

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

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OSSE  
Office of Dispute Resolution  
January 20, 2021

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: January 20, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0190

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: January 11, 2021

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or Mother) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to timely find Student eligible for special education, failure to conduct a comprehensive special education evaluation, failure to develop appropriate Individualized Education Programs (IEPs) and failure to provide the parent access to Student’s complete education records.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on October 29, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on October 30, 2020. On November 16, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On December 3, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. My final decision in this case was originally due by January 12, 2021. Due to the holiday breaks, the earliest due process hearing date, mutually available to the parties and counsel, was January 11, 2021. On December 11, 2020, to accommodate the January 11<sup>th</sup> hearing date, I granted DCPS' unopposed motion to extend the final decision due date to January 26, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on January 11, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother testified and called as witnesses EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS waived making an opening statement and called no witnesses. Petitioner's Exhibits P-4 through P-44, P-47 through P-51 and P-53 through P-54 were admitted into evidence,

including Exhibits P-17 through P-27 and P-48 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-45 and P-46. DCPS offered Exhibits R-1 through R-4 and R-7 through R-17, which were admitted into evidence without objection.

Following presentation of the evidence, counsel for the respective parties made oral closing arguments. Neither party requested leave to file written closings.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as certified in the November 16, 2020 Prehearing Order, are:

- a. Whether DCPS denied the student a FAPE by failing to timely initiate eligibility evaluations by fall 2018 for the student pursuant to the child find obligation under the IDEA;
- b. Whether DCPS denied the student a FAPE by not ensuring that its initial eligibility evaluation of the student during the 2019-2020 School Year was comprehensive, by failing to conduct a Speech and Language evaluation, an Occupational Therapy (OT) evaluation, a Test of Non-Verbal intelligence, an Assistive Technology (AT) evaluation and/or a Functional Behavioral Assessment (FBA);
- c. Whether DCPS denied the student a FAPE by not ensuring that Student was provided an appropriate IEP or placement from November 2019 through the present in that the initial IEP for student was not appropriate because it failed to address communication deficits or the student's need for AT; the goals in academic areas were not appropriate given Student's deficits; the IEP lacked behavioral support services or any goals to address adaptive deficits, behavior

and social skill deficits, and/or executive functioning issues; the IEP did not address the student's needs in the areas of OT or speech and language because the student was never evaluated in those areas; and the IEP did not provide the student with a sufficient amount of specialized instruction or the least restrictive environment (LRE) that would be appropriate for this student given the student's deficits, behavior issues, or needs. After the student's IEP was amended on or about March 6, 2020, the IEP was also inappropriate for the same reasons and the amended IEP did not provide the student with Extended School Year (ESY) services. Since the imposition of Coronavirus restrictions and distance learning services, DCPS has failed to amend Student's IEP to offer any additional services to address the student's difficulty with accessing education through an online program.

d. Whether DCPS denied the student a FAPE by failing to provide, or timely provide, the student with a Behavior Intervention Plan (BIP) despite the student's ongoing behavior needs.

e. Whether DCPS denied the student a FAPE by failing to provide the parent with full access to the student's education records upon request of Petitioner's attorneys.

For relief, Petitioner originally requested that the hearing officer order as follows:

a. Order that DCPS shall place and fund the student in a non-public therapeutic day school with transportation;

b. Order that DCPS shall conduct or fund additional assessments of Student including a Psychological and/or Neuropsychological evaluation that includes a test of Non-Verbal Intelligence; a Speech Language evaluation that assesses the student's receptive and expressive functioning, overall language skills including pragmatic language skills; an OT evaluation that addresses not only motor and visual perceptual skills but also the student's sensory functioning; an AT evaluation; and an FBA;

c. Order that DCPS shall revise the student's IEP, to include updated present levels of performance information, annual goals, and an increase of service hours, as well as, goals and services to address adaptive deficits in all domains, executive functioning deficits, social skill deficits, social-emotional functioning, and develop a formal BIP;

d. Award the student compensatory education for denials of FAPE alleged in the

complaint and order DCPS to fund a compensatory education evaluation; Petitioner also asserted reservation of the right to request additional compensatory education upon the completion of the additional evaluations requested;

e. Order that DCPS provide the parent, via email, the student's requested education records, including but not limited to RTI progress monitoring data, behavior records, standardized test scores, report cards and progress reports.

### **FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education under the Multiple Disabilities (MD) classification. Exhibit P-12.
2. Student has attended DCPS public schools since pre-kindergarten. From the 2014-2015 through 2016-2017 school years, Student attended CITY SCHOOL 1. Since the 2017-2018 school year, Student has been enrolled in CITY SCHOOL 2. In the 2019-2020 school year, Student repeated REPEATED GRADE after failing all classes the previous school year. Student is currently enrolled in CURRENT GRADE. Exhibit P-15, Testimony of Mother.
3. Student was evaluated by a psychiatrist at HOSPITAL in December 2013 due to ongoing behavioral difficulties that led to issues both at home and at school. The psychiatrist reported that Student's behavioral difficulties appeared to be related to a lot of impulsivity and inattention, which suggested a diagnosis of Attention Deficit-

Hyperactivity Disorder (ADHD), combined type. In addition, Student appeared to have a lot of anxiety as noted with separation difficulties and fears that someone would “get to” Student. These issues suggested an underlying anxiety disorder, not otherwise specified (NOS) diagnosis. In addition, there appeared to be concurrent delays noted in Student’s speech and social development. There also appeared to be sensitivities and other aspects which supported a possible diagnosis of autism spectrum disabilities. However, Student’s interactions and history possibly supported anxiety as being a strong component for these social difficulties. The psychiatrist diagnosed Student with ADHD, Combined Type and Anxiety Disorder, NOS. Autism Spectrum Disorder could not be confirmed by the psychiatrist. Exhibit P-15. Mother orally told staff at Student’s school about the psychiatrist’s findings, but may not have provided the psychiatrist’s written report to DCPS at the time. Testimony of Mother. DCPS’ SCHOOL PSYCHOLOGIST did have access to the report in October 2019, when she conducted a Comprehensive Psychological Evaluation of Student. Exhibit P-15.

4. Student was first introduced to the DCPS Student Support Team (SST) in October 2013. At the time, Student was struggling on a daily basis to maintain a positive attitude, pro-social behavior, and compliance with adult directives. Student had not yet learned how to regulate behavior or to self-calm when becoming angry. In October 2017 a Response to Intervention (RTI) meeting was held to discuss academic and behavioral concerns for Student. Student was referred for Tier II RTI supports due to a history of academic deficits in reading and math and significant behavior problems. At the time,

Student's literacy and math levels were assessed at several years below grade level. At the beginning of the 2018-2019 school year, Student was referred for Tier III RTI interventions. Progress monitoring records revealed that Student's problem behaviors were increasing in intensity and frequency. These behaviors included blurting out, being out of seat, walking out of class without permission, cutting class, and altercations with peers. Student displayed off-task behaviors when in class and did not complete homework or classroom assignments. Student was referred to the D.C. Department of Behavioral Health Clinical Social Worker for counseling to address significant behavioral concerns. Exhibit P-15.

5. In October 2017, the City School 2 school psychologist scheduled a special education referral meeting for Student, which appears to have been cancelled due to Mother's not showing up. Exhibit R-8.

6. Mother believes that in the 2017-2018 school year, Student was doing good at City School 2. Following the 2018-2019 school year, Student was retained in Repeated Grade and Student spiraled "down hill." Testimony of Mother. Student received F's in all core academic courses for the 2018-2019 school year. Exhibit P-35.

7. In fall 2019, Student was referred for an initial DCPS psychological evaluation by Mother, in conjunction with the City School 2 Multidisciplinary Team (MDT). Mother expressed concerns about Student's failing grades, Student's distracting behaviors that impeded Student's learning and that of others, and Student's lack of motivation and focus. In addition, Mother reported that Student presented with signs of

being depressed. Mother reported that Student cried a lot and would lock Student's self in the bathroom for hours. Exhibit P-15.

8. During the 2017-2018 and 2018-2019 school years, Student was disciplined on at least 5 occasions for fighting, reckless behavior and disruptive behaviors. P-28, P-29, P-32, P-33, P-34.

9. At an October 2019 Analysis of Existing Data (AED) meeting, the MDT team at City School 2 reported that Student exhibited great challenges in adhering to rules and behavior guidelines and caused disruptions in the learning environment by off-task behaviors, altercations with fellow students, refusing to follow redirection from staff, arriving late to class and leaving the classroom without permission. Student was reported to be functioning 5 years below grade level in math and 4 years below grade level in reading. The MDT team also reported that in the prior, 2018-2019, school year, Student failed all core courses, except for obtaining a D- in math. The 2018-2019 school year report card noted that Student failed due to absences, lack of initiative, poor study habits, incomplete homework assignments, poor test scores and incomplete classroom assignments. Exhibit P-4.

10. On September 27, 2019, as part of the initial evaluation for special education eligibility, School Psychologist conducted a comprehensive psychological evaluation of Student. In her October 25, 2019 report, School Psychologist reported that Student's overall cognitive functioning fell in the extremely low range. Strengths were noted in visual spatial skills. Weaknesses were noted in fluid reasoning skills. Student's

academic functioning performance tested in the below average to the extremely low range. Parent's and teachers' ratings on social emotional functioning rating scales revealed significant behavioral and emotional concerns for Student in various areas of executive functioning and emotional regulation. School Psychologist concluded that Student appeared to meet special education eligibility criteria under the Other Health Impairment for ADHD (OHI-ADHD) and Autism Spectrum Disorder (ASD) classifications. Exhibit P-15.

11. On November 12, 2019, the eligibility team at City School determined that Student met criteria for special education eligibility based on Multiple Disabilities (MD). The underlying disabilities were ASD and OHI-ADHD. Exhibit P-7.

12. On or about November 18, 2019, a meeting was convened at City School 2 to develop Student's initial IEP. Mother participated in the meeting. Exhibit P-6. The initial IEP identified math, reading and written expression as areas of concern for Student. Although the IEP team reported that based on parent and teacher reports, Student's aggressive and disruptive behaviors, school absences, lack of initiative, poor study habits and not completing assignments impeded Student's academic progress, Social, Emotional and Behavioral Development was not identified as an IEP area of concern. The IEP provided for Student to receive 15 hours per week of Specialized Instruction in math and reading, outside of the general education setting. For Other Classroom Aids and Services, the IEP provided for Student to receive extended time, modification, small group, direct instruction and rewards. The IEP team determined

that Student did not require Extended School Year (ESY) services for the provision of FAPE. Exhibit P-5.

13. The November 2019 IEP was amended on March 6, 2020, only to revise and update the IEP Post-Secondary Transition Plan. Exhibit P-9.

14. DCPS schools have been closed, with some distance learning provided, since March 16, 2020 due to the Coronavirus emergency. Hearing Officer Notice.

15. Since the school closure, Student has not participated in distance learning and has made no progress on the November 2019 IEP goals. Exhibit P-39. Student received failing grades or Incompletes in all courses for the 2019-2020 school year. Exhibit P-40. Student received “F” grades for all core courses for the first term of the 2020-2021 school year, except in English, where Student received a “C-”. Exhibit P-44.

16. On or about December 15, 2020, after the complaint was filed in this case, DCPS convene an IEP review meeting for Student. The December 2020 IEP indicated that Student was performing 5 to 6 years below grade level in reading and in math and identified Reading, Mathematics and Written Expression as areas of concern. The IEP team increased Student’s Specialized Instruction Services to 32 hours per week (full time) outside of general education. The IEP does not identify Social, Emotional and Behavioral Development as an area of concern for Student or provide for Behavioral Support Services or other related services. The IEP team determined that Student did not require ESY services. Exhibit P-12.

17. On December 28, 2020, DCPS issued notice to Mother that NONPUBLIC

SCHOOL had been identified as Student's location of service for the 2020-2021 School Year. Exhibit R-8. (The suitability of Nonpublic School is not in dispute in this proceeding.)

18. On January 4, 2021, DCPS issued funding authorization for the parent to obtain Independent Educational Evaluation (IEE) Comprehensive Psychological, Speech and Language, OT, AT and FBA evaluations of Student. Exhibit R-10.

19. On October 1, 2020, LAW FIRM requested City School 2 to provide copies of Student's education records. On October 6, 2020, City School 2 provided a batch of Student's education records to Law Firm by email. In November 2020, a Law Firm representative picked up more of Student's education records at the school. Petitioner's Counsel made several follow-up requests, by email, for additional records. On November 17 2020, LEA Representative informed Petitioner's Counsel, by email, that City School 2 did not have the remaining education records requested by Petitioner's Counsel. Exhibit R-14.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of

production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

- A. Did DCPS deny Student a FAPE by failing to timely conduct an initial special education eligibility evaluation of Student by fall 2018 pursuant to DCPS' child find obligations under the IDEA?

Student was found eligible for special education, under the Multiple Disabilities classification (ASD and OHI-ADHD) in November 2019. The first issue in this case is whether DCPS violated the IDEA's child find mandate by not evaluating Student for special education eligibility before the 2019-2020 school year. In her opening argument, Petitioner's Counsel clarified that Petitioner does not seek relief for DCPS' alleged child find violations which may have occurred more than two years prior to the October 29, 2020 filing of the due process complaint in this case. *See* 34 C.F.R. § 300.511(e) (Timeline for requesting a hearing).

As U.S. District Judge Boasberg explained in *Davis v. District of Columbia*, 244

F. Supp. 3d 27 (D.D.C. 2017),

A school district must “evaluate a student who may have a disability and who may require special education services.” D.C. Code § 38–2561.02(a)(2) (emphases added). This duty applies to any “child suspected of having a disability who may need special education.” 5–E D.C. Mun. Regs. § 3004.1(a) (emphases added); see 34 C.F.R. § 300.111(c)(1) (extending duty to “[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade”). Courts in this Circuit have thus repeatedly held that school districts are required to complete an evaluation process “as soon as a student is identified as a potential candidate for special education services.”

*Davis, supra*, 244 F. Supp. 3d at 49, *citing N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (emphasis in original). Once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within [60 days from receipt of parental consent].” *See DL v. District of Columbia*, 109 F. Supp. 3d 12, 16-17 (D.D.C. 2015); D.C. Code § 38–2561.02(a); 5E DCMR § 3005.2. “The ‘child find’ duty extends even to ‘[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. § 300.111(c)(1).” *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010). “School districts may not ignore disabled students’ needs, nor may they await parental demands before providing special instruction.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Petitioner’s expert psychologist, Educational Advocate 1, opined, without rebuttal by DCPS, that at least by the fall of 2017, DCPS had cause to suspect that Student was a

child with a disability. I agree. The hearing evidence established that in fall 2010, DCPS initiated a special education eligibility evaluation for Student through DCPS' Early Stages program, but the evaluation was not completed because Mother missed the evaluation appointment and did not respond to Early Stages' repeated attempts to reach out to her. Student was first introduced to the DCPS Student Support Team (SST) for additional academic and behavioral help in October 2013 at City School 1. At the time, Student was struggling on a daily basis to maintain a positive attitude, pro-social behavior, and compliance with adult directives. Student had not yet learned how to regulate behavior or to self-calm when becoming angry. In December 2013, a psychiatrist diagnosed Student with ADHD and Anxiety Disorder. Mother shared this information, at least orally, with staff at City School 1. In October 2017, the City School 2 school psychologist scheduled a special education referral meeting for Student, which appears to have been cancelled due to Mother's not showing up. When Student was eventually evaluated by School Psychologist in October 2019, Student's overall cognitive functioning measured in the extremely low range. For the last three school years, Student has been failing in school. During the 2017-2018 and 2018-2019 school years, Student was disciplined on at least 5 occasions for fighting, reckless behavior and disruptive behaviors.

I conclude that Petitioner has established that, with Student's history of mental health diagnoses, low cognitive functioning, behavior challenges and chronic failing grades, DCPS has long had cause to suspect that Student was a child with a disability

and therefore had a duty to timely conduct an initial evaluation and make a special education eligibility determination at least by October 2018.

DCPS' Counsel argued that DCPS previously attempted to evaluate Student in 2011 and in fall 2017, but was unable to complete the process due to Mother's missing appointments and her lack of cooperation with the evaluation process. But even if Mother's lack of cooperation hampered DCPS' efforts to evaluate Student in 2011 and 2017, DCPS has not shown that during the time period at issue in this case, that is, by October 30, 2018, the District diligently pursued its obligation under the IDEA to conduct its initial evaluation of Student. I conclude that by not evaluating Student and by not determining Student eligible for special education until the fall of 2019, DCPS violated the IDEA's child find mandate.

Failing to evaluate a child suspected of having a disability, as required by the child find obligations of the IDEA, is a procedural violation of the statute. *See Simms v. District of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at \*12 (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). Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the student's right to a FAPE;
- (ii) Significantly impeded the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or
- (iii) Caused a deprivation of educational benefit.

*See* 34 C.F.R. § 300.513(a)(2). In this case, when DCPS did evaluate Student in November 2019, it determined that Student was, in fact, a student with Multiple Disabilities. Based on the record in this case, that is, *inter alia*, Student's psychiatric diagnoses, Student's low cognitive functioning, Student's failing academics and Student's history of behavior incidents, I conclude that if DCPS had timely evaluated Student, it should have determined Student eligible for special education at least by October 2018. I find, therefore, that DCPS' procedural violation of not evaluating Student for special education eligibility until November 2019 impeded Student's right to a FAPE and caused Student a deprivation of educational benefit. This was a denial of FAPE.

B. Did DCPS deny Student a FAPE by not ensuring that its fall 2019 initial eligibility evaluation was sufficiently comprehensive?

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 C.F.R. § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 C.F.R. § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child.

*See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006).

Petitioner's expert, Educational Advocate 1, opined in her testimony that DCPS' initial eligibility evaluation of Student in fall 2019 was not sufficiently comprehensive because DCPS did not conduct a Speech and Language evaluation, an OT evaluation, a test of non-verbal intelligence, an AT evaluation or an FBA. I found this opinion, which was not rebutted by DCPS, to be credible and I conclude that Petitioner met her burden of persuasion that DCPS' November 2019 initial special education evaluation of Student was not sufficiently comprehensive.

An LEA's failure to conduct a comprehensive and appropriate evaluation of a student is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). As stated in the foregoing section, procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2). I find here that DCPS' failure to comprehensively evaluate Student in fall 2019 significantly impeded Mother's opportunity to participate in the

decision-making process for Student's initial IEP. This was a denial of FAPE.

Whether DCPS' failure to conduct all of the assessments now recommended by Educational Advocate 1 also resulted in a loss of educational opportunities for Student cannot be determined pending completion of the additional assessments. DCPS has agreed to fund the requested assessments and to review and revise Student's IEP, as appropriate. DCPS' November 2019 IEP and March 2020 amended IEP did not provide any related services for Student. As discussed below, further relief in the form of compensatory education may be warranted if the IEE assessments show that the November 2019 and March 2020 IEPs omitted related services, such as OT or Speech Language Therapy, necessary for Student to make appropriate educational progress.

C. Were DCPS' initial November 2019 IEP and March 2020 Amended IEP inappropriate for Student?

Petitioner contends that Student's initial November 2019 IEP and the March 2020 IEP amendment were not appropriate for Student. I find that, through her expert witnesses, Petitioner made a *prima facie* showing that these IEP were not appropriate. Therefore DCPS holds the burden of persuasion on this issue.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, supra*, the U.S. Supreme Court elaborated on the standard, first enunciated *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate

in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially* designed" to meet a child's "*unique* needs" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

*See, also, Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018).

DCPS' initial November 2019 IEP for Student identified math, reading and written expression as areas of concern and provided for Student to receive 15 hours per week of Specialized Instruction in math and reading outside of the general education setting. The IEP did not provide for any related services. The March 2020 IEP revision only updated the Post-Secondary Transition Plan.

Petitioner's experts, Educational Advocate 1 and Educational Advocate 2, opined in their hearing testimony that the initial IEP was inadequate for a host of reasons. These included the failure to place Student in a full-time Communication and Education Support (CES) program for children on the autism spectrum, inappropriate academic goals and baselines, the omission of adaptive and social-emotional goals and the lack of Behavior Support or OT services. These experts' opinions were not rebutted by DCPS.

Moreover, when the DCPS IEP team reviewed Student's IEP in December 2020, the IEP team agreed, without conducting any additional evaluations, that Student required full time Specialized Instruction Services for 32 hours per week outside of general education. Based on this record, I conclude that DCPS has not met its burden of persuasion that its November 2019 initial IEP for Student or the March 2020 revised IEP, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Petitioner also faults DCPS for not revising Student's IEP after March 2020 to address Student's alleged need for Extended School Year (ESY) services and Student's unwillingness to participate in DCPS' online distance learning program following the closing of DCPS schools in the COVID-19 emergency. In its latest COVID-19 guidance, the U.S. Department of Education's Office of Special Education Programs (OSEP) wrote that in the current COVID-19 environment, LEAs may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model). OSEP emphasized that no matter what primary instructional delivery approach is chosen, LEAs and IEP Teams remain responsible for ensuring that a FAPE is provided to all children with disabilities and that if state and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, LEAs are not relieved of their obligation to provide FAPE to each

child with a disability. *See* U.S. Department of Education: *Questions and Answers on IDEA Part B Service Provision* (September 28, 2020).

At the time the November 2019 initial IEP was developed for Student, the City School 2 IEP team determined it did not have sufficient data to determine whether school breaks would result in significant academic regression for Student, a prerequisite for ESY. *See Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’”) Due to the COVID-19 school closings, DCPS was not able to collect that data on Student. Moreover, as permitted by Department of Education guidance, DCPS elected to provide remote/distance instruction to most students, but when DCPS put its distance learning program on line, Student avoided participating. In light of these extraordinary circumstances, I find that DCPS should not be liable for not reassessing Student’s need for ESY services or revising Student’s IEP to address distance learning issues in the period before the October 29, 2020 due process complaint was filed in this case.

D. Did DCPS deny Student a FAPE by failing to provide a Behavior Intervention Plan?

Petitioner also alleges that DCPS denied Student a FAPE by failing to develop a Behavior Intervention Plan (BIP) to address Student’s behavior challenges. Petitioner has the burden of persuasion on this claim.

The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a)(2)(i). *See, also, Assistance to States for the Education of Children with Disabilities, supra* 71 Fed. Reg. at 46643 (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.)

It is well documented that for years, Student's behavior in school has impeded Student's learning. As early as the fall of 2013, Student was reported to be struggling on a daily basis to maintain a positive attitude, pro-social behavior, and compliance with adult directives. At the beginning of the 2018-2019 school year, Student was referred for Tier III RTI interventions because Student's problem behaviors were increasing in intensity and frequency.

While the IDEA requires the IEP team to consider the use of positive behavioral interventions and supports, and other strategies, it does not specify that a BIP or other particular interventions, supports or strategies must be used. *See Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. At 46683. In this case, City School 2 developed Tier III RTI behavior interventions for Student at the beginning of the 2018-2019 school year. The evidence did not show what these Tier III interventions were. Nor did Petitioner establish whether the Tier III interventions, without a BIP, were, or were not, appropriate to address Student's behaviors. I find,

therefore, that Petitioner has not met her burden of persuasion that DCPS denied Student a FAPE by not developing a separate BIP for Student.

E. Did DCPS deny Student a FAPE by failing to provide Student's complete education records upon request of Petitioner's attorneys?

On October 1, 2020, Law Firm requested City School 2 to provide copies of Student's education records. On October 6, 2020, City School 2 provided a batch of Student's education records by email. In November 2020, a Law Firm representative picked up more of Student's education records at the school. Petitioner's Counsel made several follow-up requests, by email, for additional records. On November 17 2020, LEA Representative informed Petitioner's Counsel by email that City School 2 did not have the remaining education records she had requested. Petitioner contends that DCPS' failure to provide all of the education records requested by Law Firm was a denial of FAPE. Petitioner has the burden of persuasion on this claim.

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, DCPS must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. See 34 C.F.R. §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006). The D.C. Regs. provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. See 5E DCMR § 2600.6.

Petitioner's expert witnesses, Educational Advocate 1 and Educational Advocate

2, both employees of Law Firm, testified that there were education records not provided in DCPS' responses to Law Firm's records requests, notably Response to Interventions (RTI) data documentation, the December 2013 report from Student's psychiatrist and a complete set of Student's DCPS report cards. While these records should presumably have been collected by City School 2 in the past, Petitioner did not establish that the records are currently maintained by DCPS. I find, therefore, that Petitioner did not meet her burden of persuasion that DCPS failed to permit Law Firm to inspect education records currently maintained for Student.

Moreover, the failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. *See, e.g., N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent's requests for records.) Petitioner did not show that Law Firm's not receiving the allegedly missing education records impeded Student's right to a FAPE, caused a deprivation of educational benefit or significantly impeded Mother's opportunity to participate in the decision-making process. *See* 34 C.F.R. § 300.513(a)(2), *supra*. Although I decline to order relief for this alleged violation, DCPS is under a continuing obligation to permit Mother to inspect and review any education records relating to Student that are collected, maintained, or used by DCPS. *See* 34 C.F.R. § 300.613(a).

#### Remedy

For relief in this case Petitioner initially requested that DCPS be ordered to place

Student in a non-public therapeutic day school; to conduct additional assessments, including a Psychological and/or Neuropsychological evaluation, a Speech Language evaluation, an OT evaluation, an AT evaluation and an FBA and to revise Student's IEP. Petitioner also seeks an award of compensatory education for the denials of FAPE established in this case.

Prior to the due process hearing, DCPS agreed to fund Student's placement at Nonpublic School, the private school requested by Mother. DCPS also issued funding authorization for Mother to obtain IEE Psychological, Speech and Language, OT, AT and FBA evaluations of Student. DCPS has represented before and during the due process hearing that it agrees to convene Student's IEP team to revise Student's IEP. At the hearing, Petitioner's Counsel argued that I should direct DCPS to make immediate revisions to Student's IEP. I decline to do so because the revisions to Student's IEP must address all of Student's identified special education and related services needs, informed by the updated evaluations which the parent has requested. *See* 5E DCMS § 3002.1(f).

Student is entitled to an award of compensatory education for the denials of FAPE I have found in this decision, notably DCPS' failures to find Student eligible for special education and to develop an appropriate initial IEP by October 2018.

The D.C. Circuit Court of Appeals explained the compensatory education remedy in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed

to provide a student with a FAPE, it has “ broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education “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.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.

An appropriate 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.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

*B.D.*, 817 F.3d at 797–98.

I have found in this decision that an appropriate initial IEP would have provided for Student’s full-time special education outside the general education setting and would have included sufficient Behavioral Support Services to assist Student to benefit from special education. The IEE Speech and Language and OT evaluations authorized by DCPS may further show that Student’s IEPs should also have provided Speech-Language Pathology and OT related services.

Student’s current achievement levels in reading and math are at least 4 to 6 years below grade level. Petitioner’s expert, Educational Advocate 2, opined in his testimony that had Student been determined eligible for special education by fall 2018 and

provided special education services appropriate for a student on the autism spectrum, by now Student should have progressed 2 to 3 grade levels in both reading and math. To put Student back in that position, Educational Advocate 1 and Educational Advocate 2 recommended that Student receive 600 to 900 hours of compensatory Applied Behavior Analysis (ABA) services, 600 hours academic tutoring and 100 hours of counseling. The experts also held out the possible need for additional compensatory education based on the results of the IEE Speech-Language, AT, OT and FBA assessments.

I defer to Educational Advocate 2's opinion that, with appropriate IEPs since the fall of 2018, Student would likely have progressed 2 to 3 grade levels in reading and math. But I find the experts' recommended compensatory education award less credible. First, over half of the proposed award is ABA services. Neither expert witness is an ABA specialist and whether Student is an appropriate candidate for ABA therapy has not been shown. It was also unclear how the proposed ABA services and academic tutoring would mesh with Student's full-time special education program at Nonpublic School.

By contrast, Student's need for compensatory counseling services appears plain, given that Student should have been provided IEP Behavioral Support Services at least since October 2018. In my order herein, I will require DCPS to immediately fund 100 hours of counseling for Student as compensatory education services and will permit Petitioner to reserve her claim for additional compensatory education pending the

completion of the IEE assessments and the revision of Student's IEP.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

**ORDERED:**

1. Upon completion of Independent Educational Evaluation (IEE) psychological, Speech and Language, OT, AT and FBA evaluations of Student authorized by DCPS in January 2021 or sooner if the IEE assessments are not timely completed, DCPS shall ensure that Student's IEP team, including the parent and representatives of Nonpublic School, is convened to review and revise Student's IEP as appropriate. Revisions to the IEP shall include, but not be limited to updated measurable annual goals, including academic and functional goals, and present levels of performance, full-time special education services in a special school setting, provision for Behavioral Support Services as well as other related services as determined needed by the IEP team;
2. As a partial compensatory education award for DCPS' failure to find Student eligible for special education and to provide an appropriate IEP to Student beginning in October 2018, Student is awarded 100 hours of counseling to be provided by a qualified social worker or other counseling professional. Within 15 school days of the date of this decision, DCPS shall begin providing these services directly or provide funding authorization for the parent to procure counseling services for Student. Promptly following completion of the IEE assessments described above, DCPS, Petitioner and her representatives shall meet with DCPS and endeavor in good faith to agree on what additional compensatory education services would be reasonably calculated to compensate for Student's lost progress, including 2 to 3 grade levels of progress in reading and math, resulting from Student's not having an IEP, with appropriate special education and related services, beginning in October 2018. If Petitioner and DCPS are unable to agree on a final compensatory education package, Petitioner may seek further compensatory education relief through a new special education hearing; and
3. All other relief requested by the Petitioner herein is denied.

Case No. 2020-0190  
Hearing Officer Determination  
January 20, 2021

Date: January 20, 2021

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
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