

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

Parent on behalf of Student ¹)	Case No. 2023-0210
)	
Petitioner)	Hearing Dates: December 18 and 19, 2023
)	
v.)	Conducted by Video Conference
)	Date Issued: January 10, 2024
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On October 27, 2023, Petitioner filed a *Due Process Complaint* (“Complaint”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing timely to comply with its child find obligations to Student, failed to provide an appropriate Individualized Education Program (“IEP”) and placement, and failed to provide Petitioner complete access to Student’s educational records. On November 7, 2023, DCPS filed *District of Columbia Public Schools’ Response to Petitioner’s Administrative Due Process Complaint* (“Response”), 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 October 27, 2023, Petitioner filed the *Complaint* alleging that DCPS denied Student a FAPE by (1) failing timely to comply with its child find obligations to Student. Specifically, Petitioner alleged that due to Student behavior and poor academic performance, DCPS should have completed initial evaluations of Student by the beginning of the 2021-22 school year, and DCPS denied Petitioner's request on July 19, 2023 for additional evaluations; (2) failing to develop an appropriate IEP and placement on August 4, 2023. Specifically, Petitioner alleges that the IEP was based on inadequate evaluation data, and Student requires a therapeutic placement that is not offered at School A; and (3) by failing to provide her full access to records she requested on June 13, 2023.

On November 7, 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 met with Petitioner in December 2022 regarding Student's educational needs and developed a Section 504 Plan. DCPS issued a Prior Written Notice ("PWN") in January 2023 indicating that the 504 Plan provided Student with behavioral improvement and that s/he did not present with areas of concern for IDEA evaluation and/or eligibility; (2) by May 2023, Student's performance warranted formal special education; DCPS proposed a psychological evaluation and a functional behavior assessment ("FBA"). The evaluations were completed, and in early August 2023, DCPS proposed an IEP providing 20 hours of specialized instruction outside general education, and four hours per month of behavioral support services ("BSS"). DCPS also developed a behavior improvement plan ("BIP") in October 2023; (3) In late September 2023, Student was involuntarily transferred from School B to School A due to the severity of two assaults committed by Student resulting in injuries to the other student and potential criminal charges. DCPS proposed a Behavior Educational Support ("BES") placement for Student that is available at School A, and (4) evaluations must be completed to determine if alleged child find violations rise to the level of denials of FAPE.²

The parties participated in a resolution meeting on November 15, 2023 that did not result in a settlement. The prehearing conference in this case was conducted on November 27, 2023 through video conference facilities. The *Prehearing Order* was issued that day.

The due process hearing was conducted on December 18 and 19, 2023 by video conference. The hearing was open to the public at Petitioners' request. Petitioners filed Five-day Disclosures on December 11, 2023, containing a witness list of ten witnesses and documents P1 through P71. Respondent did not file objections to Petitioners' disclosures. Thus, Petitioners' Exhibits P1-P71 were admitted into evidence.

² Respondent's counsel offered the following updated information at the prehearing conference: "DCPS response to date re records requests made, as alleged by petitioner in mid-June 2023 forward:

1. The requests expanded over the time period alleged by petitioner when the requests were made
2. DCPS provided records, including attendance 22/23 SY and historical records dating back to 2019 on or about July 6, 2023.
3. DCPS continues to seek out response and provision of access to the continuing requests for documents.

It should be further noted that part of the 504 plan and behavior intervention afforded the student during the 21/22 SY, after the distance learning school year of 20/21, included interventions and communication to parent to address the significant truancy and absences of the student."

Respondent filed disclosures on December 11 and 12, including a witness list of six witnesses and documents R1 through R38. Petitioner filed objections to Respondent's disclosures on December 14, 2023. Petitioner objected to expert testimony from Witness E and four other individuals who were not ultimately called as witnesses because their *curricula vitae* were not disclosed. These objections were sustained. Petitioner also objected to R-13 and R-35 on grounds of relevance. Rulings on the objections to the proposed exhibits were deferred until the documents were offered and authenticated. During Respondent's direct case, Respondent's Exhibits R1-R12, R14-R34, and R36-R38 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Witness C, Petitioner, and Witness D. Witness A was admitted as an expert in Occupational Therapy³ and Witness B was admitted as an expert in Special Education. Respondent presented as witnesses in chronological order: Witness E and Witness F. Witness F was admitted as an expert in Special Education. 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 December 29, 2023. On December 28, 2023, Petitioner filed *Supporting Case Laws*, and DCPS filed an email including cases on which it relies regarding observations of students in classrooms.

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 timely to comply with its child find obligations to Student. Specifically, Petitioner alleges that due to Student's behavior and poor academic performance, DCPS should have completed initial evaluations of Student by the beginning of the 2021-22 school year. Petitioner alleges that she requested initial evaluations at the beginning of the 2022-23 school year. Petitioner also alleges that the initial evaluation that DCPS conducted on June 27, 2023 was not comprehensive because Student refused to complete the battery of testing due to his/her disability-related behaviors, and DCPS denied Petitioner's request on July 19, 2023 for additional evaluations.
2. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on August 4, 2023. Specifically, Petitioner alleges that the IEP was based on inadequate evaluation data resulting in inaccurate present levels of academic performance and baselines. Petitioner also alleges Student requires a therapeutic placement that is not offered at School A.

³ I did not admit Witness A as an expert in assistive technology ("A/T"). Her *curriculum vitae* evinced no training or licensing in that area, and it referenced A/T only insofar as (1) she now manages a team consisting of "career vocational providers:" occupational therapists, physical therapists, speech therapists, assistive technologists, (2) she was clinical director of her own private clinic that provided A/T, OT, S/L, and PT services, and (3) she made two presentation in 2009-2010 entitled *The Integration of OT and AT in Special Education?* and *What is AT and How is it Integrated into Special Education?*

3. Whether DCPS denied Student a FAPE by failing to provide her full access to records she requested on June 13, 2023 including all standardized testing results through school year 2022-23, all report cards through school year 2021-22, attendance records through school year 2021-22, disciplinary records through school year 2021-22, all SEDS Communication records through school year 2022-23, and the Section 504 Plan developed on December 20, 2022.⁴

FINDINGS OF FACT

1. Student is X years old and was rising to grade L at School B for the 2023-24 school year when DCPS developed his/her IEP on August 8, 2023.⁵

2. On August 1, 2017, when Student had just completed grade E at School C, DCPS issued Student's report card for the 2016-17 school year. S/he earned the following grades: Advanced in Reading, Writing & Language, Math, Social Studies, Music, Art, Health & Physical Education, and World Languages, and Proficient in Speaking and Listening and Science. In the twelve graded behavioral categories, s/he behaved appropriately and Independently in five categories, With Limited Prompting in four categories, and With Frequent Prompting in three categories: Follows Playground Rules/ School Rules, Respects the Rights/Property of Others, and Practices Self-Control. "[Student] has been an absolute pleasure to have in class this year."⁶

3. On July 9, 2018, when Student had just completed grade C at School C, DCPS issued Student's report card for the 2017-18 school year. S/he earned the following grades: Advanced in Health & Physical Education, Proficient in Speaking and Listening, Social Studies, Music, and Art, Basic in Math and Science, and Below Basic in Writing & Language. In the twelve graded behavioral categories, s/he behaved appropriately and Independently in one category, With Limited Prompting in three categories, and With Frequent Prompting in eight categories. While no final grade in Reading was recorded, s/he entered the year reading at level Q; the year-end goal was level M. Student finished the year at Level Y. However, in Math, his/her "minimal" progress was attributed to "off-task behavior." "[Student] needs to devote more time to [his/her] studies and improve [his/her] organizational skills for the upcoming school year."⁷

4. During the spring of 2019, when Student was in grade F at School C, Student was administered the Partnership for Assessment of Readiness for College and Careers ("PARCC") assessment of English Language Arts ("ELA") & Literacy. S/he scored 701, at Performance Level 2, "Partially Met [grade level] Expectations." A score of 725 would be Level 3, "Approached Expectations. A score of 750 would have met grade level expectations."⁸ On the PARCC Math

⁴ In response to my question during the prehearing conference as to which requested documents remained outstanding, Petitioner's counsel stated that he had received no disciplinary records or attendance records prior for school year 2022-23 or prior years. When I noted that the *Complaint* did not allege that Petitioner requested disciplinary records for school year 2022-23, Petitioner's counsel conceded that point, but noted that such records were requested in the communication to DCPS on June 13, 2023 that was described in the *Complaint*.

⁵ Petitioners' Exhibit ("P:") 13 at page 1 (130). The exhibit is followed by the electronic page number in the disclosure in parentheses, i.e., P13 (130).

⁶ P41 (245).

⁷ P42 (250).

⁸ P51 (297-98).

Assessment, Student's score of 743 was at Level 3, "Approached Expectations." As in ELA, a score of 750 would have met expectations.⁹ S/he scored higher than 50% of students in the District who took the same assessment.¹⁰ On a May 30, 2019 i-Ready Math assessment, Student's overall score of 467 was within the range of grade level expectations, 446-516.¹¹

5. On July 31, 2019, DCPS issued Student's report card for the 2018-19 school year. S/he earned the following grades: Advanced in Science and Art, Proficient in Writing & Language, Speaking and Listening, Social Studies, Music, and Health & Physical Education, and Basic in Reading and Math. In the twelve graded behavioral categories, s/he behaved appropriately and Independently in four categories, With Limited Prompting in five categories, With Frequent Prompting in three categories: Follows Playground Rules/ School Rules, Listens While Others Speak, and Rarely in Completes and Returns Homework. "It has been a pleasure having [Student] in reading and math class this year. [Student] has made growth toward proficiency throughout the year and will be going to grade A next year."¹²

6. On July 29, 2020, when Student had just completed grade A at School C, DCPS issued Student's report card for the 2019-20 school year. Due to the COVID-19 restrictions and implementation of virtual learning in the spring of 2019, the only fourth term grades recorded were Pass in Reading, Math, Science, and Music, and no behavioral grades. For the third term, Student earned the following grades: Proficient in Speaking & Listening, Math, Science, Music, Art, and Health & Physical Education, and Basic in Reading, Writing & Language, Social Studies, and World Languages. In the twelve graded behavioral categories, s/he behaved appropriately and Independently in four categories and With Limited Prompting in the remaining eight categories. No year-end teacher comments were provided.¹³

7. On August 12, 2021, when Student had just completed grade D at School C, DCPS issued Student's report card for the 2020-21 school year. S/he earned the following grades: Proficient in Reading, Speaking & Listening, Social Studies, Science, Music, and Health & Physical Education, and Basic in Writing & Language, Math, and Spanish. In the twelve graded behavioral categories, s/he behaved appropriately and Independently in Practices Self Control and With Limited Prompting in the remaining eleven categories. "[Student] was a delight to have in class this school year. [S/he] participated daily online and when we were in-person. [His/her] contribution to the class was very important, I was pleased with [his/her] efforts and the amount that [s/he] grew in math this school year. According to [his/her] i-Ready test results, [s/he] grew four grade levels in math. I am sure [his/her] beginning of year score was well below [his/her] true score, so I believe [s/he] grew probably 2 grade levels since the start of the school year."¹⁴

8. Student enrolled at School B for the 2021-22 school year. During the spring of 2022, Student was administered the PARCC ELA assessment. S/he scored 738, at Performance Level 3, "Approached Expectations. A score of 750 would have met grade level expectations."¹⁵

⁹ P51 (303).

¹⁰ P51 (304).

¹¹ P53 (312).

¹² P43 (255).

¹³ P44 (260).

¹⁴ P45 (265).

¹⁵ P51 (299).

Her/his score was better than 60% of students in the District who took the same assessment.¹⁶ On the Math assessment, Student's score of 728 was also at Level 3. A score of 750 would have met grade level expectations.¹⁷ Her/his score was better than 66% of students in the District who took the same assessment.¹⁸

9. On August 11, 2022, DCPS issued her/his report card for the 2021-22 school year. S/he earned the following grades in full-year courses: Math – D (“Does not participate. Does not complete class assignments. Excessive tardiness.” [15 absences]), Language Arts –C- (“Poor behavior. Does not complete class assignments. Excessive tardiness.” [8 absences]), Science – C- (“Pleasure to have in the class. Does not complete class assignments. Excessive tardiness.” [23 absences]), World Geography & Cultures – B+ (“Pleasure to have in the class.”), Music – A (3 terms, 6 absences), and Health & Physical Education – A (3 terms, 6 absences). In courses that were one-term only: Arabic Language & Culture – D (1 absence), Art – C- (2 terms, 4 absences), and Spanish Language & Culture – C (2 absences), Drama – D+ (5 absences), and Global Citizens – F (7 absences).¹⁹ “SRI results as of 2/11/21 suggest that [Student] was reading at lexile level 608, which is a [grade F] reading level.”²⁰ Grade F was three grades below Student's grade in February 2021. During the 2021-22 school year, Student was absent 29 days, 26 unexcused, and tardy 48 days, all unexcused.²¹

10. During the 2022-23 school year, Student engaged in behaviors that resulted in a range of responses from the School B staff: verbal redirection or reprimand, temporary removal from classroom, parental contact in writing or by phone, in-school disciplinary action, on-site suspension, and off-site suspension.²² Student received verbal redirection or reprimands on the following dates: August 31, 2022 (horseplay, failing to follow directions), September 26, 2022 (behaviors that disrupted classroom teaching and learning), February 9, 2023 (hitting students in class and making explicit sexual gestures), February 16, 2023 (drew on teacher's clothes with white board marker), February 28, 2023 (accessing inappropriate websites on Chromebook, refusing to turn it off and do work), March 6, 2023 (three incidents: (a) off-task, took classmates glasses and did not return them for extended period of time, eloped, (b) threw orange at the head of a classmate, and (c) eloped from Science because it was too quiet and s/he did not want to work), and May 2, 2023 (directing profanity or obscene gesture toward staff).

Student was temporarily removed from class on the following dates: September 16, 2022 (directing profanity or obscene gesture toward staff), September 22, 2022 (behaviors that disrupted classroom teaching and learning), September 29, 2022 (physical altercation with another student), October 5, 2022 (two incidents: (a) refusal to comply with staff instructions or school rules, and (b) reckless behavior towards another student contributing to an injury to the student), December 12, 2022 (physical altercation with another student, threw another student's purse and stomped on it), January 4, 2023 (throwing objects in class, inappropriate language, turning lights off, eloped), January 19, 2023 (off-task, teacher requested his/her removal), January 31, 2023 (persistent use of profanity, elopement), February 1, 2023 (fighting, sent home with street pass), February 2, 2023

¹⁶ P51 (300).

¹⁷ P51 (305).

¹⁸ P51 (306).

¹⁹ P46 (270-73).

²⁰ P46 (274).

²¹ P39 (235-36).

²² P21 (177).

(throwing calculators in class), February 3, 2023 (throwing calculators in class, hitting classmates with paper whips), February 6, 2023 (pulled pants down, refused to do work), February 27, 2023 (two incidents: (a) put classmate in headlock, and (b) behaviors that disrupted classroom teaching and learning), March 7, 2023 (horseplay in hallway), May 30, 2023 (impolite, discourteous, or disrespectful communication).

In addition to the incidents on February 1 and 27, 2023 described above, Petitioner was contacted in writing or by phone on the following dates: September 12, 2022 (elopement), September 29, 2022 (inappropriate or disruptive physical contact between students), October 21, 2022 (verbal, written, or physical threat to person or property), December 14, 2022 (inappropriate physical contact with student of opposite sex, verbal abuse of student and school dean), January 4, 2023 (screaming at teacher, intimidating manner with teacher), January 6, 2023 (horseplay, profanity, took property of another student, threw objects, clapped hands behind staff member's head), January 9, 2023 (two incidents: (a) altercation with student of opposite sex, and (b) elopement, off-task and disruptive behavior, inappropriate language, horseplay leading to a fight, failure to follow instructions), January 11, 2023 (physical threat to staff member, elopement), February 16, 2023 (two incidents: (a) pushed student in chest, profanity, invited another student to fight, (b) wrote on teacher's back with a black marking pen), February 17, 2023 (profane language towards staff and peers, throwing objects out the window), February 27, 2023 (eloped from premises), March 22, 2023 (threw book that hit the teacher), April 6, 2023 (elopement, then eloped from confinement), and April 7, 2023 (altercation, threatened staff member, refused to stay with dean, aggression towards another student, swung at the student precipitating a fight, refused to write a statement).

In-school disciplinary action was taken on the following dates: February 17, 2023 (refusal to comply with security) and February 27, 2023 (behaviors that disrupted classroom teaching and learning).

Student was suspended on-site on March 9, 2023 for 1-3 days for a physical assault.

Student was suspended off-site for 1-5 days on the following dates: February 27, 2023 (inappropriate language, racial slurs, throwing objects, standing on tables, putting a classmate in a choke hold, eloping from the classroom, leaving the building, refusing to take work assignment),²³ March 7, 2023 (aggressive horseplay, verbal aggression towards teacher, pushed teacher, snatched teacher's glasses from his face, threatening language towards teacher), April 7, 2023 (verbal, written or physical threat to person or property),²⁴ June 2, 2023 (documented pattern of persistent Tier 3 behavior).²⁵

On February 10, 2023, Student was suspended on-site from February 9 – 14, 2023 for a physical attack on a student or staff member.²⁶

²³ Student was suspended for one day for "a Tire 4.16 behavior, described as Documented pattern of persistent Tier 3 behavior. (DCMR §B502)." P26 (196).

²⁴ Student was suspended for four days. P27 (199).

²⁵ Student was suspended for three days. P31 (210), P32 (213).

²⁶ P22 (184).

On March 31, 2023, Principal A notified Petitioner of a proposed one-day suspension for “inciting others to violence or disruption.”²⁷

On May 26, 2023, Principal A notified Petitioner of a proposed two-day suspension for fighting with a substantial risk or result of minor injury on May 9, 2023.²⁸ That day, Principal A notified Petitioner that the off-site suspension had been denied.²⁹

On June 9, 2023, a three-day off-site suspension was approved for persistent Tier 3 behavior on June 2, 2023.³⁰

11. On October 7, 2022, Physician A of Facility A authored a “To whom this may concern” letter in which she reported that Student has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (“ODD”).³¹

12. On December 15, 2022, DCPS acknowledged receipt of a referral for initial evaluations from Student’s father.³²

13. On December 20, 2022, DCPS developed a Section 504 Plan (“Plan”).³³ The Plan provided a number of classroom accommodations for Student including (a) being allowed to work independently outside the classroom on a case-by-case basis, (b) structured breaks in and out of the classroom at the teacher’s discretion – earned breaks as a reward or breaks needed to cool off, (c) redirection when off-task, to be addressed individually instead of in front of the class, (d) class jobs to keep her/him involved in positive tasks, (e) positive feedback, (f) verbal cues and prompts, (g) prompting to initiate tasks, and (h) preferential seating.³⁴

14. On January 24, 2023, DCPS issued a PWN indicating that it would not proceed with evaluations of Student. “Behavior concerns presented [have] not hindered [Student] from accessing the general education curriculum as evidenced by data reviewed by the Team. Initial 504 Plan dated 12/20/23 has been in place less than 30 days, [Student] seems to be making behavior improvements. Mom has reported that [Student] is currently taking medication daily on a consistent basis. She is receiving less negative phone calls from teachers.”³⁵

15. During the spring of 2023, when Student was in grade B at School B, Student was administered the PARCC ELA assessment. S/he scored 687 at Performance Level 1, “Did Not Meet Expectations.” A score of 750 would have met grade level expectations.³⁶ Her/his score was

²⁷ P26 (196).

²⁸ P30 (207).

²⁹ Respondent’s Exhibit (“R:”) 16 at page 168 (168). The exhibit number is followed by the electronic page number in the disclosure in parentheses, i.e., R16 (168).

³⁰ R17 (170).

³¹ P10 (108). The letter was signed by a doctor of osteopathic medicine, a “Child & Adolescent Psychiatrist,” and included a number of educational recommendations. These recommendations were not considered for two reasons: (1) there is no indication that the doctor has expertise in special education, and (2) the letter is hearsay and the doctor was not available for *voir dire* and cross-examination as to her special education qualifications and recommendations.

³² P58 (335).

³³ 29 U.S.C. §794.

³⁴ P11 (112).

³⁵ P1 (165).

³⁶ P51 (301).

better than 13% of students in the District who took the same assessment.³⁷ On the Math assessment, Student's score of 714 was at Level 2, "Partially Met Expectations." A score of 750 would have met grade level expectations.³⁸ Her/his score was better than 38% of students in the District who took the same assessment.³⁹

16. On May 5, 2023, DCPS acknowledged receipt of a referral for an initial evaluation from Student's father.⁴⁰ On May 18, 2023, DCPS issued a PWN indicating that it intended to proceed with initial evaluations of Student including a Comprehensive Psychological Evaluation and a Functional Behavior Assessment II.⁴¹

17. On May 23, 2023, DCPS developed a Functional Assessment II of Student. The behavior problem was described as "Poor Anger Management (verbal/physical aggression, destruction of property, throwing/kicking objects when upset) Poor self-regulation (Impulsive, irritability, verbally lashes out, easily angered, overreacts, moodiness, low frustration) Poor Social Skills (verbal/physical aggression, inappropriate comments to others, easily annoyed/angered, relates poorly to others)"⁴² The findings of the assessment included the following:

[Student] has a history of behavioral challenges that have both impeded on [her/his] ability to successfully function in the classroom as well as interfered with [her/his] interpersonal relationships in a negative manner. [Student] is easily emotionally dysregulated and s/he often has poor to little insight as to [her/his] role in conflict situations. [Student] seems to strive for positive personal relationships and [s/he] seeks attention from both staff members and peers. Some of [her/his] peers seem to enjoy [his/her] company. However, situations with classmates can often easily escalate into conflict situations due to overly playfulness and teasing that can reach a peak that leads to negative encounters. In addition, during times when [Student] is frustrated or angry, [s/he] tends to revert to disrespectful communication styles that are threaded with the use of profanity. [Student] can be redirected by staff members (sometimes), yet it can take time for [him/her] to self-regulate to gain a better sense of control... Some of [Student's] behaviors require more one-on-one supports. [Student's] behaviors negatively impact how [s/he] integrates in the school community, at home and the community at large...⁴³

The recommendations included preferential seating at the front of the classroom to limit distractions, time limited breaks as needed, use of fidgets as needed, consideration of the use of psychotropic medication to maintain focus and attention, and participation in extracurricular activities to help enhance the quality of peer related and adult interpersonal relationships.⁴⁴

18. On June 7, 2023, Petitioner provided written consent for Student to be evaluated

³⁷ P51 (302).

³⁸ P51 (307).

³⁹ P51 (308).

⁴⁰ P59 (337).

⁴¹ P18 (168).

⁴² P5 (65).

⁴³ P5 (69).

⁴⁴ *Id.*

to determine his/her eligibility for special education services.⁴⁵

19. On June 13, 2023, Attorney A requested access to Student's "entire academic file."⁴⁶ On July 6, 2023, Witness C, Attorney A's legal assistant, acknowledged receipt of records, including Student's "most recent report card," but no standardized test scores, no progress reports, and no report cards including grades for all four terms.

Now that we are in the midst of setting a school meeting for [Student], we are asking that the remainder of [his/her] academic file for the last two years be sent to us as soon as possible to allow parent and team time to review the records to participate meaningfully in the upcoming meeting.⁴⁷

On July 12, 2023, Witness C requested Student's disciplinary records based on Petitioner's assertion that Student was suspended several times during the 2021-22 school year and sent home "many days."⁴⁸ Witness F, School B's LEA Representative, replied on July 21 and 26, 2023, indicating that records were sent to Petitioner on July 21st, but the emails do not reveal which documents were provided to Petitioner on that date.⁴⁹

20. On June 27, 2023, DCPS completed a Comprehensive Psychological Evaluation. Student was referred by the multidisciplinary team ("MDT") due to verbal and physical aggression, high levels of impulsivity and irritability, low frustration tolerance, and moodiness. "[Student] has an early history of behavioral difficulties, but those problems have increased in rate and intensity this school year and have now severely impacted [her/his] ability to adequately access instruction... [Student] has prior diagnoses of Oppositional Defiant Disorder and Attention-Deficit Hyperactivity Disorder, and relatedly has a 504 Plan (December 2022) to provide [him/her] with a number of classroom accommodations and supports. Still, the MDT is concerned that that the 504 Plan does not provide [Student] with satisfactory educational support. Moreover, the MDT believes that [Student's] social-emotional/behavioral problems are the primary barrier to [her/his] academic success." Examiner A attempted to begin the testing in May 2023. However, due to Student's belligerence, refusal to cooperate, and unavailability, no formal assessments or classroom assessments could be conducted during the school year.⁵⁰ Examiner A was able to conduct a Behavior Assessment System for Children ("BASC-3") with rating scales being completed by Petitioner, Teacher A, and Social Worker A. The scores of all three were in the Clinically Significant range for Externalizing Problems Composite, including on each of the subtests: Hyperactivity, Aggression, and Conduct Problems, in the School Problems Composite, and on the Behavioral Symptoms Index.⁵¹

Examiner A concluded that Student met the criteria for a disability classification of Emotional Disturbance ("ED").

⁴⁵ P61 (347).

⁴⁶ P60 (339).

⁴⁷ R1 (22).

⁴⁸ R1 (20).

⁴⁹ R1 (16, 19).

⁵⁰ P7 (81).

⁵¹ *Id.* at (87).

In sum, [Student] is a vulnerable youth due to both [his/her] learning and emotional issues. [His/her] inconsistent class participation and assignment completion have prevented [him/her] from effectively accessing the curriculum. Moreover, [Student] is essentially failing all [her/his] classes and has become increasingly disengaged from [her/his] education. At this time, any difficulty [Student] is encountering accessing [his/her] academic program appears to be the result of behavioral and social-emotional barriers. Additionally, it would seem that [his/her] academic performance has been significantly impacted by [her/his] emotional concerns. [S/he] continues to require academic and behavioral supports to successfully navigate the school environment. In sum, [Student] appears to meet criteria for a disability classification of Emotional Disability.⁵²

Examiner A provided a number of recommendations including, but not limited to, accommodations focused on Student's weaknesses in planning, organization, and behavioral initiation including guided notes to decrease the organizational demands of note-taking, assignment notebooks to organize homework assignments, and pointed questions prior to reading assignments to improve comprehension. She also recommended evidence-based interventions in reading, math, and written expression.⁵³

21. On July 7, 2023, DCPS issued Student's report card for the 2022-23 school year. S/he earned the following grades in full year courses: Math – D ("Does not participate. Does not complete class assignments. Excessive tardiness." [15 absences]), Language Arts – C- ("Poor behavior. Does not complete class assignments. Excessive tardiness." [8 absences]), Science – C- ("Pleasure to have in the class. Does not complete class assignments. Excessive absences." [23 absences]), and World Geography & Cultures – B+ ("Pleasure to have in the class." [7 absences]). In three-term courses: Music – A (6 absences), and Health and Physical Education – A (6 absences). In two-term courses: Art – C (4 absences). In courses that were one-term only: Arabic Language & Culture – D (1 absence), Spanish Language & Culture – C (2 absences), Drama – D+ (5 absences), and Global Citizens – F (7 absences).⁵⁴ "SRI results as of 1/12/23 suggest that [Student] was reading at lexile level 818 which is a [grade A] reading level."⁵⁵ Grade A was three grades below Student's grade in January 2023. During the 2022-23 school year, Student was absent 60 days, 35 unexcused, and tardy 24 days, unexcused 23.⁵⁶

22. On July 12, 2023, Petitioner's counsel requested that DCPS conduct the following evaluations of Student: comprehensive psychological, occupational therapy, assistive technology, and a Woodcock-Johnson Test of Achievement.⁵⁷

23. On July 13, 2023, DCPS convened an eligibility meeting for Student. Examiner A indicated that Student's Section 504 Plan was insufficient to meet his/her needs and proposed an IEP with a classification of ED, noting that she was unable to complete a comprehensive evaluation due to Student's refusal to cooperate. Educational Advocate A requested consideration of placement in a therapeutic setting. Witness F, School B's local education agency ("LEA")

⁵² *Id.* at (93).

⁵³ *Id.* at (94).

⁵⁴ P47 277-280).

⁵⁵ P47 (281).

⁵⁶ P38 (231-33); P40 (241-43).

⁵⁷ P61 (344).

representative, proposed a placement in a self-contained setting in the BES program in which the staff/teacher ratio would be 12:3, including a behavior technician, an aide, and a special education teacher. Petitioner's attorney, Attorney C, requested cognitive and achievement testing, testing to assess executive functioning, an occupational therapy evaluation, and an assistive technology evaluation. Examiner A agreed to complete the psychological evaluation, but not an OT, and opined that Student did not need assistive technology. Petitioner concurred with the proposed placement in the BES program at School B due to positive relationships Student had developed with staff members at School B.⁵⁸

24. On July 13, 2023, DCPS issued a Final Eligibility Determination Report finding Student eligible for services as a student with an Emotional Disability.⁵⁹

Academically, [s/he] is solid, but [his/her] behavior and impulsiveness in class makes it difficult for [him/her] to progress. All of [his/her] teachers see [his/her] strengths as [his/her] leadership skills, energy, and sense of humor. [S/he] likes classroom jobs and responds to rewards. However, [s/he] doesn't do well in larger settings. [S/he] can show attitude, cussing and defiance. When [s/he] loses [his/her] equilibrium, [s/he] often doesn't recover for the remainder of the day... [Student] has a history of poor social skills, distractibility, non-compliance, and aggression. [Student's] behaviors have negatively impacted [his/her] ability to maintain academic success on a consistent basis. [Her/his] behavior can be extremely intense and explosive and often disrupts the academic and school environments. [Student's] interpersonal relationships are also negatively affected, creating a strained atmosphere with others, both staff members and peers. At times, [s/he] does seek positive interactions with both peers and staff members. Yet, negative peer attention can lead to conflicts with classmates.⁶⁰

25. On July 17, 2023, DCPS issued a PWN notifying Petitioner of the eligibility determination. The PWN reported that Examiner A was unable to complete a comprehensive psychological evaluation due to Student's refusal to cooperate. The PWN indicated DCPS' intention to complete that evaluation as well as an informal observation by the school's occupational therapist "to see if there may be concerns surrounding executive functioning due to student's diagnosis of ADHD."⁶¹

Parent Attorney requested non-public placement. The IEP Team disagrees but the request is noted.

In regards to placement, it was further determined based on student's historical data and interventions that have already been implemented, at this time, the IEP [team] believes that [Student] will be best supported in [a] self-contained program within the BES (Behavior & Educational Support) classes. Parent and parent Attorney, [Attorney C], as well as Educational Advocate, [Educational Advocate A], agreed with IEP Team's recommendation for self-contained BES program.

⁵⁸ P55 (319-21).

⁵⁹ P16 (153).

⁶⁰ P16 (158).

⁶¹ P16 (162-63); P19 (171-72).

Mom stated that she wanted [Student] to remain at [School B] due to the positive relationships [s/he] has with several staff members. [Student] is also requesting the same.⁶²

26. On July 19, 2023, Attorney A requested that DCPS conduct a Comprehensive Psychological Evaluation, an Occupational Therapy Evaluation, an Assistive Technology Evaluation, and a Woodcock-Johnson Test of Achievement.⁶³

27. On August 1, 2023, Witness C, Attorney A's legal assistant, notified Witness F, School B's LEA Representative, that Petitioner had not received, *inter alia*, a draft IEP, complete report cards for the 2021-22 and 2022-23 school years, all reading and math standardized testing scores, or all FBAs and BIPs developed in the past two years.⁶⁴ Witness F replied on August 3, 2023, enclosing a draft IEP, but she made no mention of the requested records that had not yet been provided.⁶⁵

28. On August 4, 2023, DCPS convened an Initial IEP meeting. The Areas of Concern were Mathematics, Reading, and Emotional, Social, and Behavioral Development. The Present Levels of Academic Achievement and Functional Performance ("PLOP") in Math reported Student's i-Ready and PARCC scores during the 2022-23 school year. The Reading PLOP reported his/her ANET, PARCC, and Reading Inventory scores during the 2022-23 school year. The IEP team prescribed 20 hours per week of specialized instruction outside general education and four hours per month of behavioral support services outside general education.⁶⁶

29. On September 19, 2023, Principal A, School B's Principal, notified Petitioner of the school's intent to suspend Student for five days for an incident on September 15, 2023 involving "Bullying, or using humiliating or intimidating language or behavior including internet bullying. (DCMR - §B2502)."⁶⁷

30. On September 29, 2023, Principal A notified Petitioner of the school's intent to suspend Student for four days for an incident on September 25, 2023 involving "Participating in a group fight which has been planned, causes major disruption to school day or results in substantial bodily injury. (DCMR - §B2502)."⁶⁸

31. On or about September 30, 2023, Principal A issued at Notice of Immediate Involuntary Transfer of Student due to her/his assault of a classmate causing injury requiring stitches at a hospital. The victim "stated that [s/he] is in fear of [Student] and did not want to attend school further. The parent also stated her intent to press charges against [Student]."⁶⁹

⁶² P16 (163); P19 (172).

⁶³ P61 (344).

⁶⁴ R1 (15).

⁶⁵ R1 (14).

⁶⁶ P13 (130-140).

⁶⁷ P33 (216).

⁶⁸ P34 (219).

⁶⁹ P35 (222-23), P36 (225-26).

32. On October 4, 2023, DCPS issued a PWN notifying Petitioner that Student was being involuntarily transferred to School A due to Student's assault on another student. "Due to the severity of the assault and injury, the intent of the parent of the victim to press charges and this being the second assault resulting in an injury by [Student] as well as repeated examples of bullying to the same victim, DCPS proposes an immediate involuntary transfer."⁷⁰

33. On October 10, 2023, Petitioner provided written consent for Student to be evaluated to determine his/her continued eligibility for special education services.⁷¹

34. On October 10, 2023, DCPS notified Petitioner that Student was being reassigned from School B to School A.⁷² On October 17, 2023, Petitioner's counsel notified DCPS that Petitioner disagreed with the involuntary reassignment, that Student had been unsuccessful the Behavior & Educational Support ("BES") Program at School B and required a more restrictive environment with a therapeutic program.⁷³ After Petitioner enrolled Student at School A on October 24, 2023, Petitioner's counsel reiterated the request for a more restrictive environment with a therapeutic program.⁷⁴

35. On November 21, 2023, the Administrator A notified Petitioner of a proposed two-day suspension for "inciting others to violence or disruption." (DCMR - §B2502).⁷⁵

36. On November 21, 2023, DCPS sent Attorney A an email confirming that it had provided or enclosed all of the records requested by Petitioner.⁷⁶

37. Witness A, Petitioner's occupational therapy expert, was asked to comment on Examiner A's Psychological Evaluation. She opined that the self-regulation problems identified in the evaluation indicate that Student *might* have a problem with sensory processing. The fact that Examiner A recommended interventions in reading and writing suggest that Student may have occupational therapy needs. Witness A stated that Student needs to be calmer to be present in the classroom. She opined that an occupational therapist can help to determine the potentially calming factors. She further opined that Student's frustration, lack of tolerance, and lack of self-regulation all show the need for an occupational therapy evaluation.⁷⁷

38. Witness B, Petitioner's Educational Advocate, opined that by the time of the Analysis of Existing Data meeting in January 2023, there was a Section 504 plan but no behavior intervention plan ("BIP") or counseling support despite absences, low academic performance, and difficulty recovering from behavioral incidents. She opined that the non-public placement requested at the IEP meeting in August 2023 was appropriate because of the frequency of Student's behaviors. When asked what stood out in Student's record, she highlighted Student's behaviors and the fact that s/he was reading three grade levels below her/his grade. She opined that Student

⁷⁰ P20 (174).

⁷¹ P9 (105).

⁷² P62 (349).

⁷³ P63 (351).

⁷⁴ P66 (360).

⁷⁵ P37 (228).

⁷⁶ R1:1 (1).

⁷⁷ Testimony of Witness A.

should have had initial evaluations during the 2021-22 school year; s/he was already showing academic problems and her/his behaviors spiked. Witness A opined that the August 2023 IEP was inappropriate because 12 minutes/day of BSS was insufficient, and the specialized instruction was insufficient to address [her/his] grade level deficiency in reading. Under the IEP, Student had behavioral problems at the beginning of the school year.

Witness B developed a Compensatory Education Plan for Student. The period of harm for the child find violation was October 27, 2021 to the present. This constituted 64 weeks of total missed specialized instruction and related services, or 1280 hours of specialized instruction and 64 hours of BSS. The period of harm for the inappropriate IEP was from August 4, 2023 to the present. As for where Student would be but for the denials of FAPE (child find, inappropriate IEP, lack of BIP, failure to amend the IEP since August 2023, and failure to provide records timely), Witness B stated:

It is difficult to fully answer this question, due to the lack of comprehensive data including but not limited to information regarding [his/her] cognitive functioning and FSIQ or current academic achievement, however, had support been provided to address the Social Emotional and Executive Functioning deficits noted in the Psychological evaluation, we should have seen a decrease in behaviors and an increase in attendance which in turn would have impacted classroom performance. At a minimum, based on [her/his] academic history and report cards, [s/he] should have been able to obtain passing grades in all of [his/her] academic courses.⁷⁸

Witness B proposed 360 hours of academic tutoring (5 hours per week for the 64 weeks lost), (c) 72 hours of counseling, and 360 hours of mentoring as compensatory education.⁷⁹ Witness B's proposal includes an enhanced restatement of the prayer for relief including requests for (a) four evaluations: Cognitive and Executive Functioning, Formal Academic Achievement, Occupational Therapy, and Assistive Technology, On cross-examination, Witness B conceded that she has never met Student, never talked to any of his/her teachers, never observed her/him in a class, and never attended a school meeting on her/his behalf.

39. Witness C, Attorney A's Legal Assistant, handled the initial records requests for Petitioner. When I asked which requested records were never provided, she replied that Student's i-Ready assessments were never provided.⁸⁰

40. Witness E is the Director of Specialized Instruction at School A. She testified that the BES self-contained classroom to which Student is assigned currently has three students; there is a special education teacher, a paraprofessional, and a behavior technician in the class. The maximum BES class size at School A is 12. A social worker provides direct support services as well as crisis intervention support as needed. The behavior technician is trained in Applied Behavior Analysis ("ABA") techniques. The class employs a token economy to reward positive behaviors. There is a Restorative Justice Coordinator who provides a safe space for emotional situations. The goal is to restore calm and to avoid suspensions.⁸¹

⁷⁸ P71 (388).

⁷⁹ *Id.*

⁸⁰ Testimony of Witness C.

⁸¹ Testimony of Witness E.

41. Witness F is the LEA at School B. She described Student as inquisitive, popular, and average to proficient academically, a “brainiac.” In terms of his/her behavior, she testified that Student was “not on our radar” during the 2021-22 school year, but that started changing in November of 2022 and remarkably in February of 2023. The school developed a Section 504 plan to address Student’s behaviors. Although Student was absent from classes, it was not because s/he was not in the building; s/he would come to school but not report to her/his scheduled classrooms. Student admitted being under the influence of marijuana. During the 2022-23 school year, his/her behaviors became more frequent, argumentative, abusive, physical, and defiant and s/he did not respond to redirection. Although the school was aware that Student was hospitalized in May, the school received no information about the circumstances. At the IEP meeting in August, although it was unusual to place a child in the BES program in an initial IEP, Student’s behavior warranted it. Petitioner stated that s/he wanted Student to remain at School B. Student started off the school year well, but started bullying one of her/his classmates, culminating in an attack with injury to the other student. Once Student was transferred to School A, “[s/he] tried to set [School B] on fire on her/his last day. Student continues to appear at School B at dismissal three times per week and recently assaulted another student at a School B dismissal. Witness F opined that she did not know if School A was capable of giving Student the support s/he needs, and that “[s/he] needs an intensive therapeutic environment.”⁸²

CONCLUSIONS OF LAW

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

Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.⁸³

Two of the issues in this case involve the alleged failure of DCPS to provide an appropriate IEP and placement. Under District of Columbia law, DCPS bears the burden as to these issues. Petitioners bear the burden as to all other issues. The burden of persuasion must be met by a preponderance of the evidence.

⁸² Testimony of Witness F.

⁸³ D.C. Code Sect. 38-2571.03(6)(A)(i).

Whether DCPS denied Student a FAPE by failing timely to comply with its child find obligations to Student. Specifically, Petitioner alleges that due to Student's behavior and poor academic performance, DCPS should have completed initial evaluations of Student by the beginning of the 2021-22 school year. Petitioner alleges that she requested initial evaluations at the beginning of the 2022-23 school year. Petitioner also alleges that the initial evaluation that DCPS conducted on June 27, 2023 was not comprehensive because Student refused to complete the battery of testing due to his/her disability-related behaviors, and DCPS denied Petitioner's request on July 19, 2023 for additional evaluations.

IDEA requires local education agencies to identify and evaluate all students suspected of having disabilities to determine their eligibility for special education services:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.⁸⁴

The regulations define a child with a disability as follows:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.⁸⁵

The District's regulations impose strict timelines once a child is referred for evaluation for services:

An LEA shall:

- (a) Make and document reasonable efforts, as defined in this chapter, to obtain parental consent within thirty (30) days from the date on which the child is referred for an initial evaluation, and begin such efforts no later than ten (10) business days from the referral date; and
- (b) Evaluate and make an eligibility determination for a student who may have a disability and who may require special education services within sixty (60) days

⁸⁴ 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.111(a)(1)(i).

⁸⁵ 34 C.F.R. §300.8(a)(1).

from the date that the student's parent or guardian provides consent for the evaluation.⁸⁶

During the 2018-19 school year, Student's ELA PARCC score partially met grade level expectations, and his/her math score of 743 was seven points below grade level expectations and higher than 50% of his/her local peers. His/her May 30, 2019 i-Ready Math assessment was within the range of grade level expectations. Student's year-end grades were Basic in Reading and Math, but Advanced or Proficient in all other courses. S/he did not present behavioral issues in the classroom and teacher comments were complimentary regarding his/her comportment and academic progress during the school year. The 2019-20 school year featured virtual learning from late May through the end of the school year. Student earned Basic grades in Reading, Writing, Social Studies, and World Languages and Proficient in all other courses through the third term and presented no behavioral problems. During the 2020-21 school year, Student earned Basic grades in Writing, Math, and Spanish, and Proficient in all other courses and presented no behavioral problems. Her/his teacher opined that s/he grew two grade levels in Math during the year, was a "delight to have in class," and made important participatory contributions. Based on this three-year history, while Student showed relative weakness in math, s/he made significant progress in math during the 2020-21 school year and otherwise made steady academic progress. Moreover, his/her behavior was such that his/her teachers consistently complimented his/her classroom participation and comportment. I conclude that Petitioner has failed to meet her burden of proving that DCPS should have suspected Student of having a disability as of the beginning of the 2021-22 school year.

During the 2021-22 school year, Student's standardized testing scores indicated that s/he was performing slightly below grade level. Her/his spring PARCC ELA score of 738 was twelve points below grade level expectations, and her/his math score of 728 was higher than 66% of her/his local peers.⁸⁷ However, Student's grades and attendance and attitude deteriorated markedly. S/he received a D in Math in which it was reported s/he did not participate, complete assignments, and had excessive tardiness. In ELA, s/he received a C- and the teacher report was identical. In Science, s/he received a C-. While s/he was a pleasure when in class, s/he did not complete assignments and had excessive tardiness. Student also had poor grades in Arabic Language & Cultures (D), Art (C-), Drama (D+), and Global Citizens (F). Student had 26 unexcused absences and was tardy 48 times during the school year.

During the fall of 2022, Student was temporarily removed from class on September 16th, September 22nd, September 29th, October 5th, and December 12th for serious misconduct including disregarding and disrespecting teachers, disruptive behavior in the classroom, multiple physical altercations, profane language and gestures, reckless behavior causing injury to other students, and throwing and stomping on a classmate's purse. In addition, Petitioner was contacted and informed of Student's serious misconduct on September 12th, September 29th, October 21st, and December 14th, for behaviors including elopement, physical aggression towards students, inappropriate physical contact with a student of the opposite sex, verbal abuse of a student and a school dean.

⁸⁶ 5-A DCMR § 3005.4.

⁸⁷ Student scored three grades below grade level on the SRI reading assessment on February 11, 2021, but this appears to be markedly inconsistent with all other of his/her standardized reading scores.

While School B developed a Section 504 plan in December 2022, none of DCPS' witnesses offered any explanation why Student's deteriorating academic performance during the 2021-22 school year and antisocial behavior during the fall of the 2022-23 school year did not lead the School B staff to conclude that evaluations were warranted instead of a Section 504 plan. Arguably, his/her slightly below grade level standardized test scores offered hope that with a moderate level of classroom accommodations, Student would return to the level of performance shown at School C. However, the poor grades in several courses along with the increasingly antisocial behavior exhibited for the first time during the fall of 2022 should have created a greater sense of urgency, particularly in light of incidents in which there was physical aggression, bodily injury, disregard and disrespect of school staff members, and inappropriate contact with a student of the opposite sex. And all of these incidents occurred before the determination was made to develop the Section 504 plan in December 2022.

I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to initiate child find procedures, certainly no later than the request made by Student's father on December 15, 2022, instead of developing a Section 504 plan. The statement in the January 24, 2023 PWN that Student's behavior had not hindered his/her ability to access the curriculum is palpably absurd. Student's grades had dropped markedly from the level s/he was able to achieve at School C. Moreover, Student had not only been chronically absent during the 2021-22 school year, s/he was well on his/her way to 60 absences and 24 days of tardiness during the 2022-23 school year; and why 35 of the absences were deemed excused is also questionable. The puzzling statement in the PWN also ignores the impact that Student's disruptive and antisocial behavior was having on his/her classmates and their ability to focus on classwork.

DCPS acknowledged Petitioner's father request for initial evaluations on December 15, 2022. Under local regulations, DCPS was obligated to initiate efforts to obtain parental consent for evaluations within ten business days, make reasonable attempts to obtain consent within thirty calendar days, and to evaluate Student and make an eligibility determination within sixty days of obtaining consent. Since DCPS convened a meeting with the parents to develop the Section 504 plan that day, consent could have been obtained that day. Thus, DCPS should have determined Student's eligibility by February 13, 2023 and developed an initial IEP by March 1, 2023.

Petitioner has not met her burden of proving that DCPS failed to conduct a comprehensive psychological evaluation or other evaluations. Examiner A's Psychological Evaluation was incomplete due entirely to Student's refusal to cooperate during the evaluation. Nevertheless, Examiner A made findings sufficient to qualify Student for services and for twenty hours of specialized instruction outside general education and four hours per month of BSS.

Witness A, Petitioner's OT expert, was asked to comment on Examiner A's evaluation from an occupational therapy aspect. Witness A opined that Student *might* have a problem with sensory processing. However, Witness A cited no evidence that was, or should have been, apparent to DCPS at the time it conducted initial evaluations, that it should have also conducted an OT evaluation. Examiner A did not recommend that Student undergo an OT evaluation. In light of Witness A's testimony, I will order DCPS to conduct an OT evaluation, but I do not conclude that it denied Student a FAPE by failing to conduct an OT evaluation along with Examiner A's Comprehensive Psychological Evaluation.

Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP and placement on August 4, 2023. Specifically, Petitioner alleges that the IEP was based on inadequate evaluation data resulting in inaccurate present levels of academic performance and baselines. Petitioner also alleges Student requires a therapeutic placement that is not offered at Cardozo.

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*.⁸⁸ 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.'" ⁸⁹ 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..." ⁹⁰ 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."⁹¹

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁹² 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*.'" ⁹³ 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.⁹⁴

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

⁸⁸ 458 U.S. 176, 187 (1982).

⁸⁹ *Id.* at 189-90, 200

⁹⁰ *Id.* at 200.

⁹¹ *Id.* at 203-04.

⁹² *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁹³ *Id.* at 997.

⁹⁴ *Id.* at 1000-01 (citations omitted).

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.”⁹⁵

Upon his/her arrival at School B, Student was not the same student that was routinely described as a pleasure to have in class at School C. Witness F, School B’s LEA Representative, testified that it is unusual to place a child in a BES classroom in an initial IEP. Her reluctance to initiate services in a highly restrictive environment is understandable, particularly when IDEA favors maintaining children with disabilities in a general education environment “*to the maximum extent appropriate,*” and removal from general education should be undertaken “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁹⁶

As noted in the previous section, Student’s grades markedly deteriorated during her/his first year at School B from the levels s/he was able to achieve at School C. Student’s behavior became uncontrollable, disrespectful, and sometimes violent for the first time during the fall of the 2022-23 school year. During the second half of the 2022-23 school year, Student’s anti-social behavior escalated even beyond what occurred before the holiday break. There were multiple incidents of throwing objects in class including out the window, persistent use of profanity, constant elopement, further inappropriate contact with a student of the opposite sex, an altercation with a student of the opposite sex, multiple fights, off-task and disruptive behavior in class, horseplay leading to fights, and a persistent failure to follow instructions or redirection from teachers. In addition, on January 11th, s/he physically threatened a staff member, committed a physical attack on February 10th, s/he pushed a student in the chest on February 16th, put a classmate in a choke hold on February 27th and eloped from the building, pushed and snatched a teacher’s glasses on March 7th, committed a physical assault on March 9th, invited another student to fight, wrote on a teacher’s back with a black marking pen, and incited violence on March 31st, threatened another staff member on April 7th, and was suspended for three days in June for “persistent Tier 3 behavior.” In May and June, shortly before the IEP meeting, Student frustrated attempts to conduct the initial evaluation by refusing to cooperate during Examiner A’s Psychological Evaluation.

Witness F, School B’s LEA Representative, conceded that School A’s BES program may not be capable of meeting Student’s needs and that “[s/he] needs an intensive therapeutic environment.” Petitioner’s entire team originally agreed with the placement in the BES program at School B at the July eligibility meeting in July 2023 and the IEP meeting in August. Petitioner testified as to her continued preference for Student’s placement at School B due to relationships Student has there. However, Petitioner’s representatives in the hearing urge placement in a private, therapeutic day school. In fact, Student’s increasingly uncontrollable, anti-social, and violent behavior poses a threat to other students, teachers, and staff members, and at least in the near term, warrants placement in a residential facility.

⁹⁵ 137 S.Ct. at 1000-01.

⁹⁶ 20 U.S.C. §1412(a)(5)(A), emphasis added.

In *Seattle School District, No. 1 v. B.S.*,⁹⁷ like Student, the child exhibited frequent behavioral problems including physical and verbal aggression, oppositionality, tantrums, and attention difficulties. The school district determined that the child's least restrictive environment was a self-contained classroom, rejecting the opinion of an independent evaluator who concluded that the child was unable to progress outside a residential school environment. Despite the child's academic proficiency, the court upheld the lower court's determination that a residential placement was appropriate and necessary.⁹⁸

In *Linda E. v. Bristol Warren Regional School District*,⁹⁹ the student was reported to have pushed a student down, was unconcerned about misbehaving, and was guilty of rudeness, disruptive behavior, and theft, and was "out of control" on the school bus. The court rejected the school district's argument that the student's behaviors were "segregable from the learning process," and found that the school district had failed to meet its burden of proving that it had provided an appropriate placement.¹⁰⁰

After the IEP was developed, Student began bullying a student at School B during the fall of 2023 and eventually assaulted the student, causing injury requiring stitches at a hospital. When Student was involuntarily transferred to School A, s/he caused a fire at School B on his/her last day there, continues to appear at School B at dismissals, and assaulted another student at dismissal at School B. I conclude that DCPS has failed to meet its burden of providing an appropriate IEP on August 4, 2023. Student's behavior is significantly more extreme than that of the students in the two cases cited above, as well as the student in Case No. 2021-0026, in which I granted a petitioner's prayer for a residential placement.

Whether DCPS denied Student a FAPE by failing to provide her full access to records she requested on June 13, 2023 including all standardized testing results through school year 2022-23, all report cards through school year 2021-22, attendance records through school year 2021-22, disciplinary records through school year 2021-22, all SEDS Communication records through school year 2022-23, and the Section 504 Plan developed on December 20, 2022.

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

- (a) (a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to—
- (b) (1) The identification, evaluation, and educational placement of the child; and
- (c) (2) The provision of FAPE to the child.
- (d) (b) Parent participation in meetings.
- (e) (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

⁹⁷ 82 F.3d 1493 (9th Cir. 1996).

⁹⁸ *Id.* at 1502.

⁹⁹ 758 F.Supp.2d 75 (D.R.I. 2010).

¹⁰⁰ *Id.* at 90-92.

- (f) (i) The identification, evaluation, and educational placement of the child; and
- (g) (ii) The provision of FAPE to the child.
- (h) (2) Each public agency must provide notice consistent with [§ 300.322\(a\)\(1\)](#) and [\(b\)\(1\)](#) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.¹⁰¹

and

- (a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request *without unnecessary delay and before any meeting regarding an IEP*, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.
- (b) The right to inspect and review education records under this section includes—
 - (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
 - (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative of the parent inspect and review the records.¹⁰²

For upcoming IEP meetings, District’s regulations require DCPS to provide not only the draft IEP, but all evaluations, reports, and assessments that will be discussed at the meeting, five days in advance of the meeting.

The LEA shall provide, at no cost to the parent, an accessible copy of any evaluation, assessment, report, data chart, or other document that will be discussed at the meeting. Such accessible copies shall be provided no fewer than five (5) business days before a scheduled IEP Team meeting, if the purpose of which is to discuss the child's IEP or eligibility for special education and related services. However, if a meeting is scheduled fewer than five (5) business days before it is to occur, such accessible copies shall be provided no fewer than twenty-four (24) hours before the meeting.¹⁰³

Student’s initial IEP meeting was scheduled for August 4, 2023. On August 1, 2023, Witness C, Attorney A’s legal assistant, notified Witness F, School B’s LEA Representative, that Petitioner had not received, *inter alia*, a draft IEP, complete report cards for the 2021-22 and 2022-23 school years, all reading and math standardized testing scores, or all FBAs and BIPs developed in the past two years.¹⁰⁴ Witness F replied on August 3, 2023, enclosing a draft IEP, but she made no mention of the requested records that had not yet been provided.¹⁰⁵

¹⁰¹ 34 C.F.R. §300.501.

¹⁰² 34 C.F.R. §300.613, emphasis added.

¹⁰³ 5-A DCMR § 3009.4.

¹⁰⁴ R1 (15).

¹⁰⁵ R1 (14).

The failure to provide educational records to a parent is a procedural violation. A Hearing Officer's determination of whether a child was denied a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only 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.¹⁰⁶ In other words, an IDEA claim is viable only if procedural violations affected the child's substantive rights.¹⁰⁷

Why Petitioner did not already have Student's report cards was not explored during the hearing, but the regulations required DCPS to provide them upon request. Moreover, Petitioner and her team could not possibly be adequately prepared to participate in the meeting without Student's past standardized test score. In the absence of a comprehensive psychological evaluation, the standardized test scores would provide the only objective measures of Student's history of performance in reading and math. The regulations required DCPS to provide Petitioner assessments or reports that would be considered at the IEP meeting. It is inconceivable that an initial IEP could be developed without consideration of Student's past grades or standardized test scores.

If the IEP was developed without consideration of Student's past report cards or standardized test results, the appropriateness of that IEP would be questionable. In fact, in the child find analysis above, I concluded that DCPS seemingly ignored Student's deteriorating academic performance once s/he enrolled at School B, and took issue with the statement in the January 2023 PWN that Student's behavior had not impaired her/his ability to access the curriculum. In the IEP analysis in the previous section, I again noted that Student's academic performance had deteriorated. While the IEP cited standardized tests results from the 2022-23 school year, there is nothing in the record to indicate that Petitioner and her team was provided these assessments before the meeting. There is also nothing in the record to refute Petitioner's assertions that she had no standardized tests from school year 2021-22 or from School C. Thus, there was apparently no consideration at the meeting of the longitudinal history of Student's grades or standardized test results. Thus, the failure to provide Petitioner these documents deprived her and her team of the meaningful opportunity to participate in the IEP meeting, an eventuality Witness C presaged in her July 5, 2023 email to School B's LEA Representative.¹⁰⁸

While the record herein includes Student's test scores for the last two years, it does not include each beginning of the year, middle of the year, and end of the year report for each assessment, which I have seen in many other cases. The lack of complete reports limited my reliance on the scores. Moreover, Petitioner's original request was for Student's entire educational record, which would have included assessments administered at School C when Student's behavior

¹⁰⁶ 34 C.F.R. 300.513(a).

¹⁰⁷ *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015); *Brown v. District of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

¹⁰⁸ Witness C, Attorney A's legal assistant, made no reference to disciplinary records in her August 1, 2023 email setting forth documents that had not yet been provided. I assume that she had been convinced that no such records existed or that those records were provided and did not support Petitioner's assertions that Student had a number of disciplinary incidents during the 2021-22 school year, as described in paragraph 19 above. The lack of disciplinary records for the 2021-22 school year in the record of this proceeding informed my assertion in the penultimate paragraph of the child find analysis that Student's behavior became problematic for the first time in the fall of 2022.

presumably did not affect his/her ability to participate in the classroom or his/her diligence taking standardized tests. It would have been instructive to see Student's performance levels during his/her last year at School C in light of his/her February 11, 2021 SRI score that was three grades below grade level. Moreover, the fact that records were provided after the *Complaint* was filed, affording a seemingly complete academic record since the beginning of the 2021-22 school year for my review, does not satisfy the law or regulations, which require access to records to be provided without unnecessary delay and before any meeting regarding an IEP.

For these reasons, I conclude that Petitioner has met her burden of proving that DCPS failed to provide Petitioner complete access to Student's records within forty-five days¹⁰⁹ of the June 13, 2023 request, July 28, 2023, thereby precluding Petitioner and her team from having a meaningful opportunity to participate in the IEP meeting on August 4, 2023.

RELIEF

For relief, Petitioner requests (1) an order requiring DCPS to conduct a comprehensive psychological evaluation including cognitive and achievement assessments, an occupational therapy evaluation, and an assistive technology evaluation, (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 place and fund Student in a therapeutic, non-public day school for the remainder of the 2023-24 school year, during the summer of 2024, and succeeding school years, (4) an order requiring DCPS to provide Petitioner access to all of the requested educational records, (5) compensatory education services including academic tutoring, counseling and mentoring, and OT services, and (6) attorney's fees.

In the child find section above, I concluded that DCPS failed to comply with its child find obligations to Student and should have developed an initial IEP by March 1, 2023. There were 72 school days from March 1, 2023 until the end of the school year, or 14.4 school weeks. In the second section, I determined that DCPS failed to provide an appropriate IEP. I will issue an order requiring DCPS to revise the IEP, and to facilitate a residential placement. In the records section, I concluded that DCPS should have provided the requested records by July 28, 2023. However, this delay does not warrant an award of compensatory education as Student was not in school during the summer of 2023 and the IEP was developed and in effect by the beginning of the school year. While Petitioner was deprived of a meaningful opportunity to participate in the IEP meeting, DCPS was well aware of Student's academic and behavioral problems and placed her/him in the most restrictive setting it would have even if Petitioner had access to all of the records DCPS ever developed for Student. Moreover, although their participation in the meeting was impaired by DCPS' failure to provide timely access to Student's records, Petitioner and her entire team concurred with the BES placement at School B, and Petitioner continued to do so at the hearing. Thus, the relief is redundant to the relief for DCPS' failure to develop an appropriate IEP.

In her Compensatory Education Proposal, Witness B proposed 360 hours of academic tutoring, 72 hours of counseling, and 360 hours of mentoring. The tutoring proposal was based on 1280 hours of missed specialized instruction and 64 hours of missed BSS due to DCPS' failure to

¹⁰⁹ 34 C.F.R. §300.613(a).

initiate child find by October 27, 2021 and 19.8 weeks without a BIP, 14.6 weeks without revising the IEP, and 25.4 weeks (since June 13, 2023) for failing to provide requested records.

Petitioner has the burden of establishing entitlement to compensatory education services.¹¹⁰ 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 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*:¹¹¹

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.¹¹²

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.¹¹³

Witness B's proposal fails to meet the requirements of *Reid* because it is essentially arbitrary. The child find aspect of the proposal is based on the assumption that the period of harm began on October 27, 2021. However, in the child find analysis, I found that Petitioner had failed to meet her burden of proving that DCPS should have suspected a disability by the beginning of the 2021-22 school year. Even I had found that the violation began on October 27, 2021, Witness B offered no analysis of the educational harm Student suffered from October 27, 2021 until the present, or why 360 hours of tutoring would bring Student to the point s/he would have been but for the delay in the eligibility determination. In fact, I found that Student should have been determined eligible by February 13, 2023 and an initial IEP developed by March 1, 2023. Thus, based on the August 4, 2023 IEP, Student lost 284 hours of specialized instruction (14.2 weeks x 20 hrs./wk.), not 1280 hours, and 14 hours of BSS (one hour per week) instead of 64 hours.

Witness B's proposal suggests that Student would regain what s/he lost by providing 28.13% of the specialized instruction hours lost in the form of tutoring. This ratio makes intuitive sense to me; instead of a small class environment for 20 hours a week, Student would receive one-on-one tutoring for 5.63 hours per week. However, *Reid* requires a fact-specific analysis. Witness B offered no analysis of what Student lost during the period of harm, no basis for the 28.13% ratio, and cited no study that would justify the ratio. *In fact, in her proposal, Witness B conceded that*

¹¹⁰ *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010).

¹¹¹ 401 F.3d 516 (D.C. Cir. 2005).

¹¹² *Id.* at 524. *See also, B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

¹¹³ *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).

*the required analysis could not be made “due to the lack of comprehensive data.”*¹¹⁴ Similarly, the proposal for BSS was based on the period of harm beginning on October 27, 2021 to the present rather than from March 1, 2023 through the end of the 2022-23 school year, after which Student had an IEP providing an hour per week of BSS services.

The other features of Witness B’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 failure to develop a BIP by May 23, 2023 was not an issue presented and, thus, not compensable. The failure to amend the IEP at some point after the beginning of the 2023-24 school year was not an issue presented and, thus, not compensable. Finally, as to DCPS’ failure to provide to provide records without unnecessary delay is not separately compensable because the appropriate relief is redundant to the relief for failing to develop an appropriate IEP; the failure to provide the records precluded Petitioner’s meaningful participation in the August 2023 IEP meeting. For the failure to provide an appropriate IEP, Petitioner requested placement in a non-public, therapeutic day-school. However, Witness B’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.¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷

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,¹¹⁸ 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 B’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

¹¹⁴ P71 (388).

¹¹⁵ 401 F.3d. at 523.

¹¹⁶ *Id.* at 524.

¹¹⁷ *Id.*

¹¹⁸ *Phillips and Gill, supra.*

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 B recommended 360 hours of tutoring, for 1280 lost hours of specialized instruction, but there was no explanation why the lost hours would be adequately compensated for 28.13% of that amount in hour-for-hour tutoring. Thus, Witness B's recommendation of 360 hours of tutoring 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.

There are several reasons why *Reid* is unworkable in due process hearings. First, as is the case here, where the student is chronically truant, 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 an 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 the beginning of the school year.

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 B 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 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."¹¹⁹ 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.

¹¹⁹ Case No. 21-cv-0223 (RCL) at 39 (D.D.C. April 20, 2023).

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.

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 170 hours of tutoring.¹²⁰ 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 85 up to 170 tutoring sessions. Psychological counseling services could be compensated on an hour-for-hour basis for two reasons. First, it may take several sessions for the provider to develop trust and rapport with the student. Second, the amount of counseling services missed is invariably a small fraction of the specialized instruction lost. Hour-for-hour compensation may be needed to achieve meaningful results.

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

¹²⁰ I am ordering DCPS to convene an IEP meeting to revise Student's IEP to prescribe a residential placement. Assuming that it takes until the end of February 2024 to effectuate this placement, there are 113 school days from the beginning of the 2023-24 school year through February 2024. Assuming further that Petitioner should have been entitled to at least six hours of specialized instruction per day in full-time special education program instead of the 4 hours per day prescribed in the August 4, 2023 IEP, Student lost 226 hours. Added to the 284 hours lost due to the belated determination of eligibility and development of an initial IEP, Student lost a total of 510 hours. 33.3% of 510 = 170.

will award Student 170 hours of independent tutoring services and 14 hours of independent counseling services.

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 revise Student's IEP to establish Student's least restrictive environment to be a residential facility and to coordinate as necessary with the Office of the State Superintendent of Education to determine and effectuate an appropriate location of services;

IT IS FURTHER ORDERED, that within ten (10) school days of the issuance of this HOD, DCPS shall solicit the written consent of Petitioner to conduct an occupational therapy evaluation of Student. Upon receipt of Petitioner's consent, DCPS shall complete the evaluation within thirty days. The occupational therapist shall have the discretion to terminate the evaluation in the event of any physical or verbal aggression by Student or if Student fails to comply with the evaluator's instructions during the evaluation. Within fifteen (15) school days of the completion of the evaluation, DCPS shall convene an IEP team meeting to review the evaluation and update the IEP as necessary.

IT IS FURTHER ORDERED, that within fifteen (15) school days of the issuance of this HOD, DCPS shall issue funding authorization for 170 hours of independent tutoring in math and reading, and 14 hours of independent psychological counseling.

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
Hearing Officer

Date: January 10, 2024

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