

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

Parent on behalf of Student¹)	Case No. 2023-0229
)	
Petitioner)	Hearing Dates: January 8 and 10, 2024
)	
v.)	Conducted by Video Conference
)	Date Issued: January 29, 2024
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X-year-old student (“Student”) attending School A. On November 15, 2023, Petitioner filed a Due Process Complaint alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to evaluate Student in all areas of suspected disability and failed to provide appropriate Individualized Education Programs (“IEPs”). On November 30, 2023, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint*, denying that it had denied Student a FAPE in any way.

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

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

PROCEDURAL HISTORY

On November 15, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing timely to conduct comprehensive psychological, assistive technology (“A/T”), and occupational therapy (“OT”) evaluations, and a functional behavior assessment (“FBA”) by the end of December 2022; and (2) failing to develop appropriate IEPs and placements on November 16, 2021, November 14, 2022, and November 13, 2023. Specifically, Petitioner alleges that the IEPs (a) were based on inadequate evaluation data, thereby failing to address Student’s needs in adaptive functioning, A/T, and O/T; (b) failed to address Student’s behavior needs by failing to include a behavior intervention plan (“BIP”) or behavior support services (“BSS”) outside general education; (c) failed to provide sufficient specialized instruction, and (d) failed to provide extended year services (“ESY”).

On November 30, 2023, DCPS filed its *Response*, in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE in any way. DCPS asserted that (1) DCPS completed Student’s triennial review in December 2019 when s/he was at School B. At the time of the triennial review, there were no concerns warranting an OT or A/T evaluation. Moreover, the need for A/T is reviewed annually; as such, an evaluation is not required to determine if a student needs A/T to support learning needs. Petitioner never requested additional evaluations until the 2023-24 school year. On October 4, 2023, Petitioner requested a psychological, OT, A/T, and FBA evaluations. On November 16, 2023, after an Analysis of Existing Data (“AED”) meeting at which Petitioner was represented, the MDT proposed to conduct a psychological evaluation (including adaptive functioning), OT, and A/T evaluations, but declined to propose an FBA on recommendation of the School Social Worker. (2) The three IEPs at issue were developed using various data sources and were appropriate when they were developed. The IEPs did not include OT services because Student has not been found eligible for such services.

The parties participated in a resolution meeting on November 28, 2023 that did not result in a settlement. The prehearing conference in this case was conducted on December 20, 2023 through video conference facilities. The *Prehearing Order* was issued that day.

The due process hearing was conducted on January 8 and 10, 2024 by video conference. The hearing was open to the public at Petitioner’s request. Petitioner filed Five-day Disclosures on January 3, 2024, containing a witness list of three witnesses and documents P1 through P-87. Respondent did not file a timely or clear objection to Petitioner’s disclosures. Therefore, Petitioner’s Exhibits P1-P87 were admitted into evidence.

Respondent also filed disclosures on January 3, 2024, including a witness list of eight witnesses and documents R1 through R28. Petitioner did not file objections to Respondent’s disclosures. Therefore, Respondent’s Exhibits R1-R28 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner. Witness A was admitted as an expert in Special Education and Witness B was admitted as an expert in Occupational Therapy and Assistive Technology. Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, and Witness F. Witness C and Witness D were admitted as experts in Special Education; Witness E and Witness F were admitted as experts in School Social Work. At the conclusion of Respondent’s direct case, Petitioner provided rebuttal testimony. At the conclusion of testimony, the parties’ counsel gave oral closing

arguments. The Hearing Officer authorized the parties to submit authorities upon which they rely on or before January 17, 2024. On January 17, 2024, Petitioner filed *Petitioner's Supporting Case Laws*, and DCPS filed an email including authorities on which it relies.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, and as modified on the first day of hearings, the issues to be determined in this case are as follows:

1. Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability. Specifically, Petitioner alleges that DCPS should have conducted the following evaluations by the end of December 2022 (DCPS previously conducted a psychological evaluation in December 2019): comprehensive psychological (including adaptive functioning to address whether Student meets the criteria for a classification of intellectual disability), assistive technology (“A/T”), occupational therapy (“OT”), and functional behavior assessment (“FBA”).
2. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 16, 2021. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student’s needs in adaptive functioning, A/T, and O/T; (b) failed to address Student’s behavior needs by failing to include a behavior intervention plan (“BIP”) or behavior support services (“BSS”) outside general education; (c) failed to provide sufficient specialized instruction, and (d) failed to provide extended year services (“ESY”).
3. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 14, 2022. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student’s needs in adaptive functioning, A/T, and O/T; (b) failed to address Student’s behavior needs by failing to include a BIP or BSS outside general education; (c) failed to provide sufficient specialized instruction and inappropriately reduced services, and (d) failed to provide ESY.
4. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 13, 2023. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student’s needs in adaptive functioning, A/T, and O/T; (b) failed to address Student’s behavior needs by failing to include a BIP or BSS outside general education; (c) failed to provide sufficient specialized instruction and inappropriately reduced services, and (d) failed to provide ESY.

FINDINGS OF FACT

1. Student is X years old and in grade K at School A for the 2023-24 school year when DCPS developed his/her IEP on November 13, 2023.²

2. On July 10, 2018, when Student was in grade F at school C, DCPS issued Student's Report Card for the 2017-18 school year. Student earned the following grades: Proficient in Reading, Writing & Language, Speaking and Listening, Math, Social Studies, Science, Art, and Health & Physical Education, and Basic in Music and World Languages. In the twelve graded behavioral categories, Student performed appropriately and Independently in one category, With Limited Prompting in six categories, and With Frequent Prompting in five categories (Follows directions, completes classwork on time, follows classroom rules, respects the rights/property of others, and practices self-control).³ Student's skill development was graded as Developing in each graded category within each of her/his courses.⁴ On Text Reading and Comprehension ("TRC") assessment Student reached level M at year-end, the mid-year goal, and short of the year-end goal of level O or P.⁵

3. On July 31, 2019, when Student was in grade A at school C, DCPS issued Student's Report Card for the 2018-19 school year. Student earned the following grades: Proficient in Social Studies, Science, Music and Art, Basic in Reading, Speaking and Listening, and Math, and Below Basic in Writing & Language. In each of the twelve graded behavioral categories, Student performed appropriately With Limited Prompting.⁶ Student's skill development grades were roughly split between Basic and Developing in the graded categories within each of her/his courses.⁷ On Text Reading and Comprehension ("TRC") assessment Student reached level L at year-end, one grade below Student's grade.⁸

4. On December 20, 2019, Examiner A, of DCPS, completed an initial Comprehensive Psychological Evaluation of Student. Student was on a Section 504 plan⁹ at the time, but Petitioner and his/her teachers had concerns about pervasive academic delays and self-regulation.¹⁰ In interview with Examiner A, one or both of Student's teachers rated him/her Poor or Below Average in a number of areas including, but not limited to, Receptive English Language Skills, Expressive English Language Skills, Emotional/Behavioral//Social Skills, Work Habits/Learning Behaviors, and Academic Characteristics. They estimated Student grade equivalent performance levels to be as follows: Reading – grade E (three grades below Student's level at that time), Writing – grade E, and Math – grade C (two grades below Student's grade at that time).¹¹ On the Woodcock Johnson Tests of Cognitive Abilities ("WJ-IV Cog"), Student scored in the Low Average range in Visual Processing (83), in the Low range in Long-Term

² Respondent's Exhibit ("R:") 3 at electronic page 33. The exhibit is followed by the electronic page number, e.g. P3:33.

³ P63:328.

⁴ *Id.* at 329-30. The skill levels were Basic, Developing, and Secure.

⁵ *Id.* at 331.

⁶ P64:333.

⁷ *Id.* at 334-35. The skill levels were Basic, Developing, and Secure.

⁸ *Id.* at 336.

⁹ 29 U.S.C.A. § 794.

¹⁰ Petitioner's Exhibit ("P:") 4 at electronic page 41. The exhibit is followed by the electronic page number, e.g. P4:41.

¹¹ *Id.* at 44-45.

Retrieval (72) and Processing Speed (78), and in the Very Low range in Crystallized Intelligence (65), Auditory Processing (62), Fluid Reasoning (52), and General Intellectual Ability (59). “Overall, [Student displayed cognitive skills that are delayed when compared to [her/his] same-age peers.”¹² On the WJ-IV Tests of Achievement (“WJ-IV Ach”), Student scored in the Average range in Sentence Writing Fluency (90), Low Average range in Written Expression (82), in the Extremely Low range in Basic Reading Skills (58), Reading Fluency (50), Reading Comprehension (52), Math Calculation (63), and Math Problem Solving (69).

[Student’s] word reading abilities fell at an early to mid [grade E] level... On the Passage Comprehension subtest... [s/he] performed at a mid [grade E] level... [His/her] overall performance fell at a beginning [grade E] level due to the low number of items [s/he] was able to complete within the given time... On the Writing Samples subtest... [his/her] spelling word organization, and overall presentation, however, made it extremely difficult to decipher [her/his] writing at face value... On the Applied Problems subtest, [Student] performed at a mid [grade C] level... [S/he] struggled to solve anything with money or coins (not knowing the value of them) or anything with fractions, percentages, or multi-step problems... When asked to complete basic (one-digit) addition or subtraction problems under a time constraint to measure [his/her] fluency, [Student] completed enough correct items to fall at a late [grade E] level. [S/he] fell at an early [grade E] level on Number Matrices, which asked [him/her] to look at number patterns and identify the missing number... Overall, [Student] showed significantly delayed academic abilities compared to other children [his/her] age... [S/he] showed a relative strength in the area of Written Expression with a Below Average score, although this should not be indicative of [his/her] ability to perform at grade-level within the classroom due to the significant difference in demand in the classroom.¹³

On the Conners-3, which assesses Attention Deficit Hyperactivity Disorder (“ADHD”), Petitioner, Teacher A, and Teacher B completed rating scales. All three responses yielded Very Elevated scores in every category: Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Defiance Aggression, Peer Relations, ADHD Predominantly Inattentive Type, ADHD Predominantly Hyperactive-Impulsive Type, Conduct Disorder, and Oppositional Defiant Disorder. “Based on results from this assessment tool, [Student] is displaying characteristics of ADHD across school and home settings.”¹⁴

Examiner A concluded that Student met the IDEA criteria for eligibility with a classification of Other Health Impairment (“OHI”). S/he recommended that Student receive behavior support from a school social worker, instruction including a modified curriculum and a highly accommodated environment including, *inter alia*, repetition, read aloud of tests, additional time, graphic organizers.¹⁵

5. On December 20, 2019, DCPS issued an initial Final Eligibility Determination in

¹² *Id.* at 46-47.

¹³ *Id.* at 50.

¹⁴ *Id.* at 50-52.

¹⁵ *Id.* at 55.

which it found Student eligible for special education services with a classification of OHI.¹⁶

6. On January 9, 2020, Staff Member E, Student's Case Manager at School B, completed an Evaluation Summary Report. In Math, Student was reported to be over two grade levels below his/her peers on a BOY assessment. In Reading, s/he was reported to be performing at a grade H level, five grade levels below his/her grade. In Emotional, Social, and Behavioral Development, Student's teachers reported that s/he requires a great deal of attention and prompting to remain on task, is sometimes oppositional, and reacts inappropriately to redirection.

[Student] routinely calls attention to [him/herself], but hates being called out. [S/he] demonstrates attention seeking behaviors (annoying peers, repetitive sounds, moving about the classroom, sitting wherever [s/he] wants, etc. and will escalate dramatically if addressed publicly. [S/he] is easily frustrated and often gives up when an adult is not readily available...

It is recommended to the IEP committee that an eligibility of Other Health Impairment be considered. Behavior support through a school social worker is recommended to continue for coping strategies related to frustration levels and difficulties with self-regulation. Instruction that includes modified curriculum and a highly accommodated environment will be the most beneficial for [Student]. [S/he] needs to fill in the academic gaps that are resulting in [his/her] functionally performing approximately 4 grade levels behind.¹⁷

7. On January 13, 2020, when Student was in grade D at School C, DCPS convened an Initial IEP team meeting. S/he was classified OHI.¹⁸ The Consideration of Special Factors provided that Student's behavior did not impede his/her learning or that of other children, that s/he had no communication deficits, and s/he did not require A/T.¹⁹ In Math, the Present Levels of Academic Achievement and Functional Performance ("PLOP") reported that on a beginning of the year ("BOY") i-Ready assessment, Student was performing on a grade C level, three grades below his/her grade at the time.²⁰ In Reading, the PLOP reported that Student was reading on a grade E level, four grades below his/her grade at the time.²¹ In Emotional, Social, and Behavioral Development ("Behavior"), PLOP reported that Student will often intentionally do the opposite of what is asked of him/her, and will become agitated when redirected. In counseling sessions, Student puts forth a great deal of effort, follows directions, and completes requested tasks. On a Strengths and Difficulties Questionnaire ("SDQ") completed on October 9, 2019, Student's scores were high in Behavioral Difficulties, Hyperactivity, and Concentration. His/her attendance was good, three unexcused absences since the beginning of the school year. The IEP team prescribed eleven hours of specialized instruction outside general education (five in Reading, five in Math, and one in Written Expression) and two hours per month of BSS inside general education.²² The team did not provide ESY.²³

¹⁶ P9:78.

¹⁷ *Id.* at 82-87.

¹⁸ P13:109.

¹⁹ *Id.* at 110.

²⁰ *Id.* at 111.

²¹ *Id.* at 112-13.

²² *Id.* at 117.

²³ *Id.* at 121.

8. On May 28, 2020, DCPS issued Student's IEP Progress Report for the 2019-2020 school year. None of Student's Math, Reading, or Behavior goals had been introduced.²⁴

9. On July 30, 2020, when Student had just completed grade D at school C, DCPS issued Student's Report Card for the 2019-20 school year. Student earned the following grades: Pass in Reading, Writing & Language, Speaking and Listening, Math, Art, and Social Studies. In the twelve graded behavioral categories, Student performed appropriately and Independently in one category, With Limited Prompting in ten categories, and With Frequent Prompting in Returns Completed Homework.²⁵ Student's skill development grades were roughly split between Basic and Developing in the graded categories within each of her/his courses except that in Reading, the grades were all Basic.²⁶

10. On July 2, 2021, when Student had just completed grade D at school B, DCPS issued Student's Report Card for the 2020-21 school year. Student earned the following grades: Pass in Health & Physical Education, Math, Science, Middle School Support, and Green Architecture, and Incomplete in World Geography and Cultures, Language Arts, and Art.²⁷ On July 2, 2021, DCPS also issued Student's Attendance History for the 2020-21 school year. S/he had five absences, all unexcused.²⁸ On July 28, 2022, DCPS issued Student's Attendance History for the 2021-22 school year. S/he had sixteen absences, all unexcused, and was tardy eleven times, all unexcused.²⁹

11. On September 7, 2021, Student was administered BOY Scholastic Reading Inventory ("SRI") Reading Comprehension assessment. Her/his Lexile score of 363 was Below Basic. On February 18, 2022, her/his MOY score of 207 was Below Basic. On June 1, 2022, her/his score of 296 was Below Basic.³⁰ On September 21, 2022, her/his BOY score of 238 was Below Basic, and her/his MOY score of 308 was Below Basic.³¹

12. On September 13, 2021, Student was administered a beginning of the year ("BOY") i-Ready Math assessment. Student's score of 450 was in Level 4, Below Level. On February 3, 2022, his/her middle of the year ("MOY") score of 440 was in Level 3, Below Level.³² On September 14, 2022, Student was administered a BOY i-Ready Math assessment. His/her score of 442 was Below Level, at a grade F level, four grades below his/her grade.³³ On the MOY, his/her score of 436 was Below Level.³⁴

13. On November 16, 2021, when Student was in grade B at School B, DCPS convened an IEP Annual Review meeting.³⁵ The Consideration of Special Factors was unchanged from the

²⁴ P52:266-69.

²⁵ P65:338.

²⁶ *Id.* at 339-40. The skill levels were Basic, Developing, and Secure.

²⁷ P67:351-52.

²⁸ P77:384.

²⁹ P77 (383).

³⁰ P74:377.

³¹ P75:379.

³² P71:371. Petitioner's Exhibit 72 (373) provided raw scores of BOY and MOY ANET assessments in English Language Arts ("ELA") and Math. However, Petitioner offered no testimony or documentation as to the interpretation of the data.

³³ P8:71.

³⁴ P76:381.

³⁵ P14:123.

previous IEP. In Math, the PLOP reported that her/his September 13, 2021 i-Ready assessment score of 450 placed her/his performance at a grade A level, three grade levels below her/his current grade. In Reading, Student's September 7, 2021 BOY Reading Inventory ("RI") score of 363 was more than 600 points below the grade level expectation range of 970-1120. The PLOP also reported that a comprehensive file review on November 18, 2020 determined that Student was performing a grade E level, five grades below his/her grade at that time.³⁶ In Behavior, the PLOP reported that Student is very respectful, well-mannered, well groomed, and had demonstrated the ability to comply with school expectations such as uniform and cell phone policy. S/he is reported always to be willing to attend and engage in BSS. Her/his October SDQ scores were all in the average range. The Behavior goal addressed the use of strategies to self-regulate.³⁷ Student's services remained unchanged from the previous IEP.³⁸ Classroom accommodations included Read Aloud, Screen Reader Technology, a calculator, preferential seating with minimal distractions, extended time, flexibility in scheduling, frequent breaks, and clarification/repetition of directions.³⁹

14. On November 17, 2021, DCPS issued Student's IEP Progress Report for the first reporting period of the 2021-22 school year. Student was reported to be Progressing on two goals and one had not been introduced. In Reading, Student was reported to be Progressing all three goals. There was no description of the progress made in Math and Reading. Student was also reported to be Progressing on his/her three Behavior goals. S/he was reported to have avoided any disciplinary referrals, was able to articulate and demonstrate self-regulation skills, to demonstrate attentive behavior in non-preferred tasks for a minimum of 15 minutes in 2 out of 5 situations.⁴⁰

15. On April 6, 2022, Student was administered Partnership for Assessment of Readiness for College and Careers ("PARCC") assessments in ELA and Math. His/her ELA score of 650 was at ELA Performance Level 1. His/her Math score of 699 was at Math Performance Level One.⁴¹

16. On June 21, 2022, DCPS issued Student's IEP Progress Report for the 2021-22 school year. Student was reported to be Progressing on her/his three Math goals, two Reading goals, and one Behavior goal, working diligently and completing her/his assignments. Student's social worker reported that Student had been able to use self-regulation skills, and was working on utilizing effective communication skills to identify his/her needs especially during times of stress.⁴²

17. On July 28, 2022, when Student had just completed grade B at school B, DCPS issued Student's Report Card for the 2021-22 school year. Student earned the following grades: English – D+, Humanities – Withdrew, Middle School Support -B, Math – C+, Health & Physical Education – A, Science – C, World History Geography – F, and Extended Literacy – B.⁴³

³⁶ *Id.* at 127-28.

³⁷ *Id.* at 130-31.

³⁸ *Id.* at 132, 136.

³⁹ *Id.* at 134.

⁴⁰ P53:271-273. Consecutive pages are labeled p. 273.

⁴¹ P73:375.

⁴² P56:290-93.

⁴³ P68:356-58.

18. On September 28, 2022, DCPS issued a Prior Written Notice (“PWN”) indicating its intention to conduct an Educational Assessment, because Student “rushed through several of [his/her] beginning of year assessments.”⁴⁴

19. During the 2022-23 school year, Student was the subject of three incidents on a Student Incident Report. On October 12, 2022, Student was reprimanded for verbal abuse and threat to her/his teacher. On November 1, 2022, s/he was removed from the classroom for disruptive horseplay. On April 4, 2023, Petitioner was notified when Student was involved in a physical altercation with another student.⁴⁵ On September 9, 2022, Staff Member C called Petitioner when Student became profane and non-compliant when denied permission to use the lavatory. On September 12, 2022, Staff Member B called Petitioner about an incident that occurred in class. On September 14, 2022, Staff Member A called Petitioner when Student hit a student during class and lied about “multiple instances of physically bothering other students during class.”⁴⁶

20. On November 14, 2022, when Student was in grade L at School B, DCPS convened an IEP Annual Review Meeting.⁴⁷ The Consideration Special Factors was unchanged from the previous IEP. In Math, the PLOP revealed that his/her September 14, 2022 BOY i-Ready score of 442 was at a grade F level, five grades below his/her grade at the time. “[Student] rushed on this assessment, otherwise [his/her] scores would have been higher.”⁴⁸ In Reading, the PLOP reported that his/her September 21, 2022 RI score of 238 was in the first percentile, at a grade E level, seven grade levels below his/her grade at that time.⁴⁹ In Behavior, Student was described as funny, joyful, jovial, well-groomed, well-spoken, and engages well with his/her peers. However, s/he struggles with paying attention, following teacher directives, completing his/her work independently, and needs support with emotional regulation. On an October 2022 SDQ, Student scored in the High range in Behavioral Difficulties, Hyperactivity, and Concentration. The Behavior goals addressed inattention and self-regulation.⁵⁰ The IEP team prescribed five hours of specialized instruction outside general education and five hours inside general education, and two hours per month of BSS inside general education.⁵¹ Classroom accommodations included Read Aloud, Screen Reader Technology, a calculator, preferential seating with minimal distractions, extended time, flexibility in scheduling, frequent breaks, and clarification/repetition of directions.⁵²

21. On December 2, 2022, Witness D, then a special education teacher at School B, administered Student a Woodcock-Johnson Test of Achievement (“WJ-IV Ach”). Student scored in the Average range in Writing Samples (93), in the Low Average range in Applied Problems (83), in the Low range in Sentence Writing Fluency (74), and in the Very Low range in Letter-Word Identification (59), Passage Comprehension (60), Sentence Reading Fluency (65), Calculation (64), Math Facts Fluency (58), and Spelling (67).⁵³

⁴⁴ R5:53.

⁴⁵ P61:324.

⁴⁶ P62:326.

⁴⁷ P15:138.

⁴⁸ *Id.* at 140.

⁴⁹ *Id.* at 142.

⁵⁰ *Id.* at 144-45.

⁵¹ *Id.* at 146.

⁵² *Id.* at 148.

⁵³ P7:67-68.

22. On December 19, 2022, DCPS issued a Final Eligibility Determination after a reevaluation in which it found that Student remained eligible for special education services with a classification of OHI.⁵⁴

23. On December 20, 2022, Staff Member D, Student's Case Manager at School B, completed an Evaluation Summary Report. After reviewing Student's records and past evaluations, interviewing Student, and interviewing her/his teachers, Staff Member D noted that Student does not remain focused in class; s/he is often distracted by peers talking and often late to some classes. Staff Member D recommended as follows:

It is recommended to the IEP committee that an eligibility of Other Health Impairment be considered. Behavior support through a school social worker is recommended to continue for coping strategies related to frustration levels and difficulties with self-regulation. Instruction that includes modified curriculum and a highly accommodated environment will be the most beneficial for [Student]. [S/he] needs to fill in the academic gaps that are resulting in [his/her] functionally performing approximately 4 grade levels behind.⁵⁵

24. On March 30, 2023, DCPS issued an Extended School Year Services Eligibility Worksheet indicating that "The MDT has reviewed present levels and has determined that there is no regression of critical skills at this time. Student has demonstrated reasonable recoupment of learned skills."⁵⁶

25. On June 20, 2023, DCPS issued Student's 2022-23 IEP Progress Report. In Math, s/he was Progressing on two goals and one had just been introduced. S/he was able express a decimal as fraction and vice versa, and was able to solve a one-variable linear equation. In Reading, Student was reported to be Progressing on all three goals. S/he was able to define the meaning of specified words and cite at least one detail and support in texts. In Behavior, Student was Progressing on both goals.⁵⁷

26. On July 7, 2023, when Student had just completed grade L at school B, DCPS issued Student's Report Card for the 2022-23 school year. Student earned the following grades: Health & Physical Education – B+, Science – D+, Math – B-. Computer Science for Innovators - C, U.S. History & Geography – A, Design and Modeling – D, English – D+, and Extended Literacy – C+.⁵⁸ On a January 18, 2023 SRI assessment, Student's Lexile score of 308 was at a grade E level, seven grade levels below Student's grade.⁵⁹

27. On October 4, 2023, Petitioner's counsel requested that DCPS conduct the following evaluations of Student: Comprehensive Psychological with and adaptive assessment component, a Functional Behavior Assessment ("FBA"), an Occupational Therapy ("OT")

⁵⁴ P11:91.

⁵⁵ P11:100.

⁵⁶ R13:93.

⁵⁷ P60:316-21.

⁵⁸ P70:366-67.

⁵⁹ *Id.* at 368.

Evaluation, and an Assistive Technology (“A/T”) Evaluation.⁶⁰

28. On November 13, 2023, when Student was in grade K at School A, DCPS convened an IEP Annual Review meeting.⁶¹ The Consideration of Special Factors remained unchanged since the initial IEP. In Math, the PLOP reported no new data as “[Student] missed the testing window for Fall 23-24 NWEA MAP testing...”⁶² In Reading, Student’s RI Lexile score of 347 in the fall of 2023 was in the first percentile and well below the grade level expectation range of 490-497.⁶³ In Behavior, Student’s positive interaction with peers was noted, but it was also reported that s/he struggles with focus and attention in the classroom, and with completing assigned tasks without prompting, redirection and support. The Behavior goal addressed self-regulation.⁶⁴ A new Area of Concern was added, Motor Skills/Physical Development. There was no data in the PLOP.⁶⁵ The team prescribed five hours per week of specialized instruction outside general education and five hours inside general education, but no related services.⁶⁶ Classroom Accommodations included clarification/repetition of directions, Read Aloud for assessments, a calculator on non-calculator assignment, extended time, flexibility in scheduling, frequent breaks, Screen Reader, redirection, and preferential seating with minimal distractions.⁶⁷

29. On November 16, 2023, DCPS issued a PWN indicating that as result of an Analysis of Existing Data meeting that day, DCPS intended to conduct a comprehensive psychological evaluation including adaptive testing, an OT evaluation, and an A/T evaluation. Petitioner and her counsel objected to DCPS’ decision not to conduct an FBA due to her/his scores on SCQ’s that “indicate minimum challenges in all areas of functioning.”⁶⁸

30. Witness A, Student’s educational advocate, opined that Student should have been reevaluated due to his/her 59 IQ score on Examiner A’s 2019 evaluation to determine if s/he had an intellectual disability. Witness A also opined that Student should have received an OT evaluation due to his/her problems with self-regulation and executive functioning. She also opined that Student should have received an FBA because s/he was receiving BSS; any student receiving BSS should also have an FBA. Witness A also opined that Student required an A/T evaluation because s/he was low functioning in reading. Witness A opined that all of these evaluations should have been conducted by 2022. Witness A further opined that Student required a more restrictive environment in light of his/her lack of academic progress. As for the 2021 IEP, Witness A conceded that the academic goals were well-written. She disagreed with the failure to find Student eligible for ESY because Student’s long-term memory was a weakness. Witness A opined that the 2022 IEP was inappropriate because the Consideration of Special Factors states that his/her behavior does not affect his/her learning, his/her self-regulation problems were not addressed because s/he had not received an OT evaluation and no services, and her/his specialized instruction was reduced despite the lack of academic progress. As for the 2023 IEP, Witness A disagreed with the termination of BSS, and disagreed with the reduction in specialized instruction in light of

⁶⁰ P80:393-94; P82:402.

⁶¹ R3:33.

⁶² *Id.* at 35.

⁶³ *Id.* at 37.

⁶⁴ *Id.* at 39.

⁶⁵ *Id.* at 41.

⁶⁶ *Id.* at 42.

⁶⁷ *Id.* at 45.

⁶⁸ R7: 57-58.

Student's failure to master any of his/her IEP goals.

Witness A developed a Compensatory Education Proposal.⁶⁹ The Proposal seeks compensation for the failure to provide evaluate Student in 2022 (psychological, FBA, OT, and A/T), because the three IEPs were inappropriate, because DCPS deprived Student of ESY. The period of harm for failure to provide appropriate IEPs was from November 16, 2021 to November 16, 2023. There was insufficient specialized instruction for 176 days, or 46.5 weeks. The period of harm for failure to conduct an FBA and an OT evaluation was the same. Witness A opined that had Student received the OT, FBA, and A/T evaluations been conducted:

[Student] would have been provided the intensive special education supports and services, as well as modified curriculum suggested by DCPS' own IEP team, [s/he] would have had greater access to obtain educational benefit. Additionally, had a BIP [been] created and implemented in conjunction with Occupational Therapy services to address self-regulation issues, given [her/his] IQ score and academic delays, [s/he] would have been able to make, at least, one year's worth of academic and behavioral progress and mastered the goals on [his/her] IEP.⁷⁰

As compensatory education services, Witness A proposed that Student receive 415 hours of tutoring and mentoring, 11.5 hours x 36 weeks, 15 hours of behavioral intervention services or counseling (1 hour x 15 weeks), and psychological, FBA, A/T, and OT evaluations.⁷¹ During the hearing, Witness A testified that if Student had received appropriate IEPs, s/he would have made a one-to-two-year grade improvement. When I asked the basis of the one-to-two-year predicted improvement, she replied, it "would likely result in greater improvement." The fifteen hours of missed counseling was determined by reviewing service trackers.⁷²

31. Witness B was Petitioner's expert witness in OT and A/T. Witness B testified that Student's 2019 psychological evaluation revealed problems with self-regulation, focusing, and completing assignments. If Student's self-regulation issues were caused by sensory related triggers, that is an issue that occupational therapists could address in therapy. Thus, Witness B opined that Student should receive an OT evaluation to determine the impact of sensory triggers on her/his behavior: visual, auditory, or vestibular. As for A/T, Witness B opined that A/T should be considered for a student whenever the student fails to evince improved performance after receiving support. Student is now at the point where s/he should be reading to learn rather than learning to read, so something different must be done. Witness B testified that A/T evaluations are necessary to determine which devices will work best for individual students; there is a 70% abandonment rate for A/T devices. Witness B opined that he would not have pushed for an A/T evaluation for Student during the 2020-21 or 2021-22 school years, but he would now. He was unaware that DCPS had recently agreed to conduct an A/T evaluation.⁷³

32. Witness C, the Special Education Coordinator at School A, testified that DCPS agreed to conduct comprehensive psychological, OT, and A/T evaluations at the AED meeting on

⁶⁹ P87:418.

⁷⁰ *Id.* at 429.

⁷¹ *Id.*

⁷² Testimony of Witness A.

⁷³ Testimony of Witness B.

November 16, 2023, and completed the evaluations by December 30, 2023. It did not agree to conduct an FBA, because Student's behaviors were not high-risk, and s/he was making progress. The IEP team also did not want to change Student's service hours until the completion of the evaluations. The team did not increase BSS because "we had no behavioral concerns." Witness C also testified that the team did not believe Student qualified for ESY. Witness C opined that Student did not require more service hours because s/he was passing courses and was quite motivated and easily redirected. Witness C testified that the absence of BSS on the IEP was due to a technical glitch; it was prescribed at the same level as in prior years, but due to the use of new software, the service did not populate properly on the IEP form. She noted that the PWN issued contemporaneously indicated continuing BSS services.⁷⁴ Witness C also testified that the addition of Motor Skills as an Area of concern was another technical mistake.⁷⁵

33. Witness D was the Special Education Coordinator at School B. Witness D testified that Student was "under the radar" at School B: s/he did what s/he was supposed to do and did not present a behavior problem. When Student got off-task, s/he was easily redirected. Witness D testified that the WJ-IV Ach conducted in late 2022 was done to ensure the accuracy of the PLOPS in the 2022 IEP; Student had rushed through his/her fall 2022 standardized tests, so the team wanted another data source. Witness D testified that Student also rushed through the WJ-IV Ach. The staff did not believe Student required adaptive testing because his/her adaptive skills appeared to be on par with his/her peers. Student had no trouble with basic skills such as keyboarding, holding a pen or pencil, putting thoughts on paper, interacting with peers, or participating in team sports. The IEP team did not consider increasing Student's service hours because her/his report cards showed s/he was making progress.

34. Witness F was the School Social Worker at School B. She testified that Student did not present a significant behavior concern at School B; at times s/he could become distracted. Witness F described Student as a strong personality, a leader, one who interacted well with his/her peers. There were no requests by Petitioner for an FBA, and there was no need for one, as Student's behavior was not impeding her/his learning.

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

⁷⁴ R4:51.

⁷⁵ Testimony of Witness C.

public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁷⁶

Three of the issues in this case involve the alleged failure of DCPS to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden of persuasion as to these issues presented. Petitioner bears the burden of persuasion as to all other issues presented. The burden of persuasion must be met by a preponderance of the evidence.

Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability. Specifically, Petitioner alleges that DCPS should have conducted the following evaluations by the end of December 2022 (DCPS previously conducted a psychological evaluation in December 2019): comprehensive psychological (including adaptive functioning to address whether Student meets the criteria for a classification of intellectual disability), A/T, OT, and an FBA.

IDEA regulations require that LEA evaluate children with disabilities in all areas of suspected disabilities to (1) determine eligibility for services, and (2) determine the appropriate content for students' IEPs:⁷⁷

Each public agency 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, academic performance, communicative status, and motor abilities...⁷⁸

The regulations also require reevaluations if a teacher or parent requests them, and at least once every three years:

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.⁷⁹

⁷⁶ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁷⁷ 34 C.F.R. §300.304 (b)(1) (i) and (ii).

⁷⁸ 34 C.F.R. §300.304 (c)(4).

⁷⁹ 34 C.F.R. §300.303.

Petitioner asserts that DCPS should have completed psychological, OT, and A/T evaluations by the end of 2022. Witness A opined that Student's IQ score on Examiner A's evaluation in 2019 warranted a reevaluation to determine his/her eligibility for classification with an intellectual disability. Witness A also opined that Student should have received an FBA because s/he was receiving BSS and due to his/her problems with executive functioning. Witness B opined that in light of Examiner A's evaluation found weaknesses in self-regulation, Student required an OT evaluation to determine whether there was a sensory component affecting his/her behavior. Witness B opined that he would not have recommended an A/T evaluation through the 2021-22 school year, but believed one was appropriate by the time of his testimony in 2024.

Witness A's reasons for an FBA and a psychological evaluation are unpersuasive. Arguing that every student receiving BSS should also undergo an FBA is unsupported. It ignores the fact that a significant percentage of students with behavioral issues can be served adequately with minimal direct services or with classroom aids, services, and accommodations. FBAs are generally reserved for students whose behavior is more intractable and disruptive to the learning environment. The evidence in this case supports DCPS' witnesses' testimony that Student's ability to access the curriculum was primarily affected by his/her inattention and lack of focus. There was a brief period during the fall of 2022 that Student engaged in disruptive behavior, but for the most part, her/his behavior did not pose a problem in the classroom. Student was generally described as jovial, friendly, engaged, motivated, and a leader. Witness A's suggestion that a psychological evaluation was necessary to explore the possibility of a different disability classification is also unpersuasive. IDEA requires that the IEP meet a student's unique needs, but it does not require the IEP's disability classification to define or embody those needs:

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis. See generally [20 U.S.C. § 1414\(d\)](#) (stating the general requirements of an IEP). Instead, as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis "compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."⁸⁰

Student's cognitive and behavioral deficiencies were established in Examiner A's 2019 evaluation. DCPS updated the achievement portion of the psychological evaluation on December 2, 2022 by conducting a WJ-IV Ach, which confirmed Student's continued weaknesses in reading, writing, and math. While Examiner A's evaluation found problems with self-regulation, Student did not present as a behavioral problem in the classroom. While s/he was the subject of behavioral reports on five occasions during the fall of 2022, three occurred within one week, and none rose to the level requiring a suspension. The November 2022 Behavior PLOP reported that Student was a funny, joyful, jovial, well-groomed, and well-spoken student who engaged well with his/her

⁸⁰ *Fort Osage R-1 School District v. Sims ex rel. B.S.*, 641 F.3d 996, 1004 (8th Cir. 2011), citing *Lathrop R-II School District v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010).

peers. “However, s/he struggles with paying attention, following teacher directives, completing his/her work independently, and needs support with emotional regulation.” The multidisciplinary team (“MDT”) had sufficient data to find that Student remained eligible for services under the classification of OHI, to develop a program for a student functioning well below grade level in all three core areas, and to address behavioral difficulties of inattention and self-regulation. Thus, I conclude that Petitioner has not met her burden of proving that Student required a comprehensive psychological evaluation or an FBA by the end of 2022.

However, as for Student’s writing ability, on the WJ-IV Writing Samples subtest, “[his/her] spelling word organization, and overall presentation, however, made it extremely difficult to decipher [her/his] writing at face value...” In combination with Witness B’s testimony that Petitioner’s self-regulation weaknesses might have a sensory component that could be identified in an OT evaluation, I conclude that Petitioner has met her burden of proving that DCPS should have conducted an OT evaluation by the end of 2022. Finally, I conclude that Petitioner has not met her burden of proving that an A/T evaluation was warranted by the end of 2022. Witness B conceded that an evaluation was not warranted until it was established that interventions were not working, and he would not have recommended an A/T evaluation through the 2021-22 school year.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 16, 2021. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student’s needs in adaptive functioning, A/T, and O/T; (b) failed to address Student’s behavior needs by failing to include a BIP or BSS outside general education; (c) failed to provide sufficient specialized instruction, and (d) failed to provide ESY.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁸¹ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁸² Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”⁸³ Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁸⁴

More recently, the Court considered the case of an autistic child under IDEA who, unlike

⁸¹ 458 U.S. 176, 187 (1982).

⁸² *Id.* at 189-90, 200

⁸³ *Id.* at 200.

⁸⁴ *Id.* at 203-04.

the student in *Rowley* was not in a general education setting.⁸⁵ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁸⁶ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁷

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁸⁸

Student was first found eligible for services on December 20, 2019. The PLOPs on Student’s January 13, 2020 IEP reported that s/he was performing three grades below grade level in Math and four grades below grade level in Reading. Behaviorally, although Student was sometimes oppositional in class, s/he responded well in counseling. The IEP team prescribed eleven hours of specialized instruction outside general education (five in Reading, five in Math, and one in Written Expression) and two hours per month of BSS inside general education. The team did not provide ESY and did not include Written Expression as an Area of Concern. By the end of the school year, none of Student’s IEP goals had been introduced. All of Student’s courses were Pass/Fail, and s/he passed all of his/her courses. His/her behavioral grades indicate that s/he did not present a behavioral problem in the classroom, performing Independently or With Limited Prompting in all but one category. At the end of Student’s first year at School B, also graded Pass/Fail, Student passed five courses, but three were Incomplete.

In Student’s first term IEP Progress Report for the 2021-22 school year, Student was reported to be progressing on most of her/his Math and Reading goals, but no reasons were given to support these characterizations. However, the social worker provided credible explanations for indicating that Student was progressing on her/his goals. The next IEP filed by either party is the IEP at issue, developed on November 16, 2021. The Math PLOP reported that Student was three

⁸⁵ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁶ *Id.* at 997.

⁸⁷ *Id.* at 1000-01 (citations omitted).

⁸⁸ 137 S.Ct. at 1000-01.

grades below grade level in Math, her/his Reading Lexile score was more than 600 points below the grade level range, and s/he was five grade level below her/his grade based on a comprehensive file review in November 2020. The Behavior PLOP reported that Student is very respectful, well-mannered, well groomed, had demonstrated the ability to comply with school expectations and was always willing to attend and engage in BSS. Her/his October SDQ scores were all in the average range.

In the twenty-two months since the previous IEP in the record, Student had maintained a three grade below grade level performance in Math, but lost ground in Reading; since Examiner A's evaluation in December 2019, when Student was reading at a grade E level, s/he fell to five grades below grade level in a file review in November 20, 2020. Thus, s/he made no objective progress in reading from December 2019 until November 2020. In writing, Examiner A found Student to be in the Low Average range in Written Expression. However, this score appears implausibly high in light of Student's Extremely Low scores in Basic Reading Skills (58), Reading Fluency (50), and Reading Comprehension (52), along with his/her low cognitive scores. Examiner A also noted that "[his/her] spelling word organization, and overall presentation, however, made it extremely difficult to decipher [her/his] writing at face value..."⁸⁹ While Student made progress in his/her behavior, and advanced two grade levels in Math to maintain her/his performance level three grades below her/his grade. Student made no demonstrable progress in reading over the twenty-two-month period. Moreover, I conclude that there was sufficient data in Examiner A's evaluation to warrant adding Written Expression as an Area of Concern. Finally, in light of Student's severe deficits in Math and Reading, indicating that s/he had not yet acquired "critical skills" that s/he would be in danger of losing over the summer, the IEP team should have prescribed ESY to ensure the retention to the extent possible, of whatever skills Student acquired during the school year. For these reasons, I conclude that by failing to increase Student's specialized instruction outside general education, where s/he would receive more intensive and individualized instruction, by failing to add Written Expression as an Area of Concern, and by failing to prescribe ESY, DCPS has failed to meet its burden of proving that it developed an IEP for Student on November 16, 2021 that was reasonably calculated for him/her to make progress in light of his/her circumstances.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 14, 2022. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student's needs in adaptive functioning, A/T, and O/T; (b) failed to address Student's behavior needs by failing to include a BIP or BSS outside general education; (c) failed to provide sufficient specialized instruction and inappropriately reduced services, and (d) failed to provide ESY.

On the first Issue Presented, I concluded that DCPS denied Student a FAPE by failing to conduct an OT evaluation by the end of 2022. In the previous section, I concluded that Student's November 16, 2021 IEP was inappropriate because it did not include Written Expression as an Area of Concern, because it did not increase Student's specialized instruction despite a lack of

⁸⁹ When Student was tested again by Witness D on December 2, 2022, s/he scored in the Average range in Writing Samples, but in the Low range I Sentence Writing Fluency, and in the Very Low range in Letter-Word Identification and Spelling, all of which skills are essential for competence in Written Expression.

progress in Reading and a continued below grade level performance in Math, and because it did not prescribe ESY.

For the 2021-22 school year, Student received a D+ in English, a C+ in Math, a C in Science, and s/he failed World Geography. During the fall of 2022. For the first time, the record reflects reports of disruptive behavior on five occurrences that did not result in suspensions. In Math, the PLOP on the November 14, 2022 IEP reported that Student had fallen to five grades below grade level on a fall 2021 i-Ready assessment. In Reading, Student's performance had regressed to a grade E level on an SRI assessment in September 2022, seven grades below grade level. In Behavior, Student was described as generally socially appropriate with her/his peers, s/he struggled with paying attention, following teacher directives, completing his/her work independently, and needed support with emotional regulation. The IEP team reduced Student's overall specialized instruction by one hour, and changed five of the ten hours per week from outside general education to inside general education.

There was no data cited in any of the PLOPs that Student had made any objective improvement in Math or Reading since the 2021 IEP was developed. On the contrary, the only relevant data in the record, the fall 2022 i-Ready and SRI assessment scores, revealed that Student's performance in Math and Reading had regressed by one grade level. Thus, there was no data in the record to support reducing the intensity or amount of Student's specialized instruction overall, or his/her specialized instruction outside general education. Moreover, as discussed in the previous section, I viewed the prior IEP as inadequate for failing to *increase* the specialized instruction outside general education due to a lack of meaningful progress in the twenty-two months prior to the development of that IEP, and the failure of that IEP to include Written Expression as an Area of Concern. In light of Student's behaviors during the fall of 2022, I also concluded earlier that DCPS should have initiated steps by the end of 2022 to undertake an OT evaluation of Student. For all of these reasons, I conclude that DCPS has failed to meet its burden of proving that it developed an IEP for Student on November 14, 2022 that was reasonably calculated for him/her to make progress in light of his/her circumstances.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on November 13, 2023. Specifically, Petitioner alleges that the IEP (a) was based on inadequate evaluation data, thereby failing to address Student's needs in adaptive functioning, A/T, and O/T; (b) failed to address Student's behavior needs by failing to include a BIP or BSS outside general education; (c) failed to provide sufficient specialized instruction and inappropriately reduced services, and (d) failed to provide ESY.

In the two previous sections, I concluded that DCPS had failed to provide appropriate IEPs in 2021 and 2022 by failing to provide an adequate amount of specialized instruction outside general education, failing to include Written Expression as an Area of Concern, failing to prescribe ESY, and failing to evaluate Student in the area of OT to determine his/her needs in that area. In December 2022, Witness D's WJ-IV Ach test confirmed continued Low or Very Low scores in Sentence Writing Fluency, Letter-Word Identification, Passage Comprehension, Sentence Reading Fluency, Calculation, Math Facts Fluency, and Spelling. Staff Member D's Evaluation Summary Report, on December 20, 2022, concluded that Student was "functionally performing approximately 4 grade levels behind," a charitable estimation in light of the I-Ready and RI

assessments earlier in the fall of 2022 that found Student five and seven grades below grade level in Math and Reading, respectively. Student's year-end report card for the 2022-23 school year reflected D+s in Science and English, a B- in Math and the score of a January 2023 SRI assessment revealing a reading level seven grades below his/her grade level at that time. The Math PLOP on the IEP included no new data. In Reading, Student's SRI Lexile score in the fall of 2023 was in the first percentile. In Behavior, Student's positive interaction with peers was noted, but it was also reported that s/he struggled with focus and attention in the classroom, and with completing assigned tasks without prompting, redirection and support. Motor Skills was added as a new Area of Concern, but the IEP included no data in the PLOP nor any goals in that area. The IEP team maintained Student's specialized instruction at five hours per week inside general education and five hours per week outside general education, and prescribed no related services

For the same reasons for the previous IEP, I conclude that DCPS has failed to meet its burden of proving that it provided an appropriate IEP on November 13, 2023. Despite citing no data in math and data in Reading revealing no progress, DCPS again failed to increase Student's specialized instruction outside general education to increase the amount and intensity of services of a student performing five to seven grades below her/his grade level in Math and Reading. Moreover, the IEP did not include Written Expression as an Area of Concern, and did not include ESY despite Student's failure to have acquire critical skills in Math and Reading. In addition, the IEP team terminated Student's BSS despite the indication in the Behavior PLOP that s/he continued to struggle with focus, attention, and completing assignments. And although there still had been no OT evaluation, the IEP included Motor Skills as an Area of Concern, but included no goals and no direct OT services.

RELIEF

For relief, Petitioner requests (1) an order requiring DCPS to conduct a comprehensive psychological evaluation (including adaptive functioning), an OT evaluation, an A/T evaluation, and an FBA (2) an order requiring DCPS to convene an IEP meeting upon the completion of the evaluations to update Student's IEP, (3) an order requiring DCPS to amend Student's IEP to provide more specialized instruction and BSS outside general education, (4) compensatory education services, and (5) attorney's fees.

DCPS has already completed comprehensive psychological, OT, and A/T evaluations as agreed at the AED meeting on November 16, 2023. As for compensatory education, Witness A, Petitioner's educational advocate, developed a Compensatory Education Proposal that requested 415 hours of tutoring and mentoring, 11.5 hours x 36 weeks, 15 hours of behavioral intervention services or counseling (1 hour x 15 weeks), and psychological, FBA, A/T, and OT evaluations.

Petitioner has the burden of establishing entitlement to compensatory education services.⁹⁰ Absent such a showing, any award by the Hearing Officer would be arbitrary. In this jurisdiction, petitioners have the burden of persuasion on all issues other than the appropriateness of IEPs and placements. From a practical point of view, it would be both counterintuitive and unreasonable to require the educational agency to propose a compensatory education plan when its position is that

⁹⁰ *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010).

it did not deny a FAPE in the first place. The requirements for an appropriate compensatory education plan are set forth in the D.C. Circuit's decision in *Reid v. District of Columbia*:⁹¹

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.⁹²

Thus, Petitioner must show (1) what educational harm Student suffered as a result of the alleged denial of FAPE, (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE, and (3) the assessments or educational, psychological, or scientific studies that support the type and amount of services requested.⁹³

Witness A's proposal fails to meet the requirements of *Reid* because it is essentially arbitrary. She proposed 415 hours of tutoring and mentoring, 11.5 hours x 36 weeks. She asserted that Student was deprived of specialized instruction for 176 days or 46.5 weeks. There is no explanation of the origin of the 176 days. Since there are five school days in a school week, 176 days would translate into 35.1 weeks, not 46.5. There is no explanation how or why the 46.5 weeks was reduced to 36 weeks, or why she concluded that Student was deprived of 11.5 hours each week.

Witness A's proposal suggests that Student would regain what s/he lost by providing 77.4% of the specialized instruction hours lost in the form of tutoring and mentoring (36 weeks/46.5 weeks). There is no explanation as to how this ratio was derived. Witness A offered no analysis of what Student lost during the period of harm, no basis for the 77.4% ratio, and cited no study that would justify the ratio. The other features of Witness A's proposal that can reasonably be construed as compensatory services are unsupported by any analysis whatsoever. There is no explanation of how mentoring would compensate Student for her/his academic loss, had that loss been identified in the first instance. The proposal also requests 15 hours of BSS or counseling, one hour for 15 weeks. Witness A testified that these hours are proposed to address prescribed services that were not actually provided, based on her review of Service Trackers. However, the failure to implement any of the IEPs was not an issue presented in this case. Witness A's proposal offers no analysis or recommendation as to an amount of tutoring and/or counseling that would be appropriate under *Reid* for the period Student should have been in a more restrictive environment.

The *Reid* court rejected the parent's request for tutoring on an hour-for-hour lost basis as arbitrary.⁹⁴ Similarly, the court rejected DCPS' proposed award, "although 810 hours certainly seems like a significant award," because it, too, was not based on a fact-specific assessment.⁹⁵

⁹¹ 401 F.3d 516 (D.C. Cir. 2005).

⁹² *Id.* at 524. *See also, B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

⁹³ *See, Gill v. District of Columbia*, 751 F.Supp.2d 104, 111-12 (D.D.C. 2010) (petitioners offered neither reasoning nor factual findings to support the appropriateness of their proposed compensatory education plan), *further proceedings*, 770 F.Supp.2d 112, 116-18 (D.D.C. 2011).

⁹⁴ 401 F.3d. at 523.

⁹⁵ *Id.* at 524.

Instead, the court stated that an award must be based on an individualized assessment: "... just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments."⁹⁶

Reid requires an analysis of the type and amount of services required to bring a student to the point s/he would have been but for the denial of FAPE. Unfortunately, while they are well-intentioned, this case highlights the fact that *Reid* and its progeny are unworkable. I was a Hearing Officer when *Reid* was issued in 2005. In fact, I believe I was the first Hearing Officer to order DCPS to fund an independent evaluation to address *Reid's* requirements. However, in the intervening eighteen years, I have never seen a compensatory education plan that met its requirements. First, *Reid* requires an individualized assessment of what the child lost during the period s/he was denied a FAPE and an analysis of the type and amount of services that would compensate for that loss. Obviously, such an analysis must be presented at the hearing by the petitioner,⁹⁷ because the school district's position is that it offered a FAPE. I have never conducted a hearing in which a petitioner submitted a qualifying analysis as part of its direct case. I have never seen an analysis quantifying what a student lost, or failed to gain, in terms of grade equivalence or percentile rankings as a result of a denial of FAPE during a period of harm. Here, Witness A's plan cites no data establishing Student's growth, or lack thereof, during the purported period of harm. Thus, a fundamental requirement of *Reid* was not documented: the loss to be compensated. Second, I have never seen a credible, individualized analysis presented during a hearing, based on the student's cognitive level and history of academic achievement, of how much one-on-one tutoring would be necessary to produce a finite amount of academic growth. Here, Witness A recommended 415 hours of tutoring *or mentoring*, for 535 lost hours of specialized instruction (11.5 hours x 46.5 weeks), but there was no explanation why the lost hours would be adequately compensated for 77.4% of that amount in hour-for-hour tutoring. Thus, Witness A's recommendation of 415 hours of tutoring mentoring is as equally arbitrary as the *Reid* petitioner's hour-for-hour request or DCPS' 810-hour proposal that the *Reid* court deemed "significant" yet arbitrary. Moreover, there no explanation in Witness A's proposal as to why mentoring would be appropriate compensation for lost specialized instruction.

There are several reasons why *Reid* is unworkable in due process hearings. First, there may be no reliable data as to a student's academic growth rate during the period of harm. If the complaint is filed during or shortly after the period of harm, there may be no data as to the student's expected growth rate with the necessary support. Without such data, it would be impossible to determine the amount of services needed to compensate a student for the loss sustained. Here, there is no data or analysis as to what quantifiable harm Student suffered as a result of the lack of services during the period s/he should have been supported by a more intensive IEP, and no data or analysis of the quantifiable harm s/he has suffered for being in a less restrictive environment than s/he should have been since November 16, 2021.

Second, as is the case here, petitioners routinely do not offer evaluations conducted by psychological experts during due process hearings addressing *Reid's* requirements. *In fact. Witness A conceded that she was unaware of Reid or its requirements.* Because Hearing Officers have a statutory deadline to issue their decisions, they cannot simply retain jurisdiction after finding

⁹⁶ *Id.*

⁹⁷ *Phillips and Gill, supra.*

liability on the part of the educational agency to order and await the completion of such evaluations to award compensatory education services. In Case No. 2020-0138-B, the petitioner offered no evidence consistent with *Reid's* requirements. Nevertheless, because the student was clearly entitled to a considerable amount of tutoring as compensatory education services, I awarded 100 hours of tutoring and ordered the LEA to fund an evaluation to determine how much additional services were warranted under *Reid*. Because I could not retain jurisdiction once the HOD was issued, I further ordered that the IEP team reconvene upon completion of the evaluation to determine an appropriate amount of compensatory education services. Either the LEA would agree with the proposal in the petitioner's plan or the petitioner would have an evaluation in-hand to support a due process claim for services. However, the LEA justifiably appealed on the grounds that the petitioner had not established an entitlement for compensatory education services under *Reid*. The court agreed that my award of even 100 hours was "not supported by any individualized assessments or facts..." and disallowed consideration of the evaluation that I authorized, and determination of a compensatory education award by the IEP team, as a delegation of my authority "to a group that includes an individual specifically barred from performing the hearing officer's functions."⁹⁸ Thus, despite my finding, upheld by the court, that the student made no objective academic progress for three years while enrolled at the LEA's school, and the LEA developed three inappropriate IEPs, that student still has received no compensatory education services. More than three years after I issued the HOD, and six years after the initial violation, the evaluation authorized in the HOD has yet to be conducted. Once it is completed, I seriously doubt that it will meet *Reid's* requirements. Thus, if a petitioner fails to submit a plan at the hearing that is supported by an evaluation that complies with *Reid*, the Hearing Officer is limited to ordering the LEA to fund such an evaluation, but the Hearing Officer no longer has jurisdiction of the case.

Fourth, and most important, there appear to be no academic studies available to provide the support for *Reid's* requirements. *In the eighteen years since Reid was issued, I have never seen a study cited that addressed the likely quantifiable benefits of one-on-one tutoring of students with various disabilities.* Moreover, the success rate of tutoring would likely vary depending upon the child's disability. For example, a student with a Specific Learning Disability ("SLD") and a low IQ who has been deprived of FAPE for two years would likely need significantly more intensive tutoring, i.e., a higher percentage of hour-for-hour compensation, than a student classified Other Health Impairment due to ADHD with an average IQ who has been deprived of FAPE for one or two reporting periods. In a recent case, Case No. 2020-0093, a witness was admitted as an expert in compensatory education services. He testified that he had developed scores of compensatory education plans and had testified in numerous due process hearings in support of compensatory education proposals. In fact, it was the third time in the last year that he had done so before me. When I asked him the basis for proposing a particular percentage of service hours lost in the form of tutoring, he simply said it was based on his experience. In the three cases before me, he recommended tutoring as a percentage of specialized instruction lost ranging from 38%, to 50%, to 78%, none of which was supported by any analysis whatsoever. When I asked if he was aware of any studies that supported the ability to quantify the efficacy of one-on-one tutoring of disabled students, he stated that he was unaware of any such studies. Thus, as far as compensatory education under the *Reid* standard is concerned, expertise simply does not exist. Like the student in Case No. 2020-0138-B, the student in Case No. 2020-0093 has received no compensation for violations that occurred more than five years ago.

⁹⁸ Case No. 21-cv-0223 (RCL) at 39 (D.D.C. April 20, 2023).

Because of these intractable problems complying with *Reid*, awards could be made much easier, and without the unnecessary, time-consuming litigation that has occurred in many cases that has deprived student of services during the years of litigation. Hearing Officers could be authorized to award tutoring as a fixed percentage of the specialized instruction that was lost. For example, Hearing Officers could award one hour of tutoring for every three hours of lost specialized instruction time. Here, Student would be eligible for 288 hours of tutoring.⁹⁹ This is a significant amount of services considering that they are likely to be provided in one or two-hour sessions after school or on weekends -- anywhere from 144 up to 288 tutoring sessions.

Whatever is lost in the lack of an empirical justification for the amount of tutoring is more than offset by the immediacy of an award of services without further costly, wasteful, and time-consuming compensatory education evaluations and litigation. An obvious, necessary, and time-sensitive benefit should not continue to be sacrificed in pursuit of unattainable perfection. To that end, though mindful that the award does not comport with *Reid*, for the reasons set forth above, I will award Student 288 hours of independent tutoring.

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the closing arguments of counsel for the parties, and the parties' post-hearing submission of authorities relied upon, it is hereby

ORDERED, that within fifteen (15) school days of the issuance of this HOD, DCPS shall convene an IEP meeting to review the recently completed psychological, OT, and A/T evaluations. The IEP team shall revise Student's IEP as necessary and include at least twenty hours per week of specialized instruction outside of general education, including all of Student's instruction in Reading, Math, and Written Expression.

IT IS FURTHER ORDERED, that within fifteen (15) school days of the issuance of this HOD, DCPS shall issue funding authorization for 288 hours of independent tutoring in Math, Reading, and Written Expression.

⁹⁹ I concluded that Student has been deprived of an appropriate IEP since November 16, 2021. I am ordering DCPS to increase Student's specialized instruction outside general education to at least 20 hours per week, which would include all of Student's Reading, Written Expression, and Math courses as well as other courses which involve reading, writing, or math. Thus, from November 16, 2021 until November 14, 2022, Student was deprived of nine hours per week of specialized instruction. Assuming this HOD is not effectuated until the end of February 2024, from November 14, 2022 until February 29, 2024, Student would have been deprived of ten hours per week of specialized instruction. From November 16, 2021 through November 14, 2022, there were 202 school days, or 40.4 weeks, including ESY. From November 15, 2022 through February 29, 2024, there are 265 school days, or 53 weeks, including ESY. Thus, Student was deprived of 9 hours x 40.4 weeks plus 10 hours x 53 weeks, or a total of 863.6 hours of specialized instruction.

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 29, 2024

Copies to: Attorney A, Esquire
Attorney B, Esquire
OSSE Office of Dispute Resolution