

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 - First Street, N.E.; Washington, D.C. 20002
(202) 698-3819 www.osse.dc.gov

Confidential

Parent on behalf of Student:)	Case No. 2019-0269
██████████, Student)	
)	
Petitioner,)	Hearing Dates: December 19-20, 2019
)	Room 112
v.)	Date Issued: January 13, 2020
)	
District of Columbia Public Schools.)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving an X-year-old student who is currently eligible for services as a student with a Developmental Delay (the “Student”). 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 October 30, 2019. The *Complaint* was filed by the parent of the Student (“Petitioner”). On November 13, 2019, Respondent filed a *Response to Parent’s Administrative Due Process Complaint* (“*Response*”). A resolution meeting was held on November 15, 2019. The initial resolution period expired on November 29, 2019.

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

¹ 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

The *Complaint* was filed on October 30, 2019 by Petitioner, who is the parent of the Student at issue (“the Student”). The Petitioner attends School A. A prehearing conference was held on November 14, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A *Prehearing Order* was issued on November 14, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The parties participated in a Resolution Meeting on November 15, 2019 that did not result in a settlement.

The due process hearing was conducted on December 19 - 20, 2019. This hearing was open to the public, but no members of the public attended. Petitioner moved into evidence Exhibits 1-79. There were no objections and Petitioner’s Exhibits 1-79 were admitted. Respondent moved into evidence Exhibits 1-68. There were no objections and Respondent’s Exhibits 1-68 were admitted.²

Petitioner presented as witnesses in chronological order: Witness A, a Speech and Language Pathologist (offered as an expert); Witness B, an Occupational Therapist; (offered as an expert); Witness C, an Educational Advocate (offered as an expert in school psychology and IEP development), Witness D, Admissions Coordinator at School B, Petitioner’s father, and Petitioner. Respondent presented as witnesses in chronological order: Witness E, a Speech and Language Pathologist (offered as an expert); Witness F, an Occupational Therapist (offered as an expert); Witness G, a Physical Therapist (offered as an expert); and Witness H, LEA Representative and Case Manager (offered as an expert in determining placements). Neither party objected to the qualifications of any of the proposed experts.

ISSUES

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

1. Whether DCPS failed to provide Student with an appropriate Individualized Education Program (IEP) on or about April 4, 2018, December 13, 2018, and/or April 4, 2019 by failing to include:
 - a. Updated present levels of performance information, baseline data, and/or goals;
 - b. Physical therapy services;
 - c. 90 minutes/week of speech and language services
 - d. Consultative occupational therapy services and/or a sensory diet
 - e. Appropriate Behavior Support Services (“BSS”) such as applied behavior analysis (“ABA”) therapy or a social skills group

² The *Prehearing Order* required any objections to witnesses or proposed exhibits to be filed two days before the hearing. Neither party submitted an objection.

- f. Assistive technology
 - g. A behavior plan
2. Whether DCPS failed to evaluate Student comprehensively in a timely manner by failing to conduct a timely Assistive Technology evaluation and/or a timely Functional Behavior Assessment (“FBA”).
 3. Whether DCPS failed to conduct a timely reevaluation of Student as recommended by ■■■ initial evaluations conducted through Early Stages to rule out or confirm diagnoses of Autism, ADHD, a Speech and Language Impairment, and Intellectual Disability.
 4. Whether DCPS failed to conduct timely Physical Therapy, Psychological, or Adaptive assessments.
 5. Whether DCPS denied Student a free appropriate public education (“FAPE”) by failing to allow the parent’s designee to conduct an observation of the student in the classroom.
 6. Whether DCPS failed to implement Student’s IEP appropriately during the 2017-18 and 2018-19 school years by failing to provide the full extent of ■■■ speech and language therapy services (9.5 hours in 2017-18 and 12.5 hours in 2018-19), occupational therapy services (9 hours in 2017-18), and 26 hours of specialized instruction outside of general education during the 2019-20 school year.

DCPS asserted that (1) the parent consented to the services provided in the 2017-18 school year, (2) the parent failed to make Student available for extended year services (“ESY”) in 2018, (3) Student is still being evaluated pursuant to an October 2019 meeting, (4) the IEP developed on September 26, 2017 was appropriate, (5) Student was appropriately evaluated in the spring of 2019, a functional behavior assessment (“FBA”) was conducted, and an appropriate behavior intervention plan (“BIP”) was developed, (6) the parent failed to make Student available for ESY in 2019, (7) the designee is not eligible to conduct an observation as an employee of Student’s attorney’s law firm, and (8) the designee lacks expertise in the areas where the Complaint alleges “multiple failures in a variety of areas and expertise.”

FINDINGS OF FACT

1. The Student is an X-year-old, attending School A.³
2. On August 8, 2017, Evaluator A of Facility A completed an Educational Evaluation Report. The evaluator’s qualifications are unknown. She administered a BDI-2, a standardized assessment that measures children’s developmental performance across five domains: Adaptive, Personal-Social, Communication, Motor, and Cognitive. However, the Communication and Motor domains were not tested. In the Adaptive, Personal-Social, and

³ Petitioner’s Exhibit (“P”) 35-1.

Cognitive domains, Student's scores reflected significant developmental delay.⁴ The evaluator found that "Through observation, it was apparent that [Student] demonstrated delayed general cognitive and learning skills. [Student] did not demonstrate the ability to engage in standardized task or informal requests. [Student] did not readily or consistently respond to verbal cues or physical touch or gestures to participate in age appropriate tasks. [Student] presented with ongoing reduced attention, responsiveness, interest and self-directedness and decreased understanding of what was expected of [Student]. Current observations revealed [Student] might present as someone who seems "out of control" or extremely busy, impulsive and self-directed. [Student] exhibited difficulty adjusting to the testing environment, people, situations and changing demands... [Student] was overly active and exhibited aggressive behaviors throughout the room, as ■■■ was not attentive to what ■■■ was doing."⁵

3. On September 15, 2017, Psychologist A at Facility A completed a Supplemental Psychological Assessment Report. On the Gilliam Autism Rating Scale, Student's mother's assessment of Student's behavior indicated a "Very Likely probability of Autism."⁶ "Student presented with delayed social programmatic skills in that ■■■ use of eye contact, gaze and other social communicative behaviors were poorly modulated or used. [Student] did not use language to request or ask for a toy or for an action to be taken... [Student's] play and social interests were self-directed and [Student] was unable to carry out turn taking opportunities."⁷ Psychologist A found, *inter alia*, that "[Student] demonstrated delayed general cognitive and learning skills. [Student] did not demonstrate the ability to exhibit mastery of a task upon trial and error or repeated experiences. [Student] did not readily or consistently respond to verbal cues or physical touch or gestures to look at pictures in a book or various pictures or items in the environment. [Student] did not display flexibility in ■■■ thinking to find alternative ways to complete a task or request help. [Student] appeared to have difficulty understanding what was being said or asked of [Student]. Objective data indicated poor expressive and receptive communication skills... [Student's] social-emotional behavioral profile suggests that ■■■ might have difficulty functioning in a general classroom setting with a large student to teacher ratio and limited structure without supports. [Student's] overall difficulties might impede ■■■ ability to participate in whole group instruction, follow multi-step directions, adjust to classroom and changing routines, and keep up with the demands of the classroom. Additionally, [Student] might have difficulty sustaining attention during whole group and independent instruction. [Student] would benefit from a highly structured classroom and behavioral interventions such as visual cueing or prompting, teacher scaffolding and modeling of appropriate classroom behavior to participate and remain on task during independent and group work... [Student] would benefit from additional resource support to ensure that ■■■ receives adequate attention to areas of concern regarding the basic building blocks for academic achievement... [Student] would benefit from a total communication system... Given [Student's] receptive and expressive language deficits, [Student] would likely benefit from both visual and verbal presentation of material. Visual cueing and illustrations such as flash cards should be used to accommodate for ■■■ language difficulties and deficits in word knowledge."⁸

⁴ P1:4.

⁵ P1:7.

⁶ P2:6.

⁷ *Id.* at 7.

⁸ *Id.* at 8-11.

4. On September 11, 2017, Occupational Therapist A of Facility A completed an Occupational Therapy Assessment Report.⁹ “[Student] was active and appeared not to understand spoken directions. [Student] frequently did not comply with directives or follow demonstrated activities, and sometimes responded by pushing test materials onto the floor. [Student] completed or attempted other activities that attracted [redacted] interest (lacing, buttoning, feeding a baby doll). [Student] engaged in behaviors related to sensory seeking (noise-making, seeking hugs, leaning against others, biting [redacted] wrist)... **Strengths.** [Student] displays age-appropriate neuromuscular development (muscle strength, range of motion, postural control) that is adequate for participating in the educational setting. Per parent report, [Student] displays appropriate self-care skills as expected in the educational environment. [Student] can feed [redacted] independently and drink from an open cup. [Student] is independent in dressing tasks as needed for school, although [redacted] is not yet managing clothing fasteners. Toilet training is in process. **Areas of Growth.** [Student] may be avoiding fine motor tasks that are difficult for [redacted]. [Student] did not display fine motor development at a level expected at [redacted] age. [Student] displayed sensory seeking behaviors during observation... **Impact on Learning and Participation.** Delays in fine motor development will impact [Student’s] performance and progress in the preschool education curriculum. Behaviors related to sensory processing will impact [Student’s] ability to focus [redacted] attention for learning in the classroom... **Recommendations for the educational staff.** [Student] will benefit from participating in activities to further develop [redacted] fine motor skills in the classroom. Some suggested fine motor activities for supporting development of grasp, dexterity and eye-hand coordination skills are: (1) stringing beads, cheerios or macaroni, (2) buttoning, (3) Peeling Velcro, peeling and placing stickers, (4) Geobards, (5) Using tweezers (Operation game)...”¹⁰

5. On September 19, 2017, Physical Therapist A at Facility A completed a Physical Therapy Evaluation Report on Student. Physical Therapist A found Student’s strengths to be independent functional ambulation on various surfaces and emerging jumping skills. The therapist found “Areas of Growth” to be decreased safety awareness with running/stairs, and slightly decreased motor planning/coordination. The therapist concluded that Student “has emerging foundational functional mobility, however, [Student] has slightly decreased attention and motor planning, which can impact safety and independence in the school environment.”¹¹ The therapist recommended that education staff “Provide verbal cues/reminders to slow down and pay attention to direction while running and hold railing/pay attention to foot placement with stairs.”¹²

6. On September 26, 2017, DCPS Developed Petitioner’s Initial IEP At School C,¹³ but the IEP indicated that [redacted] did not attend daycare or school.¹⁴ However, Psychologist A’s Report indicated that Student was enrolled in the PreK program for the 2017-18 school year at School C.¹⁵ Student was found to be eligible for special education services as a student with a Developmental Delay. The IEP team found that “At the time of the evaluation,

⁹ P5.

¹⁰ P5:6.

¹¹ P6:5.

¹² *Id.*

¹³ P13:1.

¹⁴ *Id.* at 5.

¹⁵ P2:8.

[Student] demonstrated difficulties related to the production of age-appropriate articulatory and language skills. Consequently, the provision of special education services may include direct speech and language therapy services in an attempt to explicitly intervene upon personal areas of difficulty, provide strategic instruction, and develop [Student's] skills related to articulation and language.” [Student's] behavior was not found to impede [Student's] learning or that of other children, and assistive technology devices and services were not deemed to be required.¹⁶ Annual goals were developed for Adaptive/Daily Living Skills, Communication/Speech and Language, and Physical Therapy.¹⁷ The IEP prescribed 26 hours/week of specialized instruction, four hours per month of speech and language pathology, and two hours per month of occupational therapy, all outside of general education. The team also prescribed 30 minutes per month of physical therapy consultation services, and 45 minutes per month of occupational therapy consultative therapy.¹⁸

7. The IEP team considered feedback from Student's teacher in developing the IEP: “[Student] is full of energy and [redacted] loves to run, run, run! The slide on the playground is one of [redacted] favorites! [Student] loves the wooden people in the blocks center and the magnets in the science center. [Student] carries the wooden people in [redacted] hands every day. On several occasions, [Student has] put the pretend food in [redacted] mouth from the dramatic play center. Although [Student] plays in the center with the other children, [Student] has limited interaction with [Student's] peers. During the whole group, I've observed [Student] as being very fidgety with hands and feet (unable to sit during instruction). [Student] has difficulty engaging in activities (inattentive) with the whole group and will often leave the group, wandering around the classroom, in/out of centers touching and taking things out. If [Student] sits for a story, it's for a very short time then [Student] takes off again, wandering. When re-directed, [Student] will stretch out on the floor crying. It can happen anywhere/anytime of the day in the classroom, hall, special classes. Due to [Student's] lack of verbal communication, [redacted] cries and it's difficult to understand what [redacted] wants or needs. There are times when [Student] bites [redacted] and on occasion, the teachers. [Student] [Student] hits [Student] in the face. Assessment – While assessing [Student] on the alphabet, numbers, colors, shapes, [Student] didn't understand what was asked of [Student]... Although there are two adults in the classroom, [Student] needs one on one assistance daily. It appears that [Student] would greatly benefit from an environment with fewer children.”¹⁹

8. On December 1, 2017, Witness G, the physical therapist at School D, completed a Service Tracker. She observed Student in the classroom and in a hallway and found “[Student] is totally independent navigating the classroom. [Student] was then observed in circle time. Participation was good, however, there were some behavior issues (screaming, rocking [Student's] seat back and forth which present as a safety issue because of the possibility of the seat falling backwards. PT call and spoke with [Student's mother] to discuss physical therapy concerns for [Student]. PT discuss[ed] her findings based on clinical observations and inquired about parent concerns. [Petitioner] reported that ‘she has absolutely no concerns’ and stated she ‘told them this when [Student] was at Facility A.’ Parent also commented that she does not know why [Student] is getting physical therapy...

¹⁶ P13:3.

¹⁷ *Id.* at 4-11.

¹⁸ *Id.* at 12.

¹⁹ P14:5-6.

[Student] is totally independent navigating [Student's] classroom and school setting to access [Student's] academic program. [Student] is not a candidate for school based physical therapy service.”²⁰

9. For the 2017-18 school year, Student was enrolled in pre-K at School D, where the annual IEP was developed on April 4, 2018.²¹ The present levels of functional performance in the area of Adaptive/Daily Living Skills were virtually identical to those in the 2017 IEP, and additional goals were established.²² While the present levels for Communication/Speech and Language were unchanged,²³ Student's baselines on three goals increased by 20%, 25%, and 10%.²⁴ In Motor Skills/Physical Development, Student was noted to have made progress in several areas with continued delays in others; new annual goals were prescribed.²⁵ The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP.²⁶ The team did not retain the consultation services in speech and language and occupational therapy that were prescribed in the 2017 IEP. The IEP team prescribed extended year services (“ESY”) with goals in pre-writing, attentional instructions, shapes and colors, adaptive/daily living skills, and identifying letters.²⁷

10. Student did not attend ESY during the summer of 2018.²⁸

11. During the fall of 2018, Student's teacher kept a log of Student's behavior. Student had a relatively good day on September 24, 2018, except for a brief period of difficulty following directions.²⁹ On October 2, 2018, during Speech, Student began yelling and bit ■■■ arm.³⁰ On October 4, 2018, Student did well in Music and Speech, but struggled the rest of the day.³¹ On October 9, 2018, ■■■ had a “rough day,” struggling with following directions.³² On October 10, 2018, directions had to be constantly repeated. When told to sit, Student became extremely upset and banged ■■■ fist on the floor and wall. When Student banged Student's head on the floor during nap time, Student was escorted to the nurse.³³ On October 11, 2018, instruction had to be repeated “over and over.”³⁴ On October 12, 2018, Student had difficulty following directions in the afternoon.³⁵ On October 22, 2018, Student had a good day.³⁶ On November 5, 2018, Student would not follow directions and talked back and yelled at staff.³⁷ November 14, 2018 was a “rough day with ■■■ behavior,” but Student

²⁰ P40:4.

²¹ P15:1.

²² *Id.* at 3-5.

²³ *Id.* at 5.

²⁴ *Id.* at 6-7.

²⁵ *Id.* at 8.

²⁶ *Id.* at 10.

²⁷ *Id.* at 13.

²⁸ Testimony of Witness H.

²⁹ P37:12.

³⁰ *Id.* at 10.

³¹ *Id.* at 3.

³² *Id.* at 4.

³³ *Id.* at 9.

³⁴ *Id.* at 7.

³⁵ *Id.* at 5.

³⁶ *Id.* at *Id.* at 11.

³⁷ *Id.* at 14.

did well and completed tasks in during centers.³⁸ On November 15, 2018, staff had to repeat directions continually, Student was not following directions, “throwing tantrums,” and pointing [Student’s] finger at others like a gun.³⁹ Student had a good day on November 19, 2018.⁴⁰

12. On November 14, 2018, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of Student’s goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development.⁴¹

13. On December 11, 2018, Speech Pathologist A at Facility B completed a Speech and Language Evaluation. On the Preschool Language Scales, in auditory comprehension and expressive communication, ■■■ had scores of 61 and 60, respectively, both in the first percentile, and both well below the average range of 85 to 115. In receptive language, Student had a basal level of functioning at the 2.5-year age level with scattered skills noted up to the beginning 4-year age level (Student was 4 years 10 months at the time). In expressive language, Student had a basal level of functioning within the 2 to 2-year, 5-month age level with a few scattered skills noted up to the 3.5 to 3-year, 11-month age level. Student’s articulation was relatively age-appropriate but with some deficits. The clinical impression was that Student had severe deficits in receptive and expressive language and a mild articulation delay. Deficits were also noted for pragmatic language, and Student had “some autistic-like tendencies that need to be considered.” The pathologist recommended speech therapy at a frequency of 90 minutes per week split up over two sessions.⁴²

14. The IEP team reconvened at School D to conduct an annual IEP review on December 13, 2018.⁴³ Assistive technology devices were again deemed unnecessary.⁴⁴ Student’s present levels of performance in Adaptive/Daily Living Skills remained unchanged from previous IEPs,⁴⁵ and Student’s goals were unchanged from the previous IEP.⁴⁶ In Communication/Speech and Language, Student was noted to have “made significant gains in regards to ■■■ communication and social skills. Although [Student] continues to exhibit articulation and language skills that are within the below average range, ■■■ is always ready to learn and explore new things. In regards to vocabulary, [Student] has made growth by continues to exhibit vocabulary skills that are within the lower range of functioning. [Student] can name several items in the classroom, home, and knows a host of animals [Student] can name [Student’s] classmates and teachers as well. At this time needs in the area of vocabulary continue to be a struggle for [Student], as [Student] can name some words but ■■■ struggles with many. ■■■ does well socially as well and is able to take turns during game and social tasks... ■■■ also struggles with answering basic questions.”⁴⁷ Student’s Communication baselines were unchanged in Goals 1 and 3, but increased from 25% to 45% in Goal 2.⁴⁸ In

³⁸ *Id.* at 15.

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 13.

⁴¹ R61:337-342.

⁴² P8:3-4.

⁴³ P17:1.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 4-5.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 7.

the area of Motor Skills/Physical Development, Student's present levels, baselines, and goals were largely unchanged from the previous IEP.⁴⁹ The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP.⁵⁰ The IEP team prescribed extended year services ("ESY") with goals in pre-writing, attentional instructions, shapes and colors, adaptive/daily living skills, and identifying letters.⁵¹

15. On February 6, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of [REDACTED] goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development, except one Adaptive goal that Student had mastered.⁵²

16. The IEP team reconvened for an annual review on April 4, 2019.⁵³ Attorney C and Educational Advocate A participated on the April 4, 2019 IEP team on Petitioner's behalf.⁵⁴ Petitioner requested that a comprehensive assistive technology evaluation be completed due to concerns raised in a speech and language evaluation conducted by Facility B in December 2018. The IEP indicated that "Assistive technology is being considered."⁵⁵ In Adaptive/Daily Living Skills, the team noted improvement toileting, understanding letter formation, concepts of printing, and letter identification at a pre-K level, counting to ten, identifying nine of eleven colors, and three of six shapes, and following directions. "Although [Student] has had difficulty expressing [REDACTED] needs/desires, [Student] has made great improvements in this area. [Student's] overall cognitive, communicative and behavioral profile includes deficits which impact [Student's] adaptive/daily living skills function. [Student] frequently engages in preferred independent sensory-based play, which makes it difficult for [Student] to perform adaptive skills consistently. [Student] exhibited reduced attention, responsiveness, interest and self-directedness, as well as decreased understanding of what was expected of [Student]."⁵⁶ Student's goals reflected improvement in responding to Student's first name, identifying colors and shapes, identifying uppercase letters, counting to ten, and identifying Student's written first name.⁵⁷ In Communication/Speech and Language, Student's baseline in Goal 1 increased from 20% to 30-40%, and from 10% to 20% in Goal 3, answering "wh" questions.⁵⁸ In Motor Skills/Physical Development, Student showed improvement in one of three goals, coloring 6" pictures with 50% accuracy.⁵⁹ The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP.⁶⁰ The team added thirty minutes per month of speech and language consultation services.⁶¹ The IEP team prescribed extended year services ("ESY") with goals in following directions, identifying the alphabet, counting and identifying

⁴⁹ *Id.* at 7-9.

⁵⁰ *Id.* at 10.

⁵¹ *Id.* at 14-15.

⁵² R61:343-348.

⁵³ P19:2.

⁵⁴ *Id.*

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.* at 6-7.

⁵⁸ *Id.* at 9-10.

⁵⁹ *Id.* at 11.

⁶⁰ *Id.* at 13.

⁶¹ *Id.*

numbers, writing letters, and identifying shapes and colors.⁶²

17. On April 10, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of ■ goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development, except three Adaptive goals and two Motor Skills goals that had just been introduced.⁶³

18. On April 30, 2019, Social Worker A completed a Functional Behavior Assessment, interviewing Student's teacher at School D. According to Student's teacher, problematic behaviors include instances of noncompliance including refusal to participate in non-preferred activities, not following adult directives and inconsistent completion of academic tasks. Student also exhibits emotional dysregulation including crying, cursing, yelling, and knocking over chairs. The behaviors can last up to 15 minutes per incident and occur in all environments throughout the day. "Generally, the behaviors are most likely to occur when [Student] is prompted to complete a non-preferred task or given verbal redirection when ■ is refusing to complete or participate in designated tasks."⁶⁴ [Student] demonstrates these behaviors towards the staff, not Student's peers.⁶⁵

19. On June 13, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of ■ goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development.⁶⁶

20. Student did not attend ESY during the summer of 2019.⁶⁷

21. On October 9, 2019, DCPS issued a Prior Written Notice indicating that it would proceed with Speech and Language, Occupational Therapy, and Psychoeducational evaluations "upon receiving recently completed evaluations (evaluations conducted within the last few days), which the attorney shared should be available within the next 10 days. In addition, the team agreed to order an AT assessment, per attorney request, which can be ordered today as an outside AT evaluation has not been completed within the last few days, as has been done with other evaluations... The MDT will wait until receiving the comprehensive (OT, Speech, Psychological) assessment that was conducted for [Student] just a few days ago, per parent and attorney reports to order further assessments to look further into these specific areas through assessment. Had [Student] not just been assessed in each of these areas, the team would be able to order assessments today. The team is not able to assess until receipt of this comprehensive assessment as parent or parent attorney did not know what assessments were used so that they are not replicated, and ultimately invalidated (on both sides) ... On June 5, 2019, [Student's] previous DCPS school was prepared to convene with mom and her legal representation for an AED meeting to review present levels and order evaluations. Parent cancelled this meeting, stating that she would like [Student's] next school to evaluate, rather than [for Student to] be evaluated immediately over the summer. In addition to emails the school has (and shared with attorney) from this meeting, attorney

⁶² P19:17.

⁶³ R61:349-354.

⁶⁴ P7:1-2.

⁶⁵ *Id.* at 3.

⁶⁶ R61:355-360.

⁶⁷ Testimony of Witness H.

confirmed today that mom was willing to wait several months for [Student] to attend [Student's] new school to be evaluated.”⁶⁸ As for behavioral concerns, “The team found that many of the concerns that mom has from [Student's] previous years of schooling are not held by School A since [Student] began attending School A the beginning of this school year (ex: aggressive behavior towards other and SIB) have not existed since enrollment at School A – mom also shared she does not have behavior concerns. Case Manager A shared that as of last week, there has (*sic*) been 3 instances of [Student] attempting to flip a chair over out of frustration.”⁶⁹

22. On October 15, 2019, Attorney A made a written request for Petitioner's educational advocate, Witness C, to have the opportunity to observe Student in the classroom.⁷⁰ DCPS declined the request for an observation by an educational advocate,⁷¹ but offered the Student's mother “to come to school to and see the classroom.”⁷² Petitioner wants the observation to ensure Student's safety; if Student is behaving erratically, Petitioner wants it to be documented.⁷³

23. On November 1, 2019, Petitioner's attorney notified DCPS that Petitioner was unsuccessful in having the comprehensive evaluations performed by the Social Security Administration that were discussed in the October 9, 2019 Prior Written Notice.⁷⁴ On November 6, 2019, Witness H confirmed that DCPS was now able to move forward with conducting Psychoeducational, Occupational Therapy, and Speech and Language evaluations.⁷⁵

24. On November 15, 2019, DCPS issued an IEP Progress Report from School A indicating that Student was progressing on all of [redacted] goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development except one Motor Skills goal that Student had mastered.⁷⁶

25. On December 6, 2019, Witness F completed a Comprehensive Occupational Therapy Reevaluation. “Results from the Berry VMI-6th Edition revealed the following: *average* overall visual-motor integration, visual perception and motor coordination skills. [Student] demonstrated good attention to task skills during the administration of the battery. [Student] looked at each choice before choosing an answer and was provided with minimal cues to slow [redacted] rate of speed. [Student's] performance on the Berry VMI 6th edition revealed that [Student] demonstrates adequate skills in the areas of eye and had coordination skills. This skill will enhance [Student's] participation in functional academic tasks performed within the classroom environment. Based on [Student's] performance on the BOT-2nd Edition, [Student's] overall fine manual control was in the *average* range and [Student's] manual coordination scores fell in the *below average* range. While [Student] completed all

⁶⁸ P35:1-2.

⁶⁹ *Id.* at 1.

⁷⁰ P64:1.

⁷¹ *Response to Parent's Administrative Due Process Complaint* at 3.

⁷² Respondent's Exhibit (“R:”) 56:210.

⁷³ Testimony of Petitioner.

⁷⁴ P67:1.

⁷⁵ P71:6.

⁷⁶ R61:364-369.

of the tasks presented, [Student's] slow rate of speed and decreased coordination skills impacted █ overall score significantly. [Student] demonstrated challenges following directions of the manual coordination sections of the subtest. [Student] demonstrated decreased manipulation and grasping skills. Thus, [Student's] challenges with manual dexterity and upper limb coordination skills may impact █ participation within [the] academic setting." The evaluator, who provides Student's occupational therapy services, provided twelve recommendations to continue the development of Student's fine, gross, and visual motor skills.⁷⁷

26. On December 9, 2019, Evaluator B completed an Assistive Technology Assessment. The evaluator found that "Direct methods of data collection indicate that [Student] has some difficulty answering "wh" questions at times, demonstrates traits of echolalia. █ benefitted from the support of picture symbols to accurately answer "wh" questions, although [Student] did not require the verbal output of the application. [Student] was able to answer the question verbally after viewing the picture symbols and verbally stating the answer to the question while pointing to the symbol... Overall, [Student] may benefit from low to high tech assistive technology to support █ access to the educational environment... Based on the data collected during the assistive technology evaluation, [Student] may benefit from picture supports to enhance █ ability to communicate effectively within the classroom environment. Although [Student] can communicate verbally, Augmentative and Alternative Communication (AAC) may be use to repair communication breakdowns, increase the mean length of utterance, or support a student's word retrieval. Since [Student] does not require voice output, since █ is able to verbally state the work after viewing the picture symbol within a field, the IEP team should determine if [Student] would benefit from a trial of AAC supports (either low or high tech) to determine if these tools increase █ communication within the educational environment. In addition, the Specialist recommends a trial of assistive technology for reading and writing to support █ access to the academic curriculum."⁷⁸ She suggested a trial of a low or high tech version of a picture based AAC, digital word banks, and digital books.

27. On December 9, 2019, Witness E completed a Speech and Language Reevaluation. In Articulation, Student obtained a standard score of 84, one point below the average range of 85-115.⁷⁹ In Receptive Vocabulary, Student scored 77, below average and in the 6th percentile of same-aged peers. "This indicates that [Student] may have difficulty understanding grade level vocabulary in the general education setting."⁸⁰ In Expressive Vocabulary, Student scored 69, below average and in the 2nd percentile. "This indicates that █ may have difficulty utilizing grade level vocabulary for a variety of purposes such as answering questions or participating in classroom discussions."⁸¹ The evaluator was unable to complete an assessment of Student's receptive and expressive language skills due to Student's inability to obtain a basal on various subtests: "*i.e.*, perfect score on two consecutive start items."⁸² Student's scores were below average in Formulated Sentences,

⁷⁷ P10:8-9.

⁷⁸ P11:6-7.

⁷⁹ R50:141

⁸⁰ *Id.* at 142.

⁸¹ *Id.*

⁸² *Id.* at 142-143.

Recalling Sentences, and Pragmatics.⁸³ The evaluator opined that “Currently, [Student] presents with mild articulation deficits; however, these articulation errors do not negatively impact [Student’s] overall intelligibility when communicating. [Student] also presents with a mild deficit in receptive vocabulary and a mild-moderate deficit in expressive vocabulary. According to qualitative information specific to [Student’s] overall language skills indicates that ■■■ presents with a moderate expressive/receptive language delay.”⁸⁴

28. As of the date of the hearing, the Psychoeducational Evaluation had not been completed, but it was expected to be completed by January 3, 2020, when the parties would meet to review the assessments and Student’s classification and eligibility.⁸⁵

29. DCPS did not order an updated Functional Behavior Assessment as no extreme behaviors were observed since Student enrolled at School A.⁸⁶

30. Student interacts with non-disabled peers 40 minutes per week in “Specials:” Art, Physical Education, Music, Library, and Spanish.⁸⁷

31. DCPS failed to provide Student 9.5 hours of prescribe speech and language services during the 2017-1018 school year,⁸⁸ and 12.5 hours for the 2018-19 school year.⁸⁹

32. DCPS failed to provide Student 9 hours of occupational services during the 2017-18 school year.⁹⁰

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.⁹¹

⁸³ *Id.* at 143-144.

⁸⁴ *Id.* at 145.

⁸⁵ Testimony of Witness H.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ P38:3, P40:3, P40:8, P40:14, P40:18.

⁸⁹ P38:2, P41:8, P41:11, P41:15, P41:17, P41:20, P41:27; P41:34.

⁹⁰ P39:2, P40:6, P40:10, P40:16, P40:26.

⁹¹ D.C. Code Sect. 38-2571.03(6)(A)(i).

The first issue involves the appropriateness of the Student's IEP. Therefore, as to this issue, 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.⁹²

Whether DCPS failed to provide Student with an appropriate Individualized Education Program (IEP) on or about April 4, 2018, December 13, 2018, and/or April 4, 2019 by failing to include: (1) Updated present levels of performance information, baseline data, and/or goals; (2) Physical therapy services; (3) 90 minutes/week of speech and language services; (4) Consultative occupational therapy services and/or a sensory diet; (5) Appropriate Behavior Support Services (“BSS”) such as applied behavior analysis (“ABA”) therapy or a social skills group; (6) Assistive technology; and (7) A behavior plan. If so, did DCPS act in contravention of 34 CFR 300.320, *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*,⁹³ and *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*?⁹⁴ If so, did DCPS deny the Student a FAPE?

An IEP must be “reasonably calculated” to enable the child to receive educational benefit.⁹⁵ As stated in *S.S. ex rel. Shank v. Howard Road Academy*,⁹⁶ the measure and adequacy of an IEP should be determined as of the time it was offered to the student. In 2017, the Supreme Court addressed a split amongst circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. In keeping with *Rowley*,⁹⁷ in *Andrew F.*, the Court held that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁹⁸ The Court made clear that the standard is “markedly more demanding than the ‘merely more than *de minimis*’ test” applied by many courts.⁹⁹

Updated Present Levels, Baseline Data, and Goals

Petitioner argues that the three IEPs were inappropriate because present levels of performance, baseline data, and goals were carried forward from one IEP to the next. Claimant’s initial IEP was developed at School C on September 26, 2017. Prior to its development, DCPS conducted an Educational Evaluation on August 8, 2017, a Supplemental Psychological Assessment on September 15, 2017, an Occupational Therapy Assessment on September 11, 2017, and a Physical Therapy Evaluation on September 19, 2017. The IEP prescribed 26 hours of specialized instruction outside of general education, four hours per month of speech and language services, two hours per month of occupational therapy services, 30 minutes per month of physical therapy consultation services, and 45 minutes per month of occupational therapy consultation services. The team specifically found

⁹² *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁹³ 137 S.Ct. 988 (2017).

⁹⁴ 458 U.S. 176 (1982).

⁹⁵ *Id.* at 203.

⁹⁶ 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008).

⁹⁷ 458 U.S. at 203-4, 207.

⁹⁸ 137 S.Ct. at 1001.

⁹⁹ *Id.* at 1000.

that Student's behavior did not impede Student's learning or that of other children, and assistive technology devices were not deemed to be required. Petitioner does not contest the appropriateness of the September 26, 2017 IEP.

DCPS convened a meeting to review Student's progress on April 4, 2018. The present levels of functional performance in the area of Adaptive/Daily Living Skills were virtually identical to those in the 2017 IEP, and additional goals were established. While the present levels for Communication/Speech and Language were unchanged, Student's baselines on three goals increased by 20%, 25%, and 10%. In Motor Skills/Physical Development, Student was noted to have made progress in several areas with continued delays in others; new annual goals were prescribed. The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP. The team did not retain the consultation services in speech and language and occupational therapy that were prescribed in the 2017 IEP. However, consultation services involve coordination between related service providers and Student's special education teacher, rather than therapy for Student. On November 14, 2018, DCPS issued an IEP Progress report from School D indicating that Student was progressing on all of [REDACTED] goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development.

Thereafter, on December 11, 2018, the Speech and Language Evaluation at Facility B found that Student had severe deficits in receptive and expressive language, and a mild articulation delay. Deficits were also noted for pragmatic language, and Student had "some autistic-like tendencies that need to be considered." The pathologist recommended speech therapy at a frequency of 90 minutes per week split up over two sessions.

The IEP team met two days later. Assistive technology devices were again deemed unnecessary. Student's present levels of performance in Adaptive/Daily Living Skills remained unchanged from previous IEPs, and [REDACTED] goals were unchanged from the previous IEP. In Communication/Speech and Language, Student was noted to have made significant gains in communications and social skills. [REDACTED] Communication baselines were unchanged in Goals 1 and 3, but increased from 25% to 45% in Goal 2. In the area of Motor Skills/Physical Development, [REDACTED] present levels, baselines, and goals were largely unchanged from the previous IEP. The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP.

On February 6, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of [REDACTED] goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development, except one Adaptive goal that Student had mastered. The team reconvened on April 6, 2019 for another annual IEP review. Petitioner requested that a comprehensive assistive technology evaluation be completed due to concerns raised in a speech and language evaluation conducted by Children's Hospital in January 2019. The IEP indicated that "Assistive technology is being considered." In Adaptive/Daily Living Skills, the team noted improvement toileting, understanding letter formation, concepts of printing, and letter identification at a pre-K level, counting to ten, identifying nine of eleven colors, and three of six shapes, and following directions. Student's goals reflected improvement in responding to Student's first name, identifying colors and shapes, identifying uppercase letters, counting to ten, and identifying Student's written first name. In Communication/Speech and Language, Student's baseline in

Goal 1 increased from 20% to 30-40%, and from 10% to 20% in Goal 3, answering “wh” questions. In Motor Skills/Physical Development, Student showed improvement in one of three goals, coloring 6” pictures with 50% accuracy. The levels of specialized instruction and related services, outside of general education, were retained from the previous IEP, but the team added thirty minutes per month of speech and language consultation services.

On April 10, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of ■ goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development, except three Adaptive goals and two Motor Skills goals that had just been introduced. On June 13, 2019, DCPS issued an IEP Progress Report from School D indicating that Student was progressing on all of ■ goals in Adaptive/Daily Living Skills, Communication/Speech and Language, and Motor Skills/Physical Development.

The record reveals that although DCPS did not modify the present levels of performance in Student’s IEPs, it did consistently document changes in Student’s baseline data and goals. In Progress Reports issued on November 14, 2018, February 6, 2019, April 10 2019, and June 13, 2019, DCPS specifically documented progress made on each of Student’s IEP goals. While few goals were mastered, the reports indicated that Student was progressing on virtually all of ■ goals. I also note that Attorney C and Educational Advocate A participated on the April 4, 2019 IEP team, and there is no indication that they raised objections to the IEP developed at that time. Thus, I conclude that any deficiencies in the drafting of present levels of performance, baselines, and goals did not amount to a denial of FAPE.

Elimination of PT Services

Petitioner argues that the failure to retain physical therapy services on the April 4, 2018 IEP constituted a denial of FAPE. DCPS conducted a Physical Therapy Evaluation on September 19, 2017. Physical therapy consultative services and goals were added to the IEP that was developed on September 26, 2017. However, on December 1, 2017, the physical therapist at School D, Witness G, completed a Service Tracker that indicated that Student was totally independent navigating the classroom and school setting to access the academic program, and that Student was not a candidate for school based physical therapy services. The Service Tracker indicated that Witness G had discussed the matter with Petitioner. Petitioner had “absolutely no concerns” about physical therapy services, she had informed Facility A of her lack of concern, and she did not know why Student was receiving physical therapy. Therefore, the record supports the elimination of physical therapy services from Student’s IEP.

Failure to Increase Speech and Language Services and to Address Assistive Technology

On December 11, 2018, Speech Pathologist A at Facility B completed a Speech and Language Evaluation. The clinical impression was that Student had severe deficits in receptive and expressive language and a mild articulation delay. Deficits were also noted for pragmatic language, and Student had “some autistic-like tendencies that need to be considered.” The pathologist recommended speech therapy at a frequency of 90 minutes per week split up over two sessions. At the IEP meeting on December 13, 2018, the team noted

that Student had made significant gains in communication and social skills, but conceded that Student's articulation and language skills were within the below average range. Vocabulary remained a struggle, and Student had difficulty answering basic questions. Student made moderate measurable progress in but one of three goals. The team declined to increase Student's speech and language services.

At the IEP meeting on April 4, 2019, Petitioner requested that a comprehensive assistive technology evaluation be completed due to concerns raised in a speech and language evaluation conducted by Facility B. The IEP team indicated only that "Assistive technology is being considered."

On December 9, 2019, Evaluator B completed an Assistive Technology Assessment and found that Student may benefit from low to high tech assistive technology to support Student's access to the educational environment. On December 9, 2019, Witness E completed a Speech and Language Reevaluation. In Articulation, Student obtained a standard score of 84, one point below the average range of 85-115. In Receptive Vocabulary, Student scored 77, below average and in the 6th percentile of same-aged peers. "This indicates that [Student] may have difficulty understanding grade level vocabulary in the general education setting." In Expressive Vocabulary, Student scored 69, below average and in the 2nd percentile. "This indicates that ■ may have difficulty utilizing grade level vocabulary for a variety of purposes such as answering questions or participating in classroom discussions." The evaluator was unable to complete an assessment of Student's receptive and expressive language skills due to Student's inability to obtain a basal on various subtests: "i.e., perfect score on two consecutive start items." Student's scores were below average in Formulated Sentences, Recalling Sentences, and Pragmatics. The evaluator opined that "Currently, [Student] presents with mild articulation deficits; however, these articulation errors do not negatively impact [Student's] overall intelligibility when communicating..." and that "■ presents with a moderate expressive/receptive language delay."

The record reveals that DCPS was on notice through the Facility B Speech and Language Evaluation in December 2018 of severe deficits in expressive and receptive language. It offered no explanation for the apparent failure even to discuss the evaluator's recommendation that Student's speech and language services be increased to 90 minutes per week. DCPS also offered no explanation for declining Petitioner's request for an assistive technology assessment at the April 4, 2019 IEP team meeting. The Speech and Language Reevaluation conducted by Witness E on December 9, 2019 confirmed Student's deficits in expressive and receptive language, such that the evaluator was unable to get a basal on several subtests. Therefore, I conclude that DCPS denied Student a FAPE by failing to increase the amount of speech and language services and failing to address Petitioner's request for an assistive technology assessment.

Removal of OT Consult

On September 11, 2017, DCPS completed an Occupational Therapy Assessment Report that led the IEP team to prescribe two hours per month of occupational therapy outside of general education. The April 4, 2018 IEP noted that Student made progress in several areas related to Motor Skills/Physical Development. While the team eliminated occupational consultation services from the previous IEP, it retained the two hours per month of direct

services to Student. Consultation services involve coordination between related service providers and special education teachers, rather than direct therapy to students. The four IEP Progress Reports in the record reveal that Student has made consistent progress in Motor Skills/Physical Development. Petitioner has not shown that there has been any denial of FAPE to Student by the elimination of OT consultation services after the initial IEP.

Whether DCPS failed to evaluate Student comprehensively in a timely manner by failing to conduct a timely Assistive Technology evaluation and/or a timely Functional Behavior Assessment (“FBA”).

Assistive Technology

As discussed above, I have concluded that DCPS denied Student a FAPE by failing to evaluate Student’s need for assistive technology in light of the findings in the December 11, 2018 Speech and Language Evaluation by Speech Pathologist A at Facility B.

Functional Behavior Assessment

In Student’s initial IEP, the IEP team considered the feedback from Student’s teacher and concluded that Student’s behavior was not found to impede Student’s learning or that of other children. During the fall of 2018, Student’s teacher kept a log, described in paragraph 11 of the Findings of Fact. While there were numerous instances of disruptive behavior, the log covered only a two-month period from September 24, 2018 through November 19, 2018, and the log addressed behaviors on but 12 days during that period. The December 13, 2018 IEP noted that Student “does well socially as well and is able to take turns during games and social tasks...” The April 4, 2019 IEP reported that “[Student] frequently engages in preferred independent sensory-based play, which makes it difficult for ■■■ to perform adaptive skills consistently. [Student] exhibited reduced attention, responsiveness, interest and self-directedness, as well as decreased understanding of what was expected of ■■■.”

On April 30, 2019, Social Worker A completed a Functional Behavior Assessment, interviewing Student’s teacher at School D. According to Student’s teacher, problematic behaviors include instances of noncompliance including refusal to participate in non-preferred activities, not following adult directives and inconsistent completion of academic tasks. Student also exhibits emotional dysregulation including crying, cursing, yelling, and knocking over chairs. The behaviors can last up to 15 minutes per incident and occur in all environments throughout the day. “Generally, the behaviors are most likely to occur when [Student] is prompted to complete a non-preferred task or given verbal redirection when ■■■ is refusing to complete or participate in designated tasks.” [Student] demonstrates these behaviors towards the staff, not peers.

The Prior Written Notice on September 26, 2019 reported aspects of a Multidisciplinary Team (“MDT”) Meeting that addressed behavioral concerns, “The team found that many of the concerns that mom has from ■■■ previous years of schooling are not held by School A since [Student] began attending School A the beginning of this school year (ex: aggressive behavior towards other and SIB) have not existed since enrollment at School A – mom also shared she does not have behavior concerns. Case Manager A shared that as of last week, there has (*sic*) been 3 instances of [Student] attempting to flip a chair over out

of frustration.”

Overall, it cannot be fairly said that DCPS ignored Student’s behavior. ■■■ teacher kept a log in the fall of 2018, and a Functional Behavior Assessment was completed in April 2019. While Student is responsible for periodic disruptions, none of ■■■ teachers or service providers considered that ■■■ behavior had a significant effect on ■■■ ability to function in the academic environment, and ■■■ behavior is not reported to disturb ■■■ peers. It is also significant that the staff at ■■■ current school reported that it has not observed the behaviors previously reported, and that Petitioner does not have concerns about Student’s behavior. Therefore, I conclude that DCPS did not deny Student a FAPE by failing timely to complete a Functional Behavior Assessment or develop a behavior plan.

Appropriate Behavior Support Services (“BSS”) such as Applied Behavior Analysis (“ABA”)

As just discussed, the record does not support a finding that DCPS failed adequately to address Student’s behavior issues.

Whether DCPS failed to conduct a timely reevaluation of Student as recommended by ■■■ initial evaluations conducted through Early Stages to rule out or confirm diagnoses of Autism, ADHD, a Speech and Language Impairment, and Intellectual Disability.

34 C.F.R. §300.303 provides that reevaluations must be conducted if the child’s parent or teacher requests a reevaluation, not more than once a year unless the parent and public agency agree otherwise, and at least once every three years unless the parent and public agency agree that a reevaluation is unnecessary.

Petitioner’s counsel argues that the September 15, 2017 Supplemental Psychological Assessment Report recommended reevaluation in one year if there was no measurable progress to assess disorders associated with language, social communication, social skills, and sensory integration difficulties. In fact, the report states: “If ■■■ behavioral and social difficulties increase in severity or frequency or measurable growth is not observed in one school year, re-evaluation might be warranted to rule out disorders associated with language, social communication, social skills, and sensory integration difficulties.”¹⁰⁰

As discussed above, the record does not reveal behavioral and social difficulties that are significant. Counsel also argues that there should have been a physical therapy reevaluation before termination of consultation services. However, direct physical therapy services to Student were terminated because ■■■ service provider determined that ■■■ did not need them, and Petitioner concurred.

Petitioner obtained an independent Speech and Language Evaluation at Facility B fifteen months after the Supplemental Psychological Assessment that revealed severe deficits in receptive and expressive language, a mild articulation delay, and “some autistic-like tendencies that need to be considered.” As discussed above, I have concluded that DCPS denied Student a FAPE by failing to address the service recommendations in this evaluation.

¹⁰⁰ P2:10.

However, the overall record does not support a denial of FAPE due to behavioral or social concerns.

Whether DCPS failed to conduct timely Physical Therapy, Psychological, or Adaptive assessments.

As discussed above, the record establishes that Student has not required physical therapy services since Student's initial IEP. There is no evidence of a request or need for an adaptive assessment. The Supplemental Psychological Evaluation was conducted in September 2017, and for the reasons discussed above, the record did not compel reevaluation after one year. In June 2019, Petitioner declined to authorize School D to conduct a psychological evaluation; she preferred that any further evaluations be conducted by the school in which Student would enroll in the fall of 2019. Authorization to evaluate was further delayed awaiting evaluations that Petitioner expected the Social Security Administration to conduct. Once it was confirmed that Social Security had not, and would not, perform the evaluations, Petitioner authorized DCPS to conduct occupational therapy, speech and language, and psychological examinations. Thus, the record does not support a finding that DCPS failed timely to conduct physical therapy, psychological, or adaptive assessments.

Whether DCPS denied Student a free appropriate public education ("FAPE") by failing to allow the parent's designee to conduct an observation of the student in the classroom.

On October 15, 2019, Attorney A made a written request for Petitioner's educational advocate to have the opportunity to observe Student in the classroom.¹⁰¹ DCPS declined the request for an observation by an educational advocate.¹⁰² However, at the Resolution Meeting on November 15, 2019, DCPS offered the Student's mother "to come to school to and see the classroom."¹⁰³

District of Columbia law specifically authorizes a parent to observe his or her child in the classroom and/or to have a special education professional conduct the observation. The District of Columbia Special Education Student Rights Act of 2014 ("Act") provides in pertinent part:

Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational program: (i) The parent of a child with a disability; or (ii) A designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; *provided that the designee is neither representing the parent's child in litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.*¹⁰⁴

¹⁰¹ P64:1.

¹⁰² *Response to Parent's Administrative Due Process Complaint* at 3.

¹⁰³ R56:210.

¹⁰⁴ DC Code § 38-2571.03(5) (2015) (emphasis supplied).

The designee proposed by Petitioner, Witness C, is an employee of the law firm that represents Petitioner. In its *Response to Parent's Administrative Due Process Complaint*, DCPS asserted that "The parent's designee is not entitled to do such an observation. The firm is engaged in legal representation of the parent and the advocate is law firm employee. The individual has failed to provide an expertise in the areas where the complaint now alleges multiple failures in a variety of areas and expertise."¹⁰⁵

DCPS offers no support for its contention that an employee of the firm representing a petitioner is precluded from serving as an observer under the Act. The Act specifically precludes such participation only if the observer is representing the parent's child in litigation related to the provision of FAPE, or if the observer has a financial interest in the outcome of the litigation. First, when the request for the observation was made, Petitioner had not initiated litigation against DCPS. Therefore, the exception for representation in litigation was not available to DCPS. Second, Petitioner is represented in this litigation by Attorney A, not Witness C, and DCPS has asserted no facts to establish that Witness C has ever served as a representative, either in IEP team meetings or in this proceeding. Third, DCPS has not asserted or offered evidence that Witness C's compensation is related to participation in this proceeding. Fourth, as for the argument that Witness C lacked the necessary expertise to serve as an observer, DCPS raised no objection at the hearing to the qualifications of Witness C to offer testimony as an expert in school psychology and IEP development. Therefore, DCPS denied Petitioner a FAPE by denying Petitioner the opportunity to have her designated educational advocate observe Student in the classroom.

Whether DCPS failed to implement Student's IEP appropriately during the 2017-18 and 2018-19 school years by failing to provide the full extent of [REDACTED] speech and language therapy services (9.5 hours in 2017-18 and 12.5 hours in 2018-19), occupational therapy services (9 hours in 2017-18), and 26 hours of specialized instruction outside of general education during the 2019-20 school year.

As documented in paragraphs 31 and 32 in the Findings of Fact, DCPS failed to implement Student's IEP appropriately during the 2017-18 and 2018-19 school years by failing to provide the full extent of [REDACTED] speech and language therapy services (9.5 hours in 2017-18 and 12.5 hours in 2018-19), occupational therapy services (9 hours in 2017-18).

Petitioner's counsel also alleged that since the beginning of the 2019-20 school year, Student has received only 20 of the 26 hours of specialized instruction outside of general education prescribed in the IEP, citing Exhibit P36. This argument assumes that lunch and recess are in the general education setting. However, Witness H, the LEA Case Manager, testified that special education students are segregated from their non-disabled peers in all activities other than "Specials," which occupy a daily 50-minute time period. Thus, between 8:45 a.m. and 3:00 p.m. daily, 26.25 hours per week, Student would be outside of general education.

I conclude that DCPS denied Student a FAPE by failing to provide 22 hours of speech and language services over a two-year period, and nine hours of occupational therapy during the 2017-18 school year.

¹⁰⁵ *Response to Parent's Administrative Due Process Complaint* at 3.

RELIEF

Petitioner seeks (1) placement in an alternative program that can implement the full 26 hours of specialized instruction outside general education prescribed in the IEP, preferably at School B, (2) amendment of the IEP to provide for BSS services such as ABA therapy and social skills training, (3) increased speech services, (4) comprehensive reevaluations to include Psychological, Adaptive, Physical Therapy, Occupational Therapy, and an FBA, (5) an opportunity for Petitioner’s educational advocate to observe Student in the classroom, and (6) compensatory education.

ORDER

As a result of the foregoing:

1. Respondent shall pay for 50 hours of independent speech and language therapy in accordance with 5 D.C.M.R. Section 3027.5.
2. Respondent shall pay 9 hours of independent occupational therapy services in accordance with 5 D.C.M.R. Section 3027.5.
3. Respondent shall reconvene the IEP team within thirty days to revise the Student’s IEP to add weekly speech and language services and assistive technology to address Student’s speech and language deficits.
4. Respondent shall facilitate a classroom observation by Witness C at the earliest mutually convenient date.
5. 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: January 13, 2020

Copies to:

- cc: Attorney A, Esq.
Attorney B, Esq.
OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS