

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
1050 First Street, NE, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

OSSE
Office of Dispute Resolution
July 29, 2019

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Date: 7/10/19, Room 432
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2019-0128
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Other Health Impairment (the “Student”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 10, 2019. The Complaint was filed by the parent of the Student (“Petitioner”). On May 22, 2019, Respondent filed a response (two days late). A resolution meeting was held on May 23, 2019. The resolution period expired on June 9, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR 300 et seq., Title 38 of

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

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

III. Procedural History

A prehearing conference was held on June 17, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 20, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The hearing proceeded on July 10, 2019. Closing arguments were presented, on the record, on July 16, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner objected to Witness C's presence in the hearing room since he was a witness, but this objection was overruled. Petitioner moved into evidence exhibits 1-77, and then exhibits 61a and 62a. Objections were sustained in regard to exhibits 77, 61a, and 62a. Exhibits 1-76 were admitted. Respondent moved into evidence exhibits 2, 5-13, 15-17, and 22-25. There were no objections. Exhibits 2, 5-13, 15-17, and 22-25 were admitted.

Petitioner presented as witnesses: herself; Witness A, a psychologist (expert: psychology, neuropsychology, and special education as it relates to Individualized Education Program ("IEP") programming and ordering of specific evaluations); Witness B, a special education advocate (expert: special education as it relates to IEP programming); and Witness C, a pastor. Respondent presented as a witness: Witness D, a special education coordinator (expert: school psychology and special education programming and evaluation).

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined in this case are as follows:

1. Did DCPS fail to conduct a reevaluation of the Student after parental requests for a reevaluation in January–March, 2019? If so, did DCPS violate 34 CFR Sect. 300.303(a)(2) and related provisions, and therefore deny the Student a Free and Appropriate Public Education (“FAPE”)?

Petitioner argued that the Student should have promptly received an occupational therapy evaluation, a speech and language therapy evaluation, a functional behavior assessment (“FBA”), and a comprehensive psychological evaluation after she requested them in January, 2019.

2. Did DCPS fail to conduct a complete triennial evaluation of the Student in or about 2016? If so, did DCPS violate 34 CFR Sect. 300.303(b)(2), 34 CFR Sect. 300.304, and related provisions, and therefore deny the Student a FAPE?

Petitioner argued that the Student should have promptly received an occupational therapy evaluation, a speech and language therapy evaluation, an FBA, and a comprehensive psychological evaluation.

3. Did DCPS fail to provide Petitioner with educational records? If so, did the Local Education Agency (“LEA”) violate 34 CFR Sect. 300.501 and related provisions? If so, did the LEA deny the Student a FAPE?

As relief, Petitioner is seeking an independent comprehensive psychological evaluation, a speech and language evaluation, an occupational therapy evaluation, an FBA, and a behavior intervention plan (“BIP”). Petitioner also seeks to reserve her rights regarding compensatory education until these evaluations are completed, including the tolling of the statute of limitations for a subsequent claim on this issue.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Other Health Impairment. The Student has gone to school at DCPS since approximately the first grade, and has had an IEP since approximately the third grade. The Student is well below grade level in reading, writing, and mathematics. The Student has had difficulty in school for several years, though the Student tends not to talk about these issues because the Student is “too proud.” The Student prefers to be in a general education setting, even though classes can be as large as thirty-five students in a class. Testimony of Petitioner; P-49-2; Testimony of Witness D.

2. The Confidential Psychological Evaluation of the Student by DCPS dated December 18, 2013, found that the Student was functioning in the “moderate to below age level” range. The report indicated that the Student had engaged in limited episodes of bullying, which was a “huge improvement” from previous years. On the Kaufman Assessment Battery for Children-Second Edition (“KABC-II”), which measures cognitive functioning, the Student had a Mental Processing Index of 102, which was in the average range, in the 55th percentile. In the four indices associated with this test, the Student scored in the average to high average range. Testing on the Woodcock-Johnson Test of Achievement-Third Edition (“WJ-III”) indicated that the Student was at the 1st percentile in broad reading, 13th percentile in broad math, and 8th percentile in written expression. Behavior testing was conducted on the Student through the Behavior Rating Inventory of Executive Functioning (“BRIEF”). The Student’s overall scores were elevated, indicating issues with behavioral regulation, executive functioning, impulsivity, changes in routine, working memory, planning, self-monitoring, and organizing. The BRIEF report indicated that DCPS should focus on “controlling antecedents” to behavior,

and “limiting stimuli or situations where [the Student] might be impulsive.” Additional “structure” in the Student’s environment was recommended, including a more explicit, extensive, and/or clear set of rules and expectations. P-2.

3. The Student attended School A for the 2016–2017 school year. During this period, the Student performed at least two grades below level in math and caused disruption in class with outbursts. When the Student’s father died in October, 2016, these issues got worse. The Student began to talk back to teachers more freely and his/her behavior would escalate more quickly. During an observation with Witness D, the Student got into a conflict with the teacher over talking in class, and was observed dancing in his/her seat, making noises, speaking and laughing with peers, and leaving his/her seat without permission. Witness D concluded that the Student was struggling in his/her learning environment. P-1-5, 7, 10; P-6; P-46-2.

4. For the 2016–2017 school year, the Student’s progress reports on goals mostly indicated that the Student had made progress on a goal, or that the goal was not introduced (or “just” introduced). The Student made no progress on functioning appropriately in class during the second reporting period, and no progress on impulse control during the fourth reporting period. R-23-126-149.

5. Testing of the Student, conducted by Teacher A through the Woodcock-Johnson Tests of Achievement (“WJ-IV ACH”), indicated that the Student was in the low average range in reading, at the 21st percentile, and in the low average range in math, at the 10th percentile. The Student scored in the average range in broad written language. The testing also indicated that the Student had significant challenges in math calculation and math fluency. P-1-7-10; P-46-6.

6. In December 2016, Witness D wrote a report summarizing the Student's existing evaluations. She reported that the Student was able to complete all classwork activities in a timely manner, fully understood the concepts taught in class, and could independently read grade-level material, but continued to require support for adding and subtracting decimals through the hundreds, multiplying multi-digit numbers by two numbers, comparing two decimals through the thousandths, and multiplying decimals. Witness D also reported that the Student's parent told her that the Student was "doing a lot better" since the father's passing in October, 2016, and that the Student was receiving grief counseling. Witness D reported that the Student tended to be playful with peers, was at a "low risk for any disorder," and responded positively to "Tier 1" interventions when displaying off-task behaviors. P-1; P-46-2; Testimony of Witness D.

7. An IEP was created for the Student on or about December 14, 2016. The IEP recommended two hours per week of specialized instruction inside general education in reading and written expression, and four hours per week of specialized instruction inside general education in math, with 180 minutes per month of behavior support services, consisting of sixty minutes outside general education and 120 minutes inside general education. Fifteen minutes of additional behavioral support services per month on a consultation basis was also recommended. P-6.

8. The Student continued at School A for the 2017–2018 school year. The Student was approximately two grade levels below in math, and 1.5 grade levels below in reading fluency and comprehension during this time. The Student would make inappropriate noises, talk across the room to peers, and engage in other off-task behaviors. An IEP meeting was held for the Student on December 6, 2017. The

Student's IEP dated December 6, 2017, recommended two hours per week of specialized instruction inside general education in reading and written expression, and four hours per week of specialized instruction inside general education in math, with 150 minutes per month of behavior support services (100 minutes outside general education and 50 minutes inside general education), and fifteen minutes per month of additional behavioral support services on a consultation basis. P-4; P-45; P-50; R-16.

9. For the 2017–2018 school year, the Student did not make progress on any academic goal during any of the four reporting periods. R-23 at 150-173.

10. The Student continued at School A for the 2018–2019 school year. During that period, the Student's behavior impacted his/her or other children's learning. S/he had challenging behaviors, requiring prompts and redirection to tasks. Also during this school year, the Student struggled in math and reading, needing redirection, prompting, and individual attention. The Student was well below grade level in math and reading during this year. The Student's IEP of December 4, 2018, recommended four hours per week of specialized instruction inside general education in reading, written expression, and mathematics, with 210 minutes per month of behavior support services (90 minutes outside general education and 120 minutes inside general education) and fifteen minutes per month of additional behavioral support services on a consultation basis. However, a December 5, 2018, Prior Written Notice indicated that the Student's specialized instruction in math would be increased to six hours per week inside general education and required teachers to email the Student's tutor and parent for missed homework. P-3; P-48.

11. On December 10, 2018, Petitioner asked Respondent for the following documents: all of the Student's attendance records; progress reports; standardized test scores; class schedules; IEPs; evaluations and assessments; multidisciplinary meeting notes; report cards; portfolios; charts and observations; reports; letters; memos; notes; emails; data compilations; letters of understanding; disciplinary records; related service provider logs; and service trackers. P-74.

12. The Student got into a fight at school on December 20, 2018, which resulted in a suspension. Petitioner requested a multidisciplinary team ("MDT") meeting. A reentry meeting was conducted on January 2, 2019. An MDT meeting was conducted on January 11, 2019. Petitioner sought more support and wanted to speak with the Student's teachers. The teachers reported that the Student was below grade level and had behavioral concerns, including failures to complete assignments. There was a discussion of whether the Student should be evaluated for autism, and a psychologist promised to complete evaluations. Petitioner sought a comprehensive psychological evaluation, an occupational therapy evaluation, a speech and language pathology evaluation, and an FBA. DCPS stated that it would reach out to an occupational therapist and a speech and language pathologist to determine if there was a need to conduct those observations. Petitioner's request for an FBA was initially rejected because DCPS staff felt that the fight was an isolated incident. P-43; Testimony of Witness B; Testimony of Witness D.

13. The DCPS speech and language pathologist and occupational therapist did not feel that speech and language and occupational therapy evaluations were necessary. A social worker was willing to perform an FBA, but DCPS staff felt that it would not tell them anything they did not already know. However, Psychologist A felt that the Student

might have a specific learning disability, and that cognitive testing was needed. DCPS was therefore prepared to conduct a comprehensive psychological evaluation and FBA for the Student. Testimony of Witness D.

14. Thereafter, an observation of the Student was scheduled for one of Petitioner's advocates. After School A initially agreed to allow this observation, DCPS decided on or about February 11, 2019, that it would not be allowed. Petitioner therefore sought to adjourn a meeting that was scheduled for the Student on March 1, 2019. P-64; P-65.

15. Petitioner sent a correspondence to DCPS on February 28, 2019, seeking evaluations and attaching a consent form. Petitioner sought a full neuropsychological evaluation, a speech and language evaluation, an occupational therapy evaluation, and an FBA/BIP. P-63-1-2.

16. Petitioner again sought a full neuropsychological evaluation, speech and language evaluation, occupational therapy evaluation, and FBA/BIP on March 28, 2019. Also, on March 28, 2019, DCPS asked Petitioner if she wanted to appear at an "AED meeting." P-62-1-2.

17. For the 2018–2019 school year, the Student did not make academic progress in reading or writing in the first reporting period, did not make any academic progress in most areas in the second reporting period, and reportedly made progress in most academic areas in the third and fourth reporting periods. There was no progress in impulse control in the third or fourth reporting period, and no progress in organization in the third reporting period. R-23 at 174-202.

VI. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

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

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

None of the three issues directly involves the appropriateness of the Student's IEP and placement. Therefore, the burden of persuasion must be on Petitioner for these issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to conduct a reevaluation of the Student after parental requests for a reevaluation in January–March, 2019? If so, did DCPS violate 34 CFR Sect. 300.303(a)(2) and related provisions, and therefore deny the Student a FAPE?

Petitioner argued that the Student should have promptly received an occupational therapy evaluation, a speech and language therapy evaluation, an FBA, and a comprehensive psychological evaluation.

A public agency must ensure that a reevaluation of each child with a disability is conducted if the agency determines that the child's education warrants a reevaluation, or if the child's parent or teacher requests a reevaluation. 34 CFR Sect. 300.303(a).

An LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 CFR 300.304(b). The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 CFR 300.304(c).

Petitioner seeks a speech and language evaluation and an occupational therapy evaluation for the Student. DCPS considered the Petitioner's requests for a speech and language evaluation and an occupational therapy evaluation but found that neither was necessary after consulting with a speech and language pathologist and an occupational therapist. Petitioner objects to DCPS's position but did not call a witness who is

qualified to deliver speech and language therapy or occupational therapy in support of her claims. Instead, Petitioner relied on witnesses with more general expertise. Witness A, a psychologist, is an expert in psychology, neuropsychology, and special education as it relates to IEP programming and ordering of specific evaluations. Witness B, a special education advocate, is an expert in special education as it relates to IEP programming. Witness A and Witness B both indicated that the Student has expressive and receptive language issues in class yet did not observe the Student's class and did not talk to the Student's teachers. Witness A and Witness B also contended that the Student has difficulty with written expression, suggesting that this is a skill to be developed during speech and language therapy. However, written expression is ordinarily addressed in the classroom, and there was no clear showing how speech and language therapy would help the Student's writing. Both Witness A and Witness B also argued that the Student requires an occupational therapy assessment because of his/her attentional, executive functioning, and visual motor issues, but did not clearly explain why an occupational therapy evaluation was needed to explore these issues. Moreover, there is no documentation in the record that recommends the Student for a speech and language evaluation or an occupational therapy evaluation.

Petitioner also seeks a comprehensive psychological evaluation and an FBA. The record reflects that DCPS did try to conduct these assessments. After Petitioner's request and the meetings in January, 2019, DCPS agreed to conduct a psychological evaluation and an FBA, based on the parent's request. However, although DCPS said that it had decided to conduct a comprehensive psychological evaluation and an FBA, no assessments were conducted, and the Student's reevaluation has still not been completed

at this time. A meeting to discuss these issues was scheduled on March 1, 2019, but this meeting was cancelled because Petitioner did not want to attend until her designee was allowed to observe School A.

Issues relating to that observation appear to have put the matter on hold from DCPS's perspective, but DCPS provides no support for the position that such a dispute or issue might "excuse" a school district's duty to provide a student with an evaluation. At this point, Petitioner is correct that DCPS has not complied with its legal obligation to respond to provide a reevaluation when a parent asks for it. 34 CFR Sect. 300.303(a).

DCPS also suggested that the Student did not actually need a comprehensive psychological evaluation, indicating that such an evaluation would not provide any new information. But DCPS's own psychologist, Psychologist A, said that the Student could have a specific learning disability, which was also the opinion of Witness A. Moreover, in 2013, the Student scored in the average to high average range on cognitive measures but tested as low as the 1st percentile in broad reading, which reflects a significant discrepancy in scores. Cf. 5-E DCMR 3006.5(g)(6)(written evaluation report for student with suspected learning disability requires determination of whether there is a severe discrepancy that requires specialized instruction). The Student needs cognitive testing to determine if the Student has a specific learning disability.

DCPS argued that the FBA was unnecessary because it would not tell DCPS anything that it did not already know and suggested that the Student's behaviors were not extreme and could be managed in his/her classrooms with counseling. But there is little in the record to suggest that counseling has been especially helpful to the Student. For the last several school years, while the Student has received a significant amount of

counseling, the Student's behaviors have continued without abatement. The Student's behaviors were mentioned in the "Area of Concern" sections in Reading, Mathematics, and Written Expression in all of the Student's IEPs. During the 2017–2018 school year, these behavioral issues contributed to the Student's lack of progress on any academic goal during the entire school year. Indeed, the most recent IEP, from December, 2018, indicated that the IEP team discussed an FBA for the Student and that the Student had challenging behaviors, including calling out, engaging with peers in off-task conversations, joking/playing at inappropriate times, and work and class avoidance. However, no FBA was ever written for the Student. To this Hearing Officer, an FBA is necessary for this Student because, among other things, the Student may be struggling because s/he is in a large general education class with typically developing peers who are functioning at a higher level. An FBA could determine whether the Student's behaviors are a function of the Student not understanding classwork or of the Student acting self-conscious about his/her abilities in class.

In sum, DCPS denied the Student a FAPE by failing to reevaluate the Student through a comprehensive psychological evaluation and an FBA, after the request for a reevaluation in January, 2019.

2. Did DCPS fail to conduct a complete triennial evaluation of the Student in or about 2016? If so, did DCPS violate 34 CFR Sect. 300.303(b)(2), 34 CFR Sect. 300.304, and related provisions, and therefore deny the Student a FAPE?

Petitioner argued that the Student should have received an occupational therapy evaluation, a speech and language therapy evaluation, an FBA, and a comprehensive psychological evaluation in or about December, 2016 during his/her triennial evaluation.

DCPS's triennial evaluation in 2016 mostly involved achievement testing, as conducted by Teacher A, and the report of Witness D.

Pursuant to 34 CFR 300.303(a), a public agency must ensure a reevaluation of each child with a disability if the public agency determines that the child's educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. A reevaluation conducted under 34 CFR 300.303(a) may occur not more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 20 U.S.C. Sect. 1414 (a)(2). During such a reevaluation, the failure to go beyond merely reviewing existing data can constitute a denial of FAPE if more information is needed to develop an appropriate IEP. James v. D.C., 194 F. Supp. 3d 131, 142 (D.D.C. 2016) ("Summary of Existing Data" prepared in response to request for an updated psychological assessment did not fulfill the district's obligation to reevaluate the student). Still, for there to be a finding of FAPE denial on this issue, a parent should show that the failure to evaluate resulted in a substantive harm to the student. Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

As discussed, *supra*, there is no clear basis in this record for an occupational therapy evaluation or a speech and language evaluation. Petitioner's witnesses, Witness A and Witness B, did not specifically point to any documentation that was written prior to November, 2016 that establishing the need for any such evaluations at that time, and neither witness even knew the Student at that time.

However, there is ample evidence that the Student had behavioral issues prior to November, 2016. The Student's evaluation from 2013 discussed the Student's behavior at length. Behavior testing through the BRIEF measure showed elevated scores overall, and indicated issues with behavioral regulation, executive functioning, impulsivity, changes in routine, working memory, planning, self-monitoring, and organizing. The evaluation report indicated that DCPS should focus on "controlling antecedents" to behavior, and "limiting stimuli or situations where [the Student] might be impulsive." Additional "structure" in the Student's environment was recommended, including a more explicit, extensive, and/or clear set of rules and expectations.

The Student's IEP of December 14, 2016 indicated that these problems continued through 2016. This IEP said that the Student engaged in outbursts and disruptions in math, and that his/her lack of focus and disruptive behavior caused him/her and peers to be distracted from learning. In reading and writing, the Student became frustrated when presented with new material, and displayed off-task behaviors. The IEP also indicated that the Student made minimal progress meeting his/her IEP goals for "Emotional, Social and Behavioral Development" in the previous year. This section of the IEP noted that the Student had difficulty controlling his/her impulses, causing him/her to fail to complete assignments. The IEP reported that the Student's case manager said that the Student often displayed avoidance, poor impulse control, and attention-seeking behaviors. Moreover, Witness D's own report indicated that the Student's issues worsened when his/her father died in October, 2016. The Student began to talk back to teachers more freely and his/her behavior would escalate more quickly. Indeed, during an observation with Witness D, the Student got into a conflict with the teacher for talking, and was

observed dancing in his/her seat, making noises, speaking and laughing with peers, and leaving his/her seat without permission.

It is further noted that the Student's behaviors continued to be significant after the December, 2016, triennial review. The IEP of December, 2017, stated that "[the Student] continues to have challenges demonstrating appropriate behaviors consistently" in class. The Student engaged in "tapping," making inappropriate noises, and calling out students' names in class, and the Student often required redirection. The IEP stated that the Student's behavioral issues caused low work output and made him/her unavailable for instruction. Indeed, in the 2017–2018 school year, the Student did not make progress on any academic goal during any of the four reporting periods. Behavioral testing and/or analysis should have been conducted to determine why the Student was engaging in this sort of behavior and whether there was any way to control the Student's antecedents so that the behavior could be minimized.

Finally, the evidence supports Petitioner's additional contention that the Student should have received cognitive testing in 2016 to determine if the Student had a specific learning disability. In 2016, the Student's achievement testing scores were low when compared to the Student's cognitive scores from 2013, especially in mathematics, where the Student scored at the 5th percentile in math facts, fluency, and calculation. As was eventually concluded by Psychologist A, cognitive testing could have determined whether there was a significant discrepancy between the Student's achievement testing scores and cognitive testing scores, which might have encouraged DCPS to explore services designed to more specifically address the Student's learning issues.

As a result of the foregoing, DCPS denied the Student a FAPE when it failed to conduct a sufficiently comprehensive reevaluation of the Student in or about December, 2016.²

3. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR Sect. 300.501, D.C. Code Sect. 38-2571.03 and related provisions? If so, did DCPS deny the Student a FAPE?

20 U.S.C. 1232g(a)(1)(A) requires each educational agency or institution to grant parents access to the educational records of their children no more than forty-five days after the request. The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 CFR 300.501(a). The term “education records” means the type of records covered under the definition of “education records” in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (“FERPA”)). 34 CFR 300.611-300.625. Education records as defined under FERPA are “directly related to a student” and “maintained by an educational agency or institution or by a party acting for the agency or institution.”

Petitioner contended that DCPS did not respond in full to her December, 2018, request for the Student’s records, but none of Petitioner’s witnesses explained which documents were missing. In fact, Witness B testified that she did not know what documents were missing. Emails in the record (P-66) indicate that Petitioner received at

² DCPS did not raise the affirmative defense of the statute of limitations in this case. As a result, this Hearing Officer need not address issues relating to the statute of limitations. Kroot by and through Kroot v. District of Columbia, 800 F. Supp. 976, 980 (D.D.C. 1992) (in IDEA action, statute of limitations defense waived if not raised because it is an affirmative defense and not “jurisdictional”).

least two groups of documents in response to her record requests. Petitioner herself did not mention the records issue during testimony. Petitioner also did not present any argument that the records issue had any substantive impact on the Student's education. Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir. 2004). Moreover, Petitioner did not present any authority to support this claim, which must be dismissed.

RELIEF

Petitioner seeks a comprehensive psychological assessment, a speech and language evaluation, an occupational therapy evaluation, and an FBA. Petitioner also requests an order that, once the evaluations have been conducted and appropriate programming for the Student's IEP can finally be determined, Petitioner can seek appropriate compensatory education for the Student, including the tolling of the statute of limitations back to the filing the Complaint.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." Burlington, 471 U.S. at 371. The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." 20 U.S.C. Sect. 1415(i)(2)(C)(iii).

Petitioner's request for a comprehensive psychological evaluation and an FBA are appropriate, as indicated earlier in this HOD. Accordingly, a comprehensive psychological evaluation and an FBA will be ordered. Since it is not appropriate for hearing officers to consider requests for relief that do not correspond to FAPE denial, the

requests for a new speech and language evaluation and an occupational therapy evaluation must be denied.

Petitioner also seeks an order authorizing a compensatory education award to be ordered after the completion of the comprehensive psychological evaluation and the FBA. DCPS objected to this approach, contending that it is beyond a hearing officer's authority, but this is an approach that was suggested by the District of Columbia Court of Appeals in B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016). The B.D. court stated:

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.

Accordingly, in Lee v. District of Columbia, 15-cv-1802 2017 WL 44288 (D.D.C. Jan. 3, 2017), the court held that when a hearing officer finds there was a FAPE denial but lacks necessary information to make an assessment of compensatory education, "she can order additional assessments as needed." 2017 WL 44288 at *2.

The problem, in this case, is that Petitioner's claims may be time-barred if Petitioner raises them in a subsequent litigation. Petitioner therefore seeks an order from this Hearing Officer tolling the statute of limitations so that a second litigation may be initiated after the evaluations are done and new programming is created. However, Petitioner submitted no direct authority suggesting that a hearing officer has the authority to order the tolling of the statute of limitations, and this Hearing Officer is aware of no such authority. Accordingly, it is appropriate for this Hearing Officer to calculate a

compensatory education award based on a hearing officer's wide authority to provide relief, including compensatory education. Though a written compensatory education plan from a witness is preferred, there is no requirement in the law for a hearing officer to base a compensatory education award on a written plan, or even a particular witness. A court may rely on principles of fairness and its discretion in crafting an award of compensatory education. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1123 (10th Cir. 2008). Considering the extent of the Student's FAPE deprivation, including the length of the time that the Student was denied a FAPE, and applying the standards in Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005), this Hearing Officer finds that 200 hours of compensatory tutoring, to be provided by a special education teacher, at a rate that is usual and customary in the community, will constitute appropriate services to make up for the Student's past deficient program from December, 2016, to present.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 200 hours of compensatory tutoring for the Student, to be provided by a licensed special education teacher, at a usual and customary rate in the community;
2. All services shall be used by the Student by December 31, 2021;
3. Respondent shall reimburse Petitioner for a comprehensive psychological evaluation and an FBA, to be provided by a qualified provider at the usual and customary rate in the community;
4. Petitioner's other requests for relief are denied.

Dated: July 24, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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 USC §1415(i).

Date: July 24, 2019

Corrected: July 29, 2019

Michael Lagan

Impartial Hearing Officer