

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 1/19/24; 1/31/24
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0223
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 6, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On November 15, 2023, Respondent filed a response. A resolution meeting was held on November 21, 2023, without an agreement being reached. The resolution period expired on December 6, 2023.

II. Subject Matter Jurisdiction

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

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

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

III. Procedural History

On December 20, 2023, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On January 1, 2024, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. The order was revised on January 11, 2024.

The matter proceeded to trial on January 19, 2024, and January 31, 2024. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After completion of testimony and evidence, the parties presented oral closing statements on January 31, 2024. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-51 without objection. Respondent moved into evidence exhibits R-5 through R-8, R-20, R-23, R-26, R-28, R-41, and R-43 without objection.

Petitioner presented as witnesses, in the following order: Witness A, an educational advocate (expert in special education, eligibility, Individualized Educational Plan (“IEP”) programming, placement process, and procedure); Witness B, a paralegal; and Petitioner. Respondent presented as witnesses, in the following order: Witness C, a teacher at School A; Witness D, a social worker at School A; and Witness D, a teacher at School A (expert in programming, placement, student needs, and evaluation).

IV. Issues

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

1. Did DCPS deny the Student a Free Appropriate Public Education (“FAPE”) when it failed to provide the parent with access to the Student’s educational records in June 2023 and August 2023?

2. Did DCPS deny the Student a FAPE by failing to fully implement the Student’s IEP during the 2021-2022 or the 2022-2023 school years by failing to provide the Student with all of his/her behavioral support services?

3. Did DCPS deny the Student a FAPE by failing to reevaluate the Student during the 2021-2022 school year?

Petitioner alleged that, following the January 2022 Analysis of Existing Data (“AED”) meeting and prior to the March 7, 2022, eligibility determination, DCPS failed to conduct a reevaluation of the Student, consisting of a Functional Behavior Assessment (“FBA”) and an updated comprehensive psychological evaluation and/or assessment in the areas of autism, specific learning disability, or other health impairment. Petitioner also alleged that DCPS failed to provide the Student with academic testing, including in the area of written expression.

4. Did DCPS fail to provide the Student with an appropriate IEP on or about December 2, 2021, and/or on or about November 9, 2022?

Petitioner contended that DCPS did not provide sufficient hours of instruction for the Student based on his/her academic performance and behavior issues, failed to address the Student's needs in the area of written expression, did not base the IEPs on updated comprehensive evaluations, and did not develop a Behavior Intervention Plan (“BIP”).

As relief, Petitioner seeks the outstanding Student records; a finding that the statute of limitations is tolled for any possible issues from August 27, 2023, until the time that DCPS fully provides a records response; a finding that DCPS shall fund independent evaluations, including an FBA, a comprehensive psychological evaluation that addresses possible autism or a specific learning disability or other health impairment, and any other

warranted evaluations, including occupational therapy, speech and language, and assistive technology assessments; and a finding that the Student is entitled to compensatory education services for denials of FAPE.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services. The Student has been diagnosed with oppositional defiant disorder. Testimony of Petitioner. The Student is described as “energetic and loving.” The Student is behind grade level in math, and far below grade level in reading. The Student can complete single-digit multiplication. The Student requires manipulatives, visuals, images, and explicit instruction in class. The Student’s emotional issues affect his/her ability to self-regulate behavioral responses under normal circumstances, resulting in the Student acting or speaking inappropriately (speaking out of turn, being in constant motion), poor decision-making, and difficulty learning from experience. P-15-5-7.

2. It is important to build a relationship with the Student, who can be difficult to reach at first. Testimony of Witness C. The Student can do better work than testing shows, but attendance and behavior issues hinder his/her learning and performance. Testimony of Witness D. The Student needs behavior support services to strengthen his/her awareness of his/her emotions, and to improve self-control of his/her body and voice. Testimony of Witness D.

3. In late 2018, the Student was given a comprehensive psychological evaluation by DCPS. At the time, the Student was eligible as a student with Speech-Language Impairment. The evaluator’s report, dated December 30, 2018, underscored the Student’s behavioral issues. The evaluator indicated that the Student spent a

significant amount of time outside of the classroom due to his/her behavior and missed a large amount of instructional time. As a result, the Student's academic performance and participation suffered. The evaluator found that the Student needed specialized instruction to address emotional regulation difficulties and social skills deficits, to learn appropriate behavior skills, and to address academic deficits. The evaluator also recommended the continued use of a specific, individualized behavior modification system where tangible rewards lead to preferred reinforcement. P-8.

4. The evaluator's report mentioned that the Student had a history of trust issues with adults and responded "spectacularly" to a setting where the adults consciously and overwhelmingly showed him/her love and support to make him/her feel safe. The report indicated that having at least one adult and space in school where the Student could feel completely safe and supported could be essential to his/her maintaining better behavioral control. The report indicated that such an adult should, ideally, also provide services to the Student inside the classroom to remind him/her in real time. This adult should not be involved during larger disciplinary issues, unless it was solely for de-escalation and support. P-8.

5. In 2018, DCPS evaluated the Student for speech and language. The corresponding report, dated December 18, 2018, revealed that the Student was able to effectively communicate, clearly participate in and contribute to classroom discussions, understand grade-level vocabulary, formulate age-appropriate sentence structures using appropriate word endings and tense uses, recall information needed to write to dictation and take notes, follow directions, and understand and use related words. The Student's pragmatic language skills were found to be a weakness. P-8.

6. During the 2020-2021 school year, the Student first attended School C. The Student was involving in at least thirty-five behavioral incidents. The Student then moved to School A during virtual learning. At the time, the Student received five hours per week of specialized instruction, outside general education, and 240 minutes per month of behavioral support services. The Student was functioning at a kindergarten level in both math and reading and had difficulty controlling his/her emotions during this year. P-12; Testimony of Witness C; Testimony of Witness D.

7. The Student continued at School A for the 2021-2022 school year. The Student's classes contained approximately thirteen to fifteen students in reading and math. The Student did not receive pull-out math instruction during a portion of the school year because of a staffing shortage. Testimony of Witness C. The Student's behavior support services mandate for the 2021-2022 school year was implemented by Witness D, who pulled the Student out of class and also provided services inside the classroom to remind the Student in real time. Testimony of Witness D.

8. At the start of the 2021-2022 school year, Witness C filled out a Strengths and Difficulties Questionnaire ("SDQ") for the Student. The SDQ is a brief behavioral screening questionnaire for the Student's age group, comprised of twenty-five items (five items on each of five subscales: emotional problems, hyperactivity, relationships, conduct and pro-social behavior). The Student's overall score was in the "very high" range. The Student scored in the "high" range in behavioral difficulties, impact of any difficulties on the child's life, and hyperactivity and concentration difficulties. P-12-3.

9. On December 2, 2021, an IEP meeting was held to review the Student's program. This IEP indicated that the Student's behavioral issues were getting in the way

of his/her education. In the “consideration of special factors” section, the IEP stated that the Student required frequent reminders to stay on task, especially during independent in-class assignments. The IEP stated the Student socialized with peers or zoned out instead of initiating and completing work, demonstrated difficulties with following school rules during transitions, ran in the hallways or played in the bathroom stalls, and sometimes defiantly and openly refused to comply with adult requests. The IEP indicated that many strategies had been used to address the Student’s behavior, including positive behavioral interventions and supports (“PBIS”), “ClassDojo,” incentives for appropriate behavior, and assigned seating. The IEP also indicated that the Student was performing math and reading at a kindergarten level, based on i-Ready testing, and DIBELS testing indicated that the Student was reading well below grade-level expectations. P-13.

10. This IEP did not change the Student’s program. The “Area of Concern” sections of the IEP continued to be mathematics, reading, and emotional, social and behavioral development. The section devoted to emotional, social and behavioral development indicated that the Student was making slight gains toward developing positive peer relationships with classmates and following teacher directives and was gradually learning to follow classroom structures and routines but struggled to engage in most “specials” classes. The IEP stated that the Student often eloped from specials, including physical education and Spanish. The IEP recommended that the Student continue to receive five hours per week of specialized instruction, outside general education, and 240 minutes per month of behavioral support services (120 minutes per month in a group setting and 120 minutes per month individually). The IEP noted that the following supports and services were attempted in the general education setting: small

group instruction, chunked assignments, instructional level assignments, positive behavior rewards and incentives, structured breaks, reading intervention, targeted math intervention, blended learning, class jobs, assigned seating, and the like. P-13.

11. On December 13, 2021, Petitioner received a letter from School A indicating that the Student had been absent without an excuse for seven days, and that the school had to report Petitioner if three more such absences occurred. R-6. On January 12, 2022, the Student received a letter from School A indicating that the Student had been absent without an excuse for ten days. This letter said that, in accordance with District Policies and Regulations, DCPS was required to initiate specific actions based on the number of unexcused absences that a student accumulated, as reported on the student's attendance record for the school year. The letter explained that: for one unexcused absence and each unexcused absence thereafter, DCPS would issue a “robocall” to the student’s family; for three unexcused absences, DCPS would provide attendance notification to the family and conduct a telephone wellness check for virtual students only; for four excused or unexcused absences, a teacher would call the student’s home to discuss the student’s attendance; for five unexcused absences, DCPS would provide attendance notification to the student’s family and the student would be referred for a “Student Attendance Conference” to identify attendance barriers and create an attendance support plan; for seven unexcused absences, DCPS, in collaboration with the Metropolitan Police Department, would provide an attendance notification to the student’s family; for ten unexcused absences, DCPS would provide attendance notification to the student’s family and consider the student chronically truant. If the student was age five to thirteen and accumulated ten full-day unexcused absences, DCPS

would refer the student to the District of Columbia Child and Family Services Agency.

The letter provided an attendance point of contact and indicated that the school was “committed to working with you to address any challenges you may be facing in getting your child to school.” Witness D; R-7.

12. An AED meeting was held for the Student on January 19, 2022, during which the parties again found that the Student was at a kindergarten level in math and reading and continued to exhibit the same behaviors, despite the interventions that had been tried. P-12. On February 7, 2022, Petitioner received a letter from School A indicating that the Student had been absent without an excuse for fifteen days. The language in this letter was similar to the language in the previous letters that the school had sent to the parent about attendance. R-8. On March 7, 2022, an eligibility meeting was held for the Student, at which it was determined that the Student should remain eligible for services as a student with emotional disturbance. P-11.

13. During the 2021-2022 school year, the Student was offered direct counseling services as follows: August 2021, zero hours; September 2021, ninety minutes; October 2021, ninety minutes; November 2021, sixty minutes (the Student absent for one session); December 2021, sixty minutes; January 2022, sixty minutes (but the Student was absent both times); and February 2022, 105 minutes. P-23; P-24; P-25; P-26; P-27; P-28; P-29.

14. The Student would attend counseling if it was virtual. Even then, s/he would not engage much. Instead, s/he would stare and listen but not communicate, go to different places in the room, and sometimes not listen at all or pretend not to hear. By the

end of the 2021-2022 school year, the Student's behaviors had improved in the sense that they were not unsafe behaviors, such as standing on a desk. Testimony of Witness C.

15. The Student's IEP progress reports for the 2021-2022 school year indicated that the Student had mastered one math goal, had made inconsistent progress in reading, and had not progressed in emotional, social and behavioral development. P-17.

16. The Student was absent from school or tardy frequently during the 2021-2022 school year. R-20. When students at School A have serious attendance issues, School A refers those students to Center A to support case management. Through this center, a family support worker mentors the student's family and tries to talk through the attendance barrier, including home visits. Center A offers incentives to address behavioral issues for students, including food, sports, arts and crafts, and the like. Testimony of Witness D.

17. For the 2022-2023 school year, the Student continued to attend School A. On the fall 2023 NWEA MAP Math Assessment, the Student scored 176, at the 2nd percentile. P-34. In September 2022, on the Reading Inventory Assessment, the Student's score was "BR," indicating that s/he was a beginning reader and performing significantly below expected grade level. P-14-4.

18. An IEP meeting was held on November 9, 2022, to review the Student's program. The IEP team reviewed the Student's draft IEP. The team used data including report card and progress report information, informal observations, teacher input, related service provider inputs and notes, input from the family, classroom and school-based assessment data (including "TRC" reading data and "ANET" data for both reading and writing), curriculum-based measurements, and student work samples. In addition, the

team reviewed ClassDojo data, an SDQ, behavior logs, and the results of the Student's previous cognitive and academic evaluations. P-40.

19. In the Student's IEP of November 9, 2022, the "consideration of special factors" section relating to behavior and present levels and goals in math was replicated almost verbatim from the prior IEP, and the present levels and goals in reading were only slightly changed from the prior IEP. The IEP contained a new reading comprehension goal but no writing goals. P-14; Testimony of Witness A. The IEP recommended ten hours of specialized instruction per week outside general education, with the same 240 minutes per month of behavioral support services as before and contained the same language about "Other Classroom Aids and Services" as the prior two IEPs. P-14.

20. The Student's IEP progress report for the second reporting period of the 2022-2023 school year (corresponding to November 9, 2022, to January 2, 2023) indicated that s/he had made progress on all but one goal, including progress on his/her emotional, social and behavioral goals. P-19. The Student's IEP progress report for the third reporting period (January 26, 2023, to April 10, 2023) indicated that s/he had made progress in math and emotional, social and behavioral development, but had not progressed on any reading goals. P-20.

21. The Student was absent from school or tardy frequently during the 2022-2023 school year. R-20. During this school year, the Student engaged in negative behaviors, including going in and out of the general education classroom, eloping, calling out, being disruptive, and trying to get away from tasks that s/he found a little challenging. However, if there was a topic of interest, the Student would do better. The Student often did not respond to redirection, points systems, or redirection. When the

Student was absent, his/her general education teacher contacted Petitioner, and the absences were discussed at parent-teacher conferences. Testimony of Witness E.

22. On or about June 27, 2023, Petitioner requested records from Respondent, including all attendance records, progress reports and report cards, standardized test scores, class schedules, IEPs, evaluations and assessments, multidisciplinary meeting notes, related service provider logs and service trackers, portfolios, charts and observations, disciplinary records, forms and data compilations, letters of understanding, reports, letters, memos, notes, emails, and all “SED Communication Logs.” P-49; Testimony of Witness B. Follow-up correspondences were sent on July 12, 2023, July 27, 2023, August 17, 2023, and October 10, 2023. P-49; P-45; P-46; P-47. Petitioner received some but not all records. Petitioner did not receive all service trackers, documents relating to discipline, standardized tests, IEPs, evaluation reports, FBAs, BIPs, and related documentation. Testimony of Witness B.

23. The Student is attending Charter School B for the 2023-2024 school year. This school has agreed to conduct evaluations of the Student, including a comprehensive psychological evaluation and an assistive technology evaluation. Testimony of Witness A. The Student has progressed a little in the new school, which has successfully communicated with the parent. Testimony of Petitioner.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or

placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-

2571.03(6)(A)(i). Accordingly, on Issues #1, #2, and #3, the burden of persuasion is on Petitioner. On Issue #4, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case.

1. Did DCPS deny the Student a FAPE when it failed to provide the parent with access to the student's educational records in June 2023 and August 2023?

The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to ‘examine’ or ‘inspect and review’ all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 C.F.R. Sect. 300.501(a); see 5-A D.C.M.R. Sect. 2600.1. The term “education records” means the type of records covered under the definition of “education records” in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974). 34 C.F.R. Sect. 300.611-300.625. Additionally, pursuant to the Office of Dispute Resolution Standard Operating Procedures, parents have the right to examine all records maintained by the school. Section 410 states: “the parents of a child with a disability must be afforded an opportunity to inspect and review all educational records with respect to: (1) The identification, evaluation, and educational placement of the child. (2) The provision of

FAPE to the child.” Where, as here, a parent requests such educational records, “[the school district] must comply...without unnecessary delay and before...any [due process] hearing,’ and a failure to do so ‘is a procedural violation of the IDEA.” Malloy v. District of Columbia, No. 20-cv-3219, 2022 WL 971208, at *5 (D.D.C. Mar. 30, 2022).

However, for a hearing officer to issue a finding of FAPE denial on this basis, cases hold that the parent must explain how the documentation was necessary to the preparation for the due process hearing at issue. Parents cannot paint in the “broadest of strokes,” asserting that the evidence would have provided the basis for a claim. Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (missing records revealed the student was autistic).

On or about June 27, 2023, Petitioner requested records from Respondent, including all attendance records, progress reports and report cards, standardized test scores, class schedules, IEPs, evaluations and assessments, multidisciplinary meeting notes, related service provider logs and service trackers, portfolios, charts and observations, disciplinary records, forms and data compilations, letters of understanding, reports, letters, memos, notes, and emails, and all “SED Communication Logs.” Follow-up correspondences were sent on July 12, 2023, July 27, 2023, August 17, 2023, and October 10, 2023. Petitioner received some of the educational records that she asked for, but Petitioner did not receive all service trackers, documents relating to discipline, standardized tests, IEPs, evaluation reports, FBAs, and/or BIPs. Petitioner argued that, as a parent, her lack of access to these records amounted to a denial of FAPE because it

placed Petitioner and her team in a disadvantaged position when trying to determine the Student's educational programming. Petitioner suggested that there are suspected denials of FAPE in the missing documents, and that Petitioner could not fully address those claims.

This position is similar to the position of the parent in Simms. Petitioner is speculating that the missing documents would have been necessary in order to determine the Student's placement now, and that the documents might create the basis for a cause of action. But Petitioner has the burden for this claim, and it cannot be assumed that the remainder of the records would have established that DCPS denied the Student a FAPE. While DCPS should have complied in full with the records requests, Petitioner failed to show that the school district's failure to completely respond to the records request had any impact on the Student's education, or on Petitioner's right to participate in the Student's education. Amanda J. v. Clark Cty Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (missing records revealed the student was autistic).

Parenthetically, in the relief and order sections of this Hearing Officer Determination, DCPS will be ordered to produce the missing records pursuant to Sect. 34 U.S.C. Sect. 300.513(a)(3), which states that a hearing officer may order a local educational agency ("LEA") to comply with procedural requirements relating to records under even if the procedural violations do not rise to the level of FAPE deprivation. Dawn G. v. Mabank Indep. Sch. Dist., No. 3:13-CV-135-L, 2014 WL 1356084, at *1 (N.D. Tex. Apr. 7, 2014) (upholding an administrative order that required the district to remedy the procedural violations that resulted in its failure to conduct a timely in-home

training assessment and its improper documentation of the student's ability to maintain behavioral skills over the summer).

2. Did DCPS deny the Student a FAPE by failing to fully implement the Student's IEP during the 2021-2022 or the 2022-2023 school years by failing to provide the Student with all of his/her behavioral support services?

After a student's IEP is developed, the school district must ensure that special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. Sect. 300.323(c)(2). "Failure to implement" claims may therefore be brought if the LEA cannot "materially" implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40–41 (D.D.C. 2013). A parent challenging inadequate implementation of a student's IEP must demonstrate that the school district failed to implement substantial or significant provisions of the IEP or that "deviations from the IEP's stated requirements" were material. Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). The parent "must show more than a *de minimis* failure to implement elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP).

This approach affords school districts some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures. Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("a material failure occurs when there is more than

a minor discrepancy between the services a school provides to a disabled child and [those] required by the child’s IEP.”); see also S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 67–68 (D.D.C. 2008); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 (D.D.C. 2011).

Petitioner argued that the Student received 375 minutes (6.25 hours) of behavioral support services and that, based on his/her IEP, s/he should have received at least 1440 minutes (24.00 hours) of behavioral support services. But there is no evidence about whether the Student received behavior support services between March 2022 and June 2022, so this Hearing Officer cannot find that the Student did not receive the services during this period.

Moreover, Witness D said that half of the behavioral support services mandate for the 2021-2022 school year was for Witness D to pull the Student out of class and provide services to him/her inside the classroom to remind him/her about behavioral concerns in real time. Petitioner’s analysis presumed that a service tracker would be created for such in-classroom behavioral support services, but this Hearing Officer cannot make that assumption in this record, because the service trackers in the record appear to be for “direct” individual or small-group sessions.

As for the time period between August 2021 and February 2022, DCPS argued that it should not be held responsible for sessions where the Student was absent. However, courts take the position that a student should be offered make-up services if the student was absent. In White v. District of Columbia, No. 20-CV-3821 (APM), 2022 WL 971330, at *5 (D.D.C. Mar. 31, 2022), a student’s IEP called for one hour of occupational therapy per month, but that student was unavailable for services. The

hearing officer in that case (myself) ruled that there was no FAPE denial because that student was offered the services. The court disagreed and reversed, remarking that an IEP is “not a form,” that it is constructed only after careful consideration of a child’s present levels of achievement, disability, and potential for growth, and that it is not enough merely to “offer” the services provided by an IEP. Instead, the court decided that the school district must “ensure” that the child actually receives those services.

It is clear that the Student did not receive his/her mandate of behavioral support services from August 2021 to February 2022. According to the service trackers, the Student did not receive one of four thirty-minute sessions in August 2021, September 2021, and October 2021. The Student received one session in November 2021. The Student did not receive two of four thirty-minute sessions in December 2021. The Student did not receive any services in January 2022. In February 2022, the Student’s direct behavioral support services mandate fell fifteen minutes short, with one hour and fifteen minutes of counseling services provided to the Student.

The Student did not receive his/her mandate of direct services during any month between August 2021 and February 2022, and therefore missed more than 25% of those services. DCPS therefore denied the Student a FAPE when it did not provide him/her with regular behavior support services between August 2021 and February 2022.

3. Did DCPS deny the Student a FAPE by failing to reevaluate the Student during the 2021-2022 school year?

Petitioner alleged that, following the January 2022 AED meeting and prior to the March 7, 2022, eligibility determination, DCPS failed to conduct a reevaluation of the Student, consisting of an FBA and an updated comprehensive psychological evaluation and/or assessment in the areas of autism, specific learning disability, or other health

impairment. Petitioner also alleged that DCPS failed to provide the Student with academic testing, including in the area of written expression.

The IDEA requires school districts to ensure that students are “assessed in all areas of suspected disability” and to base a student’s IEP on the most recent evaluation. 20 U.S.C. Sects. 1414(b)(3)(B), (c)(1); 34 C.F.R. Sect. 300.304(c)(4). The child’s reevaluation must consist of two steps. First, the child’s evaluators must “review existing evaluation data on the child,” including any evaluations and information provided by the child’s parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Based on their review of that existing data, the evaluators must “identify what additional data, if any, are needed” to assess whether the child has a qualifying disability and, if so, “administer such assessments and other evaluation measures as may be needed.” 34 C.F.R. Sect. 300.305(a)(2), (c). The LEA is required to “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” Sect. 300.304(b). All the methods and materials used must be “valid and reliable” and “administered by trained and knowledgeable personnel.” Sect. 300.304(c)(1). These regulations have the effect of ensuring that an evaluation both confirms a student’s potential disabilities and examines whether he or she needs services. Davis v. District of Columbia, 244 F. Supp. 3d 27, 49 (D.D.C. 2017).

During such a reevaluation, the failure to go beyond merely reviewing existing data can constitute a denial of FAPE if more information is needed to develop an appropriate IEP. James v. District of Columbia, 194 F. Supp. 3d 131, 142 (D.D.C. 2016)

(the “summary of existing data” document that the District of Columbia prepared in response to a guardian’s request for an updated psychological assessment of a teenager with an intellectual disability did not fulfill the district’s obligation to reevaluate the student). In the wake of Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), it is especially important for districts to monitor students and be alert to indications that a student needs to be reevaluated, even when a triennial evaluation is not due and the parent has not requested a reevaluation, to ensure that the student’s IEP continues to be reasonably calculated to allow the child to make appropriate progress in light of the child’s circumstances. Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 (U.S. Dep’t of Educ. 2017).

Still, for there to be a FAPE denial on this issue, a parent should show that the failure to evaluate resulted in substantive harm to the student. Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

The Student had not been subject to formal assessments since 2018, when s/he was a younger and quite different child. For the 2021-2022 school year, a triennial evaluation of the Student was therefore due, and it was needed. Witness A, Petitioner’s expert, said that the Student needed a comprehensive psychological evaluation because the 2018 evaluations were too old and not comprehensive, and that the Student’s behavioral problems drove the need for an FBA. Witness A also said that virtual assessments could have been done if COVID-19 concerns made in-person evaluations difficult during the 2021-2022 school year. She suggested that the lack of evaluations has made it difficult for the IEP team to assess the Student’s progress and program,

especially in written expression, since the IEP had no “Area of Concern” section for written expression.

According to the testimony of the Student’s teacher at School A, Witness C, Witness A is right. Witness C, who was called as a witness by DCPS, said more assessments should have been done during this time. Testifying specifically about the 2021-2022 school year, and referencing the FBA and the comprehensive psychological evaluation, Witness C said that “those two critical documents...would have really, you know, driven this decision.” Witness C said that the 2018 psychological report was too old to use and that, “based on the behaviors that I observed” and from the SDQ that he completed, the Student did need an FBA.

Moreover, Witness D, the Student’s social worker, also said that the Student needed an FBA and that she wrote one for the Student, though this FBA is not in the record. DCPS suggested that the Student’s attendance made evaluations more difficult, but the record indicates that the Student attended school often enough to be evaluated. DCPS also suggested that staff shortages during the pandemic made it more difficult to conduct in-person evaluations, but COVID-19-related problems do not relieve school districts of their IDEA obligations. A thorough discussion of these principles is found in Abigail, P. through Sarah F. v. Old Forge Sch. Dist., No. 3:21-CV-02033, 2023 WL 2505011, at *9–10 (M.D. Pa. Mar. 14, 2023), where the court explained that the United States Department of Education has required schools, to the greatest extent possible, to provide FAPE to students with IEPs even in periods of curtailed instruction during the COVID-19 pandemic. The court found that “even in times of emergency, the IDEA itself requires school districts to provide FAPEs to students with IEPs.” See also Hernandez v.

Grisham, 508 F. Supp. 3d 893, 1005 (D.N.M. 2020), aff'd in part, appeal dismissed in part, No. 20-2176, 2022 WL 16941735 (10th Cir. Nov. 15, 2022) (“the IDEA [does not] create any emergency exception excusing funding recipients from delivering a FAPE to students with disabilities”).

This Hearing Officer agrees with Petitioner that DCPS’s evaluation should have included an FBA and a comprehensive psychological evaluation, including testing in written expression.² Accordingly, DCPS denied the Student a FAPE by failing to conduct a complete reevaluation of the Student during the 2021-2022 school year.

4. Did DCPS fail to provide the Student with an appropriate IEP on or about December 2, 2021, and/or November 9, 2022?

Petitioner contended that the IEP did not provide sufficient hours of specialized instruction based on the Student’s academic performance and behavior issues. Petitioner also contended that the IEP failed to address the Student's needs in written expression, that the IEP was not based on comprehensive evaluations, and that the IEP did not include a BIP.

December 2021 IEP

As Witness A pointed out, the record indicates that the Student functions far below level in reading, math, and writing. The December 2, 2021, IEP indicated that the Student was performing math and reading at a kindergarten level (based on i-Ready testing), and there was no language indicating clear and specific progress in any academic

² This record does not contain sufficient evidence that the Student required an autism assessment, as originally alleged.

area. Accordingly, the record established that the Student would need a considerable amount of scaffolding to be able to genuinely participate in regular education classes.³

The Student's December 2, 2021, IEP, however, again only required that the Student receive five hours of specialized instruction per week outside general education. There was nothing in the IEP to suggest how the Student, given his/her low reading level, could manage a large general education class with grade-level reading material. Under these circumstances, it was incumbent on the IEP team to clearly explain to the parent how the teachers and staff plan could practically educate the Student in a class full of students who functioned at a much higher level and with a teacher who gave lessons at a much higher level. There is nothing in the record to suggest that the IEP team seriously considered these issues or considered adding any accommodations or modifications in the "Other Classroom Aids and Services" section of the IEP, which was repeated verbatim from the prior IEP.

It was also incumbent on the IEP team to clearly explain how the Student's behavioral issues, such as elopement, could be managed in a large general education classroom with one teacher and no aide. There is no question that the Student had behavioral issues during the 2020-2021 school year, when s/he engaged in thirty-eight separate incidents. This behavior continued during the 2021-2022 school year. The December, 2021, IEP indicated that the Student would "zone out" instead of complete work, demonstrate difficulties with following school rules during transitions, run in the

³ Even today, at Charter School A, which reports that the Student is doing better, the Student's teacher said that the Student gets frustrated with the work because a lot of it is intimidating to him/her; that s/he is on a first-grade level in reading; that s/he still works on vowel teams, phonics, and being comfortable reading out loud; and that s/he only reads out loud if s/he is by him/herself, not in a group.

hallways, play in the bathroom stalls, and sometimes defiantly and openly refuse to comply with adult requests. The IEP section devoted to emotional, social and behavioral development indicated that the Student had made slight gains toward developing positive peer relationships with classmates and following teacher directives and was gradually learning to follow classroom structures and routines *but struggled to engage even in most specials classes. The IEP stated that the Student often eloped from specials, including physical education and Spanish.*

Given this language, the IEP team should have at least seriously considered more services or a more restrictive placement of the Student, who has not done well in a larger classroom setting. But the IEP did not address class size, did not increase specialized instruction hours, did not increase the behavioral support mandate, did not contain a BIP, did not change the Student's placement, and was based on an inadequate reevaluation. This Hearing Officer agrees with Petitioner that the December 2021 IEP denied the Student a FAPE.

November 2022 IEP

In or about September 2022, the Student received a score of "BR" on the Reading Inventory Assessment." This score indicated that the Student had regressed, that s/he was a beginning reader, and that s/he was performing significantly below expected grade level. The November 9, 2022, IEP indicated that the Student was at a kindergarten level in math and did not indicate that s/he had made progress in reading or math. Clearly, additional services were necessary to provide the Student with a FAPE.

DCPS decided to add five hours of specialized instruction to the Student's mandate, bringing his/her program to ten hours per week of specialized instruction

outside of general education, or two hours per day. However, there are more than two hours of academics in a school day. For the remainder of the school day, the Student would still be in a general education classroom, functioning well below the other students in the class, without additional assistance. There was no reason for the IEP team to believe that the Student would suddenly be able to manage general education classes, especially since the school was the same, no new services were proposed, and very few new goals were proposed. Indeed, the November 2022 IEP included the exact same “consideration of special factors” section, relating to behavior and the present level and goals in math, as the prior IEP. Again, the IEP did not contain writing goals. The IEP also did not increase behavioral support services. There was also nothing in the IEP to address the concerns raised in the prior IEP about the Student’s issues in “specials” classes. And again, there was no practical discussion of how the Student might be able to manage the general education environment with such a low reading level.

DCPS suggested that the problem was the Student’s absences. Where a student simply does not want to go to school, a school district should not be held responsible. Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 2007 WL 5023652 (D.N.M. Jan. 10, 2007), aff’d in part sub nom. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116 (10th Cir. 2008) (school district made an exceptional number of attempts to contact both the student and her mother, including phone calls and certified letters to the parents and attempts to conduct a home visit); S.J. ex rel. S.H.J. v. Issaquah Sch. Dist. No. 411, 2007 WL 2703056 (W.D. Wash. 2007) (“School District is not responsible for the Parents’ failure to ensure the Student was at school in order to benefit from [the student’s] education”).

But there is nothing in the record to suggest that this still-young Student does not want to go to school. There is also nothing in the record to suggest that Petitioner is an irresponsible parent who contributes to the Student's attendance issues. To the contrary, Witness D said that Petitioner was doing "her absolute best." In this situation, this Hearing Officer agrees with Petitioner that an IEP or a BIP should have addressed issues relating to the Student's attendance. Middleton v. District of Columbia, 312 F. Supp. 3d 113, 146 (D.D.C. 2018); Garris v. District of Columbia, 210 F. Supp. 3d 187, 191–92 (D.D.C. 2016); Presely v. Friendship Pub. Charter Sch., No. 12-0131, 2013 WL 589181, *8–9 (D.D.C. Feb. 7, 2013).

DCPS argued that the Student's absences did not relate to the Student's disability, but that is not what DCPS's witnesses said. Witness D, for example, connected the Student's attendance with his/her disability by indicating that attendance issues were, or should be, addressed on the Student's FBA and BIP. Witness D said that, when a student at School A has serious issues with attendance, School A calls the parents and might refer the student to Center A, where a family support worker mentors the family and tries to talk through attendance barriers, including during home visits. Center A offers incentives to help behavioral issues for students, as does School A generally. Incentives include food, sports, arts and crafts, and the like. However, this service was not mentioned in the Student's IEP, which must be judged on the basis of the services actually offered by the IEP team at the time of the IEP meeting. Edward M.-R. by & through T.R.-M. v. D.C., 660 F. Supp. 3d 82, 144 (D.D.C. 2023) (adequacy of an IEP can only be determined as of the time it is offered to the student).

DCPS denied the Student a FAPE by failing to provide the Student with an appropriate IEP on November 9, 2022.

RELIEF

Petitioner originally sought the outstanding Student records; a tolling of the statute of limitations until the time that DCPS fully provides a records response; independent evaluations, including an FBA, a comprehensive psychological evaluation that addresses possible autism or a specific learning disability or other health impairment, and any additional evaluations warranted, including occupational therapy, speech and language, and assistive technology assessments; and compensatory education services for denials of FAPE.

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

Hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also

Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “qualitative, fact-intensive” inquiry used to craft an award “tailored to the unique needs of the disabled student”). A petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Petitioner seeks 576 hours of tutoring (two hours per day, four days per week, for seventy-two weeks), forty hours of counseling (one hour per week for forty weeks), and forty hours of mentoring (one hour per week for forty weeks). Witness A explained that she relied on assessments in arriving at the conclusions in her compensatory education plan, which seeks to put the Student in the place that s/he would have been if s/he had received a FAPE. Respondent argued that Witness A’s approach was inconsistent with Reid, but in both Reid and B.D. v. District of Columbia, 817 F.3d 792, 798 (D.C. Cir. 2016), the United States Court of Appeals for the District of Columbia Circuit held that, in some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in other cases, the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” Id. The B.D. court explained that the compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child's needs.” 817 F.3d at 798. The language in B.D. suggesting a focus on equity and flexibility provides a basis for a finding that Witness A’s plan, which corresponds to the FAPE deprivation from December 2, 2021, through June 22, 2023, was appropriate. Accordingly, the tutoring and counseling will be awarded as requested, though the

request for mentoring relief will be denied, since no mentoring was promised to the Student in the IEP.

Insofar as Petitioner's other requests are concerned, including evaluations, Petitioner did not emphasize these forms of relief during closing. Moreover, the record indicates that the Student's current school is evaluating him/her, and this Hearing Officer agrees with DCPS that the Student's current school is the more appropriate agency to evaluate him/her at this point. As a result, the request for evaluations is denied, as is the request to toll the statute of limitations, which was not mentioned at closing argument.

Finally, as indicated, this Hearing Officer will order DCPS to provide the Student with all educational records requested by the parent on June 27, 2023, pursuant to 34 C.F.R. Sect. 300.513(a)(3).

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 576 hours of academic tutoring for the Student, to be provided by a certified special education teacher at a reasonable and customary rate in the community, together with transportation to and from the tutoring;
2. Respondent shall pay for forty hours of counseling for the Student, to be provided by a licensed psychologist or social worker with at least five years of experience in counseling, together with transportation to and from the counseling;
3. Respondent shall provide Petitioner with all educational records requested by the parent in her June 27, 2023, request for documentation;
4. All other requests for relief are hereby denied.

Dated: February 15, 2024

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2023-0223

Michael Lazan
Impartial Hearing Officer

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

VIII. Notice of Appeal Rights

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

Date: February 15, 2024

Michael Lazan
Impartial Hearing Officer