

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

<b>Parent on behalf of Student,<sup>1</sup></b>	)	<b>Case No. 2021-0090</b>
	)	
<b>Petitioner.</b>	)	<b>Hearing Date: November 2, 3, and 10, 2021</b>
	)	
<b>v.</b>	)	<b>Conducted by Video Conference</b>
	)	
	)	<b>Date Issued: December 13, 2021</b>
<b>District of Columbia Public Schools,</b>	)	
	)	<b>Terry Michael Banks</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On July 1, 2021, Petitioner filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to conduct triennial evaluations, failing to provide appropriate Individualized Education Programs (“IEP”), and failing to provide Petitioner access to Student’s educational records. DCPS filed *District of Columbia Public Schools’ Response* (“*Response*”) on July 12, 2021, denying that it had failed to provide a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

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

**PROCEDURAL HISTORY**

Petitioner is the mother of an X year-old student who is currently enrolled at School A. On

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

July 1, 2021, Petitioner filed the *Complaint* alleging that DCPS denied the student a FAPE by (1) failing timely to conduct or to conduct comprehensively the following triennial evaluations by December 2020: Comprehensive Psychological, Speech and Language (“S/L”), Occupational Therapy (“OT”), and Assistive Technology (“A/T”), (2) failing to provide Student an appropriate IEP for the 2020-21 school year by failing to provide extended year services (“ESY”) in the summer of 2021, (3) failing to provide Student an appropriate IEP for the 2019-20 and 2020-21 school years by (a) failing to base the IEPs on updated data developed through the triennial evaluations described in paragraph 1 above for the June 23, 2021 Amended IEP, (b) failing to develop appropriate goals, Present Levels of Performance (“PLOPs”), and baselines based on updated evaluation data for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (c) failing to develop appropriate goals on his/her functioning level for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (d) failing to provide at least 2 hours per month of S/L services on the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, (e) failing to prescribe a more restrictive environment in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, and (f) failing to provide an increase of 10 additional hours of specialized instruction in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, and (4) failing to provide Petitioner access to Student’s educational records requested on March 4, 2021, March 19, 2021, March 24, 2021, April 5, 2021, April 20, 2021, June 30, 2021.

DCPS filed its *Response* on July 12, 2021 and asserted that (1) for the 2019-20 and 2020-21 school years, DCPS developed IEPs for Student that prescribed ten hours per week of specialized instruction, utilizing various sources of information including class performance, educational assessments, and progress reports. At the time the IEP was developed, it was reasonably calculated to enable Student to make appropriate progress considering her/his circumstances, (2) DCPS did not deny Student a FAPE by failing to conduct psychological, S/L, OT, and A/T evaluations by December 2020. DCPS completed a triennial review on or about December 5, 2020 in which it reviewed existing evaluation data, obtained information from teachers, and conducted a classroom observation. The IEP team determined that Student continued to qualify for special education and developed an IEP based on information based on information obtained in the review. Student was not eligible for S/L, OT, and A/T and, therefore, these areas would not have been included in a triennial review, and (3) DCPS denied that it denied Student a FAPE by failing to provide access to Student’s records.

The parties participated in a resolution meeting on July 8, 2021 that did not result in a settlement. A prehearing conference was conducted by video conference on August 11, 2021, and the Prehearing Order was issued on August 13, 2021.

The due process hearing was conducted on November 2, 3, and 10, 2021 by video conference. The hearing was open to the public. Petitioner filed Disclosures on October 26, 2021 containing a witness list of eight witnesses and documents P1-P66. DCPS filed objections to Petitioner’s disclosures on October 29, 2021. Specifically, DCPS objected to P14, P28, P30, and P66. I deferred ruling on these exhibits until they were offered during testimony. During Petitioner’s direct case, I sustained the objection to page three of P30 and overruled all other objections to the four exhibits. Thus, Petitioner’s Exhibits P1-P29, pages 1 and 2 of P 30, and P31-P66 were admitted into evidence. DCPS also filed Disclosures on November 10, 2021 containing a witness list of nine witnesses and documents R-1 through R-29. Petitioner filed no objections to DCPS’ disclosures. During Respondent’s direct case, Respondent’s exhibits R1-R29 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Petitioner, Witness C, Witness D, Witness E, and Witness F. Witness A was admitted as an expert in Occupational Therapy, Witness B in Special Education, Psychology, and Neuropsychology, Witness C in Assistive Technology, Speech and Language Pathology (“SLP”), Witness D in Special Education, and Witness F in Speech and Language Pathology, all without objection. Respondent presented as witnesses in chronological order: Witness G, Witness H, Witness J, Witness K, Witness L, and Witness M. Witnesses G, J, and M were allowed to offer expert testimony in the area of Special Education, Witness H in School Psychology, Witness K in School Occupational Therapy, and Witness L in SLP, all without objection. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

## ISSUES

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

1. Whether DCPS denied Student a FAPE by failing timely to conduct or to conduct comprehensively the following triennial evaluations by December 2020: Comprehensive Psychological, Speech and Language, Occupational Therapy and Assistive Technology.
2. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP for the 2020-21 school year by failing to provide extended year services in the summer of 2021.
3. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP for the 2019-20 and 2020-21 school years by (1) failing to base the IEPs on updated data developed through the triennial evaluations described in paragraph 1 above for the June 23, 2021 Amended IEP, (2) failing to develop appropriate goals, Present Levels of Performance (“PLOPs”), and baselines based on updated evaluation data for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (3) failing to develop appropriate goals on her/his functioning level for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (4) failing to provide at least 2 hours per month of S/L services on the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, (5) failing to prescribe a more restrictive environment in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, and (6) failing to provide an increase of 10 additional hours of specialized instruction in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP.
4. Whether DCPS failed to provide Petitioner access to Student’s educational records requested on March 4, 2021, March 19, 2021, March 24, 2021, April 5, 2021, April 20, 2021, June 30, 2021.

## FINDINGS OF FACT

1. Student is X years-old and attended School A during the 2020-21 school year.<sup>2</sup>
2. On July 12, 2011, Facility A completed an Occupational Therapy Evaluation Report.<sup>3</sup> Observation of Student revealed the following: in terms of neuromuscular skills, Student's range of motion, muscle strength and endurance, muscle tone, postural control, and grasp on writing implements were within normal limits. His/her motor planning, grasp on scissors, and hand dominance were below expectation. In terms of his/her bilateral coordination, s/he was able to hold objects at midline bilaterally and able to bring objects to midline, but was unable to string beads one at a time. S/he was below expectation in visual-motor skills, but had age-appropriate body awareness and self-care/feeding/dressing skills. Student was able to manipulate fasteners independently. In visual processing, Student did not make consistent eye contact, or follow circular movements, but was able to track a moving target from right to left and back. His/her auditory processing, vestibular processing, oral processing, proprioceptive processing, and multisensory processing were all within normal limits.<sup>4</sup> On the Peabody Developmental Motor Scales (PDMS-2), Student scored in the Below Average range in grasping, and in the Poor range in Visual-Motor and Fine Motor Quotient.<sup>5</sup> The examiner made several recommendations to improve grasp, foundational skills, visual motor skills, and motor planning skills. For instructional purposes, the examiner recommended that Student receive step-by-step breakdown of instructions.<sup>6</sup>
3. In August 2011, DCPS found Student eligible for services as a child with a Developmental Delay ("DD").<sup>7</sup>
4. On February 16, 2015, when Student was in grade C (2) at School B, DCPS completed a Comprehensive Psychological Re-Initial Evaluation. S/he was being reevaluated to reconsider his/her classification.<sup>8</sup> On the Wechsler Intelligence Scale for Children ("WISC-IV"), Student was Borderline in Working Memory (77), Below Average in Verbal Comprehension (81), Perceptual Reasoning (88), and Full Scale IQ (81), and Average (97) in Processing Speed. However, Examiner A cautioned that these score may not have been an accurate representation of Student's capabilities "given comprehension difficulties throughout the test."<sup>9</sup> On the Woodcock Johnson Test of Achievement ("WJ-III NU), Student scored in the Low range in Handwriting (76), Below Average in Calculation (85), Math Fluency (83), Writing Fluency (85), and Applied Problems (87), in the Average range in Reading Fluency (106), Passage Comprehension (93), and Writing Samples (99), and High Average in Letter-Word Identification (116). Examiner A concluded that Student qualified for classification with an SLD and recommended that an OT evaluation be conducted:

Based on this current assessment, [Student] appeared to have some deficits in math compared to [her/his] reading skills. In addition, given [Student's] writing skills, an occupational assessment is recommended to determine if any deficits in occupational

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<sup>2</sup> Petitioner's Exhibit ("P:") 13, page 1 at Bates page 136. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P13:1 (136)).

<sup>3</sup> P15:1 (180).

<sup>4</sup> *Id.* at 2-7 (181-86).

<sup>5</sup> *Id.* at 7-8 (186-87)

<sup>6</sup> *Id.* at (188).

<sup>7</sup> P24:1 (249).

<sup>8</sup> P22:1 (226).

<sup>9</sup> *Id.* at 8 (233).

(i.e., fine motor, perceptual coordination) skills are present, especially given her/his performance on the Block Design subtest (borderline range) and handwriting skills (low range). Based on all the data provided and reviewed, including recent classroom based standardized scores, report cards, and Tier 1 intervention monitoring scores, as well as the data yielded from this current testing, [Student] appears to meet criteria for a student with a Specific Learning Disability.<sup>10</sup>

Examiner A also offered a number of recommendations to support Student in the classroom including, but not limited to, the use of multiple modalities when presenting directions, explanations, and instructional content, preferential seating, the use of manipulatives, and systematic multisensory approaches such as Touch Math.<sup>11</sup>

5. On February 16, 2015, when Student was in grade C at School B, DCPS conducted an IEP Annual Review meeting. Petitioner did not attend the meeting. The IEP team reclassified Student with a Specific Learning Disability (“SLD”).<sup>12</sup> The Areas of Concern were Mathematics, Reading, Written Expression, Adaptive/Daily Living Skills, and Communication/Speech and Language (“Communication”).<sup>13</sup> The IEP team prescribed five hours per week of specialized instruction outside general education and 150 minutes per month of speech-language pathology (“SLP”) outside general education.<sup>14</sup>

6. On December 8, 2017, when Student was in grade D at School B, DCPS completed a Speech and Language Evaluation.<sup>15</sup> Examiner B employed the Comprehensive Assessment of Spoken Language (“CASL”) to assess Student’s communications skills. Student scored in the Low range in Nonliteral Language (76), Marginal/Borderline/Mild in Sentence Expression (78), and in the Average range in Grammaticality Judgment (92), Double Meaning (96), and Receptive Vocabulary (99). Overall, his/her General Language Ability Index (85) fell on the border of Average and Marginal/Borderline/Mild.<sup>16</sup> Examiner B concluded that Student no longer required direct S/L services:

In terms of overall speech and language skills, [Student’s] speech and language skills fall within the expected range in comparison to same-aged peers. There are no concerns at this time with speech, language, fluency or voice. Therefore, [s/he] does not require speech and language services at this time; however, [s/he] may benefit from strategies within an academic setting to help [her/him] continue to develop [his/her] communication skills.<sup>17</sup>

7. On December 12, 2017, DCPS administered Student a WJ-IV. S/he scored in the Average range in Reading Fluency (90), Broad Reading (91), Academic Fluency (94), Reading (96), Mathematics (96), Math Calculation Skills (98), Broad Mathematics (99), Broad Achievement (99), Academic Skills (102), Basic Reading Skills (105), Academic Applications (106), and Brief

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<sup>10</sup> *Id.* at 14 (239).

<sup>11</sup> *Id.* at 14-16 (239-41).

<sup>12</sup> P4:1 (45).

<sup>13</sup> *Id.* at 3-7 (48-51).

<sup>14</sup> *Id.* at 8 (52).

<sup>15</sup> P24:1 (249).

<sup>16</sup> *Id.* at 4 (251).

<sup>17</sup> *Id.* at 6 (254).

Achievement (107), in the High Average range in Broad Written Language (115), and in the Superior range in Written Language (122) and Written Expression (125).<sup>18</sup>

8. On December 19, 2017, DCPS completed a Psychological Triennial Reevaluation of Student.<sup>19</sup> Examiner C reviewed all of the evaluations in Student's record, his/her records, conducted a classroom observation, and interviewed his/her Reading teacher. Examiner C concluded that Student continued to meet the criteria for a student within an SLD because s/he had failed to make sufficient progress to meet age or state-approved grade level standards.<sup>20</sup>

9. On December 21, 2017, DCPS conducted an IEP Annual Review meeting. Petitioner did not attend the meeting.<sup>21</sup> In Consideration of Special Factors, it was reported that Student's behavior is often disruptive and s/he requires redirection and prompting to complete tasks.<sup>22</sup> In Mathematics, the Present Level of Academic Achievement and Functional Performance ("PLOP") reported that Student had a strong grasp of multiplication and was proficient in adding and subtracting up to 1,000, but struggled with division and advanced place value concepts. The baselines were: (1) S/he can multiply and divide up to 400 and add and subtract within 1,000,000, and (2) S/he can identify the place value of numbers up to 1,000,000. The goals were: (1) Given five expressions and an Operations Term Chart, s/he will write the expressions in numerical form using appropriate operations and notations, and (2) Given a number that contains a decimal and a rounding outline, s/he will round the number to a teacher-specified place.<sup>23</sup> In Reading, the PLOP indicated that Student's strengths were verbal responses and sounding out new words. S/he had difficulty producing original ideas in response to prompts and utilizing known blends, digraphs, and word patterns to decode. The baselines were (1) S/he continued to improve in the ability to identify main ideas in texts, but still needed moderate prompting, and (2) S/he had shown significant improvement in analyzing noting similarities and differences between multiple texts. The goals were: (1) After reading a nonfiction, independent reading level text, Student would identify more than one main idea and explain in three to five sentences how key ideas support the main ideas, and (2) After a read aloud of two accounts of the same event or topic, s/he would work with a buddy group to create a poster summary that describes the point of view presented in each text and list three similarities and three differences between them.<sup>24</sup> In Written Expression, the PLOP indicated that Student had very neat and consistent handwriting and was great at copying work. S/he had difficulty generating ideas and writing them. The baseline was that s/he has shown improvement in composing sentences. The goal was: after reading an instructional level text, Student would use a graphic organizer to compose a five sentence paragraph.<sup>25</sup> The IEP team prescribed five hours per week of specialized instruction in general education.<sup>26</sup>

10. On December 6, 2018, when Student was in grade G at School C, DCPS conducted an IEP Annual Review meeting. Petitioner did not attend the meeting.<sup>27</sup> The Consideration of Special Factors was unchanged from the previous IEP. The Mathematics PLOP revealed that on a September

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<sup>18</sup> P25:1 (256).

<sup>19</sup> P26:1 (259).

<sup>20</sup> *Id.* at 8 (266).

<sup>21</sup> P7:1 (79).

<sup>22</sup> *Id.* at 2 (80).

<sup>23</sup> *Id.* at 3 (81).

<sup>24</sup> *Id.* at 4 (82).

<sup>25</sup> *Id.* at 5 (83).

<sup>26</sup> *Id.* at 6 (84).

<sup>27</sup> P8:1 (89).

2018 i-Ready assessment, Student's overall score was 429, which corresponds to a grade F level of performance. The baselines were: (1) a repeat of the 2017 baseline involving identifying place values, and (2) Student's lowest i-Ready score was in geometry (408). The goals were: (1) a repeat of the 2017 goal involving rounding, and (2) Given a worksheet, Student will be able to describe equal parts of circles, rectangles, and squares using terms such as halves, fourths, and quarters.<sup>28</sup> In Reading, the PLOP reported no present levels of performance, and the baselines and goals were unchanged from the previous IEP.<sup>29</sup> In Written Expression, the PLOP, baseline, and goal were repeated from the previous IEP.<sup>30</sup> The IEP team prescribed ten hours per week of specialized instruction outside general education.<sup>31</sup>

11. Student earned the following final grades for the 2018-19 school year: Science – B, Graded Advisory – F (“Excessive absences [45]. Pleasure to have in the class.”), Math – C, World Geography & Cultures – B-, Reading Resource – A-, Middle Grades Math Support – A-, Art – B-, Health & Physical Education – A, and Reading Workshop – B+.<sup>32</sup>

12. On November 14, 2019, when Student was in grade B at School C, DCPS conducted an IEP Annual Review. Petitioner did not attend the meeting.<sup>33</sup> The Consideration of Special Factors was revised from previous IEPs to indicate that Student behavior does not impede her/his learning. It also indicated that s/he has no difficulty expressing him/herself orally and had no need for A/T.<sup>34</sup> In Mathematics, the PLOP reported that Student's latest i-Ready assessment placed her/him at the grade F level, four grades below her/his current grade. The single baseline was that Student can add and subtract integers. The single goal was to add and subtract rational numbers and represent addition or subtraction on a horizontal or vertical number line diagram.<sup>35</sup> In Reading, the PLOP reported that on the SRI assessment in September 2019, Student's score of 588 placed him/her at the grade F level. S/he was described as playful in class, “which often leads to off task behavior, such as talking during instructional time or joking with other students...” The baselines were: (1) Student has continued to improve in determining an author's point of view, and (2) S/he has shown significant improvement in analyzing how particular elements of a story interact. The goals were: (1) Given an independent level informational, persuasive text, Student would explain the author's point of view in 1-2 sentences and list at least 2 details that distinguish their point of view, and (2) Given a grade level literary text, Student would state the setting, cite one detail that shows how the setting impacts the plot, one detail that shows how the setting impacts the character, and analyze the details to explain how the setting impacts one character and one major plot event.<sup>36</sup> In Written Expression, The PLOP was unchanged from the 2017 IEP. The baseline was that s/he shows improvement writing narratives. The goal was: given two grade level, informational texts, Student would write an essay that includes paragraphs in the correct order: introductory paragraph, three body paragraphs, and an conclusion paragraph.<sup>37</sup> The IEP team prescribed ten hours per week of specialized instruction divided equally inside and outside general education.<sup>38</sup>

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<sup>28</sup> *Id.* at 3 (91).

<sup>29</sup> *Id.* at 3-4 (91-92),

<sup>30</sup> *Id.* at 5 (93).

<sup>31</sup> *Id.* at 6 (94).

<sup>32</sup> P33:1-3 (297-99).

<sup>33</sup> P9:1 (99).

<sup>34</sup> *Id.* at 2 (100).

<sup>35</sup> *Id.* at 3 (101).

<sup>36</sup> *Id.* at 3-4 (101-02).

<sup>37</sup> *Id.* at 4-5 (102-03).

<sup>38</sup> *Id.* at 6 (104).

13. On May 12, 2020, DCPS administered Student a WJ-III NU. Student scored in the Very Low range in Academic Knowledge (55), Broad Math (57), Brief Math (62), Math Calculation Skills (63), Academic Fluency (64), Listening Comprehension (66), Math Reasoning (67), and Oral Language (69), in the Low range in Pre-Academic (70), Total Achievement (71), Reading Comprehension (72), Academic Applications (75), Broad Reading (78), and Brief Achievement (78), in the Below Average range in Academic Skills (81), Oral Expression (84), Broad Written Language (84), Brief Reading (84), and Brief Writing (88), and in the Average Range in Basic Reading Skills and Phonographic Knowledge (107).<sup>39</sup>

14. On June 1, 2020, DCPS issued an IEP Progress Report encompassing all four reporting periods for the 2019-20 school year.<sup>40</sup> In Mathematics, Reading, and Written Expression, Student was reported to have made progress in the second and fourth periods, but not in the third.<sup>41</sup>

15. Student earned the following final grades for the 2019-20 school year: Math – B-, Science – F (40 absences), Spanish – B-, World History & Geography: Ancient World (19 absences) – P, Reading Workshop – B- (34 absences), Middle Grades Math Support – P, English – B, Science of Technology – A, and Music – B (14 absences).<sup>42</sup>

16. On November 5, 2020, when Student was in grade L at School A, Witness H completed a Psychological Triennial Reevaluation of Student for DCPS.<sup>43</sup> Witness H administered no tests and conducted no observations, but she interviewed Student’s special education math teacher and reviewed i-Ready assessments and work samples. Witness H concluded that Student remained eligible for services as a student with an SLD.<sup>44</sup>

17. On November 12, 2020, DCPS conducted an IEP Annual Review meeting. Petitioner did not attend the meeting.<sup>45</sup> The Consideration of Special Factors was unchanged from the previous IEP. In Mathematics, the PLOP revealed that Student scored 459 on the latest i-Ready assessment, placing her/her at the grade A level overall. The baseline regarding his/her ability to add integers was unchanged from the previous IEP. The goal was: given a multi-step linear equation with rational coefficients that require distribution and/or collecting like terms to solve, Student would use inverse operations to solve for the unknown variable.<sup>46</sup> In Reading, the PLOP revealed that the September Reading Inventory showed Student remained on a grade F reading level. The baselines were: (1) Student continues to improve in citing textual evidence that supports an analysis of what the text says, and (2) The prior year baseline regarding analyzing how particular elements of a story interact was unchanged. The goals were: (1) Given an independent level informational text, a claim about the text, and a graphic organizer, Student would write a paragraph that cited three pieces of evidence and explained how each supported the claim, and (2) After reading a grade level informational text, Student would correctly respond to short-answer, analytical questions that require him/her to infer information from explicit information in the text by writing 3-6 sentences including citations of

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<sup>39</sup> P28:2 (276).

<sup>40</sup> Respondent’s Exhibit (“R:”) at Bates page 41. The exhibit number is followed by the electronic page number, i.e., R5:50.

<sup>41</sup> *Id.* at 50-52.

<sup>42</sup> P34-1-3 (302-04).

<sup>43</sup> P29:1 (279).

<sup>44</sup> *Id.* at 3-4 (281-82).

<sup>45</sup> P10:1 (109).

<sup>46</sup> *Id.* at 3-4 (111-12).



textual evidence.<sup>47</sup> In Written Expression, the PLOP remained unchanged from the 2017 IEP. The baseline was that s/he continued to improve in writing arguments to support claims and providing concluding statements. The goal was: after reading a grade level passage that presents an argument with the author's original conclusion removed, Student would write a 4-6 sentence concluding paragraph that summarized at least three of the author's claims, summarized at least one of the author's counter-arguments to an opposing claim, and provided a statement of the author's concluding opinion.<sup>48</sup> The IEP did not change Students services: five hours per week each in general education and outside general education.<sup>49</sup>

18. On November 13, 2020, DCPS issued an IEP Progress Report for the first reporting period of the 2020-21 school year. Student was reported to have made progress on all of his/her goals.<sup>50</sup>

19. On January 8, 2021, Student's Lexile score of 646 indicated a grade F Reading level.<sup>51</sup>

20. On March 3, 2021, Petitioner's counsel requested that DCPS provide fifteen categories of Student's educational records for the last three years.<sup>52</sup> On March 4, 2021, March 19, 2021, and April 5, 2021, Petitioner's counsel's legal assistant acknowledged receipt of records from DCPS, but indicated that the following records were not received: only one IEP and two progress reports were received, all report cards T1 through T4, standardized tests, service trackers, and all evaluations.<sup>53</sup> On April 8, 2021, DCPS forwarded Evaluation Summary Reports and S/L service trackers.<sup>54</sup> Petitioner's counsel's legal assistant requested 24 categories of records on June 30, 2021,<sup>55</sup> and 25 categories on July 28, 2021.<sup>56</sup>

21. On June 21, 2021, DCPS issued an IEP Progress Report encompassing all four reporting periods for the 2020-21 school year. In Mathematics, s/he was reported to have made progress on his/her single goal in the third and fourth periods after it was introduced in the second period. There was no report on the first period. In Reading and Written Expression, Student was reported to have made progress on all goals in the last three reporting periods. There was no report on the first period.<sup>57</sup>

22. On June 23, 2021, DCPS convened an IEP team meeting to amend Student's IEP to add new accommodations and transportation services. Petitioner attended by telephone.<sup>58</sup> The Classroom Accommodations added were Read Aloud for Non-ELA/Literacy Assessments, Read Aloud for ELA/Literacy Assessments, and a graphic organizer for tests and class notes.<sup>59</sup> Petitioner's

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<sup>47</sup> *Id.* at 4 (112).

<sup>48</sup> *Id.* at 5 (113).

<sup>49</sup> *Id.* at 6 (114).

<sup>50</sup> P31:1-3 (288-90).

<sup>51</sup> Testimony of Witness D; P42:2 (333).

<sup>52</sup> P43:3 (337).

<sup>53</sup> P44:1-2 (346-47); P45:1 (351); P47:1 (364).

<sup>54</sup> P48:1 (370).

<sup>55</sup> P54:1 (403).

<sup>56</sup> P55:1 (407).

<sup>57</sup> R5:64-66.

<sup>58</sup> P13:1 (136).

<sup>59</sup> *Id.* at 8 (143).

counsel requested an increase to 20 hours per week specialized instruction. The DCPS IEP team refused to grant the request because such an increase would change his/her placement, which the DCPS team believed would be a “disservice.” Staff Member A opined, “There are times when[Student] gets small group instruction. There are times when [s/he] gets one-on-one instruction. [S/he] is one of our group leaders. I feel like [s/he] can be successful. When things are put in place such as graphic organizers, timers or read aloud, [Student] is successful. [S/he] is able to give an argument as well as a rebuttal. This is grade level skill.” The IEP team did not prescribe ESY because “█ did make gains.”<sup>60</sup> The DCPS team reported that Student did not exhibit distractibility; even during virtual learning, s/he was consistently responsive.<sup>61</sup>

23. Witness A, an occupational therapist, testified that there was insufficient data to have terminated Student’s OT services without a reassessment. Witness A further opined that an OT assessment should have been conducted during the most recent triennial review, because one was recommended in the February 16, 2015 Psychological Evaluation and because Student’s IEPs indicated difficulty with planning and formulating ideas.<sup>62</sup>

24. Witness B testified that the November 5, 2020 Psychoeducational Triennial Evaluation was not comprehensive because it provided only a review of Student’s records and did not address areas of need identified in the prior evaluation. Student required cognitive testing because s/he was last tested at an age before cognitive skills stabilize. Moreover, Witness B testified that DCPS should have used the WJ-IV in 2020, which was introduced in 2014, instead of the WJ-III. She testified that DCPS should have administered a S/L prior to a psychoeducational evaluation; if Student demonstrates receptive and expressive language deficits, it would indicate the need for a non-verbal cognitive assessment. Witness B opined that DCPS should have conducted OT, S/L, and comprehensive psychoeducational evaluations during the triennial review. She also testified that Student requires more specialized instruction in light of his/her performing five grades below grade level.<sup>63</sup>

25. Witness C opined that Student could have benefitted from an A/T evaluation because of low math and reading achievement scores. He testified that Student might benefit from text-to-speech and organization software to help Student get his/her thoughts on paper.<sup>64</sup>

26. Witness D testified that DCPS failed to provide the following records that Petitioner had requested: not all i-Ready assessments were provided, no report cards have Term 4 grades for grades A to B and for Terms 3 and 4 for grade L, progress reports for all four reporting periods were not provided for school years 2019-20 and 2020-21, attendance records for the 2018-19 and 2019-20 school years, and meeting notes for the 2018-19, 2019-20, and 2020-21 school years except the June 23, 2021 IEP meeting. Witness D opined that Student’s November 14, 2019 IEP was not appropriate because it did not address his/her behavioral issues and his/her continued performance at the grade F level warranted more specialized instruction than was prescribed. She also opined that due to Student’s expressive and receptive language deficits, S/L services should not have been terminated. Witness D testified that the November 12, 2020 IEP was inappropriate because it did not address Student’s distractibility, it lacked A/T for his/her reading deficits, the Math PLOP was

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<sup>60</sup> P12:2-3 (129-30).

<sup>61</sup> *Id.* at 7 (133-34).

<sup>62</sup> Testimony of Witness A.

<sup>63</sup> Testimony of Witness B.

<sup>64</sup> Testimony of Witness C.

insufficient, and s/he was still performing at a grade F level. She opined that Student required OT and S/L services. She opined that the June 23, 2021 Amended IEP was inappropriate because it did not address behavior, did not provide A/T, the PLOPs and goals were inadequate, there was insufficient specialized instruction, and no ESY was prescribed. In support of the Compensatory Education Plan that she developed, specifically 500 hours of academic tutoring, Witness D opined that all SLD students would be expected to make three-fourth of a year of academic progress per school year with appropriate supports.<sup>65</sup>

27. Witness F opined that Student's S/L services should not have been terminated as a result of the December 8, 2017 evaluation because of continued concerns over expressive and receptive vocabulary, following directions, and reading comprehension. Witness F also opined that Student should have been reevaluated in S/L because of his/her grade F reading level and difficulty expressing [REDACTED].

28. Witness G opined that the November 14, 2019 IEP was appropriate because no concerns were raised concerning Student's behavior, his/her communication skills, or her/his ability to understand content through direct instruction. However, Witness G conceded that Student's math and reading assessment scores had regressed, and s/he had difficulty putting his/her ideas on paper. Witness G was not aware that this had been an issue for the last five years.

29. Witness H, who conducted the November 5, 2020 Psychological Triennial Evaluation, testified that a more comprehensive evaluation was not necessary because of the availability of ample recent achievement data. However, she conceded that she did not have Student's prior standardized assessments reflecting regression in math and reading. While Petitioner's counsel wanted testing for distractibility, Student's teachers did not view this as a problem area. Witness H offered to conduct a Conners screening assessment, but Petitioner's team rejected the offer.

30. Witness K opined that termination of OT services in 2013 was appropriate because Student was able to cut with scissors on straight and curved lines, use building blocks, complete pencil tasks, string beads, and write letters; there were no longer any OT concerns. Despite being below average in block design, his/her overall scores were in the average range. Witness K disagreed that OT services were necessary to help a child translate ideas into written work – "that's for the teacher." She also opined that psychologists are better suited to test for executive functioning deficits.

31. Witness M was Student's special education math teacher in grade L. She testified that Student was eager to learn, asked questions readily, regularly attended optional office hours during virtual learning, stayed on top of his/her assignments, volunteered eagerly, always participated, and advocated for her/himself. Because Student was progressing on his/her math goals, Witness M did not believe s/he required more service hours. However, Witness M agreed that if a student was not making progress from one IEP to the next, an increase in service hours would be appropriate.

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<sup>65</sup> Testimony of Witness D. Witness D also testified that Petitioner requested evaluations in 2021 that were not timely conducted, but that is not an issue presented in the *Complaint*.

## 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.<sup>66</sup>

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.<sup>67</sup>

**Whether DCPS denied Student a FAPE by failing timely to conduct or to conduct comprehensively the following triennial evaluations by December 2020: Comprehensive Psychological, Speech and Language Occupational Therapy, and Assistive Technology.**

The regulations require that a child must be assessed in all areas of suspected disability.<sup>68</sup> The regulations also require that a child with a disability must 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
  - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.<sup>69</sup>

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<sup>66</sup> D.C. Code § 38-2571.03(6)(A)(i).

<sup>67</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>68</sup> 34 C.F.R. §300.304(c)(4).

<sup>69</sup> 34 C.F.R. §300.303.

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.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

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

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<sup>70</sup> 34 C.F.R. §300.15, 34 C.F.R. §300.30.

<sup>71</sup> 34 C.F.R. §300.304.

<sup>72</sup> 34 C.F.R. §300.305.



the provision of [FAPE] to the parents' child; or (iii) caused the deprivation of educational benefits.”<sup>73</sup>

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.

### *Psychological*

DCPS conducted a Comprehensive Psychological Re-Initial Evaluation on February 15, 2015. On December 12, 2017, it administered a WJ-IV followed by a Psychological Triennial Reevaluation on December 19, 2017. On May 12, 2020, DCPS administered a WJ-III followed by a Psychological Triennial Reevaluation on November 5, 2020. The November Reevaluation included no new testing, only an interview of Student's special education math teacher and reviews of Student's assessments, evaluations, and other records. Witness B testified that the November Reevaluation was inadequate because it was not preceded by an S/L evaluation, did not include cognitive testing, did not address all of Student's needs, and the achievement test conducted in May 2020 was outdated.

Student's S/L services were terminated in 2017 after an evaluation in which Examiner B concluded that Student no longer required direct S/L services. There is no persuasive evidence that Student has exhibited communication deficits since 2017 that call that decision into question. In fact, the Consideration of Special Factors in Student's November 12, 2020 IEP states that s/he has no difficulty expressing his/her understanding of content in the classroom and none in communicating with his/her peers. Thus, I do not credit Witness B's testimony that a S/L evaluation should have preceded the Psychological Reevaluation. Nor do I concur that the Reevaluation did not address all of Student's needs. The record does not reveal that during the triennial period Student presented behavioral issues in the classroom. In the November 13, 2019 IEP, the Reading PLOP indicates that s/he was playful in class, leading to off-task behaviors, but the Consideration of Special Factors was revised from previous IEPs to indicate that Student behavior does not impede her/his learning. In the 2020 IEP, the off-task concern is again raised in the Reading section, but it appears to suggest that Student's SLD causes frustration resulting in off-task behavior. In the June 23, 2021 Amended IEP, the IEP team reported that Student did not exhibit distractibility; even during virtual learning, s/he was consistently responsive. On balance, the record does not support a finding that Student presented a behavioral problem or that inattentiveness was a significant contributor to his/her academic difficulties. Thus, a social/emotional assessment was not indicated.

Witness B's arguments concerning cognitive testing and the use of the WJ-III instead of the WJ-IV are valid. I must note, however, that the results of the WJ-III in 2020 appear to be consistent with Student's history, while the data reported in the 2017 WJ-IV do not appear to be related to this student. In any event, these are procedural violations that did not result in educational harm. There was ample data in the record to support a the IEP team's conclusion that Student remained eligible for

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<sup>73</sup> 20 U.S.C. §1415(f)(3)(E)(ii).

services as a student with an SLD. Moreover, there was also ample data in the record to reveal his/her deficiencies in Math, Reading, and Written Expression for the IEP team to determine that s/he needed specialized instruction in these areas to address the severe weaknesses revealed in the achievement tests and standardized tests. Therefore, I conclude that Petitioner has failed to meet her burden of proving that Student was denied a FAPE due to DCPS' failure to conduct a more comprehensive psychological evaluation.

### ***Speech and Language***

As discussed in the previous section, there is no persuasive evidence that Student has exhibited communication deficits since 2017 that undermines DCPS' decision that year to terminate S/L services. Therefore, I conclude that the triennial reevaluation was not inadequate for DCPS' failure to conduct a S/L evaluation.

### ***Occupational Therapy***

Facility A conducted an Occupational Therapy Evaluation Report on July 12, 2011 that revealed several deficiencies, principally visual-motor skills and the ability to grasp scissors. However, Student's range of motion, muscle strength and endurance, muscle tone, postural control, and grasp on writing implements were within normal limits, s/he was able to manipulate fasteners independently and had age-appropriate body awareness and self-care/feeding/dressing skills. Witness K testified that OT services for Student were terminated in 2013, which predates any IEP introduced into evidence. In her February 16, 2015 Psychological Re-Initial Evaluation, Examiner A recommended that an OT reevaluation. While the IEP team accepted her recommendation to classify Student with an SLD, it did not prescribe OT services or refer Student for an OT evaluation.

The issue here is whether the record in December 2020 warranted an OT evaluation as a necessary part of the triennial review. Witness A opined that an evaluation was needed because Student had difficulty with planning and formulating ideas. However, Witness K did not agree that OT services were necessary to help a child translate ideas into written work, and she opined that testing for executive functioning issues should be done by psychologists. She also opined that termination of OT services in 2013 was appropriate because Student was able to cut with scissors on straight and curved lines, use building blocks, complete pencil tasks, string beads, and write letters. Moreover, the Written Expression PLOPs in each of the IEPs from 2017 through 2020 reported that Student had very neat and consistent handwriting and was great at copying work. I conclude that Petitioner has failed to meet her burden of proving that an OT reevaluation was a necessary part of the 2020 triennial reevaluation of Student.

### ***Assistive Technology***

Witness C testified that Student could have benefitted from an A/T evaluation because of low math and reading achievement scores. IDEA requires LEAs to assess students in all areas of suspected disability. While A/T may be beneficial to some students, it is not an area of disability for which IDEA compels evaluation. IDEA also compels an LEA to conduct an assessment if it is requested by the parent. Petitioner did not request an A/T evaluation during the triennial review period. Petitioner's claim on this request is based on the theory that a local education agency is compelled to conduct an A/T evaluation whenever an SLD student is performing below grade level. This record does not support imposing such a mandate. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS denied Student a FAPE by failing to conduct an A/T evaluation as a part of the triennial

reevaluation in 2020.

**Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP for the 2020-21 school year by failing to provide extended year services in the summer of 2021.**

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*.<sup>74</sup> 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.'"<sup>75</sup> 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..."<sup>76</sup> 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."<sup>77</sup>

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.<sup>78</sup> 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*.'"<sup>79</sup> The Court rejected the Tenth Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>80</sup>

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

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<sup>74</sup> 458 U.S. 176, 187 (1982).

<sup>75</sup> *Id.* at 189-90, 200

<sup>76</sup> *Id.* at 200.

<sup>77</sup> *Id.* at 203-04.

<sup>78</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>79</sup> *Id.* at 997.

<sup>80</sup> *Id.* at 1000-01 (citations omitted).



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.”<sup>81</sup>

Extended Year Services is summer school for disabled students. It is typically prescribed if it is anticipated that a student will regress over the summer in the absence of continued academic instruction. The only evidence in the record of Student’s need for ESY in the summer of 2021 is the Meeting Notes of an IEP team meeting on June 17, 2021. Petitioner’s team requested ESY out of concern that Student would regress academically over the summer, while DCPS asserted that there was no record of regression. Petitioner introduced i-Ready assessment data in Exhibits P38, P39, and P41, and SRI assessment data in P40 and P42. At the IEP meeting, Petitioner’s counsel argued that the data proved that Student regresses over the summer. However, Petitioner offered no explanatory testimony concerning these exhibits. It is not apparent from the i-Ready exhibits whether they pertain to Reading or Math. Thus, it is not apparent that the data in P38 relates to the same subject matter in P39. The SRI exhibits reveal no end of year (“EOY”) scores, so it is not possible to compare one year’s EOY score to the following year’s beginning of the year score. I conclude that Petitioner has failed to make a *prima facie* case that Student would regress over the summer of 2021 without ESY, which would trigger DCPS’ obligation to offer that service.

**Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP for the 2019-20 and 2020-21 school years by (1) failing to base the IEPs on updated data developed through the triennial evaluations described in paragraph 1 above for the June 23, 2021 Amended IEP, (2) failing to develop appropriate goals, Present Levels of Performance (“PLOPs”), and baselines based on updated evaluation data for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (3) failing to develop appropriate goals on his/her functioning level for the November 12, 2020 IEP and June 23, 2021 Amended IEP, (4) failing to provide at least 2 hours per month of S/L services on the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, (5) failing to prescribe a more restrictive environment in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP, and (6) failing to provide an increase of 10 additional hours of specialized instruction in the November 14, 2019 IEP, November 12, 2020 IEP, and June 23, 2021 Amended IEP.**

In her opening statement, Petitioner’s counsel argued that Student’s IEPs were inappropriate because the goals were not based on his/her functioning level, PLOPs were carried over since elementary school, s/he has not made progress (stuck at a grade F reading level), and was not prescribed S/L services, ESY, or a sufficient amount of specialized instruction. Respondent’s counsel countered by arguing that Student is thriving in school; s/he is a leader, participates in school activities, has made good grades, and is capable of doing grade level work with support.

Petitioner asserts that the IEPs are inappropriate because they are not based on updated data. I rejected this argument in my analysis of the first issue presented. There is ample data in the record from the three-year period from 2017 to December 2020 to establish Student’s deficiencies

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<sup>81</sup> 137 S.Ct. at 1000-01.

in Math, Reading, and Written Expression. When the November 14, 2019 IEP team meeting was convened, a triennial evaluation was not overdue, and the team was aware that Student was performing four grades below grade level in his/her core subjects. While Petitioner alleges that goals and PLOPs were inappropriate, they are allegedly inappropriate because some are repeated from year to year. However, there may be reasons for repeating goals other than that they were inherently inappropriate. Petitioner asserts that the 2020 and 2021 IEPs are inappropriate because they did not include a least two hours per month of S/L services. I also addressed this issue in the analysis of the first issue. There is no persuasive evidence that Student has exhibited communication deficits since 2017 that undermines DCPS' decision that year to terminate S/L services.

This leaves the fifth and sixth reasons Petitioner advances for the IEPs inappropriateness: that the setting was insufficiently restrictive and an insufficient amount of specialized instruction was provided. The mandates of *Rowley* and *Endrew* are clear and simple. *Rowley* requires that an IEP be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. While Student is in a general education environment, and is being passed from grade to grade, there is no objective evidence that s/he *should be* being passed from grade to grade. In Student's November 2019 IEP, s/he was performing four grades below grade level in Math and Reading. The latest math assessment in the record, an i-Ready assessment described in the November 2020 IEP's Mathematics PLOP, placed her/him at a grade A level of performance, five grades below his/her current grade. As of January 8, 2021, his/her Reading Inventory score of 646 placed him/her at a grade F level, six grades below his/her current grade. At the IEP team meeting on June 12, 2021, the IEP team denied Petitioner's request for 20 hours per week of specialized instruction because it would change his/her placement. This is a case of the tail wagging the dog. The placement should be determined by the educational program necessary to produce educational benefit, rather than the capabilities of the school defining the limitations of the program. *Endrew* requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. DCPS has offered no circumstances unique to Student that would suggest s/he is incapable of achieving annual academic growth. The record reveals that Student has made minimal, if any, objective progress in Math, Reading, or Written Expression since 2017. Therefore, I conclude that Petitioner has met her burden of proving that the November 14, 2019, November 12, 2020, and June 23, 2021 Amended IEPs were inappropriate.

**Whether DCPS failed to provide Petitioner access to Student's educational records requested on March 4, 2021, March 19, 2021, March 24, 2021, April 5, 2021, April 20, 2021, June 30, 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.<sup>82</sup>

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<sup>82</sup> 34 C.F.R. §300.501.

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.<sup>83</sup>

Petitioner's records requests and DCPS' responses are documented in paragraphs 20 and 26 above. The first request was made on March 3, 2021, so there is no allegation that the lack of records impaired Petitioner's ability to participate in the 2019 or 2020 IEP Annual Review meetings. From the documents comprising Petitioner's exhibits, it is apparent that Petitioner's team received sufficient records to develop a relatively complete history of Student's academic experience within DCPS. Not all i-Ready assessments were provided, and there were gaps in reporting periods of the report cards and progress reports that were submitted. While Witness D did not mention them, I would have been interested in reviewing the IEPs prior to 2015. Nevertheless, the record is adequate to provide a clear picture of Student's academic history within DCPS. Therefore, while DCPS did not provide all of Student's records, constituting a violation of its obligation to do so, I do not find that there has been a denial of FAPE. This is a procedural violation and the failure to provide Student's complete records did not significantly impede the Petitioner's opportunity to participate in the decision-making process.

## RELIEF

For relief, Petitioner requests, *inter alia*, (1) an order requiring DCPS to fund independent Comprehensive Psychological, S/L, OT, and A/T evaluations, (2) allow Petitioner to reserve the right to request additional compensatory education services after the completion of the independent evaluations, (3) an order for DCPS to convene an IEP meeting to update the IEP with data from the independent education evaluations ("IEEs") within 30 days of the completion of the evaluations, (4) an order requiring DCPS to prescribe 120 minutes per month of S/L services to Student's IEP, (5) an order requiring DCPS to provide sufficient instructional hours in a sufficiently restrictive setting to meet his/her academic needs, (6) an order requiring DCPS to prescribe 10 additional hours of specialized instruction inside general education, for a total of 20 hours, (7) compensatory education with no restrictions as to the time of day or deadlines for the completion of such services, (8) an order requiring DCPS to provide Petitioner access to Student's educational records, (9) allow Petitioner to amend the *Complaint* based on new information from the requested documents that have not been received from DCPS as of the filing of the *Compliant*, and (10) attorney's fees.

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<sup>83</sup> 34 C.F.R. §300.613.

As for Petitioner's request for compensatory education services, the Petitioner has the burden of establishing entitlement to any requested relief, including the type and amount of compensatory education services that would compensate the student for the services that were allegedly denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.<sup>84</sup>

Thus, Petitioner must show (1) what educational harm Student suffered as a result of the alleged denial of FAPE, (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE, and (3) the assessments or educational, psychological, or scientific studies that support the type and amount of services requested.

Petitioner offered no credible evidence of the type and amount of compensatory services Student requires to put her/him in the position s/he would be had there been no denial of FAPE. Witness D prepared a Compensatory Education Plan requesting 500 hours of specialized instruction for 1040 hours of missed specialized instruction over two years to compensate Student for the 10 hours per week of additional instruction Petitioner believes Student needed. In support of the proposal, Witness D testified that the plan would put Student in the position s/he would have been but for the denial of FAPE. However, the entire plan is based on Witness D's assertion that all SLD students would be expected to make three-fourths of a year growth in academic progress with adequate support. This assertion appears to be inherently suspect as all SLD students are different, with different learning patterns, different learning rates, different backgrounds, different deficits, and varied cognitive skills. Therefore, I will order DCPS to fund 100 hours of compensatory education along with an independent evaluation to determine the appropriate type and amount of appropriate compensatory education consistent with the mandate set forth in *Reid*.

Finally, I will order DCPS to amend Student's IEP to add ten additional hours of specialized instruction. Student appears to be socially well adjusted in the general education environment, so this order should not be interpreted to suggest the need for resource rooms, although that is certainly within the discretion of the IEP team. I note that Petitioner's prayer for relief requests that the ten hours be specified to be in general education. I am primarily concerned with getting Student significantly more individual attention. The IEP team should have the flexibility to determine the most effective way to deliver those services.

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<sup>84</sup> *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). See also, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

## 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 100 hours of compensatory education tutoring services in Math, Reading, and Written Expression for Student with no restrictions as to the time of day or deadlines for the completion of such services.

**IT IS FURTHER ORDERED**, that DCPS shall fund an independent evaluation to determine the appropriate type and amount of specialized instruction Student requires to make one year of grade level improvement in Math, Reading, and Written Expression.

**IT IS FURTHER ORDERED**, that within fifteen (15) business days of the issuance of this Order, DCPS shall schedule an IEP team meeting through Petitioner's counsel to review all current evaluations and assessments and to review and revise Student's IEP as necessary, including the addition of ten hours per week of specialized instruction.

**IT IS FURTHER ORDERED**, that within fifteen (15) business days of the completion of the independent evaluation, DCPS shall schedule an IEP team meeting through Petitioner's counsel to consider the need for additional compensatory education services for Student for the denial of FAPE over two school years.

## 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 13, 2021

Copies to: Attorney A, Esquire  
Attorney B, Esquire  
OSSE Office of Dispute Resolution  
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