

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Hearing Dates: 5/11/20; 6/23/20</b>
	)	<b>Hearing Officer: Michael S. Lazan</b>
	)	<b>Case No. 2020-0059</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

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**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 February 28, 2020. The Complaint was filed by the Student’s parent. On March 11, 2020, Respondent filed a response. A resolution meeting was held on March 10, 2020. The resolution period expired on March 30, 2020.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

A prehearing conference was held on March 31, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on April 3, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case.

On April 15, 2020, Petitioner moved for a Notice to Appear for Witness C. The Notice to Appear was signed, without opposition, by this Hearing Officer on April 21, 2020.

The Hearing Officer Determination (“HOD”) due date was originally May 13, 2020. On May 10, 2020, Respondent moved on consent for a thirteen-day extension of the HOD due date, in consideration of the May 11, 2020, hearing date. An interim order on continuance was signed on May 13, 2020. When testimony was not completed by the end of the day on May 11, 2020, the parties selected June 23, 2020, for a second hearing date due to witness availability and related issues. On May 12, 2020, Respondent filed a motion on consent for a fifty-four day extension of the HOD due date to July 6, 2020, in consideration of the June 23, 2020, hearing date. On May 13, 2020, the motion was granted and the HOD due date was changed to July 6, 2020.

The matter was heard on May 11, 2020, and June 23, 2020, through the Microsoft Teams video conferencing platform, on consent. Oral closing arguments were presented on June 23, 2020. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. During the

proceeding, Petitioner moved into evidence exhibits P-1 through P-53. Objections were filed and made during the hearing to exhibits P-12 through P-31, and P-44 through P-46. Exhibits P-1 through P-43, P-47, and P-49 through P-53 were admitted, and exhibits P-44 through P-46 and P-48 were marked for identification only. Respondent moved into evidence exhibits R-1 through R-16 (including R-4A, R-5A, R-5B, R-5C, and R-5D). Objections were made to supplemental exhibits R-4A and R-16. These objections were overruled. Exhibits R-1 through R-16 (including R-4A, R-5A, R-5B, R-5C, and R-5D) were admitted.

Petitioner presented as witnesses, in the following order: Witness A, an educational advocate and neuropsychologist (expert in evaluating students with neuropsychological assessments); Witness B, an educational advocate (expert in school psychology and evaluating students); herself; and Witness C, a pediatric neurologist (expert in neurology and evaluating students for neurological disorders). Respondent presented as witnesses, in the following order: Witness D, an occupational therapist (expert in occupational therapy, assessment, and programming and placement); Witness E, a psychologist (expert in school psychology, evaluation, and programming and placement); Witness F, a school psychologist (expert in school psychology and programming and placement); Witness G, a speech and language pathologist (expert in speech and language pathology, evaluation, and programming and placement); Witness H, an occupational therapist (expert in occupational therapy, evaluation, and programming and placement) and Witness I, the manager of specialized instruction at School C (expert in special education programming and placement).

#### IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

**1. Did the Local Educational Agency (“LEA”) fail to comprehensively evaluate the Student in all areas of suspected disability from in or about February, 2018, to present? If so, did the LEA violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioner contended that Respondent should have evaluated the Student by conducting an occupational therapy assessment, speech and language therapy assessment, neuropsychological assessment, and assistive technology assessment.

**2. Did the LEA fail to provide the Student with an appropriate Individualized Education Program (“IEP”) in or about May, 2018, and April, 2019? If so, did the LEA act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did the LEA deny the Student a FAPE?**

Petitioner contended that neither IEP contained sufficient specialized instruction, and that the April, 2019, IEP contained inappropriate goals and baselines that did not address the Student’s anxiety and post-traumatic stress disorder (“PTSD”).

As relief, Petitioner seeks compensatory education for the Student, as well as an occupational therapy assessment, a speech and language therapy assessment, a neuropsychological assessment, and an assistive technology assessment.

#### V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for special education services as a student with Other Health Impairment. “(O)verwhelming data” indicates that the Student functions well below his/her same-age peers in all academic areas. The Student has been diagnosed with epilepsy, PTSD, and anxiety. The Student

has difficulty knowing letters, writing his/her name, and counting numbers without skipping. Some days, the Student gets “overwhelmed” by academics. Testimony of Witness H; Testimony of Witness F; Testimony of Petitioner. The Student also has a stutter, which can make it difficult to understand him/her. Testimony of Petitioner. The Student takes medication to prevent seizures, which can be “unseen” or difficult to identify. Testimony of Witness C.

2. At the beginning of the 2016-2017 school year, the Student attended School A, a DCPS public school. The Student was initially evaluated for special education services in November, 2016. The Student’s teacher at School A expressed that the Student presented with articulation and sensory concerns. P-9-1. A speech and language assessment of the Student was conducted on November 29, 2016. The evaluator administered the Preschool Language Scales, 5th Edition (“PLS-5”), Receptive One-Word Picture Vocabulary Test-4th Edition (“ROWPVT-4”), Expressive One-Word Picture Vocabulary Test-4th Edition (“EOWPVT-4”), and Clinical Assessment of Articulation and Phonology, 2nd Edition (“CAAP-2”). The evaluator also conducted a hearing screening, an “oral peripheral examination,” a clinical observation, a family interview, and a classroom observation. In addition, the evaluator collected information about the Student from the teacher. The Student’s teacher told the evaluator that she understood only five percent of the Student’s speech. The teacher also indicated that the Student mispronounced words, used echolalia (repetition of another person’s spoken words), and did not create sentences on his/her own. P-10-2. Still, the Student scored in the average range on articulation skills on the CAAP-2 and received a receptive vocabulary standard score of 87 (in the 19th percentile) on the ROWPVT-4. P-10-4. On

the EOWPVT-2, the Student received an expressive vocabulary standard score of 99 (in the 47th percentile). P-10-5. On the PLS-5, the Student's receptive language standard score of 89 indicated age-appropriate skills compared with same-age peers. P-10-6. The Student's pragmatic language skills were assessed to be age-appropriate. P-10-7.

3. The Student was also assessed by Witness D, an occupational therapist, on November 29, 2016. Witness D interviewed Petitioner, a teacher, and the Student, and conducted testing on the Student. The Student's teacher told the evaluator that the Student needed assistance and was not on target with basic fine motor skills. P-11-2-3. The evaluator administered the Peabody Developmental Motor Scales-second edition ("PDMS-2") (Grasping Subtest and Visual Motor Integration Subtest). On the PDMS-2, the Student scored in the "poor" range in grasping and in the below-average range in visual motor integration. The test report also noted that the Student may not participate in whole learning activities when s/he is not provided with 1:1 support. P-11-9.

4. An eligibility team then met and determined that the Student was ineligible for services. Testimony of Witness E. Petitioner withdrew the Student from School A in or about January, 2017, and enrolled the Student at School B, a non-public school, in or about February, 2017. P-9-2.

5. The Student was assessed by a medical team at Hospital A during several visits from December, 2016, to May, 2017, and the Student was diagnosed with complex partial epilepsy in January, 2017. P-17-9. The Student was brought to the emergency room on December 23, 2016, because of a second unprovoked seizure, during which the Student's eyes rolled back and s/he went limp for five minutes. The Student had several seizures in January, 2017, characterized by staring with a chewing motion for four to five

minutes. Medication was administered to the Student and a medical report was issued by Hospital A on May 26, 2017, which discussed the Student's PTSD. P-17-9-10; P-22-1.

6. Petitioner sought another assessment from Respondent in or about May, 2017. Witness E conducted a psychological assessment of the Student in or about June, 2017, and issued a report dated June 15, 2017. At the time of the assessment, the Student had not attended School B for two weeks because Petitioner felt that the Student was being bullied. P-9-2. Witness E's assessment included interviews with Petitioner and the Student, as well as testing of the Student. Witness E's report stated that the Student displayed many pre-academic skills and could recognize the alphabet and count to ten. Still, on the Wechsler Preschool and Primary Scale of Intelligence-IV ("WPSI-IV"), a test of cognitive ability, the Student was found to have a Full-Scale IQ of 63 (in the 1st percentile). Witness E indicated that the Student's overall performance suggested that s/he may have difficulty engaging in any type of language-based classroom activities, "may exhibit difficulty identifying objects according to category or function and labeling objects," and "may also exhibit some difficulty answering questions and recalling information as they relate to stories read in the classroom." Witness E also wrote that the Student "may require verbal prompting" or require "as many cues as needed in order to assist [him/her] in providing verbal responses." P-9-4. Witness E further indicated that the Student "may display some difficulty completing tasks involving the use of visual motor skills (writing, coloring, cutting, etc.) and in copying from the board. P-9-5. Additionally, Witness E indicated that the Student "may have difficulty completing multi-step classroom projects and assignments, difficulty recalling information, and will benefit from constant repetition of information as well as having the verbal information,

coupled with visuals to assist him/her in retaining information.” P-9-5. Witness E also administered the Behavior Rating Inventory of Executive Function-Preschool (“BRIEF-P”), which tests for executive functioning skills. The Student scored in the “clinically significant” range in four of five subtests. P-9-6. Witness E recommended that the Student be determined to be eligible for services as a student with Other Health Impairment, and stated that the Student’s diagnosis of epilepsy had a significant impact on his/her executive functions. P-9-7. Witness E’s report also indicated that the Student had memory problems, and that the Student’s teacher should consider strategies to address this issue. Testimony of Witness E.

7. Respondent completed an Ages and Stages Questionnaire (“ASQ”) about the Student on May 11, 2017, which noted concerns in the areas of communication, problem solving, and social issues. P-3-1.

8. The Student was determined to be eligible for services in or about August, 2017. For the 2017-2018 school year, the Student attended School C, a DCPS public school. Petitioner advised School C staff about the Student’s medical needs when s/he first started attending School C. Testimony of Petitioner. During the 2017-2018 school year, the Student had difficulties with fine motor skills, managing emotions, and speech, and it was challenging for him/her to hold a pencil properly. The Student also manifested a stutter, which made it difficult to understand him/her. P-15-1-3. The Student could not write his/her name and had difficulty putting on his/her clothing. P-16-2. The Student had issues with drooling, including over other students’ work, and was bullied in school because of his/her difficulties. P-16-3. However, the Student was not the lowest-performing student in the classroom. The Student was able to write all the letters (both



upper and lower case), and “knew” numbers zero through twenty. The Student could also rhyme, participate in phoneme activities, and answer some questions correctly. The Student’s teacher expressed that the Student “does not have any challenges performing at the level of an average student as far as academics.” P-16-4.

9. An IEP meeting for the Student was held on May 29, 2018. The corresponding IEP stated that the Student had intact and age-appropriate communication skills and could identify almost all letters of the alphabet. The IEP further stated that the Student knew letter sounds, could identify numbers one to ten, and met expectations in regard to managing feelings and sustaining balance during movement. The IEP also stated that the Student had begun to understand that a specific sequence of letters represents a spoken word, had an increased attention span, and would “actively and enthusiastically participate in structured activities.” The IEP also indicated that the Student could listen to a story and, with no more than two verbal/gestural prompts, verbally answer “who, what, where, when, and why” questions. The Student’s handwriting was deemed to be “very hesitant and light-handed,” and the IEP mentioned that the Student “does not enjoy writing [his/her] name” and had begun hiding under a desk to avoid this activity. The IEP provided the Student with goals for: adaptive/daily living skills, including strength and coordination of smaller muscles, transitions, and decoding words through phonics; cognitive skills, including understanding classroom rules, understanding text read aloud, writing his/her name, writing letters accurately, and following directions; and motor skills/physical development. The Student was recommended for 2.5 hours of specialized instruction per week inside general education, with 120 minutes of occupational therapy per month. The IEP also indicated that the

Student needed preferential seating, extra time to complete assignments, and small group instruction as needed. P-8.

10. By the end of the 2017-2018 school year, the Student still needed to work on gripping a pencil appropriately, but showed improvement with coloring. The Student participated in activities but was prone to throwing tantrums and showing other noncompliant behaviors (e.g., crying, hiding under a table, and refusing to complete work) when asked to do non-preferred activities. The Student knew “many letters” of the alphabet and some of their associated sounds, but did not know words and could not write his/her name, which caused him/her great distress. The Student made progress on two of three adaptive/daily living goals (one was not introduced), but did not master any. Similarly, the Student made progress on three of four cognitive goals (one was not introduced), but did not master any. The Student also progressed on one of three goals in motor skills/physical development (two had just been introduced). R-5A at 67-71.

11. The Student attended School C for the 2018-2019 school year. Hospital A created a plan on September 11, 2018, to address the Student’s seizures. R-9 at 158-161. During the 2018-2019 school year, the Student had significant difficulties in several areas, including reading, math, fine motor skills, speech, staying focused, and regulating his/her emotions. The Student had particular issues with reading; s/he was approximately two years behind grade level. The Student was unable to blend sounds or use decoding skills to sound out a word. The Student had difficulty with speech and was able to say a word only if the teacher said the word first or showed a picture of the word. P-12-1-2; P-13-1-4. On the Dibels 8th edition TRC composite assessment (“Dibels TRC”), which tests reading skills, the Student scored only at “Print Concepts.” P-13-2. The Student

also experienced small seizures characterized by staring into the distance and chewing motions. P-13-1. The Student struggled with writing and was not able to hold a pencil properly or write his/her name. P-12-2; P-13-3. The Student could add up to ten only with the help of a picture representation. The Student also struggled to behave appropriately and regulate his/her emotions, had issues with assignments, and had difficulty expressing his/her speech clearly. P-12-2-3; P-13-4. The Student was not able to respond immediately to questions and would have to think about the meaning of the question and what his/her answer might be for up to a minute or more before s/he was able to answer. P-13-2. 14. The Student's 2018-2019 report cards indicated that the Student was "below basic" in math, speaking and listening, and writing and language for the first two terms. The Student was deemed to be "basic" in reading during these terms. For the third term, the Student was deemed to be "below basic" in reading but "basic" in math, speaking and listening, and writing and language. The Student's teacher expressed concerns about the Student's progress in the classroom and sought a parent-teacher conference after term three. P-41-1-2. The teacher remarked on the Student's joyous attitude, but stated that the student needed "maximum support" in understanding the material and completing assignments. The teacher also remarked that the Student had made no progress on the iReady assessment in math. P-42-1. The Student's reading comprehension level on the Dibels TRC was below Print Concepts at the start of the year, then at Print Concepts for the rest of the year, which is "far below" grade level. P-42-4; P-41-4; P-34; P-13-1; P-7-4.

12. Nevertheless, during the first term of the 2018-2019 school year, the Student made progress in his/her goals for adaptive/daily living skills, cognitive skills,

and motor skills/physical development. R-5D 1-5. In the second term of the 2018-2019 school year, the Student also made progress on goals for adaptive/daily living skills and cognitive skills, but made no progress on the motor skills/physical development goal of using a “static tripod grasp.” Three out of five times, the Student could recognize and name ten or more letters; eight of fifteen times, the Student could use letter-like forms, letter strings, and some letter combinations to form words; and sixty-five percent of the time, the Student could apply grade-level phonics and word-analysis skills in decoding accurately. R-5D -6-10. For the third term of the 2018-2019 school year, the Student made progress on all goals in adaptive/daily living skills, cognitive skills, and motor skills/physical development, except for the goal relating to the static tripod grasp. The Student also improved in applying grade-level phonics and word-analysis skills in decoding, with seventy percent accuracy. R-5D 11-15.

13. Notwithstanding the progress reports, the Student’s teacher indicated to Petitioner that she wanted the Student to be retained in the same grade for the 2019-2020 school year. Petitioner agreed. As a result, a decision was made to retain the Student for the 2019-2020 school year. P-47.

14. An IEP meeting was held for the Student on April 30, 2019. The ensuing IEP stated that the Student had intact and age-appropriate communication skills, could identify all letters of the alphabet, and had developed an increased attention span. The IEP indicated that the Student scored “Emerging K Red 42” on his/her mid-year Dibels TRC testing, “far below” grade level. The IEP stated that the Student’s iReady math assessment score was 337, below the end-of-year goal of between 362 and 454. The IEP also indicated that the Student demonstrated limited comprehension and Print Concepts

reading skill when reading grade-level text and matching letter symbols to sounds. The IEP provided the Student with goals in adaptive/daily living skills, cognitive skills, and motor skills/physical development. All of these goals were exactly the same as the corresponding goals in the prior IEP, except for date changes and citations to learning standards. The Student was recommended for five hours of specialized instruction per week outside general education, and 120 minutes of occupational therapy per month. The IEP also indicated that the Student needed preferential seating, extra time to complete assignments, and small group instruction as needed. P-7. The recommendations were based on assessments, test scores, and information from the Student's previous psychological assessment. Testimony of Witness I.

15. The Student continued at School C for the 2019-2020 school year. On Dibels TRC testing at the start of this school year, the Student scored "below average" (Print Concepts) on reading comprehension and "well below average" on word reading and decoding. P-33-1. On September 12, 2019, the Student scored a 331 on the iReady math measure (emerging kindergarten level), lower than the Student's score from January, 2019. P-40-1. Toward the end of 2019, Petitioner asked Witness I for a reevaluation. Testimony of Petitioner.

16. The Student's first-term report card for the 2019-2020 school year indicated that the Student was meeting expectations in speaking and listening and reading, but "basic" in math and writing and language. The Student struggled with basic features of print; sounding out and using rules to decode words; describing familiar people, places, things, and events; counting to 100 by ones and tens; understanding addition and subtraction; and classifying objects. P-40-2. The report card indicated that

the Student was reading at the Pre-A level on the Dibels TRC. P-40-1; P-40-3. For the second term, the Student was deemed “proficient” in math, but “basic” in reading and speaking and listening, and “below basic” in writing and language. P-38-1. The Student again struggled with basic features of print; sounding out and using rules to decode words; describing familiar people, places, things, and events; counting to 100 by ones and tens; understanding addition and subtraction; and classifying objects. P-38-2. On iReady testing administered on January 14, 2020, the Student remained at the emerging kindergarten level with a score of 335, an increase of four points from the previous score, but lower than the Student’s score of 337 on January 15, 2019. P-35-1.

17. On January 16, 2020, the Student scored at the “RB” level on the Dibels TRC measure, indicating limited reading comprehension of grade-level text. P-6-4. On March 19, 2020, the Student visited Hospital A for a “seizure follow up.” The Student was considered to be “doing well overall” but had had “a few staring spell-type seizures” since his/her last appointment. P-25-4.

18. A comprehensive occupational therapy assessment of the Student was conducted on March 12 and March 13, 2020, by Witness H, who administered the Peabody Developmental Motor Scales, 2nd Ed. (“PDMS-2”), and concluded that the Student had below-average grasping skills. R-12-2-3. Witness H’s report included an email from the Student’s general education teacher indicating that the Student’s issues could stem from “learned helplessness,” and that the Student had made great progress in the beginning of the school year but had regressed after winter break. The teacher reported that the Student needed motivation to complete tasks and had issues with taking directions. The teacher also reported that the Student’s fine motor skills had improved,

his/her letters were legible, and s/he was working on correct spacing within sentences. R-12-3. On the Bruininks-Oseretsky Test of Motor Proficiency, 2nd edition (“BOT-2”), the Student scored mostly below average, and on the Test of Handwriting Skills (THS), the Student scored in the 6th percentile. R-12-6.

19. An IEP meeting was held for the Student on April 29, 2020. The corresponding IEP provided the Student with goals in adaptive/daily living skills; cognitive skills relating to retelling a story, writing his/her name, and following directions; and motor skills/physical development. The Student was recommended for twenty hours of specialized instruction per month outside general education and four hours of specialized instruction per month inside general education. The IEP also recommended 120 minutes of occupational therapy per month. P-6.

20. On or about April 24, 2020, Witness F wrote a “due diligence” report based on testing and interviews. The Student’s current special education teacher reported that the Student is a “tactile and visual learner” who “works well one-on-one or in a small group” and does not like large crowds. The Student can identify the alphabet and numbers up to 10, is below grade level in reading, and performs at an emerging kindergarten level in math. The special education teacher also indicated that the Student has exhibited behaviors in class, including shutting down and refusing to complete classwork, but benefits from encouragement to complete small tasks, chunking, and rewards. The Student’s general education teacher reported that she is “most concerned with [his/her] lack of motivation, productivity and independence,” and that the Student does not have the drive to complete assignments. The general education teacher also reported that the Student regressed after winter break, is an “auditory” learner, and

receives small group instruction with no more than four students, along with individual math instruction and an English language arts intervention with one other student. The general education teacher reported that the Student does quite well with phonics, can produce rhyming words, and can determine the beginning, middle, and ending sounds in a “consonant-vowel-consonant-word.” She reported that the Student requires growth in writing sentences and in recognizing and spelling sight words, and that the Student has “the most difficulty” completing math assignments. This teacher felt that the Student does not display any serious behavior problems, and has not had a problem with sensory overload or seizures in class. R-10-5-6. Witness F also administered the Behavior Assessment System for Children - Third Edition (“BASC-3”), the Parent and Teacher Rating Scales (“PRS-C” and “TRS-C”), and Conners Third Edition (“Conners-3”). On the BASC-3, Petitioner and the Student’s special education teacher reported significant problems with concentration, distractibility, and making careless mistakes, though for the general education teacher, the Student’s “inattention” score was average. The special education teacher also reported elevated learning problems and executive functioning issues, as well as defiance and poor control of anger. The general education teacher reported problems with peer interactions. R-10.

21. On April 15, 2020, Witness G wrote a speech and language “due diligence” report, featuring a teacher interview indicating that the Student struggles with reading fluency and has difficulty writing sentences, recognizing and spelling sight words, and completing assignments independently. R-11-2.

22. The Student has mastered occupational therapy goals for the 2019-2020 school year in regard to manipulating his/her clothing and alternating between hands.



Testimony of Witness H. Since March, 2020, after the onset of the COVID-19 pandemic, Petitioner has declined video instruction with general education teachers but has permitted special education instruction for the Student. Testimony of Witness I. The Student has done well with occupational therapy sessions conducted through video conferencing. Testimony of Witness H.

## VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia Code now states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a prima facie case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1 is therefore on Petitioner, since those issues do not directly involve the appropriateness of the child’s IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005). However, for Issue #2, which directly involves a challenge to IEPs, the burden of persuasion is on Respondent, provided that Petitioner has presented a prima facie case.

**1. Did the LEA fail to comprehensively reevaluate the Student in all areas of suspected disability from in or about February, 2018, to present? If so, did the LEA violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a FAPE?**

A public agency must ensure that a reevaluation of each child with a disability is conducted if there has been no evaluation within three years (unless the parties deem it unnecessary), if the child’s parent or teacher requests such reevaluation, or if conditions

warrant a reevaluation. 34 C.F.R. Sect. 300.303(a); 34 C.F.R. Sect. 300.303(b). A “reevaluation” is more than a single assessment. A reevaluation consists of a review of assessments of the child in all areas of suspected disability to assist in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). When conducting a reevaluation, the LEA is directed to use a variety of assessment tools and strategies to gather “relevant functional, developmental, and academic information,” including information from the parent, which may assist in determining (i) whether the child is a child with a disability and (ii) the content of the child’s IEP. The LEA must also 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 C.F.R. 300.304(b). It is important for school districts to be alert to indications that a student needs to be reevaluated (even when a triennial evaluation is not due and the parent has not requested a reevaluation) to ensure the student’s IEP continues to be reasonably calculated to enable the child to make progress that is appropriate in light of the child’s circumstances. Questions and Answers on Andrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 (U.S. Dep’t of Educ. 2017). Still, for there to be a FAPE denial on this issue, a parent should show that the failure to reevaluate resulted in substantive harm to the student. Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010).

The record indicates that the Student was last evaluated in or about June, 2017, through a psychological assessment and an ASQ completed by Respondent, meaning that the Student’s triennial reevaluation became due during this litigation. Accordingly, in April, 2020, Witness H conducted an occupational therapy assessment and Witnesses F

and G initiated a psychoeducational assessment and a speech and language assessment.

The remaining assessments for the Student's triennial reevaluation are on hold because of the COVID-19 pandemic.

Petitioner contended that the LEA should have reevaluated the Student starting in February, 2018, by conducting an occupational therapy assessment, speech and language assessment, assistive technology assessment, and neuropsychological assessment.

Petitioner argued that Respondent should have conducted an additional assessment of the Student's occupational therapy needs, just over a year after the prior occupational therapy assessment, per the testimony of Witness B. Petitioner contended that another occupational therapy assessment was necessary by February, 2018, because the Student had unexplored motor skills issues and continued to have the same issues with handwriting and holding a pencil. But Witness B testified that she did not hold herself to be an expert on the Student's occupational therapy-related issues.

Opposing this claim, Respondent called two different occupational therapists. Witness D, an occupational therapist with approximately forty years of experience, is an expert in occupational therapy, assessment, and programming and placement. Witness D testified that the Student had been comprehensively assessed regarding his/her occupational therapy needs in November, 2016, and that no additional occupational therapy assessment was needed during the 2018-2019 and 2019-2020 school years. Witness H, an occupational therapist who has worked at School C for six years, is an expert in occupational therapy and programming and placement. She has provided occupational therapy services to the Student at School C. Like Witness D, she testified that the Student had been appropriately evaluated for occupational therapy needs in 2016,

and that no additional occupational therapy assessment was needed during the 2018-2019 and 2019-2020 school years. Witness H also testified that the Student has been making progress on his/her IEP goals and has improved on manipulating his/her clothing and alternating between hands. Consistent with the testimony, the detailed service trackers in the record establish that Witness H understood the Student's occupational therapy issues when she was working with him/her, and that the Student was making consistent progress, including in writing, which was illegible in November, 2018 (R-5C-8) but is legible now (R-12-3). Accordingly, Petitioner did not meet her burden on this issue, and this claim must be deemed to have no merit.

Petitioner also contended that the Student needed to be assessed through a speech and language assessment in February, 2018. A speech and language assessment of the Student was administered on November 29, 2016, through the CAAP-2. The Student scored within the average range on articulation skills and in the 47th percentile on expressive vocabulary. P-10-5. The Student's receptive language standard score of 89 indicated age-appropriate skills when compared with same-age peers, and the Student's pragmatic language skills were assessed to be age-appropriate. P-10-7.

During the 2018-2019 school year, the Student's special education teacher reported, in an affidavit prepared for the purposes of litigation, that the Student was difficult to understand, had a hard time expressing him/herself, and stuttered. She also wrote that it took the Student a long time to process a question before attempting to respond. Witness A, a psychologist, also pointed out that the Student has a stutter and speaks unclearly. Witness B, an educational advocate, said that "maybe" the Student

needed a speech assessment, given his/her intelligibility issues, though she also testified that she did not hold herself to be an expert in speech and language issues.

Respondent opposed this claim by calling Witness G, a speech and language pathologist with expertise in speech and language pathology, evaluation, and programming and placement. Witness G, who has been working as a speech and language pathologist at School C for ten years, testified that the Student's articulation issues were not severe enough to warrant speech and language services, and that the Student's speech and language assessment in 2016 was sufficient. Witness G came across credibly in the hearing and must be deemed to have greater credibility on this issue than Petitioner's witnesses, who are not experts in the field. Witness G's expert opinion was also more credible than the one paragraph of hearsay assertions from the Student's teacher in an affidavit. Accordingly, Petitioner did not meet her burden to establish that the Student's speech and language needs warranted a reevaluation prior to the triennial reevaluation.

Petitioner also contended that the Student should have received an assistive technology assessment as part of his/her reevaluation in February, 2018. But Petitioner did not specify which kind of assistive technology should have been considered, Petitioner's witnesses barely touched on the Student's need for an assistive technology assessment, and there is nothing in the record to suggest that Petitioner ever requested this kind of assessment from the school district during the relevant time period. To the contrary, Witness G, a speech and language expert who said she was knowledgeable about assistive technology and had referred students for assistive technology assessments, testified that the Student did not have severe communication issues and therefore did not

need assistive technology. Witness I, an expert in special education programming and placement, concurred. Petitioner therefore did not meet her burden on this issue.

Petitioner also argued that the Student required a neuropsychological assessment in February, 2018 at the earliest. Witness C, a physician with expertise in child neurology and evaluating students for neurological disorders, recommended a neuropsychological assessment to help “pinpoint the Student’s issues” and look at depression, attention and concentration, anxiety, and various types of learning. However, Witness C did not specify that the neuropsychological assessment should have been administered as far back as February, 2018, nor is there any documentation in the record to suggest that the Student should have been so assessed in February, 2018. Indeed, Hospital A, which evaluated the Student extensively in 2017 after a series of seizures, did not recommend a neuropsychological assessment for the Student during that period or afterward.<sup>2</sup>

Witness A, a psychologist who conducts neuropsychological assessments, did testify that the Student should have received a neuropsychological assessment in February, 2018. She said that a neuropsychological assessment could identify whether or not the Student’s issues were a function of epilepsy and, if not, could help with the Student’s other issues, including with PTSD, speech, depression, attention, concentration, anxiety, and learning. I found Witness A’s testimony to be somewhat vague and

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<sup>2</sup> Witness H, the Student’s occupational therapist, also testified that the Student needed a neuropsychological assessment as part of his/her *current* reevaluation. This witness stated that “the team” wanted to make sure that the Student’s epilepsy “wasn’t affecting [his/her] learning or progression.” But Witness H, also, did not clearly state that the Student needed a neuropsychological assessment prior to the Student’s triennial reevaluation.

speculative. Additionally, Witness A did not mention that the Student's epilepsy was being treated, that the Student was receiving medication for epilepsy at school during the 2018-2019 and 2019-2020 school years, or that a plan had been created in September, 2018, to address the Student's epilepsy.

In sum, the record indicates that the Student is due a triennial reevaluation now, and on this record, Respondent should reconsider its posture that the Student does not require a neuropsychological assessment as part of the current reevaluation. But to this Hearing Officer, Petitioner did not show that the Student needed to be reevaluated through a neuropsychological assessment during the 2018-2019 or 2019-2020 school years. It is further noted that there is virtually no reported federal caselaw where parents have successfully alleged that their child was denied a FAPE because a school district failed to reevaluate their child through a neuropsychological assessment. All of Petitioner's claims in Issue #1 must therefore be dismissed.

**2. Did the LEA fail to provide the Student with an appropriate IEP on or about May, 2018, and April, 2019? If so, did the LEA act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did the LEA deny the Student a FAPE?**

Petitioner contended that neither of the Student's IEPs contained sufficient specialized instruction, and that the April, 2019, IEP contained inappropriate goals and baselines that did not address the Student's anxiety and PTSD. In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court's decision in Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), elaborated on the doctrine established in Rowley. The student in Endrew was provided

with a largely unchanged IEP after he had made little progress. The Court reasoned that “a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all.” Id. At 1001. Finding that “instruction that aims so low” would be tantamount to “sitting idly...awaiting the time when they were old enough to drop out,” the Court held that IDEA “demands” a higher standard—“an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. At 1002.

1. May, 2018, IEP.

Respondent recommended that the Student receive 2.5 hours of specialized instruction per week inside general education. Petitioner contended that this was not enough support for a child with significant deficits in all academic areas. Petitioner presented two witnesses to support this position, neither of whom is an expert in special education programming. Witness A is an expert in evaluating students with neuropsychological assessments, and Witness B is an expert in school psychology and evaluating students. Neither of these witnesses clearly explained why Respondent’s recommendation of 2.5 hours of specialized instruction for the Student was inadequate.

Respondent, on the other hand, presented Witness I, an expert in special education programming and placement, who testified that the Student’s specialized instruction hours and academic goals were appropriate because the Student had made good progress



during the 2017-2018 school year. This testimony was consistent with the sworn statement of one of the Student's teachers for the 2017-2018 school year, who wrote that the Student was able to write all the letters, both upper and lower case, "knew" numbers 0-20, and could rhyme, participate in phoneme activities, and answer some questions correctly. The Student's teacher also expressed that the Student "does not have any challenges performing at the level of an average student as far as academics."

There is some contrary evidence in the record, including data showing that the Student has performed well below his/her same-age peers in all academic areas. The Student's psychological assessment from June, 2017 indicated that s/he "may have difficulty completing multi-step classroom projects and assignments, difficulty recalling information, and will benefit from constant repetition of information as well as having the verbal information, coupled with visuals to assist [him/her] in retaining information." Still, Petitioner did not clearly dispute the contention that the Student had progressed during the 2017-2018 school year with a similar program. Petitioner therefore did not present a prima facie case to show that the IEP created in May, 2018, was inappropriate at the time it was created.

2. April, 2019, IEP.

Petitioner claimed that the increase in the Student's specialized instruction hours in this IEP, to five hours per week, was insufficient. Petitioner also contended that this IEP's goals and baselines were insufficient, failing to address the Student's anxiety and PTSD.

An IEP must contain a "statement of measurable annual goals, including academic and functional goals" designed to "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 to meet "each of the child's other educational needs that result from the child's disability." 34 C.F.R. Sect. 300.320(a)(2)(i). In closing, Petitioner pointed out that all the Student's goals in the April, 2019, IEP were repeated from the IEP of May, 2018. There is no statutory requirement that an IEP must change from school year to school year. J.B. by & through Belt v. D.C., 325 F. Supp. 3d 1, 16 (D.D.C. 2018). Even so, IEP goals should ordinarily reflect a student's year-to-year progress, or lack thereof. Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016) ("the wholesale repetition" of goals and objectives "indicates an ongoing failure to respond to [a student's] difficulties"); Belt, 325 F. Supp. 3d at 8 (rejecting goals claim because goals were modified once the Student had made documented progress in certain areas).

In this case, Respondent was obligated to provide a "cogent and responsive explanation" for its choice to repeat every goal in the April, 2019 IEP meeting. Respondent suggested that the goals in the April, 2019, IEP differed from the prior year's goals in their references to different "common core" citations. But no witness clearly explained the significance of these common core citations, or why the Student's goals needed to be repeated word for word without taking into account whether the Student had made meaningful progress on, or mastered, the goals in the previous year's IEP.

Respondent also did not clearly explain why it recommended that the Student receive five hours of specialized instruction outside general education for the 2019-2020 school year. This program would put the Student in a general education classroom for most of the school day without a special education teacher in the room, even though, by

this time, the Student was struggling throughout the school day. Witness I indicated that the Student progressed during the 2018-2019 school year, but the Student's 2018-2019 report cards indicated that s/he needed "maximum support" to understand the material and complete assignments, was "below basic" in math, speaking and listening, and writing and language for first two terms, and was "below basic" in reading during the third term. The Student made no progress in math during the school year as shown by the iReady measure, and his/her reading comprehension was "far below" level throughout the year, as shown by the Dibels TRC measure. Affidavits from the Student's teachers indicated that the Student had significant issues with reading during this time period. The affidavits indicated that the Student was unable to blend sounds together to make words, unable to use decoding skills to sound out a word based on sounds he or she already knew, and unable to hold a pencil properly or write his/her name. Accordingly, these teachers recommended that the Student be retained for the 2019-2020 school year, and the Student was in fact retained for the 2019-2020 school year with Petitioner's consent.

Respondent objected to these affidavits going into the record, but there is no rule prohibiting hearsay in special education due process proceedings. Moreover, Respondent could have easily called these teachers as witnesses to rebut the statements in the affidavits if they were untrue. Instead, Respondent did not call any of the Student's teachers as witnesses during its presentation. Respondent also contended that the Student's flat academic progress during the 2018-2019 school year was commensurate with his/her low IQ, but none of its witnesses clearly supported this contention during their testimony. Respondent also contended that Petitioner agreed with the IEP of April, 2019. However, Petitioner did not agree with the Student's speech and language

services, and none of Respondent's witnesses clearly testified that Petitioner specifically agreed with the specialized instruction hours in the IEP. Moreover, a parent's agreement to an inappropriate IEP does not inoculate a school district from liability. Letter to Lipsitt, 52 IDELR 47 (OSEP Letter December 11, 2008). Petitioner established a prima facie case on this issue, and Respondent did not meet its burden of persuasion to show that the Student's IEP of April, 2019, was appropriate. Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with an appropriate IEP in April, 2019.

### **RELIEF**

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." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). 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."

Petitioner seeks compensatory education in the form of 500 hours of tutoring, forty hours of compensatory speech and language therapy, and twenty hours of occupational therapy. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, at 521-23. An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and "must be reasonably calculated to provide the

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” Id. at 524. The District of Columbia Circuit Court of Appeals has “explicitly disavowed” compensatory education in the form of “cookie-cutter” lump-sum awards when a hearing officer does not explain how the remedy is tailored to provide the services the student was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005). Moreover, the circuit court has emphasized that, in determining the “complicated work” of fashioning such a remedy, a hearing officer should play close attention to the question of assessment. B.D. v. District of Columbia, 817 F.3d 792, 800 (D.C. Cir. 2017).

Petitioner’s request for compensatory education corresponds to the time period from March, 2018 (in the 2017-2018 school year), through the entirety of both the 2018-2019 and 2019-2020 school years. Petitioner’s compensatory education recommendations are premised on Petitioner’s contention that the Student’s specialized instruction hours were inadequate and that Respondent failed to reevaluate the Student over the course of three different school years. However, Petitioner’s claims that the Student’s May, 2018, IEP was inappropriate and that the Student should have been reevaluated beginning in February, 2018, were dismissed. Additionally, no FAPE violation has been found in connection to the Student’s speech and language therapy or occupational therapy. This Hearing Officer will therefore adjust the proposed compensatory education plan to reflect the findings in this HOD, which finds FAPE denial from May 1, 2019 to present only. The Student shall accordingly be awarded 200 hours of academic tutoring, at a usual and customary rate in the community, to be provided by a certified special education teacher.

Petitioner also seeks a change to the Student's IEP. Petitioner contended that the Student should now receive fifteen hours of specialized instruction per week, ten hours inside general education and five hours outside general education. Petitioner's proposal is speculative and not clearly explained, but the Student needs specialized instruction inside a smaller classroom to make appropriate progress going forward. The Student's special education teacher recently told Witness F that the Student is a "tactile and visual learner" who "works well one-on-one or in a small group" and does not like large crowds. Accordingly, this Hearing Officer will order the IEP team to reconvene and provide the Student with an IEP that provides for at least fifteen hours of specialized instruction services in academic classes. The IEP team shall determine whether such specialized instruction is to be provided inside general education or outside general education.

## **VII. Order**

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay for 200 hours of academic tutoring for the Student, to be delivered to the Student by a certified special education teacher, at a usual and customary rate in the community;
2. The above services must be delivered to the Student by December 31, 2021;
3. The IEP team shall reconvene within thirty days to provide the Student with an IEP that provides at least fifteen hours of specialized instruction per week in academic classes;
4. Petitioner's other requests for relief are denied.

Hearing Officer Determination  
Michael S. Lazan, Hearing Officer  
Case # 2020-0059

Dated: July 6, 2020

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).

Dated: July 6, 2020

*Michael Lazan*  
Impartial Hearing Officer