

OSSE  
Office of Dispute Resolution  
February 10, 2020

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

## Hearing Officer Determination

Case No. 2019-0297

reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 2/18/20.

Following the prehearing conference on 1/9/20 and issuance of the Prehearing Order that same day, the due process hearing took place on 1/30/20 and 2/3/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was not present for the hearing (apart from brief involvement by telephone) due to unexpected challenges with another child, but sought to proceed through counsel which the undersigned permitted despite opposition from Respondent.

Petitioner’s Disclosures, submitted on 1/23/20, contained documents P1 through P50, all of which were all admitted into evidence over objections filed by Respondent. Respondent’s Disclosures, submitted on 1/23/20, contained documents R1 through R20, of which only R1, R2, R3, R4, R5, R6, R7, R12, R13, R14, R15, R16, R17, R18, and R19 were offered into evidence and were admitted. Petitioner’s objection to R1 was withdrawn and objection to R16 was overruled.<sup>2</sup>

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychologist* (qualified over objection as an expert in Special Education and Psychological and Neuropsychological Evaluations)
2. *Educational Advocate* (qualified over objection as an expert in Special Education)

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see* Appendix A):

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy with Respect to Special Education Students)
2. *School Psychologist* (qualified without objection as an expert in School Psychology)
3. *Special Education Teacher at Public School* (qualified without objection as an expert in Special Education)

Petitioner’s counsel did not present any rebuttal witnesses.

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

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<sup>2</sup> References herein to documents are indicated by a “P” for Petitioner’s documents, or “R” for Respondent’s documents, followed by the exhibit number, a hyphen, and the exhibit page number (or numbers, separated by commas).

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**Issue 1:** Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP from December 2017 through June 2019, where Student did not receive the full extent of (a) Behavioral Support Services ("BSS") with over 29 hours missed, and/or (b) occupational therapy ("OT") services with over 19 hours missed. *Petitioner has the burden of persuasion on this issue.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to conduct or agree to conduct a comprehensive triennial reevaluation when it did not conduct or agree to conduct (a) an assistive technology assessment, and/or (b) a neuropsychological evaluation based on findings of a prior psychological, as requested at a 11/18/19 meeting. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall conduct or fund (a) a neuropsychological evaluation and (b) an assistive technology assessment of Student, and upon completion convene the IEP team to review the results and revise Student's IEP as appropriate.
3. DCPS shall provide compensatory education to make up for any services missed over the past 2 years, with reservation of Petitioner's right to additional compensatory education once the evaluations above are completed.<sup>3</sup>
4. Any other just and reasonable relief.

### **Findings of Fact**

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

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<sup>3</sup> So far as Petitioner's request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student's assessments and a determination of eligibility for additional special education services.

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

<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under

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1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Public School.<sup>6</sup> Petitioner's key concern is that Student is not progressing, particularly in reading, despite receiving a great deal of specialized instruction, now including a self-contained Specific Learning Supports ("SLS") class.<sup>7</sup> Student is very conscious of these deficits; when offered 3 wishes in the 1/1/20 comprehensive psychological evaluation Student listed "to be able to read and write" after "becoming a trillionaire" and before being able to fly.<sup>8</sup>

2. IEPs. Student's recent IEPs all include a disability classification of Specific Learning Disability ("SLD") and provide services comprised of 20 hours/week of specialized instruction outside general education, 120 minutes/month of OT outside general education, 240 minutes/month of BSS outside general education, and 30 minutes/month of BSS consultation.<sup>9</sup> The services in Student's prior IEP dated 12/11/17 differed only by not including BSS consultation.<sup>10</sup> Student's 1/24/17 IEP differed slightly as specialized instruction was divided between 16 hours/week inside general education and 7 hours/week outside general education, and BSS was divided between 60 minutes/month inside general education and 60 minutes/month outside general education, along with 120 minutes/month of OT outside general education (and no consultation).<sup>11</sup>

3. Reading. Student's reading has remained for years on a kindergarten level, with no progress.<sup>12</sup> On 9/4/15, Student's iReady score in reading was 347, a kindergarten level.<sup>13</sup> On 9/11/18, Student's iReady score in reading was 398, a kindergarten level.<sup>14</sup> On 8/29/19, Student's Beginning of Year ("BOY") Reading Inventory was Beginning Reader, showing no progress.<sup>15</sup> Student took the Middle of Year ("MOY") Reading Inventory on 1/15/20 and achieved a score 234 points higher than BOY, which is a year's growth in half a school year.<sup>16</sup> The school team placed great weight on Student's recent progress in reading.<sup>17</sup> Special Education Teacher hopes that Student has now gotten past the initial "hump" and

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consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> P5-1; P7-1.

<sup>6</sup> *Id.*

<sup>7</sup> P1-2; P12-1.

<sup>8</sup> P12-5.

<sup>9</sup> P12-1 (listing services in 11/18/19 IEP); P5-1,12 (10/23/19 draft IEP); P7-1,10 (11/20/18 IEP).

<sup>10</sup> P11-1,10.

<sup>11</sup> P9-1,9.

<sup>12</sup> Educational Advocate.

<sup>13</sup> P38-1.

<sup>14</sup> P37-1.

<sup>15</sup> P4-1; R1-2.

<sup>16</sup> Special Education Teacher; R1-2; P1-2.

<sup>17</sup> School Psychologist.

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will continue to show good progress in reading.<sup>18</sup> Special Education Teacher has also seen recent behavior improvement by Student.<sup>19</sup>

4. Implementation of Related Services. Student's IEPs required 120 minutes/month of OT services for a total of 1960 minutes from December 2017 through June 2019 (with no services due in July and partial services in June and August); Student's service trackers indicated that Student received 1350 minutes and missed 610 minutes.<sup>20</sup> Petitioner's chart of OT services erred by including a month prior to December 2017 and several months after June 2019 and by assuming that a full month of services was due for August.<sup>21</sup> Most of the OT services were offered in a small group setting and not 1:1; Student performs better 1:1.<sup>22</sup>

5. Student's IEPs required 240 minutes/month of BSS services for a total of 3920 minutes from December 2017 through June 2019 (with no services in July and partial services in June and August); Student's service trackers indicated that Student received 3005 minutes and missed 915 minutes.<sup>23</sup> Petitioner's chart of BSS services contained inaccuracies by including a month prior to December 2017 and several months after June 2019, by making basic math errors (in October 2018 and May 2019), and by not including services shown by all trackers in the record (for December 2017, April 2018, May 2018, and December 2018).<sup>24</sup> Further, during the period in issue Student refused 270 minutes of BSS services, was absent for 115 minutes of BSS, and was unavailable for 120 minutes of BSS due to PARCC testing.<sup>25</sup> Most of the BSS services were offered in a small group setting; Student performs better 1:1.<sup>26</sup>

6. Testing. Student is sensitive to testing and demonstrates limited willingness to participate in academic testing.<sup>27</sup> On the 1/1/20 comprehensive psychological evaluation, Student refused parts that required reading and writing; the tester considered Student's scores to be low in validity.<sup>28</sup> Student would not welcome additional testing and is not a good candidate for more testing at this time; no answers have been found to obtain Student's cooperation in further testing.<sup>29</sup> The IEP team (other than Parent) did not see a need even for a new comprehensive psychological evaluation in late 2019 as they considered Student's current classification of SLD to be accurate; Special Education Teacher believes that Student "truly" is a child with SLD; she has no concerns about classification.<sup>30</sup> At this

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<sup>18</sup> Special Education Teacher.

<sup>19</sup> *Id.*

<sup>20</sup> P44; R14; R13-39; Educational Advocate; Administrative Notice.

<sup>21</sup> P44-1; Educational Advocate; Administrative Notice.

<sup>22</sup> Educational Advocate; P44.

<sup>23</sup> P45; R13; Educational Advocate; Administrative Notice.

<sup>24</sup> P45-1; Educational Advocate; Administrative Notice.

<sup>25</sup> R13; P45; Administrative Notice.

<sup>26</sup> Educational Advocate; P45.

<sup>27</sup> P1-3 (1/17/20 IEP Meeting).

<sup>28</sup> P12-7.

<sup>29</sup> School Psychologist.

<sup>30</sup> P12-1; Special Education Teacher.

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point, no other areas need to be examined; sufficient information is available to program appropriately for Student.<sup>31</sup>

7. Cognitive Abilities. Student has had numerous comprehensive psychological evaluations, which have shown variation in Student's cognitive abilities.<sup>32</sup> A 7/22/13 comprehensive psychological evaluation used the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (“WPPSI-III”) to determine that Student's Full Scale IQ (“FSIQ”) was 84, while other indices ranged from 68 to 100, which was the Average to Low Average range (with one index in the Lower Extreme).<sup>33</sup> A 8/19/16 comprehensive psychological evaluation relied on the Reynolds Intellectual Assessment Scales (“RIAS”) for a Composite Intelligence Index (“CIX”) of 103, with other indices ranging from 89 to 104, all of which were Average to Low Average.<sup>34</sup> A 5/31/17 independent educational evaluation (“IEE”) comprehensive psychological evaluation relied on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) to determine that Student's FSIQ was 93, with indices ranging from 84 to 103, all of which were Average to Low Average.<sup>35</sup> On the 1/1/20 comprehensive psychological evaluation, Student showed some resistance on the Verbal Memory subtest which may have impacted performance.<sup>36</sup> The 1/1/20 evaluation relied on the Reynolds Intellectual Assessment Scales, 2<sup>nd</sup> Ed. (“RIAS-2”) for a CIX of 82, which was Below Average, while the other indices ranged from 79 to 88, all of which were Average to Low Average.<sup>37</sup>

8. Academic Achievement. The 8/19/16 comprehensive psychological evaluation found that academically Student was performing significantly below grade and age level in reading and mathematics and struggled significantly with handwriting and visual-perceptual skills.<sup>38</sup> The 8/19/16 evaluation relied on the Woodcock-Johnson III Tests of Achievement (“WJ-III ACH”) which found that many of the results were in the 70s.<sup>39</sup> The 5/31/17 IEE comprehensive psychological evaluation relied on the WJ-IV ACH, which found Broad Reading to be a 56, Broad Written Language to be 59, and Broad Mathematics to be 73, all in the Very Limited to Extremely Limited ranges; in addition to subtests showing Oral Reading was <40, Sentence Writing Fluency was 43, while others were in the mid-50s.<sup>40</sup> On the 1/1/20 comprehensive psychological evaluation, the WJ-IV ACH indicated on completed subtests that Student scored <40 on Passage Comprehension, 91 on Applied Problems and 41 on Spelling.<sup>41</sup>

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<sup>31</sup> School Psychologist; Occupational Therapist.

<sup>32</sup> Psychologist.

<sup>33</sup> P15-3,6.

<sup>34</sup> P20-1,5; P12-3.

<sup>35</sup> P19-10,11; P12-3.

<sup>36</sup> P12-7.

<sup>37</sup> P12-8,9,10; School Psychologist.

<sup>38</sup> P20-11.

<sup>39</sup> P20-6,7; P12-4.

<sup>40</sup> P19-13,21; P12-3.

<sup>41</sup> P12-19.

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9. Assistive Technology Assessment. On 1/7/20 DCPS agreed to conduct an assistive technology (“AT”) assessment of Student; Parent consented on 1/9/20.<sup>42</sup> The 12/12/19 OT evaluation recommended that Student engage in a keyboarding tutorial program as an alternative to handwriting.<sup>43</sup> OSSE’s AT training materials note that AT can aid in the areas of reading and written composition, among many others.<sup>44</sup> DCPS had agreed to an AT evaluation in September 2017.<sup>45</sup> In a prior due process hearing (before this hearing officer), DCPS testified that an AT evaluation was scheduled for 1/18/18, the week after that due process hearing concluded.<sup>46</sup> Parent consented, but the AT evaluation was not conducted as promised.<sup>47</sup> DCPS stated in the present due process hearing that an AT evaluation of Student had begun and was to be completed immediately following the hearing.<sup>48</sup>

10. Neuropsychological Evaluation. Petitioner’s counsel repeatedly sought a neuropsychological evaluation, but DCPS disagreed that it was necessary.<sup>49</sup> Psychologist testified that a neuropsychological evaluation should be conducted because “more is going on” with Student given challenges, and a psychological evaluation had already been conducted but Student was still not thriving.<sup>50</sup> Psychologist noted the concern of over-testing Student, but since Student had made no progress she advocated more testing.<sup>51</sup>

11. Neuropsychological evaluations are not school-based evaluations and are not typically conducted for educational programming.<sup>52</sup> Neuropsychological evaluations are needed to look at brain functioning, including brain injuries, cerebral palsy, and the like.<sup>53</sup> There is significant overlap between neuropsychological evaluations and OT and comprehensive psychological evaluations; for example, visual perception would be similarly evaluated in neuropsychological and comprehensive psychological evaluations, and could be examined in even more detail in an OT evaluation.<sup>54</sup> The 12/12/19 OT evaluation of Student did cover some of the areas sought in a neuropsychological evaluation, including visual perception, sensory processing, and visual closure.<sup>55</sup> Occupational Therapist did not think that a neuropsychological evaluation would answer concerns about visual closure and that there was no academic impact from Student’s sensory processing issues.<sup>56</sup> A

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<sup>42</sup> Educational Advocate; P1-4; R2-5; R3-1 (PWN); R5-1.

<sup>43</sup> P14-9.

<sup>44</sup> P50-15.

<sup>45</sup> Educational Advocate.

<sup>46</sup> P47-9.

<sup>47</sup> Educational Advocate.

<sup>48</sup> Educational Advocate; Occupational Therapist; Administrative Notice.

<sup>49</sup> P40-1 (formal request on 11/21/19); P1-2,3; School Psychologist.

<sup>50</sup> Psychologist.

<sup>51</sup> *Id.*

<sup>52</sup> School Psychologist; Occupational Therapist; P4-2.

<sup>53</sup> School Psychologist.

<sup>54</sup> School Psychologist; Occupational Therapist.

<sup>55</sup> P14-1,4,5,9; Occupational Therapist.

<sup>56</sup> R2-4.

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neuropsychological evaluation can highlight strengths and weaknesses, but cannot explain why they exist.<sup>57</sup>

12. Psychologist was concerned about Student's cognitive scores dropping, which could indicate a serious progressive disorder.<sup>58</sup> School Psychologist noted that Student's cognitive results have remained in the Average to Low Average range over time, with the same general strengths and weaknesses.<sup>59</sup> School Psychologist questioned the validity of the 1/1/20 FSIQ score of 82 (which compared to a 93 on 5/31/17), since Student was not fully cooperating in the testing.<sup>60</sup> Some variability among cognitive scores is expected and Student's scores were not extreme; fluctuation should not raise an expectation that something is wrong.<sup>61</sup>

13. School Psychologist persuasively testified that evaluations are to determine how to program for students and that DCPS has no question about how to program for Student and can treat the symptoms without knowing the theoretical reason for the problem.<sup>62</sup> Psychologist concurred that after 3 (or 4) comprehensive psychological evaluations and 2 OT evaluations, it was known that Student had weaknesses in visual perception, weaknesses in visual closure, weaknesses in phonological processing and decoding, weaknesses in sensory processing, and weaknesses in memory functioning.<sup>63</sup>

14. The 5/31/17 IEE comprehensive psychological evaluation recommended that Student see a neurologist "to evaluate for an organic cognitive deficit" due to challenges with visual perception and difficulties in verbal expression and processing.<sup>64</sup> School Psychologist explained that there was no evidence to suggest an organic (genetic) neurological condition, and that a neuropsychological evaluation could not test for that condition, which would require a medical doctor.<sup>65</sup> The IEE noted that Student's academic struggles are likely "first and foremost" to be the result of SLD, along with an Unspecified Neurodevelopmental Disorder, so additional testing should be conducted by a neurologist to understand Student's visual perception and integration and determine the underlying neurological reasons that contribute to Student's struggles.<sup>66</sup> The IEE noted a family history of neurodevelopmental disorders; a discrepancy between cognitive scores and Student's academic achievement supported the IEE's conclusion that Student met the criteria for diagnosis of Unspecified Neurodevelopmental Disorder.<sup>67</sup> The visual-motor results

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<sup>57</sup> School Psychologist.

<sup>58</sup> Psychologist.

<sup>59</sup> School Psychologist.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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

<sup>63</sup> Psychologist.

<sup>64</sup> P19-19.

<sup>65</sup> School Psychologist; P19-18.

<sup>66</sup> P19-18.

<sup>67</sup> P19-17.

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suggested no evidence of a neurological impairment.<sup>68</sup> Parent has not taken Student to see a neurologist.<sup>69</sup> Neurologists cannot conduct neuropsychological evaluations.<sup>70</sup>

15. Compensatory Education. At the resolution meeting, Petitioner sought 45 hours of BSS, 35 hours of OT, and 80-100 hours of independent tutoring due to missed related services.<sup>71</sup> Educational Advocate's Compensatory Education Proposal sought at least 45 hours of independent counseling, 35 hours of independent OT, and 124 hours of independent tutoring to restore Student to the place Student would have been but for the alleged denial of FAPE.<sup>72</sup> Educational Advocate's proposal sought the reservation of a claim for additional compensatory education pending the outcome of assessments not completed by the time of the due process hearing.<sup>73</sup> Given Student's cognitive abilities, Educational Advocate believed that Student should have been able to achieve one year's growth during a school year.<sup>74</sup> On 1/21/20, DCPS authorized 45 hours of BSS, 35 hours of OT and 50 hours of tutoring and/or mentoring for Student from independent providers to be completed by 1/20/21, which was not conditioned on settlement of the case.<sup>75</sup>

### Conclusions of Law

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

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

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

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<sup>68</sup> P19-10.

<sup>69</sup> Educational Advocate.

<sup>70</sup> School Psychologist.

<sup>71</sup> P2-3; R2-5.

<sup>72</sup> Educational Advocate; P41-5.

<sup>73</sup> *Id.*

<sup>74</sup> Educational Advocate.

<sup>75</sup> R15-1.

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

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing* *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew F.*, 137 S. Ct. at 1001.

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

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

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP from December 2017 through June 2019, where Student did not receive the full extent of (a) BSS with over 29 hours missed, and/or (b) OT services with over 19 hours missed. (Petitioner has the burden of persuasion on this issue.)*

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Petitioner met her burden of persuasion on the issue of full implementation of related services required by Student's IEPs as to OT, but not BSS services, for the reasons set forth below.

With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "de minimis failure to implement all elements of [the student's] IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

OT Services. Considering Student's missed OT services first, Student's IEPs required 120 minutes/month of OT during the period challenged by Petitioner from December 2017 through June 2019 (with no services in July and partial services in June and August), which totaled 1960 minutes. Based on Student's available service trackers, only 1350 minutes of OT services were actually provided to Student during this period and 610 minutes were missed. That amounts to provision of 69% of the OT services that Student was supposed to receive during this period and failure to provide 31% (just over 10 hours), which is a material deviation from Student's IEPs and a denial of FAPE. *See Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This denial of FAPE is addressed with an award of compensatory education below, although it is noted that DCPS has already authorized 35 hours of OT, as sought by Petitioner, to make up for these 10 missed hours, along with 50 hours of tutoring and/or mentoring for Student to address the impact of the missed services on the rest of Student's education.

BSS Services. The missed BSS services are a different matter. Student's IEPs required 240 minutes/month of BSS for a total of 3920 minutes from December 2017 through June 2019 (with no services in July and partial services in June and August). Student's service trackers indicated that Student received 3005 minutes and missed 915 minutes. However, of the time missed for BSS, Student refused 270 minutes of services, was absent for 115 minutes, and was unavailable for 120 minutes of services due to PARCC testing. The law is clear that a student refusing services, missing services by being absent, and at least the first 4 hours of unavailability due to testing are not to be held against DCPS. In *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the Court held that related services sessions missed due to "snow days, holidays, [student's] absence from school, and the like" were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14-01119, 2015 WL 5175885, at \*8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if

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the student “would not have been present to receive any” of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP, 4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability for school functions to be made up). These cases are generally in line with DCPS’s *Missed Related Services and Untimely Assessment Guidelines* (August 2019), which makes clear at page 5 that missed related service sessions due to student absence or refusal need not be made up. Sessions missed due to provider unavailability must be made up, but student unavailability due to school-related activities does not need to be made up until such activities exceed 4 hours. *Id.* at 4. Finally, related service sessions missed because of planned school holidays and breaks must be made up, while sessions missed due to unplanned school closures due to weather and the like need not be made up. *Id.* at 8.

Applying these principles here reduces the 915 minutes missed by 505 minutes, resulting in 410 out of 3920 minutes being missed by DCPS, which is less than 7 hours spread over 19 months or 10.5% of the total time. Considering all the circumstances and given the guidance of *Johnson*, 962 F. Supp. 2d at 269 (9% deviation not material), *Middleton*, 312 F. Supp. 3d at 145, and *Wade*, 322 F. Supp. 3d at 133, this Hearing Officer concludes that the missed BSS services do not amount to a material deviation but are *de minimis*. In any case, DCPS already authorized 45 hours of BSS, as sought by Petitioner, to make up for these 7 missed hours.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to conduct or agree to conduct a comprehensive triennial reevaluation when it did not conduct or agree to conduct (a) an assistive technology assessment, and/or (b) a neuropsychological evaluation based on findings of a prior psychological, as requested at a 11/18/19 meeting. (Petitioner has the burden of persuasion on this issue.)*

Petitioner proved a procedural violation due to the delay of the AT assessment as it had not been agreed to prior to the filing of the due process complaint or completed as of the due process hearing, even though there was no dispute over the AT assessment by that point. On the other hand, the need for a neuropsychological evaluation was the central focus of this hearing. The undersigned concludes on balance that Petitioner did not meet her burden of demonstrating that a neuropsychological evaluation was required for Student.

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The Appellate Court explained in *Z.B.*, 888 F.3d at 524, that failing to conduct adequate assessments was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student’s issues, leading to them being addressed in the IEP inadequately or not at all. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); *Hill v. Dist. of Columbia*, No. 14-cv-1893, 2016 WL 4506972, at \*18 (D.D.C. 2016); 34 C.F.R. § 300.304(c)(4). Petitioner must demonstrate an “educational harm” to Student in order to establish denial of FAPE based on

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a procedural violation. *See, e.g., Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109-110 (D.D.C. 2011).

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a reevaluation, or if DCPS determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. Decisions on the areas to be assessed are to be made based on the suspected needs of the child. *Z.B.*, 888 F.2d at 518; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Cf. James*, 194 F. Supp. 3d at 143. The specific evaluations at issue are considered in turn.

(a) Assistive Technology Assessment. DCPS agreed to conduct an AT assessment of Student on 1/7/20 and Parent signed the consent form on 1/9/20. This agreement by the parties was not merely an effort to resolve the dispute for the 12/12/19 OT evaluation recommended a keyboarding tutorial program as an alternative to Student writing by hand. Further, OSSE training materials on AT note that AT can aid in the areas of reading and written composition. This Hearing Officer will not second-guess the parties' concurrence that an AT assessment was needed where Student has significant academic deficits. The delay in the AT assessment is a procedural violation at this point, *Z.B.*, 888 F.3d at 524, but the assessment may well find a significant need for AT that raises the harm from delay to a substantive level that is a denial of FAPE. As noted in footnote 3 above and ordered below, a claim for compensatory education is expressly reserved pending completion of the assessment. At present, DCPS is simply ordered to complete its pending AT assessment by a date certain and meet within 10 business days to consider the report and determine what AT may be needed by Student.

(b) Neuropsychological Evaluation. The more challenging dispute in this case concerns the need for a neuropsychological evaluation which Petitioner seeks based on the common sense notion that "more is going on" with Student given the inability to learn to read despite years of effort, as well as the fact that psychological evaluations had not found the solution. Petitioner relies heavily on the 5/31/17 IEE comprehensive psychological evaluation's call for a neurological evaluation, but the IEE did not recommend a neuropsychological evaluation. Moreover, a neurological evaluation – which is not sought by Petitioner in this case – must be conducted by a medical doctor, and a medical doctor is not qualified to conduct a neuropsychological evaluation. However, Petitioner does raise legitimate concerns about the many years in which Student has not learned to read, given Student's IQ. The undersigned shares those concerns and finds it very troublesome that Student has made so little progress despite ongoing efforts.

On the other hand, School Psychologist and Occupational Therapist persuasively testified that a neuropsychological evaluation would not reveal the theoretical basis for Student's challenges and that after 4 comprehensive psychological and 2 OT evaluations there is sufficient information to be able to program appropriately for Student's needs. DCPS understandably places great weight on Student's recent progress in reading, with the

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significant increase of 234 points in MOY testing last month, which is good news as far as it goes. Special Education Teacher conveyed her hopes that Student has gotten over the initial difficult hump in reading and will now begin to make up lost time. Further, as a practical matter, Student has been tested to the point of refusing to do more, so is not a good candidate for additional testing even if there were compelling reasons for more, which this Hearing Officer concludes there are not.

On balance, the undersigned is not persuaded that Petitioner's experts' assertion that "something more must be going on" is sufficient to overcome DCPS's experts' logical explanation and solid testimony that they have sufficient data to program appropriately for Student. That is the point of evaluations, not to gain a theoretical understanding of the challenges or to explain past shortcomings. Petitioner bears the burden of persuasion and did not meet it. This Hearing Officer upholds the IEP team's triennial reevaluation determination and concludes that there was no denial of FAPE by refusing to conduct a neuropsychological evaluation under the circumstances presented in this case.

### Remedies

DCPS is ordered below to complete an AT evaluation of Student by 2/23/20 and convene an IEP team meeting within 10 business days following completion to review the report and update Student's IEP as appropriate. A claim for compensatory education is reserved for the relatively short delay in completing the AT evaluation, as calculated from when the process should have begun on about 11/18/19 to when it actually began on 1/9/20. The parties are encouraged to informally reach a fair determination of compensatory education for the modest delay in AT at the time the AT report is reviewed, although the outcome will of course depend on the extent of AT found appropriate for Student.

In determining compensatory education for the denial of FAPE due to failure to provide the OT services required by Student's IEPs, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the Compensatory Education Proposal seeks an award of 35 hours of OT to make up for 975 missed minutes, plus additional hours of tutoring. This Hearing Officer determined that only 610 minutes were missed, but nonetheless awards the entire 35 hours as compensatory education, which DCPS has already authorized. Not only do these 35 hours more than make up for the 10 hours missed, but they are to provide 1:1 services – which work best for Student – even though the missed hours were mostly in a small group setting. As for the 124 hours of tutoring that Petitioner seeks based on Student's inability to access the curriculum due to the lack of all related services, adjustment must be made for the conclusion that there was no denial of FAPE as to BSS which was well over twice as large

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as the OT claim (2210 missed minutes alleged for BSS compared to 975 for OT). Accordingly, based on the evidence and the various factors discussed above, the undersigned concludes that 50 hours of academic tutoring and/or mentoring (at Parent's option) along with the 35 hours of OT services are appropriate to restore Student to the place Student would have been but for the denial of FAPE relating to missed OT services found above.

These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). In conformity with the hours DCPS has already authorized, all compensatory education hours are to be used by 1/20/21 in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

### **ORDER**

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

- (1) DCPS shall complete an assistive technology assessment of Student by 2/23/20 and convene an IEP team meeting within 10 business days from the completion of the assistive technology report to review the report and update Student's IEP as appropriate.
- (2) As compensatory education for the denial of FAPE due to the failure to fully implement Student's IEPs as to occupational therapy services, Student is entitled to (a) 35 hours of independent occupational therapy services, and (b) a total of 50 hours of academic tutoring and/or mentoring at Parent's option, both of which DCPS has already provided to Parent. All hours are to be used by 1/20/21; any unused hours shall be forfeited.
- (3) A claim for compensatory education due to the delay in completing the assistive technology assessment shall be reserved for subsequent resolution.

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

**IT IS SO ORDERED.**

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.  
Hearing Officer

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**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

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