

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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**Confidential**

<b>Student,<sup>1</sup></b>	)	<b>Case No. 2021-0047</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: June 17 and 25, 2021</b>
	)	
<b>v.</b>	)	<b>Conducted by Video Conference</b>
	)	
<b>District of Columbia Public Schools,</b>	)	<b>Date Issued: July 6, 2021</b>
	)	
<b>Respondent.</b>	)	<b>Terry Michael Banks,</b>
	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is an X year-old student (“Student”) who attended School A during the 2020-21 school year. On April 15, 2021, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to conduct timely evaluations, failing to provide appropriate Individualized Education Programs (“IEP”) for Student, failing to conduct a functional behavior assessment (“FBA”), behavior intervention plan (“BIP”), and safety plan, and failing to implement Student’s IEPs. On April 26, 2021, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint* (“*Response*”) denying that it had denied Student a FAPE in any way.

**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. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

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

## PROCEDURAL HISTORY

Petitioner filed the *Complaint* on April 15, 2021 alleging that DCPS denied Student a FAPE by (1) failing to evaluate Student in all areas of suspected disability, and failing to conduct timely triennial evaluations, (2) failing to provide an appropriate IEP since December 9, 2019, (3) failing to conduct an FBA and develop a BIP and safety plan at the inception of Student's enrollment at School A, and (4) failing fully to implement Student's IEPs. DCPS filed its *Response* on April 26, 2021 and asserted that (1) Student's IEPs for the 2019-20 and 2020-21 school years were developed using information from class performance, educational assessments, functional behavior assessment, psychological, speech and language, and occupational therapy evaluations, and were reasonably calculated to enable the Student to make progress considering her/his circumstances, (2) DCPS denied that the Student was denied a FAPE by failure to conduct an FBA or develop an FBA, (3) DCPS provided Student behavior support services ("BSS") to the greatest extent possible, (4) DCPS denied that a failure to conduct a comprehensive psychological reevaluation since January 2016 constituted a denial of FAPE, and (5) to the extent Petitioner's claims predate April 15, 2019, they are barred by the statute of limitations.

The parties participated in a resolution meeting on May 6, 2021 that did not result in a settlement. The resolution period ended on May 15, 2021. A prehearing conference was conducted by video conference on May 14, 2021, and the Prehearing Order was issued On May 17, 2021. I issued an Amended Prehearing Order on May 27, 2021 in response to suggested modifications by the parties' counsel.

The due process hearing was conducted on June 17 and 25, 2021 by video conference and was closed to the public.<sup>2</sup> Respondent's *Hearing Disclosures*, filed June 10, 2021, contained a witness list of seven witnesses and documents R-1 through R-31. On June 15, 2021, Petitioner filed objections to DCPS' disclosures. Petitioner objected to expert testimony from Witness D, Witness E, Witness F, and Witness G, because DCPS failed to specify their respective areas of expertise. I ruled that this violation of the Amended Prehearing Order did not justify precluding the witnesses' opinion testimony. Petitioner also objected to page 120 of R19 and R24-R26 on the grounds that the documents related to events occurring after the filing of the Complaint. I sustained the objections to page 120 of R19, R25, and R26, and overruled the objection to R24. At the inception of Respondent's direct case on June 25<sup>th</sup>, Respondent's exhibits R1 – R24 (except page 120 of R19), R27 – R28, and R30 were admitted into evidence.

*Petitioner's Disclosure* was also submitted on June 10, 2021, containing a list of five witnesses and documents P1-P45. DCPS filed objections to *Petitioner's Disclosure* on June 15, 2021. DCPS objected to expert testimony from Witness C, who was offered as an expert in special education, eligibility, IEP Programming, Placement and Process, and Procedure, in any area other

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<sup>2</sup> The second day of hearings was scheduled for June 18, 2021. However, the new federal holiday, Juneteenth, was enacted and took effect immediately, which precluded a hearing on June 18<sup>th</sup>. The parties agreed to continue the hearing to June 25<sup>th</sup> and to extend the Hearing Officer Determination ("HOD") due date to July 6, 2021.

than the student's alleged educational needs. DCPS objected to Witness B, offered as an expert in clinical psychology and special education programming, because some of her expertise is in areas not germane to this case. DCPS objected to Witness J, who was not offered as an expert, but on the grounds her testimony might be irrelevant or she might be unqualified to provide the testimony. Rulings on these objections were deferred until the respective witnesses' testimony was elicited. DCPS also objected to P4, a 2013 evaluation, on grounds of relevance, P15 – P20 on grounds of relevance, P24 on grounds that it is not a valid IEP as no IEP team meeting took place on December 7, 2020 at Petitioner's request, P27 on grounds that it is not a finalized IEP, pages 1-13 of P29, and pages 1-9 of P40. The objection to P4 was overruled when Respondent's counsel determined that it was part of Student's educational records. The objections to P15 – P20 and P29 were overruled because they were relevant to student's educational history. The objection to P24, a draft IEP, was sustained, as the evidence revealed that an IEP meeting was not conducted on the date of the draft. The objection to P27 was overruled, as the IEP that was not developed in P24 was developed on January 12, 2021. The objection to pages 1-8 of P40 was sustained as the service trackers, offered to prove that services were not provided, related to services provided beyond the reach of the statute of limitations; the objection to page 9 was overruled as that page related to services provided less than two years prior to the filing date of the *Complaint*. Thus, Petitioner's Exhibits P1 – P23, and P25 – P45 (except pages 1-8 of P40) were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, Witness B, and Witness C. Petitioner offered Witness B as an expert in Clinical Psychology, School Psychology, and Special Education Programming, and Witness C was offered as an expert in Special Education. There was no objection to expert testimony in these categories and I allowed opinion testimony from each of these witnesses. Respondent presented as witnesses in chronological order: Witness D, Witness E, and Witness F. Witness D was offered as an expert in School Social Work, Witness E was offered as an expert in School Psychology, and Witness G was offered as an expert in Special Education. Petitioner did not object to these witnesses' qualifications, and I allowed each to offer opinion testimony in their respective areas of expertise. The parties' counsel provided oral closing arguments at the conclusion of testimony on June 25, 2021.

## ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, and failing to conduct timely triennial evaluations. Specifically, Petitioner alleges that DCPS should have conducted a comprehensive psychological evaluation and an FBA no later than April 15, 2019 and up to the filing of the *Complaint*.
2. Whether DCPS failed to provide an appropriate IEP since December 9, 2019. Specifically, Petitioner alleged that Student's IEPs failed to provide appropriate

levels of specialized instruction, did not place Student in the least restrictive environment (“LRE”), did not provide appropriate goals and baselines, and because they were not informed by updated evaluations and/or assessments.

3. Whether DCPS denied Student a FAPE by failing to conduct an FBA and develop a BIP and safety plan at the inception of Student’s enrollment at School A.
4. Whether DCPS denied Student a FAPE by failing fully to implement Student’s IEPs developed on December 12, 2018, December 10, 2019, and December 7, 2020. Specifically, DCPS has failed to provide 52% of prescribed behavior support services (“BSS”) from April 2019 until November 2019. From December 2019 to March 2020, DCPS failed to provide 43% of prescribed BSS.

### **FINDINGS OF FACT**

1. Student is X years old and was in grade N at School A during the 2020-2021 school year.<sup>3</sup>

2. On January 25, 2013, when Student was in grade E in School B, Examiner A completed a Comprehensive Psychological Evaluation of Student.<sup>4</sup> Examiner A reported that Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD”) in 2012.<sup>5</sup> On the Wechsler Intelligence Scale for Children, (“WISC-IV”), Student’s Full Scale IQ (92) and Working Memory (94) were in the Average range, while his/her Perceptual Reasoning (119) was High Average, and his/her Verbal Comprehension (83) and Processing Speed (80) were Low Average.<sup>6</sup> On the Beery-Buktenica Developmental Test of Visual Motor Integration (“VMI”), Student’s ability to perceive, process, and respond to objects while also giving meaning or interpretation to what is presented was Average (90).<sup>7</sup> On the Woodcock-Johnson Test of Achievement (“WJ-III”), Student was Average in Broad Math (96) and Oral Language (96), Low Average in Broad Written Language (83) and Total Achievement (81), and Borderline in Broad Reading (77).<sup>8</sup> On the Behavior Assessment System for Children (“BASC-II”), the responses of Witness A and Staff Member A placed Student in the Clinically Significant for Internalizing Problems, which includes Depression, Anxiety, Somatization.<sup>9</sup> However, on the Beck Youth Inventories, her/his Anxiety, Anger, and Disruptive Behavior Inventories were within the Average range.<sup>10</sup> Witness A and Staff Member A’s responses on the BASC-II placed Student in the At Risk category for hyperactivity and attention problems.<sup>11</sup> On the Behavior Rating Inventory of Executive Function (“BRIEF”),

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<sup>3</sup> Petitioner’s Exhibit (“P:”) 27 at page 1, electronic page 321. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P27:1 (321).

<sup>4</sup> P4:1 (40).

<sup>5</sup> *Id.* at 3 (43).

<sup>6</sup> *Id.* at 8-14 (48-54).

<sup>7</sup> *Id.* at 14 (54).

<sup>8</sup> *Id.* at 14-18 (54-58).

<sup>9</sup> *Id.* at 18-20 (58-60).

<sup>10</sup> *Id.* at 20 (60).

<sup>11</sup> *Id.* at 21 (61).

Staff Member A expressed significant concerns regarding Student's ability to resist impulses, adjust to changes in routine or task demands, regulate his/her emotions, sustain working memory, maintain attention, concentrate on schoolwork, and finish tasks.<sup>12</sup> Examiner A concluded that Student met the criteria for a student with a Specific Learning Disability ("SLD"):

*Based on the findings of the present evaluation, [Student's] performance on the WISC-IV is not comparable to [her/his] performance on the WJ-III ACH, suggesting that [her/his] cognitive abilities are stronger than what is demonstrated in [his/her] academic achievement at this time. [Student's] processing speed deficits limit [her/his] capacity for higher order thinking, and likely make it very difficult for [him/her] to follow along during class lessons – especially those that are not accompanied by visuals or demonstrations. [Student's] greatest strength is [her/his] perceptual reasoning ability; therefore, [s/he] exceeds at tasks that utilize pictures and require nonverbal problem-solving. Significant compromise is noted in reading and written expression. [Student's] struggles with hyperactivity, short attention span, and emotional dysregulation also make it difficult for [her/him] to get the most benefit from [his/her] education. [Student] requires considerable academic support in order to bring [her/him] to a performance level that is commensurate with [her/his] age and grade.*

The findings of the present comprehensive psychological evaluation suggest that [Student] meets IDEA (2004) criteria as a student with a Specific Learning Disability in Reading and Written Language. Additionally, [Student] requires emotional support services.<sup>13</sup>

3. On January 30, 2013, Student was found to be eligible for special education services as a child with Multiple Disabilities.<sup>14</sup>

4. The first IEP in the record was developed on November 12, 2014, when Student was in grade G at School C.<sup>15</sup> In Consideration of Special Factors, it was reported that Student engages in numerous off-task behaviors during reading and math tasks resulting in class disruptions "that are between borderline verbal fights to actual fist fights. It is my observation that this off-task behavior tends to be in the context that [s/he] wants to avoid the task at hand."<sup>16</sup> The Areas of Concern were Reading, Written Expression, and Emotional, Social and Behavioral Development ("Behavior").<sup>17</sup> The IEP team prescribed 7.5 hours per week of Specialized Instruction and two hours per month of BBS, all outside general education.<sup>18</sup>

5. DCPS conducted a reevaluation of Student in January 2016.<sup>19</sup>

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<sup>12</sup> *Id.* at 21-23 (61-63).

<sup>13</sup> *Id.* at 23 (63), emphasis supplied in text.

<sup>14</sup> P15:1 (166).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2 (167).

<sup>17</sup> *Id.* at 3-8 (168-73).

<sup>18</sup> *Id.* at 9 (174).

<sup>19</sup> P16:1 (179).

6. Student's last IEP at School C was developed on May 22, 2017, when s/he was in Grade I.<sup>20</sup> In Consideration of Special Factors, it was reported that that Student had

...[r]educed the behaviors that impeded [him/her] from learning in the general education setting tremendously. [S/he] does not abscond from classes, does not go to hide from staff, and completes [her/his] daily assignments with little difficulty. When things are difficult, [s/he] continues to take extra time to get started. [Her/his] tantrums that normally are conducted when things are difficult have also reduced in frequency. [S/he] continues with some impulsivity during class that requires redirection and some frequent breaks. The program uses incentive based activities to assist [Student] in making good decisions and also getting [his/her] needs met. The following interventions have been used for [Student]: inclusion setting for science, small group instruction, self-contained instruction, counseling, after school programming/activities, reading 180, math (ready and 1<sup>st</sup> in Math)."

Behavior: [Student] tends to manifest a lot of off-task behaviors during reading tasks (and sometimes math tasks also) where [s/he] ends up engaging [his/her] classmates or table mates in a way that disrupts them from their work. Most of the time these disruptive interactions tend to lead to more negative infractions that are between borderline verbal fights to actual fist fights. It is my observation that this off-task behavior tends to be in the context that [s/he] wants to avoid the task at hand.<sup>21</sup>

The Areas of Concern were unchanged from the November 12, 2014 IEP: Reading, Writing, and Behavior. However, the services were increased to 18 hours per week of specialized instruction and two hours per month of BSS, all outside general education.<sup>22</sup>

7. The first IEP in the record that was developed at School A was on April 11, 2018 when Student was in grade J.<sup>23</sup> The Consideration of Special Factors was unchanged from the May 22, 2017 IEP. In Reading, the Present Level of Performance and Annual Goals ("PLOP") revealed that a reading inventory conducted during the school year resulted in a Lexile score of 253, corresponding to a grade equivalence of mid-grade E, eight grades below her/his current level. However, "According to [his/her] English teacher, [her/his] lexile score does not reflect what [s/he] can and cannot do in class... [Student] is able to read a grade level text when provided support in decoding unfamiliar words." The baseline was "Below grade level; early [grade C] according to [his/her] most recent SRI score."<sup>24</sup> The Written Expression PLOP refers to a September 1, 2016 WJ-IV report that is not in the record, in which age-equivalence scores were presented; Student scored two years below her/his age overall, six years below in written language, seven years below in spelling, and six years below in academic skills. "[His/her] English teacher says that [Student] is able to write responses to grade level prompts. However, [Student] needs the prompt broken down so that what the prompt is specifically asking for is clear to [her/him]." Baselines were not

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<sup>20</sup> P17:1 (186)

<sup>21</sup> *Id.* at 2 (187).

<sup>22</sup> *Id.* at 9 (194).

<sup>23</sup> P18:1 (199).

<sup>24</sup> *Id.* at 4-5 (202-3). Grade C is seven grades below her/his current grade.

provided.<sup>25</sup> The Behavior PLOP provided that while teachers report that s/he is a good student, “at times [s/he] can be oppositional and distracting, depending on the dynamics of the classroom.” An August 31, 2017 SDQ self-report reflected Average and Low-risk scores. The baselines were: (1) s/he continues to require continued work with regulating his/her emotions, (2) s/he continues to require supports to decrease his/her distractions and improve her/his attention span for longer periods, and (3) at times s/he tends to shut down and/or become distracting when confronted with an academic challenge.<sup>26</sup> The IEP team prescribed 18 hours per week of specialized instruction and 90 minutes per month of BSS, all outside general education.<sup>27</sup> The meeting notes reflected no dissent on any issue.<sup>28</sup>

8. On December 12, 2018, when Student was in grade K at School A, DCPS conducted an Analysis of Existing Data (“AED”).<sup>29</sup> At that time, Student’s services were 18 hours per week of specialized instruction and 90 minutes per month of BSS, all outside general education.<sup>30</sup> His/her current grades were Beginning Swimming – B, Geometry – C+, Chemistry – C, Conditioning & Fitness – C, World History and Geography – C, English II – F, Reading Workshop – F, and Automotive Technology – I.<sup>31</sup> Student’s reading inventory score on May 23, 2018 placed him/her on the grade D level, four grades below her/his grade at that time. “[Student] is reading significantly below grade level. [S/he] is easily distracted and will not complete assignments because [s/he] is so distracted. [Student] will find a reason to get out of [her/his] seat and walk around the classroom and to leave the room. [Student] struggles with comprehension of grade level text.”<sup>32</sup> While Student was described as a “pleasure to have in class” and a good class participant, [his/her] English and Geometry teachers attributed her/his low grades to the failure to complete assignments and “excessive tardies,” respectively.<sup>33</sup> On the Strengths and Difficulties Questionnaire (“SDQ”), Student’s responses placed her/him in the Average or Low Risk in all categories. “[Student] has a pleasant and respectful demeanor. [S/he] can be a leader among [his/her] peers. Concerns at this time are [her/his] inconsistency in [her/his] classes as it relates to [her/his] not completing assignments and absences.”<sup>34</sup>

9. On December 12, 2018, DCPS also conducted an IEP Annual Review meeting.<sup>35</sup> The Consideration of Special Factors repeated information from the 2016-17 school year from the prior IEPs but added that during the current school year, s/he had reduced the amount of behaviors and had shown growth, but continued to show avoidance behaviors when presented with reading or writing tasks.<sup>36</sup> The Reading and Written Expression PLOPs and baselines were unchanged from the April 11<sup>th</sup> IEP except that an additional Reading baseline was added: s/he is currently

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<sup>25</sup> *Id.* at 5-6 (204-5).

<sup>26</sup> *Id.* at 7-9 (205-7).

<sup>27</sup> *Id.* at 10 (208).

<sup>28</sup> P19:1 (220).

<sup>29</sup> P5:1 (68).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2 (69).

<sup>32</sup> *Id.* at 3 (70).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4 (71).

<sup>35</sup> P20:1 (222).

<sup>36</sup> *Id.* at 3 (224).

reading and comprehending significantly below grade level.<sup>37</sup> The Behavior PLOP was unchanged except for reporting first advisory grades. The second baseline from the previous IEP was repeated; there were two new baselines: (1) s/he continues to require supports to decrease distractions and improve her/his attention span for longer periods, and (2) s/he has been late to classes, which has an impact on her/his academic success.<sup>38</sup> His/her services and setting were unchanged from the April 11<sup>th</sup> IEP.<sup>39</sup>

10. From two years prior to the filing date of the *Complaint* through the 2019-20 school year, Witness D provided direct BSS to Student on April 30, 2019 (30 minutes), May 21, 2019 (60 minutes), September 30, 2019 (60 minutes), October 6, 2019 (90 minutes), November 19, 2019 (45 minutes), December 10, 2019 (60 minutes), January 15, 2020 (45 minutes), January 23, 2020 (30 minutes), April 2, 2020 (15 minutes), April 8, 2020 (30 minutes), April 13, 2020 (30 minutes), April 22, 2020 (30 minutes), April 28, 2020 (15 minutes), May 6, 2020 (15 minutes), May 19, 2020 (20 minutes), May 26, 2020 (15 minutes). School was closed on April 17, 2019. Student was unavailable for services on May 31, 2019, November 26, 2019, and December 12, 2019.<sup>40</sup>

11. For the 2018-19 school year, Student earned the following grades: English II – C, Reading Workshop I – C, Reading Workshop II – D+, Automotive Technology I – D, World History and Geography – C, Geometry – C, Chemistry – C, Beginning Swimming – A-, Swimming II – B-, Body Conditioning & Fitness – C-, and Fitness & Lifetime Sports – C-.<sup>41</sup>

12. On June 6, 2019, DCPS issued an IEP Progress Report for the 2018-19 school year.<sup>42</sup> Student was reported to be progressing on all of her/his goals.<sup>43</sup>

13. On December 10, 2019, when Student was in grade M at School A, DCPS conducted an IEP Annual Review meeting.<sup>44</sup> For the first time, the Consideration of Special Factors indicated that Student's behavior does not impede his/her learning or that of other children.<sup>45</sup> The Reading PLOP was unchanged from the previous IEP. The previous baseline indicating that s/he was reading significantly below grade level was replaced with his/her reading "between a [grade C and A] reading level," nine and seven years below her/his current grade, respectively.<sup>46</sup> In Written Expression, the PLOP indicated that Student had earned a D+ in English for the first quarter of the school year, which the teacher attributed to incomplete and missing assignments. "When focused and asked to write a response to a prompt, [Student] is able to organize and clearly write out [her/his] ideas and thoughts. When asked to review, [s/he] is able to fine tune [her/his] writing if [s/he] is given a graphic organizer and an exemplar sample." The

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<sup>37</sup> *Id.* at 5-8 (226-9).

<sup>38</sup> *Id.* at 9-10 (230-1).

<sup>39</sup> *Id.* at 11-12 (232-3).

<sup>40</sup> P40:9-18 (486-95).

<sup>41</sup> Respondent's Exhibit ("R:") 24 at page 1, electronic page 203. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R24:1 (203).

<sup>42</sup> P29:14 (387).

<sup>43</sup> *Id.* at 14-19 (387-92).

<sup>44</sup> P23:1 (265).

<sup>45</sup> *Id.* at 2 (267).

<sup>46</sup> *Id.* at 4-5 (268-9).



baselines were: (1) S/he is able to write responses to prompts but is unable to take a position and defend it using textual evidence, and (2) s/he reads between a [grade C and A] reading level. In the Behavior PLOP, despite having removed behavior as an issue in the Consideration of Special Factors, the team stated that

Teachers have reported that [Student's] behavior has been a major impact on [her/his] inability to obtain academic success thus far. During the first part of this school year, [Student] received several reprimands for [her/his] acting out behavior (*i.e.*, walking the halls, leaving class, peer involved conflicts. Teachers have conveyed that in the past [Student] seemed to be a positive leader amongst [her/his] peers, however, now [s/he] seem to be following the negative behavior of others... Overall, [Student] continues to have academic challenges as a result of [her/his] learning disability, as well as [his/her] distractibility, inattentiveness, and recently an increase in negative behaviors. These concerns are preventing [her/him] from successfully accessing the general education curriculum. Student seems to avoid participating in behavioral support services, as [her/his] attendance and engagement with this social worker has been sporadic.<sup>47</sup>

The Behavior baselines from the previous IEP were unchanged.<sup>48</sup> The IEP team reduced Student's BSS from 90 to 60 minutes per month, outside general education, but her/his specialized instruction remained at 18 hours per week outside general education.<sup>49</sup>

14. On January 16, 2020, Student completed an SDQ. His/her scores were "close to average" In Overall Stress, Emotional Distress, Behavioral Difficulties, Hyperactivity and Concentration Difficulties, Helpful Behavior, and Impact of any Difficulties on the Young Person's Life, they were Low Risk in Any Disorder, Emotional Disorder, Behavioral Disorder, and Hyperactivity, and they were Very High in Getting Along with other Young People.<sup>50</sup>

15. On May 19, 2020 and September 28, 2020, Student completed an SDQ. His/her scores were "close to average" In Overall Stress, Emotional Distress, Behavioral Difficulties, Hyperactivity and Concentration Difficulties, Helpful Behavior, and Impact of any Difficulties on the Young Person's Life, they were Low Risk in Any Disorder, Emotional Disorder, Behavioral Disorder, and Hyperactivity, and they were Slightly Raised in Getting Along with other Young People.<sup>51</sup>

16. On June 10, 2020, DCPS issued an IEP Progress Report for the 2019-20 school year.<sup>52</sup> Student was reported to be progressing on all of her/his goals.<sup>53</sup>

17. For the 2019-20 school year, Student earned the following grades: Physics – P, U.S.

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<sup>47</sup> *Id.* at 7 (271).

<sup>48</sup> *Id.* at 8 (272).

<sup>49</sup> *Id.* at 10-11 (274-5).

<sup>50</sup> P39:1 (474).

<sup>51</sup> *Id.* at 2-3 (475-6).

<sup>52</sup> P30:22 (415).

<sup>53</sup> *Id.* at 22-27 (415-20).

History & Geography – B-, Spanish I – P, English III – B-, Algebra & Trigonometry – P, Automotive Technology II – F, Auto Technology III – P, Introduction to Theater – D, Academic Support – B+.<sup>54</sup>

18. On October 20, 2020, when Student was in grade N at School A, DCPS conducted an Analysis of Existing Data (“AED”).<sup>55</sup> In Reading, his/her deficits “impact [his/her] ability to decode words and reading comprehension... Due to [Student’s] Multiple Disabilities, [s/he] has not progressed in the areas of comprehension. Without specialized instruction in reading, [Student] would have difficulties accessing the general education curriculum.”<sup>56</sup> Student was observed to be the “class leader” in U.S. Government: “[Student] motivates the other students to engage in conversation, and [Student] assists with maintaining order.” In Written Expression, s/he “will exclude end-of sentence punctuation, low sentence structure that often lacks subjects, subject-verb agreement, and academically correct capitalization and grammar.” It was noted that Student’s mother and attorney “are concerned that there is an underlying language weakness that is attributing to difficulties with reading and writing.”<sup>57</sup> On the September 28, 2020 SDQ, Student was Average or Low Risk in all categories. “Student is well liked by [her/his] teachers and peers. [S/he] is often willing to help others. At times, [s/he] has been one to take the lead in class... The concern at this time is student’s difficulties with conveying [his/her] feelings. Rather than convey [her/his] emotion, student will often shut down. In addition, [s/he] may exhibit impulsive behaviors as result of [his/her] unexpressed emotion... Student has made some progress with BSS services. [S/he] seems to be more open to discussing [his/her] academic challenges and goals; however, there have been time in which student is reluctant to engage.”<sup>58</sup> Student’s mother and attorney raised concerns about Student’s motor skills and physical development.<sup>59</sup>

19. On October 23, 2020, DCPS issued a Prior Written Notice (“PWN”) indicating that in response to a request from Student’s mother, DCPS would conduct the following virtual evaluations: comprehensive psychological, occupational therapy, speech and language, and functional behavior.<sup>60</sup>

20. For the first term of the 2020-21 school year, ending on November 6, 2020, Student earned the following grades: Probability & Statistics – C-, Spanish II – F, and Principles of U.S. Government – A-.<sup>61</sup>

21. On November 25, 2020, Witness E completed a Psychological Triennial Reevaluation.<sup>62</sup> Witness E stated that the referral was necessary because the AED team “determined that there was not enough information to continue [his/her] current eligibility and [Student] requires updated psychological and educational testing to determine [his/her] present

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<sup>54</sup> P37:1-2 (453-4); R24:1 (203).

<sup>55</sup> P7:1 (78).

<sup>56</sup> *Id.* at 2 (79).

<sup>57</sup> *Id.* at 3 (80).

<sup>58</sup> *Id.* at 4 (81).

<sup>59</sup> *Id.* at 5 (82).

<sup>60</sup> P41:11 (512).

<sup>61</sup> P37:6 (458).

<sup>62</sup> P8:1 (84).

levels of academic related development needs.<sup>63</sup> Witness E interviewed Teacher A, Petitioner, and Witness A, Student's mother. Teacher A, Student's Spanish teacher, reported that Student's attendance is a major concern; s/he attended class half of the time, and when s/he attends, s/he participates half of the time. Witness E attempted to observe Student on three occasions using the virtual platform due to COVID-19 restrictions. On each occasion, Student did not participate in the scheduled class.<sup>64</sup>

On the WJ-IV, Student was in the Below Average range in Broad Reading (81), Broad Math (87), and Broad Written Language (80). On the Reynolds Intellectual Assessment System ("RIAS-2"), Student's Composite Intelligence Index (95) was in the Average range, as was his/her score on the Nonverbal Intelligence Index (107). His/her Verbal Intelligence Index (84) was Below Average.<sup>65</sup> On the Conners Parent Rating Scale, which assesses hyperactivity, attention problems, and related behavior concerns, the responses were Very Elevated in Hyperactivity/Impulsivity, High Average in Inattention, and Average in Learning Problems, Defiance/Aggression, and Family Relations. On the Teacher Rating Scale, Teacher B rated Student Very Elevated in Inattention, Hyperactivity/Impulsivity, Learning Problems, and Executive Functioning, and Average in Defiance/Aggression and Peer Relations. Witness D rated her/him Very Elevated in Hyperactivity/Impulsivity, Elevated in Inattention, High Average in Learning Problems, and Average in Defiance/Aggression, Executive Functioning, and Peer Relations.<sup>66</sup> On the BASC-3, Student's self-report scored At-Risk in School Problems, Average in Internalizing Problems, Inattention/Hyperactivity, Personal Adjustment, and Emotional Symptoms Index.<sup>67</sup> Teacher C rated him/her At-Risk in Externalizing Problems (Hyperactivity, Aggression, Conduct Problems), in Internalizing Problems (Anxiety, Depression, and Somatization), in School Problems, in Behavioral Symptoms Index, and in Adaptive Skills.<sup>68</sup> Student's mother rated her/him At-Risk on the Behavioral Symptoms Index, and Average in Externalizing Problems, Internalizing Problems, and Adaptive Skills.<sup>69</sup>

Witness E concluded that the assessment did not support continued eligibility under the classification of Emotional Disturbance.<sup>70</sup> While the assessment confirmed the negative impact of Attention Deficit Hyperactivity Disorder ("ADHD") on Student's academic performance, Witness E did not make a recommendation as to Student's classification:

[Student's] teachers report that [his/her] poor study skills, self-regulating skills, difficulty remaining focused, and hyperactivity/impulsivity is what is holding [him/her] back from making educational progress. [Student's] poor executive functioning skills causes [him/her] to miss school and need extra help from [her/his] mother and sister. Due to [her/his] poor executive functioning skills, [s/he] is also unable to construct cohesive and well thought written assignments. [Student's]

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5-6 (88-89).

<sup>65</sup> *Id.* at 10-12 (93-95).

<sup>66</sup> *Id.* at 12-15 (95-98).

<sup>67</sup> *Id.* at 15-17 (98-100).

<sup>68</sup> *Id.* at 18-20 (101-103).

<sup>69</sup> *Id.* at 20-21 (103-104).

<sup>70</sup> *Id.* at 25-27 (108-110).

distractibility is also a contributor to [her/his] ability to increase [his/her] vocabulary and comprehend long passages and mathematical word problems. Additionally, [Student's] focus in the classroom and ability to acquire high quality executive functioning skills will allow for [her/him] to increase [her/his] vocabulary and overall confidence.

Based upon these data points, it is clear that [Student] presents with a significant form of ADHD and it has impacted [her/his] overall school performance both academically, socially, behaviorally. [His/her] impulsive urges, inattentiveness, and poor executive functioning abilities can all be directly linked to ADHD. Overall, it is apparent that [s/he] has average cognitive abilities, however, [his/her] ADHD impact the way in which [s/he] receives information in the learning environment, how [s/he] responds to others, and how [s/he] is able to regulate [her/his] emotions.... The IEP team will meet to review assessment results and determine if [Student] meets the criteria for OHI.<sup>71</sup>

22. On December 4, 2020, DCPS developed an FBA for Student<sup>72</sup> at the request of Student's mother.<sup>73</sup> The targeted problems were "Lack of engagement: failure to submit assignments and respond to teacher requests. Lack of initiative – inability to easily get started on classwork and complete homework assignments." The antecedents of the behaviors were as follows: "[Student] is more likely to disengage when [s/he] is being challenged academically. Some of [her/his] teachers have conveyed that [s/he] seems to give up easily. [Student] is more likely to display non-compliant behaviors when [s/he] is faced with an academic challenge and/or frustrated or emotionally overwhelmed."<sup>74</sup> Witness D observed Student in three classes, and the teachers in those classes completed a Motivation Assessment Scale, which is designed to identify those situations in which an individual is likely to behave in certain ways.<sup>75</sup> Witness D's conclusions included the following:

All of [her/his] teachers have conveyed that [Student] presents no major behavioral challenges in the virtual classroom setting. In fact, at times [s/he] is a model student and positive role model for [her/his] peers. [S/he] attends [her/his] classes on a regular basis, according to ASPEN [s/he] has 4 unexcused. The primary concern at this time, is [her/his] disengagement and [his/her] inability to complete [her/his] classwork and homework assignments. [His/her] teachers have stated that [Student] seems to require several prompts to get started on [her/his] classwork independently and reminders to complete [his/her] homework. Although in [her/his] Spanish class [s/he] seems unmotivated to engage within the classroom activities. According to [Student] [s/he] does not engage in the class, as [s/he] is not familiar with the other approximately 20 students in the class...

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<sup>71</sup> *Id.* at 28 (111).

<sup>72</sup> P9:1 (114).

<sup>73</sup> Testimony of Witness D.

<sup>74</sup> P9:1 (114).

<sup>75</sup> *Id.* at 3-4 (116-117).

In summary, [Student] is a student who is having some academic success. [S/he] seems to have a difficult time with expressing [her/his] frustration, as evident by [her/his] disengagement and lack of initiative, as it related to [his/her] classwork and completion of homework. At times [Student] seems to become frustrated; as a result of [his/her] inability to convey [his/her] emotions as it relates to [her/his] academic challenges, family dynamics and relationships, to include the emotional challenges that appear with adolescent development. [S/he] appears to internalize this emotion, which may have an impact on [his/her] ability to obtain optimal academic success.<sup>76</sup>

23. On December 29, 2020, Examiner B completed a Virtual Speech and Language Comprehensive Evaluation.<sup>77</sup> Her findings included the following:

[Student's] overall communication skills are within normal limits. [S/he] effectively produces all speech sounds utilizing appropriate vocal quality and fluent speech during conversation. [Student's] vocabulary skills are strengths. [S/he] identifies target words receptively and expressively in isolation, through antonym pairs and through idioms. Vocabulary assist with completing math equations and word problems, responding to questions, enhancing writing, and assisting with reaching higher level thinking skills. [Student's] weakness is understanding synonyms. This weakness can affect vocabulary development and reading comprehension. [Student] has good syntactic skills. [S/he] verbally composes and comprehends grammatically and syntactically simple and complex sentences. Furthermore, [s/he] recognizes meanings of sentences that have similar structures and words. This skill assists with expressing [her/his] ideas and thoughts verbally and through writing, assisting with verbal and writing presentations and question and answering activities. [Student's] supralinguistic skills are good. [S/he] has an overall ability to understand the deeper meanings of vocabulary and syntax to use language flexibly across both receptive and expressive formats. [S/he] comprehends and uses figurative language, utilizes context clues to define words and effectively answer questions that require background knowledge. These skills assist [her/him] to participate in higher level thinking activities in English, Math and Science classes.

[Student] has average pragmatic language skills. [S/he] demonstrates appropriate use of language during rituals and conversation. [Her/his] weakness is making relevant contributions to topics during conversations. [S/he] appropriately asks for, gives, and responds to information. [Her/his] weakness is asking others for help. [Student] reads, interprets, and demonstrates nonverbal messages effectively.<sup>78</sup>

24. On January 11, 2021, DCPS developed a BIP.<sup>79</sup> The behaviors that were impeding

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<sup>76</sup> *Id.* at 6-7 (119-20).

<sup>77</sup> P10:1 (122).

<sup>78</sup> *Id.* at 7-8 (128-29).

<sup>79</sup> P22:1 (141).

learning were “Lack of Initiative (work avoidance)” and “Disengagement.” The antecedents to the behavior were that s/he “seems to disengage with [his/her] classwork when [s/he] feels it is too challenging and or [s/he] is given a verbal prompt to participate in the class. [Her/his] lack of initiative seems to occur when [s/he] is presented with something [s/he] does not want to do.” The strategies and resources necessary to address the targeted behaviors were: Social/Emotional Counseling, Teacher check-ins, and Teacher use of academic interventions and accommodations.<sup>80</sup> When Student disengages, “Teachers will provide [Student] with an opportunity to engage separate from the class to identify the reasons for [her/his] disengagement. If needed, [s/he] will have an opportunity to discuss [her/his] concerns with social worker or other identified support person for additional support.” When s/he shows a lack of initiative, “Virtually, [her/his] teachers will break down instructions and ensure [her/his] understanding before releasing work independently. [Her/his] teachers will walk to [her/his] desk when requesting information and/or checking for understanding when in the school building.”<sup>81</sup>

25. On January 12, 2021, DCPS conducted an IEP Annual Review meeting, the first such meeting at which Student had [REDACTED].<sup>82</sup> Student was represented by Attorney A and Witness C at the meeting.<sup>83</sup> The IEP team changed Student’s classification to Other Health Impairment (“OHI”) due to ADHD.<sup>84</sup> The Consideration of Special Factors reported that Student’s ADHD was interfering in her/his ability to access the curriculum:

[S/he] appears to internalize [his/her] emotions, and [s/he] will disengage in the virtual classroom setting, displaying a lack of initiative regarding starting classwork and completing homework. These concerns are preventing [her/him] from successfully accessing the general education curriculum. [Student] is provided behavior support services; however, [s/he] does not consistently attend [her/his] sessions. It should be noted that [his/her] participation has increased from last school year.<sup>85</sup>

The Reading PLOP reported the WJ-IV scores from Witness E’s November 25, 2020 Psychological Reevaluation. The baselines were: (1) S/he currently reads a grade level text with support. While s/he can identify literary elements, s/he struggles to apply the elements in text-based responses, and (2) S/he identifies initial items rapidly and identifies more difficult items through increased application of phoneme-grapheme relationships. Due to his/her reading stamina/ability level, it is challenging for her/him to find evidence in the text to support [his/her] views.<sup>86</sup> In Written Expression, the PLOP related that Student has difficulty applying his/her thoughts into writing. “[S/he] struggles to acknowledge a counter-argument, which weakens [her/his] claim by making [his/her] writing a one-sided argument. The baselines were: (1) On the recent WJ-IV, her/his Writing Samples subtest score was Average. In class, s/he can write responses to prompts, but cannot take a position and defend it using textual evidence, and (2) S/he

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<sup>80</sup> *Id.* at 1-2 (141-2).

<sup>81</sup> *Id.* at 3-4 (143-4).

<sup>82</sup> P27:1 (321).

<sup>83</sup> P28:1 (342).

<sup>84</sup> P27:1 (321).

<sup>85</sup> *Id.* at 3 (323).

<sup>86</sup> *Id.* at 4-6 (324-6).



needs support in introducing her/his opinion and creating a counter argument.<sup>87</sup> The Behavior PLOP was largely unchanged from the previous IEP except to note that s/he “has made some gains this year, during virtual learning, as [s/he] has the ability to engage in the classroom setting without major distractions.” A September 28, 2020 SDQ reflected Average and Low Risk scores. The baselines were: (1) S/he disengages with her/his classwork when it is challenging as evidenced by not trying, and (2) His/her SDQ score was slightly raised, indicating difficulties in interacting with classmates.<sup>88</sup> The IEP reduced Student’s specialized instruction from 18 hours to 15 hours per week and retained the one hour per month of BSS, all outside general education.<sup>89</sup>

Petitioner’s attorney complained that she was not provided with recently completed FBA, occupational therapy and speech evaluations five days in advance of the meeting and, thus, was not prepared to comment on them.<sup>90</sup> Student’s mother offered that Student requires additional time to complete assignments, tests, and homework.<sup>91</sup> At no time during the meeting did Student, his/her mother, Attorney A, or Witness C raise an objection to the service hours or setting.<sup>92</sup>

26. For the second term of the 2020-21 school year, ending on January 29, 2021, Student earned the following grades: Spanish – P, Principles of U.S. Government – A-, District of Columbia History & Government – P.<sup>93</sup>

27. On February 11, 2021, DCPS issued an IEP Progress Report for the first two reporting periods of the 2020-21 school year.<sup>94</sup> S/he was reported to be progressing on all of her/his goals while the two Behavior goals were “Just Introduced” in the second reporting period.<sup>95</sup>

28. Student [REDACTED] and has been accepted into Morgan State University and Jackson State University.<sup>97</sup>

29. Witness B opined that Student’s setting, 18 hours of specialized instruction outside of general education, was too restrictive for a student with average cognitive abilities, and that more of his/her services should have been “pushed-in” to a general education setting. She also suggested that Student would have benefitted from more BSS: 60 minutes per week with 30 minutes in general education and 30 minutes outside general education.

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<sup>87</sup> *Id.* at 6-8 (326-8).

<sup>88</sup> *Id.* at 8-10 (328-30).

<sup>89</sup> *Id.* at 11-12 (331-2).

<sup>90</sup> P28:3 (344).

<sup>91</sup> *Id.* at 14-15 (355-6).

<sup>92</sup> *Id.* at 1-31 (341-72).

<sup>93</sup> P 37:10 (462).

<sup>94</sup> P31:8 (429).

<sup>95</sup> *Id.* at 8-12 (429-33).

<sup>96</sup> Testimony of Witness D.

<sup>97</sup> Testimony of Petitioner.

## 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:

In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: Where there is a dispute about the appropriateness of the child's 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.<sup>98</sup>

One of the issues in this case involves the alleged failure of DCPS to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden of persuasion on this issue; Petitioner bears the burden as to all other issues presented. The burden of persuasion shall be met by a preponderance of the evidence.<sup>99</sup>

**Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, and failing to conduct timely triennial evaluations. Specifically, Petitioner alleges that DCPS should have conducted a comprehensive psychological evaluation and an FBA no later than April 15, 2019 and up to the filing of the *Complaint*.**

The regulations require that a child with a disability be reevaluated whenever such is requested by a teacher or parent, or in the event the local education agency ("LEA") determines that the child's needs warrant it, and at least once every three years.

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—
  - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
  - (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section—

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<sup>98</sup> D.C. Code Sect. 38-2571.03(6)(A)(i).

<sup>99</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).



- (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
- (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.<sup>100</sup>

The LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining the appropriate content of the child's IEP.<sup>101</sup>

In the case of a triennial evaluation, the LEA must review all existing data involving the child's academic and disability history to determine if additional data is necessary and to determine (1) whether the child continues to have a disability, (2) if so, whether the child continues to require special education services, (3) the present levels of academic achievement and related developmental needs of the child; and (4) the appropriate content of the child's IEP:

- (a) Review of existing evaluation data. As part of ...any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—
  - (1) Review existing evaluation data on the child, including—
    - (i) Evaluations and information provided by the parents of the child;
    - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
    - (iii) Observations by teachers and related services providers; and
  - (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine...
    - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
    - (ii) The present levels of academic achievement and related developmental needs of the child...
    - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
    - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.<sup>102</sup>

DCPS conducted its first reevaluation of Student in January 2016. Thereafter, Student entered School A for the 2017-18 school year with an IEP that had been developed at School C on May 22, 2017. That IEP classified Student with Multiple Disabilities (Emotional Disturbance and OHI). The only evaluation in the record prior to this IEP was conducted in 2013, and Examiner A determined that Student had an SLD in reading and written expression. Examiner A also reported that Student carried a preexisting diagnosis of ADHD. There is no diagnosis in the record of any other mental illness. Thus, it is unclear from the record why Student's second classification on the May 22, 2017 IEP was Emotional Disturbance rather than SLD.

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<sup>100</sup> 34 C.F.R. §300.303.

<sup>101</sup> 34 C.F.R. §300.304.

<sup>102</sup> 34 C.F.R. §300.305.

The May 2017 IEP indicated that Student's behavior had improved "tremendously," in that s/he had stopped absconding from class and hiding from the staff, and had improved in turning in assignments, although s/he still engaged in disruptive, off-task behaviors. That IEP increased his/her specialized instruction in reading and written expression from 7.5 to 18 hours per week and maintained two hours per month of BSS.

The first IEP developed at School A on April 11, 2018 revealed that Student was reading eight grades below her/his current level, but his/her English teacher asserted that the Lexile score did not reflect Student's actual capability, and that "[Student] is able to read a grade level text when provided support in decoding unfamiliar words." Similarly, in Written Expression, s/he scored 6-7 years below his/her current level, but the English teacher reported that s/he was able to write responses to grade level prompts. Student continued to require support to regulate his/her emotions and to reduce off-task behavior. That off-task behavior was described as Student's habit of trying to avoid challenging assignments. The April 11, 2018 IEP team retained the 18 hours per week of specialized instruction outside general education, but reduced the BSS from two hours per month to ninety minutes per month.

In December 2018, DCPS conducted an AED. At that time, a reading inventory assessment indicated that s/he was four grades below level as of May 23<sup>rd</sup> of that year. His/her only failing grades were in English and Reading Workshop, which his/her English teacher attributed to his/her "failure to complete assignments and class avoidance." Otherwise, teachers described him/her as a "pleasure to have in class," a good participant in class discussions, and "can be a leader among [his/her] peers." The year-end reports revealed C grades in all courses except D's in Reading Workshop and Automotive Technology, and progress on all of her/his goals. An IEP developed on December 12, 2018 reported that Student's behavior had improved during the 2018-19 school year, but continued to require support for inattentiveness, and s/he had continued to be late to classes.

Student's December 10, 2019 IEP reflected a deterioration in Student's behavior during the first two terms of the school year, leading to several reprimands. Her/his academic challenges were attributed to distractibility, inattentiveness, and negative behaviors. S/he was also reported to avoid participating in BSS. The IEP team again prescribed 18 hours of specialized instruction outside general education, but reduced his/her BSS to one hour per month. SDQ's in January and May 2020 revealed Average and Low Risk scores. At year-end, Student had B level grades in History & Geography and English, and passed all other courses.<sup>103</sup>

By the time of Student's October 20, 2020 AED meeting, s/he was again being described as a class leader in U.S. Government. "[Student] motivates the other students to engage in conversation, and [Student] assists with maintaining order." It was also reported that s/he had made progress in participating in BSS, being more open to discussing his/her academic challenges. DCPS acceded to Student's mother's request for psychological, occupational therapy, speech and language, and functional behavior evaluations. The November 25, 2020 Psychological Triennial Reevaluation determined that Student did not meet the criteria for Emotional Disturbance, but it

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<sup>103</sup> Student failed Automotive Technology II, but passed Automotive Technology III.

confirmed the negative impact of ADHD on Student's academic performance. The FBA was developed on December 4, 2020, followed by a BIP on January 11, 2021.

In the January 12, 2021 IEP Annual Review meeting, the English teacher reported that Student was capable of reading grade level text with support. In Written Expression, s/he was able to write responses to grade level prompts and scored in the Average range on the recent WJ-IV Writing Sample subtest. In Behavior, s/he had made gains during virtual learning, evincing the ability "to engage in the classroom setting without major distractions." Student passed her/his three courses in the term ending on January 29, 2021, including an A- in District of Columbia Government.

As set forth in the regulations above, the purpose of a triennial evaluation is to determine Student's continued eligibility for services, and to inform the determination of the appropriate content of the IEP. DCPS conducted a reevaluation in 2016, conducted AEDs in 2018 and 2020, and completed psychological, OT, speech, and functional behavior assessments in 2020.<sup>104</sup> The issue is whether Petitioner has met his/her burden of proving that DCPS failed to conduct triennial evaluations adequate for their intended purpose. I conclude that Petitioner has failed to meet that burden. The record is consistently clear that while Student has average cognitive ability, s/he has reading and writing disabilities that require support. Ever since s/he has been at School A, s/he has been in a small class environment receiving up to 18 hours per week of specialized instruction in her/his two academic areas of need, reading and written expression. Student's 2012 diagnosis of ADHD led to his/her original classification of Multiple Disabilities (ED and OHI), and each IEP and AED in the record addressed BSS services that s/he has received for distractibility, inattentiveness, and off-task behavior. The psychological evaluation conducted in November 2020 confirmed my suspicion that the ED classification was unsupported. Nevertheless, throughout the school years at issue, Student received BSS services for the behaviors that were affecting his/her ability to access the curriculum.

Petitioner offered no evidence that s/he was suffering from a disability which should have been suspected by DCPS. Although DCPS agreed to conduct OT and speech evaluations in late 2020, there was no showing in this record of the need for those evaluations. The psychological reevaluation reaffirmed the diagnosis of ADHD and student's weaknesses in reading and writing. While DCPS agreed to conduct the FBA, the record supports the conclusion that while Student exhibits classic symptoms of ADHD and engages in off-task behaviors, s/he also has been described as a pleasure to have in the classroom, a class leader, and a motivator of her/his peers.

Therefore, I conclude that Petitioner has failed to meet his/her burden of proving that DCPS failed to evaluate him/her in all suspected areas of disability or that DCPS failed to conduct adequate triennial evaluations of Petitioner.

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<sup>104</sup> P8:1 (83), P11:1 (131), P10:1 (121), and P9:1 (113).

**Whether DCPS failed to provide an appropriate IEP since December 9, 2019. Specifically, Petitioner alleged that Student’s IEPs failed to provide appropriate levels of specialized instruction, did not place Student in the least restrictive environment (“LRE”), did not provide appropriate goals and baselines, and because they were not informed by updated evaluations and/or assessments.**

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>105</sup> The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>106</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”<sup>107</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>108</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>109</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.’”<sup>110</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>111</sup>

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

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<sup>105</sup> 458 U.S. 176, 187 (1982).

<sup>106</sup> *Id.* at 189-90, 200

<sup>107</sup> *Id.* at 200.

<sup>108</sup> *Id.* at 203-04.

<sup>109</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>110</sup> *Id.* at 997.

<sup>111</sup> *Id.* at 1000-01 (citations omitted).

When all is said and done, 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. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>112</sup>

Petitioner’s novel theory in advancing this issue is that Student suffered educational harm because DCPS placed him/her in a setting that was not his/her least restrictive environment. In other words, Student would have progressed more had s/he received more of his/her specialized instruction in a less restrictive setting. The problem with this theory is that Petitioner offered no legal or educational support for its validity.

In the hundreds of cases that I have adjudicated involving not only Attorney A’s law firm, but all of the attorneys who have alleged the inappropriateness of IEPs, the consistent argument has been that more services in a more restrictive setting will yield academic improvement. Moreover, in addition to expert testimony supporting these arguments, it is intuitive that the lower the student/teacher ratio, and the more individual attention a student receives, the greater the likelihood of academic improvement.

Petitioner has cited no legal authority for the proposition that a less restrictive setting is more likely to confer educational benefit. It is a historical fact the EHA was enacted to ensure equal educational opportunity for disabled students, and that Act, like IDEA, “requires participating States to educate handicapped children with nonhandicapped children whenever possible.”<sup>113</sup> However, that mandate was to address the fact that “millions of handicapped children ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’”<sup>114</sup>

While Student’s mother testified that she emphatically protested Student’s placement in a self-contained, small class environment at every meeting she attended, the record does not support this assertion. In fact, nowhere in the record is there any indication that Petitioner’s mother had any dispute with Student’s restrictive classroom setting. Student was first provided 18 hours of specialized instruction outside general education on May 22, 2017 at School C. The record includes no meeting notes from that meeting. However, when the IEP team at School A prescribed the same setting on April 11, 2018, the meeting notes reflect no dissent by Student’s mother. At the AED meeting on October 20, 2020, Student’s mother and attorney raised concerns about Student’s motor skills and physical development, but said nothing about the restrictive setting. Even more significantly, at the IEP team meeting on January 12, 2021, when the team prescribed 15 hours of specialized instruction outside general education, Student was represented by Attorney A and Witness C, his/her educational advocate. These representatives expressed concern that Student might have an underlying language weakness that is attributing to difficulties with reading

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<sup>112</sup> 137 S.Ct. at 1000-01.

<sup>113</sup> *Rowley*, 458 U.S. at 202.

<sup>114</sup> *Id.* at 191, citing H.R.Rep. No. 94-332 at 2 (1975).

and writing, but said nothing about the restrictive classroom setting. Again, there was no mention of, or dissent to, the prescribed setting recorded in the 31 single-spaced pages of meeting notes.<sup>115</sup>

The question is whether DCPS developed IEPs that were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. Over the past two years, Student has certainly demonstrated inconsistency both in his/her academic achievement and in his/her behavior. Despite documented deficiencies in his/her ability to read and write, Student's English teachers have reported that s/he is capable of reading grade level text with support, s/he was able to write responses to grade level prompts, and s/he scored in the Average range on the WJ-IV Writing Sample subtest in November 2020. While Student's off-task behavior has had a negative impact on her/his ability to access the curriculum, s/he has also been described in glowing terms as a leader and motivator. Although Student's grades over the past two years have been no better than average, s/he passed from grade to grade, graduated, and was accepted by two universities.

I conclude that as this issue is grounded on the unfounded premise that less intensive support would have produced greater educational benefit, Petitioner has failed to make a *prima facie* case that DCPS has failed to provide Student with appropriate IEPs since December 9, 2019.

**Whether DCPS denied Student a FAPE by failing to conduct an FBA and develop a BIP and safety plan at the inception of Student's enrollment at School A.**

Student enrolled at School A for the 2017-18 school year. As August 2017 is more than two years prior to the filing of the *Complaint*, this claim is barred by the statute of limitations.<sup>116</sup>

The record also does not support a finding that within the last two years, DCPS was derelict in failing to develop an FBA until it was specifically requested by Student's mother on October 20, 2020. As was discussed above, Student engaged in off-task behavior, was inattentive, and, at times, was disruptive in the classroom. However, to the extent Student was disruptive, it never warranted disciplinary action. Other than the reference in the December 9, 2019 IEP to "several reprimands" for his/her acting out behavior, it appears that Student's inappropriate behavior was adequately managed by her/his teachers. There is no record of a suspension throughout her/his four years at School A. FBAs are typically indicated where the student's behavior is persistent, physically and/or verbally aggressive, and/or impairs the ability of classmates to learn or the teacher to maintain order in the classroom. Student's behavior did not rise to that level. On the contrary, teachers found her/him to be a pleasure to have in the classroom and, at times, a class leader and motivator. In the latest IEP, the Behavior PLOP reported that s/he had made gains this year during virtual learning, demonstrating the ability to engage in the classroom setting without major distractions. I conclude that Petitioner has failed to meet his/her burden of proving that DCPS failed to develop a necessary FBA, BIP, or safety plan.

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<sup>115</sup> P28:1-31 (341-272).

<sup>116</sup> 20 U.S.C. §1415(f)(3)(C).

**Whether DCPS denied Student a FAPE by failing fully to implement Student's IEPs developed on December 12, 2018, December 10, 2019, and December 7, 2020. Specifically, DCPS has failed to provide 52% of prescribed behavior support services ("BSS") from April 2019 until November 2019. From December 2019 to March 2020, DCPS failed to provide 43% of prescribed BSS.**

Student's 2018-19 IEP prescribed 90 minutes per month of BSS. The statute of limitations precludes claims prior to April 15, 2019. Between April 15, 2019 and the end of the school year in June, Witness D provided 90 minutes of BSS, school was closed during the week of April 15<sup>th</sup>, when Student would have had services on April 19<sup>th</sup>, and Student was unavailable for services on May 31, 2019.

During the 2019-20 school year, Witness D provided 60 minutes of BSS on in September, 90 minutes in October, 45 minutes in November, and Student was unavailable for services on November 26, 2019. Student's IEP was reviewed and revised on December 10, 2019 in which BSS services were reduced to 60 minutes per month. Witness D then provided 60 minutes in December, 75 minutes in January 2020, 105 minutes in April, 50 minutes in May, and Student was unavailable for services on December 12, 2019.

In *Johnson v. District of Columbia*,<sup>117</sup> the parents argued that the student's placement was inappropriate because [REDACTED] could provide only 28.25 of the 31 hours prescribed on the student's IEP, and did not have qualified special education teachers to provide adequate instruction in Spanish and physical education. The court ruled that the 28.25 hours was 91% of the hours prescribed and did not constitute a "material deviation" from the requirements of the IEP. The *Johnson* court was also satisfied that DCPS was endeavoring to hire special education teachers in Spanish and physical education that would allow the student subsequently to receive the necessary credits. The court cited *Savoy v. District of Columbia*,<sup>118</sup> where a difference of one hour per week was not deemed material, and *Catalan ex. rel. E.C. v. District of Columbia*,<sup>119</sup> where this Hearing Officer was upheld for approving counseling sessions being terminated before the full 45 minutes when, in the professional provider's opinion, the sessions had reached the point of diminishing returns.

I conclude that DCPS was in substantial compliance with its obligation to provide 90 minutes of BSS per month from April 15, 2019 to December 10, 2019, and 60 minutes per month from December 10, 2019 until May 29, 2020.

## **RELIEF**

For relief, Petitioner requested, *inter alia*, (1) an order directing DCPS to develop an appropriate IEP including updated transition goals with data from a Vocational Level II

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<sup>117</sup> 962 F.Supp.2d 263 (D.D.C. 2013). *See also*, *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008).

<sup>118</sup> 844 F.Supp.2d 23, 34 (D.D.C. 2012).

<sup>119</sup> 478 F.Supp.2d 73, 76 (D.D.C. 2007).

evaluations, (2) compensatory education, and (3) attorney's fees.

### ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, and the closing arguments by the parties' counsel, it is hereby

**ORDERED**, that the *Complaint* is **DISMISSED**.

### APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: July 6, 2021

Copies to: Attorney A, Esquire  
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