

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

OSSE
Office of Dispute Resolution
January 27, 2024

PETITIONER, on behalf of STUDENT, ¹)	
)	
Petitioner,)	Date Issued: January 27, 2024
)	
v.)	Hearing Officer: Peter B. Vaden
)	
)	Case No: 2023-0232
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates: January 18, 19 & 22, 2024
Respondent.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (PARENT) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the Parent alleges that Respondent District of Columbia Public Schools (DCPS) denied her child a free appropriate public education (FAPE) in the 2021-2022 and 2022-2023 school years by failing to comprehensively evaluate the child and by offering inappropriate Individualized Education Programs (IEPs).

¹ Personal identification information is provided in Appendix A.

Petitioner's due process complaint, filed on November 27, 2023, named DCPS as respondent. The undersigned hearing officer was appointed on November 28, 2023. On December 20, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On January 5, 2024, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

With the Parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on January 18, 19 and 22, 2024. A Spanish Language interpreter was provided to interpret the examination and responses of the Parent on January 18, 2023.² Parent appeared online for the first two days of the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE, for the first two days of the hearing only, and by DCPS' COUNSEL.

Counsel for the parties made opening statements. Parent testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called as witnesses SCHOOL SOCIAL WORKER, SCHOOL PSYCHOLOGIST, GENERAL EDUCATION TEACHER and SPECIAL EDUCATION TEACHER. Petitioner's Exhibits P-1 through P-50 were admitted into evidence, with exception of Exhibits P-3, P-5, P-15, P-30, P-31

² The Parent, by counsel, only requested interpreter services for her own testimony.

and P-45 which were withdrawn. DCPS' Exhibits R-1 through R-44 were all admitted into evidence without objection. On January 22, 2024, after the taking of the evidence was completed, counsel for the respective parties made oral closing arguments. There was no request to submit written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

The issues for determination, set out in the January 5, 2024 Prehearing Order, are:

Whether DCPS denied the student a FAPE by failing to provide the student with appropriate IEPs from April 22nd, 2022 to present, in that the DCPS IEPs developed on or about April 22, 2022 to the present (including the April 12, 2023, IEP³, the May 4th, 2023 Amended IEP and the October 18, 2023 IEP) were inappropriate because the IEPs 1) were not based on sufficient evaluative data, 2) lacked appropriate academic goals, 3) Did not provide sufficient Specialized Instruction support and 4) inappropriately removed Specialized Instruction support from the April 22, 2022 IEP (including the April 12, 2023, IEP) until the May 4th, 2023 IEP; and

Whether DCPS denied the student by failing to conduct comprehensive psychological evaluations on April 20, 2022, and June 17, 2023, which included social-emotional testing.

For relief, Petitioner requests that the hearing officer:

Order DCPS to timely fund an independent Comprehensive Psychological

³ In an apparent typographical error in the due process complaint, this issue refers to an April 12, 2022 IEP [*sic*]. The next IEP developed after the April 22, 2022 IEP was the April 12, 2023 IEP. There was no April 12, 2022 IEP offered into evidence.

Evaluation which includes an assessment of the student's cognitive functioning as well as social/emotional/behavioral functioning, with input from both the Parent and teachers, and order that DCPS shall reconvene the Multidisciplinary Team (MDT)/IEP team to review and revise the child's IEP as appropriate based upon the updated data from the independent evaluations;

Order DCPS to fund compensatory education for the student for the alleged denials of FAPE;

Order DCPS to reconvene the MDT/IEP team to review, revise and/or amend the child's IEP to provide for an increase in Specialized Instruction, up to 20 hours per week outside the general education classroom, and add appropriate academic goals in math, reading and writing.

FINDINGS OF FACT

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

1. Student, an AGE child, resides with MOTHER in the District of Columbia.

Testimony of Mother. Student is a child with a disability, as defined by the IDEA, as having a Specific Learning Disability (SLD). Exhibit P-47.

2. Student began formal schooling attending CITY SCHOOL 1 beginning in the 2016-2017 school year. He/she remained there until the 2018-2019 school year when he/she began attending CITY SCHOOL 2. Exhibit P-32.

3. Student was initially evaluated in October of 2016 through the Office of the State Superintendent of Education's (OSSE) Strong Start DC Early Intervention center. Results of the child's evaluation revealed a 25% delay in adaptive development, gross motor development and fine motor development. Results also indicated deficits in the child's expressive communication skills as he/she did not use any words or phrases. The

child was initially found eligible in February 2017 to receive special education services as a student with a Developmental Delay. Student was reevaluated by School Psychologist in February 2020. School Psychologist reported that Student continued to show deficits in reading, writing and mathematics. School Psychologist reported that the data suggested that Student would continue to meet eligibility criteria for Developmental Delay. Exhibit P-32.

4. Student's May 12, 2021 City School 2 IEP reported his/her disability as Developmental Delay. The IEP team reported that Student had a developmental delay observed in the area of cognition, that affected his/her ability to meet age-appropriate milestones related to acquiring and understanding knowledge through thoughts, experiences, and senses. This impacted math-related instruction, and tasks such as learning and recalling number facts/operations, applying problem solving strategies to novel situations, understanding abstract mathematical concepts, and reading and understanding word problems. Student also was reported to have demonstrated areas of need in Reading and was below grade level in Phonological and Phonemic Awareness. Student had demonstrated foundational skills, such as counting out syllables, producing rhyming words, and blending on set and rhyme. Student was below grade level in Concepts of Print. Student had scored an "RB" on reading behaviors level on the most recent reading comprehension assessment. Mathematics, Reading, Communication/Speech & Language and Motor Skills/Physical Development were identified as IEP areas of concern for Student. For special education and related services, the May 12, 2021 IEP

provided for Student to receive 30 minutes per week of Specialized Instruction in the general education setting, and for related services, 120 minutes per day [sic] of Occupational Therapy and 60 minutes per month of Speech-Language Pathology, both outside general education. Exhibit P-4.

5. On February 9, 2022, City School 2 held an Analysis of Existing Data (AED) meeting for Student. Prior to the meeting School Social Worker observed Student in his/her general education classroom and at recess. Throughout the observation, Student complied with classroom rules including following directions. Student appropriately transitioned between the “White Board” and his/her seat. At recess, Student engaged appropriately with peers. Student was observed learning appropriately, as well as working independently on the computer, and then transitioning to cleaning up and to the carpet with the whole class. While Student’s body language and attention remained appropriate throughout these exercises, Student did not verbally repeat any of the exercises nor volunteer to respond. Based upon data reviewed and observations conducted, School Social Worker concluded that related services for behavior support through an IEP were not recommended because the child did not demonstrate significant behavioral concerns impacting his/her ability to access the general education curriculum. Exhibit R-28, Testimony of School Social Worker.

6. In the spring of 2022, Student was referred to the City School 2 MDT for a psychological reevaluation. In an April 20, 2022 Psychological Evaluation Report, School Psychologist reported that in terms of reading, formal assessments using

DIBELS (Dynamic Indicators of Basic Early Literacy Skills) revealed Student had made little progress since his/her assessments in Kindergarten. Middle of the year assessments indicated that Student was reading at a Level A, which was well below the grade level goal of Level J. School Psychologist noted that Student's resistance to verbally participate affected his/her results. Student's performance on the January 21, 2022 Reading Inventory assessment resulted in a score of O, which was well below grade level. In the classroom, Student could spell Consonant-Vowel-Consonant (CVC) words and he/she also responded well to feedback and worked hard to correct mistakes. However, Student required increased support to accurately spell more complex 4-letter words and the level of support needed was impacted by the child's lack of verbal participation. School Psychologist reported that Student's cognitive skills were measured using the Kaufman Assessment Battery for Children – Second Edition (KABC-II), but due to a lack of verbal participation by the child, only a Nonverbal Index score could be acquired. The KABC-II index score can provide a measure of general intellectual functioning that minimizes expressive language demands. Student displayed solid ability in his/her visual-motor and short-term memory skills. He/she had varied success with visual spatial processing abilities. Considering Student's performance on standardized academic testing from the Woodcock Johnson Tests of Achievement (WJ-ACH), evidence was presented on some of his/her academic struggles. School Psychologist noted that due to Student's reluctance to verbally participate, only select subtests of the WH-ACH could be completed, resulting in limited

information about his/her academic skills. Student's test performance in written expression and mathematics fell in the Low Average Range. In order to gain some insight into the child's reading ability, the Sentence Reading Fluency subtest was administered. Student's performance on this subtest fell in the Low Average Range. Information from classroom and IEP progress reports indicated that Student was making progress academically, but further progress was believed to be prevented by Student's reluctance to speak in most situations. Although Student had speech-language services as part of his/her IEP, there was an interruption in the speech-language staff assigned to City School 2 and Student had not received speech services in the months preceding the psychology evaluation. Additionally Student had not received speech services in the prior 2020-2021 school year. School Psychologist reported that considering the importance of verbal participation in the classroom, it had been difficult to ascertain Student's full range of skills and areas of need. Although evidence from both the classroom and standardized testing presented evidence of the child's academic struggles, his/her lack of verbal participation, coupled with the lack of Tier 3 intervention in speech and language, made it difficult to determine the source of Student's academic difficulty. School Psychologist concluded that considering the child's developmental history, teacher input, parent input, observations, IEP goal progress, specialized services and assessment testing, there was a lack of data supporting Student's need for specialized academic services. On that basis, School Psychologist opined that Student did not meet eligibility criteria for special education

services as a child with a Specific Learning Disability (SLD). Exhibit P-32.

7. At a City School 2 IEP team meeting on April 22, 2022, the IEP team reported Student's disability category as Speech or Language Impairment (SLI) and identified only Communication/Speech and Language as an IEP area of concern for the child. The team reported that Student's expressive language delays and difficulties in the areas of articulation/intelligibility were impacting his/her ability to progress in the general education curriculum. For special education services, the April 22, 2022 IEP team provided for Student to receive 60 minutes per month of Speech-Language Pathology in the general education setting. The IEP noted that Speech-Language Pathology (SLP) is a related service, but for the purposes of that IEP, it was treated as Specialized Instruction. No other special education or related services were offered in the April 22, 2022 IEP. Exhibit P-6.

8. At an MDT meeting on June 24, 2022, the City School 2 eligibility team determined that Student qualified for IEP Speech-Language services as a child with SLI. The MDT team reported that Student's significant deficits in speech production had negatively impacted his/her reading, writing and phonics, and that his/her challenges articulating accurate sounds impacted how he/she sounded out words. In addition to articulation concerns, there were significant concerns about Student's refusal to speak, which was significantly impacting his/her academic performance. Student was receiving non-IEP behavior intervention to support the child for his/her fear of speaking. The MDT team recommended that there be follow-up with the family

physician regarding whether “selective mutism” were present. The team reported that while Student demonstrated some academic delays in reading, writing and math, it was felt that the root cause was speech impairment and social-emotional driven refusal to speak, and that Specialized Instruction supports had limitations in their support of such at that time. The MDT team explored the disability categories of Emotional Disturbance, SLI and SLD for Student. The MDT team recommended that Student qualify for an SLI-impairment IEP. Exhibit P-46.

9. On April 3, 2023, Petitioner’s Counsel wrote the City School 2 principal to request that Student be reevaluated, to include to a comprehensive psychological evaluation that addressed cognitive, social emotional, and psychoeducational functioning, and a speech and language evaluation. Exhibit P-33.

10. On April 12, 2023, the City School 2 IEP team convened for Student’s annual IEP review. Communication/Speech and Language was identified as the only IEP area of concern. The IEP provided for Student to receive 60 minutes per month of SLP services, outside the general education setting. The IEP noted that SLP is a related service, but for the purposes of that IEP, it was treated as Specialized Instruction. Exhibit P-7.

11. On May 4, 2023, Student’s City School 2 IEP was amended to, *inter alia*, add Reading as an academic area of concern and two Reading Goals. The IEP team also provided for Student to receive 1 hour per week of Specialized Instruction Services outside general education. SLP services were continued at 60 minutes per month

outside general education. Exhibit P-8.

12. In May and June 2023, School Psychologist conducted a comprehensive psychological reevaluation of Student. The reevaluation included a review of Student's records and previous evaluations, administration of the WJ-ACH and the KABC-2, classroom observations and teacher interviews. In his June 17, 2023 evaluation report, School Psychologist reported, as background, that in the 2022-2023 school year, Student had made great improvement in willingness to speak to peers and to adults in small group and whole group settings. Student had participated in numerous Tier 2 intervention groups and had success. However, middle of the year (MOY) assessments in reading revealed Student scored at the Beginning reader level. In mathematics, Student earned a MOY score of 392, when the expected score range for Student's grade was 449-516. Student had participated in Tier 2 intervention instruction in reading. While Student had made progress with these interventions, there was concern the child was still not performing at, or approaching, grade level. Reporting on his assessments of Student, School Psychologist reported that Student's cognitive skills were measured using the KABC-II. His/her cognitive skills fell in the Extremely Low to Average Range of functioning and the child's full-scale IQ score fell in the Below Average Range. Short term memory skills and Comprehension-Knowledge were areas of weakness. Student's performance on standardized testing from the WJ-IV ACH, presented evidence of academic difficulties in reading and mathematics. Student's performance in reading fell in the Low Range. While Student displayed decent decoding and fluency skills, when

reading the child would sometimes omit sounds, or make phonetic errors when attempting to blend sounds. Student's performance in mathematics fell in the Low Range. While Student displayed solid computation skills solving equations, he/she seemed to struggle fully processing how to solve various word problems, even though problems were read to him/her. School Psychologist reported that it was likely that Student's difficulty processing written/verbal information was impacting his/her ability to process the information presented in word problems. School Psychologist reported that Student's weaknesses with short term memory skills and comprehensive-knowledge logically impacted his/her reading ability, as well as his/her ability to fully comprehend math word problems. School Psychologist concluded that the results of his reevaluation indicated that Student did meet the criteria as a student with a specific learning disability. Exhibit P-34.

13. On October 18, 2023, the City School 2 IEP team met to review Student's IEP and the June 17, 2023 psychological reevaluation report. The IEP team reported that Student met eligibility criteria for SLD. The IEP team identified Reading, Mathematics, Written Expression and Communication/Speech & Language as areas of concern for Student. For special education and related services, the IEP team provided for Student to receive 5 hours per week of special education, outside general education, including 2 hours for Reading, 1 hour for Mathematics and 2 hours for Written Expression. At the meeting, Petitioner's Attorney requested that Student's special education be increased to 20 hours per week. The school representatives declined this

request. Exhibit P-9.

14. In November and December 2023, School Psychologist conducted a supplemental psychological assessment at the request of Mother and the MDT team to assess Student's social, emotional and behavioral concerns. In a January 4, 2024 psychological evaluation Addendum Report, School Psychologist reported that he had the Parent and three teachers complete the Behavior Assessment System for Children, 3rd Edition (BASC-3) rating scales to help evaluate and measure the behaviors Student exhibits both at home and at school. Rating scale responses from Mother indicated elevated scores in the Behavior Symptoms Index and Adaptive Skills composite areas, including elevated composite scale scores in the areas of Atypicality, Attention Problems, Leadership, Activities of Daily Living, Functional Communication and Withdrawal (clinically significant classification range). In addition, ratings from Mother resulted in a T score of 75 (mean of 50) on the Autism Probability index. This T score falls in the clinically significant classification range. Teacher responses on the BASC-3 indicated Average functioning across the majority of composite and composite scale areas. All three teachers' responses resulted in T scores for Student in the At-Risk range in the area of Functional Communication. Student's current grade teachers both provided ratings resulting in a T score in the At-Risk classification range in the area of Social Skills. The ELA teacher's responses indicated the At-Risk classification range for Student in the areas of Atypicality and Leadership. Additionally, the ELA teacher's rating resulted in a T score in the At-Risk range on the Autism Probability index.

Student's BASC-3 profile scores did not indicate significant elevations on Externalizing Problems, Internalizing Problems, or Attention Problems scales. This suggested to School Psychologist the absence of clinical syndromes associated with these scales such as the Autism Probability scale. School Psychologist noted that beginning in the 2022-2023 school year and continuing in the current school year, Student had made significant improvements in his/her verbal communication with peers and staff. Considering Student's current functioning and continued progress, School Psychologist opined in the Addendum Report that elevated ratings for Student in various areas on the BASC-3 do not have a significant impact on Student's access to education, but can still possibly be addressed through some intervention and/or accommodations in the classroom. Exhibit R-34. The Addendum Report had not been reviewed with Student's family prior to the January 2024 due process hearing. Testimony of School Psychologist.

15. In the current, 2023-2024, school year, Student is doing well in the GRADE general education classroom. Student gets pulled out of class for special education services for Reading, Math and Written Expression. There are no push-in special education services. In the regular classroom, Student is very curious, works really hard, is very vocal and a leader in small groups, excited to learn, very social and participates fully in activities. Student is a little reserved and shy when speaking in front of the whole class group. Student is functioning great in class and is able to keep up with the pace of the class. The classroom teacher has no behavior concerns for Student.

Testimony of General Education Teacher.

16. At the start of the 2023-2024 school year, Student was reading at the first grade level. By January 2024, Student was reading at the end of second grade level and is able to access current grade level content. Testimony of General Education Teacher,
Testimony of Special Education Teacher.

CONCLUSIONS OF LAW

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

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP 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. See D.C. Code § 38-2571.03(6).

ANALYSIS

I.

April 20, 2022 and June 17, 2023 Evaluation Reports

- Did DCPS deny the student by failing to conduct comprehensive psychological evaluations of the child on April 20, 2022, and June 17, 2023, which included social-emotional testing.

DCPS' School Psychologist conducted a comprehensive psychological evaluation of Student in spring 2022. In his April 20, 2022 evaluation report, School Psychologist noted that Student was reluctant to participate verbally in the testing. For that reason, only select subtests of the Woodcock-Johnson Tests of Achievement (WJ-ACH) could be completed, resulting in limited information about Student's academic skills. School Psychologist reported that considering the importance of verbal participation in the classroom, it had been difficult to ascertain Student's full range of skills and areas of need. Although evidence from both the classroom and standardized testing presented evidence of Student's academic struggles, the child's lack of verbal participation in the psychological evaluation, coupled with the lack of Tier 3 intervention in speech and language, made it difficult to determine the source of Student's academic difficulty. School Psychologist concluded in the April 20, 2022 report that there was a lack of data supporting Student's need for specialized academic services. On that basis, School Psychologist opined that Student did not meet eligibility criteria for special education services as a child with a Specific Learning Disability (SLD). Following School Psychologist's opinion, when the City School 2 IEP team met on April 22, 2022 to review

Student's IEP, the team identified only Communication/Speech and Language as an area of concern for the child. The team provided for Student to receive Speech-Language Pathology (SLP) services, but no academic Specialized Instruction services. At the next IEP annual review, on April 12, 2023, Student's IEP team again prescribed SLP services, but no Specialized Instruction services for the child. On May 4, 2023, Student's IEP was amended to, *inter alia*, add Reading as an area of concern along with two Reading Goals. The May 4, 2023 amended IEP also provided for Student to receive 1 hour per week of Specialized Instruction Services outside general education. Student's SLP services were continued at 60 minutes per month outside general education.

School Psychologist reevaluated Student in May and June 2023. After this assessment, School Psychologist reported on June 17, 2023 that Student's cognitive skills fell in the Extremely Low to Average Range of functioning; that the child's full-scale IQ score fell in the Below Average Range and that Student's performance on the WJ-ACH, presented evidence of academic difficulties in reading and mathematics. School Psychologist reported Student's weaknesses with short term memory skills and comprehensive-knowledge logically impacted his/her reading ability, as well as his/her ability to fully comprehend math word problems. In the June 17, 2023 report, School Psychologist concluded that Student did meet IDEA criteria as a student with an SLD. When Student's IEP team met again on October 18, 2023, SLD was identified as the disability category for Student and the team provided annual academic goals for Reading, Mathematics and Written Expression in Student's IEP. The October 18, 2023

IEP team determined that Student would receive 5 hours per week of special education, outside general education, including 2 hours for Reading, 1 hour for Mathematics and 2 hours for Written Expression.

Petitioner alleges that School Psychologist's inability, in his spring 2022 assessment of Student, to obtain the data needed for the IEP team to determine whether Student met SLD criteria meant that the reevaluation was not sufficiently comprehensive. I agree. Generally, when a child has been evaluated for special education eligibility and the appropriateness of the LEA's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6). Federal IDEA law and regulations do not impose any specific requirements on the content of a psychological evaluation. *See Richardson v. District of Columbia*, 273 F. Supp. 3d 94, 100. *See, also, Hill v. District of Columbia*, No. 14-CV-1893 (GMH), 2016 WL 4506972, *18 (D.D.C. Aug. 26, 2016) ("In fact, the IDEA lacks specific parameters regarding the content of psychological evaluations, or for that matter, of other evaluations.")

When School Psychologist conducted the spring 2022 psychological reevaluation of Student, he was apparently stymied by the child's extreme reticence to speak and decided that he was not able to obtain enough data to diagnose Student's disability or to

recommend specialized academic services for the child. Even though School Psychologist acknowledged that data from both the classroom and standardized testing presented evidence of Student's academic struggles, for want of sufficient formal testing data, the assessor opined that Student did not meet eligibility criteria as a child with a Specific Learning Disability (SLD).

DCPS should have ensured that the additional data were obtained. The IDEA requires that if additional data are needed to determine whether the student is a student with a disability, and the educational needs of the student, the agency must gather those data. *See, e.g., Simms v. District of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *17 (D.D.C. July 26, 2018), *report and recommendation adopted*, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018) (IDEA requires IEP team to identify what additional data, if any, are needed to determine whether additions or modifications to the special education and related services are needed.) I conclude that the Parent met her burden of persuasion that the District's summer 2022 reevaluation of Student was not sufficiently comprehensive to identify all of the child's needs and that DCPS failed to adequately gather functional, developmental and academic information about the Student's needs to determine the content of his/her IEP in all areas of suspected disability, specifically SLD.

The failure to conduct an appropriate reevaluation of a student is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249

(3d Cir. 2012). Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

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

34 C.F.R. § 300.513(a)(2).

In this case, I find that DCPS’ failure to obtain additional educational assessment data on Student – after School Psychologist reported in spring 2022 that he was not able to obtain enough data to diagnose Student’s disability or to recommend specialized academic services for the child – resulted in a delay of over 14 months in finding Student eligible for special education as a child with an SLD and, as a result, Student was not provided special education Services (except SLP related services) from June 24, 2022 until the May 4, 2023 IEP amendment. I conclude, therefore, that DCPS’ failure to ensure that Student was comprehensively evaluated for special education needs in spring 2022 impeded the child’s right to a FAPE and caused a deprivation of educational benefit. This was a denial of FAPE.

The Parent also alleges that DCPS’ spring 2022 reevaluation of Student was inadequate because it did not include social-emotional testing. Petitioner’s expert, Educational Advocate, opined in her hearing testimony Student needs Behavioral Support Services now and that Student’s assessment scores in 2022 suggested that

social-emotional issues were an area of concern for Student, which warranted assessment as part of Student's spring 2022 reevaluation.

Behavioral Support Services fall under the IDEA related services category, which means "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." *See* 34 C.F.R. § 300.34(a). I find that Petitioner did not meet her burden of persuasion that Student was suspected of needing Behavioral Support Services to benefit from special education. It was well-established that Student was unwilling to speak in most school settings and was effectively nonverbal until the 2023-2024 school year. However, Student was able to communicate in class in other ways and was still able to engage in lessons and access the curriculum. Moreover, Student's April 22, 2022 IEP provided for related services in Speech-Language Pathology to address communication challenges.

School Social Worker reported that none of Student's teachers had expressed concerns about Student's behavior in the classroom. School Social Worker conducted observations of Student in the classroom and at recess and reported to the child's AED team in February 2022 that Student did not require IEP Behavioral Support Services. Although Student never received IEP Behavioral Support Services, his/her classroom teacher this school year reports that Student is functioning great in class and is able to keep up with the pace of the class. The teacher testified that she has no behavior concerns for Student.

The Parent's expert, Educational Advocate, has never met Student or spoken directly to the child's teachers about his/her needs. By contrast, School Social Worker has worked with Student since the 2020-2021 school year. On this disagreement, I found School Social Worker's opinion more persuasive and I conclude that Mother did not meet her burden of persuasion that DCPS' spring 2022 reevaluation of Student was not sufficiently comprehensive for want of a social-emotional evaluation.

II.

Appropriateness of IEPs

– Did DCPS deny the student a FAPE by failing to provide the student with appropriate IEPs from April 22, 2022 to present, in that the DCPS IEPs developed on or about April 22, 2022 to the present (including the April 12, 2023, IEP, the May 4, 2023 Amended IEP and the October 18, 2023 IEP) were inappropriate because the IEPs – 1) were not based on sufficient evaluative data, 2) lacked appropriate academic goals, 3) did not provide sufficient Specialized Instruction support and 4) inappropriately removed Specialized Instruction support from the April 22, 2022 IEP (including the April 12, 2023, IEP) until the May 4th, 2023 IEP?

Petitioner alleges that the City School 2 IEPs developed for Student, beginning April 22, 2022, were inappropriate because the IEPs did not include appropriate academic goals and sufficient Specialized Instruction Services, and were not based on adequate evaluative data. DCPS maintains that the IEPs were appropriate when developed. Petitioner made a *prima facie* showing, through the testimony of her expert witness, that the IEPs at issue were inadequate. Therefore, DCPS holds the burden of persuasion on the appropriateness of the IEPs at issue. For the reasons explained below, I find that except for the October 18, 2023 IEP, DCPS did not meet its burden.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128.

Procedural Compliance

In this case, the Parent alleges that DCPS’ IEPs developed for Student on April 22, 2022, April 12, 2023, May 4, 2023 and October 18, 2023 were not based sufficient evaluative data. To comply the IDEA’s procedural requirements, a local education agency (LEA) must ensure that each child with a disability is appropriately evaluated before developing his/her IEP. *See* 34 C.F.R. § 300.304(b). In the preceding section, I found that DCPS’ spring 2022 reevaluation of Student was not sufficiently comprehensive. DCPS did not reevaluate Student until June 2023. It follows that DCPS did not comply with the IDEA’s evaluation procedures when it developed its April 22, 2022, April 12, 2023 and May 4, 2023 IEPs for Student and I so hold.

School Psychologist’s June 17, 2023 psychological reevaluation of Student did not include a formal social-emotional assessment. It was implied in the hearing testimony of the Parent’s expert, Educational Advocate, that this witness believed that such an

assessment should have been conducted. In November and December 2023, School Psychologist conducted an supplemental assessment to assess Student's social, emotional and behavioral concerns. In the preceding section, I concluded that Mother did not meet her burden of persuasion that Student's spring 2022 special education reevaluation was inadequate for want of a social-emotional evaluation. Student's current classroom teacher testified that Student is functioning great in class and she has no behavior concerns for the child. Therefore, I also conclude that Mother did not establish that the June 2023 reevaluation of Student, without a formal social-emotional assessment, was not sufficiently comprehensive to identify all of the child's needs.

Turning to the second, substantive, prong of the *Rowley* IEP inquiry, were the DCPS IEPs developed on April 22, 2022, April 12, 2023, May 4, 2023 and October 18, 2023 appropriate for Student? In *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, (D.D.C. Mar. 8, 2022), U.S. District Judge Beryl Howell explained the IDEA's FAPE requirement:

A "free and appropriate public education," or "FAPE," is delivered by local education authorities through a uniquely tailored "individualized education program," or "IEP." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993-994 (2017); *see also* 20 U.S.C. §§ 1401(9)(D), 1412(a)(1). To be IDEA-compliant, an IEP must reflect "careful consideration of the child's individual circumstances" and be "reasonably calculated to enable the child to receive educational benefits," *Andrew F.*, 137 S. Ct. at 994, 996 (cleaned up), "even as it stops short of requiring public schools to provide the best possible education for the individual child," *Z.B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018). . . . An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP "denies the child an appropriate education." *Z.B.*, 888 F.3d at 519.

A.D., 2022 WL 683570 at *1. “[A]n IEP’s adequacy thus ‘turns on the unique circumstances of the child for whom it was created,’ and a reviewing court should defer to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances.’” *A.D.* at *7, quoting *Andrew F.*, *supra*, 137 S. Ct. at 1001-02.

DCPS’ May 12, 2021 IEP provided for Student to receive 30 minutes per week of Specialized Instruction in the general education setting, in addition to related services for OT and Speech-Language Pathology. The April 22, 2022 IEP discontinued Specialized Instruction services, apparently because in the April 20, 2022 evaluation report, School Psychologist concluded that there was a lack of data supporting Student’s need for specialized academic services and that Student did not meet eligibility criteria for an SLD. However, in the subsequent June 17, 2023 psychological evaluation report, School Psychologist reported that Student’s cognitive skills fell in the Extremely Low to Average Range of functioning and the child’s performance on educational testing presented evidence of academic difficulties in reading and mathematics. At that point, School Psychologist concluded that Student did meet IDEA criteria as a student with an SLD. In the October 18, 2023 IEP, the City School 2 IEP team determined that Student needed 5 hours per week total of special education services, outside general education, for Reading, Mathematics and Written Expression.

On this evidence, I find it more likely than not that throughout this period, Student needed Specialized Instruction services and I conclude that DCPS did not meet

its burden of persuasion that it provided Student a FAPE with the April 22, 2022 and April 12, 2023 IEPs, which both prescribed no Specialized Instruction services. I also agree with Petitioner that these IEPs were inadequate for want of any academic annual goals.

City School 2 amended Student's IEP on May 4, 2023 to add goals for Reading as well as one hour per week of Specialized Instruction. However, on October 18, 2023, after reviewing the June 17, 2023 psychological reevaluation of Student, the City School 2 IEP team identified Reading, Mathematics, Written Expression, Communication/ Speech & Language as areas of concern for Student. The October 18, 2023 IEP team determined Student needed 5 hours per week of special education, outside general education, including 2 hours for Reading, 1 hour for Mathematics and 2 hours for Written Expression. Special Education Teacher opined that the May 4, 2023 IEP, with 1 hour per week of Specialized Instruction for Student was appropriate. However, I conclude that it is more likely than not that if Student had been comprehensively evaluated in spring 2022, School Psychologist and Student's IEP team would have reached the same conclusion they reached in October 2023, that is that Student needed academic annual goals for Reading, Math and Written Expression, and at least 5 hours per week of Specialized Instruction Services. I conclude that DCPS did not meet its burden of persuasion that the April 22, 2022 IEP, April 12, 2023 IEP or the May 4, 2023 IEP was appropriate, that is, reasonably calculated to enable Student to receive educational benefits in light of his/her circumstances.

In the October 18, 2023 IEP, the IEP team increased special education services from 1 hour per week in the May 4, 2023 IEP to 5 hours per week. Educational Advocate testified that at the October 2023 IEP team meeting, she had recommended 10 hours per week of Specialized Instruction for Student and she also opined, that based on the January 2024 psychological evaluation addendum, the IEP should have provided for Behavior Support goals and services. I find that these opinions were not supported by the record.

The hearing evidence established that Student made impressive progress in Reading and Mathematics in the 2022-2023 school year, even without Specialized Instruction. From the start of the 2023-2024 school year, Student has continued to make good progress. The general education teacher testified that Student works really hard, is vocal, excited to learn and very social and participates fully in activities. The child is functioning great in class and is able to keep up with the classroom pace. Special Education Teacher opined that Student has shown impressive growth this school year in Reading and comprehension. Neither School Social Worker nor the classroom teachers has behavior concerns for Student. On this evidence, I find that DCPS has met its burden of persuasion that the October 18, 2023 IEP was appropriate for Student at the time it was developed. *See, e.g., S.S. ex rel. Shank v. Howard Rd. Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008) (Adequacy of an IEP can only be determined as of the time it is offered to the student.)

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not conducting an appropriately comprehensive special education reevaluation in spring 2022 and by offering no Specialized Instruction services in Student's April 22, 2022, and April 12, 2023 IEPs and insufficient Specialized Instruction services in the May 4, 2023 IEP. The primary relief sought by the Parent is a compensatory education award for Student.

In the Court's recent decision in *J.T. v. District of Columbia*, No. CV 21-3002 (RBW), 2023 WL 8369938, (D.D.C. Dec. 4, 2023), U.S. District Judge Reggie B. Walton explained the compensatory education remedy:

When a [hearing officer] finds that a school district has denied a student a FAPE under the IDEA, "it has 'broad discretion to fashion an appropriate remedy,' which can go beyond prospectively providing a FAPE, and can include compensatory education." *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016) (quoting *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). In assessing whether an equitable remedy should be provided, however, "[courts] must consider all relevant factors." *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (quoting *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993)). This includes considering "the parties' conduct" in fashioning an equitable remedy. [*Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)]. For instance, a court may consider "the school system reasonably 'requir[ing] some time to respond to a complex problem,' " or if "[a] parent[s] refusal to accept special education delays the child's receipt of appropriate services[.]" *Id.*

Typically, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *Id.* at 523 (internal quotation marks omitted) (quoting *G ex rel. RG v. Fort Bragg Dependent*

Schs., 343 F.3d 295, 309 (4th Cir. 2003)). However, “[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Id.* at 524 (quoting *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994)). Nevertheless, “the inquiry must be fact-specific and . . . 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.” *Id.* Moreover, “[e]ven if entitlement to an award is shown through a denial of a free and appropriate public education, it may be conceivable that no compensatory education is required for the denial of a FAPE either because it would not help or because the student has flourished in his current placement.” *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 (D.D.C. 2013) (Walton, J.) (quoting *Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 145 n.3 (D.D.C. 2012)). Indeed, “the weight of authority in this Circuit . . . recognizes that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established.” *Id.* at 52 n.4; see *Reid*, 401 F.3d at 524; see also *B.D.*, 817 F.3d at 798 (“An appropriate compensatory education award must rely on individualized assessments, and the equitable and flexible nature of the remedy will produce different results in different cases depending on the child’s needs.” (internal quotation marks omitted)).

J.T., 2023 WL 8369938, at *13–14. “[T]he plaintiff has the burden of proposing a well-articulated [compensatory education] plan that reflects the student’s current education abilities and needs and is supported by the record.” *Smith v. District of Columbia*, No. 22-CV-2755-TSC-ZMF, 2023 WL 6291637, at *4 (D.D.C. July 31, 2023), report and recommendation adopted sub nom. *Mabel Smith, Guardian of the minor child K.C., v. District of Columbia*, No. 22-CV-2755 (TSC/ZMF), 2023 WL 8519987 (D.D.C. Dec. 8, 2023), quoting *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010) (cleaned up).

Petitioner’s special education expert witness, Educational Advocate, calculated that Student was denied some 40 hours of Specialized Instruction services from April 2022 through May 2023 due to City School 2's curtailing special education services in the April 22, 2023 IEP. She opined that as a result, Student lost at least one year of academic progress toward his/her IEP goals. For make-up services to compensate for missed Specialized Instruction, Educational Advocate opined that Student should be awarded 40 hours of private academic tutoring. *See* Exhibit P-49. Educational Advocate’s compensatory education analysis does not track my finding that, based on the October 18, 2023 IEP, Student needed 5 hours per week of Specialized Instruction. On the other hand, Educational Advocate assumes that Student should have received 4 hours per month of Specialized Instruction beginning May 13, 2022, when Student’s May 12, 2021 IEP only provided for Student to receive 30 minutes per week of Specialized Instruction. However, perfection is not required for compensatory education analysis. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (Petitioner is not required “to have a perfect case to be entitled to compensatory education.”) The final 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.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (internal quotation marks omitted).

I conclude that Petitioner’s request for 40 hours of compensatory education academic tutoring for Student is reasonably calculated to enable Student to receive the

educational benefits that would have accrued had his/her IEP teams provided for appropriate special education services in the April 22, 2022, April 12, 2023 and May 4, 2021 IEPs.

Petitioner also requested that DCPS be ordered to fund an independent comprehensive psychological reevaluation of Student; to ensure that Student's IEP is appropriately reviewed and revised and to increase the child's IEP Specialized Instruction services to up to 20 hours per week. I find that none of the requested additional relief is supported by my findings in this decision.

ORDER

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

ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall promptly issue funding authorization to the Parent for Student to receive 40 hours of 1:1 independent academic tutoring by an instructor experienced with working with children with specific learning disabilities. If transportation is needed for the child to meet with the tutor, DCPS shall fund the Parent's transportation costs in accordance with OSSE regulations.

2. All other relief requested by the Petitioner herein is denied.

Date: *Date in Caption*

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

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution.