academic, social-emotional, and adaptive goals.
3. DCPS shall conduct an updated transition/vocational assessment of Student and revise the transition plan as appropriate.
4. DCPS shall provide or fund compensatory education for any denial of FAPE, and shall fund a compensatory education evaluation.<sup>3</sup>
5. Any other just and reasonable relief.

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<sup>3</sup> Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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### Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Residential School, where Student began on 8/4/17.<sup>6</sup> Student is often pleasant and cooperative and participates "very well" in class; Student functions well below grade level in all areas, with the behavior of a much younger child with frequent tantrums.<sup>7</sup>

2. IEPs. According to the 1/22/20 psychoeducational evaluation, Student meets the criteria for Schizophrenia, unspecified; Attention Deficit Hyperactivity Disorder ("ADHD"), combined type; and Autism Spectrum Disorder ("ASD").<sup>8</sup> Student has had IEPs in place throughout the many years in school, with the disability classification ASD.<sup>9</sup> ASD impacts Student's ability to effectively learn in the classroom and participate in a general education setting.<sup>10</sup>

3. Student's 4/20/17 IEP provided 29 hours/week of specialized instruction outside general education, along with 570 minutes/month of Behavioral Support Services ("BSS").<sup>11</sup> Student's 6/12/18 IEP increased services slightly, adding 15 minutes/month of Occupational Therapy ("OT") consultation.<sup>12</sup> Student's 7/15/19 IEP maintained the same level of services as the prior year.<sup>13</sup> Student's 10/21/20 IEP added speech-language services, providing 29 hours/week of specialized instruction outside general education, along with 60 minutes/week of speech-language services, 570 minutes/month of BSS, and 15 minutes/month of OT consultation.<sup>14</sup>

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<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> Parent.

<sup>6</sup> Parent; P21-1,11.

<sup>7</sup> P28-3; P21-14; P18-3; R8p127.

<sup>8</sup> P28-11.

<sup>9</sup> Parent; P4-1; P5-1; P6-1; P21-1.

<sup>10</sup> P21-4.

<sup>11</sup> P4-16.

<sup>12</sup> P5-14.

<sup>13</sup> P6-15.

<sup>14</sup> P27-17.

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4. Speech-Language Evaluation. Upon entering school Student had delays in expressive and receptive language and a historical diagnosis of Mixed Expressive/Receptive Language Disorder; Student benefited from speech therapy in the past, with direct speech-language therapy from 2006 to 2008 and consultative speech-language therapy from 2009 to 2012.<sup>15</sup>

5. DCPS committed on the record during a due process hearing on 4/7/17 to conduct a speech-language evaluation of Student.<sup>16</sup> Parent consented to the speech-language evaluation in 2017, but did not see any results until the report was provided a few days before the due process hearing in this case.<sup>17</sup> Petitioner's counsel had sought the 2017 speech-language evaluation report in early April 2020 without success.<sup>18</sup> A triennial evaluation of Student had been conducted in April 2019 but did not include a speech-language evaluation.<sup>19</sup>

6. The 6/12/17 speech-language evaluation found that Student's communication scores ranged from below average to borderline range, although standardized portions of the evaluation were to be interpreted with caution.<sup>20</sup> While noting that eligibility is an IEP team decision, the evaluation concluded that Student had below average oral communication skills that may limit the ability to access or benefit from general education.<sup>21</sup> Student needed speech-language services based on the 2017 evaluation.<sup>22</sup>

7. An 8/25/20 speech-language evaluation of Student was conducted by School Speech-Language Pathologist which found a severe receptive and expressive language disorder based on the Clinical Evaluation of Language Fundamentals-5 ("CELF-5"), with pragmatic language skills falling well below age expectations.<sup>23</sup> Based on the 2020 speech-language evaluation, Petitioner's counsel sought to add speech-language services to Student's IEP.<sup>24</sup> Student's IEP incorporated the findings of the 2020 speech-language evaluation that Student evidences deficits in abstract language that warrant speech-language services and could benefit from speech-language services to address social language deficits and support functional employment training.<sup>25</sup> The speech-language evaluation recommended 30 minutes/week of speech-language services, but Petitioner's counsel sought

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<sup>15</sup> P28-2; R10p152.

<sup>16</sup> P16-4; P60-2,3 (Hearing Officer Final Decision and Order, Case No. 2017-0047 (5/6/17)).

<sup>17</sup> Parent; P59-1; R10 (2017 speech-language evaluation).

<sup>18</sup> P35-2 (4/6/20); P7-1 (4/7/20).

<sup>19</sup> Private Speech-Language Pathologist.

<sup>20</sup> R10p162.

<sup>21</sup> R10p163.

<sup>22</sup> Private Speech-Language Pathologist.

<sup>23</sup> P29-1,2; School Speech-Language Pathologist; Private Speech-Language Pathologist; P21-3 (10/21/20 IEP); P18-3,4.

<sup>24</sup> P12-1.

<sup>25</sup> P21-11,12.

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at least 60 minutes, and the school agreed to 60 minutes/week.<sup>26</sup> Student had never received speech-language services at Residential School until “just recently.”<sup>27</sup> Petitioner’s counsel unsuccessfully sought compensatory education for Student for the speech-language services that had not been provided earlier.<sup>28</sup>

8. Cognitive Abilities. Student is reported to be “extremely intelligent.”<sup>29</sup> The Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) conducted as part of the 6/8/10 comprehensive psychological evaluation found that Student’s Full Scale IQ (“FSIQ”) was a standard score of 75, which was considered unreliable due to very variable index scores ranging from 53 for processing speed to 98 for verbal comprehension.<sup>30</sup> Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) in the 1/22/20 psychoeducational evaluation, Student’s intellectual capabilities range from very low to extremely low, with a FSIQ standard score of 65, and subtests ranging from 49 for processing speed to 76 for verbal comprehension.<sup>31</sup> Student’s cognitive scores might have been better if Student had persevered on difficult tasks.<sup>32</sup>

9. Academics. In the 1/21/20 psychoeducational evaluation, Student was reported to have “variable” academic performance; Student is overwhelmed easily but seeks assistance from adults when encountering difficulties.<sup>33</sup> Academic challenges may cause tantrums or Student may persist with difficult tasks if motivated to please.<sup>34</sup> The 1/20/20 evaluation found that Student’s education level was significantly below grade based on the Woodcock-Johnson IV (“WJ-IV”), with Student’s Broad Achievement score about 8 years below grade; Broad Math about 9 years below grade; Broad Reading about 8 years below grade; and Broad Written Language 7 years below grade.<sup>35</sup>

10. Student’s KTEA-3 results on 9/29/17 indicated that Student was 6 or more years below grade in every category, with most categories 7 years below grade.<sup>36</sup> Student’s Kaufman Test of Educational Achievement – Third Edition (“KTEA-3”) results on 12/17/18 indicated that Student was 6 or more years below grade in every category, with most

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<sup>26</sup> P29-2; P12-1; Private Speech-Language Pathologist (agreed that Student needed 60 minutes/week).

<sup>27</sup> Parent; Private Speech-Language Pathologist (no speech-language services following 2017 speech-language evaluation until the fall of 2020).

<sup>28</sup> P12-2.

<sup>29</sup> P4-11 (4/20/17 IEP); P21-14 (10/21/20 IEP).

<sup>30</sup> P23-12.

<sup>31</sup> P28-5.

<sup>32</sup> P28-9.

<sup>33</sup> P28-2.

<sup>34</sup> *Id.*

<sup>35</sup> P28-6,7; P21-4,5; R9p146-147.

<sup>36</sup> P25.

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categories 8 or 9 years below grade<sup>37</sup> Teacher did not review Student's KTEA results and does not trust test scores, but goes by what a student can do.<sup>38</sup>

11. Teacher believes that Student can "read very well," at about 5 or 6 years below Grade.<sup>39</sup> Superintendent of Schools stated at the 10/21/20 team meeting that Student reads 7-8 years below Grade, while Petitioner's counsel referred to the Woodcock-Johnson that showed Student reading 8-9 years below grade.<sup>40</sup> As for math, Teacher stated that Student is 3-4 years below Grade.<sup>41</sup> Student struggles taking iReady reading assessments on the computer and rushes through the test; Student is able to read stories that are 6-7 years below grade.<sup>42</sup> The psychoeducational evaluation stated that some of Student's test scores, particularly composite scores, may underestimate Student's "true" ability and skill level.<sup>43</sup>

12. Grades. Student had good grades on the diploma track at Residential School, with 1 "A," 4 "Bs," and 1 "C" in 2017/18, and 6 "As" and 1 "B" in 2018/19.<sup>44</sup> Every academic class was listed as "functional," meaning it was modified for Student.<sup>45</sup> Student received mostly "As" in the 3 completed marking periods (out of 8) on the 2019/20 report card.<sup>46</sup> Educational Advocate noted that students with severe deficits often may be rewarded for effort and not academic skills.<sup>47</sup> Teacher testified that one-quarter of the grade at Residential School is for "participation," but that Student would have received good grades – "As" and "Bs" – even without any boost from "participation."<sup>48</sup>

13. Diploma v. Certificate Track. Petitioner's counsel raised concerns over Student being on the diploma track at the 8/25/20 IEP team meeting.<sup>49</sup> Petitioner's counsel asserted that the past 2 years of programming had been "all wrong" as Student was working on diploma track material that Student was cognitively "unable" to benefit from, rather than working on functional skills for independent living.<sup>50</sup> Educational Advocate believed that Student could not access grade level and pass courses to receive a diploma, and viewed Student as regressing.<sup>51</sup>

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<sup>37</sup> P26.

<sup>38</sup> Teacher.

<sup>39</sup> P20-2; Teacher.

<sup>40</sup> P20-2.

<sup>41</sup> Teacher.

<sup>42</sup> P21-6.

<sup>43</sup> P28-4,9.

<sup>44</sup> P56-1 (transcript).

<sup>45</sup> Teacher; P56-1.

<sup>46</sup> P57-1.

<sup>47</sup> Educational Advocate.

<sup>48</sup> Teacher.

<sup>49</sup> P10-1,2.

<sup>50</sup> P16-4.

<sup>51</sup> Educational Advocate.

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14. No one disagreed about shifting Student to the certificate track at the beginning of 2020/21.<sup>52</sup> Superintendent of Schools concurred that it would be “virtually impossible” for Student to achieve a diploma and agreed it was more logical for Student now to be on the certificate track, with which the IEP team agreed on 9/9/20.<sup>53</sup> Superintendent of Schools confirmed on 9/23/20 that Student had been “flipped” to the functional curriculum and was “doing really well.”<sup>54</sup> The option for Graduation Planning on Student’s 10/21/20 IEP was shifted from “H.S. Diploma” to “H.S. Certificate prior to age 22” rather than “H.S. Certificate at age 22,” a decision of the IEP team.<sup>55</sup>

15. School Speech-Language Pathologist observed Student in late August 2020 and found that Student participated well in classroom discussion, raised hand, waited to be called on, and contributed to the discussion; Student followed rules for classroom discussion.<sup>56</sup> Teacher considered Student a “very good student” who does work and asks for help as needed.<sup>57</sup> Student was proud of work completed and good grades.<sup>58</sup>

16. Student could do diploma track grade level work, if modified; courses were modified by as much as 6-8 years to a level Student could understand.<sup>59</sup> The course modifications were made by Superintendent of Schools, Teacher, and other teachers.<sup>60</sup> With modification, Student was doing the work, accessing the curriculum, and making progress with good grades.<sup>61</sup> Teacher had no concern about Student remaining on the diploma track, as Student was making progress on IEP goals; Student suffered no harm “at all” from the diploma track.<sup>62</sup> Student needed “read aloud” technology on the diploma track when reading books like *The Odyssey*.<sup>63</sup>

17. All students at Residential School receive functional courses and employment training and independent living skills, regardless of track.<sup>64</sup> Student took Independent Living Skills in 2017/18 and both Independent Living Skills and Employment in 2018/19.<sup>65</sup> Superintendent of Schools waited to shift Student to certificate track in order to provide

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<sup>52</sup> Parent; Superintendent of Schools.

<sup>53</sup> P10-2; R9p138; P18-4; P43-1 (signature by Parent dated 8/31/20 on form acknowledging shift to certificate track); P42-1 (legible diploma track requirements); P46-1 (parental consent form transmitted to DCPS on 9/14/20).

<sup>54</sup> P49-2.

<sup>55</sup> P21-26; P6-24; Superintendent of Schools; Nonpublic Monitoring Specialist; Teacher.

<sup>56</sup> P29-2; School Speech-Language Pathologist; P18-3 (Student participated “very well” in class and was able to contribute to almost any classroom discussion).

<sup>57</sup> Teacher.

<sup>58</sup> School Speech-Language Pathologist.

<sup>59</sup> Superintendent of Schools; Teacher.

<sup>60</sup> Teacher; Superintendent of Schools.

<sup>61</sup> Teacher.

<sup>62</sup> *Id.*

<sup>63</sup> P16-3.

<sup>64</sup> Superintendent of Schools.

<sup>65</sup> P56-1.



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every opportunity for Student to succeed on the diploma track and viewed it as “unfair” to shift a student to certificate track early on without giving every opportunity for the diploma track.<sup>66</sup> Superintendent of Schools’ approach was to wait until near the end of their education to “flip” to the certificate track students who could not graduate with a diploma.<sup>67</sup>

18. Student benefited from being on the diploma track, as it “pushed” Student to succeed and allowed teachers to be more rigorous; Student liked being pushed and sought to please teachers.<sup>68</sup> Student’s independent work was thorough and largely accurate; Student completes all schoolwork.<sup>69</sup> Student was able to write stories and essays on personal opinions and had strong functional math skills, although Student was well below grade level in all areas.<sup>70</sup>

19. Student received good reports on 9/22/20 on Student’s progress on the goals/objectives of the 7/15/19 IEP, which were based on the diploma track, with Mastery of 20 of 34 reported goals/objectives, and Sufficient Progress on 8 more goals/objectives.<sup>71</sup> Earlier progress reports from 2018/19 had a predominance of Sufficient Progress and Not Introduced; Student was making progress with scaffolding.<sup>72</sup> Progress reports for 2019/20 in the standard DCPS format indicated that Student was consistently Progressing.<sup>73</sup>

20. Teacher believes that Residential School students receive the same amount of functional and independent living skills regardless of whether they are on the diploma or certificate track.<sup>74</sup> The 4/9/19 Educational Summary noted that in math the class was working on number identification up to 60, days of the week, months of the year, finding dates on a calendar, and telling time; English included knowing and writing emergency contact information; and Social Studies included learning to recognize people by their names.<sup>75</sup> In addition, the class worked on independent living instruction every day.<sup>76</sup> The 5/7/19 Education Summary stated that in addition to IEP instruction, in math the class worked on identifying the value of money and counting coins and bills up to 5 dollars; in English the class worked on identifying community signs.<sup>77</sup> By 7/30/19, Student’s class was learning to sort money highest to least amounts and telling time on both digital and analog clocks.<sup>78</sup>

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<sup>66</sup> Superintendent of Schools.

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

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

<sup>69</sup> P18-3; R8p126.

<sup>70</sup> P18-3; R9p137.

<sup>71</sup> P14-14,15,16.

<sup>72</sup> R6; Superintendent of Schools.

<sup>73</sup> R7.

<sup>74</sup> Teacher.

<sup>75</sup> R6p76.

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

<sup>77</sup> R6p80.

<sup>78</sup> R6p38.

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21. In the 4/10/17 adaptive evaluation, on the ABAS-III Parent rated Student in the low range for functional academics, while a teacher rated Student in the above average range and reported that Student was able to read, complete math tasks, and write.<sup>79</sup> Student may have more significant deficits in adaptive behavior at home than at school.<sup>80</sup> The ABAS-III assessment on adaptive behavior in the 1/22/20 psychoeducational evaluation found that all composites and adaptive skill areas were average, except for community use and leisure, which were below average.<sup>81</sup>

22. Behavior. Student was placed in the residential treatment facility due to aggression toward self and others within Student's home and academic settings.<sup>82</sup> Student had shown improvement in behaviors overall throughout the course of treatment at Residential School.<sup>83</sup> Parent was primarily focused on behavior and felt Residential School didn't explain Student's needed courses and academics adequately.<sup>84</sup>

23. Specifically, Student displays "maladaptive, aggressive, unsafe, violent, and inappropriate behaviors at times."<sup>85</sup> Student frequently displayed tantrum behavior including screaming, crying, and aggression.<sup>86</sup> Student had a "head banging" incident on 3/29/20 in which Student tried to choke self; Student continues to be impulsive.<sup>87</sup> On 4/21/20, Student banged head and was aggressive toward staff.<sup>88</sup> Student has thoughts of killing, about which Student journals.<sup>89</sup> Student had 10 suicidal ideations in April 2020.<sup>90</sup> Voices tell Student to act out aggressively.<sup>91</sup> Student has 2 imaginary friends, one of which is with Student and the other at home.<sup>92</sup> Residential School provides security measures to enhance the safety of all and minimize the impact of unsafe behaviors; Residential School provides 24/7 staffing and nursing.<sup>93</sup>

24. Compensatory Education. To make up for the failure to provide speech-language services prior to the fall of 2020, the compensatory education proposal developed by Educational Advocate seeks 100 hours of speech-language services in addition to the

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<sup>79</sup> P24-6 (Parent may have had difficulty separating behaviors from skills, while the teacher may have overestimated skills).

<sup>80</sup> P24-7.

<sup>81</sup> P28-18.

<sup>82</sup> P14-9.

<sup>83</sup> P14-9; P28-1 (Student showed "marked improvement" in symptomatic behavior).

<sup>84</sup> Parent.

<sup>85</sup> P14-11.

<sup>86</sup> P18-3.

<sup>87</sup> P7-1.

<sup>88</sup> P8-1.

<sup>89</sup> P7-1.

<sup>90</sup> P8-1.

<sup>91</sup> *Id.*

<sup>92</sup> P7-1; P28-2,3; P14-10.

<sup>93</sup> P18-5; P7-1.

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services on Student's IEP.<sup>94</sup> Private Speech-Language Pathologist testified that it is difficult to determine the exact number of hours necessary to put Student in the place Student would be but for the denial of FAPE, but concluded that 100 hours was more appropriate as compensatory education than more speech-language service and more appropriate than less speech-language service.<sup>95</sup> Private Speech-Language Pathologist was certain that additional hours of speech-language services would benefit Student, but that Student would need more time than usual to use compensatory education hours due to the pandemic.<sup>96</sup>

### Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The

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<sup>94</sup> P64-6; Educational Advocate.

<sup>95</sup> Private Speech-Language Pathologist.

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

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IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen 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.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at \*3 (D.D.C. 9/26/18).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate and/or timely conduct a Speech and Language assessment of Student, which had been promised by DCPS since May 2017 and should have at least been completed during Student's April 2019 triennial reevaluation. (Petitioner has the burden of persuasion on this issue.)*

Focusing solely on the need for a speech-language evaluation, Petitioner met her burden on this initial issue based on the failure by DCPS to conduct and move forward with a speech-language evaluation at least by Student's 2019 triennial reevaluation. The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. §

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1414(b)(3)(B). The Appellate Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

Here, Student had received direct or consultative speech-language services from 2006 to 2012 and DCPS agreed on the record during a due process hearing on 4/7/17 to conduct another speech-language evaluation of Student. Parent consented to the 2017 speech-language evaluation, but – inexplicably – following evaluation no action was taken and there is no indication that the report was ever reviewed. The report was not provided to Parent or Petitioner’s counsel until a few days before the due process hearing in this case. The 2017 speech-language evaluation should have been carried through to completion and resulted in services according to Private Speech-Language Pathologist. Failing that, Petitioner reasonably notes that a speech-language evaluation should have been carried out at least by Student’s next reevaluation in April 2019. *See* 34 C.F.R. § 300.305(a); *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016).

A failure to conduct an evaluation is sometimes simply a procedural violation of the IDEA, as it is often difficult to know what needs the child would have had earlier, or whether there would have been any problem at all, due to the lack of evaluation. Here, however, the 2017 speech-language evaluation is now available and reveals that Student had below average oral communication skills that may have limited Student’s ability to access or benefit from general education, on which basis Parent’s expert persuasively concluded that Student needed speech-language services to adequately access the curriculum.

Thus, this Hearing Officer concludes that DCPS’s failure to evaluate Student at least by April 2019 and determine speech-language eligibility and services both impeded Student’s right to a FAPE and caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(i),(iii). This is a denial of FAPE resulting in an award of compensatory education as discussed below.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP between July 2019 and present by (a) failing to include Speech and Language as a related service, and/or (b) placing Student on a Diploma Track rather than a Certificate Track. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case through expert testimony and documents on this issue, shifting the burden of persuasion to DCPS, which failed to meet its burden on speech-language services for the reasons discussed above, but did meet its burden on the appropriateness of the diploma track for Student at Residential School from July 2019 until Student was shifted to the certificate track in the recent IEP.

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The applicable legal standard for analyzing the appropriateness of the 7/15/19 IEP at issue here was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of each IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.<sup>97</sup> *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Speech-Language Services. Speech-language is a “related service” that must be provided if required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue is whether, without speech-language as a related service, the 7/15/19 IEP was reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances.

As stated above, this Hearing Officer concluded that a speech-language evaluation should have been carried out at least by Student’s next reevaluation as sought here by Petitioner so that DCPS’s failure to evaluate Student at least by April 2019 and determine speech-language eligibility and services impeded Student’s right to a FAPE and caused a deprivation of educational benefit. Thus, speech-language services should have been added to Student’s IEP by 7/15/19 as asserted by Petitioner. DCPS’s failure to do so prevented the speech-language services required in Issue 1 from being provided to Student, which is also a denial of FAPE pursuant to 34 C.F.R. § 300.513(a)(i),(iii). This Hearing Officer concludes that this reconfirms, but does not duplicate, the compensatory education based on Issue 1 which is awarded below.

(b) Diploma or Certificate Track. The more challenging issue is whether Student was provided appropriate special education services and received a FAPE when Residential School and DCPS kept Student on the diploma track<sup>98</sup> in the 7/15/19 IEP, and did not shift Student to the certificate track until the 10/21/20 IEP. The question is whether Student

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<sup>97</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Issue 1, above, addresses a procedural violation.

<sup>98</sup> DCPS has established the necessary course work that students must successfully complete to earn a regular high school diploma, which is known as the “diploma track.” *See* 5A D.C.M.R. § 2203.2. DCPS has also established an alternative for special needs students to receive an IEP Certificate of Completion, known as the “certificate track,” instead of a regular high school diploma. *See* 5A D.C.M.R. § 2203.8.

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could make appropriate progress on the diploma track given the circumstances of Student's cognitive and academic limitations, or whether it was necessary for Student to be on the certificate track in order to make appropriate progress and receive a FAPE.

On the face of it, Petitioner's counsel makes a compelling argument that, with a FSIQ of 65 and being 6-8 years below grade level, Student was cognitively unable to benefit from the diploma track and instead needed to focus on functional skills for independent living. Yet, proper analysis requires consideration of Student's individual circumstances, which give a different story. Considering the diploma track at Residential School and all the facts set forth herein, the undersigned ultimately concludes that Student was able to make appropriate progress on the diploma track, as it was extensively modified to Student's level, and Student was provided functional skills for independent living even while on the diploma track.

In an effort to provide as much educational benefit to students as possible, Superintendent of Schools' approach is to wait until near the end of students' time at Residential School to shift to the certificate track those who could not graduate with a diploma. Thus, Superintendent of Schools concurred in shifting Student to the certificate track in the 10/21/20 IEP when urged by Petitioner's counsel. However, all students at Residential School receive functional courses, employment training and independent living skills, regardless of track. That is confirmed by the Residential School summaries of the work Student's class was doing while Student was on the diploma track. In 2019, the class was working on number identification up to 60, days of the week, months of the year, finding dates on a calendar, independent living instruction identifying the value of money and counting coins and bills up to 5 dollars, identifying community signs, learning to sort money highest to least amounts, and telling time on both digital and analog clocks. It seems quite clear that the diploma track at Residential School provided the type of functional progress that Petitioner's counsel sought for Student, while also modifying and reading *The Odyssey*.

The concern that Student would be overwhelmed by the challenges of the diploma track is also rebutted by Student's good grades and positive progress reports. Student earned mostly "As," some "Bs," and a few "Cs." Teacher testified that the grades were based on Student's modified work and did not need to be boosted based on Student's participation. Further, Student received good reports on progress on the goals/objectives of the 7/15/19 IEP on the diploma track, with Mastery of 20 of 34 reported goals/objectives, and Sufficient Progress on 8 more goals/objectives. Progress reports for 2019/20 in the standard DCPS format indicated that Student was consistently Progressing.

Concerns that Student would be frustrated and could not benefit from the diploma track are further rebutted by observations that Student participated very well in class, raised hand, and was able to contribute to almost any classroom discussion. Teacher viewed Student as a very good student who did the work and asked for help as needed. Superintendent of Schools noted that Student's independent work was thorough and largely accurate. This certainly does not sound like a Student unable to keep up or who is struggling to find meaningful educational benefit.

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In sum, with modification of the diploma track, Student was doing the work, accessing the curriculum, and making progress with good grades. Thus, this Hearing Officer concludes that Student's 7/15/19 IEP was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances and no more is required for DCPS to prevail on this issue.

### Remedy

Having analyzed and resolved the issues in this case, what remains is to determine appropriate compensatory education to make up for the denials of FAPE relating to the lack of speech-language services from April 2019 when a speech-language evaluation should have been conducted until late August 2020 when it actually was. In determining the amount of compensatory education for the denials of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, there is more clarity than is often the case due to the earlier 2017 speech-language evaluation that is now available and shows that Student did need speech-language services prior to August 2020. Educational Advocate prepared a Compensatory Education Proposal in which she found that 100 hours of additional speech-language services would be appropriate to make up the deficit caused by the denials of FAPE and restore Student to the position in which Student should have been but for the denials. The 100 hours covers both the failure to conduct a speech-language evaluation sooner and the failure to include speech-language services on Student's IEP sooner.<sup>99</sup>

While Private Speech-Language Pathologist noted the difficulty of determining a precise number of hours required to put Student in the place Student would be but for the denial of FAPE, she concluded that 100 hours of speech-language services would be appropriate as compensatory education and would benefit Student. Private Speech-Language Pathologist also emphasized that with the pandemic Student may need extra time to use compensatory education hours, which is taken into account below.

Thus, based on the experience and judgment of the undersigned, the Order below provides 100 hours of speech-language services to be provided by School Speech-Language Pathologist or other Residential School speech-language pathologist as long as Student is a student there, and by an independent speech-language pathologist selected by Petitioner if

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<sup>99</sup> Educational Advocate also proposed other remedies which the undersigned rejects as unnecessary to address the speech-language denials of FAPE; the undersigned rejected Petitioner's other IEP claim relating to the appropriateness of the diploma track in 2019/20.



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Student leaves Residential School before all compensatory education hours are used. As long as Student is at Residential School, Student is to be provided 60 minutes/week of speech-language services, unless Petitioner and Residential School agree otherwise, in addition to the ongoing speech-language services on Student's IEP. If Student leaves Residential School before the compensatory education award is fully used, DCPS is to promptly authorize funding of the remaining services from an independent speech-language pathologist selected by Petitioner.

These determinations by the undersigned have been carefully considered and specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 30 months, although the undersigned encourages use of the speech-language hours without delay to ensure that the remedial services that Student needs are obtained promptly.

### **ORDER**

Petitioner has prevailed in part in this case, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, Student is awarded 100 hours of speech-language services to be provided by a Residential School speech-language pathologist at a rate of 60 minutes/week (unless Petitioner and Residential School agree otherwise) as long as Student attends Residential School. If Student leaves Residential School prior to completing the 100 hours, DCPS shall provide within 10 business days a letter of authorization for the remaining hours of speech-language services from an independent provider chosen by Petitioner. All hours are to be used within 30 months and any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

**IT IS SO ORDERED.**

Dated in Caption

*/s/ Keith Seat*

Keith L. Seat, Esq.  
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

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controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov