

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 30, 2017

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2017-0107²

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: June 21-22, 2017

Respondent.

Office of Dispute Resolution, Room 2006
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not ensuring that was appropriately evaluated in all areas of suspected disabilities

¹ Personal identification information is provided in Appendix A.

² Beginning with the April 8, 2017 Notice of Prehearing Conference, I erroneously identified this case as Case No. 2017-0116. Subsequently, most of the pleadings have also carried the incorrect case number. The correct case number for this case is 2017-0107.

and by failing to provide appropriate Individualized Education Programs (IEPs) and educational placements since the 2013-2014 school year.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 19, 2017, named DCPS as respondent. The undersigned hearing officer was appointed on April 20, 2017. The parties met for a resolution session on May 2, 2017 and were unable to reach an agreement. On May 30, 2017, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. My final decision in this case is due by July 3, 2017.

The due process hearing was held before the undersigned impartial hearing officer on June 21-22, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL and STUDENT ATTORNEY 1. Respondent DCPS was represented by DCPS' COUNSEL and by LEA REPRESENTATIVE.

A Spanish language interpreter provided simultaneous interpretation of the entire due process hearing for Mother. The interpreter also interpreted Mother's hearing testimony into English for the record and for the benefit of the hearing officer and other participants.

Mother testified and called SPECIAL EDUCATION TEACHER, EDUCATIONAL CONSULTANT, STUDENT ATTORNEY 2, and STUDENT ATTORNEY 3, as additional witnesses. DCPS called SPEECH-LANGUAGE PATHOLOGIST, PRINCIPAL, READING SPECIALIST and LEA Representative as witnesses. Petitioner's Exhibits P-1 through P-65 were admitted into evidence without objection. DCPS Exhibits R-1 through R-26

were admitted into evidence without objection, except for pages 16-5 through 16-7 of Exhibit R-16 and pages 30-9 and 30-10 of Exhibit R-30, which were not offered.

Counsel for the respective parties made opening statements and closing arguments.

Neither party requested leave to file a written closing.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the April 18, 2017

Prehearing Order:

A. Whether DCPS denied Student a FAPE by removing Speech-Language services from his IEP in 2014;

B. Whether DCPS has denied Student a FAPE by failing to appropriately evaluate Student in all areas of suspected disabilities since March 2014;

C. Whether DCPS has denied Student a FAPE by failing to appropriately reevaluate since March 2014;

D. Whether DCPS has denied Student a FAPE by failing to ensure that was provided appropriate IEPs that addressed all of needs relating to disabilities since March 2014;

E. Whether DCPS has denied Student a FAPE by failing to ensure that was provided appropriate educational placements since March 2014 and

F. Whether DCPS failed to ensure that the parent was able to meaningfully participate in Student's IEP meetings from March 2014 through the present.

For relief, the parent requested that the hearing officer order DCPS to ensure that Student's IEP is reviewed and appropriately revised to meet needs resulting from disability and that be provided a suitable educational placement and location of services to implement IEP. In addition, Petitioner seeks

compensatory education for the denials of FAPE since March 2014 alleged in the complaint.

DCPS has asserted as an affirmative defense that Petitioner's claims, which predate the April 19, 2017 filing date of the due process complaint by more than two years, are barred by the applicable statute of limitations

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing on June 21-22, 2017, as well as the argument of counsel, this hearing officer's findings of fact are as follows:

1. Student resides in the District of Columbia with Mother and other family members. Testimony of Mother. Student is eligible for special education under the IDEA disability classification Specific Learning Disability (SLD). Exhibit R-31.
2. Student's mother is a native Spanish speaker. Student is bilingual and continues to be an English Language Learner. Testimony of Special Education Teacher.
3. From 2011 to 2014, Student received Speech-Language Pathology services from DCPS. Following a Bilingual Speech and Language Evaluation in December 2013, Student's speech and language services were terminated. Exhibits R-7, R-2.
4. In November 2013, Student's teacher referred Student for an evaluation for special education eligibility. SCHOOL PSYCHOLOGIST conducted a bilingual psychological evaluation of Student on March 6, 2014. School Psychologist reported that Student's cognitive abilities ranged from the Below Average to Significantly Below Average range of intellectual functioning. profile suggested relatively better developed nonverbal abilities than verbal abilities. overall cognitive abilities appeared to be less well developed than other children age. On the Woodcock-

Johnson III Tests of Achievement, Student's overall level of achievement ranged from average to very low. Student's academic skills in brief achievement, broad reading, broad written language, brief reading, brief writing, written expression, and academic applications fell within the Very Low range of skill development. School Psychologist recommended that Student met criteria necessary to receive special education assistance. Exhibit R-7.

5. Student was determined eligible for special education on March 24, 2014 under the IDEA disability classification SLD. initial March 24, 2014 IEP identified Mathematics, Reading and Written Expression as areas of concern. The IEP team decided that Student would receive 6 hours per week of Specialized Instruction, including 1 hour outside general education. Exhibit R-8. Mother and a parent advocate attended the March 24, 2014 eligibility and IEP team meeting. Mother initially stated that Student needed more hours of services. After it was explained that a meeting could be convened to adjust the service hours if the initial IEP proved unsuccessful, Mother agreed that this was a good starting point. Exhibit R-9.

6. The March 24, 2014 IEP provided for Student to receive Extended School Year (ESY) services but stated that Student was not eligible for ESY transportation. Exhibit R-8. Mother signed consent papers for Student to receive ESY including transportation. DCPS failed to provide transportation for Student to attend ESY, so Student did not attend ESY in the summer of 2014. Testimony of Mother.

7. At the end of the 2013-2014 school year, Student was reported to be progressing on 6 of March 24, 2014 IEP goals and to have mastered 1 goal. Four goals had not yet been introduced. Exhibit R-10. Student's last term grades were Below Basic in Reading and in Writing and Language and Basic or higher in all other courses.

Exhibit P-46.

8. Mother thought she had been cheated by DCPS' failure to provide ESY school transportation for Student. Before the next, October 27, 2014, IEP team meeting, Mother obtained legal representation from a law clinic program at a law school in the District of Columbia (the LAW CLINIC). Thereafter, Mother was represented by student attorneys and their attorney supervisor from the Law Clinic. Testimony of Mother.

9. City School convened an IEP team meeting for Student on October 27, 2014. Mother attended the meeting and was accompanied by two student attorneys. At the meeting, DCPS agreed to provide Student compensatory education for the missed ESY sessions. Student's IEP was amended at the meeting to increase Specialized Instruction to 8 hours per week, including 6 hours outside general education.

Testimony of Mother, Exhibit R-12.

10. An IEP review meeting was convened for Student on December 18, 2014 at City School. Mother attended the meeting and was accompanied by two student attorneys. At the meeting, Student's general education teacher stated that reading was a challenge for Student, that Student had mastered using single simple words with visual words, that now recognized letters and was putting them together to form words. The teacher stated that Student was making progress in identifying letter sounds. Special Education Teacher 2 stated that she was using the Foundations program with Student and that recognized digraphs. Special Education Teacher 2 stated that in writing Student was working on capital letters and a period and that Student's writing was slowly getting better as reading was getting better. Mother reported that everything was OK. Exhibit R-16.

11. On March 9, 2015, City School convened Student's IEP annual review meeting. Mother attended the IEP meeting and was accompanied by two student attorneys. Mother stated that while Student was progressing, was not progressing enough. The classroom teacher stated that Student had made progress but was not on grade level. Special Education Teacher 2 emphasized that while there had been growth, Student was still not on grade level. Special Education Teacher 2 stated that Student had mastered most of IEP goals in math. Mother requested and the team agreed to provide Student 10 hours per week of Specialized Instruction including 2 hours inside general education. The IEP notes state that a Spanish translation of the March 9, 2015 IEP was being prepared for Mother. Exhibits R-17, R-18, Testimony of Mother.

12. At the end of the 2014-2015 school year, Student was reported to be progressing on six of March 9, 2015 IEP goals. Three goals had not yet been introduced or just introduced. Exhibit R-19. Student's Term 3 grades were Below Basic in Reading and in Writing and Language and Basic or Proficient in all other courses. Exhibit P-43.

13. At the beginning of the 2015-2016 school year, Student was still struggling and could not read grade level books. Mother had her Law Clinic attorneys request independent educational evaluations of Student. Testimony of Mother.

14. INDEPENDENT PSYCHOLOGIST conducted a psychoeducational evaluation of Student in April 2016. In his April 2016 report, Independent Psychologist reported that Student's Full Scale IQ fell in the Low Average range, but there were clear indications of a much stronger intellectual potential. Nonverbal reasoning tests revealed very strong skills. Tests of processing speed ranged from Low Average to

Average, revealing inconsistent ability to perform highly structured processing tasks. Weaknesses with visual perception were evident. Tests of visual spatial skills were inconsistent, as Student scored in the Average range on one test, and far below the Average range on the other. Verbal skills were very weak and inconsistent. Student struggled with general knowledge and vocabulary knowledge, and had particular difficulty with verbal abstract reasoning. Working memory tests were severely deficient. Receptive vocabulary fell at the top of the Low Average range, reflecting relatively strong basic language skills. Visual-motor integration fell in the Average range. Phonological processing tests revealed severe weaknesses with phonological awareness, phonological memory, and rapid naming. Further verbal memory tests revealed significant difficulties with verbal memory skills. There were no signs of difficulties with attention, impulse control, or executive functioning. Tests of academic achievement revealed generally very weak academic skills, with reading and writing skills clustering near the bottom of the scale. Reading tests revealed profound deficits with all aspects of the reading process, including word reading, phonetic decoding, fluency, and comprehension. Analysis revealed deficits with both phonetic decoding and visual processing. Written language tests revealed extremely weak spelling. Writing fluency and the content of sentences were also very weak. Math tests clustered in the Low Average range, revealing a relative area of strength. Diagnostically, Independent Psychologist reported that testing indicated the presence of a specific language-based learning disability (also known as dyslexia), which was having a profound impact on Student's acquisition of skills in reading and writing in particular. Exhibit P-2.

15. On April 8, 2016, INDEPENDENT SLP conducted an Independent Educational Evaluation (IEE) speech and language reevaluation of Student because of

Mother's concerns about Student's reading abilities. Independent SLP diagnosed Student with mild language problems (expressive and memory) accompanied by a mild articulation disorder. Exhibit P-5.

16. For the 4th term of the 2015-2016 school year, Student's grades were Below Basic in Reading and in Writing and Language and Basic or Proficient in all other courses. Exhibit P-38.

17. On June 16, 2016, the City School multidisciplinary team (MDT) confirmed Student's eligibility for special education as a child with a Specific Learning Disability. Exhibit R-25. Mother attended the meeting and was accompanied by two student attorneys. Testimony of Mother. The team then met to revise Student's IEP. The IEP team identified Communication/Speech and Language as an additional area of concern for Student. The team maintained Student's Specialized Instructions at 10 hours per week, including 2 hours in general education. The IEP team added 90 minutes per month of Speech-Language Pathology and 15 minutes per month of Speech-Language Pathology consultation services. Exhibit R-26.

18. In the 2016-2017 school year, Student showed more progress. At home, started to read little books. Testimony of Mother. Reading Specialist and, later, Special Education Teacher 1 focused on addressing Student's dyslexia condition. Special Education Teacher 1 researched best practices for teaching children with dyslexia. Beginning in December 2016, Special Education Teacher 1 also started providing Student additional individual and small group instruction services after school for 3 hours per week. These services were in excess of those provided in IEP. Student made excellent academic progress by the end of the school year. Notably, made about one year's progress in independent reading. Testimony of Mother, Testimony of

Special Education Teacher 1. By the end of the third reporting period, Student was reported to have mastered six of June 16, 2016 IEP goals and to be progressing on the rest of goals. Exhibit R-29. Mother attributed Student's impressive progress to the dedicated efforts of Special Education Teacher 1 who provided services beyond what Student's IEP required. Testimony of Mother.

19. Student's IEP team convened on May 16, 2017 to review Student's IEP. Mother and two student attorneys attended the meeting. Mother requested that Student be provided 15 hours per week of Specialized Instruction. The IEP team decided that Student would receive 12 hours per week of Specialized Instruction, including 2 hours in the general education setting. For Speech and Language services, the IEP team ended direct services and provided for 30 minutes per month of consultation services only. Exhibits R-32, R-31.

20. At every IEP meeting for Student at City School, the school provided interpreter services for Mother using either BILINGUAL COUNSELOR or a telephone interpreting service. Testimony of Principal.

21. The D.C. Office of Human Rights determined in a Final Order issued March 20, 2017 that DCPS had violated the D.C. Language Access Act of 2004 by, *inter alia*, not providing Mother Spanish translations of Student's IEPs from March 13 through March 1, 2014. Exhibit R-41.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer's own legal research, the conclusions of law of this hearing officer are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- A. Did DCPS deny Student a FAPE by removing Speech-Language services from IEP in 2014?
- B. Has DCPS denied Student a FAPE by failing to appropriately evaluate Student in all areas of suspected disabilities since March 2014?
- C. Has DCPS denied Student a FAPE by failing to appropriately reevaluate since March 2014?
- D. Has DCPS denied Student a FAPE by failing to ensure that was provided appropriate IEPs that addressed all of needs relating to disabilities since March 2014?
- E. Has DCPS denied Student a FAPE by failing to ensure that was provided appropriate educational placements since March 2014?
- F. Has DCPS failed to ensure that the parent was able to meaningfully participate in Student's IEP meetings from March 2014 through the present?

I.

Statute of Limitations

All of Petitioner's claims in this case relate back to March 2014 when Student was

initially determined eligible for special education services as a child with an SLD disability. DCPS asserts as an affirmative defense that Petitioner's claims concerning DCPS' alleged denials of FAPE, which occurred more than two years before the parent's due process complaint was filed, are barred by the IDEA's two-year statute of limitations. *See* 34 CFR § 300.511(e). The U.S. District Court for the District of Columbia observed in *Damarcus S. v. District of Columbia*, 190 F.Supp.3d 35 (D.D.C. 2016), that the IDEA establishes a filing deadline, requiring that a due process hearing be requested "within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." *Id.* at 43. As the Court pronounced in *Damarcus S.*, so long as the complaint is filed within two years of the known or should have known (KOSHK) date, Petitioner is entitled to full relief for that injury. Therefore, the statute of limitations inquiry should focus upon the particular deficiency asserted, and the parent's ability to recognize it. *See id.* at 45. Because the statute of limitations is an affirmative defense, the burden of proof rests with Respondent DCPS. *See, e.g., Seed Co. Ltd. v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016).

In this case, Petitioner has been represented by Law Clinic since before an IEP team meeting held for Student on October 27, 2014. Student attorneys from Law Clinic have accompanied Mother to all of Student's IEP team meetings since October 2014. The student attorneys work under the supervision of the director of Law Clinic, an experienced licensed attorney. I conclude that from the time Law Clinic began representing her in October 2014, Petitioner had the ability, with her attorneys' assistance, to recognize any deficiencies relating to Student's IEP and educational placement and that Petitioner must be deemed to have known, or to should have known

about most of the deficiencies alleged in the due process complaint when they occurred.

There are two exceptions to the IDEA two-year statute of limitations. The statute shall not apply . . . if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D)(i)-(ii); *accord* 34 C.F.R. § 300.511(f)(1)-(2). For the first exception to apply, the parent must show a “‘misrepresentation’ akin to intent, deceit, or egregious misstatement.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 245 (3d Cir. 2012). A petitioner can satisfy the second exception only by showing that the District failed to provide him with a written notice, explanation, or form specifically required by the IDEA statutes and regulations. *Id.* at 246. Petitioner's Counsel argues that at the numerous IEP meetings held for Student, school representatives misrepresented that Student was progressing educationally. However, educators' opinions about students' progress are necessarily subjective. Even assuming that at times, Student's educational progress at City School was minimal, school staff's assertions about Student's progress did not rise to misrepresentations akin to intent, deceit or egregious misstatement. I find that Petitioner has not shown that one of the exceptions to the IDEA's statute of limitations applies. I conclude that DCPS has met its burden of persuasion that Mother's claims about inappropriate IEPs and educational placements, which predate by more than two years the April 19, 2017 filing date of the due process complaint, are barred by the statute of limitations.

II.

– Did DCPS deny Student a FAPE by removing Speech-Language services

from IEP in 2014?

As explained in the proceeding section, I find that this claim is barred by the IDEA's two-year statute of limitations.

III.

- Has DCPS denied Student a FAPE by failing to appropriately evaluate Student in all areas of suspected disabilities since March 2014?
- Has DCPS denied Student a FAPE by failing to appropriately reevaluate since March 2014?

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006).

Student was initially evaluated by DCPS for special education eligibility in March 2014.³ was reevaluated in June 2016, based upon IEE psychological and speech and

³ Student previously received Speech-Language Pathology services from 2011 until 2014. These services were terminated after a determination that Student demonstrated adequate articulation skills, average connected speech intelligibility, and normal

language reassessments obtained by the parent and upon City School IEP progress reports. The only evidence adduced by the Petitioner that Student was not appropriately evaluated in March 2014 was the opinion of Educational Consultant that School Psychologist's March 6, 2014 Bilingual Psychological Evaluation of Student was not reliable because the test questions were translated into Spanish for Student while scores were normed against the scores of other students who were tested in English. Educational Consultant opined that the test results were not reliable because this procedure violated test administration protocol. Educational Consultant also opined that the March 13, 2014 evaluation report was inadequate because School Psychologist made only two recommendations to support Student in school. DCPS offered no evidence to rebut Educational Consultant's opinions about the March 13, 2014 psychological evaluation report.

Although the March 2014 psychological evaluation was administered more than two years before the due process complaint was filed, I find that Mother had no basis for knowing that the evaluation was not properly administered until Educational Consultant reviewed the evaluation report in spring 2017. Therefore, Mother's claim that evaluation was inadequate is not barred by the statute of limitations. I find that Mother has met her burden of persuasion that DCPS' March 2014 psychological evaluation of Student was not adequate.

The failure to conduct a required IDEA evaluation is a procedural violation of the Act. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (school district's failure to adequately evaluate student was a procedural error that

receptive and expressive vocabulary enabling to participate in classroom environment without related services assistance. Exhibit R-7.

effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) 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 CFR § 300.513(a)(2). *See also, e.g., Brown v. District of Columbia*, No. 15-0043, 2016 WL 1452330 (D.D.C. Apr. 13, 2016). Considering the extent of Student's learning disability and also that in the 2016 IEE psychological reevaluation, this disability was attributed in part to dyslexia, which had not been identified in the March 2014 evaluation, I find that DCPS' failure to ensure that Student was appropriately evaluated in the initial March 2014 psychological evaluation significantly impeded Mother's opportunity to participate in the decision-making process for . This was a denial of FAPE.

IV.

- Has DCPS denied Student a FAPE by failing to ensure that was provided appropriate IEPs that addressed all of needs relating to disabilities since March 2014?
- Has DCPS denied Student a FAPE by failing to ensure that was provided appropriate educational placements since March 2014?
- Has DCPS failed to ensure that the parent was able to meaningfully participate in Student's IEP meetings from March 2014 through the present?

Petitioner's remaining claims concern the alleged inappropriateness of Student's IEPs and educational placements from March 2014 through the present. The measure and adequacy of an IEP can only be determined as of the time it is offered to the

student. See, e.g., *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). As explained above in this decision, the IDEA statute of limitations bars Mother’s claims about the alleged inappropriateness of IEPs developed before April 19, 2015. Between that date and the filing of the due process complaint, Student’s IEP was revised at IEP meetings on February 23, 2016 and June 16, 2016. DCPS maintains that these IEPs were appropriate for Student. Petitioner claims that the IEPs were not adequate.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP. “The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court’s assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA’s] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 458 U.S. at 206–07, 102 S.Ct. 3034. Courts have consistently underscored that the “appropriateness of an IEP is not a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). *Moradnejad* at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017), the U.S. Supreme Court explained that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* DCPS must carry

the burden of persuasion on the appropriateness of Student's IEPs and educational placement.

Addressing the procedural prong of the *Rowley-Andrew F.* inquiry, Petitioner contends that DCPS did not meet the IDEA's procedural requirements because it did not ensure Mother's meaningful participation in the IEP meetings. Specifically, Petitioner alleges that DCPS limited Mother's participation because the District did not provide Mother a Spanish language translation of Student's IEPs and because City School staff misled Mother about Student's educational progress and capabilities. Mother must carry the burden of persuasion on these procedural violation allegations.

The IDEA does not permit an LEA to convene an IEP meeting without ensuring that parents are afforded meaningful participation in the development of their child's IEP. *See, e.g. Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 124 (D.D.C. 2013). However, Mother's claim was unpersuasive that her participation in the IEP meetings was limited because City School staff misled Mother about Student's educational progress and capabilities. As I have observed above in this decision, educators' views on a child's capabilities and educational progress are necessarily subjective and Petitioner offered no evidence that City School staff intended to mislead Mother. Moreover, Mother was accompanied at the IEP meetings by her Law Clinic student attorneys. Whether or not the City School educators' views on Student's progress and capabilities were correct, Mother participated actively in the meetings and was able to express her own views.

With regard to providing translation of the IEPs, the Language Access Act of 2004, D.C. Code §§ 2-1931, *et seq.*, mandates that DCPS provide translations of "vital documents" into Spanish and other non-English language spoken by specified limited or

no-English proficient populations. The D.C. Office of Human Rights determined in a Final Order issued March 20, 2017 that DCPS had violated the Language Access Act by, *inter alia*, not providing Mother Spanish translations of Student's IEPs from March 13 through March 1, 2014. However, at the due process hearing in this case, DCPS established that it was more likely than not that a Spanish translation of the March 9, 2015 IEP was provided to Mother and in her testimony, Mother did not claim that she had not been provided translations of Student's 2016 or 2017 IEPs. In sum, I find that Petitioner has not met her burden of persuasion that DCPS failed to afford her the opportunity for meaningful participation in the development of Student's February 23, 2016 or June 16, 2016 IEPs.

I turn next to the second, substantive, prong of the *Rowley/Andrew F.* inquiry: Were City School's February 23, 2016 and June 16, 2016 IEPs reasonably calculated to enable Student to make progress appropriate in light of individual circumstances? Petitioner's expert, Educational Consultant, testified that these IEPs did not adequately address Student's minimal educational progress, especially in reading, through the first half of the 2015-2016 school year and were not adequate to address Student's reading comprehension deficits. The expert testified that in the middle of the 2015-2016 school year, Student was reading at the same level, beginning Kindergarten proficiency, had tested at the end of the prior school year – far below grade level. She noted that on the February 23, 2016 IEP, the Present Levels of Performance (PLOPs) and annual goals showed little or no progress for Student in Mathematics, Reading or Written Expression. Educational Consultant opined that because Student was not progressing, required more pull-out and push-in special education services, including one hour per day of pull-out services for Reading and additional pull-out hours for Written

Expression and Mathematics. She opined that the February 23, 2016 IEP's provision of 8 hours per week of pull-out services and 2 hours per week of push-in services was not sufficient.

With regard to the June 16, 2016 IEP, Educational Consultant noted that the IEE psychological and speech and language reevaluations conducted in April 2016 provided much more information on Student's deficits, including a new diagnosis of dyslexia and confirmation that Student has memory and processing speed weaknesses. She opined that the June 16, 2016 IEP did not address Student's need for more special education services inside and outside of the general education classroom. She also opined that Student required a change in annual goals and modified IEP supports because was not progressing. Educational Advocate opined that the IEP team's decision not to increase Student's Specialized Instruction services in the June 16, 2016 IEP was not appropriate.

DCPS' expert, Reading Specialist, testified that in the 2016-2017 school year, Student made tremendous process. However, all relevant witnesses agreed that Student's excellent progress in the last school year was due in part to the dedicated efforts of Special Education Teacher 1, who provided individualized services to Student above and beyond what was required by the June 16, 2016 IEP. Special Education Teacher 1 testified that on his own initiative, he researched best practices for teaching reading to children with dyslexia and that beginning in January 2017, he began providing Student an extra 3 hours per week of after school services to try out the new techniques he had researched. These services and accommodations, which proved effective for Student, including the additional hours of instruction after school, were not specified in Student's June 16, 2016 IEP. Special Education Teacher 1 testified that by

the end of the 2016-2017 school year, Student had made about one year's progress in independent reading, but was still not on grade level.

Educational Consultant opined that if Student had been receiving services like the reading services provided by Special Education Teacher 1, since the spring of 2015, should now be reading at grade level. I found Educational Consultant to be a very credible witness. She informed herself about Student's education needs not only by reviewing records, but also by conducting her own testing of Student, observing in the classroom and speaking with Special Education Teacher 1. Educational Consultant clearly has the advanced education, training and experience to make her assessment and I credit her opinion that the 2016 IEPs were not adequate to enable Student to make progress "appropriate in light of the circumstances." See *Andrew F., supra*. I conclude that DCPS has not met its burden of persuasion that the February 23, 2016 and June 16, 2016 IEPs were appropriate for Student. This was a denial of FAPE.

Remedy

At the due process hearing, Petitioner's Counsel sought compensatory education as the only immediate relief for the denials of FAPE in this case. Specifically, Petitioner requests an order for DCPS to fund Student's participation in a Lindamood-Bell reading program over the summer of 2017 and that after the program, DCPS reevaluate Student and ensure that IEP is revised as appropriate.

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

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has "broad discretion to fashion an appropriate remedy," which can go beyond prospectively providing a

FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial. An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

B.D., 817 F.3d at 797–98.

At the due process hearing, Educational Consultant testified credibly that if Student had received appropriate IEP services focused on reading deficits beginning in the spring of 2015, would now be reading at grade level. Her opinion was informed by the great progress Student made in Reading in the 2016-2017 school year once was provided services attuned to individual circumstances – notably dyslexia. Educational Consultant also supported her opinion by her own testing of Student before the due process hearing and her review of the 2016 IEE psychological evaluation of Student and City School formal testing. Educational Consultant opined that to bring Student’s reading up to grade level, requires the type of award described in *B.D.*, *supra*, as consisting of “short, intensive compensatory programs targeted at specific problems or deficiencies.” Specifically, she recommends an individualized summer reading program designed for Student, typically for 160 to 200 hours, by the Lindamood-Bell Learning Center. Educational Consultant opined that with this

compensatory relief, Student's reading comprehension could be brought to grade level before the 2017-2018 school year. She opined that after the program is completed, Student may need less Specialized Instruction than is included in recent May 16, 2017 IEP. I find that funding for Lindamood-Bell reading instruction would be an appropriate award to compensate Student for the lost progress would have been expected to make but for the denials of FAPE in this case, including the failure to conduct an appropriate initial psychological assessment in 2014 and the failure to provide Student appropriate IEPs on February 23 and June 16, 2016 . I will order DCPS to fund the Lindamood-Bell program for Student and to convene an IEP team meeting to review Student's needs and update IEP as appropriate after the Lindamood-Bell program is completed.

ORDER

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

ORDERED:

1. As compenstory education for the denials of FAPE found in this decision, within 5 business days of the date of this decision, DCPS shall provide funding authorization for Student to be assessed by Lindamood-Bell Learning Center and to enroll in an individually designed Lindamood-Bell reading program over the summer of 2017. DCPS shall provide sufficient funding to pay in full the customary fees charged by Lindamood-Bell for these services. If needed, DCPS shall provide transportation for Student to attend the Lindamood-Bell program.
2. After the Lindamood-Bell summer program is completed, DCPS shall convene Student's IEP team to review and revise Student's IEP in conformity with 34 CFR § 300.320, *et seq.* and with this decision. The hearing officer strongly recommends that Educational Consultant be invited to participate in the meeting.
3. All other relief requested by the Petitioner herein is denied.

Date: June 30, 2017

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
OSSE Division of Specialized Education
DCPS Resolution Team