

OSSE  
Office of Dispute Resolution  
December 31, 2022

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

2022. On July 19, 2022, Petitioner filed a prior due process complaint on behalf of Student (Case No. 2022-0141). On August 19, 2022, Petitioner moved to consolidate Case No. 2022-0141 with the present case. On August 23, 2022, Petitioner moved to withdraw her complaint in Case No. 2022-0141. By order issued August 23, 2022, I granted Petitioner's motion to withdraw her complaint in the prior case and denied her motion to consolidate as moot.

On August 31, 2022, the parties met for a resolution session and were unable to resolve the issues in dispute. On August 31, 2022, I convened a videoconference prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

On September 19, 2022, DCPS filed a motion to dismiss Petitioner's child find claims arising outside of the IDEA's 2-year statute of limitations. On September 10, 2022, DCPS filed a separate motion for partial summary adjudication. By order issued October 14, 2022, I denied DCPS' motion for summary adjudication. I granted DCPS' statute of limitations motion and dismissed so much of Petitioner's child find claims arising before August 19, 2020. On December 19, 2022, Petitioner, by counsel, filed a motion for reconsideration of my statute of limitations decision. On December 20, 2022, I denied on the record, as untimely filed, the motion for reconsideration.

On November 7, 2022 and November 23, 2022, Petitioner, by counsel, filed motions for orders to require DCPS to allow the parent's designees to observe Student in the school setting. By orders issued November 14, 2022 and November 30, 2022

respectively, I denied the November 7, 2022 motion and granted the November 23, 2022 motion.

On November 23, 2022, DCPS, by counsel, filed a motion to quash Notices to Appear issued to certain DCPS employees. By order issued November 29, 2022, I denied DCPS' motion to quash.

On August 31, 2022 and September 22, 2022, Petitioner filed motions to extend the final decision due date in this case. DCPS filed an additional extension motion on December 15, 2022. I granted each of these motions, resulting in a final decision due date of January 4, 2023.

With consent of the parent, the due process hearing in this case was held online and recorded, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on December 14, 15, 16 and 20, 2022. Mother appeared online for the hearing and was represented by PETITIONER'S COUNSEL 1, PETITIONER'S COUNSEL 2 and PETITIONER'S COUNSEL 3. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL 1 and DCPS' COUNSEL 2.

Petitioner's Counsel 1 made an opening statement. DCPS waived making an opening. Mother testified at the hearing and called EDUCATIONAL ADVOCATE, BEHAVIOR ANALYST and SCHOOL SOCIAL WORKER as additional witnesses. DCPS called as witnesses TEACHER 1, TEACHER 2, TEACHER 3, LEA Representative and PRINCIPAL. Petitioner's Exhibits P-1 through P-56, P-58, P-73 and P-74 were admitted

into evidence, including Exhibits P-3, P-44 through P-47, P-58, P-73 and P-74 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-57 and P-59 through P-71. DCPS' Exhibits R-1 through R-23, R-25 through R-34, R-36 through R-47, R-49 through R-53 and R-55 through R-72 were admitted into evidence, including Exhibits R-71 and R-72 admitted over Petitioner's objections. At the conclusion of the taking of the evidence, Petitioner's Counsel 2 and DCPS' Counsel 2 made oral closing arguments. Upon request of DCPS, counsel for both parties were permitted to file by email citations to relevant authorities after the hearing.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the September 1, 2022 Prehearing Order, are:

A. Whether DCPS denied Student a FAPE by failing in its child find duties to locate, identify, and evaluate Student for special education eligibility, determine Student eligible for special education prior to January 2022 and ensure that appropriate IEPs and educational placements were developed for Student during the 2016-2017, 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years;

B. Whether DCPS denied Student a FAPE by developing inappropriate IEPs in February and March 2022, in that the IEP, as amended, contained inappropriate academic and behavioral goals, failed to provide behavioral services to help teach Student appropriate behaviors and address all of his/her individualized needs, provided for only four hours per week of specialized instruction that was not defined and only 120 minutes per month of behavioral support services, did not provide a dedicated aide, did not provide for school transportation and did not

find Student eligible for extended school year (ESY) services.

For relief, Petitioner seeks sufficient compensatory education services in the areas of academic, social, functional, and behavioral for the alleged denials of FAPE.

After the start of the due process hearing, Petitioner withdrew with prejudice a third issue, whether DCPS denied Student a FAPE by not funding an independent functional behavioral assessment (FBA) in the 2020-2021 year.

### **FINDINGS OF FACT**

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

1. Student, an AGE youth, resides with Mother in the District of Columbia.

#### **Testimony of Mother.**

2. On January 27, 2022, DCPS' CITY SCHOOL eligibility team determined that Student was eligible for special education services under the IDEA disability classification Other Health Impairment/Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (OHI/ADHD). Exhibit R-11.

3. Student attended Pre-Kindergarten at PRESCHOOL. In the spring of that school year, Student's father was killed in a street violence episode. Testimony of Mother.

4. Since the Kindergarten school year, Student has been enrolled in City School, where he/she is currently enrolled in GRADE. Testimony of Mother.

5. When Student first got to City School, he/she was above grade level.

Student's final Kindergarten grades in Reading, Writing, Speaking/Listening and Math were Proficient or Advanced. Testimony of Mother, Exhibit P-45.

6. Since the Kindergarten year, Student has struggled academically at City School, especially in Reading and Writing. Student's final term grades in core classes for 1<sup>st</sup> Grade were all "Basic" (Approaches expectation for grade level); for 2<sup>nd</sup> Grade "Below Basic" (Writing was not measured); for 3<sup>rd</sup> Grade "Not Measured"; and for 4<sup>th</sup> Grade Basic or Below-Basic. Exhibit R-21. Student was recommended for retention at the end of 2<sup>nd</sup> Grade but was not held back. Exhibit P-47. Student was retained in 4<sup>th</sup> Grade. At the end of the repeated 4<sup>th</sup> Grade year, his/her grades in Reading, Writing, Speaking/Listening and Math were Basic. Exhibit P-50.

7. Student's historical norm-based testing results, which were offered into evidence, were sketchy and incomplete. When tested with the iReady Diagnostic Reading Assessment in October 2021, Student was performing on an overall 1st grade level in Reading with a score of 430. In Math, Student scored a 422 which was equivalent to a 2nd grade level. Both scores were years below grade level expectations for Student. Exhibit R-39.

8. At the end of the 2<sup>nd</sup> Grade school year, Student's teacher reported that Student had a hard time collaborating in a group setting and needed to work on staying focused and completing the assigned task when working with others, and avoiding being distracted by the group dynamics. The teacher added that organization was a constant

struggle for Student and something he/she should work on for the next year. Exhibit R-53.

9. Mother had been trying to get Student tested for special education since the 2018-2019 school year, due to a history of academic and behavior issues. Exhibit R-21. In 2<sup>nd</sup> Grade, Student did poorly and made no progress. Student did not follow directions and just did what he/she wanted. That year, Mother took Student to MEDICAL CENTER. Medical Center staff provided Mother Vanderbilt rating scale questionnaires, a tool designed to measure the severity of ADHD symptoms. Mother took the Vanderbilt forms to City School for Student's teachers to complete, but she never heard back from the school. Testimony of Mother.

10. In 3<sup>rd</sup> Grade Student continued to be disruptive. He/she was not following directions, could not sit still and would leave the classroom. For the 4<sup>th</sup> Grade year, DCPS schools were closed to in-person learning due to the Coronavirus pandemic. Student exhibited the same behaviors at home. The following school year (EVALUATION YEAR), Student repeated 4<sup>th</sup> Grade and Student's behaviors, when he/she returned to school, were worse. Testimony of Mother.

11. In the fall of 2021, Mother went back to Medical Center and spoke to a social worker there. The social worker provided Mother with another set of Vanderbilt rating scale forms, as well as information on education attorneys. On October 12, 2021, Mother submitted a written request to City School for Student to be evaluated for special education eligibility. Testimony of Mother, Exhibit P-15.

12. On November 1, 2021, Student was administered the ANET Interim 1 Math Assessment and scored a 46% as compared to the network average of 50%. He/she demonstrated relative strengths in the areas of understanding place value for multi-digit whole numbers, and multi-digit multiplication. Student demonstrated greater difficulty with rounding multi-digit whole numbers as well as adding and subtracting multi-digit whole numbers. Exhibit R-19.

13. On November 12, 2021, City School held an Analysis of Existing Data (AED) meeting and decided to proceed with the special education evaluation process for Student. Mother provided consent for Student to be evaluated. Exhibit R-18.

14. School Psychologist conducted a comprehensive psychological evaluation of Student on January 18 and 19, 2022. School Psychologist administered a battery of assessments and rating scales, including the Woodcock Johnson Tests of Cognitive Abilities, 4<sup>th</sup> Edition (WJ COG-IV), the Woodcock Johnson Tests of Achievement, 4th Edition (WJ ACH-IV), Behavior Assessment System for Children, Third Edition (BASC-3) - Teacher Form, Behavior Assessment System for Children, Third Edition (BASC-3) - Parent Form and Conner's 3rd Edition - Teacher Form. School Psychologist also conducted classroom observations and interviewed Student's teachers, Mother and Student. Exhibit R-21.

15. In her January 23, 2022 Comprehensive Psychological Evaluation Report, School Psychologist reported that on the WJ COG-IV, Student obtained a Global Intelligence Ability (GIA) score that suggested that his/her intellectual/cognitive



functioning was in the Low Average range. On the WJ ACH-IV, Student's performance placed his/her Reading and Writing skills at a 2nd grade level (Extremely Low) and his/her Math skills within the 3rd grade level (Low). Student presented the most difficulty with decoding and overall Reading skills. As concerns Student's social emotional functioning, behavior scales indicated high levels of inattention, hyperactivity/impulsivity, defiance/aggression and learning problems that significantly impacted Student's academic performance and limited his/her ability to access grade level material. Overall evaluation results indicated that Student was performing 2 or more levels below his/her then-current grade level. School Psychologist indicated that Student met D.C. Office of the State Superintendent of Education (OSSE) criteria for a specific learning disability in Reading and Written Language and was also performing below grade level in Math. School Psychologist also reported that behavior scales completed by Mother and Student's teachers indicated high levels of inattention, hyperactivity/impulsivity, defiance/aggression and learning problems that were significantly impacting Student's academic performance and limited his/her ability to access grade level material. These findings supported that Student presented with learning and behavior challenges associated with ADHD. Exhibit R-21.

16. On January 25, 2022, DCPS convened a special education eligibility determination meeting for Student. Mother attended the meeting. The team determined that Student was eligible for special education under the OHI-ADHD disability classification. The team reported that Student's disability impacted his/her

participation in the general education curriculum in Written Expression, Reading and Emotional, Social, and Behavioral Development. Mother agreed with the eligibility determination report. Exhibit R-11.

17. The City School IEP team met on February 16, 2022 to develop Student's initial IEP. Mother attended the meeting. The team discussed that in Reading, Student was performing at a 1<sup>st</sup> Grade level and that Student was then being instructed on Fountas & Pinnell Level G (1<sup>st</sup> Grade); that socially, Student was very engaged; that Student was usually withdrawn when tasks were difficulty for him/her; that Student's ability to focus was also identified as an area that affected his/her ability to integrate instruction and demonstrate understanding of concepts which he/she had been taught; that Student tended to do better one-on-one; that for Written Expression, Student had scored a written score of 67 (Very Low) on the WJ ACH-IV and that for Social Emotional Development, the IEP would be targeting Student's work avoidance as well as defiance. Exhibit R-4.

18. The IEP team identified Reading, Written Expression and Social-Emotional-Behavioral Development as Areas of Concern for Student. For Special Education and Related Services, the team decided that Student would be provided 2 hours per week of Specialized Instruction outside general education (pull-out) and 2 hours per week in general education (push-in) as well as 120 minutes per month of Behavioral Support Services. Mother consented to the proposed IEP services for Student. Exhibit R-1.

19. The IEP team decided that there was insufficient to decide whether Student met criteria for ESY Services and that by April 1, 2022, the team would determine the time required for Student to recoup critical skill after breaks. Exhibit R-11. No meeting to reconsider Student's ESY needs was held that school year. Testimony of Teacher 2.

20. On March 9, 2022, City School amended Student's IEP, without an IEP team meeting, only to update the Classroom Accommodations and Statewide or Alternate Assessment Participation section. Exhibit R-5, Testimony of LEA Representative.

21. Student was retained in EVALUATION GRADE for the 2021-2022 school year. Student's last term grades for the 2021-2022 school year were all Basics in Reading, Writing & Language, Speaking and Listening and Math. Exhibit P-50.

22. In the current, 2022-2023 school year, Student has shown progress. Testimony of Mother. Student is a leader in the classroom. He/she is very focused, attentive, and wants to participate and finish his/her work. Student requires very little prompting or redirection. For English as well as Math, Student approaches where he/she needs to be. Student's attendance has improved. Testimony of Teacher 3. This school year, Student is still below grade level in Math and is significantly below grade level in Reading and Writing. In November 2022, Student's IEP team added Math as an IEP area of concern for Student. Testimony of Teacher 2.

### **CONCLUSIONS OF LAW**

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

ANALYSIS

A. Did DCPS deny Student a FAPE by failing in its child find duties to locate, identify, and evaluate Student for special education eligibility, determine Student eligible for special education prior to January 2022 and ensure that appropriate IEPs and educational placements were developed for Student during the 2016-2017, 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years?

The parent alleges that DCPS denied Student a FAPE by failing to evaluate Student for special education eligibility until Mother made a written request in October 2021. I agree that DCPS failed in its child find obligation to Student. Student has been enrolled in City School since the 2016-2017 school year. At least since the 2017-2018

school year, Student, whose intellectual/cognitive functioning is in the Low Average range, has performed below grade level, most significantly in Reading and Writing, but also in Math. Student was recommended for retention after completing 2<sup>nd</sup> Grade and was retained in 4<sup>th</sup> Grade. When Student was evaluated for special education in January 2022, he/she was being instructed at the 1<sup>st</sup> grade level in Reading – years below Student’s actual grade. On the Woodcock Johnson achievement tests, Student’s performance placed him/her on the 2<sup>nd</sup> grade level in Reading and Writing and on the 3<sup>rd</sup> grade level in Math – all below grade level. Behaviorally, Student has a history of inattention, hyperactivity/impulsivity and defiance/aggression in school. In her January 23, 2022 psychological evaluation report, School Psychologist found that Student met OSSE criteria for both SLD and OHI-ADHD disabilities.

Under the IDEA’s child find mandate, the local education agency (LEA) must “ensure that ‘[a]ll children with disabilities [enrolled in the LEA] . . . who are in need of special education and related services are identified, located, and evaluated.” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005); 20 U.S.C. § 1412(a)(3). As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244 F. Supp. 3d 27 (D.D.C. 2017),

A school district must “evaluate a student who *may have* a disability and who *may require* special education services.” D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any “child *suspected* of having a disability who *may need* special education.” 5–E D.C. Mun.

Regs. § 3004.1(a) (emphases added)<sup>2</sup>; see 34 C.F.R. § 300.111(c)(1) (extending duty to “[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade”). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process “as soon as a student is identified as a potential candidate for special education services.”

*Davis*, *supra*, 244 F. Supp. 3d at 49 (citing *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008)) (emphasis in original). “School districts may not ignore disabled students’ needs, nor may they await parental demands before providing special instruction.” *Reid*, 401 F.3d at 518.

Petitioner’s expert witness, Educational Advocate, opined that Student should have been referred for an initial eligibility evaluation at the very latest by the 2018-2019 school year. She testified that there were numerous “red flags” in Student’s experience at City School which would have warranted a referral for a special education evaluation. These red flags included, *inter alia*, Student’s basic and below-basic grades since the 2018-2019 school year, Student’s very low Reading scores and low Math scores on

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<sup>2</sup> On July 1, 2022, 5-E DCMR § 3004.1(a) was repealed, and replaced by 5-A DCMR § 3003.1(a), which provides,

Each LEA and public agency shall publish and implement child find policies and procedures to ensure that:

(a) All children with disabilities between the ages of three (3) and twenty-two (22) years old enrolled in the LEA , including children . . . who are suspected of being a child with a disability even though they are making progress grade to grade . . . who are in need of special education and related services, are identified, located, and evaluated.

*Id.*

norm-based testing and Student's poor school attendance.

DCPS did not refute this opinion, but argued at the due process hearing that because Student was so frequently absent from school, it was possible that Student's academic challenges were attributable to poor attendance. This argument is unpersuasive. Even if Student's academic challenges could have been due to poor attendance, DCPS had no less cause to at least *suspect* that Student may have been a child with a disability in need of special education. *See Davis, supra*. I conclude that based on Student's low achievement in Reading and Writing, as well as his/her serious behavior challenges dating at least to the 2017-2018 school year, by the 2018-2019 school year, DCPS had cause to suspect that Student was a child who may have had a disability and who may have required special education services. *See D.C. Code § 38-2561.02(a)(2)*.

An LEA's failure to comply with child find may constitute a procedural violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *See, also, G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (School district's failure to adequately evaluate student was a procedural error.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;  
or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2)

Following Mother's October 2021 request for Student to be evaluated, DCPS had the child comprehensively evaluated by School Psychologist, who found that Student met eligibility criteria for both SLD and ADHD. Based on School Psychologist's findings, as well as Student's educational record at City School, I find that it is probable that if DCPS had evaluated Student when it first had cause to suspect that he/she may have had a disability, Student would have been determined eligible years earlier. DCPS' failure to evaluate Student until the parent made a written request in October 2021, impeded Student's right to a FAPE and caused a deprivation of educational benefit. This was a denial of FAPE.

In an order issued October 14, 2022, I granted DCPS' statute of limitations motion and dismissed so much of Petitioner's child find claim, which predated the August 19, 2022 due process complaint filing date by more than two years. In light of the statute of limitations bar, I conclude that Petitioner is entitled to relief for DCPS' failure to initiate a special education eligibility evaluation of Student by August 19, 2020.

B. Did DCPS deny Student a FAPE by developing an inappropriate initial IEP in February and March 2022, in that the IEP, as amended, contained inappropriate academic and behavioral goals, failed to provide behavioral services to help teach Student appropriate behaviors and address all of his/her individualized needs, provided for only four hours per week of specialized instruction that was not defined and only 120 minutes per month of Behavioral Support Services, did not provide a dedicated aide, did not provide for school transportation and did not find Student eligible for extended school year (ESY) services.



The City School IEP team met to develop Student's initial IEP on February 16, 2022. Mother attended the meeting. The IEP team identified Reading, Written Expression and Social-Emotional-Behavioral Development as areas of concern for Student and developed IEP annual goals, including 3 goals for Reading, 1 goal for Written Expression and 2 goals for Emotional, Social and Behavioral Development. For Special Education and Related Services, the IEP team determined that Student would be provided 2 hours per week of Specialized Instruction in general education and 2 hours per week outside of general education. The IEP team also provided for Student to receive 120 minutes per month of Behavioral Support Services outside of general education. Mother consented to the proposed IEP services for Student. The IEP was amended on March 9, 2022 only to update accommodations for Student's participation in testing.

As U.S. District Judge Colleen Kollar-Kotelly explained in *B.B. v. District of Columbia*, No. CV 20-2467 (CKK), 2022 WL 834146 (D.D.C. Mar. 21, 2022),

The IEP “is the centerpiece of the [IDEA’s] education delivery system for disabled children[.]” *Endrew F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (citation omitted). An IEP must include a variety of information, including the child’s current levels of academic achievement and functional performance, measurable annual goals, how the child’s progress towards the goals will be measured, and the special education and related services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A)(I). The IEP must be formulated in accordance with statutory requirements that emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances. 20 U.S.C. § 1414(d)(1)(B).

*B.B.*, 2022 WL 834146 at \*2. In *Endrew F. v. Douglas County School District RE-1*, 137

S. Ct. 988 (2017), the U.S. Supreme Court clarified the standards for assessing the appropriateness of IEP:

[A]n IEP must be “reasonably calculated to enable [the] child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 999; *see id.* at 1001 (“[A]dequacy . . . turns on the unique circumstances of the child.”). This “fact-intensive” standard recognizes that “crafting an appropriate program of education” requires “the expertise of school officials” as well as “the input of the child’s parents or guardians.” *Id.* at 999. . . . [T]he inquiry centers on “whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* at 999. A reviewing court may not “substitute [its] own notions of sound educational policy for those of the school authorities.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). This deference “is based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F.*, 137 S. Ct. at 1001. . . . [B]ecause the deference the Court owes school authorities is a product of their expertise, “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions,” and this explanation should show why “the IEP is reasonably calculated” to ensure that the child “make[s] progress appropriate in light of his circumstances.” *Id.* at 1002.

*Smith v. Dist. of Columbia*, No. CV 16-1386 (RDM), 2018 WL 4680208 at \*5.

Petitioner contends that City School’s February 16, 2022 IEP was inappropriate for Student because the annual goals were inappropriate, the special education and Behavioral Support Services were insufficient and the IEP did not provide for ESY services, a dedicated aide or school transportation. Through her experts’ testimony, the parent established a *prima facie* case that the February 16, 2022 IEP was not adequate. Therefore, DCPS holds the burden of persuasion on the appropriateness of the initial IEP for Student. For the reasons explained below, I find that DCPS did not meet its burden.

1. Annual Goals

The IDEA requires that each student's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability

34 C.F.R. § 300.320(a)(2). The IEP must also include, *inter alia*, a statement of the special education and related services that will be provided to the child, to enable the child (i) To advance appropriately toward attaining the annual goals and (ii) To be involved in and make progress in the general education curriculum. See 34 C.F.R. § 300.320(a)(4).

For academic annual goals, DCPS' February 16, 2022 IEP for Student provided 3 goals for Reading and a single goal for Written Expression.

Reading Annual Goal 1:

By February 15, 2023, given an informational, independent level text with 4 details highlighted and a prompt to determine main idea, Student will state the main idea and underline 2 out of the 4 pre-highlighted key details in the text to support the main idea on at least 3 out of 4 trials.

Reading Annual Goal 2:

By February 15, 2023, when given a grade-level literary text and graphic organizers, checklist, sentence starters, and character description options, Student will choose a description of the character and explain what the given story details reveal about the character in at least 3 out of 4 literary responses.

Reading Annual Goal 3:

By February 15, 2023, when given a list of 20 unfamiliar instructional level regular and irregular multisyllabic words, Student will decode and count the number of syllables with at least 80% accuracy on 3 of 4 trials.

Petitioner's expert, Educational Advocate, opined that these IEP Reading goals were not appropriate, primarily because they did not address the need to improve Student's very low independent reading skills and the need to get Student to interact as much as possible with grade-level reading texts. At the time the IEP was developed Student who was then in Evaluation Grade, was reading at a 1<sup>st</sup> Grade level. Teacher 2, who drafted the IEP academic goals, opined that the IEP was appropriate for Student and explained that the main objective was to make sure that the Reading goals for Student were aligned to the curriculum and addressed Student's needs in Reading. However, he did not explain how these goals were tailored to meet Student's disability-related need to improve Student's very low reading level. I find that DCPS did not meet its burden of persuasion on the appropriateness of the Reading goals.

Written Expression Annual Goal:

By February 15, 2023, given a short grade level informational or literary text, with accommodations including small group guided reading and writing prompt(s), Student will write a paragraph on a given topic that includes (in order) 1 opening sentence, 2-3 supporting detail sentences, and 1 closing sentence in at least 2 out of 3 paragraphs.

Teacher 2 explained in his testimony that the school team had recommended an instructional level for Written Expression intended not to overly frustrate the child. Educational Advocate, who did not participate in Student's IEP meeting, opined that the

Written Expression goal was not appropriate because it did not address spelling, writing fluency or how to get Student to the point of being able to write a paragraph. While the Written Expression goal could likely have been improved with Educational Advocate's input, the IEP does not require ideal goals. I find that the Written Expression goal was reasonable as written. *See Andrew F.*, 137 S.Ct. at 999 (Review of IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.)

The February 16, 2022 IEP provided two Emotional, Social, and Behavioral Development goals for Student, namely:

Behavior Annual Goal 1:

Within the IEP year, given a maximum of one verbal cue, Student will attend to a non-preferred, small-group activity and/or independent assignment, without protest, and remain on task with no task avoidance (bathroom, getting a jacket, tying shoes, sharpening pencil, etc.) for 10 minutes, in 3 out of 4 trials, as measured by observations and staff documentation;

Behavior Annual Goal 2:

Within the IEP year, Student will follow adult directives within 1-3 prompts in 4 out of 5 opportunities, as measured by observation and staff documentation.

Petitioner's expert, Behavior Analyst, opined that these goals are not appropriate because they do not address all issues related to Student's behavior, specifically Student's physically aggressive and other elevated behaviors and Student's "asking for help." DCPS' expert, School Social Worker, who drafted the behavioral support section of the IEP, testified that she relied on teacher reports, anecdotal notes and notes of DBH

CLINICIAN, a school-based Department of Behavioral Health employee, who previously provided services to Student. School Social Worker explained that she developed the IEP goals based on the areas of concern identified in a January 24, 2022 functional behavioral assessment of Student which she conducted. According due deference to the expertise of the City School social worker, I find that DCPS has established that the behavioral goals in Student's initial IEP were reasonable and, therefore, appropriate. *Cf. Davis v. Dist. of Columbia*, 244 F. Supp. 3d 27, 38 (D.D.C. 2017) (Deference at its apex when the court is reviewing choices implicating agency expertise.)

Omission of Annual Goal for Math

The February 16, 2022 IEP did not include any annual goals for Student in Math. Educational Advocate opined that Student needed goals in Math, because according to this expert, on the Woodcock Johnson achievement test administered by School Psychologist, the child scored 2 levels below grade expectations. Actually, Student performed in the Low Range in Math on the Woodcock Johnson measure – 1 grade level behind Evaluation Grade. On November 1, 2021, Student was administered the ANET Interim 1 Math Assessment and scored a 46% as compared to the network average of 50%.

In her January 23, 2022 psychological evaluation report, School Psychologist reported that Student presented with a specific learning disability in the areas of Reading and Written Language, but not in Math. School Psychologist found that Student was performing below grade level in Math but presented with relative strengths

when compared to his/her Reading and Writing skills. I find that DCPS established that, based on the information available to the team at the time the initial IEP was developed, the IEP team's decision that Student did not require annual goals or specific special education services in Math was appropriate.

In sum, I find that DCPS did not meet its burden of persuasion that the annual goals in the February 16, 2022 IEP adequately addressed Student's huge deficits in Reading. DCPS did establish that the initial IEP annual goals for Written Expression and for Social, Emotional and Behavioral Development were appropriate and that the IEP team's decision not to include goals or services for Math was reasonable.

2. Special Education and Behavioral Support Services

For Special Education Services, the initial IEP provided for Student to receive 4 hours per week total of Specialized Instruction, divided between 2 hours in the general education classroom and 2 hours of pull-out services. Educational Advocate opined that to make progress toward reaching grade level in academics, Student needed an additional 4 hours per week of pull-out intensive Reading instruction and 5 hours per week, each, for Written Expression and Math in the general education setting – totaling 19 hours of Specialized Instruction per week. DCPS' expert, Teacher 2, explained that the IEP team decided that 4 hours per week of Specialized Instruction was appropriate for Student because the inclusion setting with general education peers was the least restrictive environment (LRE) for Student. He opined that if Student were pulled out of the regular classroom too much, Student's current year grade skills would not be

adequately addressed.

Educational Advocate did not attend Student's IEP meetings and did not have the opportunity to assess Student herself. I give less weight to her opinion that Student requires 19 hours per week of Specialized Instruction Services, especially considering that it is undisputed that Student has made notable progress under the February 16, 2022 IEP. Nonetheless, Student continues to be significantly below grade level in Reading and Writing and below grade level in Math. At the time of the initial IEP meeting, Student was in Evaluation Grade, yet was still being instructed at a 1<sup>st</sup> grade level in Reading. I conclude that DCPS has not offered "a cogent and responsive explanation" for the decision of the February 16, 2022 IEP team to offer Student only 4 hours per week of Specialized Instruction, when Student had such extreme deficits in Reading and Written Expression. *See Endrew F., supra.*

The February 16, 2022 IEP also provided for Student to receive 120 minutes per month of Behavioral Support Services. Prior to the development of Student's IEP, DBH Clinician was providing counseling services to Student. DCPS' expert, School Social Worker, testified that in recommending 30 minutes per week of Behavioral Support Services for Student in the initial IEP, she continued the level of services previously provided by DBH Clinician.

Petitioner's expert witness, Behavioral Analyst, opined that based on Student's needs, this level of behavioral support was insufficient. She recommended that Student needed about 60 minutes per week of trauma-based cognitive behavior therapy.



Behavioral Analyst opined that Student needed a clinical social worker or a psychologist to work with him/her on issues relating to developmental trauma rooted in the violent death of his/her father, when Student was in Kindergarten.<sup>3</sup> Petitioner's other expert witness, Educational Advocate, also posited that Student suffered from "Childhood Traumatic Grief," which she described as a condition in which trauma symptoms interfere with adaptive grieving for a child.

In her January 2022 comprehensive psychological evaluation report, School Psychologist reported that Student presented with behavior challenges that were associated with that of ADHD. School Social Worker testified that there was no indication that Student was struggling with behavior at City School due to the loss of his/her father. Without a supporting diagnosis by a qualified mental health professional, I discount as overly speculative the assertions by Petitioner's experts that Student's academic and behavior challenges in school are rooted in the traumatic loss of his/her father in 2016.

I conclude that DCPS has met its burden of persuasion that based upon the information available to the City School IEP team in February 2022, the team's decision to provide Student 120 minutes per month of Behavioral Support Services in the initial IEP was appropriate.

3. Dedicated Aide; School Transportation

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<sup>3</sup> Mother testified that Student's father actually died on May 26, 2016. That school year, Student was in Pre-Kindergarten.

Petitioner alleges that the February 16, 2022 IEP was also inappropriate because it did not provide for Student to have a dedicated aide or special education transportation. DCPS denies that either service was warranted for Student.

Under the IDEA, a dedicated aide is a “supplementary aid and service” that must be provided in an IEP, if required to assist a child with a disability to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate. *See* 34 CFR §§ 300.42, 300.114(b). The IEP team must include a dedicated aide in a child’s IEP if required “to permit the child to benefit educationally from [his IEP personalized] instruction.” *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). *Cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79, 119 S. Ct. 992, 1000, 143 L. Ed. 2d 154 (1999). Teacher 2 explained that dedicated aides are only provided for Students who have “extreme needs.”

Student’s IEP team determined that he/she did not require the support of a dedicated aide in the classroom in order to benefit from special education. Teacher 3, who is Student’s homeroom teacher in the current school year, testified that Student is very focused and attentive in the classroom and requires very little prompting or redirection. I find that Petitioner did not make a creditable showing that Student required the support of a dedicated aide and that DCPS has met its burden of persuasion that the IEP team’s decision that Student did not require a dedicated aide was appropriate.

With regard to school transportation, a child's IEP team is responsible for determining whether transportation between school and home is necessary for the student to receive FAPE, and, if so, the student must receive the necessary transportation and supports at no cost to the parents. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46576 (August 14, 2006). Although Mother testified that school transportation would be beneficial to Student, there was no showing at the due process hearing that Student needed DCPS-provided school transportation in order to receive a FAPE. I find that DCPS met its burden of persuasion that the IEP team's decision that special education transportation was not required for Student was appropriate.

#### Extended School Year

The February 16, 2022 IEP team decided it did not have enough data to decide whether student met criteria for ESY services and that by April 1, 2022, the team would determine the time required for Student to recoup critical skill after breaks. However, the IEP team did not reconvene to consider Student's ESY needs. Petitioner contends that Student needed these services and DCPS denied Student a FAPE by failing to offer ESY services in the summer of 2022.

In determining whether ESY services are necessary for the provision of FAPE, the IEP team must consider and document each of the following:

- (a) The impact of break in service on previously attained or emerging critical skills;
- (b) The likelihood and degree of regression related to previously attained or emerging critical skills; and
- (c) The time required for recoupment of previously attained or emerging critical skills.

5E DCMR § 3017.2 (2018). “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008), adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)).

At the due process hearing, there was limited evidence offered on the likelihood of significant regression for Student over the summer break. There was evidence that on the DIBELS Reading assessment in 2022, Student’s score plummeted from 375 in June 2022 to 263 in September 2022. Based on these data and the failure of the City School IEP team to review Student’s need for ESY in spring 2022, as agreed at the initial IEP meeting, I find that DCPS has not provided a cogent and responsive explanation for its failure to offer ESY to Student for summer 2022.

#### Remedy

In this matter, the only relief sought by the parent is compensatory education for Student. As the D.C. Circuit explained in *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797–98 (D.C. Cir. 2016), when a hearing officer concludes that an LEA has failed to provide a student with a FAPE, the hearing officer,

has “broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education

“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>401</sup> F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.

*B.D.*, 817 F.3d at 797–98.

In this decision, I have determined that DCPS denied Student a FAPE by failing to initiate a special education evaluation and to timely develop IEPs for Student beginning August 19, 2020. I also have found that DCPS did not meet its burden of persuasion that the initial February 16, 2022 IEP was appropriate. Specifically, I found that the initial IEP did not provide appropriate annual goals for Reading and did not offer Student adequate Specialized Instruction Services. I have also found that DCPS denied Student a FAPE by not offering ESY services for summer 2022.

Petitioner’s Experts, Educational Advocate and Behavior Analyst, offered separate written compensatory education proposals. However, only Educational Advocate was examined at the due process hearing on her proposal for compensatory academic services.<sup>4</sup> Due to DCPS’ child find violation, from August 2020 until the initial IEP was implemented in March 2022, Student missed out on approximately 1.8 school years of special education services. In her written report, Exhibit P-3, Educational Advocate recommended, specifically for Reading and Written Expression deficits, that

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<sup>4</sup> Behavior Analyst premised her compensatory education recommendations on her contention that Student’s educational deficits are largely attributable to trauma relating to the violent death of the child’s father in 2016. I give less weight to her recommendations because there was no evidence at the hearing that a qualified mental health professional has diagnosed Student with a childhood trauma condition.

Student be awarded about 555 hours of compensatory education for each school year of missed services. For behavioral support, Educational Advocate recommended that Student be awarded about 42 hours of compensatory services for each year of missed services. Based on this formulation, to compensate Student for missing 1.8 school years of special education and Behavioral Support services, I will order DCPS to provide funding for the parent to obtain 1,000 hours of academic tutoring for Student and 76 hours of Behavioral Support Services.

I have also found that DCPS did not establish that its initial IEP offered Student adequate Specialized Instruction Services. However, the hearing evidence established that Student has made notable academic progress even under the very limited services provided in the February 16, 2022 IEP. For that reason, I did not find credible Educational Advocate's opinion that Student needed 19 hours per week of Specialized Instruction Services. I will order DCPS to reconvene Student's IEP team to comprehensively review Student's IEP and to make revisions, as appropriate, in light of recent data on Student and of the findings in this decision. The IEP team should also consider how much additional compensatory education may be warranted based on the failure of the February 16, 2022 IEP team to offer Student appropriate Specialized Instruction Services for Reading and Written Expression.

### **ORDER**

1. As compensatory education for the denials of FAPE found in this decision, the hearing officer orders DCPS to promptly issue funding authorization to the Parent to obtain the following compensatory education services for

Student:

(1) 1,000 hours of one-on-one tutoring by a skilled special education professional to focus on Student's Reading and Writing skills; and

(2) 76 hours of individual counseling by a qualified counselor or social worker to focus on Student's emotional, social and behavioral development.

2. DCPS shall ensure that Student's IEP team, including the parent and her representatives, is reconvened, within 30 school days of the date of this decision, to comprehensively review Student's IEP and to revise the IEP as appropriate, based on current educational information and data and in accordance with this decision.
3. Petitioner's request for additional compensatory education to compensate Student for DCPS' failure to offer appropriate Specialized Instruction Services for Reading and Written Expression in the February 16, 2022 IEP is denied without prejudice.
4. All other relief requested by the Petitioner herein is denied.

SO ORDERED.

Date: December 31, 2022

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

cc: Counsel of Record  
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