

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

<b>Parent on behalf of Student</b>	)	Case No. 2019-0289
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: February 3-4, 2020</b>
	)	<b>Room 112</b>
v.	)	<b>Date Issued: February 24, 2020</b>
	)	
<b>School A</b>	)	
	)	
<b>Respondent.</b>	)	<b>Terry Michael Banks,</b>
	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On December 3, 2019, Petitioner filed an *Amended Due Process Complaint Notice* (“*Complaint*”) alleging that School A denied Student a free appropriate public education (“FAPE”) by failing to develop and implement appropriate Individualized Education Programs (“IEPs”) and provide Petitioner Student’s records on request. On December 13, 2019, Respondent filed a *Response to the Administrative Due Process Complaint* (“*Response*”) denying all allegations in the *Complaint*.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### PROCEDURAL HISTORY

On December 3, 2019, Petitioner filed the *Complaint* alleging that School A denied Student a FAPE (1) by failing to provide Student with appropriate Individualized Education Programs (“IEP”) on or about November 9, 2017, November 8, 2018, and November 21, 2019, (2) by failing to implement Student’s IEPs dated November 9, 2017 and November 8, 2018, and (3) by failing to provide Petitioner with access to Student’s cumulative educational records despite numerous written and verbal requests for said records.

Respondent filed its *Response* to the *Complaint* on December 13, 2019 providing, *inter alia*, (1) a denial that the student has made minimal progress since ■ placement at School A in 2017, and asserting that ■ has made progress on ■ IEP goals; (2) Petitioner actively participated in the development of the November 9, 2017 IEP that required 10 hours of special education services in the general education setting, 60 minutes per month of behavioral supports and 120 minutes per month of speech and language services; (3) Petitioner actively participated in the development of the November 8, 2018 IEP that required 10 hours of special education services in the general education setting, 60 minutes per month of behavioral supports, and 90 minutes per month of speech and language services; (4) Petitioner actively participated in the development of an IEP on November 21, 2019 in which she agreed with the provision of 7.5 hours of specialized instruction in general education per week and 7.5 hours per week outside of general education; (5) the IEPs developed on November 9, 2017, November 8, 2018, and November 21, 2019 were appropriate and reasonably calculated to enable Student to make progress; (6) denial that School A failed to implement the November 9, 2017 and November 8, 2018 IEPs during the 2017-18, 2018-19, and 2019-2020 school years, including providing all prescribed speech and language services except service due to a technical issue that was explained to the Petitioner; (7) denial that School A failed to provide the behavioral support services prescribed in the November 9, 2017 and November 8, 2018 IEPs; (8) denial that School A failed to implement the November 9, 2017 and November 8, 2018 IEPs requiring specialized instruction within general education; (9) as in subparagraph (3) above, the parent actively participated in the development of the November 21, 2019 IEP that required 90 minutes per month of speech and language services, and that this level would be maintained until such time as the speech and language pathologist recommends a different level of such services; and (10) denial that School A failed to provide Petitioner access to the student’s cumulative records.

The parties participated in a resolution meeting on December 16, 2019 that did not result in a settlement. A prehearing conference was conducted on January 6, 2020, and the Prehearing Order was issued the next day.

The due process hearing was conducted on February 3-4, 2020. The hearing was closed to the public. Petitioner moved into evidence Exhibits 1-37 (“P:”) There were no objections and Petitioner’s Exhibits 1-37 were admitted into evidence. Respondent moved

into evidence Exhibits 1-13 (“R:”). There were no objections and Respondent’s Exhibits 1-13 were admitted.<sup>2</sup>

Petitioner presented as witnesses in chronological order: Witness A and Petitioner. Respondent presented as witnesses in chronological order: Witness B, Witness C, Witness D, and Witness E. Counsel provided oral closing arguments at the conclusion of the testimony.

## **ISSUES**

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

1. Whether School A denied the student a FAPE by failing to provide Student with an appropriate IEP on or about November 9, 2017, November 8, 2018, and November 21, 2019, by failing to provide an appropriate level of services outside of the general education setting.

2. Whether School A failed to implement Student’s IEPs dated November 9, 2017 and November 8, 2018 by (a) failing to implement the student’s speech and language services during the 2017-2018, 2018-2019, and 2019-2020 school years; and (b) failing to implement the student’s behavior support services during the 2017-18 and 2018-19 school years.

3. Whether School A failed to implement Student’s November 9, 2017 and November 8, 2018 IEPs by its failure to implement the inclusion support during the 2018-19 school year and during the first term of the 2019-20 school year.

4. Whether School A denied the student a FAPE by failing to provide an appropriate amount of speech and language services on the November 8, 2018 and November 21, 2019 IEPs by failing to provide at least 120 minutes/month of speech services.

5. Whether School A failed to provide the parent with access to the student’s cumulative educational records despite numerous written and verbal requests for said records.

## **FINDINGS OF FACT**

1. The Student is an X-year-old, attending School A.<sup>3</sup>

2. On December 22, 2014, the District of Columbia Public Schools (“DCPS”) completed a Speech and Language Reevaluation. At that time, Student was attending School B in grade A. Student was receiving special education services under the disability classification of Specific Learning Disability.<sup>4</sup> Student had a standard score of 77 on core

<sup>2</sup> The *Prehearing Order* required any objections to witnesses or proposed exhibits to be filed two days before the hearing.

<sup>3</sup> Petitioner’s Exhibit (“P”) 1.

<sup>4</sup> P4:1

language, 75 on receptive language, and 83 on expressive language. Student's core and expressive language scores were in the average range, while the receptive language score was moderately below average.<sup>5</sup> Student's articulation was above average.<sup>6</sup>

3. On January 2, 2015, DCPS completed a Psychological Triennial Reevaluation of Student. Student was receiving special education services under the disability classification of Specific Learning Disability.<sup>7</sup> On the Reynolds Intellectual Assessment Scales ("RIAS"), Student had a Composite Intelligence Index ("CIX") standard score of 96, and a Verbal Intelligence Index ("VIX") standard score of 92, both within the average range of intelligence.<sup>8</sup> The Woodcock Johnson III Test of Achievement ("WJ-III") was administered. On the Brief Achievement, which is a combination of the eight tests in the Broad Reading, Broad Math, and Broad Written Language, Student achieved a standard score of 91, which fell in the average range.<sup>9</sup> In Broad Reading, Student's 89 score was slightly below average, in Broad Math, student's 79 score was in the low range, and the 85 score in Broad Written Language was low average.<sup>10</sup> The examiner concluded that Student continued to meet the criteria for a Specific Learning Disability. "[Student's] mathematics skills are commensurate with ■ nonverbal reasoning abilities. ■ demonstrates a strength in nonverbal reasoning skills and the expectation would be higher achievement in the area of mathematics."<sup>11</sup>

4. On November 14, 2016, when Student was in grade B at School B, DCPS completed an annual IEP. In math, Student's i-Ready math assessment showed Student to be performing three grades below grade level: two years below in Number and Operation, four years below in Algebra and Algebraic Thinking, five years below in Measurement and Data, and two years below in Geometry.<sup>12</sup> The IEP included two math goals.<sup>13</sup> In reading, a September 2016 Reading Inventory Assessment showed ■ reading ability to be four years below grade level.<sup>14</sup> On the Gray Oral Reading Test in November 2016, Student was 3.6 years below grade level in reading rate, two years below grade level in accuracy, three years below grade level in fluency, and 5.6 years below grade level in comprehension.<sup>15</sup> The IEP included two annual reading goals. In written expression, Student was found to be "a little over one grade level behind" in spelling on the Morrison-McCall spelling inventory in August 2016.<sup>16</sup> The IEP included a spelling goal and a writing goal. In Communications/Speech and Language, Student was described as "as active and willing participant during speech and language speech therapy, although ■ struggles with transition... Although [Student] has continued to make steady progress, [Student] continues to need assistance with adequately explaining information from text read given cues/prompts, ■ is able to complete task[s]."<sup>17</sup>

<sup>5</sup> P6:8.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> P4:1

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> P35: 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 8.

The IEP included two communications goals, one in receptive language, and one in expressive language.<sup>18</sup> In Emotional, Social, and Behavioral Development, “During the last marking period, [Student ] earned the grades of “A” in Reading Support, “C” in English, “B” in World History, “B” in Math, “C” in Science, and “B” in Music... [Student] shows ‘excellent initiative,’ ‘is a pleasure to have in the class,’ and ‘shows good participation.’ [Student] has a history of being easily distracted.”<sup>19</sup> On the Strengths and Difficulties Questionnaire on September 22, 2016, Student was rated in the close to average range for overall stress, emotional distress, and hyperactivity and concentration difficulties. Student was rated in the slightly raised range for behavioral difficulties and difficulties getting along with other children, and slightly low range for kind and helpful behavior. “There have been no concerns regarding [Student’s] behavior reported to this provider,” who recommended that Student’s behavior support services be changed from outside to inside general education.<sup>20</sup> The IEP included two behavioral goals. The IEP prescribed 2.5 hours per week of specialized services in reading, 2.5 hours in written expression, and 5 hours of mathematics, all in general education. It also prescribed 120 minutes per month of speech and language pathology outside general education, and 60 minutes per month of behavioral support services in general education.<sup>21</sup>

5. Student enrolled at School A, a local education agency (“LEA”), for grade C in the 2017-18 school year. School A developed an IEP on November 9, 2017. In mathematics, Student was administered the NWEA Measures of Academic Performance (“MAP”) during the summer of 2017. In each of the tested domains – Operations and Algebraic Thinking, Real and Complex Number Systems, Geometry, and Statistics and Probability – Student was found to perform five grades below grade level. Student was enrolled in Algebra 1 and Math Seminar, and was earning grades of C+ and B respectively. Student struggled to retain material previously learned, did not read directions without prompting, and was able to solve problems with a “significant amount of prompting.”<sup>22</sup> The IEP included four annual math goals.<sup>23</sup> In reading, Student was reportedly not performing on grade level when asked to read, comprehend, and analyze text.<sup>24</sup> The IEP included two annual reading goals.<sup>25</sup> In written expression, Student could compose brief written responses in response to a prompt, was inconsistent with punctuation, and spelling mistakes were consistent with Student’s score on the Morrison-McCall inventory. The IEP included two annual goals in written expression.<sup>26</sup> In Communications/Speech and Language, Student’s present levels of performance and goals were virtually unchanged from the previous DCPS IEP.<sup>27</sup> In Emotional, Social, and Behavioral Development, the IEP repeated information from the DCPS 2016 IEP. The IEP included but one of the two goals from the previous IEP: being able to interact with peers without verbal conflict or aggression in four of five encounters.<sup>28</sup>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11.

<sup>22</sup> P10:3.

<sup>23</sup> P10:4-5.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 9-10.

The prescribed services were unchanged from the previous DCPS IEP: 10 hours per week of specialized services in general education, 120 hours per month of speech services outside general education, and 60 minutes per month of behavioral support services in general education.<sup>29</sup> The IEP included a Post-secondary Transition Plan<sup>30</sup> indicated that the graduation goal was for a diploma in 2021.<sup>31</sup>

6. School A issued an IEP Progress Report on April 24, 2018. It reported that Student was progressing on all IEP goals except the behavioral goal relating to verbal conflict and aggression, which was “Just Introduced,”<sup>32</sup> although it was included on DCPS’ 2016 IEP.<sup>33</sup> Special Education Teacher A provided descriptions of Student’s progress on goals in Mathematics.<sup>34</sup> Speech and Language Therapist A reported that Student was progressing on the first goal as follows: “[Student] is very active during session. This impacts progress toward long term goal. [Student] is able to summarize text read orally. [Student] benefits from visual supports. [Student’s] use of story boards increases accuracy in receptive language assignments.” Therapist A reported that Student was progressing on the second goal: “[Student] continues to make gains on ■ ability to make logical conclusions and make inferences when completing language based activity. [Student] benefits from story webs and other graphic organizers to aid in completing language tasks accurately. Speech therapy continues to be warranted.”<sup>35</sup> Behavioral Support Specialist A reported that the first goal, related to interacting with peers and adults without verbal aggression, was not introduced during the first three reporting periods. Specialist A reported: “[Student] has engaged in multiple instances of verbal aggression, although ■ words appeared devoid of intent. Despite warnings that these verbally aggressive statements would result in consequences, ■ continued. [Student] appears to have difficulty with inhibition, resulting in inappropriate statements during school.”<sup>36</sup>

7. On May 29, 2018, the IEP was amended to provide extended year services (“ESY”) during the summer of 2018.<sup>37</sup>

8. For the 2017-18 school year, Student received the following grades: A+ in Introduction to Music, B’s in American Sign Language and Earth Science, C’s in English Literature, English Seminar, Algebra I, and Fuel Credit Reov History, F65s in Avid I, Survey of Mindfulness, World History and Geography, and Math Seminar, an F55 in Physical Education, and a pass in Portfolio.<sup>38</sup> School A awards no D grades. F55 is awarded if a student has five unexcused absences in a class.<sup>39</sup>

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 18.

<sup>32</sup> P17:6.

<sup>33</sup> P35:9.

<sup>34</sup> P17:8.

<sup>35</sup> P17:6.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> P11:14.

<sup>38</sup> R9.

<sup>39</sup> Testimony of Witness E.

9. On June 29, 2018, Examiner A completed an independent Comprehensive Psychological Evaluation. In cognitive functioning, on the Wechsler Intelligence Scale for Children (“WISC-V”), Student’s full scale IQ was 71, in the “very low” range. “However, [Student’s] overall intellectual ability cannot be interpreted meaningfully because ■ displayed too much variability in the five indexes that compose this full-scale score. Therefore, [Student’s] intelligence is best understood by ■ performance on the separate WISC-V indexes.”<sup>40</sup> In Verbal Comprehension and Visual Spatial, Student’s scores were in the low average range, Fluid Reasoning scores were in the extremely low range, Working Memory scores were in the very low range, and Processing Speed was low average.<sup>41</sup> Student’s Visual-Motor Integration was average.<sup>42</sup>

10. Student’s academic achievement was tested on the Woodcock-Johnson Test of Achievement-Fourth Edition (“WJ-IV”). Student’s broad achievement score (78) was classified as “low,” in the 7<sup>th</sup> percentile, as were academic skills (73/4<sup>th</sup> percentile) and academic knowledge (73/4<sup>th</sup> percentile). Student’s ability to apply academic skills in timely manner, academic fluency, was low average (89/23<sup>rd</sup> percentile).<sup>43</sup> Student’s overall reading skills were low average (80/9<sup>th</sup> percentile), overall mathematics skills were low (76/5<sup>th</sup> percentile). “[Student] was able to solve two by two-digit addition problems, single-digit and two by one-digit multiplication problems, and two by one-digit division problems. However, ■ had difficulty solving three by two-digit subtraction problems with regrouping, addition problems with decimals, addition and subtraction problems with fractions, and long division problems with decimals.”<sup>44</sup> Student’s overall written language abilities were classified as low average (80/9<sup>th</sup> percentile).<sup>45</sup>

11. Student’s behavioral functioning was examined by the Behavior System for Children-Third Edition (“BASC-3), consisting of a self-report, teacher report, and parent report regarding hyperactivity, aggression, depression, withdrawal, learning problems, attention problems, and social skills. On the self-report, Student’s scores fell in the average range on all subscales, indicating that ■ is not identifying significant problems.<sup>46</sup> Petitioner’s scores fell in the Caution, Clinically Significant, and At-Risk ranges. “Her scores suggest that [Student] engages in many disruptive, impulsive, and uncontrolled behaviors, frequently engages in rule-breaking behavior such as cheating, deception, and/or stealing, and sometimes displays aggressive behaviors, such as being argumentative, defiant, and/or threatening to others.”<sup>47</sup> Examiner A indicated that the teacher’s scores should be viewed with caution, as the Consistency Index for ■ scores was in the “Extreme Caution” range indicating that ■ may have changed perception when completing the form or had difficulty with attention while completing it. The teacher’s scores suggest that Student displays a high number of aggressive behaviors, frequently engages in rule-breaking behavior such as cheating, deception, and/or stealing, and is often restless and overactive and has difficulty

<sup>40</sup> P5:9.

<sup>41</sup> *Id.* at 9-11.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.* at 14.

controlling ■■■ impulses.<sup>48</sup> Scores on the School Problems Index suggest that Student has difficulty maintaining necessary levels of attention at school and comprehending and completing schoolwork in a variety of academic areas. Student's Adaptive Skills scores "suggest that [Student] has extreme difficulty adapting to changing situations and takes much longer to recover from difficult situations than others [Student's] age, has difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner, sometimes has difficulty making decisions, lacks creativity... has trouble getting others to work together effectively, and demonstrates poor expressive and receptive communication skills... and has difficulty seeking out and finding information on ■■■ own."<sup>49</sup>

12. Based on the Multidimensional Anxiety Scale for Children-Second Edition ("MASC-2") and the Children's Depression Inventory-2<sup>nd</sup> Edition ("CDI-2"), Examiner A diagnosed Student with Disruptive Mood Dysregulation Disorder and Unspecified Disruptive, Impulse-Control, and Conduct Disorder. In terms of ■■■ academic performance, "[Student] continues to perform significantly below expectancy on reading comprehension tasks and demonstrates symptoms consistent with a diagnosis of Specific Learning Disorder with Impairment in Reading (with Impairment in Reading Comprehension)... Given that [Student] is performing significantly below grade level despite the provisions of interventions, [Student] meets criteria for a diagnosis of Specific Learning Disorder with Impairment in Mathematics (with Impairment in Accurate Calculation). Finally, Examiner A concluded that a diagnosis of Unspecified Anxiety Disorder was warranted.<sup>50</sup> Examiner A opined that Student met the criteria for special education services as a student with an emotional disturbance and specific learning disabilities in math and reading. "Consequently, [Student] should be considered for classification as a student with Multiple Disabilities," and recommended increased behavioral support services of 30 minutes per week and the implementation of a safety plan to address ■■■ behavioral problems.<sup>51</sup>

13. Petitioner did not agree that Student should be classified with an emotional disturbance.<sup>52</sup>

14. On October 23, 2018, Examiner B completed an independent Functional Behavior Assessment and Behavior Intervention Plan.<sup>53</sup> Examiner B interviewed Student's World History teacher, Teacher A, who reported that Student can complete assignments independently but can be taken off-task very quickly and become unfocused when ■■■ peers are off-task and making comments.<sup>54</sup> During a classroom observation on October 21, 2018, Examiner B found that Student displayed appropriate attentive skills despite a moderate to high level of noise in the classroom.<sup>55</sup> Student also displayed appropriate attention in a different class on October 23, 2018 despite similar environmental distractions.<sup>56</sup> Student was

<sup>48</sup> *Id.* at 15.

<sup>49</sup> *Id.* at 15-16.

<sup>50</sup> *Id.* at 20-22.

<sup>51</sup> *Id.* at 23.

<sup>52</sup> Petitioner's testimony.

<sup>53</sup> P8.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.*

also attentive in a third observation on October 24, 2018.<sup>57</sup> However, based on teacher interviews, Student “displays a significant level of restlessness, overactive behavior which results in difficulty controlling [Student’s] impulses. Teachers also report that [Student] will often times engage in rule-breaking behavior, such as cheating deception and/or stealing.”<sup>58</sup> Examiner B opined that Student tends to display more inattentive behavior in classes that are academically challenging.<sup>59</sup>

15. On October 30, 2018, Examiner C completed an independent Speech & Language Evaluation.<sup>60</sup> Student’s hearing was within normal limits.<sup>61</sup> Student’s receptive and expressive vocabulary were below average.<sup>62</sup> Student’s core language score was in the low range (76/5<sup>th</sup> percentile), while receptive language (79/5<sup>th</sup> percentile) and expressive language (82/12<sup>th</sup> percentile) scores were below average.<sup>63</sup> Examiner C recommended continued speech therapy to improve ■■■ receptive vocabulary, expressive vocabulary, and language skills.<sup>64</sup>

16. On November 8, 2018, School A completed an annual IEP review. In mathematics, the Present Levels of Academic Achievement and Functional Performance (“Present Levels”) indicated that Student “is able to solve by two-digit addition problems, single-digit and two by one-digit division problems. However, [Student] had difficulty solving three by two-digit subtraction problems with regrouping, addition problems with decimals, addition and subtraction problems with fractions, and long division problems with decimals. [Student] is able to solve problems with a significant amount of prompting. [Student] needs to improve with problems involving the application of the order of operations and solving for one and two variables.”<sup>65</sup> [Student’s] mathematics goals included identifying x-y coordinates, solving quadratic functions, creating equations in two or more variables, and graphing equations on coordinate axes.<sup>66</sup> In Reading, the Present Levels recounted the results of the WJ-IV and noted that Student’s “greatest deficit comes from the current inability to use context clues to determine the meaning of new words...[Student] isn’t currently performing on grade level when asked to read, comprehend and analyze test. This is currently preventing [Student] from achieving at the grade level curriculum without modifications on assignments...”<sup>67</sup> In Written Expression, Student “...predominantly writes sentences with limited content, and has difficulty understanding how to write a main or topic sentence and maintaining the sentence structure or writing a cohesive sentence that fits with the sentences that were provided. [Student’s] writing samples from [Student’s] reading class show that [Student] can compose brief written responses in response to a prompt...” Student’s annual goal was: “When given grade level writing prompts, [Student] will correctly write a paragraph using a topic sentence, body sentences, and conclusion/transitional sentences with

<sup>57</sup> *Id.* at 6-7.

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.* at 18.

<sup>60</sup> P7.

<sup>61</sup> *Id.* at 3

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* at 5-6.

<sup>64</sup> *Id.* at 7.

<sup>65</sup> P12:3.

<sup>66</sup> *Id.* at 3-4.

<sup>67</sup> *Id.* at 4.

90% accuracy...”<sup>68</sup> In Communications/Speech and Language, Student “is an active and willing participant during individual speech and language therapy. [Student] continues to communicate well when with peers and adults... [Student] has made progress in the area of receptive and expressive vocabulary skills...”<sup>69</sup> In Emotional, Social, and Behavioral Development, Student “has a history of being easily distracted. [Student] has deficits in receptive and expressive language which impede [Student’s] ability to understand and follow the content of grade level curriculum instruction. According to [Student’s] previous IEP, [Student] had difficulty with controlling ■ emotions and behavior which impacted [Student’s] access to the general education curriculum. When [Student] is off-task, [Student] is responsive to redirection after two or more prompts.”<sup>70</sup> Student’s goal of being able to interact with Student’s peers and adults without verbal conflict or aggression was retained from the previous IEP. The IEP prescribed 10 hours per week of specialized instruction in general education, and 90 minutes per month of speech and language services and 60 minutes per month of behavioral support services, both outside general education.<sup>71</sup>

17. On March 30, 2019, School A amended the IEP to increase behavioral support services (“BSS”) to 120 minutes per month.<sup>72</sup> Neither the Present Levels nor goals were changed from the previous IEP. Although the cover page does not indicate that a meeting was held, Witness E testified that a meeting was, in fact, held on March 19, 2019, at which Petitioner was represented by counsel.<sup>73</sup> Student’s BSS services were increased due to the Comprehensive Psychoeducational Evaluation and Petitioner’s concern for Student’s behavior in the community.<sup>74</sup>

18. On April 10, 2019, School A issued an IEP Progress Report. Special Education Teacher B that Student was progressing on two mathematics goals and one had not yet been introduced.<sup>75</sup> Student was progressing on ■ two reading goals.<sup>76</sup> Student was progressing on one written expression goal and had mastered two others.<sup>77</sup> Student had mastered ■ two communications goals and ■ behavioral goal related to verbal conflict and aggression.<sup>78</sup> Student was progressing on two transition goals while a goal relating to creating a resume had not been introduced.<sup>79</sup> Witness B, who provided speech services during the 2018-19 school year, reported that Student had mastered both goals. As for the first goal, “[Student] has demonstrated the ability to summarize text with 85% accuracy when given no more than one prompt. When provided with prompts, [Student] requires one open statement and continues to independently summarize text and scenarios.” As for the second goal, “[Student] demonstrates the ability to answer inferential questions related to passages with 70% accuracy. [Student] benefits from verbal cues of no more than 2 multiple choice answers.

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *Id.* at 7.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> P13:1.

<sup>73</sup> P33:47-48.

<sup>74</sup> P13:8-9; P33-10; Testimony of Witness E.

<sup>75</sup> P17:25-26.

<sup>76</sup> *Id.* at 26-27.

<sup>77</sup> *Id.* 27-28.

<sup>78</sup> *Id.* at 28.

<sup>79</sup> *Id.* at 29.

[Student] will continue to explain inferences and develop conclusions related to texts.”<sup>80</sup> Witness D, who provided BSS during the 2018-19 school year, reported that Student had mastered the goal of interacting with peers and adults without verbal conflict or aggression.<sup>81</sup>

19. Beginning on October 17, 2018, Witness B, a contractor, provided Student’s speech and language services in two 45-minute sessions per month for the remainder of the 2018-19 school year. Student actually received 90-105 minutes per month as the session often lasted an hour.<sup>82</sup> In June 2019, prepared a statement indicating that Student “has demonstrated strengths and mastery towards all goals and objectives. [Student] willingly participated in all speech-language therapy sessions. ■ exhibited the ability to use key vocabulary words to summarize text and scenarios... [Student] mastered ■ goal of using key curriculum vocabulary to summarize curriculum text. [Student] also mastered ■ goal of increasing [Student’s] receptive language skills by understanding inferential questions and making logical conclusions related to passages...”<sup>83</sup>

20. For the 2018-19 school year, Student received the following grades: B+ in Physical Education, B’s in English Literature and Art Theory, C+ in Biology and Math 10 Intervention, C’s in World History and Geography, Geometry, Spanish, and English 10 Intervention, and a pass in Portfolio 10.<sup>84</sup> Barring attendance violations, School A awards no grade lower than C.<sup>85</sup>

21. On July 16, 2019, Petitioner’s counsel requested the following records from School A: the most recent IEP, IEP Progress Reports for the 4<sup>th</sup> term of the 2018-19 school year, the final report card for the 2018-19 school year, all standardized test scores for the 2018-19 school year, all behavior records for the 2018-19 school year, all service trackers for the 2018-19 school year, any comprehensive psychoeducational, FBA/BIP, or achievement testing that was conducted during the 2018-19 school year, and daily attendance records and attendance records broken down by class.<sup>86</sup> On July 29, 2019, Respondent’s counsel replied, enclosing “a copy of the documents you requested,” but indicated that as Student had no behavioral concerns, there were no behavioral reports. He also indicated that School A “does not maintain a daily attendance log by class.”<sup>87</sup> On August 5, 2019, Respondent’s counsel reported that “The trackers were not compiled as they do in DCPS, so we are reaching out to the providers to get the requested information.”<sup>88</sup>

22. On July 25, 2019, School A issued an IEP Progress Report. It was identical to the report issued on April 10, 2019.<sup>89</sup>

<sup>80</sup> P17:23.

<sup>81</sup> *Id.* See paragraph 23 below.

<sup>82</sup> Testimony of Witness B.

<sup>83</sup> R6 and Testimony of Witness B.

<sup>84</sup> R9.

<sup>85</sup> Testimony of Witness C.

<sup>86</sup> P33:111.

<sup>87</sup> *Id.* at 110.

<sup>88</sup> *Id.* at 109.

<sup>89</sup> P17:30-34.

23. Witness D provided Student 60 minutes per month of BSS as a contractor for the 2018-19 school year, beginning in October 2018. Another contractor from Witness D's firm provided services at the beginning of the school year (September 5, 2019). The BSS were provided outside general education in a group setting. Student's goal was to decrease verbal aggression, but Witness D never witnessed any such aggression and none was reported to her. On August 8, 2019, Witness D prepared a statement indicating that Student had mastered ■ behavioral goals, and Witness D opined that BSS is no longer a required service and updated behavioral goals were no longer needed "based on [Student's] performance in the classroom."<sup>90</sup>

24. On September 26, 2019, Petitioner's educational advocate requested the following records from Respondent: (1) All records from the 2016-17 school year, (2) SLP evaluations for 2015 and 2018, (3) all records from the beginning of the 2019-2020 school year including attendance, behavior incidents, BOY assessments, (4) attendance records for the 2018-19 school year, (5) Service Trackers for 2015 to 2020, (6) all incident reports, and (7) Progress monitoring/behavior data indicated in FBA/BIP from 10/20/18.<sup>91</sup>

25. On October 8, 2019, Witness A, Petitioner's educational advocate, requested Student's attendance records for the 2018-19 school year, attendance for 2019-20 broken down by period, incident reports, Progress Reports for Period 1 in 2016, and Periods 1, 2, and 3 in 2018-19, Service Trackers for speech and language services for August, September and November 2017, Service Trackers for behavioral support services for March, April, May, June, August, November, and December 2017, and January, February, March, April, May, and June 2018, and August 2019, and speech and language evaluation reports for 2015.<sup>92</sup> At the IEP meeting on November 21, 2019, Witness A requested progress monitoring data, baseline data, and service trackers for the 2018-19 school year for behavioral support services. Petitioner's counsel requested Student's writing samples.<sup>93</sup> School A provided incomplete service trackers for BSS for the 2017-18 school year and 2019-20 school year,<sup>94</sup> and more complete service trackers for speech and language services for the 2017-18 school year.<sup>95</sup>

26. On November 21, 2019, School A convened the annual IEP meeting.<sup>96</sup> In mathematics, ■ standardized test scores "... continue to display [Student's] performance below the mean for [Student's] grade level... Based on [Student's] work samples [Student] was very successful in solving the problem correctly when [Student] was focused on one skill at a time."<sup>97</sup> Student's goals involved using statistics to draw conclusions about data, interpreting graphs, and plotting graphs.<sup>98</sup> In reading, Student's raw score on a standardized

<sup>90</sup> R7.

<sup>91</sup> P33:39

<sup>92</sup> P33:67-68.

<sup>93</sup> P15:4-5.

<sup>94</sup> P18.

<sup>95</sup> P19.

<sup>96</sup> Although the new IEP is dated November 7, 2019 (P14:1), Witness A testified that the meeting was held on the 21st.

<sup>97</sup> P14:5.

<sup>98</sup> *Id.* at 5-6.

test rose 10 points to 211, but Student remained below grade level.<sup>99</sup> “When reading on grade level without support, [Student] is challenged in comprehending the complex text and vocabulary that appear in higher level reading... According to [Student’s] English teacher, [Student’s] work performance in the classroom has improved. [Student] does not participate in class activities as a whole group, however [Student] will commit in trying to complete [Student’s] reading assignments in the classroom and seek help outside of the classroom instead of avoiding the task with no production. Due [to] limited reading skills and low self-confidence, [Student] will not participate in read aloud, however, [Student] will read aloud with one on one during pullout... When [Student] is focused, [Student] is able to respond to questions with elaborate detail.”<sup>100</sup> In written expression, Student continues to struggle with the writing process when given a writing assignment on grade level. In 2017, [Student’s] spelling skill was on a grade [A] level. [Student] has difficulty expressing [Student’s] self without support. [Student’s] goal was virtually the same as that from [redacted] previous IEP.”<sup>101</sup> Student’s communications Present Levels and goals were unchanged from the previous IEP.<sup>102</sup> In Emotional, Social, and Behavioral Development, Student’s Present Levels were unchanged, but Student’s previous goal of reducing verbal conflict or aggression had been mastered and replaced with two goals: one related to increasing pro-social interaction with peers, the other related to demonstrating self-advocacy skills.<sup>103</sup> Student’s specialized instruction was increased to by 6.5 hours per week including 7.5 hours of reading outside general education, 1.5 hours of written expression in general education, and 7.5 hours of mathematics in general education. Related services remained unchanged.<sup>104</sup>

27. Witness C is Student’s special education teacher. Although Student’s IEPs prior to November 2019 prescribed services in general education, Witness C often pulled Student out for services for reading, math, and projects. Student does not like to be pulled out as it is embarrassing. Petitioner receives accommodations including, but not limited to, preferential seating, more time on tests, test questions being read to Student, and on written assignments, the length of Student’s is shorter than that required of [redacted] peers, *i.e.*, two paragraphs instead of four to five. Student is currently reading on a Grade D level. At the beginning of the 2019-20 school year, it was difficult to get Student to cooperate or work, but by the end of October, [redacted] was cooperative. [redacted] was not pleased to learn of the increase in specialized instruction hours on the November 2019 IEP.<sup>105</sup>

28. Petitioner agreed to School A’s IEPs prior to November 2019 because she thought Student was making progress. However, once Witness A reviewed Student’s records in the fall of 2019, Petitioner began to doubt that Student was making progress. At the November 21, 2019 IEP meeting, School A stated that it was incapable of providing more than 10 hours of specialized services per week outside general education. If Petitioner wanted more, School A would refer Student to OSSE for an alternative placement. Petitioner insisted that she did not want Student to be removed from School A. Petitioner agreed to the services

<sup>99</sup> *Id.* at 6.

<sup>100</sup> *Id.* at 7.

<sup>101</sup> *Id.* at 8-10

<sup>102</sup> P14:10.

<sup>103</sup> *Id.* at 11.

<sup>104</sup> *Id.* at 12.

<sup>105</sup> Testimony of Witness C.

provided in the November 2019 IEP to maintain Student's enrollment at School A.<sup>106</sup> Petitioner would not remain on track to receive a diploma if, as requested by Petitioner's counsel, Student's IEP prescribed 15 hours outside general education.<sup>107</sup>

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

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

The first and fourth issues involve the appropriateness of the Student's IEP. Therefore, as to these issues, the burden of persuasion is on Respondent, provided that Petitioner meets the burden to present a *prima facie* case. The remaining issues do not directly involve the appropriateness of the Student's IEP or placement. Accordingly, the burden of persuasion must be on Petitioner for these issues.<sup>109</sup>

**Whether Respondent denied the student a FAPE by failing to provide Student with an appropriate IEP on or about November 9, 2017, November 8, 2018, and November 21, 2019, by failing to provide an appropriate level of services outside of the general education setting.**

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>110</sup> The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"<sup>111</sup> Rather, the Court ruled that "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...<sup>112</sup> Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this

<sup>106</sup> Petitioner's testimony; Testimony of Witness E; R10.

<sup>107</sup> Testimony of Witness E; R10.

<sup>108</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>109</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>110</sup> 458 U.S. 176, 187 (1982).

<sup>111</sup> *Id.* at 189-90, 200

<sup>112</sup> *Id.* at 200.

requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>113</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>114</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”<sup>115</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

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

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>116</sup>

The regulations require the following in the development of an IEP:

(a) Development of IEP—

(1) General. In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must—

<sup>113</sup> *Id.* at 203-04.

<sup>114</sup> *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>115</sup> *Id.* at 997.

<sup>116</sup> *Id.* at 1000-01 (citations omitted).

- (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
- (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP...
- (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
- (v) Consider whether the child needs assistive technology devices and services.<sup>117</sup>

### ***November 9, 2017 IEP***

In the year prior to enrolling in School A, Student's DCPS IEP revealed that Student was performing three grades below grade level in mathematics: two years below in Number and Operation, four years below in Algebra and Algebraic Thinking, five years below in Measurement and Data, and two years below in Geometry.<sup>118</sup> ■ reading ability was four years below grade level.<sup>119</sup> On the Gray Oral Reading Test in November 2016, Student was 3.6 years below grade level in reading rate, two years below grade level in accuracy, three years below grade level in fluency, and 5.6 years below grade level in comprehension.<sup>120</sup> In Communications/Speech and Language, Student was described as "as active and willing participant during speech and language speech therapy, although ■ struggles with transition... Although [Student] has continued to make steady progress, [Student] continues to need assistance with adequately explaining information from text read given cues/prompts, ■ is able to complete task[s]."<sup>121</sup> In Emotional, Social, and Behavioral Development, [Student] shows 'excellent initiative,' 'is a pleasure to have in the class,' and 'shows good participation.' [Student] has a history of being easily distracted."<sup>122</sup> "There have been no concerns regarding [Student's] behavior reported to this provider," who recommended that Student's behavior support services be changed from outside to inside general education.<sup>123</sup> The IEP prescribed 2.5 hours per week of specialized services in reading, 2.5 hours in written expression, and 5 hours of mathematics, all in general education. It also prescribed 120 minutes per month of speech and language pathology outside general education, and 60 minutes per month of behavioral support services in general education.<sup>124</sup>

Student enrolled in School A in September 2017. School A convened its initial annual IEP meeting for Student on November 9, 2017. Thus, it had but two months experience with Student in the classroom. The IDEA requires local education agencies to reevaluate students

<sup>117</sup> 34 C.F.R. §300.324.

<sup>118</sup> P35: 3.

<sup>119</sup> *Id.* at. 5.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 8.

<sup>122</sup> *Id.* at 9.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 11.

at least once every three years unless the parent and the local education agency deem such reevaluation unnecessary.<sup>125</sup> The purpose of a reevaluation is to determine whether a child continues to have a qualifying disability and the nature and extent of the special education and related services that the child needs.<sup>126</sup> Student was not due for a triennial psychoeducation evaluation, but ■■■ triennial speech and language evaluation would be due on or before December 22, 2017. Petitioner expressed no dissatisfaction with the November 9, 2017 IEP and raised no specific concerns about Student's communications needs that would have warranted an immediate speech and language reevaluation. The previous IEP indicated that Petitioner did not present behavior issues in the classroom but did have a history of distractibility. On this record, Petitioner has failed to make a prima facie case that School A developed an inappropriate 2017-18 IEP.

### ***November 8, 2018 IEP***

On April 24, 2018, School A issued an IEP Progress Report indicating that Student was progressing on all IEP goals except the behavioral goal relating to verbal conflict and aggression, which was "Just Introduced."<sup>127</sup> For the 2017-18 school year, Student received the following grades: A+ in Introduction to Music, B's in American Sign Language and Earth Science, C's in English Literature, English Seminar, Algebra I, and Fuel Credit Reov History, F65s in AVID I, Survey of Mindfulness, World History and Geography, and Math Seminar, an F55 in Physical Education, and a pass in Portfolio.<sup>128</sup>

On June 29, 2018, an independent Comprehensive Psychological Evaluation was performed that found Student's overall cognitive level to be in the "very low" range. Student's achievement score, academic skills, and academic knowledge were in the low range. Student's overall reading skills were low average, and written language and mathematics skills were low. "[Student] was able to solve two by two-digit addition problems, single-digit and two by one-digit multiplication problems, and two by one-digit division problems. However, [Student] had difficulty solving three by two-digit subtraction problems with regrouping, addition problems with decimals, addition and subtraction problems with fractions, and long division problems with decimals." Interviews with Student, Petitioner, a teacher, along with tests, led the examiner to conclude that suggest that Student "... has extreme difficulty adapting to changing situations and takes much longer to recover from difficult situations than others ■■■ age, has difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner, sometimes has difficulty making decisions, lacks creativity... has trouble getting others to work together effectively, and demonstrates poor expressive and receptive communication skills... and has difficulty seeking out and finding information on ■■■ own."<sup>129</sup> Based on these findings, *inter alia*, Examiner A confirmed the classification of Specific Learning Disability and also diagnosed Student with Disruptive Mood Dysregulation Disorder, Unspecified Disruptive, Impulse-Control, and Conduct Disorder, and Unspecified Anxiety Disorder. He opined that

<sup>125</sup> 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

<sup>126</sup> See 34 CFR § 300.15.

<sup>127</sup> P17:6.

<sup>128</sup> R9.

<sup>129</sup> P5:15-16

Student met the criteria for special education services as a student with emotional disturbance, and should be considered for classification as a student with multiple disabilities.

On October 23, 2018, Examiner B completed an independent Functional Behavior Assessment and Behavior Intervention Plan. During three classroom observations, Examiner B found that Student displayed appropriate attentive skills despite a moderate to high level of noise in the classroom.<sup>130</sup> However, based on teacher interviews, Student “displays a significant level of restlessness, overactive behavior which results in difficulty controlling ■ impulses. Teachers also report that [Student] will often times engage in rule-breaking behavior, such as cheating deception and/or stealing.”<sup>131</sup> Examiner B opined that Student tends to display more inattentive behavior in classes that are academically challenging.<sup>132</sup>

On October 30, 2018, Examiner C completed an independent Speech & Language Evaluation.<sup>133</sup> Student’s hearing was within normal limits.<sup>134</sup> Student’s receptive and expressive vocabulary were below average.<sup>135</sup> Student’s core language score was in the low range (76/5<sup>th</sup> percentile), while receptive language (79/5<sup>th</sup> percentile) and expressive language (82/12<sup>th</sup> percentile) scores were below average.<sup>136</sup> Examiner C recommended continued speech therapy to improve ■ receptive vocabulary, expressive vocabulary, and language skills.<sup>137</sup>

Thereafter, School A completed its second annual IEP for Student on November 8, 2018. The Present Levels reflected the findings of Student’s scores on the Psychological Evaluation. ■ goals were modified from the previous IEP to reflect Student’s performance during the previous school year and the findings in the recent evaluations. The only change in prescribed services was a reduction in speech and language services from 120 to 90 minutes per month. The IEP team reconvened on March 19, 2019 and increased Student’s BSS to 120 minutes per month.

The Present Levels and goals on the November 8, 2018 IEP were informed both by Student’s performance during the 2017-18 school year and by the evaluations that performed earlier in the year. Progress Reports indicated that Student had made progress on all but one goal, and that one had just been introduced. Student received passing grades in classes for which there were no attendance issues. Thereafter, the team reconvened to amend the IEP on March 19, 2019. Although Petitioner was represented at that meeting, nothing in the record indicates that there was any dispute as to the appropriateness of the prescribed specialized services. The only change made at that meeting was an increase in BSS services from 60 to 120 minutes. This change was made despite the BSS provider’s progress report that Student had mastered ■ only BSS goal and that she had never witnessed nor been informed of incidents of verbal aggression that needed to be corrected in the goal. Moreover, Petitioner testified that she disagreed with Examiner B that Student should be classified with an

<sup>130</sup> *Id.* at 6.

<sup>131</sup> *Id.* at 17.

<sup>132</sup> *Id.* at 18.

<sup>133</sup> P7.

<sup>134</sup> *Id.* at 3

<sup>135</sup> *Id.* at 4.

<sup>136</sup> *Id.* at 5-6.

<sup>137</sup> *Id.* at 7.

emotional disturbance. There is no indication that Petitioner or her representatives expressed any genuine disagreement with either the November 8, 2018 IEP or the March 30, 2019 amendment. Therefore, I conclude that Petitioner has failed to make a *prima facie* case that the November 18, 2018 IEP was inappropriate.

***November 21, 2019 IEP***

On April 10, 2019, School A issued an IEP Progress Report indicating that Student was progressing on two mathematics goals and one had not yet been introduced.<sup>138</sup> Student was progressing on ■ two reading goals.<sup>139</sup> Student was progressing on one written expression goal and had mastered two others.<sup>140</sup> Student had mastered ■ two communications goals and ■ behavioral goal related to verbal conflict and aggression.<sup>141</sup> Student was progressing on two transition goals while a goal relating to creating a resume had not been introduced.<sup>142</sup> Student's grades for the first quarter of the 2019-20 school year were as follows: A's in Spanish and Health and Wellness, B+'s in African American History and SAT/ACT Math, B's in American Literature and Writing, Chemistry, and American History, and C+'s in SAT/ACT Reading, AVID, and Algebra 2.<sup>143</sup> For the 2018-19 school year, Student received the following grades: B+ in Physical Education, B's in English Literature and Art Theory, C+ in Biology and Math 10 Intervention, C's in World History and Geography, Geometry, Spanish, and English 10 Intervention, and a pass in Portfolio 10.<sup>144</sup>

School A convened its third annual IEP meeting for Student on November 21, 2019. The Present Levels address Student's performance during the previous school year, and the goals are consistent with progress reported on the April 10, 2019 Progress Report. Thus, it cannot be fairly said that the Present Levels and goals were simply restated from the previous IEP. Rather, Petitioner's complaint with the November 2019 IEP is that Student's academic performance remains well below grade level even though ■ receives good grades. Petitioner's argument has merit. Despite achievement scores on elementary school levels, Petitioner has earned passing grades in subjects such as Chemistry, Biology, Algebra 2, Geometry, and English Literature. However, in light of the accommodations that special education students receive, and as to which Witness C testified, I am in no position to second guess the legitimacy of Student's grades. Thus, the objective evidence indicates that School A's IEPs have met the *Rowley* test of enabling the student to achieve passing marks and advance from grade to grade.<sup>145</sup>

As previously noted, the regulations require the IEP team to pay particular attention to "The concerns of the parents for enhancing the education of their child" in developing the IEP.<sup>146</sup> Here, Petitioner made it clear during her testimony that she wants Student to remain

<sup>138</sup> P17:25-26.

<sup>139</sup> *Id.* at 26-27.

<sup>140</sup> *Id.* 27-28.

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *Id.* at 29.

<sup>143</sup> P31:8.

<sup>144</sup> R9.

<sup>145</sup> 458 U.S. at 203-04.

<sup>146</sup> 34 C.F.R. §300.324(a)(1)(ii).

on track for a diploma and to remain enrolled at School A. While Petitioner's counsel argued that Student requires 15 hours of specialized instruction outside general education, Witness E testified that School A was incapable of providing more than 10 hours outside general education. If Petitioner insisted on more than 10 hours outside general education, School A was willing to refer the placement decision to OSSE for an alternative placement. Petitioner agreed to the services provided in the November 2019 IEP to maintain Student's enrollment at School A.<sup>147</sup> Therefore, as to the November 21, 2019 IEP, I conclude that while Petitioner made a *prima facie* showing, Respondent met its burden of proving that it provided an IEP that met the requirements of IDEA and judicial precedents.

**Whether Respondent failed to implement ■ IEPs dated November 9, 2017 and November 8, 2018 by (a) failing to implement the student's speech and language services during the 2017-2018, 2018-2019, and 2019-2020 school years; and (b) failing to implement the student's behavior support services during the 2017-18 and 2018-19 school years.**

Petitioner relies on Respondent's failure to provide service trackers to support her argument that Respondent failed to provide appropriate related services since Student's enrollment in 2017. Respondent argues that there is no requirement under IDEA to maintain service trackers.

As set forth in the Findings of Fact, Speech and Language Therapist A provided speech and language services during the 2017-18 school year and filed a progress report. Behavioral Support Specialist A provided BSS during that school year and filed a progress report. Witness B provided speech services during the 2018-19 school year and reported that Student had mastered both goals. Witness D testified that she provided Student 60 minutes per month of BSS as a contractor for the 2018-19 school year, beginning in October 2018. Another contractor from Witness D's firm provided services at the beginning of the school year (September 5, 2019). Witness D testified that Student had mastered the goal of interacting with peers and adults without verbal conflict or aggression and no longer required BSS. Respondent provided incomplete service trackers for BSS for the 2017-18 school year and 2019-20 school year,<sup>148</sup> and more complete service trackers for speech and language services for the 2017-18 school year.<sup>149</sup>

There is little compelling evidence that Student exhibits behavioral problems that require more services than Respondent has provided. There is no documentation, and Petitioner offered no testimony, that Student has been subject to any disciplinary proceedings during ■ enrollment at School A. During the 2017-18 school year, Behavioral Support Specialist A reported that "[Student] has engaged in multiple instances of verbal aggression, although ■ words appeared devoid of intent..." However, Speech and Language Therapist A, Student's service provider during the 2017-18 school year, reported that Student "is an active and willing participant during individual speech and language therapy. [Student] continues to communicate well when with peers and adults... [Student] has made progress in the area of receptive and expressive vocabulary skills..." Student's BSS provider during the

<sup>147</sup> Petitioner's testimony; Testimony of Witness E; R10.

<sup>148</sup> P18.

<sup>149</sup> P19.

2018-19 school year, Witness D, testified that Student mastered Student's only goal that year, interacting with peers and adults without verbal aggression, and did not require additional services. Nevertheless, Student's BSS services were increased in the March 30, 2019 amendment of the November 18, 2018 IEP. That March 30, 2019 amendment includes no explanation for the increase. Witness E testified that it was due to the June 2018 Psychoeducational Evaluation that recommended 30 minutes of BSS services per week<sup>150</sup> and Petitioner's concerns about Student's behavior in the community. However, the recommendations in the Psychoeducational Evaluation were based primarily on testing rather than on evidence of actual behavioral problems in the classroom. The one teacher report in the evaluation concerning Student's behavior was specifically discounted by the examiner as unreliable due to inconsistent responses.<sup>151</sup> In the subsequent Functional Behavior Assessment, Examiner B observed Student in class on three separate occasions and found that Student displayed appropriate attentive skills despite a moderate to high level of noise in the classroom. Witness C, Student's Special Education Teacher, testified that Student was uncooperative at the beginning of the 2019-20 school year, which led her to provide services on a pull-out basis about 5.5 hours per week. However, Witness C testified that Student's comportment had dramatically improved by late October.

Respondent offered no documentation or testimony as to speech and language services provided in the 2019-20 school year. Therefore, I conclude that Petitioner failed to meet her burden of persuasion as to all related services during the 2017-18 and 2018-19 school years, but met that burden as to four hours of speech and language services for the 2019-20 school year.<sup>152</sup>

**Whether Respondent failed to implement the student's November 9, 2017 and November 8, 2018 IEPs by their failure to implement the inclusion support during the 2018-19 school year and during the first term of the 2019-20 school year.**

Student's 2017-18 and 2018-19 IEPs prescribed 10 hours per week of specialized instruction inside general education. On the April 24, 2018 IEP, Special Education Teacher A reported on Student's progress on goals in mathematics, reading, and written expression. On the April 10 and July 25, 2019 IEP Progress Reports, Special Education Teacher B reported on Student's progress in these areas. Witness C is Student's special education teacher during the 2019-20 school year. Although Student's IEPs prior to November 2019 prescribed specialized services in general education, Witness C testified that she often pulled Student out for services for reading, math, and projects at Student's request or when Student was having behavioral issues. These exceptions to the IEP appear to be reasonable exercises of discretion on the part of Witness C with minimal impact on Student's rights to the least restrictive environment. I conclude that Petitioner has failed to meet her burden of persuasion that Respondent has failed to provide appropriate inclusion services to Student since Student's enrollment in 2017.

<sup>150</sup> P5:23.

<sup>151</sup> P5-15.

<sup>152</sup> P34:7.

**Whether Respondent denied the student a FAPE by failing to provide an appropriate amount of speech and language services on the November 8, 2018 and November 21, 2019 IEPs by failing to provide at least 120 minutes/month of speech services.**

DCPS conducted a Speech and Language Evaluation on December 22, 2014.<sup>153</sup> On October 30, 2018, Examiner C completed an independent Speech & Language Evaluation.<sup>154</sup> Neither evaluation recommended a specific amount of speech services; both examiners deferred this decision to the IEP team.<sup>155</sup> As discussed above, on the April 24, 2018 IEP Progress Report, Speech and Language Therapist A reported that Student was progressing on the two goals in the 2017-18 IEP. On the April 10, 2019 IEP Progress Report, Witness B reported that Student had mastered both goals in the 2018-19 IEP. At no time prior to the filing of the *Complaint* did the Petitioner or her representatives express dissatisfaction with the level of communications related services. When the 2018-19 IEP was amended on March 30, 2019, with the participation of Petitioner's counsel, only BSS services were increased, and the record does not reflect an objection by Petitioner over the failure to increase speech and language services at that time. Moreover, the record supports the conclusion that as to these services, the provisions in the IEPs and the levels of prescribed speech and language services were appropriate to meet Student's needs. Therefore, I conclude that Petitioner has failed to make a *prima facie* case as to the inadequacy of the IEPs in this regard.

**Whether Collegiate failed to provide the parent with access to the student's cumulative educational records despite numerous written and verbal requests for said records.**

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

- (a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—
- (1) The identification, evaluation, and educational placement of the child; and
  - (2) The provision of FAPE to the child.<sup>156</sup>

and

- (a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution

<sup>153</sup> P6.

<sup>154</sup> P7.

<sup>155</sup> P6:11; P7:7.

<sup>156</sup> 34 C.F.R. §300.501.

session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

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

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.<sup>157</sup>

The record supports the conclusion that Petitioner was provided with all records of Student maintained by Respondent including transcripts, IEPs, IEP Progress Reports, and standardized test data. Petitioner's primary objection is to the lack of service trackers, but Petitioner cites no authority for the requirement that an LEA develop service trackers. Respondent offered no documentation or testimony that it provided speech and language services during the 2019-20 school year in response to the allegations in the second issue herein. However, the IEPs and IEP Progress Reports for the 2017-18 and 2018-19 school years support Respondent's contention that the prescribed services were provided.

### **RELIEF**

Petitioner requested relief including, *inter alia*, (1) an IEP with full-time or close to full-time specialized instruction outside of general education, and speech or language services of 120 minutes/month; (2) that School A develop an appropriate IEP within 28 days of the decision in this proceeding; (3) that School A provide all records requested by the parent; and (4) compensatory education funded by School A.

### **ORDER**

As a result of the foregoing:

1. Respondent shall fund four hours of independent speech and language therapy.
2. Petitioner's other requests for relief are denied.

**APPEAL RIGHTS**

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

*Terry Michael Banks*

Terry Michael Banks  
Hearing Officer

Date: February 24, 2020

Copies to: Attorney A, Esquire  
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