

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

Parents on behalf of Student¹)	Case No. 2021-0013
)	
Petitioner,)	Hearing Dates: May 18-20, 2021 and
)	June 9, 2021
)	
)	Conducted by Video Conference
v.)	
)	Date Issued: July 19, 2021
District of Columbia Public Schools,)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioners are the parents of a [REDACTED]-year-old student (“Student”) attending School A. On January 27, 2021, Petitioners filed a *Due Process Complaint Notice* (“Complaint”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing timely to fulfill its child find obligations, thereafter failing to provide appropriate Individualized Education Programs (“IEP”) and placement, and failing to implement IEPs. Respondent filed *District of Columbia Public Schools’ Response to Parents’ Amended Administrative Due Process Complaint* (“Response”) on February 9, 2021, denying that it had failed to provide 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

¹ 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 January 27, 2021 alleging that DCPS denied Student a FAPE by (1) failing to comply with its child find obligations and find Student eligible for special education services by January 2019, (2) failing to develop and implement an appropriate IEP on April 10, 2019, May 30, 2019, and December 12, 2019 because the IEPs (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy (“OT”) services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student, (3) failed to offer Student an appropriate IEP for the 2020-21 school year, thereby justifying the unilateral placement by Petitioners at School A and continued placement there until a FAPE is offered, and (4) failed to implement Student’s IEPs from May 2019 and December 2019. Specifically, Petitioners allege the failure to provide executive functioning support, behavior supports, accommodations (no reduced workload), and once DCPS implemented virtual learning due to COVID-19 restrictions, inconsistent specialized instruction.

DCPS filed its *Response* on February 9, 2021 and asserted that (1) on April 10, 2019, DCPS found Student eligible for special education services with multiple classifications -- other health impaired (“OHI”) and specific learning disability (“SLD”) -- and developed IEPs in April and June 2019. Later in June 2019, Petitioners forwarded reports from a developmental optometrist and occupational therapists. Student’s IEP was revised in December 2019. The IEPs developed by DCPS were based on current data, evaluation reports, and student performance, and were appropriate, (2) DCPS denied that Student’s IEPs were not appropriately implemented, and (3) DCPS proposed an appropriate placement for Student at School B for the 2020-21 school year.

The parties participated in a resolution meeting on February 12, 2021 that did not result in a settlement. The resolution period ended on February 26, 2021. A prehearing conference was conducted by video conference on March 24, 2021, and the Prehearing Order was issued that day.

The hearing was conducted on May 18-20 and June 9, 2021 by video conference and was closed to the public. Respondent’s Supplemental *Disclosure Statement*, filed May 11, 2021, contained a witness list of fourteen witnesses and documents R-1 through R-67. Petitioner filed no objections to Respondent’s disclosures. During testimony, Respondent’s Exhibits R4, R-10, R13-R14, R19, R23, R31-R32, R34, R36, R42-44, R46-47, R49-50, R57, R61, R66, and R67 were serially offered and admitted into evidence.

Petitioner's Disclosures were also submitted on May 11, 2021, containing a list of four witnesses and documents P1-P108. DCPS filed no objections to Petitioner's disclosures and Petitioner's Exhibits P1-P108 were admitted into evidence.

At the beginning of the fourth day of hearings on June 9, 2021, Respondent's counsel objected to the participation of Attorney B in the proceeding, as she is not a member of the District of Columbia Bar. Rule 49(c)(8) of the District of Columbia Court of Appeals, authorizes attorneys who are in good standing and authorized to practice in another state, and are under the supervision of an enrolled, active member of the D.C. Bar, and has applied for admission to the D.C. Bar. Based on the representations of Attorney A and Attorney B that Attorney B met these requirements, I overruled Respondent's objection.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner/Mother, Petitioner/Father, and Witness B. Witness A was admitted to provide expert testimony in Special Education Placement and IEP Development, and Witness B was offered and admitted as an expert in Occupational Therapy ("OT"). Respondent presented as witnesses in chronological order: Witness C, Witness D, Witness E, Witness F, Witness G, Witness H, and Witness J. Respondent's witnesses were offered and admitted as experts, without objection, in the following areas: Witness C: Special Education Evaluation, Witness D: School Psychology, Witness E: Special Education Programming and Placement, Witness G: School Psychology, Witness H: OT, and Witness J: Special Education.

After the close of testimony on June 9, 2021, the parties counsel provided oral closing arguments. I also authorized counsel to submit authorities on which they rely. Attorney A filed summaries of cases on which Petitioner relies and page citations to evidence in the record on June 14, 2021.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to comply with its child find obligations and find Student eligible for special education services by January 2019.
2. Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate IEP on April 10, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy ("OT") services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.
3. Whether DCPS denied Student a FAPE for failing to develop and implement

an appropriate IEP on May 30, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy (“OT”) services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.

4. Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate IEP on December 12, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy (“OT”) services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.
5. Whether DCPS denied Student a FAPE by failing to offer an appropriate IEP for the 2020-21 school year, thereby justifying the unilateral placement by Petitioners at School A and continued placement there until a FAPE is offered.
6. Whether DCPS denied Student a FAPE by failing to implement Student’s IEPs from May 2019 and December 2019. Specifically, Petitioners allege the failure to provide executive functioning support, behavior supports, accommodations (no reduced workload), and once DCPS implemented virtual learning due to COVID-19 restrictions, inconsistent specialized instruction.

FINDINGS OF FACT

1. Student is X years old and was in grade F² at School A during the 2020-2021 school year.³

2. School A is a non-public, special education school in which all of the students have Specific Learning Disability (“SLD”) as one of their classifications.⁴ School A does not offer a full range of related services, employing only a social worker.⁵

3. On August 5, 2014, Examiner A completed a Psychological Assessment of Student due to Petitioners’ concerns about anxiety, separation anxiety, and regulation of

² Petitioner’s Exhibit (“P:”) 25 at page 1, electronic page 225. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P25:1 (225).

³ P27:1 (252).

⁴ Testimony of Witness A; P76:2 (668).

⁵ Testimony of Witness A.

her/his emotions.⁶ On the Wechsler Preschool and Primary Scale of Intelligence (“WPPSI-IV”), Student’s Full-Scale IQ was 111, in the High Average range. Her/his highest score was in Working Memory (118 – High Average), and his/her lowest was in Processing Speed (94 – Average).⁷ On the Woodcock Johnson Tests of Achievement (WJ-III), his/her scores ranged from Average in Broad Written Language (106) and Broad Reading (104) to Superior in Broad Mathematics (126).⁸ In Social-Emotional Functioning, Examiner A used the Child Behavior Checklist (“CBCL”) where Petitioner/father’s responses placed Student in the Clinical range on the Anxious/Depressed syndrome scales. Student was Borderline Clinical in Withdrawn/Depressed. Petitioner/mother’s responses placed Student in the Borderline Clinical range in Anxious/Depressed. On the Children’s Apperception Test (“CAT”), responses revealed that Student believes s/he lacks the resources s/he needs to manage challenging situations without the assistance of adults.⁹ Examiner A opined as follows:

In summary, both by parental report and through examination of the projective testing, [Student] appears to be struggling to manage anxieties related to managing interpersonal scenarios (including separations) that are seen as threatening, and that [s/he] feels ill equipped to manage without significant assistance from adults...

There was some variability in index scores, but overall [Student’s] performance on the cognitive portion of the assessment indicates high average cognitive capabilities, both verbal and non-verbal, with a relative strength in working memory and a relative weakness in processing speed. [Student’s] scores on the WJIII NU indicate that [s/he] is performing slightly below expected in the core academic areas of reading and writing, and somewhat better than anticipated in mathematics...

With all of the above in mind, the following recommendations are provided:

[Student] has the cognitive capacity to succeed in a typical academic setting, and performs at or near grade level on most of the achievement testing today. [S/he] would benefit from a classroom environment that is commensurate with [her/his] cognitive and academic functioning.

Given a relative weakness in reading fluency, I would encourage [Student’s] parents to incorporate (or continue to incorporate) regular reading time at home, working on all aspects of reading – including decoding and comprehension – but especially aiding [Student] in increasing [her/his] confidence in this area.

[Student] struggles to feel competent to negotiate novel or challenging situations, especially of an interpersonal/social nature. I would here recommend that [her/his] parents continue to encourage [Student] gently in

⁶ P29:1 (386).

⁷ *Id.* at 2-3 (387-88).

⁸ *Id.* at 4-5 (389-90).

⁹ *Id.* at 5-6 (390-91).

this area, facilitating [his/her] independence, and maximizing [her/his] opportunities for success... Should [s/he] continue to struggle, despite [her/his] parents' efforts, I would recommend considering further parent guidance meetings and/or play therapy for [Student] [her/himself] to provide [her/him] with more tools to regulate [her/his] feelings and behavior.¹⁰

4. During the 2016-17 school year, Student was in grade F at School C. Student earned grades of Advanced in Music and Health & Physical Education, and Proficient in Reading, Writing & Language, Speaking and Listening, Math, Social Studies, Art, and Science, Student was found to be "Secure" in virtually all of the subcategories for each course.¹¹ In the twelve behavioral categories, Student was graded as acting appropriately either "Independently" or "With Limited Prompting" in all categories.¹²

5. During the 2017-18 school year, Student was in grade A at School C. S/he earned grades of Advanced in Art, and Proficient in Reading, Writing & Language, Speaking and Listening, Math, Science, Music and Health & Physical Education. Student was found to be "Secure" in virtually all of the subcategories for English Language Arts ("ELA"), Math, and Science, and predominantly "Developing" in Music and Health & Physical Education.¹³ In the twelve behavioral categories, Student was graded as acting appropriately either "Independently" or "With Limited Prompting" in all categories except "Completes and returns homework," which s/he did "Rarely."¹⁴

6. On June 1, 2018, School Psychologist A reported on her review of "a social-emotional/behavior screening" that was conducted at Petitioners' request.¹⁵ School Psychologist A's findings and conclusions include the following:

Results across raters did reveal concerns in the areas of attention, anxiety, depression, social engagement, and executive functioning... In the classroom, [Student] reportedly has trouble following multiple-step directions, initiating independent tasks, organizing [his/her] materials, and maintaining work stamina. These observations appear to occur more during reading and writing based tasks. In the past, school staff have also reported a few incidents of social conflict with same-aged peers. Overall, this screening does suggest that [Student] would benefit from guidance counseling support and/or cognitive behavioral therapy to address the above areas of concern.¹⁶

¹⁰ *Id.* at 6-7 (391-92).

¹¹ P47:1-3 (519-21).

¹² *Id.* at 1 (519).

¹³ P54:1-3 (546-48).

¹⁴ *Id.* at 1 (546).

¹⁵ P30:1 (394). The behavior rating scales referenced in the report include the BASC-3, the Conners Behavior Assessment System (Conners-3) and the Behavior Rating Inventory of Executive Function (BRIEF-2). In Witness G's Review of Independent Psychological Evaluation, it was revealed that these screenings were conducted after an incident in which Student poked another student with a thumbtack. P32:3 (424). Petitioner/mother's testimony corroborated this account. Thus, it is apparent that the screening reviewed by School Psychologist A is not in the record.

¹⁶ *Id.*

7. On June 3, 2018, Petitioner/father inquired of Teacher D and Teacher E “what particular strategies or accommodations you have been using in the classroom to address both social emotional and academic performance.” Teacher D responded: “The strategies we’ve used for [Student] in ELA have included: preferential seating where [s/he] feels [s/he] can focus; a daily behavior chart that tracks [her/his] focus during the lesson, and [his/her] ability to begin and complete [her/his] work; restating the assignment one-on-one; providing written instructions for assignments, and teacher models; and frequent check in meetings to quickly look at [her/his] work and talk about next steps. Of these, I think the behavior chart has had the most impact, particularly around work initiation and completion.”¹⁷ Teacher E responded: “On the social/emotional side, [Student] has benefitted from a check-in at the beginning and end of each day... Academically, [Student] works best when [s/he] knows [s/he’ll] be held accountable for [her/his] work. I look at the students’ work every day and call them in at lunch the next day if it’s unfinished (which has happened a few times for [her/him]). Along those lines, group work can be difficult for [her/him] sometimes, but a word of encouragement to prompt [him/her] to fully engage is usually all it takes for [her/him] to become actively involved in the project. [S/he] is a good mathematician and after getting through a few bumps early in the year, [s/he] has been very successful – therefore [s/he] hasn’t needed individualized strategies or accommodations in order to achieve this success...”¹⁸

8. During the 2018-19 school year, Student was in grade D at School C. On October 2, 2018, Teacher A and Teacher B, issued Mid-Term Progress Report for Reading, reporting to the parents that “your student is currently presenting some academic difficulty in this subject:”

We are checking-in and redirecting [his/her] focus so that [s/he] is attentive during our mini-lesson.

We are meeting with [him/her] in [her/his] book club and providing support around the work and the club’s conversation.

Please encourage [Student] to remain on task and to complete [his/her] Independent work when assigned and to ask questions when clarity is needed. It is imperative that [Student] stay focused during lessons and remain on task during independent and group work time. The best way to facilitate being prepared and successful in reading class is to complete [his/her] homework nightly and have [her/his] materials organized in [her/his] binder ready to go for the next day. The homework reinforces the day’s lesson and helps to prepare for the next day’s conversation. At this time, a formal conference is not necessary.¹⁹

The report indicated that Student was reading on grade level, but needed to “stay focused in class and to use [his/her] time effectively during independent reading time. It is important for [him/her] to fully engage in lessons, consistently complete [her/his] independent class work

¹⁷ P1:2 (2).

¹⁸ *Id.* at 1 (1).

¹⁹ P55:1 (550).

and homework and practice the reading strategies taught in class...”²⁰ For the first term of the 2018-19 school year, Student earned grades of Basic in Reading, and Proficient in Writing & Language, Speaking & Listening, Math, Science, Music, Art, and Health & Physical Education. His/her behavior was appropriate either “Independently” or “With limited prompting” in each of the twelve categories.²¹

On December 12, 2018, Teacher A and Teacher B issued a Mid-Term Progress Report with the similar concerns and additional accommodations to those in the October 2, 2018 report²²

We are checking-in and redirecting [his/her] focus so that [s/he] is attentive during our mini-lesson.

We have changed [her/his] carpet seating to maximize [his/her] productivity.

We are checking in with [her/him] during small group and individual work time to ensure that [s/he] understands the task and is completing the work.

For the second term, Student earned grades of Basic in Reading and Writing & Language, and Proficient in all others. His/her behavior was appropriate either “Independently” or “With limited prompting” in each of the twelve categories except “Follows directions,” in which s/he needed “frequent prompting.”²³ The teachers urged Petitioners to “Please continue to encourage [Student] to focus during lessons, bring the needed materials for class and to find appropriate times to chat with peers.”²⁴ Writing teachers informed Petitioners in a conference on December 13, 2018 that Student’s performance was below grade level expectations in three aspects: (1) introductions should be complete, (2) s/he has difficulty identifying the main idea and supportive evidence, and (3) s/he does not advocate for her/himself.²⁵

In the third term of the 2018-19 school year, Student’s grades were Proficient in Social Studies, Science, Music, Art, and Health & Physical Education, and Basic in Reading, Writing & Language, Speaking & Listening, and Math. His/her behavior was appropriate either “Independently” or “With limited prompting” in each of the twelve categories.²⁶ The Reading teacher reported that “[Student] was able to participate in most club discussions, but [her/his] lack of preparation hindered the level of [her/his] contributions... When prepared to participate, [Student] was able to offer ideas and respond to the ideas of others in the group...”²⁷

9. On March 14, 2019, when Student was in grade D, Examiner B completed a Comprehensive Psychological Evaluation. Petitioners requested the evaluation due to

²⁰ P56:1 (551).

²¹ *Id.* at 3 (553).

²² P58:1 (564), P59:1 (565).

²³ P60:1 (568).

²⁴ *Id.* at 9 (575).

²⁵ P1:6 (6).

²⁶ P61:1 (577).

²⁷ P60:9 (576).

concerns about Student's difficulties in reading, writing, and his/her ability to focus.²⁸ In her recitation of relevant aspects of Student's history, a social emotional/behavior functioning screening was initiated due to concerns related to attention, executive functioning, social development, and anxiety. On the BRIEF-2, Student's English Language Arts ("ELA") teacher noted difficulties with behavioral inhibition, self-monitoring, initiation of activities, working memory, task monitoring, and organization of materials. On the Conners-3, the ELA teacher indicated significant elevations of the inattention, hyperactivity/impulsivity, executive functioning, defiance/aggression, and peer relations scales, while the math teacher indicated only mild elevation on the peer relations scale. Petitioners noted issues with shifting attention and working memory, and Petitioner/father also endorsed challenges with self-monitoring, emotional control, initiation of tasks, planning/organization, task-monitoring, and organization of materials. On the BASC-3, Petitioners reported concerns about anxiety, depression, and withdrawal. Their responses on the Conners-3 resulted in elevated scores on inattention and executive functioning. PARCC assessment scores from the spring of 2018, when Student was in grade A, showed her/him meeting grade level expectations in math, and at the "lower extreme of the expected range" in ELA. In the first term of grade D, s/he was performing at grade level in all subjects except reading, and was "approaching grade level expectations" in reading, but her/his teacher reported that Student was reading on grade level. At the mid-term progress report, Student was having difficulty in reading due to problems with attention, focus, and organization of work.²⁹

On the Wechsler Intelligence Scale for Children ("WISC-V"), Student's Full-Scale IQ was 102, in the Average range, her/his General Ability Index (112) was High Average, and Cognitive Proficiency Index (79) was Very Low. Verbal Comprehension (111) and Visual Spatial (119) were High Average, Fluid Reasoning (103) was Average, Processing Speed (86) was Low Average, and Working Memory (79) was Very Low.³⁰ On the Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI"), Student scored Below Average. "While [his/her] reproductions did not generally include significant distortions, [her/his] drawings often lacked precision... and [s/he] sometimes seemed to have difficulty determining the necessary angle to successfully join segments together." Student was also Below Average on the Berry Tests of Motor Coordination and Visual Perception. "Overall, these results suggest some mild disturbance of [her/his] visual perceptual skills and significant impairment in fine motor functioning. These skills combine to produce mild deficits in visual motor integration."³¹

On the WJ-IV, Student scored Average in Broad Reading (96), Broad Math (104), and Broad Written Language (99). S/he was Average or High Average on all subtests, including High Average in Academic Applications (110), Writing Samples (113), Calculation (112), and Applied Problems (110).³² The Feifer Assessment of Reading ("FAR") administered to assess the component skills of reading. Student was Above Average on the Phonological Index (110, 75th percentile) and in Phonemic Awareness (116), but on the Fluency Index (81) his/her score was at the lower end of the Below Average range,

²⁸ P31:1 (395).

²⁹ *Id.* at 4-5 (398-99).

³⁰ *Id.* at 8-11 (402-405).

³¹ *Id.* at 11 (405).

³² *Id.* at 12-14 (406-08).

performing below to moderately below average on tasks that involved orthographic perception of individual letters (Visual Perception (88); Rapid Automatic Naming (74)),³³

...[i]ndicating a lack of automaticity in alphabetic recognition skills. Students with slower rapid naming skills tend to have slower reading speed due to difficulties recognizing text orthography in an automatic and integrated fashion. [Student] also had difficulty on higher-level orthographic processing tasks that required [her/him] to form a visual-spatial image of the printed word form (Orthographical Processing, SS=82). Individuals with this type of score profile generally have difficulty spelling words, especially phonologically irregular words, due to an inability to hold and maintain an orthographic representation of the printed word form in the mind's eye. [Student] demonstrated low average ability to quickly read a list of phonologically inconsistent words (Irregular Word Reading Fluency, SS=93). This task serves as a measure of [her/his] ability to remember the orthographic structure of words, as decoding strategies are not necessarily effective with irregular words...

Subtest results within the Comprehension Index (SS=107, 68th percentile) were scattered across the average range. [Student] showed good overall knowledge of word meanings (Semantic Concepts, SS=95) and solid understanding of word structures inclusive of prefixes and suffixes (Morphological Processing SS=103). [His/her] lowest score came on a task assessing working memory for isolated words (Word Recall SS=90) ... This suggests difficulties self-organizing verbal information, which may impair [her/his] recall.³⁴

Student's executive functioning, the skills needed to organize and plan complex cognitive tasks, was assessed through the Behavior Rating Inventory of Executive Function (BRIEF-2). The assessment was conducted by eliciting responses to questions from Petitioners and Student's Reading, Writing, and Science teachers. The Behavior Regulation Index ("BRI") measures the ability to regulate and monitor behavior effectively. Responses from her/his Reading teacher produced a mildly elevated BRI score (61), while Petitioner/father score was in the "potentially clinically elevated" range (66). Two of [her/his] teachers and Petitioner/father rated him/her as having some trouble monitoring her/his behavior in social settings (Self-Monitor - 61, 65, 63). The Emotion Regulation Index measures the ability to regulate emotional responses and to shift, set, or adjust to changes in environment, people, plans, or demands. Petitioner/father's scores (77) placed Student in the Clinically Significant range. Both Petitioners and Student's writing teacher rated her/him as having difficulty adjusting to changes flexibly. While his/her teachers did not endorse deficits in her/his ability to modulate or regulate her/his emotional responses, Petitioner/father did. The Cognitive Regulation Index reflects the competence to control and manage cognitive processes and to solve problems effectively. Petitioner's father and two teachers provided responses yielding mildly elevated scores, but Student's science teacher's scores resulted in no elevated subscales. The ability to sustain attention was measured directly by the Test of

³³ *Id.* at 14-16 (408-10).

³⁴ *Id.* at 16. (410).

Variables of Attention (“TOVA”). Student’s overall performance on the TOVA was within normal limits.³⁵

Student’s social, emotional, and behavioral functioning assessed through the BASC-3 Rating Scales for Children:

The profiles generated by [his/her] parents’ and teachers’ responses reflect general agreement regarding the presence of some mild anxiety, with varying reports of attention problems and unusual behaviors. [Her/his] teachers tended to report far greater frequency and severity of problems compared with [Student’s] parents. This likely reflects the differing demands of the home and school environments...

For the most part, Externalizing Problems (Hyperactivity, Aggression, and Conduct Problems) were not seen as a significant problem for [Student]... [Petitioner/father] indicated the presence of a clinically significant level of aggressive behaviors (Aggression, T=83), though mostly in the form of argumentativeness (Conduct Problems, T=67).

[Student’s] teachers did not report observing significant signs of Internalizing Problems (Anxiety, Depression, Somatization), but [his/her] parents both endorsed significant concerns in this area...

Mild Attention Problems were identified by [Student’s] reading teacher (T=65), but ratings by [his/her] science and math teachers did not reach the “at-risk” range (T=58, 54). [Petitioner/father] also reported concerns regarding [Student’s] ability to maintain necessary levels of attention (T=63), with particular problems noted with distractibility and concentration... Examination of specific items endorsed [by Student’s teachers] showed that in reading, [Student] has significant difficulty keeping up in class and completing tests, demonstrates notable problems with reading and spelling, and struggles to employ critical thinking skills.

[Student’s] teachers did not report the presence of any notable level of odd behaviors (Atypicality), though [Petitioner/father’s] ratings reached the at-risk range... [His/her] parents perceive [Student] as often shy with other children, slow to join group activities. In comparison, when [her/his] teachers’ responses were reviewed, all teachers believe that [Student] never avoids making friends and two feel that [s/he] never has trouble making new friends...

The Adaptive Skills composite involves appropriate emotional expression and control, daily living skills, communication, and prosocial, organizational, and other common components of good core daily functioning. In comparison to [his/her] peers, two teachers and [her/his] father rated [Student] as having some trouble adapting to changing situations and quickly recovering from

³⁵ *Id.* at 16-18 (410-12).

difficult situations (T=38, 34) ... [h]is reading and science teachers described [Student] as only sometimes staying on task, while [his/her] math teacher rate [him/her] as often being on task. All three teachers reported that [Student] is only sometimes well organized and sometimes completes [her/his] homework. [Student's] science and reading teacher indicated that [Student] never analyzes the nature of problems before starting to solve them, while [her/his] math teacher sees [him/her] often taking this approach. [Her/his] math teacher perceives [Student] as almost always trying to do well in school, while [his/her] other teachers described this effort being demonstrated sometimes...

[Student] endorsed a high level of Internalizing Problems (T=69, 95th percentile) that places [her/him] in the at-risk range. [S/he] perceives [REDACTED] as having little control over events occurring in [her/his] life... [S/he] indicated that [s/he] experiences substantial worries related to school, nervousness, and difficulty relaxing (Anxiety, T=68, 95th percentile). [Student's] score on the Depression scale falls in the clinically significant level (T=70, 95th percentile), suggesting very significant feelings of sadness, the perception of being misunderstood by others. Additionally, [s/he] expressed strong dissatisfaction with [her/his] ability to perform a variety of tasks even when putting forth substantial effort (Sense of Inadequacy, T=73).

To gain additional information about the nature and extent of [Student's] symptoms of anxiety, [s/he] was also administered the Multidimensional Scale for Children... While [his/her] Total Score fell in the High Average range (T=56), [her/his] elevation on a number of subscales indicate a high probability that [Student] is experiencing symptoms congruent with and anxiety disorder. [S/he] did not report notable fears of being away from family or loved ones, or feeling fearful of certain places or things (Separation Anxiety/Phobias, T=53). [His/her] responses reveal that [s/he] is experiencing more worries than others [her/his] age, including symptoms often associated with a diagnosis of Generalized Anxiety Disorder (GAD Index, T=68). [Student] indicated slightly elevated levels of anxiety related to the possible experience of humiliation or rejection... Specifically, [s/he] is more anxious than most kids [her/his] age about the possibility of being humiliated, embarrassed, or rejected by others in social settings... and also worries about performing in public settings...³⁶

Examiner B's conclusions and Recommendations included, *inter alia*, the following:

Currently, [Student] worries about a wide range of things including [his/her] competence and performance, how others perceive [him/her] and natural disasters. These worrisome thoughts and [her/his] hypervigilance appear to be producing feelings of restlessness and are likely to interfere at times with [his/her] ability to concentrate and attend to matters in front of [him/her].

³⁶ *Id.* at 18-22 (412-16).

Given these symptoms, [Student] meets criteria for Generalized Anxiety Disorder... A diagnosis of Other Specified Depressive Disorder, Depressive episode with insufficient symptoms... is being given to capture [her/his] negative view of [her/his] abilities and to alert those around [her/him] that [s/he] is at risk of developing more serious depressive symptoms due to anxiety, situational distress, and learning challenges.

[Student] is also facing challenges related to [his/her] variable cognitive profile. Testing revealed a significant and unusual discrepancy between [his/her] general intellectual ability... and the efficiency of [his/her] cognitive processing... Because [Student's] cognitive processing is less efficient, [s/he] will end up expending more energy and effort than others on academic tasks, and may be slower in [her/his] mastery and execution of them. This may lead [her/him] to fatigue more easily than [her/his] peers when engaged in complex tasks, manifesting as decreased stamina. These experiences may in turn produce significant feelings of frustration for [Student] and result in worry and self-doubt as [s/he] struggles to meet academic expectations...

In terms of attentional functioning, direct assessment showed [Student] demonstrating abilities within normal limits, though [her/his] attention was somewhat more variable when the task was more stimulating and required a higher rate of response... Given that these concerns are most prominent in subjects in which [s/he] is experiencing learning problems, these observations of inattentive behaviors may reflect attempts at avoidance, mental fatigue, or distress. Additionally, anxiety can greatly impact an individual's ability to focus and concentrate, and can lead to feelings of restlessness that may look similar to symptoms of attention problems. As a result, a diagnosis of ADHD does not seem prudent. It is recommended that [Student] receive treatment for [her/his] anxiety and support for [her/his] learning disability and slow processing speed.

[Student's] performance on tasks of written language showed adequate understanding of grammar and syntax, though [s/he] required ample time to think before creating sentences. [S/he] demonstrated notable difficulties with spelling, scoring below grade level and making many orthographical spelling errors across tasks... The functional impact of [Student's] reduced processing speed and uneven working memory abilities are likely to be more prominent on longer, more open ended, or more complex writing tasks, and there was ample evidence of such impairment of performance in school reports.

Results of the WJ-A and the FAR indicate that [Student] possesses solid phonological awareness and processing, but exhibits significant difficulties rapidly and automatically recognizing words in print, which results in low reading fluency. These deficits in conjunction with [her/his] poor spelling abilities indicate the presence of a Specific Learning Disability with impairment in reading... Deficits in [Student's] orthographic processing

contribute to a slower and more effortful reading process that has the potential to negatively impact reading comprehension...³⁷

A multidisciplinary team (MDT)... should consider finding [Student] eligible for specialized services based on IDEA criteria due to functional impact associated with specific learning disability in reading. [Her/his] ability to access educational opportunities is further hampered by slow processing speed and symptoms of Generalized Anxiety Disorder... The following classroom-wide adjustments and supports are recommended:

- a. Targeted reading interventions focused on improving [Student's] automaticity and fluency to address underlying orthographical processing deficits.
- b. Preferential seating close to the teacher and away from potential sources of distractions (i.e., windows and doors) that can disrupt sustained working memory.
- c. Avoiding multi-step instructions and slowly providing clear concise, and specific directions...
- d. When new material is being introduced, the rate at which the information is being presented may need to be adjusted to allow additional processing time or too rehearse the information...³⁸

Examiner B also recommended that Student be evaluated by an occupational therapist “to further clarify factors that may be hindering [Student's] written expression.”³⁹

10. On April 8, 2019, Witness G completed a Review of Independent Psychological Evaluation of Examiner B's evaluation.⁴⁰ Witness G suggested that the MDT consider an additional classification of Other Health Impairment (“OHI”) in light Student's “executive functioning challenges and emotional difficulties that appear to be having an adverse impact on [her/him] at school... Regardless of the disability classification chosen, testing indicates that [Student] would benefit from specialized instruction in reading along with behavior support and accommodations to bolster [his/her] self-confidence and to support [her/his] overall social-emotional well-being.”⁴¹ In addition to her agreement with Examiner B's recommendations, Witness B's recommendations included, but were not limited to, the following: (1) Allow extended time for assignments and exams that involve reading and written expression, (2) Oral directions for assignments, (3) Allow use of speech to text option for writing assignments, (4) Use of multimodal instructional methods, (5) Teacher check-ins to ensure task initiation, work completion, and on-task behavior, (6) Frequent movement breaks, (7) Access to small group support across content areas to ensure comprehension of concepts and completion of assignments, (8) Behavioral support, and (9) Explicit direct instruction in phonemic awareness.⁴² Witness G testified that she agreed with Examiner B

³⁷ *Id.* at 23-25 (417-19).

³⁸ *Id.* at 26-27 (420-21).

³⁹ *Id.* at 27 (421).

⁴⁰ P32:1 (422).

⁴¹ *Id.* at 9 (430).

⁴² *Id.* at 9-10 (430-31).

that Student required an OT evaluation. She also agreed with teachers' opinions that Student could access grade level reading material.

11. On April 10, 2019, when Student was in grade D at School C, DCPS convened an Initial IEP meeting. Student was classified as a student with Multiple Disabilities ("MD"), OHI and SLD.⁴³ The Consideration of Special Factors indicated that Student frequently becomes overwhelmed or appears frustrated with academic expectations, underperforms and often fails to perform by passively disengaging from assignments. It also indicated that Student required access to technology "which allows alternatives to handwriting including computer keyboard, text to speech, small group support for organization of writing."⁴⁴ In Reading, the Present Level of Performance and Annual Goals ("PLOP") reported his/her WJ-IV achievement scores and indicated that s/he "possesses solid phonological awareness and processing but exhibits significant difficulties rapidly and automatically recognizing words in print which results in low reading fluency. Deficits in orthographic processing contribute to a slower and more effortful reading process that has the potential to negatively impact reading comprehension."⁴⁵ The baselines were: (1) s/he does not consistently demonstrate understanding of the main idea, even with support, and (2) s/he does not consistently demonstrate the ability to identify a theme, even with support. The goals were: (1) s/he will be able to independently determine one main idea of a text and support it with 2 pieces of evidence, and (2) s/he will be able to determine one theme of a fiction text and support it with 2 pieces of evidence.⁴⁶ In Behavior, the PLOP summarized Examiner B's findings related to depression and anxiety. The baselines were: (1) s/he has difficulty initiating tasks and following instructions, and (2) s/he has difficulty seeing other perspectives or strategies for solving problems in academic and social settings. The goals were: (1) with support, s/he will restate the instructions for an academic task in his/her own words to clarify [her/his] understanding and initiate the task, and (2) s/he will demonstrate flexible thinking by identifying another perspective or accepting an alternative way to solve academic or social problems.⁴⁷

The IEP team prescribed 45 minutes per week of specialized instruction inside general education, and one hour per month of behavioral support services ("BSS"). It also prescribed the following "Other Classroom Aids and Services:" preferential seating, repeated and clarified directions, checklists for multi-step directions, breaking information into smaller chunks, opportunities to verbalize thoughts prior to writing, periodic breaks, speech to text technology, access to computers, modified work load, option to opt out of timed quizzes and tests, access to standing desk and/or movement during instruction, multi-modal instruction to address orthographic concerns, and access to audio books.⁴⁸

12. On April 22, 2019, Examiner D completed a vision examination of Student.⁴⁹ Student had normal distance vision, 20/20 in both eyes, but impaired vision at close range: 20/80 in her/his right eye and 20/60 in the left eye. Examiner D concluded as follows:

⁴³ P5:1 (188).

⁴⁴ *Id.* at 2 (189).

⁴⁵ *Id.* at 3 (190).

⁴⁶ *Id.* at 3-4 (190-91).

⁴⁷ *Id.* at 4 (191).

⁴⁸ *Id.* at 5 (192).

⁴⁹ P36:1 (446).

The collected data of the optometric examination reveals evidence of an increasing stress induced visual problem as a manifestation of an earlier vision development problem. The vision development problem is associated with an ocular-motor dysfunction. There are also indications of a post concussion visual syndrome. The visual problem may result in reduced acuity, reduced visual performance, and visual discomfort. The visual problem becomes apparent when the visual demands are greater than the visual abilities to meet the demands. The visual problem may contribute to, possibly creating, problems in learning and would be referred to as a “learning-related visual problem.”⁵⁰

Examiner D provided three options: (1) Conventional: standard acuity, healthy eyes, no ocular defects, do nothing now, (2) Behavioral: provide counter stress lenses for all near centered activities, and (3) Visual Training over 7-9 months.⁵¹

13. On May 26, 2019, Examiner C completed an Occupational Therapy Evaluation. Petitioners were concerned that Student had “not recovered [her/his] once very strong level of fine-motor skills and that [s/he] continues to have visual disturbances since [her/his] concussion in 2017.”⁵² Examiner C’s findings included the following:

This assessment identified significant difficulties with visual endurance in visual and visual-motor tasks and relative weaknesses in visual-motor speed. [His/her] reduced visualization skills are likely related to [his/her] previously identified weaknesses in word identification...

[Student] demonstrated many strengths in [his/her] sensorimotor, visual perception, and work skills. Regarding [his/her] motor skills, [s/he] demonstrated integration of postural reflexes, good balance reactions, and very strong bilateral coordination and integration. [S/he] performed in the average to above-average performance in selected visual perceptual tasks...

[Student] demonstrated deficits with interpreting, remembering, and organizing auditory sequences, tactile inputs, and visual designs in order to reproduce them without visual cues. [S/he] had difficulty visualizing the directional components of tactile input and the length and timing of auditory inputs. Being able to visualize tactile input, which develops through early oral and manual exploration, assists in developing perceptions of space, form, and direction. This skill is also related to remembering formation of numbers and letters...

Difficulty with visualizing information presented through the tactile system is also related to visualizing space and numbers. This could impact the ability to

⁵⁰ *Id.* at 2 (447).

⁵¹ *Id.*

⁵² P40:1 (454).

use a consistent starting point for writing numbers and letter and the ability to translate that back into an automatic and efficient motor pattern...

[Student] demonstrated difficulties with other skills that impact [her/his] visual- motor and fine-motor performance. Most importantly, [his/her] recent diagnosis of convergence insufficiency and observed difficulty maintaining a clear and stable image of visual forms and details causes [him/her] visual and postural fatigue... Poor endurance and frustration may also account for [his/her] rushing through some tasks...

[Student's] fine-motor skills are mildly deficient. [S/he] demonstrated mild tightness in [his/her] thumbs and mild weakness in [his/her] hand arches... Fine-motor coordination issues appear only mildly impacting on [his/her] visual-motor skills.

Although [Student] scored in the "Average" range for visual-motor coordination and visual-motor integration skills on the DTVP-2 [Developmental Test of Visual Perception – 2], these skills appear somewhat variable and taxing form [REDACTED]... it is the opinion of this examiner that if [Student] has difficulty with visual fatigue, which appears to be the case, that there could be some inconsistency in performance...

Accuracy and line quality for handwriting and drawing forms was diminished, given [his/her] excellent visual perception skills. It is strongly suspected that difficulties with visual-motor coordination are most significantly impacted by the visual deficits identified by Dr. Kraskin. Brief handwriting observations indicated inefficient formation and very mild variability in case, sizing, attention to detail, and pencil control. Formation variability is not uncommon with children with difficulty visualizing form and with a language-based learning disability...

[Student] demonstrated solid foundational skills for gross-motor body coordination including generally good postural control, mature movement patterns marked by the ability to move [her/his] body as a unit and [her/his] body parts separately, balance while still moving, and moving rhythmically (skipping)...

RECOMMENDATIONS

It is recommended that [Student] receive occupational therapy weekly for at least eight weeks to strengthen visual-motor and postural endurance and visual-motor coordination, directionality, visualization skills, hand function, planning and sequencing, written communication strategies, and to work collaboratively with other professionals working with [Student] on self-regulation. The overall goal of services is to strengthen foundational skills as they relate to visual functions across settings...

Other strategies:

... Practice speech-to-text software or applications, such as “Google Read and Write.”

Use of graphic organizers to assist with the writing process.

Assistance or “check-ins” to organize homework and materials.

Break down homework and other tasks into 10-15 minute segments with movement breaks between...⁵³

14. On May 30, 2019, DCPS convened an IEP Annual Review meeting.⁵⁴ The Consideration of Special Factors was unchanged from the previous IEP. The Reading PLOP reported that on a May 2019 Scholastic Reading Inventory (“SRI”), Student’s score of 382 was below basic for her/his grade level. On the Fountas and Pinnell Reading Assessment (“F&P”), Student scored at the early to mid-level of her/his current grade. The baselines and goals were unchanged.⁵⁵ A new Area of Concern was added in Written Expression. The PLOP indicated that Student benefits from small groups and 1:1 support. S/he requires extensive prompting to initiate work and frequent check-ins and redirection. The baselines were: (1) s/he requires multiple prompts and redirection to initiate work, (2) with step-by-step guidance and significant prompting, s/he can use a graphic organizer to plan his/her writing, and (3) despite significant prompting and guidance, s/he has not consistently been willing to revise his/her writing. The goals were: (1) s/he will initiate independent work with 3 or less prompts, (2) when provided a graphic organizer, s/he will use it to plan her/his writing, and (3) given access to alternative writing means, including speech to text/keyboard, s/he will revise and elaborate on her/his writing by adding at least three sentences in her/his essays.⁵⁶ The Behavior PLOP, baselines, and goals were unchanged.⁵⁷ The IEP team prescribed 1.75 hours per week of specialized instruction in Reading and Written Expression inside general education, and one hour per month of BSS, half outside general education. The Other Classroom Aids and Services were unchanged from the previous IEP.⁵⁸

15. In the fourth term of the 2018-19 school year, Student’s grades were Proficient in Math, Social Studies, Science, Music, Art, and Health & Physical Education, and Basic in Reading, Writing & Language, and Speaking & Listening. S/he required “frequent prompting” to follow directions, work well with others, return completed homework, make an effort, follow classroom rules, and practice self-control.”⁵⁹ The subcategory comments in ELA, Health & Physical Education, and Social Studies were predominantly “Developing,” and predominantly “Secure” in Math, Science, Music, and Art.⁶⁰ Witness F, Student’s grade D general education teacher, testified that Student was intense, required prompting – sometimes multiple prompting, and check-ins, but s/he was able to complete the work,

⁵³ *Id.* at 8-12 (461-65). Petitioner/father testified that the OT evaluation was sent to DCPS on June 5, 2019.

⁵⁴ P6:1 (196).

⁵⁵ *Id.* at 3-4 (198-99).

⁵⁶ *Id.* at 4-5 (199-200).

⁵⁷ *Id.* at 5-6. (200-01).

⁵⁸ *Id.* at 7 (202).

⁵⁹ P63:1 (588).

⁶⁰ *Id.* at 2-3 (589-90).

particularly in the small group sessions of eight students. Witness F did not believe that Student required OT services; there was no problem with [his/her] handwriting.

16. For the first term of the 2019-20 school year, when Student was in grade G at School B, Student earned the following grades: Science – B+, World Geography & Culture – B, 7th Grade Math – A-, Language Arts – B, French Language & Culture – B, and Music – B-.⁶¹ In the second term, Student earned the following grades: Science – A-, World Geography & Culture – C+, 7th Grade Math – C-, Language Arts – B, and Art – C.⁶²

17. On October 2, 2019, DCPS convened an IEP meeting that did not result in a finalized IEP.⁶³ School B staff believed Student was “keeping up in language arts class.” The case manager, Teacher C, suggested a weekly spelling activity for Student to address his/her word recognition and spelling weaknesses. Witness A, Student’s educational consultant questioned whether such activity would meet Student’s need for “explicit instruction to support these weaknesses.” The staff reported that Student’s use of a computer in ELA has been “helpful,” but s/he was not yet using text to speech. The team indicated that its occupational therapist would review Examiner C’s independent OT evaluation. In Math, Teacher C had been supporting Student, though such was not reflected on Student’s IEP, due to an opening in Teacher C’s schedule. Teacher C reported that Student’s homework was being reduced, and s/he had the ability to finish timed tests after school. The team agreed to modify Reading goals 1 and 2, add a reading fluency goal, add a written language goal for developing a written product to match expectations regarding structure/development, and add a goal for Student to turn in completed assignments.⁶⁴

18. On October 23, 2019, Petitioner/father indicated his desire for Student to take the STARI assessment to determine if a supplemental reading class would be appropriate. “[S/he] is ready, even begging, to get extra help with reading.” Teacher C, Student’s special education teacher was skeptical of the need for the class, “because [his/her] comprehension level and overall ability are well above most students in the reading program, thus the change (being surrounded by lower level students) may actually work against [her/his] confidence. Then again, being as academic leader in that class may boost [her/his] confidence...”⁶⁵ I agree that we should implement a reading intervention asap, one that’s in accordance with the results from the assessment.”⁶⁶ On October 26th Teacher C informed Petitioners that Student’s scores on the STARI assessment qualified her/him for the reading program, which would result in her/him dropping French.⁶⁷

19. On October 27, 2019, Petitioner/father submitted detailed proposed amendments to a draft IEP that was discussed at a meeting on October 2, 2019.⁶⁸ Petitioner/father offered specific language for the PLOPs, baselines, and goals in Reading,

⁶¹ P64:1-3 (592-94). The report card reported Student’s May 21, 2019 SRI score of 382 that was cited in the May 30, 2019 IEP. *Id.* at 4 (595).

⁶² P66:1-3 (603-5).

⁶³ P22:1 (363).

⁶⁴ *Id.* at 1-2 (363-64).

⁶⁵ P1:11 (11).

⁶⁶ *Id.* at 10 (10).

⁶⁷ *Id.* at 9 (9).

⁶⁸ P1:13-16 (13-16).

Written Expression, and Behavior. In Services, Petitioner/father requested a reading intervention program, requiring additional hours of specialized instruction outside general education, an unspecified increase in the amount of BSS outside general education, and “supported classes in all academic areas. [S/he] currently does not have cotaught Geography and science classes. While [s/he] currently has the special education teacher in [her/his] math class, we understand this is not always available at [School B].”⁶⁹ Petitioner/father also requested, *inter alia*, the following Other Classroom Aids and Services: (1) prompts to wear her/his glasses, (2) access to course readings above her/his independent reading level, (3) break down complex sequential tasks into parts with written directions for him/her to refer to, (4) a checklist for beginning and end of class procedures, (5) morning and afternoon check-ins for organization and executive functioning skills, (6) enlarged font sizes when possible, and (7) reduced math homework.⁷⁰

20. On December 17, 2019, DCPS convened an IEP Annual Review meeting.⁷¹ The Consideration of Special Factors was amended from the previous IEP to add in the A/T section that Student would have access to a laptop “as often as possible, especially in ELA.”⁷² In Reading, the PLOP revealed that on an SRI assessment at the beginning of the year (“BOY”), Student scored 456, placing him/her at a grade C level, four grades below her/his level. On the STARI pre-assessment test on October 25, 2019, Student read at a speed of 87 wpm. The target rate range for grade G was 90-114. Scores in Summarizing (0/4), Clarifying (2/4), Decoding (0/4), and Argumentation “indicate an overall weakness in orthographical processing, as also indicated by [his/her] parents.” The PLOP reiterated that the Student scored at grade level on the F&P in May 2019 and reiterated WJ-IV scores from Examiner B’s evaluation and comments regarding Student’s phonological awareness and processing and deficits in orthographic processing from the May 30, 2019 IEP.⁷³ The baselines were: (1) s/he needs teacher support to determine the main idea, (2) s/he read at 87 wpm with no mistakes at the beginning of the STARI program, but on the day of the IEP, s/he read at 67 wpm, and (3) s/he struggles to decode words. The goals were: (1) Using a graphic organizer and after reading an informational grade level text, Student will be able to determine the main idea of a grade level text and support it with two pieces of evidence, (2) given an instructional grade level passage, s/he will read the passage aloud at a rate of at least 120 words per minute with 96% accuracy, and (3) given an unfamiliar instructional grade level passage with 15 teacher-selected words, Student will read the passage aloud and correctly decode the selected words. Witness A indicated that Petitioners disagreed with the staff that Student can read and comprehend at grade level.⁷⁴

In Written Expression, the PLOP indicated that Student

...[i]s regularly able to express [her/himself] through [his/her] writing to meet grade level expectations as compared to [her/his] peers. [S/he] often struggles with deciphering writing prompts which can lead to [her/him] not fully answering a question or prompt. [Her/his] handwriting is conditional on

⁶⁹ *Id.* at 15 (15).

⁷⁰ *Id.* at 15-16 (15-16).

⁷¹ P8:1 (217).

⁷² *Id.* at 2 (218).

⁷³ *Id.* at 3 (219).

⁷⁴ P24:1 (367).

[her/him] taking [her/his] time rather than rushing. Through [her/his] writing on summative assessments during 1st advisory, [Student] has shown understanding of point of view, figurative and sensory language, and dialogue, having scored 93%, 93%, and 100% respectively. [Student] benefits from small groups and 1:1 support. Teacher-supported breakdown of every writing prompt is crucial for [Student] to understand what is being asked of [her/him]. Prompting and guidance enables [her/him] to initiate work and frequent check-ins and redirection help [her/him] to continue to develop each writing piece.⁷⁵

The baselines were: (1) s/he is able to write one paragraph with textual evidence to answer a prompt, and is working toward writing a full essay independently, (2) s/he benefits from graphic organizers to create a plan for her/his writing and requires less guidance when using them, and (3) s/he is reluctant to revise her/his writing, but is willing to do so when urged. The goals were: (1) given a graphic organizer when given an informational writing prompt with a specified topic, Student will write a four paragraph essay, (2) given a graphic organizer, s/he will use it to plan her/his writing 66% of the time, and (3) s/he will develop and strengthen his/her writing by improved planning, revising, editing rewriting, or trying a new approach.⁷⁶ The team agreed to add objectives to the second goal.⁷⁷ A new Area of Concern was added in Adaptive/Daily Living Skills. The PLOP indicated that s/he is motivated to perform well academically and s/he does, but struggles to begin classwork assignments, becomes frustrated if s/he does not understand directions, and struggles to turn in completed assignments and homework. The baseline was that s/he is missing two to four assignments per advisory. The goal was to complete and submit assignments 90% of the time.⁷⁸ In Behavior, the PLOP was written by Student's social worker, and provided that Student "is sweet, polite, reserved, and mild-mannered. [S/he] readily and actively participates in behavior support services and has a positive relationship with this writer and [her/his] group members. [Student] has fidgets that [s/he] uses regularly to manage [his/her] anxiety in school. [S/he] has an identified friend group and interacts positively with [his/her] peers. However, in discussing supports, [Student] had difficulty identifying people in [her/his] life whom [s/he] feels connected to and could go to for support. [Student] will benefit from learning and practicing self-advocacy skills to increase [her/his] ability in identifying when [s/he] needs help and confidence in seeking support." The baselines were: (1) s/he has difficulty initiating tasks and following instructions to complete tasks when s/he is unsure of the expectations, (2) s/he has difficulty seeing other perspectives or strategies for solving problems in academic or social settings, and (3) s/he has difficulty identifying when to seek support and how to ask for help; s/he is better in small group settings. The goals were: (1) Student will use a self-monitoring toll to address task initiation, following directions, and asking for clarification, (2) s/he will improve insight into self-regulation by identifying instances where s/he struggled to attend in class or in difficult social situations, by identifying associated thoughts and feelings, and by identifying more adaptive responses, and (3) s/he

⁷⁵ P8:6 (222).

⁷⁶ *Id.* at 6-8 (222-24).

⁷⁷ P24:2 (368).

⁷⁸ P8:8-9 (224-25).

will increase self-advocacy skills by demonstrating that s/he knows when and how to ask for help and accepts support from teachers in 4 out of 5 opportunities.⁷⁹

The IEP prescribed eight hours per week of specialized instruction, four hours in Reading and Written Expression inside general education and four hours of Reading outside general education, two hours per month of BSS outside general education, and thirty minutes per month inside general education.⁸⁰ Petitioners objected to the level of services: “Family shared [s/he] requires support in all [her/his] academic areas.”⁸¹ The Other Classroom Aids and Services from the previous IEPs were increased to include, but was not limited to, morning and afternoon check-ins for organization and executive functioning skills, daily check-ins for emotional regulation, use of a checklist for beginning and end of class procedures, and use of a fidget such as a Rubik’s cube. “Teachers should ensure upcoming assignments are written down in [Student’s] agenda or homework checklist. Teachers should give [her/him] advance notice of tests and bigger assignments. Teachers should also frequently check in with [her/him] to make sure [s/he’s] turning everything in.”⁸²

The Petitioners and DCPS disagreed as to Student’s need for OT services. DCPS’ therapist stated that in a previous observation, Student’s handwriting spacing, sizing, and legibility were appropriate. Petitioners were concerned about hand fatigue and requested OT support. DCPS representatives stated that “school-based services are geared towards accessing the curriculum and educational environment.”⁸³

21. On or about January 25, 2020, Petitioner/father reported that during parent/teacher conferences, “almost every teacher noted that [Student’s] mood was quite down and that [s/he] was extremely lethargic, putting [her/his] hoodie over [his/her] head and not even trying in some classes.”⁸⁴ Teacher C saw “a good amount of smiling and joking with friends, but also noticed that [s/he] seemed distant, usually during class time. [S/he’s] extremely sensitive to any academic pressure these days...”⁸⁵ Social Worker B responded that while Student’s mood had been “a little subdued compared to normal,” s/he was mostly positive in group sessions.⁸⁶

22. On February 6, 2020, Petitioner/mother notified Teacher C that Student had a “breakdown” two weeks previously at the thought of having to go on the ■ and ■ grade ski trip. Since then, Student was concerned about two kids who absconded from school and “then collapsed in the rest room after ‘taking some drugs’ and the ambulance was called.” Teacher C confirmed only that two students with erratic heartbeats were sent to Children’s Hospital.⁸⁷

⁷⁹ *Id.* at 9-10 (225-26).

⁸⁰ *Id.* at 11 (227).

⁸¹ P24:3 (369).

⁸² P8:12 (228).

⁸³ P24:3 (369). Witness E, the special education Support Coordinator at School C, testified that the staff believed that Examiner C’s OT evaluation revealed that Student’s deficits were mild and saw no impact on his/her performance in school. Witness H, an occupational therapist at School B, testified that Student’s handwriting was not a concern to teachers, s/he had access to a computer, and did not require OT services on [his/her] IEP.

⁸⁴ P1:50 (50).

⁸⁵ *Id.* at 49-50 (49-50).

⁸⁶ *Id.* at 49 (49).

⁸⁷ *Id.* at 54-55 (54-55).

23. On January 31, 2020, DCPS issued an IEP Progress Report for the second reporting period of the 2019-20 school year. In Reading, the first goal had not been introduced. On the second and third goals, s/he was noted to be “making slow progress when reading aloud as [s/he] has started to stutter. [Her/his] wpm when reading is starting to decrease slightly. [S/he] has great anxiety about reading out loud in class.”⁸⁸ In Written Expression, s/he was reported to be progressing on all three goals: “With the use of a graphic organizer, [Student] is able to follow the RACE system for literacy prompts in order to write a four paragraph essay with supporting evidence... [Student] continues to benefit from frequent teacher check-ins to confirm [s/he] is planning [her/his] writing assignments efficiently and according to the directions or writing prompt... [Student] responded well to feedback in order to improve [his/her] Anet essay and definitely responds better to feedback when the writing and revising is done on computer.”⁸⁹ In Adaptive, Student was reported to be progressing unevenly on turning in assignments 90% of the time: “[Student] has been using the newly-introduced system of weekly, one-page homework lists. In the beginning it seemed to be working well, though as the advisory continued it became more difficult for [her/him] to keep up with. [S/he] fell behind in math assignments and the work accumulated to a degree that seemed to stress [her/him] and bring about negative thoughts about [his/her] math ability. [S/he] has presented with more interest in keeping up with the fresh start of 3rd advisory.”⁹⁰ In Behavior, the first and third goals had been “Just Introduced.” On the second, the self-regulation goal, s/he had made no progress as s/he “struggles with identifying areas of challenge and sharing [his/her] feelings and challenges with this writer.”⁹¹

24. On April 20, 2020, Petitioner/father complained that Student was not receiving the supports to which s/he was entitled. In Executive Functioning, “the basic organization of materials makes it extremely difficult for me as a parent to navigate, much less a 6th grader, and pretty much impossible for children such as [Student] that struggle with executive functioning... [Student] works very hard and is frustrated that [s/he] cannot complete all the assignments by the end of the school day/week. This only adds to [her/his] anxiety and feeling of self doubt. Can these be adjusted?” In Content and Self-advocating, Petitioner/father asserted that in distance learning, Student is “completely left behind” because s/he does not advocate for her/himself, and suggested that Student and “some others with similar struggles across the classes have one day of dedicate Grit/office hours so they can learn from the core teachers?”⁹²

25. On April 27, 2020, DCPS issued an IEP Progress Report for the third reporting period of the 2019-20 school year. In Reading, Witness J, Student’s Reading teacher, provided the same comments to all three goals: “Prior to March 16, 2020, [Student] was beginning to make progress towards this goal. Since the start of Learning @ Home on March 24, 2020, [Student] has made some progress based on [his/her] responses to distance learning.”⁹³ In Written Expression, Teacher C, Student’s special education teacher, reported that Student was progressing on all three of her/his goals: “[Student] was able to write a 4-

⁸⁸ P68:1-6 (608-13).

⁸⁹ *Id.* at 7-9 (614-616)

⁹⁰ *Id.* at 9-10 (616-17).

⁹¹ *Id.* at 11 (618).

⁹² P1:61 (61).

⁹³ P68:2-6 (657-61).

paragraph essay based on informational text about a refugee camp... [s/he] collected evidence from the text. [Her/his] introductory paragraph and concluding paragraph were each one sentence, like most of [his/her] peers. [Her/his] body paragraphs followed the proper RACE format, citing and explaining evidence and details, with minimal teacher support... Graphic organizers are consistently beneficial to [Student]... Pre-writing discussion with the teacher, in conjunction with the graphic organizer, has proved to be very helpful in getting [Student] off to a strong start... [S/he] has become less resistant to revision, realizing the necessity of more than one draft, though the process of re-writing can still frustrate [him/her].”⁹⁴ In Adaptive, Teacher C reported that “Due to the school closure, this completion/submission data is difficult to calculate.”⁹⁵ In Behavior, Social Worker A reported no progress on the first and third goals, and that the second goal had been “Just Introduced.” Social Worker A was assigned to Student on March 2, 2020, and provided the same comment for all three goals: “Prior to social distancing, youth had a self-monitoring checklist that [s/he] is supposed to complete w/[her/his] teachers each class period but this has not been entirely successful.”⁹⁶

26. Student’s final grades for the 2019-20 school year were as follows: 7th Grade Math – A-, Health & Physical Education – A-, Science – A-, Work Geography & Cultures – A-. ELA – B+, Music – B-, and Art – C.⁹⁷

27. On August 13, 2020, Attorney A notified DCPS that Petitioners disapproved of the IEP developed on December 17, 2019 and would enroll Student at School A for the 2020-21 school year. Attorney A alleged a denial of FAPE because, “Simply put, [Student’s] IEP does not provide [her/him] the supports [s/he] needs.” The letter indicated that Petitioners held DCPS responsible for the costs of Student attending School A “until such time as FAPE is offered.”⁹⁸

28. Upon Student’s enrollment at School A, s/he was administered MAP assessments in Math and Reading.⁹⁹ In Math, his/her score of 225 was in the 61st percentile, with High Average in Operations and Algebraic Thinking and Statistics and Probability, and Average in Geometry and The Real and Complex Number Systems. In Reading, his/her score of 211 was in the 42nd percentile, Average in four of five categories, and Low Average in Key Ideas and Details.¹⁰⁰

29. For the first quarter of the 2020-21 school year, Student earned the following grades: Drama – A, Physical Education – A-, Social Studies – B-, English – C, Math II – C-, Science – C-. During the second quarter, Student was Proficient in three Phonemic Awareness and Application of Skills goals and “In Progress” on two. S/he was Proficient in two Decoding goals, In Progress on one, and “Not Yet” on one. Student was Proficient in two Spelling goals and In Progress on a Comprehension and Vocabulary Skills goal. S/he

⁹⁴ *Id.* at 7-9 (662-64).

⁹⁵ *Id.* at 10 (665).

⁹⁶ *Id.* at 10-11 (665-66).

⁹⁷ P74:1 (655).

⁹⁸ P3:79-80 (182-83).

⁹⁹ P80:1 (683).

¹⁰⁰ *Id.*

was In Progress on three Independent Reading goals and Not Yet on one.¹⁰¹

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.¹⁰²

Here, the issues involve child find, the appropriateness of IEPs and placement, and the implementation of IEPs. Under District of Columbia law, Petitioners bear the burden of persuasion as to child find, the implementation of IEPs, and the propriety of a unilateral placement, while DCPS bears the burden as to the appropriateness of the IEPs and placements it provided. The burden of persuasion shall be met by a preponderance of the evidence.¹⁰³

Whether DCPS denied Student a FAPE by failing to comply with its child find obligations and find Student eligible for special education services by January 2019.

The regulations require local education agencies ("LEA") to identify and evaluate students within their jurisdictions who are suspected of having disabilities, i.e., "child find:"

- (1) The State must have in effect policies and procedures to ensure that—
 - (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

¹⁰¹ P79:1-2 (681-82). *See also*, P81:1-3 (684-86).

¹⁰² D.C. Code Sect. 38-2571.03(6)(A)(i).

¹⁰³ *Schaffer v. Weast*, 546 U.S. 49 (2005).

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services...

(c) Other children in child find. Child find also must include—

(1) Children who are suspected of being a child with a disability under §300.8 and in need of special education, even though they are advancing from grade to grade...¹⁰⁴

A child with a disability means a child having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.¹⁰⁵

To qualify for services under classifications of emotional disturbance or other health impaired, the disability must “adversely affect the child’s educational performance.”¹⁰⁶

The record reveals that during the 2016-17 school year, Student’s grades were all in the Advanced or Proficient range, and did not present behavioral issues. For the 2017-18 school year, Student’s grades were again in the Proficient and Advanced range, but s/he began to have difficulty turning in homework assignments. When Student was alleged to have stuck another student with a thumbtack, Petitioners requested a behavioral screening in which teachers “did reveal concerns in the areas of attention, anxiety, depression, social engagement and executive functioning.” On June 1, 2018, School Psychologist A reviewed the screening and recommended guidance counseling and/or cognitive behavioral therapy. On June 3, 2018, Teacher D and Teacher E reported that they had implemented preferential seating, a daily behavior chart that tracked her/his focus during the lesson, restating the assignment one-on-one, providing written instructions for assignments, teacher models, and frequent check in meetings to address Student’s inattentiveness and failure to turn in assignments.

During the first two terms of the 2018-19 school year, Teacher A and Teacher B sent home warnings that Student was not remaining on task or turning in all assignments. For the first term of the 2018-19 school year, his/her grades were all Proficient except Basic in Reading. His/her behavior was appropriate either independently or with limited prompting in all measured categories. In the second term, Student was basic in Reading and Written Language, and Proficient in all others. In the third term, when Student again received a Basic grade in Reading, the reading teacher clarified that Student’s performance was diminished by lack of class participation.

In their post-hearing submission, Petitioners cited their notes from meetings in November 2018¹⁰⁷ and December 2018¹⁰⁸ to prove that Student required special education

¹⁰⁴ 34 C.F.R. § 300.111(a) and (c).

¹⁰⁵ 34 C.F.R. § 300.8(a)(1).

¹⁰⁶ 34 C.F.R. § 300.8(c)(4)(i) and (c)(9)(ii).

¹⁰⁷ P1:4 (4).

¹⁰⁸ P1:6 (6).

services by January 2019. Neither document is persuasive on this issue. The December 14, 2018 notes indicate that Student was reading at grade level and needed only limited prompting. Petitioners also cited School Psychologist A's letter of June 1, 2018, which had already been addressed by Teacher D and Teacher taking unilateral action to address Student's off-task behavior and failure to turn in homework.

Petitioners also cited Teacher A and Teacher B's Mid-Term Progress Reports on October 2, 2018 and December 12, 2018. Petitioners apparently believe that because Student exhibited inattention that was affecting her/his performance in one class, that DCPS should have suspected a disability. However, for the first two terms of the 2018-19 school year, Student earned Proficient grades in every course but Reading and Written Expression, and those grades were affected by poor class participation, which was not reported to be an issue in other classes. Finally, Petitioners cited historical data from Examiner B's evaluation and Witness G's review of that evaluation. Neither report existed prior to January 2019.

Until the first term of the 2018-19, Student had a history of Proficient and Advanced grades in every course. Despite this above-average performance, Teacher D and Teacher E took unilateral action to address signs of inattentiveness and failure to turn in assignments. These problems persisted into the fall of 2018, as indicated in the Progress Reports of Teacher A and Teacher B. Those Progress Reports stated that Student was not meeting grade level *expectations*, but reassured Petitioners that s/he continued to read at grade level.¹⁰⁹ In fact, the measures the teachers took to address the change in performance were directed towards increasing Student's attentiveness. This was confirmed in a conversation Petitioners had with the teachers on December 13, 2018.¹¹⁰ I do not conclude that DCPS was derelict in failing to suspect a disability due to Student's fall-off of performance in Reading and Writing & Language. Due to Student's history of above-average academic performance in all courses, and his/her continued ability to read at grade level, it was not unreasonable for the staff to believe that the diminished performance in the fall of 2018 in ELA alone was due to a lack of focus that could be addressed with classroom accommodations. I conclude that Petitioners have failed to meet their burden of proving that DCPS failed to meet its child find obligations as of January 2019.

¹⁰⁹ P56:1 (551); P59:1 (565).

¹¹⁰ P1:6 (6).

Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate IEP on April 10, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy (“OT”) services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.¹¹¹

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*.¹¹² 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.’”¹¹³ 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...”¹¹⁴ 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.”¹¹⁵

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.¹¹⁶ 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*.”¹¹⁷ 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

¹¹¹ In her opening statement, Petitioner’s counsel withdrew the OT claim as to the April 10, 2019 IEP.

¹¹² 458 U.S. 176, 187 (1982).

¹¹³ *Id.* at 189-90, 200

¹¹⁴ *Id.* at 200.

¹¹⁵ *Id.* at 203-04.

¹¹⁶ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹¹⁷ *Id.* at 997.

who cannot.¹¹⁸

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:

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."¹¹⁹

While the record is extensive, Petitioners' case is grounded on the assertion that s/he is "significantly below grade level" in reading, as Witness A. Student's educational consultant, asserted early into her direct testimony. This testimony was presaged by Attorney A's opening statement, which stressed the fact that DCPS's IEPs consistently failed to provide adequate intervention to address Student's deficits in orthographical processing. As to the April 10, 2019 IEP, Witness A testified that 45 minutes of specialized instruction was inadequate for the interventions Student required in reading and written expression, s/he needed support for her/his executive functioning deficits, and there were no goals in orthographic processing.

In the first issue, I discussed the fact that Student had a recent history of above average performance as measured by his/her grades, but his/her performance in ELA fell from Proficient to Basic during the fall of 2018. After Examiner B's independent psychological evaluation on March 14, 2019, and Witness G's Review on April 8, 2019, DCPS conducted an Initial IEP meeting on April 10, 2019. Cognitively, Student was in the average range. S/he was also in the average range in Broad Reading, Broad Math, and Broad Written Language. On the FAR, s/he was below average on the Fluency Index, and moderately below average on tasks that involved orthographic perception, "indicating a lack of automaticity in alphabetic recognition skills."

Student's executive functioning was assessed through BRIEF-2. Responses from the her/his Reading teacher produced a *mildly elevated* BRI score, while Petitioner/father's score was in the "potentially clinically elevated" range. While his/her teachers did not endorse deficits in her/his ability to modulate or regulate her/his emotional responses, Petitioner/father did. On the TOVA, which measure the ability to sustain attention, Student's overall performance was within normal limits.

On the BASC-3, there continued to be a divergence between the responses of Student's parents and his/her teachers. "[Petitioner/father] indicated the presence of a clinically significant level of aggressive behaviors... [Student's] teachers did not report observing significant signs of Internalizing Problems (Anxiety, Depression, Somatization),

¹¹⁸ *Id.* at 1000-01 (citations omitted).

¹¹⁹ 137 S.Ct. at 1000-01.

but [his/her] parents both endorsed significant concerns in this area... Mild Attention Problems were identified by [Student's] reading teacher... but ratings by [his/her] science and math teachers did not reach the "at-risk" range (T=58, 54). [Petitioner/father] also reported concerns regarding [Student's] ability to maintain necessary levels of attention (T=63), with particular problems noted with distractibility and concentration... Examination of specific items endorsed [by Student's teachers] showed that in reading, [Student] has significant difficulty keeping up in class and completing tests, demonstrates notable problems with reading and spelling, and struggles to employ critical thinking skills. [Student's] teachers did not report the presence of any notable level of odd behaviors (Atypicality), though [Petitioner/father's] ratings reached the at-risk range... [His/her] parents perceive [Student] as often shy with other children, slow to join group activities. In comparison, when [her/his] teachers' responses were reviewed, all teachers believe that [Student] never avoids making friends and two feel that [s/he] never has trouble making new friends..."

Examiner B diagnosed Student with General Anxiety Disorder, Other Specified Depressive Disorder, Depressive Episode with insufficient symptoms, and a Specific Learning Disability in Reading. Examiner B specifically rejected ADHD as an appropriate diagnosis. He attributed Student's inattention to "attempts at avoidance, mental fatigue, or distress." Examiner B's recommendations included: (1) targeted reading interventions focused on improving Student's automaticity and fluency to address underlying orthographical processing deficits, (2) preferential seating close to the teacher and away from potential sources of distractions, (3) avoiding multi-step instructions and slowly providing clear concise, and specific direction, (4) when new material is being introduced, the rate at which the information is being presented may need to be adjusted to allow additional processing time or to rehearse the information, and (5) that Student be evaluated by an occupational therapist "to further clarify factors that may be hindering [Student's] written expression."

Witness G reviewed Examiner B's evaluation for DCPS and agreed with all aspects of it. She offered additional recommendations, including, but not limited to (1) Allowing extended time for assignments and exams that involve reading and written expression, (2) Oral directions for assignments, (3) Allow use of speech to text option for writing assignments, (4) Use of multimodal instructional methods, (5) Teacher check-ins to ensure task initiation, work completion, and on-task behavior, (6) Frequent movement breaks, (7) Access to small group support across content areas to ensure comprehension of concepts and completion of assignments, (8) Behavioral support, and (9) Explicit direct instruction in phonemic awareness. Witness G testified that she agreed with Examiner B that Student required an OT evaluation. She also agreed with teachers' opinions that Student could access grade level reading material.

The IEP addressed Student's orthographical processing in the Reading PLOP, but did not include a goal that specifically addressed it. Instead, the goals addressed his/her weaknesses in determining the main idea in a narrative, and his/her inability to determine the theme in a work of fiction. In Behavior, the baselines and goals addressed Student's difficulty initiating tasks and with flexible thinking. The IEP team prescribed 45 minutes per week of specialized instruction inside general education, and one hour per month of BSS. The classroom accommodations included preferential seating, repeated and clarified directions, checklists for multi-step directions, breaking information into smaller chunks, opportunities

to verbalize thoughts prior to writing, periodic breaks, speech to text technology, access to computers, modified work load, option to opt out of timed quizzes and tests, access to standing desk and/or movement during instruction, multi-modal instruction to address orthographic concerns, and access to audio books. Thus, while the team did not specifically address orthographical processing, it did adopt Examiner B's second, third, and fourth recommendations, described above, along with several additional accommodations designed to address inattentiveness and focus.

While Witness A professed that Student was reading well below grade level, Examiner B found his/her academic achievement to be average in Reading, Written Language, and Math. While s/he has deficits in orthographical processing, and goals to address it would have been preferable, in light of Student's circumstances, the lack of such goals would not impair his/her ability to continue to make progress in reading. The record does not support that Student's reading deficiencies are as dire as asserted by Petitioners and Witness A. Similarly, I note that Examiner B's testing did not reveal a significant problem with Student's executive functioning. His/her Reading teacher's responses suggested only a mild problem, and on the TOVA, his/her inattention was within normal limits. Although Witness A testified that 45 minutes per week of specialized instruction was insufficient to address Student's reading and writing deficits, neither Examiner B or Witness G made a recommendation as to the amount of specialized instruction or as to the academic setting.

I conclude that DCPS has met its burden of proving that it developed an IEP that was reasonably calculated to help Student to achieve passing marks and advance from grade to grade. In light of Student's grade level performance in core subjects, based on Examiner B's testing, it was reasonable for DCPS to prescribe essentially one period of specialized instruction per week, along with several classroom aids and accommodations recommended by Examiner B and Witness G, to address Student's reading deficits.

Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate IEP on May 30, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy ("OT") services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.

Witness E, the special education Support Coordinator at School C, testified that DCPS convened another IEP team meeting on May 30, 2019 to address Written Expression and BSS. The Reading PLOP reported that an SRI Reading assessment conducted earlier in the month found Student to be below basic in Reading. However, the F&P assessment showed Student to be at grade level. The team added Written Expression as a new Area of Concern with three goals, added an hour per week of specialized instruction, and specified that the hour of BSS would be split between general education and outside general education. Although Examiner C completed her OT evaluation on May 26, 2019, Petitioner/father

testified that he did not send it to DCPS until June 5, 2019. Thus, it was not subject to review before the IEP team.

As there was no meaningful change in Student's circumstances between April 10th and May 30th, I conclude that the IEP that was developed on May 30, 2019, that increased specialized services by one hour in Reading and Written Expression, was reasonably calculated to enable Student to achieve passing marks and advance from grade to grade.

Whether DCPS denied Student a FAPE for failing to develop and implement an appropriate IEP on December 12, 2019, because the IEP (a) provided insufficient specialized education hours, (b) provided inappropriate IEP goals and baselines based on the nature and extent of the disability at that time and the present levels of performance as described in the IEP, (c) failed to provide occupational therapy ("OT") services, (d) failed to provide an appropriate placement, and (e) failed to provide appropriate modifications, accommodations, and interventions including an appropriate reading program to address the needs of the student.

Between the May 30th and December 17, 2019 IEPs, DCPS received Examiner C's OT evaluation. Examiner C recommended that Student receive OT weekly for at least eight weeks, speech-to-text software, use of graphic organizers to assist with the writing process, assistance or "check-ins" to organize homework and materials, and to break down homework and other tasks into 10-15 minute segments with movement breaks between. At the end of the 2018-19 school year, Student earned Proficient grades Math, Social Studies, Science, Music, Art, and Health & Physical Education, and Basic in Reading, Writing & Language, and Speaking & Listening. Witness F, Student's grade D general education teacher, testified that Student was intense, required prompting – sometimes multiple prompting, and check-ins, but s/he was able to complete the work, particularly in the small group sessions of eight students. Witness F did not believe that Student required OT services, as there was no problem with his/her handwriting.

For the first term of the 2019-20 school year, when Student was in grade G at School B, Student earned the following grades: Science – B+, World Geography & Culture – B, 7th Grade Math – A-, Language Arts – B, French Language & Culture – B, and Music – B-.¹²⁰ In the second term, Student earned the following grades: Science – A-, World Geography & Culture – C+, 7th Grade Math – C-, Language Arts – B, and Art – C.

Witness A, the educational advocate, testified that an appropriate IEP would have required orthographic processing support, extra time for testing, occupational therapy, updated goals, more specific baselines, Written Expression goals that actually addressed Student's deficits, a lower student/teacher ratio, a smaller building, and prompts to wear glasses. Witness E, School C's special education coordinator, countered with the observation that Student was already performing at grade level in a general education environment, and that the primary purpose of the services was to improve his/her fluency. On October 27, 2019,

¹²⁰ P64:1-3 (592-94). The report card reported Student's May 21, 2019 SRI score of 382 that was cited in the May 30, 2019 IEP. *Id.* at 4 (595).

Petitioner/father requested a reading intervention program, requiring additional hours of specialized instruction outside general education, an unspecified increase in the amount of BSS outside general education, and “supported classes in all academic areas.” He also requested, *inter alia*, the following Other Classroom Aids and Services: (1) prompts to wear her/his glasses, (2) access to course readings above her/his independent reading level, (3) break down complex sequential tasks into parts with written directions for him/her to refer to, (4) a checklist for beginning and end of class procedures, (5) morning and afternoon check-ins for organization and executive functioning skills, (6) enlarged font sizes when possible, and (7) reduced math homework.

The IEP developed on December 17, 2019 added A/T in the form access to a laptop. The Reading PLOP reiterated that Student was reading at grade level, but Petitioners disagreed. In Written Expression, the PLOP also indicated that Student was meeting grade level expectations. The quality of his/her handwriting was dependent upon him/her taking his/her time. The Written Expression goals required the use of a graphic organizer and addressed Student’s ability to write a competent essay, which also addressed Petitioner/father’s concerns in the October 2, 2019 meeting about Student’s ability to write with appropriate paragraph structure and development.

The IEP prescribed eight hours per week of specialized instruction, four hours in Reading and Written Expression inside general education and four hours of Reading outside general education, two hours per month of BSS outside general education, and thirty minutes per month inside general education. Petitioners objected to the level of services, insisting on specialized instruction in all courses. The Other Classroom Aids and Services from the previous IEPs were increased to include, but was not limited to, morning and afternoon check-ins for organization and executive functioning skills, daily check-ins for emotional regulation, use of a checklist for beginning and end of class procedures, and use of a fidget such as a Rubik’s cube. “Teachers should ensure upcoming assignments are written down in [Student’s] agenda or homework checklist. Teachers should give [her/him] advance notice of tests and bigger assignments. Teachers should also frequently check in with [her/him] to make sure [s/he’s] turning everything in.”

The Petitioners and DCPS disagreed as to Student’s need for OT services. DCPS’ therapist stated that in a previous observation, Student’s handwriting spacing, sizing, and legibility were appropriate. Petitioners were concerned about hand fatigue and requested OT support. DCPS representatives countered that “school-based services are geared towards accessing the curriculum and educational environment,” and that Student was accessing the curriculum without OT services.

In their post-hearing submission, Petitioners cite emails on October 22-23, 2019 as proof that Student’s reading program was inappropriate. Those emails offer no support for this contention. In fact, Teacher C, Student’s special education teacher at School B, expressed his reluctance to honor Petitioners’ request to place Student in a reading class, “because [his/her] comprehension level and overall ability are well above most students in the reading program...” Petitioners also cite Student’s poor scores on SRIs during the winter of 2020.¹²¹ However, Examiner B’s evaluation determined that Student’s reading level was Average in

¹²¹ P1:56-58 (56-58).

Broad Math in March 2019 despite deficits in orthographical processing and reading fluency. Student was also at grade level in Reading on the F&P assessment in May 2019. For the first two terms of the 2019-20 school year, Student earned grades of B in Language Arts. In the Progress Report on January 31, 2020, Student was reported to have begun to stutter when asked to read aloud due to “great anxiety about reading out loud in class.” Student’s final grade in ELA for the 2019-20 school year was B+, and upon his/her enrollment at School A in the fall of 2020, on the MAP assessment, Student was Average in four of the five categories and Low Average in Key Ideas and Details.

Petitioners argue that it may not be appropriate to rely upon grades to determine Student’s progress. However, a student’s grades are the best indication of teachers’ determinations of the level of the student’s overall performance in a subject area. In this regard, Petitioners rely on a number of cases. In *Montgomery Township Board of Education v. S.C. ex rel. D.C.*,¹²² the court found the student’s grades unreliable because the teacher allowed informal academic assistance, including help from ■■■■■ parents, and gave the student grades based on effort to boost ■■■■■ self-esteem. Here, Student received no such assistance, and there is no evidence that Student’s grades are invalid or inflated.

W.H. by B.H. and K.H. v. Clovis Unified School District,¹²³ presents a strikingly similar factual situation. The student was of average to above average intelligence, scored in the proficient range in language arts and advanced in math. Unlike Student, W.H. presented behavior problems, including 24 conduct referrals in one year. Like Student, W.H. had difficulty with work completion. Nevertheless, the school district denied W.H. eligibility for services. W.H. scored in the average range on the VMI, but was below average in fine motor integration. Despite limited evidence of W.H.’s ability to write, the ALJ relied on the student’s A and B grades on ■■■■■ report cards and ■■■■■ proficient score in language arts in standardized testing. The court discounted these findings because W.H.’s grades were inflated; s/he was only required to complete 10-30% of the assigned work for ■■■■■ grade, and was not penalized for failing to turn in assignments. Moreover, the standardized testing did not require writing and, thus, was not a reliable measure of writing ability. The court reversed the ALJ’s decision that had upheld the school district’s denial of eligibility. However, the court sustained the district’s determination that W.H. did not require OT services, as s/he had no difficulty participating in sports, held a pencil properly, had a good grasp in writing, and her/his handwriting was age appropriate. Here, Student received extra time to complete tests, but there is no evidence that s/he was required to do less than his/her classmates.

Finally, Petitioners rely on *J.P. ex rel. Peterson v. County School Board of Hanover County, Virginia*.¹²⁴ There, the court rejected the student’s grades on ■■■■■ IEP goals, because the authors of the grades were not identified, and there were “no explanatory comments... included with the notations, making it difficult to assess their reliability.” Thus, the student’s grades were dismissed as a valid indication of academic progress.¹²⁵

¹²² 43 IDELR 186 (3rd Cir. 2005).

¹²³ 52 IDELR 258 (E.D. Ca. 2009).

¹²⁴ 447 F.Supp.2d 553 (E.D. Va. 2006).

¹²⁵ *Id.* at 575.

In light of the fact that Student's grades are consistent with achievement testing and teacher comments, there is no reason to suspect the validity of Student's grades. I conclude that DCPS has met its burden of proving that the December 17, 2019 IEP was appropriate. The record supports that Student is already performing at grade level in Reading, Written Expression, and Math. The Reading and Written Expression goals are designed to enhance his/her ability to analyze texts and to draft appropriately structured essays. As for OT services, the record does not support that Student requires OT services to access the general education services. As was previously discussed, testing found Student's executive functioning deficits to be mild. In Examiner's C's evaluation, Student "demonstrated many strengths in [his/her] sensorimotor, visual perception, and work skills. Regarding [his/her] motor skills, [s/he] demonstrated integration of postural reflexes, good balance reactions, and very strong bilateral coordination and integration. [S/he] performed in the average to above-average performance in selected visual perceptual tasks..." Examiner C found Student's fine-motor skills to be only mildly deficient. Moreover, none of Student's teacher expressed any concerns about his/her handwriting, or any physical disability preventing him/her from accessing the curriculum. Finally, there is no support in the record, other than the opinion of Student's educational consultant, for specialized instruction in all of Student's courses.

Therefore, I conclude that DCPS has met its burden of proving that it developed an appropriate IEP on December 17, 2019.

Whether DCPS denied Student a FAPE by failing to offer an appropriate IEP for the 2020-21 school year, thereby justifying the unilateral placement by Petitioners at School A and continued placement there until a FAPE is offered.

As was discussed in the previous section, the IEP developed on December 17, 2019 was reasonably calculated to enable Student to make academic progress. Therefore, I conclude that DCPS provided Student an appropriate IEP to begin the 2020-21 school year, with an annual IEP not due until December 17, 2020. Thus, Petitioners are not entitled to reimbursement for the placement of Student at School A.

Whether DCPS denied Student a FAPE by failing to implement Student's IEPs from May 2019 and December 2019. Specifically, Petitioners allege the failure to provide executive functioning support, behavior supports, accommodations (no reduced workload), and once DCPS implemented virtual learning due to COVID-19 restrictions, inconsistent specialized instruction.

As was discussed above, Petitioners' allegations of Student's executive functioning deficits are exaggerated. Examiner B's testing found his/her executive functioning deficits to be only mildly elevated in the academic setting. Nevertheless, DCPS included classroom aids and accommodations in the May and December 2019 IEPs to address Student's executive functioning deficits. Petitioners offered no evidence that DCPS failed to provide the services or accommodations other than undocumented assertions by Witness A. Petitioners also offered no persuasive evidence that DCPS' services were inconsistently provided during

virtual learning. In fact, the only evidence offered on this issue was an email from Petitioner/father on April 20, 2020 alleging that “In distance learning, kids appear to be largely left to their own devices...”¹²⁶ Therefore, I conclude that Petitioners have failed to meet their burden of proving that DCPS failed to implement the May 2019 and December 2019 IEPs.

RELIEF

For relief, Petitioner requests (1) an order for DCPS to reimburse Petitioners for the cost of any and all related services and assessments or evaluations paid out of pocket by the parents related to the alleged denials of FAPE, (2) an order for DCPS to reimburse Petitioners for all costs incurred at School A during the 2020-21 school year, including tuition and related services; and (3) an order for Student to remain placed and funded at School A by DCPS through the 2020-21 school year and until such time as a FAPE is offered.¹²⁷

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 Petitioners’ post-hearing submissions, 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
Hearing Officer

Date: July 19, 2021

¹²⁶ P1:61 (61).

¹²⁷ During the prehearing conference, Petitioners’ counsel withdrew the request for compensatory education services that was set forth in the *Complaint*.

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