

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

Parent on behalf of Student,¹)	Case No. 2021-0068
)	
Petitioner.)	Hearing Date: November 18-19, 2021
)	
v.)	Conducted by Video Conference
)	
)	Date Issued: December 6, 2021
District of Columbia Public Schools,)	
)	Terry Michael Banks
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X year-old student (“Student”) who attended School A throughout the 2019-20 and 2020-21 school years. On May 19, 2021, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to conduct triennial evaluations, failing to provide appropriate Individualized Education Programs (“IEP”), and failing to implement Student’s IEP. On June 1, 2021, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint* (“*Response*”) denying that it had denied Student a FAPE in any way. After a prehearing conference on June 23, 2021, Petitioner filed an *Amended Complaint* on July 12, 2021, and DCPS filed an *Amended Response* on July 13, 2021.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

PROCEDURAL HISTORY

Petitioner is the mother of an X year-old student who is currently enrolled at School A. On July 12, 2021, Petitioner filed the *Amended Complaint* alleging that DCPS denied the student a FAPE by (1) failing timely to conduct the following triennial evaluations by May 2019: occupational therapy (“OT”), speech and language (S/L), psychological, and an assistive technology evaluation, (2) failing to provide appropriate IEPs in January 2019, January 2020, and on January 25, 2021 due to insufficient speech services and adaptive goals, and the IEPs were not based on current evaluations, (3) failing to implement Student’s IEP by failing to provide the prescribed 24 hours of specialized instruction per week from March 2020 to the present. Specifically, Petitioner alleges that Student has received but 11 hours per week of the 24 hours of specialized instruction prescribed in the IEP (4) failing to provide Petitioner the opportunity to participate in the January 25, 2021 IEP meeting by failing to invite Petitioner and Petitioner’s counsel to the meeting, and (5) failing to provide Petitioner full access to Student’s education records that Petitioner requested on December 23, 2020, February 12, 2021, March 8, 2021, April 1, 2021, and April 19, 2021.

On July 13, 2021, DCPS filed its *Amended Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE as follows: (1) all allegations in the Complaint relating to actions or omissions prior to May 19, 2019 are precluded by the statute of limitations, (2) Student’s current IEP was developed on January 25, 2021 with a disability classification of intellectual disability (“ID”). It prescribes 24 hours per week of specialized instruction outside general education, 3 hours per month of S/L pathology outside general education, one hour per month of S/L pathology inside general education, 30 minutes per month of OT consultation, classroom and statewide assessment accommodations, transportation, and extended year services (“ESY”), all of which were reasonably calculated to enable Student to make progress in light of his/her circumstances, (3) DCPS made diligent but unsuccessful efforts to ensure Petitioner’s participation in the January 25, 2021 IEP meeting, (4) the January 27, 2020 IEP includes the same disability classification, and prescribed 24 hours per week of specialized instruction per week outside general education, 3 hours per month of S/L pathology outside general education, one hour per month of S/L pathology inside general education, 30 minutes per month of OT consultation, classroom and assessment accommodations, transportation, and ESY. The IEP was based on the current I-Ready, Reading Inventory, work samples, weekly practice and drills, as well as observations by teachers and related services providers, and was reasonably calculated to enable Student to make progress in light of her/his circumstances, (5) Student was making progress toward mastering her/his IEP goals but did not consistently participate in virtual learning. During the 4th term of the 2020-21 school year, Student participated inconsistently in-person classes, (6) Petitioner provided consent for Student to be evaluated in May 2021. While DCPS has begun the process of re-evaluating Student, her/his inconsistent attendance is a barrier to the completion of the reevaluations, (7) Due to the COVID-19 pandemic, DCPS implemented virtual learning in March 2020, and “Issues regarding the number of hours of specialized instruction and/or placement are no longer an issue in the virtual environment,” citing guidance by the Department of Education that allows but does not mandate distance learning plans, and (8) DCPS denies a failure to conduct comprehensive triennial evaluations, a failure to provide appropriate IEPs, a failure to provide an opportunity for parental participation on the January 25, 2021 IEP meeting, and a failure to fully implement the IEP since March 2020.

The parties participated in a resolution meeting on June 24, 2021 that did not result in a settlement. A prehearing conference was conducted by video conference on June 23, 2021, and the Prehearing Order was issued on July 7, 2021. An Amended Prehearing Order was issued on August 24, 2021 to reflect the *Amended Complaint* and *Amended Response*.

The due process hearing was conducted on November 18-19, 2021 by video conference. The hearing was closed to the public. Petitioner filed Disclosures on November 10, 2021 containing a witness list of nine witnesses and documents P1-P83. DCPS filed no objections to Petitioner's disclosures; thus, Petitioner's Exhibits P1-P83 were admitted into evidence. DCPS also filed Disclosures on November 10, 2021 containing a witness list of eight witnesses and documents R-1 through R-41. Petitioner filed no objections to DCPS' disclosures. During Respondent's direct case, Respondent's exhibits R1-R41 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Petitioner, and Witness C. Witness A was admitted as an expert in Speech and Language Pathology, Witness B in Special Education, and Witness C in School Psychology, all without objection. Respondent presented as witnesses in chronological order: Witness D, Witness E, Witness F, and Witness G. Witness E was allowed to offer expert testimony in the area of Special Education without objection. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to conduct the following triennial evaluations by May 2019: occupational therapy ("OT"), speech and language (S/L), psychological, and an assistive technology ("A/T") evaluation.
2. Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs in January 2019, January 2020, and on January 25, 2021 due to insufficient speech services and adaptive goals, and the IEPs were not based on current evaluations.
3. Whether DCPS denied Student a FAPE by failing to implement Student's IEP by failing to provide the prescribed 24 hours of specialized instruction per week from March 2020 to the present. Specifically, Petitioner alleges that Student has received but 11 hours per week of the 24 hours of specialized instruction prescribed in the IEP.
4. Whether DCPS denied Student a FAPE by failing to provide Petitioner the opportunity to participate in the January 25, 2021 IEP meeting by failing to invite Petitioner and Petitioner's counsel to the meeting.
5. Whether DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's education records that Petitioner requested on December 23, 2020, February 12, 2021, March 8, 2021, April 1, 2021, and April 19, 2021.

FINDINGS OF FACT

1. Student is X years-old and attended School A throughout the 2019-20 and 2020-21 school years.²

2. On January 10, 2010, when Student was Y years old, Facility A conducted a Speech and Language Evaluation of Student.³ Student's hearing, voice, and fluency were found to be within normal limits. His/her articulation was poor; his/her speech was unintelligible both to the familiar and unfamiliar listener. His/her expressive and receptive language scores revealed "profound" deficits, with both scores in the first percentile. In terms of pragmatic language, s/he did not use words to greet, inform, request, or demand. Examiner A concluded that Student "presents with a profound delay in expressive and receptive language. [S/he] also presents with below average skills in articulation and phonological skills as characterized by a standard score of <55 on the CAAP. [Student's] delayed speech and language skills may have a negative impact on [his/her] academics and hinder [him/her] from properly accessing the classroom curriculum."⁴

3. On April 11, 2011, Facility A completed a Comprehensive Psychological Evaluation.⁵ On the Wechsler Preschool and Primary Scale of Intelligence ("WPPSI-III"), Student scored in the Borderline range in Verbal IQ (77), Performance IQ (70), and Full IQ (70).⁶ On the Battelle Developmental Inventory ("BDI-2"), Student scored in the 32nd percentile in Adaptive development and in the 13th percentile in Personal-Social development.⁷ Examiner B was reluctant to attribute Student's poor academic performance to a disability due to his/her frequent absences: "Based upon information obtained, [Student] presents as a student who has academic challenges that are exacerbated by tardiness and absences. Due to the fact that [Student] has not had an opportunity to achieve academic skills upon [his/her] grade level due to [her/his] excessive absences and tardiness, it is premature to determine the presence or absence of a disability. Rather, it is recommended that [Student] receive support services prior to determining a disability to provide [her/him] the opportunity of adequate educational exposure."⁸

4. On April 12, 2011, DCPS developed an initial IEP for Student with a primary disability of Speech or Language Impairment.⁹ The Present Level of Educational Performance ("PLOP") focused primarily on Student's expressive and receptive language deficits:

In Receptive language, [Student] requires growth in ability to understand negatives in sentences, identifying colors, making inferences identifying categories of objects, understanding picture analogies, concepts of more/most and expanded sentences. In the areas of expressive language, [s/he] requires growth in answering what and where questions, using verb+ ing, using a variety of nouns, verbs and modifiers, producing basic four to five words, naming a variety of pictures, telling how an object is used, using quantity concepts, using possessives, answering questions logically, using words

² Petitioner's Exhibits ("P:") 22, page 1 at Bates page 215 and 24 , page 1 at 256. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P22:1 (215) and P24:1 (256).

³ P38:1 (346).

⁴ *Id.* at 2-4 (347-9).

⁵ P39:1 (352).

⁶ *Id.* at 3 (354).

⁷ *Id.* at 5 (356).

⁸ *Id.* at 7 (358).

⁹ P13:1 (83).

that describe a physical state, complete analogies, answering questions about hypothetical events and responding to where questions.¹⁰

The IEP team prescribed four hours per month of speech-language services outside general education.¹¹

5. On March 6, 2012, DCPS conducted an IEP Annual Review.¹² The PLOP reported that Student “produces the /th/ phoneme in the initial position of words and phrases with 80-100% accuracy. [S/he] demonstrates difficulty answering wh questions.”¹³ The IEP team again prescribed four hours per month of speech-language services outside general education.¹⁴

6. On May 7, 2013, when Student was in grade H at School B, DCPS completed a Psychological Re-evaluation to determine if Student qualified for special education as a student with an Intellectual Disability (“ID”).¹⁵ On the Kaufman Assessment Battery for Children (“KABC”), which measures intellectual functioning, Student scored in the Lower Extreme range (67) on the Fluid Crystallized Index.¹⁶ On the Kaufman Test of Educational Achievement (“KTEA-II”), Student scored Below Average in Letter & Word Recognition (80-9th percentile), Math Concepts & Applications (74-4th percentile), Math Computation (83-13th percentile), and Written Expression (40-<0.1 percentile).¹⁷ Student’s Adaptive Behavior Functioning was measured on the Adaptive Behavior Assessment System (“ABAS-II”). On the General Adaptive Composite, Student’s overall adaptive behavior skills fell in the average range of functioning. While his/her conceptual and social skills also fell in the average range, his/her practical skills fell in the below average range. Her/his teacher rated her/his overall adaptive behavior functioning to be within normal limits, but had concerns regarding his/her language, cognitive functioning, self-direction, self-care, and delayed academic achievement skills.¹⁸ Examiner C concluded that Student had an ID:

Results of re-evaluation suggest global delays in cognition, academic achievement, and adaptive behavior functioning. In terms of cognitive functioning, as measured by the KABC-II and previous assessment using the WPPSI-II, [Student] does exhibit significant cognitive delays as revealed by [his/her] full scale standard scores... Given [his/her] overall global deficiencies and delayed academic achievement over time, there are significant implications for assessing grade-level curriculum... [S/he] will require considerable repetition and clarification of concepts before new material can be introduced. [S/he] will also require the use of multi-modal instructional strategies to foster comprehension of material...

In terms of communication, [Student’s] receptive and expressive language skills are impacted due to [his/her] overall deficient cognitive functioning. This has implications for vocabulary development, following directions, expressing [his/her] wants and needs, and socializing with peers. Adaptively, due to global delays in functioning,

¹⁰ *Id.* at 3 (85).

¹¹ *Id.* at 5 (87).

¹² P14:1 (92).

¹³ *Id.* at 2 (93).

¹⁴ *Id.* at 4 (95).

¹⁵ P40:1 (362).

¹⁶ *Id.* at 8 (369).

¹⁷ *Id.* at 10 (371).

¹⁸ *Id.* at 11 (372).

[Student] will require adult prompts, redirection, and clarification in order to demonstrate age-appropriate skills for personal independence and social responsibility.

Therefore, based upon global delays in functioning, [Student] presents as a student with an Intellectual Disability (ID)...¹⁹

RECOMMENDATIONS

...Due to [Student's] cognitive deficits, teacher instruction is encouraged to continue be facilitating through a multimodal sensory presentation (i.e., oral, visual, tactile, etc.) This will also facilitate learning...

[Student] will require instructional support, accommodations, and modifications to the curriculum. Some accommodations may include extended time, preferential seating, and small class environment.²⁰

7. On May 16, 2013, DCPS completed an Occupational Therapy Assessment Report. Student was referred for an evaluation due to decreased handwriting and fine motor skills.²¹ On the Beery-Butenica Developmental Test of Visual-Motor Integration ("VMI"), which measures a child's motor and perceptual/visual skills, Student was Average in Visual Motor Integration, but Very Low in Visual Perception and Motor Coordination.²² On the Bruininks-Oseretsky Test of Motor Proficiency ("BOT-2"), Student scored Well Below Average in Fine-Motor Precision, Fine-Motor Integration, Manual Dexterity, Upper-Limb Coordination, Fine-Motor Control, and manual Coordination.²³ Examiner D reached the following conclusions and recommendations:

[Student] demonstrates weak upper extremity strength and coordination skills. [Student] struggles with [his/her] handwriting skills and other manipulation tasks... [S/he] demonstrates weak oculomotor skills resulting in poor tracking, scanning, convergence and divergence skills. Functionally, this means [s/he] has a disorganized approach to worksheets causing [him/her] to omit items or make copying errors. [Student] also demonstrates poor visual perception skills; this makes learning letters, numbers and shapes a struggle.

Recommendations for the educational staff:

[Student] may benefit from using a study carrel during testing situations to reduce distractions.

[Student] would benefit from using a line guide to help [him/her] keep [his/her] place in text.

[Student] should sit near the front/close to the board during board work.²⁴

¹⁹ *Id.* at 13 (374).

²⁰ *Id.* at 15 (376).

²¹ P41: 1 (378).

²² *Id.* at 7 (384).

²³ *Id.* at 8 (385).

²⁴ *Id.* at 9 (386).

8. On June 11, 2013, DCPS completed an IEP Annual Review. Student was classified with an ID.²⁵ In the Math PLOP, the IEP team reported some of the findings of the May 2013 Psychological Evaluation, including Student's limited ability to identify or name numbers or to count. The baselines indicated that s/he was performing below grade level. The two goals addressed Student's weakness in single-digit counting.²⁶ The Reading PLOP reiterated the evaluation finding that Student's reading skills were below grade level. The single goal addressed his/her weakness in identifying letters and distinguishing between upper and lower case.²⁷ In Written Expression, the PLOP reported that Student had significant difficulty writing his/her full name, writing basic numbers, and forming alphabets. The two goals had Student use drawings and pictures to express a theme.²⁸ In Communication/Speech and Language, the PLOP reported scores from the 2010 Speech and Language Evaluation. The three goals addressed her/his ability answer "wh" questions, follow 1-2 step directions, and his/her weaknesses in receptive and expressive language.²⁹ In Motor Skills/Physical Development, the PLOP reported Student's below average fine motor scores on the BOT-2. The goals involved writing his/her name, copying upper and lower case letters, cutting out a circle, complete mazes, and locate items in a hidden picture book.³⁰ The IEP team prescribed 24.5 hours of specialized instruction outside general education, and four hours per month each of S/L pathology and OT services outside general education.³¹

9. On March 16, 2017, when Student was in grade A at School C, DCPS completed an IEP Annual Review.³² The Math PLOP revealed that Student was performing at a grade E level, three grades below his/her current grade. S/he was able to add single-digit numbers, but had difficulty counting backwards, number comparison, and skip counting. The goals were: (1) Given 20 addition and 20 subtraction problems with sums less than 20, s/he will determine the answer from memory, and (2) Given 5 verbal starters of a number other than 1 and less than 120, s/he will count forward by ones, saying and writing the next 10 numbers that follow in sequence.³³ In Reading, the PLOP reported that on Student's January 26, 2017 reading assessment, s/he could read 10 words correctly per minute with 53% accuracy. S/he was performing at a grade H level, four grades below his/her current grade. "[S/he] is struggling with reading comprehension, decoding multi syllabic words, and using proper tense in reading." The goals were: (1) After reading a grade level story, Student will restate 5 key details from the text with 80% accuracy, and (2) Given a passage on his/her reading level, s/he will read aloud fluently with appropriate intonation and expression with no more than 5 errors.³⁴ In Written Expression, the PLOP indicated that Student could write her/his first and last name, the month, day, and year. S/he was unable to identify all of the letters of the alphabet, but could write sentences with the assistance of a graphic organizer. The goal was: given a sentence stem describing a topic, Student will complete the sentence and draw a supporting picture.³⁵ In Communication, the PLOP reported that Student continued to exhibit receptive-expressive language deficits. S/he could follow 1-2 step directions given verbal or visual prompts, and could answer "wh" questions with 60-80% accuracy. The goals were to be able to answer "wh" questions with 80% accuracy and to tell stories using

²⁵ P15:1 (100).

²⁶ *Id.* at 2-3 (101-2).

²⁷ *Id.* at 3-4 (102-3).

²⁸ *Id.* at 4-5 (103-4).

²⁹ *Id.* at 6-7 (105-6).

³⁰ *Id.* at 7-8 (106-7).

³¹ *Id.* at 9 (108).

³² P19:1 (163).

³³ *Id.* at 3-4 (165-6).

³⁴ *Id.* at 4-5 (166-7).

³⁵ *Id.* at 6 (168).

appropriate vocabulary, concepts, syntax, and morphology to formulate sentences.³⁶ In Motor-Skills, the PLOP reported that Student independently and consistently uses a functional grasp when completing writing/coloring activity. “When copying, [her/his] handwriting typically displays good letter formulation, fair sizing, and good line orientation... [Student] is able to transition independently to classes. [S/he] requires moderate cues to maintain organization skills.” The goals were to keep his/her desk organized, and to correct her/his work using a writing checklist to correct for punctuation, case usage, and spacing of words and letters.³⁷ The IEP team prescribed 24 hours per week of specialized instruction outside general education, one hour per month of S/L pathology and 90 minutes per month of OT outside general education,³⁸ and extended year services (“ESY”).³⁹

10. DCPS completed Student’s next IEP Annual Review on February 1, 2018, when Student was in grade D at School C.⁴⁰ The Consideration of Special Factors provided that Student did not need A/T devices and services, but performs well with interactive math games.⁴¹ The Math PLOP reported that on a January 26, 2018 i-Ready assessment, Student’s score was well below grade level. S/he would benefit from intensive intervention focused on skills and concepts related to quantitative reasoning and representation. The goals were: (1) given a two-step word problem involving any of the four operations, Student would solve the problem by drawing pictures or writing equations to determine the final solution, and (2) given 10 three-digit numbers, Student would represent the number using base ten blocks and then write the digit that is in the hundreds place, tens place, and the ones place.⁴² In Reading, Student was well below grade level on a January 26, 2018 i-Ready assessment, but his/her score on the middle of the year (“MOY”) DIBELS assessment was two levels above his/her beginning of the year (“BOY”) assessment. The results indicated that s/he had not acquired fundamental decoding skills and needed instruction in phonics. The goals were: (1) After reading an instructional level literary text, Student will ask or answer “wh” questions by referring to key details with support, and (2) After reading an independent level informational text or read aloud, and given a verbal question, Student will answer the question by referring to a detail in the text.⁴³ In Written Expression, the PLOP reported that Student was able to write her/his first and last name. S/he is able to complete sentence stems, but often asks how to spell sight words and frequently used words. The goal was: given a prompt, Student will write a five sentence paragraph that includes a topic sentence, states relevant details, and includes a concluding sentence.⁴⁴ In Communication, the PLOP and goal were unchanged from the previous IEP, but the desired accuracy of the goal was raised from 60-80% to 80%.⁴⁵ In Motor Skills, the PLOP indicated that Student demonstrated good fine motor and coordination skills to manipulate small items in the classroom, was able to adapt a functional tripod grasp during writing tasks, and color within bold lines without difficulty, but needed extra time to complete writing exercises. As for organizational skills, s/he was able to follow through with strategies with 70% accuracy. S/he was also able to transition to classes without difficulty, including climbing stairs, handling a tray in the cafeteria, and completing self-care activities. The goals from the previous

³⁶ *Id.* at 7-8 (169-70).

³⁷ *Id.* at 9 (171).

³⁸ *Id.* at 10 (172).

³⁹ *Id.* at 13 (175).

⁴⁰ P20:1 (179).

⁴¹ *Id.* at 2 (180).

⁴² *Id.* at 3-4 (181-2).

⁴³ *Id.* at 5-6 (183-4).

⁴⁴ *Id.* at 7-8 (185-6).

⁴⁵ *Id.* at 8-9 (186-7).

IEP, involving organization and correcting his/her work, were unchanged.⁴⁶ The only change in services from the previous IEP was a reduction in OT services from 90 to 60 minutes per month.⁴⁷

11. On January 1, 2019, during Student's grade G and first year at School A, DCPS completed an IEP Annual Review. Petitioner did not attend the IEP team meeting.⁴⁸ The Math PLOP indicated that Student's BOY i-Ready score was "two or more grade levels below grade level." Student

... needs to develop basic concepts related to basic counting and number recognition. Algebra test results indicate that London needs to develop basic concepts of part-part-whole relationships leading toward early addition and subtraction concepts. Measurement results indicate [Student] needs to develop a basic understanding of measurable attributes and may benefit from practice comparing and sorting objects by attributes such as length or weight. Geometry test results indicate that [Student] would likely benefit from practice identifying basic shapes and their attributes... [her/his] inability to comprehend and apply skills necessary to solve problems using the higher-level math concepts presented significantly impacts [his/her] ability to demonstrate successful grade-level performance in a general curriculum.

The goals from the previous IEP were unchanged.⁴⁹ In Reading, the PLOP revealed that a Scholastic Reading Inventory ("SRI") conducted on August 28, 2018 determined Student's level to be that of Beginning Reading ("BR").

When reading [s/he] had excessive deviations from print, meaning that [s/he] made up words as [s/he] went along... [Student's] weakness is that [s/he] has a hard time staying focused on work. [S/he] requires small group and one on one cue to keep [him/her] on task, especially when applying a new strategy or activity. [Her/his] academic skills for sight reading ability and spelling are negligible. [His/her] academic application for quantitative reasoning is limited. [His/her] passage comprehension ability is negligible.

The goals from the previous IEP were unchanged.⁵⁰ In Written Expression, the PLOP indicated that Student has difficulty transferring oral responses into a written document. Her/his grammar, punctuation, and sentence structure skills are "limited." The five-sentence goal from the previous IEP was unchanged.⁵¹ In Communication, Student continued to demonstrate 60% accuracy in answering "wh" questions. The goal of achieving 80% accuracy from the previous IEP was unchanged.⁵² In Motor Skills, the PLOP indicated that Student had demonstrated functional organization skills since arriving at School A. His/her handwriting is "generally functionally legible when completing his/her written work in the classroom." The first goal from the prior IEP, relating to organizing his/her desk, was deleted. The second goal, relating to editing his/her work, was repeated.⁵³ The only change in services from the previous IEP was a reduction in OT services from 60 to 30 minutes per month.⁵⁴

⁴⁶ *Id.* at 9-10 (187-8).

⁴⁷ *Id.* at 11 (189).

⁴⁸ P21:1 (197).

⁴⁹ *Id.* at 3-4 (199-200).

⁵⁰ *Id.* at 5-7 (201-3).

⁵¹ *Id.* at 7-8 (203-4).

⁵² *Id.* at 8-9 (204-5).

⁵³ *Id.* at 9-10 (205-6).

⁵⁴ *Id.* at 11 (207).

12. On May 21, 2019, DCPS issued an Evaluation Summary Report to provide Petitioner the results of its reevaluation of Student.⁵⁵ In Math, Student was found to be performing four grades below grade level. S/he could “adequately perform basic operations with speed and accuracy at the [grade C] level, fluency in correctly executing higher level operations is significantly compromised as the math concepts become more complex and abstract.” The intended strategy was “Specialized instruction all day in a small group and one-on-one setting.”⁵⁶ In Reading, Student was reported to be at the BR level:

[Student] struggles with decoding, word meaning, comprehension of figurative language, as well as the higher-level concepts in the text significantly impact [his/her] present ability to demonstrate the skill sets necessary for grade appropriate performance in the area of reading... [Student] requires specialized instruction in the area of reading grade level text and recognizing high frequency and functional words. [S/he] needs to extend, analyze and evaluate ideas presented in text, make and support assertions with evidence drawn from text, and analyze. [S/he] would benefit from intensive remedial reading intervention services that would target phonemic awareness, phonics, fluency, sight word recognition, and reading comprehension. [Student] needs small group instruction as well as one-on-one assistance to help [him/her] improve all aspects of reading and move toward accessing grade level content. This can be met by small group, one-on-one, differentiate instruction, and accommodations and modifications on class assignments and tests.⁵⁷

In Written Expression, “[his/her] weakness is that [her/his] composition skills are far below grade level peers and [s/he] finds it difficult to complete writing assignments without cues and adult support. Because [his/her] sight reading ability and spelling are negligible, it impacts [her/his] ability to demonstrate stronger written expression skills.” The strategy was specialized instruction in a small group and one-on-one setting.”⁵⁸ In Communication, Student was reported to present with functional articulation and fluency skills, but demonstrates difficulty with answering “wh” questions and lacked motivation to participate in speech and language therapy. The strategy was S/L therapy targeting receptive and expressive language deficits.⁵⁹ In Motor Skills, Student was reported to have weak upper extremity strength and coordination, struggles with handwriting skills and other manipulation skills, poor visual perceptual skills, and has a disorganized approach to worksheets, causing her/him to omit items. The strategy was direct OT services.⁶⁰ DCPS determined that “No additional assessments were warranted” in any of Student’s areas of concern.

13. On May 29, 2019, DCPS issued a Prior Written Notice (“PWN”) stating its intention to conduct an OT evaluation.⁶¹ On June 14, 2019, DCPS completed an Occupational Therapy Data Review Evaluation.⁶² In addition to reviewing Student’s academic records, Examiner E conducted interviews, clinical observations, and classroom observations, analyzed work samples, and reviewed

⁵⁵ Respondent’s Exhibit (“R:”) 14, page 1 at Bates page 101. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R14:1 (101).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2 (102).

⁵⁸ *Id.* at 3 (103).

⁵⁹ *Id.*

⁶⁰ *Id.* at 4 (104).

⁶¹ R8:1 (84).

⁶² P42:1 (389).

the prior OT evaluation. She did not conduct testing due to Student's absences from school. Examiner E recommended that comprehensive testing be completed when Student returned to school in the fall.⁶³

14. On January 27, 2020, when Student was in grade B at School A, DCPS completed an IEP Annual Review.⁶⁴ The Math PLOP reported that on a September 4, 2019 i-Ready diagnostic test, Student was "several grade levels behind but it definitely shows growth." S/he is able to answer basic computation problems only with the use of a calculator. The two goals replacing the prior goals were: (1) Given a one-step equation involving any of the four operations, Student will use her/his notes, anchor chart, foldable or graphic organizer to solve the equation, and (2) Given ten integer problems with mixed operations, Student will be able to use the integer rules and a calculator to solve the problems.⁶⁵ In Reading, an SRI assessment on August 28, 2019 found Student still to be reading at the BR level. Student was reported to have difficulty staying focused in class, and was often distracted by others. S/he "does well with answering literary questions orally and using organizers to help organize information from text." The goals were: (1) After reading two texts on her/his functioning level and on the same topic with a similar theme, Student will complete a graphic organizer containing 3 similarities and 3 differences in the texts, and (2) After reading a text on his/her instructional level, Student will identify the main idea, two key details, and describe in 2-3 sentences how the key details support the main idea, both orally and written.⁶⁶ In Written Expression, the PLOP reported that Student "is performing in the below average range of written composition. [S/he] is able to write very simple sentences with a subject and a verb. When asked to write more complex sentences and to include details from the text in [his/her] writing, [s/he] struggles significantly... [Student's] writing samples show [s/he] does not grasp the basic structure of letters when it comes to spelling, nor is [s/he] able to form many complex words." The goal was: given a real event, Student will write a minimum of five sentences about the event, with appropriate punctuation.⁶⁷ In Communication, Student's ability to answer "wh" questions had improved from 60% to 70% accuracy. The prior goal of achieving 80% accuracy was unchanged from the prior IEP.⁶⁸ In Motor Skills, the PLOP reiterated Student's functional organizational skills and that his/her handwriting was functionally legible. The editing goal from the prior IEPs remained unchanged.⁶⁹ The IEP maintained Student's specialized instruction and S/L services, but replaced his/her 30 minutes per month of direct OT services with 30 minutes per month of consultation services.⁷⁰

15. For the 2019-20 school year, Student received the following grades: Graded Advisory – A-, Math – B, English – P, Reading Workshop – P, Concepts of World History and Geography – C, Art – A-, Dance – C+, Science – C+, and Health & Physical Education – B.⁷¹ On June 1, 2020, DCPS issued the final IEP Progress Report for the 2019-20 school year. In Math, neither goal had been introduced. In Reading and Written Expression, Student made no progress on any of the three goals. The Communication goal had not been introduced, and there was no report on the Motor Skills goal.⁷²

16. On July 2, 2020, when Student was in grade L at School A, DCPS Witness E completed an Assistive Technology Assessment Review to determine the need for additional supports

⁶³ *Id.* at 3 (391).

⁶⁴ P22:1 (215).

⁶⁵ *Id.* at 3-4 (217-18).

⁶⁶ *Id.* at 4-7 (218-21).

⁶⁷ *Id.* at 7-8 (221-22).

⁶⁸ *Id.* at 8-9 (222-23).

⁶⁹ *Id.* at 9-10 (223-24).

⁷⁰ *Id.* at 11 (225).

⁷¹ P48:2 (460).

⁷² P28:1-5 (293-97).

that may increase Student’s access to the educational environment.⁷³ Upon her review of a June 2020 psychological assessment, the evaluator, Witness E, concluded that Student had sufficient fine motor, visual motor, visual perception, sensory processing, and functional life skills to access the curriculum. “However, [s/he] demonstrates difficulty in acquiring the concepts of new skills and recalling of previously learned strategies in order to complete academic based tasks. [S/he] benefits from repetition to learn new concepts, incorporating learning strategies, use of visual models, prompts for recall and practice of skills.” The IEP team completed the Student, Environment, Task, and Tools (“SETT”) worksheet to consider Student’s need for assistive technology. The team found that Student struggles with attention and executive functioning tasks.⁷⁴ Witness E reviewed data “from the most recent psychological evaluation” and found that Student had reading and writing skills “at a grade equivalent ranging from grade E through grade A, the latter being four grades below Student’s current grade. Student was able to recognize letters and letter sounds, but had difficulty in decoding tasks. In math, Student was able to solve one-digit problems with the support of manipulatives. Witness E opined that “Throughout the upcoming school year, [Student] should utilize assistive technology to support his/her reading, writing, and calculation. [Student] demonstrated an ability to utilize text to speech and speech to text but required repetition of how to access the supports.”⁷⁵ Witness E recommended consideration of the use of the following A/T: text to speech, access to Bookshare on school computers or tablet, access to dictation, graphic organizers, access to checklists, screen masking, a picture based dictionary, and manipulatives.⁷⁶

17. On December 23, 2020, Petitioner’s counsel requested a copy of Student’s “entire academic file.”⁷⁷ On January 12, 2021, Witness E replied, “attaching the requested records...”⁷⁸ On February 12, 2021, Petitioner’s counsel’s legal assistant replied, indicating that the following records had not been forwarded: all psychological evaluations, all speech/language testing, all report cards for grades G – L, and all IEPs prior to 2020.⁷⁹ On March 8, April 1, and April 19, 2021, the assistant reiterated her request for the missing records.⁸⁰ Witness E replied on April 20, 2021 indicating that she had “regenerated and attached the requested files.”⁸¹ On April 22, 2021, the assistant replied, acknowledging receipt of five evaluations, 10 IEPs, and three grade L term report cards.⁸² However, on April 27, 2021, she notified DCPS that the following records still were not submitted: grade L Progress Reports, grades B and G report cards, grade G Progress Reports, and any standardized testing scores on file.⁸³

18. On January 14, 2021, DPCS forwarded a draft IEP to Petitioner’s counsel and proposed IEP team meeting dates of January 21 or 22, 2021.⁸⁴ On January 21, 2021, Petitioner’s counsel’s legal assistant replied, indicating that Petitioner’s “team is unable to schedule a meeting for [Student] in January. Mid-to-late February would be a better time to schedule for parent and counsel...”⁸⁵ On February 12, 2021, the assistant stated that their team would consider scheduling an

⁷³ P43:1 (393).

⁷⁴ *Id.* at 5 (397)

⁷⁵ *Id.* at 6 (398).

⁷⁶ *Id.* at 7-8 (399-400).

⁷⁷ P58:1 (499); P61:1-2 (506).

⁷⁸ P61:1 (506).

⁷⁹ P65:1 (516).

⁸⁰ P66:1 (521), P67:1 (526), P68:1 (532).

⁸¹ P69:1 (539).

⁸² P70:1 (546).

⁸³ P71:1 (554).

⁸⁴ P63:1 (511).

⁸⁵ P64:1 (513).

IEP team meeting upon receipt of the missing records and a status report on the 2019 OT evaluation, “as the report sent to us in January appears incomplete.”⁸⁶

19. On January 25, 2021, when Student was in grade L at School A, DCPS completed an IEP Annual Review.⁸⁷ Petitioner did not attend the IEP meeting.⁸⁸ In Reading, Student’s BOY score was 427, a 107 improvement over two years. This placed his/her performance level at grade C, six grades below his/her current grade. S/he was reported not currently making progress due to inconsistent attendance and sleeping in class. S/he could answer basic computation problems only with the aid of a calculator. The goals from the previous IEP were unchanged.⁸⁹ In Reading, a July 2019 SRI placed Student between a grade E and grade C level of performance, the latter being four grades below Student’s grade at that time. Student was reported to have difficulty with attendance, turning in assignments, and remaining on-task. The goals were: (1) Given an informational independent level text, Student will list two main or central ideas and two supporting details for each main idea, and (2) Given 20 unfamiliar words of 1-2 syllables, Student will correctly read 19 out of 20 words on the first attempt.⁹⁰ In Written Expression, the PLOP from the previous IEP was unchanged, but the single goal was replaced with two: (1) Given an event on his/her instructional level, Student will compose 4-5 sentences that include one topic sentence, three linking words/phrases, or three temporal words/phrases, and two supporting detail sentences, and (2) When encountering unknown vocabulary words, Student will use context clues within the sentence to figure out the meaning.⁹¹ In Communication, the PLOP was unchanged from the previous IEP. The goal was: Student will answer higher order questions related to making predictions, inferences, and identifying the main idea/theme of a passage using graphic organizers.⁹² In Motor Skills, the PLOP reiterated Student’s functional organizational skills and that his/her handwriting was functionally legible. The editing goal from previous IEPs was repeated.⁹³ Student’s services of 24 hours per week of specialized instruction, one hour per month of S/L services, and 30 minutes per month of OT consultation services were unchanged.⁹⁴

20. On February 8, 2021, on an SRI assessment, Student scored 495, which is commensurate with grade C performance, six grades below Student’s current grade.⁹⁵ On June 8, 2021, s/he scored 330.⁹⁶ On May 10, 2020, Student’s overall i-Ready Math assessment, Student scored 427, which is at the grade C level. On May 25, 2021, s/he scored 380, which is at the grade H level, eight grades below his/her current grade. However, three days later, s/he scored 440, which is at the grade F level, five grades below his/her current grade.⁹⁷

21. On April 27, 2021, Petitioner’s counsel’s legal assistant inquired by email as to whether an IEP meeting had been held this year.⁹⁸ Witness E did not reveal that the IEP team met on

⁸⁶ P65:1 (516).

⁸⁷ P24:1 (256).

⁸⁸ Testimony of Petitioner; P56:1 (488).

⁸⁹ P24: 3-4 (258-59).

⁹⁰ *Id.* at 4-7 (259-62).

⁹¹ *Id.* at 7-8 (262-63).

⁹² *Id.* at 9 (264).

⁹³ *Id.* at 10 (265).

⁹⁴ *Id.* at 11 (266).

⁹⁵ P49:3 (466).

⁹⁶ P52:1 (477).

⁹⁷ P53:1 (480).

⁹⁸ P71:1 (554).

January 25, 2021: “A meeting could not be scheduled so the document shared is the plan that we are using until the parties can agree to schedule a meeting.”⁹⁹

22. For the 2021-22 school year, Student received the following grades: Concepts of World History & Geography – B+, Math – B, Science – B, Reading Workshop – F, Graded Advisory – A, Art – A, and Health & Physical Education – B.¹⁰⁰ On June 23, 2021, DCPS issued the final IEP Progress Report for the 2020-21 school year. In Math, Student was reported to have made progress on both goals once they were introduced in the third term. In Reading, Student made “a little” progress on the theme identification goal and the unfamiliar words goal once they were introduced in the third term due to poor attendance. In Written Expression, Student made “a little” progress on the sentence composition goal, and the vocabulary goal was not introduced, for the same reason. In Communication, Student was reported to have progressed on the goal for the last three reporting periods. In Motor Skills, s/he was reported to have made progress on the work editing goal in the last two reporting periods once it was introduced in the second reporting period.¹⁰¹

23. During the 2020-21 school year, Student’s schedule reflects that s/he received instruction from special education teachers, Teacher A and Teacher B, for 11 hours per week.¹⁰²

24. On May 6, 2021, Petitioner’s counsel’s legal assistant, by email, requested that DCPS conduct an OT evaluation, a S/L evaluation, a comprehensive psychological evaluation, and an A/T evaluation.¹⁰³

25. On June 25, 2021, DCPS completed an Occupational Therapy Reevaluation of Student.¹⁰⁴ On June 30, 2021, DCPS completed a Comprehensive Psychological Reevaluation.¹⁰⁵ On July 9, 2021, DCPS completed a Speech and Language Reevaluation.¹⁰⁶

26. Witness A, a speech language pathologist, opined that due to the deficits revealed in Student’s January 10, 2010 Speech and Language Evaluation, and in light of Student’s failure to make any progress improving his/her communication skills, s/he should have been reassessed as part of the triennial evaluation to determine the current extent of his/her deficits and to inform his/her service needs. Witness A noted that despite Student having several deficits, her/his IEP had but one speech goal, and Student showed no improvement over the years in that goal. Witness A opined that Student required goals to address deficits in grammar, vocabulary, comprehension, and higher order thinking skills.

27. Witness B, Petitioner’s Educational Advocate, opined that Student’s IEP’s were inherently inappropriate because they were not based on current data and lacked goals to address Student’s adaptive deficits. For example, Student could not count, tell time, or make change. Witness B also opined that Student required increased S/L services to address her/his expressive and receptive language deficits. Witness B opined that despite Student’s cognitive deficits, with proper supports, s/he would be able to make one-half year of academic growth per school year.¹⁰⁷

⁹⁹ *Id.*

¹⁰⁰ P51:2 (473).

¹⁰¹ P31:1-5 (308-12).

¹⁰² P74:1 (573).

¹⁰³ R19:5 (120).

¹⁰⁴ P46:1 (417).

¹⁰⁵ P47:1 (429).

¹⁰⁶ P45:1 (406).

¹⁰⁷ Witness B relied on *Is Scientifically Based Reading Instruction Effective for Students with Below Average IQ’s?*

28. Witness C, a Clinical Psychologist, opined that Student should have had an updated psychological evaluation during the triennial review, both to provide data to support continuing eligibility and to develop an appropriate educational program. He recommended assessment of non-verbal cognitive and adaptive skills as well as a social/emotional screener. Witness C testified that an individual's scores for cognitive development stabilize around ages 11-12.

CONCLUSIONS OF LAW

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹⁰⁸

One of the issues in this case is the alleged failure to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden as to this issue; Petitioner bears the burden on all other issues presented in this case.¹⁰⁹

Whether DCPS denied Student a FAPE by failing to conduct the following triennial evaluations by May 2019: occupational therapy, speech and language psychological, and an assistive technology evaluation.

The regulations require that a child with a disability be reevaluated whenever such is requested by a teacher or parent, or in the event the local education agency ("LEA") determines that the child's needs warrant it, and at least once every three years.

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
 - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section—
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(Allors, Mathes, Jones & Roberts, 2014); P79:9 (596).

¹⁰⁸ D.C. Code § 38-2571.03(6)(A)(i).

¹⁰⁹ *Schaffer v. Weast*, 546 U.S. 49 (2005).

- (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.¹¹⁰

Evaluation means procedures used in accordance with C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.¹¹¹ The LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining the appropriate content of the child's IEP.¹¹²

In the case of a triennial evaluation, the LEA must review all existing data involving the child's academic and disability history to determine if additional data is necessary and to determine (1) whether the child continues to have a disability, (2) if so, whether the child continues to require special education services, (3) the present levels of academic achievement and related developmental needs of the child; and (4) the appropriate content of the child's IEP:

- (a) Review of existing evaluation data. As part of ... any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—
 - (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
 - (1) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine...
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child...
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.
 - (d) Requirements if additional data are not needed.
 - (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—
 - (i) That determination and the reasons for the determination; and
 - (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.
 - (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.¹¹³

¹¹⁰ 34 C.F.R. §300.303.

¹¹¹ 34 C.F.R. §300.15, 34 C.F.R. §300.30.

¹¹² 34 C.F.R. §300.304.

¹¹³ 34 C.F.R. §300.305.

The courts treat violations of these provisions as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it “(i) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.”¹¹⁴

DCPS’ position is that the triennial evaluation regulations do not compel it to conduct assessments that it has conducted of a student in the past. Rather, 34 C.F.R. Section 300.305 requires it to review all existing data relating to a student’s educational history to determine (1) whether the child continues to have such a disability, (2) and the educational needs of the child. If it does not require any “additional data” to make these determinations, it need not conduct assessments to complete its evaluation. However, I note that subsection 34 C.F.R. Section 300.305 (a)(1)(i) requires DCPS to review evaluations provided by the parents of the child. Clearly, this reference to evaluations is to actual assessments solicited by parents that may not be in DCPS’ possession. Thus, while the regulations define evaluations as a process, they also use it in the commonly accepted manner, as specific, individual assessments of the student.

Occupational Therapy

DCPS conducted a OT Assessment Report on Student in 2013, but no further assessments prior to the triennial review in May 2019. In Motor Skills, Student was reported to have weak upper extremity strength and coordination, struggles with handwriting skills and other manipulation skills, poor visual perceptual skills, and has a disorganized approach to worksheets, causing her/him to omit items. The strategy to address these concerns was direct OT services. It issued a PWN on May 29, 2019 stating its intention to conduct an OT evaluation. On June 14, 2019, DCPS completed an Occupational Therapy Data Review Evaluation. Examiner E did not proceed with an OT assessment at that time due to Student’s absences, but recommended that comprehensive testing be completed when Student returned to school in the fall.

No evidence was offered by either party as to why an OT evaluation was not conducted in the fall of 2019. At the IEP Annual Review in January 2020, the team reported that Student had functional organizational skills and that his/her handwriting was functionally legible. The editing goal from the prior IEPs remained unchanged, and the team terminated Student’s direct OT services.

In its own Evaluation Summary Report as part of the triennial, DCPS found significant motor skill deficits that warranted direct OT services, and issued a PWN stating its intention to conduct an OT evaluation. That evaluation did not take place, and within a year, Student’s direct OT services were terminated. I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to conduct an OT assessment as part of its 2019 triennial evaluation.

Speech and Language

Prior, to DCPS’ 2019 triennial review, it had not conducted a S/L evaluation of Student since 2010. During its triennial evaluation, DCPS’ review of Student’s history revealed a student who had functional articulation and fluency skills, but who demonstrated difficulty with answering “wh” questions since 2013 and lacked motivation to participate in speech and language therapy. Witness A offered expert testimony that a S/L assessment should have been conducted to determine the current extent of his/her deficits and to inform his/her service needs. Specifically, he testified that Student

¹¹⁴ 20 U.S.C. §1415(f)(3)(E)(ii).

required goals to address deficits in grammar, vocabulary, comprehension, and higher order thinking skills.

DCPS' consistent argument is that in light of its determination that Student remained eligible for services as a child with an ID, it was not required to conduct additional assessments unless such were specifically requested by Petitioner. However, this ignores the second and equally important reason for the triennial evaluation: to determine "whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum." Here, Student's prior testing revealed "profound" deficits in expressive and receptive language, pragmatic language, and s/he was below average in articulation and phonological skills. The only communication goal prescribed over the years related to his/her inability to ask and answer "wh" words, and s/he exhibited little progress with this goal as of the triennial evaluation. This deficit was first identified as an issue in the 2013 Psychological Reevaluation. Nevertheless, Student's S/L services were reduced over time from four hours per month to one hour per month.

It is not apparent from the record that this X year-old has learned the alphabet. At the time of the triennial evaluation, Student's academic skills for sight reading ability and spelling were described as "negligible."¹¹⁵ Witness F confirmed that Student had significant difficulty reading, even with support. Nevertheless, Witness E was opposed to prescribing four hours per month of S/L services, because it would remove Student from his/her core classes for too long. In light of Student's meager progress on the one Communication goal, and his/her seeming inability to make meaningful progress in Reading and Written Expression, Witness A's testimony was persuasive. He suggested that Student would benefit from additional goals in grammar, vocabulary, comprehension, and higher order thinking skills. While I am not suggesting that Student should receive some minimum number of hours per month of S/L services, I am saying that as of May 2019, Student was not making progress in improving his/her communication skills, which have a crucial impact on his/her ability to absorb, digest, and transmit information. Under these circumstances, DCPS should have conducted a S/L reevaluation to determine Student's current functional level and to obtain guidance as to how Student's services could be modified to achieve more progress. Therefore, I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to conduct a S/L assessment as part of its 2019 triennial evaluation.

Psychological Evaluation

The evidence of the need for an updated psychological evaluation is less apparent. Witness C testified that one was needed to provide data to support continuing eligibility and to develop an appropriate educational program. However, he also testified that Student's last psychological evaluation, though it was completed six years before the triennial evaluation, occurred after the age when an individual's cognitive development has stabilized. So we would not expect a meaningful change in Student's cognitive scores. Student's academic deficiencies were also clear in the record. At the time of the triennial, s/he was a beginning reader and was making no progress on Reading or Written Expression goals. Although s/he was found to be performing four grades below grade level in Math, this may have been a generous rating, as her/his IEPs indicate an inability to do any computations without the use of a calculator. Student's IEP already provides for full-time specialized instruction, and the team noted that s/he requires a small group environment and one-on-one assistance. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS denied Student a FAPE

¹¹⁵ P21:5 (201).

by failing to conduct a psychological assessment as part of its triennial evaluation.

Assistive Technology

In the 2013 Psychological Re-evaluation, Examiner C recommended that “teacher instruction is encouraged to continue be facilitating through a multimodal sensory presentation (i.e., oral, visual, tactile, etc.)” A thorough triennial review would have included a review of this evaluation and its recommendations. At the time of the 2019 triennial, Student not only could not do basic mathematical computations, s/he had difficulty with “number recognition.” In Reading, s/he was still a beginning reader. In Written Expression, s/he had little concept of grammar, punctuation, and sentence structure. Thus, the goal of constructing a five-sentence paragraph was beyond his/her reach. Under these circumstances, DCPS should have considered the potential use of A/T devices to jumpstart Student’s academic career. Thus, I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to conduct an A/T assessment during its triennial evaluation of Student.

Finally, I note that in violation of 20 U.S.C. §1415(f)(3)(E)(ii), DCPS did not provide Petitioner an explanation why it determined that additional data was not needed for its triennial evaluation of Student, and it did not advise Petitioner of her right to request additional assessments.

Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs in January 2019, January 2020, and on January 25, 2021 due to insufficient speech services and adaptive goals, and the IEPs were not based on current evaluations.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.¹¹⁶ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”¹¹⁷ Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...¹¹⁸ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”¹¹⁹

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.¹²⁰ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”¹²¹ The Court rejected the Tenth

¹¹⁶ 458 U.S. 176, 187 (1982).

¹¹⁷ *Id.* at 189-90, 200

¹¹⁸ *Id.* at 200.

¹¹⁹ *Id.* at 203-04.

¹²⁰ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-I*, 137 S.Ct. 988 (2017).

¹²¹ *Id.* at 997.

Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.¹²²

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

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹²³

Petitioner alleges that the three IEPs developed at School A are inappropriate because of insufficient speech services and adaptive goals, and the IEPs were not based on current evaluations. In the previous section, I found that DCPS denied Student a FAPE because it failed to conduct OT, S/L, and A/T assessments during its 2019 triennial evaluations. Thus, I concur with Petitioner that the 2020 and 2021 IEPs were developed without the benefit of important current data about Student's performance levels and recommendations for Student's program. DCPS conducted an Assistive Technology Assessment Review in July 2020 that produced recommendations for Student's use of technology in the classroom.

As for adaptive goals, Petitioner has failed to make a *prima facie* case that Student's adaptive deficits had a meaningful impact on ■■■ ability to access the curriculum. In the 2013 Psychological Reevaluation, Student's overall adaptive behavior skills, conceptual skills, and social skills all fell in the average range of functioning. Her/his teacher at that time rated her/his overall adaptive behavior functioning to be within normal limits. There is no persuasive evidence that Student had any difficulty with the ordinary functions of being a student, such as being able to navigate the hallways and stairs, use the bathroom independently, use classroom furniture and equipment appropriately, and interact with peers and adults appropriately.

Finally, although the January 2019 IEP was developed beyond IDEA's two-year statute of limitations, it remained in effect at the inception of the limitations period in May 2019. In the previous section I found that DCPS denied Student a FAPE by failing to conduct three assessments as part of its triennial review in July 2019. Had those assessments been conducted, likely in the fall of 2019, they would have been used to support the 2020 IEP rather than an amended 2019 IEP. Therefore, I do not find that the January 2019 IEP was inappropriate for the reasons asserted by Petitioner. However, the

¹²² *Id.* at 1000-01 (citations omitted).

¹²³ 137 S.Ct. at 1000-01.

2020 and 2021 IEPs fail to meet muster not only for the reasons discussed above, but because Student had failed to show any meaningful progress in Math, Reading, or Written Expression on IEPs that were little changed throughout his/her last three years at School A.

Whether DCPS denied Student a FAPE by failing to implement Student’s IEP by failing to provide the prescribed 24 hours of specialized instruction per week from March 2020 to the present. Specifically, Petitioner alleges that Student has received but 11 hours per week of the 24 hours of specialized instruction prescribed in the IEP.

Petitioner offered a copy of Student’s schedule at School A to prove that DCPS failed to provide all of the specialized instruction to which Student was entitled when services were provided virtually due to COVID-19 restrictions. That schedule revealed that Student was assigned to special education teachers for only 11 of the 24 hours per week for which specialized instruction was prescribed for Student. This would amount to approximately 520 hours of missed specialized instruction.¹²⁴ However, the circumstances are complicated by two factors. First, the record reveals that Student has a history of poor attendance. That pattern was worse during virtual learning, and School A did not keep attendance records of students during virtual learning.¹²⁵ Additionally, When COVID-19 led to school closings in March 2020, the Department of Education (“DOE”) issued guidance to school districts as to the level of services they were required to provide disabled students under IDEA:

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, *to the greatest extent possible*, each student with a disability can be provided with special education and related services identified in the student’s IEP...¹²⁶

However, DCPS offered no genuine defense to this allegation – no explanation why Student’s schedule reflected service by special education teachers less than half the time. Therefore, I conclude that Petitioner has met her burden of proving that DCPS failed to implement Student’s IEP from April 2020 through the end of the 2020-21 school year.

Whether DCPS denied Student a FAPE by failing to provide Petitioner the opportunity to participate in the January 25, 2021 IEP meeting by failing to invite Petitioner and Petitioner’s counsel to the meeting.

The record reveals that DCPS completed an IEP for Student on January 27, 2020. That IEP would technically expire on January 27, 2021. On January 14, 2021, DPCS forwarded a draft IEP to Petitioner’s counsel and proposed IEP team meeting dates of January 21 or 22, 2021. Petitioner’s counsel declined to meet before late February. Witness E testified that DCPS went forward with an

¹²⁴ I assumed eight weeks in April and May of the 2019-20 school year, and 32 weeks for the 2020-21 school year: 40 x 13 = 520.

¹²⁵ Testimony of Witness E.

¹²⁶ *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (DOE March 2020), emphasis added.

IEP meeting in Petitioner's absence to avoid having the IEP expire. I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to provide Petitioner the opportunity to participate in the January 25, 2021 IEP meeting. The email exchanges described in paragraphs 17 and 18 above persuade me that the parties are mutually responsible for the failure to agree on an IEP team meeting date.

Whether DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's education records that Petitioner requested on December 23, 2020, February 12, 2021, March 8, 2021, April 1, 2021, and April 19, 2021.

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

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

- (1) The identification, evaluation, and educational placement of the child;
- and
- (2) The provision of FAPE to the child.¹²⁷

and

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

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

- (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
- (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

The right to have a representative of the parent inspect and review the records.¹²⁸

The email exchange regarding the dispute over records is set forth in paragraph 17 above. Petitioner offered no testimony on this issue during the hearing, Petitioner's counsel did not address it in either his opening or closing statements. Therefore, I must conclude that Petitioner has failed to meet her burden of proving that DCPS denied her access to Student's records.

¹²⁷ 34 C.F.R. §300.501.

¹²⁸ 34 C.F.R. §300.613.

RELIEF

For relief, Petitioner requested, *inter alia*, (1) an order directing DCPS to conduct or fund the following evaluations: psychological (including non-verbal and adaptive testing), S/L, OT, and A/T followed by an IEP Team meeting to review the evaluations and update the IEP, (2) compensatory education or, in the alternative, a compensatory education evaluation, and (3) attorney's fees. As set forth in paragraph 25 above, after the *Complaint* was filed, DCPS completed an Occupational Therapy Reevaluation of Student, a Comprehensive Psychological Reevaluation, and a Speech and Language Reevaluation.

I do not pretend to know the composition of a program that would work best for Student. But s/he is now in grade K and cannot read at a functional level, may not know the alphabet, cannot do simple arithmetic computations without the use of a calculator, and cannot write a literate paragraph. Something must change in his/her program if s/he is to acquire these basic skills before s/he is socially promoted out of the school system. Therefore, I will order an independent A/T evaluation and compensatory education that will afford Student the opportunity to have one-on-one instruction up to four hours per week for two years. If these intensive services are successful in providing a foundation for growth in his/her core subjects, they may provide a template for Student's few remaining IEPs.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

ORDERED, that DCPS shall fund an independent A/T evaluation of Student. Within ten (10) business days of receipt of the independent evaluation, DCPS shall schedule a IEP team meeting through Petitioner's counsel to review current evaluations and other relevant data to update Student's IEP as necessary.

IT IS FURTHER ORDERED, that DCPS shall fund 400 hours of compensatory education services in remedial Math, Reading, and Written Expression for Student.

APPEAL RIGHTS

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

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: December 6, 2021

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