

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

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

Petitioner,

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: July 26, 2018

Hearing Officer: Peter B. Vaden

Case No: 2018-0121

Hearing Dates: July 16-17, 2018

Office of Dispute Resolution  
Rooms 111 and 112  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (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) has denied Student a free appropriate public education (FAPE) by not conducting appropriate evaluations, by not developing appropriate Individualized Education Programs (IEPs) and not providing an appropriate curriculum for Student and by failing to fully implement Student’s IEP in the 2017-2018 school year.

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

Petitioner's Due Process Complaint, filed on May 4, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on May 7, 2018. On May 22, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was set for July 16-17, 2018. To accommodate these hearing dates, by order of July 15, 2018, I granted Petitioner's unopposed request to extend the final decision due date from July 18, 2018 to July 28, 2018.

The due process hearing was held before the undersigned impartial hearing officer on July 16 and 17, 2018 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. Respondent DCPS was represented by CASE MANAGER and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called EDUCATIONAL CONSULTANT as an additional witness. DCPS called as witnesses SCHOOL PSYCHOLOGIST and Case Manager. Petitioner's Exhibits P-13 through P-24 and P-26 through P-37 were admitted into evidence without objection. No exhibits marked P-1 through P-12 or P-25 were offered. DCPS' objections to Exhibits P-38 and P-39 were sustained. DCPS' Exhibits R-1 through R-19 were admitted into evidence, including Exhibits R-11 and R-19 admitted over Petitioner's objections. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written briefs.

## **JURISDICTION**

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

## **ISSUES AND RELIEF SOUGHT**

The issues for determination, as clarified by Petitioner's Counsel on the record at the due process hearing, are:

Whether D.C. Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to adequately evaluate Student in early 2016, in that the psychological evaluation did not include an adaptive assessment or address the clinically significant and at-risk responses to the BASC rating scales;

Whether DCPS developed an inappropriate IEP for Student in January 2017, with insufficient Specialized Instruction in light of Student's levels in math and reading, and because the annual goals were vague and complicated, not individualized to Student and not measurable;

Whether DCPS failed to implement the January 2017 IEP by not providing 1:1 behavioral support counseling services in the 2017-2018 school year at City School 2;

Whether DCPS has failed to timely develop an annual IEP for Student since the last IEP was developed in January 2017 and

Whether City School 2 denied Student a FAPE by failing to offer an appropriate curriculum in the 2017-2018 school year.

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

- a. Order DCPS to immediately fund an Independent Educational Evaluation (IEE) which shall include a psychological evaluation, inclusive of an adaptive behavior assessment, and an IEE functional behavioral assessment. Upon completion of the IEE assessments, DCPS shall be ordered to convene Student's IEP team to review the data and revise Student's IEP, as appropriate and
- b. That the hearing officer will craft and order an appropriate compensatory education plan, or, upon request of the parent, reserve compensatory education until completion of the requested reevaluations.

## **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument and legal memoranda of counsel, this hearing officer's findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother.

### Testimony of Mother.

2. At all times concerned in this matter, Student has been eligible for special education under the IDEA disability classification Multiple Disabilities, based upon the underlying impairments Specific Learning Disability and Other Health Impairment.

### Exhibit P-16.

3. In January 2016, School Psychologist conducted a comprehensive psychological reevaluation of Student at the request of Mother and PRIOR EDUCATIONAL ADVOCATE due to Student's continued academic challenges and behavioral, social and emotional needs. Student's Multidisciplinary Team (MDT) at City School 1 also sought input on whether Student met criteria for the Emotion Disturbance (ED) disability classification. School Psychologist reviewed existing data, conducted a classroom observation and interviewed Mother, Student, a classroom teacher and the school social worker. School Psychologist administered a battery of cognitive, educational and behavioral assessments, including the Behavior Assessment Scale for Children 3 (BASC-3), the Behavior Rating Inventory of Executive Function (BRIEF), the Conners 3<sup>rd</sup> Edition (Conners 3) for assessing for Attention Deficit Hyperactivity Disorder (ADHD), the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV) and the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH). On cognitive testing, Student demonstrated Average performance on Short-Term-Working Memory. Student demonstrated Low Average performance on Quantitative Reasoning. Student

demonstrated Low performance on Comprehension Knowledge, Fluid Reasoning, Cognitive Processing Speed, Auditory Processing, Long-Term Retrieval, and Visual Processing. On the WJ-IV ACH Math Facts Fluency, Applied and Calculation, Student demonstrated difficulties correctly computing presented problems. On the WJ-IV ACH reading clusters, Student obtained low standard scores in the areas of broad reading, passage comprehension, and sentence reading fluency. On social-emotional and behavioral rating scales, Student was rated as demonstrating difficulty learning and/or remembering concepts, requiring additional explanation or assistance with academic content. In the home/community setting, the ratings indicated that Student had difficulty complying with established rules on a consistent basis; may lose temper; demonstrated difficulty starting and/or finishing tasks; exhibited poor planning, prioritizing, or organizational skills; may be easily distracted in the classroom setting; had challenges with monitoring (task-oriented and interpersonal awareness); had challenges initiating tasks without teacher prompting; had impaired working memory which is essential for carrying out multi-step activities; had difficulty with planning/organizing as it relates to problem solving and with the ability to order and organize things in Student's life. Based on the then existing information and her evaluation results, School Psychologist concluded that Student continued to meet eligibility criteria for special education services as a student with Multiple Disabilities for SLD and OHI due to ADHD. Exhibit R-8.

4. In an interview for the psychological evaluation, Student's 2015-2016 special education teacher reported to School Psychologist that in the area of written expression, Student was able to retell a story and develop two well-written paragraphs. She reported that Student had strong self editing skills, but demonstrated

inconsistencies with spelling, capitalization and punctuation. In her classroom observation of Student, School Psychologist observed that Student copied the correct answers to the questions on paper and was taking detailed notes. Exhibit P-23.

5. In a February 22, 2016 letter to the Special Education Coordinator at City School 1, Prior Educational Advocate wrote that School Psychologist's psychological report provided a "comprehensive overview of [Student's] educational history, current profile and present levels of performance." Prior Educational Advocate wrote that neither Mother nor he had "any concerns about the validity of [School Psychologist's] assessment." Exhibit R-9.

6. Student's City School 1 IEP was amended on March 10, 2016. At the request of Mother, by her educational advocate, Student was removed from the general education setting for Specialized Instruction in Mathematics. Exhibit P-19. The Amended IEP identified Mathematics, Reading and Emotional-Social-Behavioral Development as areas of concern for Student. The March 10 2016 amended IEP provided for Student to receive 4 hours per week of Specialized Instruction in general education, 4 hours per week of Special Education in Mathematics outside general education, and 100 minutes per month of Behavioral Support Services. Exhibit P-21.

7. On the Scholastic Reading Inventory (SRI) assessment for reading, Student's 2016-2017 beginning-of-year score was 849. Although this score was more than one year below grade level, it was a substantial improvement over Student's SRI score from the prior school year. In August 2016, Student scored, overall, 433 on the i-Ready diagnostic measurement of mathematics. This score represented a decline from Student's i-Ready score in January 2016 and was years below expectations for Student's actual grade level. Exhibit P-23. In spring 2018, Educational Consultant administered

parts of the Woodcock Johnson achievement tests to Student and Student's scores in mathematics were consistent with the fall 2016 i-Ready score. Testimony of Educational Consultant.

8. Student's City School 1 IEP team met on January 13, 2017 for the annual review of Student's IEP. The January 13, 2017 IEP team identified Mathematics, Reading and Emotional-Social-Behavioral Development as areas of concern for Student and continued the prior IEP's provision for 4 hours per week of Specialized Instruction in general education, 4 hours per week of Special Education in Mathematics outside general education, and 100 minutes per month of Behavioral Support Services.

9. For the 2017-2018 school year, Student matriculated to City School 2. Student did not have a successful school year at City School 2. Student's grades were:

<u>Course</u>	<u>T1</u>	<u>T2</u>	<u>T3</u>	<u>T4</u>	<u>Final</u>
Math	A-	B	F	D	C
Art	C-	B-			C+
Music			F	F	F
Drama			D	F	D
Comp. Religion	F	F			F
Self-Advocacy	A-	A	C	C	B
Science	C	C+	F	D	D+
History	F	F	D	F	F
Writing	F	F			F
Fitness			D+	B-	C
English	C+	D+	F	F	D

Exhibit P-26.

10. From the beginning of the 2017-2018 school year, Mother requested City School 2 to move Student into the choir class. This never happened due to schedule conflicts. Testimony of Mother.

11. At the Resolution Session Meeting for this case on May 17, 2018, DCPS stated it was willing to reevaluate Student. Petitioner's Counsel stated that the parent was not open to DCPS' completing an evaluation. Exhibit R-1.

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

#### **Analysis**

1. Did DCPS deny Student a FAPE by failing to adequately evaluate Student

in early 2016, in that the psychological evaluation did not include an adaptive assessment or address the clinically significant and at-risk responses to the BASC rating scales?

Petitioner first alleges that School Psychologist's January 2016 comprehensive psychological reevaluation of Student was inadequate because it did not include an adaptive assessment or address responses to the Behavior Assessment Scales for Children (BASC-3) rating scales which indicated clinically significant or at-risk characteristics in certain domains. DCPS responds that the evaluation was adequate at the time the evaluation report was made. Mother has the burden of persuasion on this claim.

The IDEA regulations specify that in conducting an evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under §300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; . . .

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 CFR § 300.304(b). Petitioner did not call an expert witness who was qualified to conduct psychological evaluations or to assess the sufficiency of School Psychologist's evaluation. Petitioner offered no competent evidence that the January 2016 psychological evaluation of Student was not comprehensive or did not otherwise meet the relevant requirements § 300.304(b).

In her hearing testimony, School Psychologist explained that she did not conduct

an adaptive assessment because, although Student's General Intellectual Ability (GIA) tested low at 65, other data points did not indicate that Student was a child with an Intellectual Disability. School Psychologist also testified that Student's MDT team did look at the possibility that Student had an Emotional Disturbance (ED), using data from the BASC scales, and the team decided that Student did not meet the ED criteria. No one on the 2016 MDT team disagreed with this decision. To the contrary, Mother's prior educational advocate wrote the City School 1 Special Education Coordinator on February 22, 2016 that neither he nor Mother had any concerns about the validity of School Psychologist's assessment of Student. I conclude, therefore, that Mother did not meet her burden of persuasion that DCPS denied failed to adequately evaluate Student in January 2016.

2. Did DCPS develop an inappropriate IEP for Student in January 2017, with insufficient Specialized Instruction in light of Student's levels in math and reading, and because the annual goals were vague and complicated, not individualized to Student and not measurable?

Petitioner next alleges that DCPS' January 13, 2017 IEP, developed for Student at City School 1, was inappropriate because the IEP annual goals were deficient and because the IEP did not provide sufficient Specialized Instruction Services to address Student's needs in math and reading. DCPS responds that the IEP was appropriate for Student at the time it was developed.

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.

*Moradnejad* at 274-75. Petitioner does not allege that DCPS failed to comply with procedural requirements when the January 13, 2017 IEP was developed. Therefore, I move to the second prong of the *Rowley* inquiry. Was the IEP appropriate for Student? In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, ——— U.S. ———, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated *Rowley, supra*, for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . in *Endrew F. . . .*, raised the bar on what counts as an adequate education under the IDEA. *Endrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’” standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ), the Court in *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000. *Z. B.*, 888 F.3d at 517. Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034. *Z. B.*, 888 F.3d at 519.

...

The IDEA calls on public schools throughout the United States to provide a free, appropriate education. Congress has not committed to educational perfection: “Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). If there is a gap between the best education that money can buy at a private school for a student with disabilities and the free and appropriate education at a public school that the IDEA promises, one might justly

hope to close that gap for all students. Meanwhile, what Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately. *Z. B.*, 888 F.3d at 528.

...

Understanding the particulars of a child’s current skills and needs is critical to developing an “individualized” educational plan: “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) ). *Z. B.*, 888 F.3d at 522.

...

Ordinarily, states must ensure “removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). [In *Endrew F.*, the Supreme Court] affirmed that “the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’ “ *Endrew F.*, 137 S.Ct. at 999 (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034). *Z. B.*, 888 F.3d at 527–28.

...

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999. *Z. B.*, 888 F.3d at 524. . . . The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated. *Z. B.*, 888 F.3d at 524 (internal quotations and citations omitted.)

DCPS must shoulder the burden of persuasion on the appropriateness of the January 13, 2017 IEP. *See* D.C. Code § 38-2571.03(6).

The January 13, 2017 IEP identified Mathematics, Reading and Emotional-Social-Behavioral Development as areas of concern for Student and continued the

March 22, 2016 amended IEP's provision for 4 hours per week of Specialized Instruction in general education, 4 hours per week of Special Education in Mathematics outside general education, and 100 minutes per month of Behavioral Support Services.

i. Annual Goals

The IDEA requires that each child's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i). Petitioner's expert, Educational Consultant, was critical of both the mathematics and the reading goals in the January 2017 IEP and opined that the IEP should have included goals for written expression.

The January 13, 2017 IEP, Exhibit P-23, included two annual goals for math:

Annual Goal 1: When given an algebraic expression on combining like terms, Student will be able to determine if to use the distributive property and use the proper steps to combine like terms in 9 out of 10 trials with 80% accuracy independently.

Annual Goal 2: When given a multi-step word problem using proportions and fractions to find a percentage, Student will be able to analyze what is being asked and use the correct operations(s) to solve the problem in 4 out of 5 trials with 80% accuracy.

Educational Consultant opined that because Student was functioning at a very low math level, and also had a reading comprehension problem, these goals should have been broken down further so that Student could possibly master them. DCPS' expert, Case Manager, opined, to the contrary, that these goals were appropriate because they were written to address Student's baselines recorded in the IEP. The mathematics baselines indicated that Student was able to follow the steps of combining like terms

with teacher and peer assistance and was able to complete one step word problems with little or no difficulty.

The January 13, 2017 IEP also included two annual reading goals for Student:

Annual Goal 1: After reading a grade-level text, Student will utilize at least two pieces of textual evidence to correctly analyze the theme of the text in 4 out of 5 trials.

Annual Goal 2: When given a grade level informational text, Student will be able to use a graphic organizer to cite textual evidence correctly when answering reading comprehension questions with minimal teacher and peer assistance in 4 out of 5 trials.

Educational Consultant, opined that these goals' requirement for Student to read grade level text were not meaningful because Student was then reading 5 or 6 years below grade level. She opined that these reading goals "set Student up for failure." However, the IEP states that at the beginning of the 2016-2017 school year, Student's Scholastic Reading Inventory (SRI) score was 849. DCPS' expert, Case Manager, explained that Student's SRI score indicated that Student was then reading, with support, only one year below grade level. He opined that the annual goals for reading were appropriate based on Student's IEP baselines. Moreover, in School Psychologist's January 2016 comprehensive psychological evaluation report, Exhibit P-14, School Psychologist wrote that with specialized support, Student would be able to read grade-level text. The Supreme Court teaches in *Andrew F.* that the IDEA requires ambitious IEP goals so that "every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 992. In light of this directive, I find that DCPS has met its burden of persuasion that the mathematics and reading goals in the January 13, 2017 IEP were appropriate for Student when developed.<sup>2</sup>

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<sup>2</sup> In her due process complaint, Petitioner also alleged that the January 13, 2017 IEP annual goals are vague and complicated, not individualized to Student and not

Educational Consultant was particularly concerned that the January 13, 2017 IEP did not include writing goals for Student. Educational Consultant informally tested Student in spring 2018 and concluded that Student was struggling with writing, capitalization and punctuation. However, the evidence in the hearing record on Student's writing skills does not show that at the time the January 13, 2017 IEP was developed, Student needed writing goals to make progress in the general education curriculum. *See Z. B., supra*, 888 F.3d at 524 (*Andrew F.* standard calls for evaluating an IEP as of the time it was created rather than with the benefit of hindsight.)

At the time of the January 2016 psychological evaluation, Student's 2015-2016 special education teacher reported to School Psychologist that in the area of written expression, Student was able to retell a story and develop two well-written paragraphs. She reported that Student had strong self-editing skills, but demonstrated inconsistencies with spelling, capitalization and punctuation. In her classroom observation of Student, School Psychologist observed that Student copied the correct answers to the questions on paper and was taking detailed notes. In her January 29, 2016 evaluation report, which Prior Educational Advocate and Mother endorsed at the time, there was no recommendation for Student to receive IEP support for writing. Nor is there any evidence in the record that, at the time of the January 2017 IEP team meeting, the parent or Student's teachers requested that Student be provided special education support for Written Expression. I conclude, therefore, that DCPS has met its burden of persuasion that the January 13, 2017 IEP was not deficient for omission of

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measurable. The testimony of Parent's expert, Educational Consultant, did not support that claim. I agree with the opinion of Case Manager that on their face, the IEP goals are measurable and individualized to the student and that the goals are neither vague nor complicated.

annual goals for writing.

ii. Specialized Instruction Services

Petitioner contends also that the Specialized Instruction Services in the January 13, 2017 IEP were insufficient in light of Student's levels in math and reading. Student's prior year, March 10, 2016, IEP had provided for 8 hours per week of Specialized Instruction including 4 hours per week of Special Education in Mathematics outside general education, as requested by the parent and Prior Educational Advocate. These hours of services were carried over in City School 1's January 13, 2017 IEP. DCPS did not call a witness from City School 1 to explain the IEP team's decision not to change Student's special education services.

On the SRI assessment for reading, Student's 2016-2017 beginning-of-year score was 849. Although this score was more than one year below grade level, it was a substantial improvement over Student's SRI score from the prior school year. From this evidence, I conclude that DCPS has shown that the IEP team's decision not to alter Student's Specialized Instruction for reading was not inappropriate.

In August 2016, Student scored overall 433 on the i-Ready diagnostic measurement of mathematics. This score was a decline from Student's i-Ready score in January 2016 and was years below expectations for Student's actual grade level. In spring 2018, Educational Consultant administered parts of the Woodcock Johnson achievement tests to Student and Student's scores in mathematics were consistent with the fall 2016 i-Ready score. In light of these data DCPS should have offered competent evidence to support the January 13, 2017 IEP team's decision not to revise Student's special education services to address what appeared to be lack of progress in mathematics. DCPS did not do so. *See Andrew F., supra*, 137 S.Ct. at 1002. ("A

reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”) On this evidence, I find that DCPS did not meet its burden of persuasion that the January 13, 2017 IEP was reasonably calculated to enable Student’s progress in math.

In sum, I find that DCPS has met its burden of persuasion that the annual goals in the January 13, 2017 IEP were appropriate. However, I find that DCPS did not meet its burden of showing that the unchanged Specialized Instruction Services in the IEP were reasonably calculated to enable Student to make appropriate progress in mathematics. This was a denial of FAPE.

3. Did DCPS fail to implement the January 2017 IEP by not providing 1:1 behavioral support counseling services in the 2017-2018 school year at City School 2?

The parent alleges that in the 2017-2018 school year, City School 2 failed to implement the 100 minutes per month of one-on-one counseling services required by Student’s January 13, 2017 IEP. In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S. District Court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”

*Beckwith*, 208 F. Supp. 3d at 49 . (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000)). The burden of persuasion for this claim is on the Petitioner.

Petitioner’s evidence that Student was not provided 1:1 counseling services came

from Educational Consultant. She testified that Student told her that Student was never pulled out of class for counseling services. However Educational Consultant stated that she did not communicate with anyone at City School 2 to confirm this information. Case Manager testified that the school social worker did provide Student's Behavioral Support Services and that Mother, with whom he spoke frequently, did not tell him that Student was not receiving counseling services. On this limited record, I find that Mother has not met her burden of persuasion that DCPS failed to implement the counseling services required by Student's January 13, 2017 IEP.

4. Did DCPS fail to timely develop an annual IEP for Student subsequent to the January 13, 2017 IEP?

For this issue, the Petitioner alleges that DCPS denied Student a FAPE by failing to ensure that Student's IEP team at City School 2 conducted an annual IEP review and issued an updated IEP within one year of the January 13, 2017 IEP team meeting at City School 1. The parent claims that Student's IEP team has not reviewed Student's IEP since Student matriculated to City School 2. The IDEA requires that DCPS must ensure that an IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. It must revise the IEP as appropriate to address annual goals, results of any reevaluation, information about the child, the child's anticipated needs, or other matters. 34 C.F.R. §§ 300.324(b)(1) (i)-(ii), 300.324(b)(2). DCPS contends that City School 2 timely convened an IEP annual review meeting for Student on January 11, 2018 and that Student's IEP was revised on that date. Mother has the burden of persuasion on this claim.

Case Manager testified that Student's IEP was revised at an IEP team meeting on

January 11, 2018 and that, in addition to Mother and himself, the special education coordinator, a school social worker and a regular education teacher attended. However, Case Manager admitted that the school did not provide the parent a prior written notice concerning the IEP or a copy of the draft or final IEP before or after the meeting. *See* D.C. Code § 38-2571.03(3) (4) (Requirements to provide draft IEP 5 business days before meeting and to provide final IEP within 5 business days after meeting.) The IEP allegedly adopted at City School 2 on January 11, 2018, offered as Exhibit R-11 by DCPS, states that the father attended the meeting, when Case Manager agreed that he did not, and the IEP copy lacks the signature of any participant. More troubling, the entire IEP, except for the Emotional, Social and Behavioral Development section appears to have been copied, verbatim, from the January 13, 2017 IEP, Exhibit P-23, including the Present Levels of Academic Achievement and Functional Performance (PLOPs). For example the most recent data in the IEP PLOPs for Reading came from the August 31, 2016 SRI assessment, even though the SRI had also been administered again to Student as recently as September 27, 2017 (Exhibit P-27). The PLOPs for Mathematics, likewise, do not contain current data, but repeat the scores from the September 8, 2016 i-Ready assessment administered to Student before the January 13, 2017 IEP meeting.

An IEP is not a form document. *Andrew F., supra*, 137 S.Ct. at 999. Every IEP must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance. 34 CFR § 300.320(a)(1). "Academic achievement" generally refers to a child's **current** performance in academic areas (*e.g.*, reading or language arts, math, science, and history)." U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46662 (August 14, 2006) (emphasis supplied). Assuming that Student's IEP team did

meet on January 11, 2018, as DCPS claims, the resulting IEP, which lacked data on Student's current academic performance and was copied, mostly verbatim, from the January 13, 2017 IEP, was not a valid IEP.

DCPS' failure to ensure that Student's IEP team reviewed Student's January 13, 2017 IEP within one calendar year and revised the IEP, as appropriate, based on current data, was a procedural violation of the IDEA. *See, e.g., D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.) 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). In this case, City School 2's development of the January 11, 2018 IEP, based on outdated present levels of academic achievement and functional performance data, when current data was available, necessarily impeded Mother's opportunity to participate in the IEP decision making process for Student. I find that this was a denial of FAPE.

5. Did City School 2 deny Student a FAPE by failing to offer an appropriate curriculum in the 2017-2018 school year?

From the beginning of the 2017-2018 school year Mother wanted Student to be placed in the City School 2 choir class. Despite assurances to mother that choir class could be added to Student's schedule, it did not happen because of schedule conflicts.

Mother also objected to Student's assignment to classes in Honors Biology, and Comparative Religion and creative writing, which Mother considered too challenging for Student. Mother contends that placing Student in an inappropriate academic curriculum was a denial of FAPE. Mother has the burden of persuasion on this claim.

Case Manager testified that at City School 2, all students in the general education curriculum are included in honors classes, with accommodations provided, as needed, for students with disabilities. He added that although titled honors classes, these classes are not necessarily advanced. Under the IDEA, class assignments and teaching methodologies remain the province of educators provided that the IEP is faithfully implemented. "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardians of the child." *Rowley, supra*, 458 U.S. at 207, 102 S.Ct. at 3051. [I]t seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a [due process] proceeding." *Id.*, 458 U.S. at 207-208. Mindful of this Supreme Court guidance, I find that Petitioner has not shown that City School 2's schedule and class assignments for Student of the 2017-2018 school year were a denial of FAPE.

### Remedy

For relief in this case, Petitioner requested that DCPS be ordered to fund an Independent Educational Evaluation (IEE) to include a psychological evaluation, inclusive of an adaptive behavior assessment, and a functional behavioral assessment. With regard to the IEE request, under 34 CFR § 300.502(b), subject to certain limitations, a parent has the right to an independent educational evaluation at public

expense if the parent disagrees with an evaluation obtained by the public agency. In this case the parent has withheld consent for DCPS to conduct an evaluation and so the District has not conducted an evaluation with which the parent disagrees. The parent is not entitled to an IEE evaluation if she will not allow the District to conduct its own evaluation of Student. *See, e.g., Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir.1996) (“[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation.”). I, therefore, decline to order DCPS to fund an IEE evaluation of Student in this proceeding. (At the due process hearing in this case, Mother stated that she would now sign DCPS’ evaluation consent form to allow DCPS to proceed with its own evaluation of Student.)

Addressing compensatory education, the D.C. Circuit pronounced in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), that if a hearing officer concludes that the school district denied a student a FAPE, he has “broad discretion to fashion an appropriate remedy, which may include compensatory education.” *Id.* at 800. “That inquiry requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799. In this decision, I have determined Student was denied a FAPE by the failure of the City School 1 IEP team in January 2017 to provide appropriate Specialized Instruction to address Student’s needs in math and by the failure of City School 2 to timely develop a valid revised IEP for Student in January 2018. The parent elected not to put on evidence of what position Student would be in absent these denials of FAPE or what type of compensatory education would be warranted to restore Student to that position.

In the D.C. Circuit’s *B.D.* decision, *supra*, in the context of compensatory

education awards, the Court encouraged hearing officers to order further assessments if needed to discern a student's needs. ("Assessments sufficient to discern B.D.'s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them . . ." *Id.* at 800.) It appears that the Circuit Court anticipated that the hearing officer or district court would keep the evidentiary record open until further compensatory education assessments are completed.

However, because my final decision is due by July 28, 2018, *see* 34 CFR § 300.515(a), it is not permissible to defer my Hearing Officer Determination until after a compensatory education evaluation could be completed. Accordingly, I will order that unless DCPS and the parent are able to reach agreement on an appropriate compensatory education award, DCPS must obtain a compensatory education evaluation of Student to assess what award is needed to get Student back to the place where Student would now be, if Student had been provided appropriate IEPs in January 2017 and January 2018. If, after Student's IEP team has reviewed the ordered assessment, as well as DCPS' reevaluation of Student, Petitioner and DCPS are unable to agree on a compensatory education award "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," *see Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir. 2005), Petitioner may request compensatory education relief through a new due process hearing request.

## **ORDER**

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

ORDERED:

1. DCPS shall convene Student's IEP team within 21 school days of the start of the 2018-2019 school year to review and revise Student's IEP in accordance with this decision and 34 CFR § 300.320, et. seq.
2. Unless the parent and DCPS reach a voluntary agreement on compensatory education for Student, DCPS must promptly obtain a compensatory education assessment by a qualified professional to assess Student's compensatory education needs resulting from the denials of FAPE determined in this decision – namely (1) the failure of the January 13, 2017 IEP team at City School 1 to provide revised Specialized Instruction Services in the January 13, 2017 IEP which were reasonably calculated to enable Student to make appropriate progress in mathematics and (2) the failure of the City School 2 IEP team in January 2018 to timely develop a valid revised IEP for Student, based upon Student's then-current data including documented present levels of academic achievement and functional performance. If, informed by the recommendations of the compensatory education evaluator, DCPS and Petitioner remain unable to agree upon an appropriate compensatory education remedy, Petitioner may request another due process hearing to seek an award of compensatory education for the denials of FAPE determined in this decision and
3. All other relief requested by the Petitioner herein is denied.

Date: July 26, 2018

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 - SPED  
DCPS Resolution Team**