

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 12/14/23; 12/15/23;
)	12/21/23
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0138
)	
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently ineligible for services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 21, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On July 31, 2023, Respondent filed a response. A resolution meeting was held on August 1, 2023, without an agreement being reached. The resolution period expired on August 20, 2023.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-E, Chapter 30.

III. Procedural History

On September 12, 2023, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On September 19, 2023, a revised prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The matter was to proceed to trial on October 5, 2023, and October 6, 2023. On October 3, 2023, Petitioner moved to extend the timelines, on consent, from October 4, 2023, to October 27, 2023. This motion was granted by an order issued on October 3, 2023. Petitioner then became unavailable on those dates, and the hearings were rescheduled to December 14, 2023, and December 15, 2023. Accordingly, on October 23, 2023, Petitioner moved to extend the timelines for the Hearing Officer Determination (“HOD”) to be due on December 29, 2023. This motion was granted by an order issued on October 25, 2023.

The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Testimony and evidence proceeded on the scheduled dates: December 14, 2023, and December 15, 2023. After Petitioner’s presentation, Respondent moved to dismiss issue #3. This motion was denied. Additional testimony, evidence, and closing statements, were presented on December 21, 2023. The parties submitted citations in support of their positions to this Hearing Officer by correspondence dated December 22, 2023. Respondent objected to Petitioner’s submission, which did not

originally copy Respondent. However, I will overrule this objection because the error was very likely inadvertent and Petitioner's citations were later forwarded to Respondent.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-88 without objection. Respondent moved into evidence exhibits R-3, R-9 through R-11, R-15, R-17 through R-19, R-20, R-24, R-25, R-29 through R-30, R-33 through R-36, R-46, R-51, and R-58 without objection.

Petitioner presented as witnesses, in the following order: herself; Witness A, a psychologist (expert in psychology as it relates to evaluations); Witness B, a speech-language pathologist (expert in speech language pathology, audiology, and language processing disorders and evaluations); Witness C, an educational advocate (expert in special education as it relates to evaluations and Individualized Education Program ("IEP") programming); and the Student. Respondent presented as witnesses: Witness D, a teacher (expert in special education); Witness E, a speech-language pathologist (expert in speech-language pathology); Witness F, a teacher (expert in special education); Witness G, an audiologist (expert in audiology), Witness H, a speech-language pathologist (expert in speech-language pathology); Witness I, a teacher (expert in education); and Witness J, a special education coordinator at School C.

IV. Issues

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

1. Did Respondent violate the IDEA when it determined that the Student was ineligible for services in January and March 2023 and inappropriately exited the Student from special education services? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioner contended that the Student should continue to be eligible for services as a student with a speech and language impairment.

2. Did Respondent violate the IDEA by failing to timely and comprehensively evaluate the Student prior to determining the Student to be ineligible for services? If so, did Respondent deny the Student a FAPE?

Petitioner contended that DCPS should have evaluated the Student through comprehensive psychological, occupational therapy, and audiology evaluations.

3. Did Respondent fail to provide Petitioner with full access to the Student's educational records as of May 30, 2023? If so, did Respondent deny the Student a FAPE?

At the prehearing conference, Petitioner sought a determination that the Student is eligible for services and requires an IEP, that Petitioner shall be given full access to the Student's educational records, and that DCPS shall deem the Student eligible for special education services. Petitioner also sought evaluations, including an assessment of the Student's clinical, cognitive, and academic scores; an autism spectrum disorder ("ASD"), evaluation; and an occupational therapy evaluation to measure the Student's sensory profile. Petitioner also sought a finding that DCPS shall reconvene the multidisciplinary team ("MDT") team to review, revise, and/or amend the Student's IEP as appropriate, based upon the updated data from the aforementioned evaluations; that DCPS shall be ordered to fund compensatory education for the Student for the alleged denials of FAPE; and that Petitioner may reserve the right to request additional compensatory education upon completion of the aforementioned evaluations, as well as related relief.

V. Findings of Fact

1. The Student is an X-year-old who is currently ineligible for services. The Student was originally determined to be eligible for services in pre-school because of

speech-language issues relating to articulation, memorization, and hearing and processing. Testimony of Petitioner. The Student can be reluctant when it comes to answering questions and has difficulties with peers and understanding figurative language. Testimony of Witness C.

2. DCPS conducted a Central Auditory Processing Disorder (“CAPD”) evaluation of the Student in April 2021. The evaluator found that the Student had normal hearing acuity in both ears and no specific deficits to indicate definitive CAPD, based on the criteria of the American Speech-Language-Hearing Association (“ASHA”). P-4-43.

3. For the 2021-2022 school year, the Student attended School A. An IEP meeting was held for the Student on May 17, 2022. The ensuing IEP stated that the Student was eligible for services as a student with speech and language impairment. The IEP recommended retesting the Student in one to two years to observe the maturation of his/her neurological pathways. The IEP also recommended that an audiologist consult with the Student’s school-based team on a quarterly basis to monitor his/her potential processing concerns. The IEP stated that the Student presented with needs in the area of language and communication and would benefit from increased time to respond and visual aids to supplement the formulation of responses. P-48.

4. The IEP contained an “area of concern” section in speech and language/communications. It stated that the Student was receiving twenty minutes per month of speech and language services outside the classroom setting to address grammar, vocabulary, story-retelling, sequencing, describing, and following directions. The IEP stated that the Student required explicit instructions for synonyms, antonyms, and the use of words in context to increase overall word knowledge. The Student sometimes required

two to four repetitions of multistep directions. The Student increased overall success with turn-taking but required moderate verbal prompting to display flexibility with figurative language understanding. The IEP stated that the Student's weakness in language and pragmatics would affect his/her ability to access the general education curriculum. The IEP said that the Student had difficulty following directions, participating in whole-group tasks, following classroom routines, completing tasks, expressing his/her wants and needs, answering questions, retelling stories, and asking questions to clarify understanding. The IEP indicated that the Student's difficulty with pragmatic language affected his/her ability to interact with peers in the classroom setting. The IEP recommended speech-language pathology for 120 minutes per month and included five goals in the area of speech-language/communications. P-48.

5. The Student went to School B for the 2022-2023 school year. The Student struggled with perspective-taking and managing emotions, could get stuck on things s/he wanted to do or discuss, and needed reminders to stay on topic. The Student also required reminders during activities to allow others to share talking time, could become argumentative when having a difference of opinion, and greatly struggled to allow fair play in games. The Student's teachers felt that s/he needed help with peers, so s/he was included in a small group of students who needed help with self-discovery, healthy friendships, dealing with difficult issues, self-identity, and communication. The Student was placed in a same-sex group to address responses to social behaviors and understand what was expected and unexpected. The Student's issues with peers improved during the school year. P-10; Testimony of Witness D; Testimony of Witness I.

6. DCPS staff conducted an observation of the Student on October 25, 2022. The Student was observed following directives and working quietly, with one prompt to follow directions. Overall, in the twenty-minute observation period, the Student demonstrated 73% appropriate behavior, 18% off-task behavior and 9% verbally off-task behavior. In comparison, a general education peer demonstrated appropriate behavior 91% of the time and was verbally off-task 9% of the time. P-10-123.

7. Witness D, the Student's math and science teacher, noticed that the Student's online work was superior to his/her work in class. Witness D gave the Student additional practice and tutoring sessions. The Student required these sessions, but Witness D would spend much of the session time trying to calm the Student down. The Student got upset when s/he was not able to do what the rest of the class was doing because they were ahead of where s/he needed to be. Additionally, during instruction with Witness D, the Student would correct other students in small groups to the point where the other children became upset. Witness D had to speak to the Student privately to address this situation. The Student also engaged in unusual behaviors in class and left the classroom without letting Witness D know. In one instance, the Student crawled on the floor, and Witness D did not understand why. Witness D asked the Student if s/he was okay, to which the Student responded, "I wanna be down here." When Witness D looked under the table, the Student was on his/her knees with a stack of material that s/he wanted to take out of the classroom without permission. Testimony of Witness D.

8. The Student's English language arts ("ELA") and social studies teacher, Witness I, felt that the Student did not have significant academic difficulties in the classroom, but did have difficulties understanding classroom rules, routines, and social

situations, especially at the start of the school year. DCPS was not sure if these behaviors had a behavioral driver. Witness I also noticed that the Student often needed extra time in writing. Testimony of Witness I; P-63-347.

9. In November 2022, an Analysis of Existing Data (“AED”) meeting was held for the Student. DCPS proposed conducting a speech-language assessment and a Functional Behavior Assessment (“FBA”) of the Student. At the time, some DCPS staff felt that the Student might be autistic. Petitioner did not agree to the FBA without more information about it. Testimony of Petitioner; P-12. After hearing more about the FBA, Petitioner felt it would be overly opinion-based and inaccurate, given what Petitioner felt was inaccurate documentation in the class “dojo.” Petitioner raised a concern that an audiology assessment should be conducted because the Student’s last audiology assessment indicated that s/he would need retesting in one to two years. Testimony of Petitioner.

10. A Prior Written Notice was sent to Petitioner on November 28, 2022, indicating that the Student was performing at or above grade level in academics and had progressed on or mastered all language goals, but had continued to demonstrate areas of deficit in pragmatic language and behavior supports. The Prior Written Notice indicated that the Student was to receive speech-language testing. P-12. The Student’s IEP was amended on December 12, 2022, to add testing accommodations. P-50.

11. Witness E, the Student’s speech-language pathologist, felt that the Student had mastered his/her speech-language/communication goals, so Witness E wanted to test the Student to see if s/he no longer qualified for speech and language services or if there was an area that still needed to be targeted. Testimony of Witness E.

12. Witness E evaluated the Student on four dates in December 2022 and January 2023 and issued a corresponding report on January 12, 2023. Witness I was interviewed as part of this evaluation. Witness I indicated that the Student always attended to oral class discussions, used complex sentences, answered questions appropriately, responded to questions in a timely manner, used vocabulary terms correctly, sometimes asked questions appropriately, and asked for assistance when needed. In the area of social language, Witness I reported that the Student always responded to greetings to or from others, observed turn-taking rules, asked for clarification when needed, and sometimes maintained eye contact during conversations.

P-4; Testimony of Witness E.

13. The Clinical Evaluation of Language Fundamentals-Fifth Edition (“CELF-5”), Expressive One-Word Picture Vocabulary Test-Fourth Edition (“EOWPVT-4”), and Receptive One-Word Picture Vocabulary Test-Fourth Edition (“ROWPVT-4”) were attempted for the Student. However, the test results were not felt to be an accurate and valid representation of the Student’s skills and current levels of performance, as the results fell below the Student’s observed and reported communicative abilities in social and academic settings. As a result, standardized scores were not provided. During the evaluation, Witness E gave the Student the option of writing down the numbers in one assessment, though that is not how the assessment was supposed to be administered. P-4;

Testimony of Witness E.

14. The evaluation of the Student included three observations. In Witness E's first classroom observation, she saw different behavior from the Student than she saw at the beginning of the school year. Witness E did a second observation, without being

noticed, during the Student's social skills group. The Student was able to use language to explain situations, ask for clarification, and negotiate with a peer. However, the Student said s/he wanted to read, started reading, mispronounced one title word, and then said s/he could not read. The Student did not want to play a game correctly after losing the first time. Thereafter, a different speech-language pathologist conducted a third observation of the Student, in math class. The Student referred to the month of December as "ducktail" but read correctly during this observation. The teacher asked at one point "what type of math word is 'altogether,'" to which the Student responded, "addition." The Student used age-appropriate voice, tone, and fluency to respond to all questions. P-4; Testimony of Witness E.

15. Also as part of the Student's evaluation, the Orion Pragmatic Language Skills Questionnaire was provided to two of his/her teachers and his/her school social worker to determine his/her pragmatic skills. The questionnaire responses showed that the Student had pragmatic language deficits. Both teachers said that the Student rarely understood the facial expressions of others or responded appropriately. Witness I said that the Student rarely acted at an age-appropriate level. Witness D said that s/he acted at an age-appropriate level half the time. Witness D also said that half the time the Student spoke clearly and in an appropriate tone and volume. Witness I agreed that the Student spoke in an appropriate tone and volume half the time. Both teachers indicated that the Student was rarely able to take another person's perspective. According to some of the questionnaire responses, the Student exhibited significant issues in the following areas: understanding sarcasm and metaphor; letting go of an argument; conversational skills (topic maintenance); changing topic appropriately; taking turns in conversation;

interrupting both peers and adults; using appropriate conversational pleasantries; asking for help; establishing and maintaining appropriate friendships; refraining from making fun of others; offering and accepting criticism appropriately; demonstrating empathy; compromising and negotiating appropriately; listening to other perspectives without imposing his/her own; recognizing and expressing his/her own emotions; demonstrating remorse; respecting the school hierarchy, and caring what others think. P-4.

16. Witness E decided, based on teacher reports, observations, and the Student's most recent report card, that the Student was demonstrating age-appropriate articulation, voice, and fluency skills. Witness E felt the Student could follow multi-step directions in the classroom, understood curricular vocabulary, and could make inferences from classroom texts. Witness E reported that the Student had a strong understanding of the rules for appropriate pragmatic language in the classroom but struggled to use them appropriately in social situations and during group projects. Testimony of Witness E; P-4.

17. Center A evaluated the Student on January 19, 2023. On the Clinical Evaluation of Language Fundamentals-5th Edition ("CELF-5"), the Student's "Core Language Score" was 51, indicating below-average overall language skills, and his/her "Receptive Language Index" score was 55, indicating below-average receptive language skills. On the Goldman Fristoe Test of Articulation-3 ("GFTA-3"), the Student scored in the very low range. On the Expressive One-Word Picture Vocabulary Test-4th Edition ("EOWPVT-4"), the Student's results were well below expected. The Student was diagnosed with Mixed Receptive Expressive Language Disorder, and Center A concluded that s/he presented with below-average receptive and expressive skills. Expressively, the

Student produced single words and short sentences to answer questions. S/he provided short answers to open-ended questions and had difficulty engaging in back-and-forth conversation. Based on these findings, Center A recommended school-based speech and language therapy, as well as further speech and language testing to assess cognitive skills related to language impairment. An outside provider list was provided to Petitioner, who was encouraged to share Center A's findings with the Student's school-based team. P-3.

18. An eligibility meeting was held for the Student on January 30, 2023.

Notwithstanding Center A's evaluation, DCPS felt that the Student's speech and language issues did not have any academic impact on his/her education, and DCPS determined that s/he was ineligible for special education services. The DCPS team reviewed all formal and informal assessments, data collected during the AED meeting, observations, state policy definitions, eligibility criteria worksheets, and exclusionary factors in determining that the Student did not meet all required criteria under the category of Speech and Language Impairment. Testimony of Petitioner; P-14-144.

19. On February 7, 2023, Petitioner wrote a letter disagreeing with the team's determination, and she requested assessments of the Student's cognitive skills, academic achievement, executive functioning, attention, and auditory processing. Petitioner also requested the Student's educational records and his/her test and subtest scores from the speech evaluation conducted by DCPS. P-22.

20. An AED meeting was held for the Student in or about February 2023.

After reviewing the CAPD evaluation of 2021 and Center A's evaluation of 2023, DCPS continued to maintain that the Student was not eligible for services. DCPS felt that, though the Student was below level on the ROWPVT (receptive vocabulary) and

EOWPVT (expressive vocabulary), the Student's teacher reports, writing samples, and observations suggested that his/her expressive and receptive vocabulary skills were in the average range. DCPS felt that the Student understood “curricular vocabulary” and was able to integrate it into both written and oral responses to make inferences from classroom texts and connections between concepts. DCPS did indicate that the Student spoke “in sentence fragments” but was able to express him/herself overall. DCPS noted that the Student was at grade level in all aspects of speaking and in ELA overall.

Concerning pragmatic language, DCPS felt that the Student was unable to complete the majority of items in a formal measure, but that checklists completed by the Student’s classroom teachers and school social worker revealed areas of strength in taking turns, interrupting appropriately, shifting between topics, maintaining appropriate topics, and expressing information concisely. DCPS also noted strengths in using appropriate volume and tone. DCPS felt that the Student’s weaknesses were in empathy, establishing and maintaining friendships, and compromising, and that s/he struggled to use these skills appropriately in social situations and during group projects. P-11.

21. On February 9, 2023, a speech and language assessment review was written by Witness E, who noted that Center A’s testing was duplicative with her testing on the CELF-5, ROWPVT, and EOWPVT. DCPS therefore determined that the evaluation should be viewed with caution. Although Center A's report was accepted as comprehensive, the scores and findings were not accepted as valid because of the testing issue and inconsistencies in the Student’s performance. However, Witness E's report stated: “Results of testing suggest [the Student] does meet criteria for speech language impairment due to deficits in pragmatic language. Pragmatic language deficits may

hinder [the Student's] ability to interact with peers and participate in small groups. The MDT should convene and review all information and assessments to determine eligibility for special education.” Testimony of Witness E; P-6.

22. By this time, the Student’s attendance had begun to decline. DCPS felt that this was a function of Petitioner’s objections to the ineligibility determination. The Student provided medical excuses for some of the days that s/he missed. Testimony of Witness D; R-25. On March 16, 2023, a Prior Written Notice was issued indicating that no additional information was needed to determine if the Student qualifies as a student with a disability who is eligible for special education and related services under IDEA. P-16. DCPS then suggested a Section 504 plan for the Student. P-14-144. Under the Section 504 plan, the Student now receives speech services. Testimony of Witness H.

23. In June 2023, Petitioner sent DCPS an email requesting the Student’s IEP progress reports, service trackers, report cards, transcripts, and attendance reports. P-22. DCPS responded by sending the documents it had, but not academic records for the 2020-2021, 2021-2022, and 2022-2023 school years, standardized test results, progress reports, final eligibility reports, service trackers, and related documents. P-20-180.

24. For the 2023-2024 school year, the Student attends School C, but s/he has frequently been absent from school. A CAPD evaluation was conducted for the Student and reported on September 13, 2023. The evaluation indicated that hearing sensitivity was within normal limits and speech discrimination, in the absence of any competing noise, was excellent in each ear. Even so, the evaluation stated that the Student met the ASHA diagnostic criteria for CAPD, and that the Student’s difficulty processing speech and other auditory information was consistent with an “auditory decoding” deficit. P-8.

VI. Conclusions of Law

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.” D.C. Code Sect. 38-2571.03

(6)(A)(i). None of the issues in this case directly involves a challenge to program or placement. Accordingly, on all three issues, the burden of persuasion is on Petitioner.

1. Did Respondent violate the IDEA when it determined that the Student was ineligible for services in January and March 2023 and inappropriately exited the Student from special education services? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should continue to be eligible for services as a student with a speech and language impairment.

Pursuant to 34 C.F.R. Sect. 300.8(c)(11), a child who is eligible for services as a student with “speech or language impairment” must have a “communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child’s educational performance.” Pursuant to 5-A DCMR Sect. 3010.5, speech-language pathology services may be considered special education, and may be designated as special education on a child’s IEP.

In determining eligibility on the basis of speech or language impairment, the IEP team must consider assessments and child data related to: (1) Whether the child displays an articulation impairment, including atypical production of speech sounds characterized by substitutions, omissions, additions, or distortions that interfere with intelligibility in conversational speech; (2) Whether the child displays a fluency impairment characterized by interruption in the flow of speech, by an atypical rate or rhythm, by repetition in sounds, syllables, words, and phrases that significantly reduce the child's ability to participate in the learning environment, by excessive tension, by struggling behaviors, or by ritualistic behaviors or movements, stuttering, or cluttering; (3) Whether the child displays a language impairment, including impaired comprehension or use of spoken language that may also impair written or other symbol systems, impairment in the form of language, such as phonology, morphology, and syntax, impairment in the content of language, such as semantics, and impairment in the use of language in communication, such as *pragmatics*. 5-A DCMR Sect. 3011.12 (emphasis added).

The record contains multiple references to the Student's issues with respect to pragmatic language and how those issues impact the Student in the classroom, including testimony from Respondent's own witnesses. The Student got upset when s/he perceived the rest of the class was ahead of where s/he needed to be; s/he corrected other students in small groups to the point where the other children became upset; and s/he engaged in unusual behaviors in class, such as when s/he crawled on the floor to impermissibly take materials out of the classroom. The Student also struggled with perspective-taking, got stuck on things s/he wanted to do or discuss, needed reminders to stay on topic, struggled

with managing his/her emotions, did not allow others to share talking time, could become argumentative, and greatly struggled to allow fair play in games.

In fact, the Student's teachers felt that s/he needed so much help with peers that s/he was included as part of a small group of students who needed help with self-discovery, healthy friendships, dealing with difficult issues, self-identity, and communication. The purpose of the group was to address responses to social behaviors and understand what was expected and unexpected. DCPS suggested that this was a "general education" intervention, but the legal definition of "specially designed instruction" does not mean that the instruction must be delivered by a special education teacher. In McLean v. District of Columbia, 264 F. Supp. 3d 180 (D.D.C. 2017), the hearing officer relied on an expert who said that the student in that case was meeting expectations grade-wise and was "normal achievement-wise." The court reversed the hearing officer, paying close attention to the testimony of the petitioner's expert, who suggested that the student could benefit from special education strategies such as teaching the student to calm down and meditate. Id. at 185. Also on point is Letter to Chambers, 59 IDELR 170 (May 9, 2012), where a Massachusetts school district contended that certain extra services, like counseling, social skills training, and modified teaching methodologies, were "best teaching practices" and therefore integrated into the district's regular education program. The United States Department of Education Office of Special Education Programs ("OSEP") stated that, "the fact that some of those services may also be considered "best teaching practices" or "part of the district's regular education program" does not preclude those services from meeting the definition of "special education" or "related services" and being included in a child's IEP. OSEP pointed out

that “specially designed instruction” means “the adaptation of content, methodology, or delivery of instruction, as appropriate to meet the unique needs of a child with a disability in order to ensure access to the general curriculum, so that the child can meet the educational standards that apply to each child within the jurisdiction of the District.” 34 C.F.R. Sect. 300.39(a)(1); 5-E DCMR Sect. 3001(1). OSEP continued by stating that “OSEP recognizes that classrooms across the country are changing as the field of special education responds to innovative practices and increasingly flexible methods of teaching. While the needs of many learners can be met using such methods, they do not replace the need of a child with a disability for unique, individualized instruction that responds to his or her disability and enables the child to meet the educational standards within the jurisdiction of the public agency that apply to all children.”

The record in this case suggests that this is a unique Student who needs such an individualized plan. DCPS based its conclusions mainly on Witness E, who, in turn, based her conclusions on observations by, and interviews with, the Student’s teachers. However, the skills questionnaire that these teachers filled out contained many references to the Student’s pragmatic language issues. Witness D found that the Student spoke clearly and in an appropriate tone and volume only half the time. Witness I agreed that the Student spoke in an appropriate tone and volume only half the time. Both teachers found the Student rarely understood the facial expressions of others. Witness I said that the Student rarely acted at an age-appropriate level, while Witness D said that s/he acted at an age-appropriate level half the time. The teacher interviews also indicated that the Student had issues in the following areas: understanding sarcasm; understanding metaphor; conversational skills (topic maintenance); interrupting both peers and adults;

using appropriate conversational pleasantries; asking for help; establishing and maintaining appropriate friendships; refraining from making fun of others; offering and accepting criticism appropriately; demonstrating empathy; compromising and negotiating appropriately; listening to other perspectives without imposing his/her own; recognizing and expressing his/her own emotions; demonstrating remorse; respecting the school hierarchy; and caring what others thought. In fact, Witness E's report stated: "Results of testing suggest [the Student] does meet criteria for speech language impairment due to deficits in pragmatic language. Pragmatic language deficits may hinder [the Student's] ability to interact with peers and participate in small groups."

Moreover, DCPS's January 30, 2023, determination that the Student did not need speech and language services is at odds with the Student's Section 504 plan, which does offer speech and language services. DCPS did not clearly explain why the Student is receiving speech and language services through the 504 plan but not through an IEP.

DCPS argued that it was appropriate to focus on observations, but the observations also indicated that the Student needed special help in the classroom. The observation of October 25, 2023, which occurred before the dispute between the parties, indicated that, in a twenty-minute observation period, the Student demonstrated appropriate behavior 73% of the time, off-task behavior 18% of the time, and verbally off-task behavior 9% of the time. This compared to a general education peer who demonstrated appropriate behavior 91% of the time and was verbally off-task 9% of the time. In Witness E's second observation, which was incognito, the Student said s/he wanted to read, started reading, mispronounced one title word, and then said s/he could not read. The Student was unable to pronounce words correctly and did not want to play

a game after losing the first time. In a third observation conducted by a different speech-language pathologist, the Student referred to the month of December as “ducktail.”

This Hearing Officer therefore agrees with Petitioner that the Student should not have been deemed ineligible at either the January 2023 meeting or the subsequent meetings in February and March, and that the Student was accordingly denied a FAPE.

2. Did Respondent violate the IDEA by failing to timely and comprehensively evaluate the Student prior to determining the Student to be ineligible for services? If so, did Respondent deny the Student a FAPE?

Petitioner’s contention was that DCPS should have evaluated the Student through a comprehensive psychological evaluation, an occupational therapy evaluation, and an audiology evaluation.

The IDEA requires school districts to ensure that students are “assessed in all areas of suspected disability” and to base a student’s IEP on the most recent evaluation. 20 U.S.C. Sects. 1414(b)(3)(B), (c)(1); 34 C.F.R. Sect. 300.304(c)(4). The child’s re-evaluation must consist of two steps. The Local Educational Agency (“LEA”) is required to “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” Sect. 300.304(b). All methods and materials used must be “valid and reliable” and “administered by trained and knowledgeable personnel.” Sect. 300.304(c)(1). These methods and materials must examine a student’s potential disabilities. Davis v. District of Columbia, 244 F. Supp. 3d 27, 49 (D.D.C. 2017).

Petitioner contended that the Student needed an audiology evaluation. However, the Student received an audiology evaluation in 2021, which found that s/he had normal hearing acuity in both ears. The evaluation also found that the Student did not have any

specific deficits that indicated CAPD. The evaluator did say that the Student should be retested in one to two years, but two years had not elapsed by January 2023. This Hearing Officer therefore finds that Petitioner's contentions regarding an audiology evaluation were unpersuasive. Moreover, Petitioner did not present any testimony or evidence to support the contention that the Student needs occupational therapy testing.

Petitioner also contended in her closing argument that the Student needed a comprehensive psychological evaluation because of sensory concerns. However, the record provides little support for this proposition. Petitioner's Witness A did not focus on sensory concerns. Instead, Witness A recommended a comprehensive clinical evaluation to either rule out or confirm if behavioral factors² might be at play with respect to the Student's speech issues. Witness B also did not focus on sensory concerns. Instead, Witness B recommended a comprehensive psychological evaluation to determine the Student's level of cognitive functioning.

Moreover, Petitioner's argument did not clearly explain how the lack of such assessments might have harmed the Student. Before FAPE denial can be found on an evaluation claim, there must be some rational basis to believe that the lack of an evaluation compromised the pupil's right to an appropriate education or caused a deprivation of education benefits. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006). This claim must therefore be dismissed.

3. Did Respondent fail to provide Petitioner with full access to the Student's educational records as of May 30, 2023? If so, did Respondent deny the Student a FAPE?

² It is noted that, in regard to behavioral testing, this is what DCPS proposed in the form of an FBA. Petitioner declined to consent to the FBA.

The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to ‘examine’ or ‘inspect and review’ all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 C.F.R. Sect. 300.501(a); 5-A D.C.M.R. Sect. 2600.1. The term “education records” means the type of records covered under the definition of “education records” in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 232g (“FERPA”)). 34 C.F.R. Sect. 300.611-300.625.

In February 2023 and again in May-June 2023, Petitioner sent DCPS an email requesting the Student’s IEP progress reports, service trackers, report cards, transcripts, and attendance reports. DCPS responded by sending the documents it had, but not the documents including academic records for the 2020-2021, 2021-2022, and 2022-2023 school years, standardized tests, progress reports, final eligibility reports, service trackers, and related documents.

While DCPS should have complied in full with the records requests, Petitioner failed to show that the school district’s failure to completely respond to the records request had any impact on the Student’s education, or on Petitioner’s right to participate in the Student’s education. Nor did Petitioner explain how the failure to respond to the records request had any impact on Petitioner’s presentation in this litigation. In a similar case, when a parent contended that DCPS’s failure to produce education records amounted to FAPE denial under the IDEA, the court found that, “Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report

cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing.” The court continued, “Rather, she paints in the broadest of strokes, asserting that the evidence ‘would have provided the basis for services’ and that they ‘related to the identification, evaluation, and educational placement’ of [the subject student].” Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (missing records revealed the student was autistic).

This claim must therefore be dismissed.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

Hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The 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. Id., 401 F. 3d at 524; see also

Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C.

2008) (compensatory award must be based on a “qualitative, fact-intensive” inquiry used to craft an award “tailored to the unique needs of the disabled student”).

Petitioner seeks a determination that the Student is eligible for services and that the Student should have an IEP that includes speech-language pathology services. This form of relief is clearly appropriate in light of the conclusions of law herein. The Student will, at a minimum, receive an IEP that provides for 120 minutes of speech-language pathology per month.

Petitioner also seeks a modest and reasonable compensatory education award for the Student: ten hours of speech language services. Those services shall be provided by a qualified provider at a reasonable and customary rate in the community.

Petitioner also seeks evaluations and educational records for the Student. However, because this Hearing Officer did not rule for Petitioner on the corresponding claims, it is appropriate to deny this form of relief.

VII. Order

As a result of the foregoing:

1. The Student is hereby eligible for services as a student with speech-language impairment;
2. An IEP team shall meet to create an IEP for the Student within twenty calendar days;
3. The Student shall receive an IEP requiring 120 minutes per month of speech-language pathology for the remainder of the 2023-2024 school year;

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4. Respondent shall pay for ten hours of speech-language pathology for the Student, to be delivered by a qualified professional at a reasonable and customary rate in the community;

5. All other claims for relief are hereby denied.

Dated: December 29, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.

VIII. Notice of Appeal Rights

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

Dated: December 29, 2023

Michael Lazan
Impartial Hearing Officer