

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

Parent on behalf of Student,¹)	Case No. 2022-0030
)	
Petitioner.)	Hearing Date: May 25-26, 2022
)	
v.)	Conducted by Video Conference
)	
)	Date Issued: July 6
)	, 2022
District of Columbia Public Schools,)	
)	Terry Michael Banks
Respondent.)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On February 22, 2022, Petitioner 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 (1) failing to provide Student appropriate Individualized Education Programs (“IEP”) and placements, and (2) failing timely to evaluate Student, (3) failing to implement Student’s IEP, and (4) failing to provide access to Student’s educational records. DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint* on March 7, 2022, 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 38 of the D.C. Code, Subtitle VII,

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

PROCEDURAL HISTORY

Petitioner filed her *Complaint* on February 22, 2022, alleging that DCPS denied Student a FAPE by (1) failing timely and comprehensively to reevaluate Student after his/her enrollment in DCPS at the beginning of the 2020-21 school year, (2) failing to provide appropriate IEPs on or about October 28, 2020, November 10, 2020, and October 13, 2021, (3) failing to implement Student's 2020-21 IEP during distance learning, and (4) failing to provide Petitioner full and timely access to Student's educational records.

On March 7, 2022, DCPS filed its response to the *Complaint* ("*Response*") denying that it had denied Student a FAPE as follows:

1. The three IEPs at issue were not inappropriate. Each IEP provided 6 hours per week of specialized instruction (4 hours outside general education, 2 hours inside) and supplemental supports. The IEPs were developed relying on various sources of information. Petitioner did not object to the amount of services in the October 28, 2020 IEP and did not raise attentional deficits as an issue of concern. At the October 2021 IEP meeting, neither Petitioner nor her counsel objected to the amount of specialized instruction hours or raised attentional deficits as an issue of concern. At no time did Petitioner or her representatives request additional goals in an IEP to address attendance or work completion.
2. The mere transfer from a different local education agency ("LEA") does not compel a reevaluation, and Petitioner does not allege that she requested evaluations at that time or that the prior evaluation conducted by the previous LEA was not comprehensive. DCPS did not fail to conduct timely and comprehensive reevaluations of Student. DCPS completed a triennial reevaluation of Student, due by February 22, 2022, in January 2022.² During the October 21, 2021 IEP meeting, neither Petitioner, her educational advocate, nor her counsel expressed a concern regarding previous evaluations or IEPs.
3. DCPS denies that it denied Student a FAPE by failing to implement Student's IEP during distance learning in the 2020-21 school year. DCPS provided Student specialized instruction and related services to the greatest extent possible, consistent with U.S. Department of Education guidelines.

The parties participated in a resolution meeting on March 8, 2022 that did not result in a settlement. A prehearing conference was conducted by video conference on March 24, 2022 and the *Prehearing Order* was issued that day. During the prehearing conference, Petitioner's counsel withdrew the allegation of DCPS' failure to provide Student's educational records.

The due process hearing was conducted on May 25-26, 2022 by video conference. The hearing

² During the prehearing conference, Respondent's counsel reported that DCPS completed a speech and language evaluation of Student on January 17, 2022 and a psychological evaluation on January 20, 2022.

was open to the public. Petitioner filed disclosures on May 18, 2022 containing a witness list of three witnesses and documents P1- P49. DCPS filed no objections to the disclosures and Petitioner's exhibits P1 – P49 were admitted into evidence. DCPS also filed disclosures on May 18, 2022 containing a witness list of six witnesses and documents R-1 through R-34. Petitioner filed objections later that day. After the first day of hearings on January 26, 2022, DCPS filed no objections to Respondent's disclosures. Respondent's Exhibits R1-R28, R30, and R34 were offered and admitted into evidence. Petitioner presented as witnesses in chronological order: Witness A and Petitioner. Witness A was admitted as an expert in Special Education. Respondent presented as witnesses in chronological order Witness B and Witness C. Witness B and Witness C were admitted as experts in Special Education. At the conclusion of Respondent's direct case, Petitioner provided rebuttal testimony. At the conclusion of testimony, counsel for the parties provided oral closing arguments.

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 timely and comprehensively to reevaluate Student after her/his enrollment in DCPS at the beginning of the 2020-21 school year.
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP for Student on or about October 28, 2020, November 10, 2020, and October 13, 2021. Specifically, Petitioner alleges that the IEP was inappropriate because of insufficient hours of specialized instruction in light of Student's lack of progress, there was insufficient evaluative data to support the IEP, and there were no supports in the IEP to address Student's Attention Deficit Hyperactivity Disorder ("ADHD").
3. Whether DCPS denied Student a FAPE by failing to implement Student's 2020-21 IEP during distance learning. Specifically, Petitioner alleges that DCPS provided Student only one-third of the specialized instruction prescribed on the IEP.

FINDINGS OF FACT

1. Student is X years-old and attended School A in grade J during the 2021-22 school year.³

2. On June 11, 2021⁵, when Student was in grade F, Examiner A conducted a Clinical Neuropsychological Evaluation of Student. Petitioner sought the evaluation out of her concern for Student's difficulty attending, listening to instructions, impulsivity, distractibility, and low frustration

³ Petitioner's Exhibits ("P:") 20 at Bates page 315. The exhibit number is followed by the electronic page number in the disclosure, i.e., P20-315.

tolerance.⁴ On the Wechsler Intelligence Scale for Children (“WISC-IV”), Student scored in the Superior range in Processing Speed (123), in the Average range in Full Scale IQ (98), Verbal Comprehension (91), and Perceptual Reasoning (96), and in the Low Average range in Working Memory (88).⁵ In testing of Student’s executive functioning, s/he scored in the Borderline range on the Animal Sorting subtest (the ability to formulate basic concepts, to transfer those concepts into action, and to shift from one concept to another), on the Response Set (the ability to shift and maintain a new and complex set involving both inhibition and correctly responding to matching or contrasting stimuli), and on the Inhibition subtest, and in the Low Average range on the Design Fluency subtest (ability to generate unique designs).⁶ On the TOVA, which measures attention, Student scored in the Borderline range on Errors of Omission and on Errors of Commission, and in the Mildly Deficient range on Correct Response Time. Student’s phonological deficits made it difficult to score and interpret his/her responses on the Memory and Learning Functions subtest, indicating “significant global language deficit and/or expressive language disorders.”⁷

In testing of Student’s Language Domain, on a Phonological Processing subtest, s/he performed in the Well Below Average range, indicating impaired auditory-phonological perception and analysis. S/he scored in the Low Average range in Comprehension of Instructions; his/her 25th percentile score indicated “relatively good auditory comprehension of verbal messages that are semantically and syntactically complex relative to [his/her] language ability.” Student’s performance on a subtest of the Reitan-Aphasia Screening Test (“R-AST”) suggested “significant indications of left-hemisphere dysfunctions such as inability to name objects (dyssomnia), inability to read (dyslexia), inability to write (dysgraphia), and an inability to recognize number and letters (dysgnosia). Student’s R-AST profile revealed developmental aphasia classified as “nonfluent.” S/he “tends to produce flowing speech that is remarkably empty of content and contains many abnormal words (paraphasias)... Occasionally, [Student’s] speech contains so many paraphasic errors that the discourse is virtually unintelligible and impossible to follow.”⁸

In Mathematics Achievement, Student scored Below Average in Math Operations. In Reading Achievement, Student was Well Below Average in Letter Identification, Word Identification, Word Attack, Word Comprehension, and Passage Comprehension.⁹

Examiner A diagnosed Student with Unspecified ADHD, Language Disorder (Developmental Aphasia), and Specific Learning Disorders (“SLD”) in Reading Written Expression, and Mathematics.¹⁰ He recommended that Student be provided an IEP, cognitive training to address attention, extended testing time, modified work, frequent breaks, and speech and language therapy from a certified speech pathologist.¹¹

3. The first IEP in the record was developed on March 22, 2016 when Student was in

⁴ P4-33.

⁵ *Id.* at 42.

⁶ *Id.* at 35.

⁷ *Id.* at 36.

⁸ *Id.* at 37-38.

⁹ *Id.* at 39-40.

¹⁰ *Id.* at 40.

¹¹ *Id.* at 40-41.

grade A at School B. Student was classified with an SLD.¹² In Consideration of Special Factors, the IEP team indicated that his/her behavior impeded his/her learning and that of other children.¹³ The Areas of Concern were Mathematics, Reading, Written Expression, Communication/Speech and Language, and Emotional, Social, and Behavioral Development (“Behavior”). The IEP team prescribed 17 hours per week of specialized instruction outside general education, six hours per month of speech and language (“S/L”) services outside general education, and two hours per month of behavioral support services (“BSS”).¹⁴

4. On November 15, 2018, when Student was in grade B, School B completed a Comprehensive Speech and Language Assessment.¹⁵ Examiner B found Student’s hearing, voice, speaking rate and fluency, and pragmatic language to be normal. On the Goldman Fristoe Test of Articulation, Student was 90% intelligible “and can easily and intelligibly communicate inside of the classroom.”¹⁶ On the Peabody Picture Vocabulary Test and the for receptive vocabulary (86), and on the Expressive Vocabulary Test (85), Student scored in the Average range.¹⁷ The Clinical Evaluation of Language Fundamental (“CELF-5”) is administered to identify and diagnose language and communication disorders. On the Word Classes, Formulated Sentences, and Recalling Sentences subtests, Student scored in the Average range. The Semantic Relationships subtest assesses the ability to interpret sentences that make comparison, identify location or direction, include time relationships, include serial order, or use passive voice. Student scored in the Borderline Average range on this subtest. His/her Core Language Score (87) was in the Average range.¹⁸ Examiner B offered no opinion as to Student’s continued need for S/L services, but he checked none of the boxes on the Speech and Language Therapy Eligibility Criteria Checklist that would have determined eligibility.¹⁹

5. On January 1, 2019, Examiner C completed a Psychoeducational Evaluation to determine Student’s continued eligibility for special education services. At that time, s/he was receiving 8.45 hours per week of specialized education and two hours per month of S/L services.²⁰ On the WISC-V, Student scored in the High Average range in Processing Speed (111), in the Average range in Visual Spatial (102), Fluid Reasoning (106), and Full Scale IQ (95), and Low Average in Verbal Comprehension (86) and Working Memory (82).²¹ On the Wechsler Individual Achievement Test (“WIAT-III”), Student scored in the Average range in Oral Language (92) and Math Fluency (88), in the Below Average range in Total Reading (71), Reading Comprehension and Fluency (75), Written Expression (73), Mathematics (82),²² and Total Achievement (75), and Low in Basic Reading (67).²³ Student’s visual-motor functioning, visual-perceptual skills, and neurological deficits were measured on the Bender Gestalt -II. S/he scored in the Very High range in Copying (141), and High Average in Recall (116), indicating adequately developed visual-motor memory abilities.²⁴ As to continued

¹² P12-148.

¹³ *Id.* at 149.

¹⁴ *Id.* at 162.

¹⁵ P6-55.

¹⁶ *Id.* at 57.

¹⁷ *Id.* at 58.

¹⁸ *Id.* 59-61.

¹⁹ *Id.* at 63-64.

²⁰ P7-66.

²¹ *Id.* at 68.

²² On the five math subtests, Student was Below Average only on one, Math Problem Solving (79). *Id.* at 73.

²³ *Id.* at 72.

²⁴ *Id.* at 75-76.

eligibility, Examiner C opined as follows:

Based on the results of the current evaluation, including observational data, teacher reports, and collateral documentation, [Student] appears to present with symptoms consistent with a Specific Learning Disorder... Teacher may want to provide support for [Student] in areas of reading comprehension, verbal reasoning, and oral communication...²⁵

6. Student's last IEP at School B was developed on February 5, 2020 when Student was in grade L.²⁶ The Consideration of Special Factors indicated that his/her behavior was no longer an impediment.²⁷ The Areas of Concern were the same except for the removal of Behavior. The IEP team prescribed 4.15 hours per week of specialized instruction *inside* general education for each of Math, Reading, and Written Expression, and one hour per month of S/L services outside general education.²⁸

7. On June 9, 2020, School B issued an IEP Progress Report for the third (final) reporting period of the 2019-20 school year. The Report indicated that School B closed for the year on March 16, 2020 due to the COVID-19 pandemic; Student received services virtually through Zoom. Student was reported to have made no progress on her/his goals in Math or Reading.²⁹ In Written Expression, s/he was reported have made no progress on one goal and "minimal" progress on the other.³⁰ Student was reported to have mastered her/his only Communication goal.³¹

8. Student's final grades for the 2019-20 school year were as follows: English C+, Math – C, Orchestra – A-, Physical Education – A, Science – B-, Social Studies – C, and Writing – B+.³²

9. DCPS issued an undated Individualized Distance Learning Plan ("IDL") for the 2020-2021 school year. The Plan stated that "This plan is based on the current IEP and does not take the place of the annual IEP."³³ The IDLP provided for 90 minutes per week of reading support,³⁴ but no other specific details as to the duration and frequency of any services were provided.

10. On October 28, 2020, when Student was in grade K in her/his first year at School A, DCPS conducted an IEP Annual Review.³⁵ In Mathematics, the Present Level of Performance and Annual Goals ("PLOG") reported Student's math scores on the WIAT-III conducted by Examiner C in 2018. The PLOG also indicated that Student was taking Honors Algebra I, but had a low grade at the beginning of the year due to his/her inability to begin and complete work. The baseline was that s/he scored in the 12th percentile in Mathematics Composite, "showing that [s/he] struggles with grade level math." The goals were: (1) when given a series of multi-step equations in one variable, s/he will

²⁵ *Id.* at 77.

²⁶ P16-243.

²⁷ *Id.* at 244.

²⁸ *Id.* at 252.

²⁹ P26-381-388.

³⁰ *Id.* at 389-92.

³¹ *Id.* at 392.

³² P35-443.

³³ P42-457, emphasis provided in the text.

³⁴ *Id.* at 459.

³⁵ P17-262.

be able to solve the equations with 75% accuracy, and (2) s/he will be able to solve linear equations and inequalities with one variable, including equations with coefficients represented by letters.³⁶ In Reading, the PLOP reported Student's scores on the 2018 WIAT-III. It also reported that s/he was earning only a 50% grade in English due to several missing assignments. The baseline was that his/her reading subtests on the WIAT demonstrate that s/he struggles to read and interpret grade-level text. The goals were: (1) when given a grade-level literary text, Student will determine the theme or central idea and analyze in detail its development, and (2) given a grade-level informational text and a claim, s/he will cite three items of supporting evidence and explain how evidence supports the claim.³⁷ In Written Expression, the PLOP reported Student's scores on the 2018 WIAT. The baseline was that Student needs support in carrying out certain phases of the writing process for larger essays. The goals were: (1) when given a writing task, Student will develop and strengthen writing as needed by planning, revising, editing, rewriting, or trying a new approach, focusing on addressing what is most significant for a specific purpose and audience, and (2) when given a grade-level writing assignment, Student will use pre-writing strategies such as graphic organizers and mind maps.³⁸ In Communication, the PLOP indicated that Student's voice, fluency, articulation, oral motor skills, and pragmatic language skills were within normal limits, but s/he required growth in receptive language and expressive language. The baselines were: (1) Student demonstrates inconsistent use of analogies and figure language, (2) s/he does not have the ability to answer "why" questions consistently, and (3) s/he uses strategies in 80% of opportunities. The goals were: (1) given verbal and visual cues, Student will increase his/her ability to understand analogies and figurative language with 80% accuracy, (2) given verbal and visual cues, s/he will improve her/his ability to answer "why" questions with 80% accuracy, and (3) s/he will repair communication breakdown by using a slower rate of speech, pointing to what s/he is trying to communicate, acting out what s/he is trying to communicate, or drawing what s/he is trying to communicate.³⁹ The IEP team prescribed four hours per week of specialized instruction outside general education, two hours per week inside general education, and one hour per month of S/L services outside general education.⁴⁰

11. On November 12, 2020, DCPS issued an amended IEP indicating that it was to "Decrease existing related service hours (time/frequency)."⁴¹ However, the S/L services on the amended IEP, one hour per month outside general education, was identical to the services prescribed in the October 28, 2020 IEP.⁴²

12. On November 16, 2020, DCPS issued an IEP Progress Report for the first reporting period of the 2020-21 school year. Student was reported to be progressing on both Math goals,⁴³ no progress on both Reading goals,⁴⁴ no progress on the first Written Expression goal, and was progressing on the second. Although Student was reported to be progressing on the second goal, Witness B, his/her special education teacher reported that Student was failing English due to several incomplete assignments. The teacher also attributed Student's lack of progress on his/her Reading

³⁶ *Id.* at 264.

³⁷ P17 at 265.

³⁸ *Id.* at 266.

³⁹ *Id.* at 267-68.

⁴⁰ *Id.* at 269.

⁴¹ P18-278.

⁴² *Id.* at 285.

⁴³ P27-396.

⁴⁴ *Id.* at 397.

goals to the incomplete assignments.⁴⁵ Student was reported to be progressing on both Communication goals.⁴⁶

13. Student's report card for the first term of the 2020-21 school year was issued on November 19, 2020.⁴⁷ His/her grades were as follows: Biology – B-, Music Theory – F, String Ensemble – F, English I – Incomplete, Honors Algebra – C, Concert Band – D+, French I – F, Violin Technique – B-, World History & Geography I: Middle Ages – C-, Study Skills – A.⁴⁸

14. On June 24, 2021, DCPS issued a final IEP Progress Report for the 2020-21 school year. Witness B reported that Student made no progress on either Math goal. “[Student] needed to prioritize other classes and so [s/he] did not make progress in this area.”⁴⁹ In Reading and Written Expression, s/he was reported to be progressing on all of his/her goals, but there were no teacher comments.⁵⁰ Student was reported to be progressing on his/her second Communication goal despite her/his variable participation in the virtual intervention sessions. The first goal was “Just Introduced” in the third reporting period and “not addressed” in the last reporting period.⁵¹ The third Communication goal was not addressed due to “limitations of technology.”⁵²

15. On August 12, 2021, DCPS issued Student's final report card for the 2020-21 school year.⁵³ His/her grades were as follows: Biology – F, English I – C, Honors Algebra – F, French I – D, World History & Geography I: Middle Ages – C-, Study Skills Development I – A, Music Theory – C, String Ensemble – F, Concert Band I – D, and Violin Technique – F.⁵⁴

16. On September 8, 2021, DCPS administered Student a Reading Inventory assessment. His/her Lexile score was 1047, which placed him/her in the 44th percentile and in the Basic Performance Standard.⁵⁵ On January 31, 2022, the assessment was administered again; s/he scored 1168, in the 68th percentile and in the Proficient Performance Standard.⁵⁶

17. On September 27, 2021, DCPS administered Student a MAP mathematics assessment. His/her standard score was 221, which placed him/her in the 19th percentile.⁵⁷

18. On October 14, 2021, when Student was in grade J at School A, DCPS conducted an IEP Annual Review.⁵⁸ The Reading PLOP reported the 2018 WIAT scores as well as the September 27, 2021 MAP assessment on which s/he scored in the 19th percentile. The PLOP also reported that her/his grades during the previous year in Honors Algebra “slipped every subsequent advisory” after a B+ in the first, including an F in the fourth advisory, “only because [s/he] had to focus on other

⁴⁵ *Id.* at 397-98.

⁴⁶ *Id.* at 398-99.

⁴⁷ P31-418.

⁴⁸ *Id.* at 419-20.

⁴⁹ P30-412.

⁵⁰ *Id.* at 413-14.

⁵¹ *Id.* at 414.

⁵² *Id.* at 415.

⁵³ P34-433.

⁵⁴ *Id.* at 434-35.

⁵⁵ P37-445.

⁵⁶ P41-454.

⁵⁷ P38-448.

⁵⁸ P19-294.

classes that [s/he] needed higher advisory grades to pass for the year.” The baseline was that s/he needs support in completing grade level math tasks. The goals were: (1) s/he will be able to describe the effect of dilations, translations, rotations, and reflections on two-dimensional figures using coordinates, and (2) when given a written prompt, s/he will be able to apply the Pythagorean Theorem to find the distance between two points in a coordinate system with 75% accuracy.⁵⁹ The Reading PLOP indicated that Student scored in the 44th percentile on a Reading Inventory assessment on September 8, 2021, which was within the Basic performance band. S/he earned a C in every advisory during the 2020-21 school year except the second, in which s/he failed. “[Student] can struggle with reading texts at grade level, evidenced by [his/her] most recent score on the SRI.” The baseline was that s/he struggles when trying to read and comprehend grade-level text. The goals were: (1) given a grade-level literary text and a verbal/written prompt to analyze what the text says, Student will explain and analyze inferences drawn from the text, citing textual evidence to support the analysis, and (2) after reading a grade-level informational text, s/he will create a concept map with five ideas, events, or people from the text and write an explanation for each example that describes how it relates to another concept or develops the text as a whole.⁶⁰

The Written Expression PLOP indicated that Student earned passing grades in 2020-21 but “managed to get through these classes without completing any large writing assignments.” The baseline was that s/he requires assistance in clarifying ideas and substantiating claims in his/her writing. The goals were: (1) s/he will be able to write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence, and (2) given a grade-level text and a prompt that requires him/her to take a position, Student will develop a claim that addresses the prompt in an essay including two strengths and two limitations of the claim, one supported counterclaim, and at least three citations of textual evidence.⁶¹ In Communication, the PLOP indicated that Student has mild to moderate deficits in identifying inferences, category words, and understanding analogies and figurative language. In expressive language, s/he has difficulty using possessive forms, answering inference questions, and responding to “why” questions. The baselines were: (1) s/he demonstrates inconsistent use of analogies and figurative language, (2) s/he hesitates and declines to answer questions if s/he is not sure of the answer, and (3) s/he uses strategies 70-80% of opportunities. The goals were: (1) given verbal and visual cues, s/he will increase his/her ability to understand analogies and figurative language, (2) given verbal and visual cues, s/he will improve his/her ability to answer “why” questions, and (3) s/he will repair communication breakdown by using a slower rate of speech, pointing to what s/he is trying to communicate, acting out what s/he is trying to communicate, or drawing what s/he is trying to communicate.⁶² The IEP team maintained Student’s services from the prior, amended IEP.⁶³

19. Witness A testified that she objected to the hours of specialized instruction being cut from the level Student received at School B and never restored by the IEP teams at School A. Witness B, Student’s special education teacher during the 2020-21 school year, testified that there was no objection from Petitioner or her representatives to DCPS’ proposed level of services at the October 14, 2021 IEP meeting.

⁵⁹ *Id.* at 297-98.

⁶⁰ *Id.* at 298.

⁶¹ *Id.* at 299-300.

⁶² *Id.* at 300-0-2.

⁶³ *Id.* at 302.

20. At an Analysis of Existing Data Meeting on December 2, 2021, Petitioner's counsel requested that DCPS conduct a comprehensive psychological evaluation, a S/L evaluation, and an assistive technology ("A/T") evaluation. DCPS agreed to conduct a psychological evaluation that would include a social/emotional component and a S/L evaluation.⁶⁴ On December 3, 2021, DCPS issued a Prior Written Notice indicating that it would conduct comprehensive psychological and S/L evaluations and an A/T screening.⁶⁵

21. On February 3, 2022, DCPS issued Student's report card for the second term of the 2021-22 school year.⁶⁶ His/her grades were as follows: Chemistry – C, English II – C+, Honors Algebra – F, French II – C, World History & Geography II: Middle Ages – C+, Geometry – C, Study Skills Development I – A, Music Theory – C, String Ensemble – C-, Concert Band II – C-, and Violin Technique – B-, and Character Exploration – A.⁶⁷

22. DCPS completed a Comprehensive Psychological Triennial Reevaluation on January 20, 2022⁶⁸ and a Speech and Language Reevaluation on January 17, 2022.⁶⁹ On April 6, 2022, DCPS issued a PWN indicating that it would conduct an OT evaluation and a Conners to evaluate Student's ADHD symptoms.⁷⁰

23. On April 20, 2022, Petitioner agreed to terminate Student's S/L services.⁷¹

24. Witness A opined that Examiner C's 2019 Psychoeducational Evaluation was not comprehensive because it contained no assessment of Student's social/emotional characteristics. Witness A noted that Student was previously diagnosed with ADHD and was not completing tasks in class. Witness A also argued that DCPS relied on two-year old assessment data and did not consider any annual testing data. Witness A opined that Student's IEPs were inappropriate, in part, because of insufficient specialized instruction. She testified that DCPS was not justified in reducing the 12.45 hours Student was receiving at School B when s/he transferred to School A in 2019. Witness A also faulted DCPS for failing to include social/emotional goals on Student's IEPs, including goals to address attentional problems as Student was noted to have difficulty completing classroom assignments, as well as behavior support services ("BSS"). Witness A also testified that Student evinced impulsivity and a low frustration tolerance. She also opined that Student's performance during the 2020-21 school year warranted the additional specialized instruction and social/emotional services and goals; Student's report cards and progress reports revealed that s/he was not making progress. On the issue of implementation of Student's October 28, 2020 IEP, Witness A testified that the IDLP provided only 90 minutes of the six hours prescribed in the IEP.

Witness A developed a Compensatory Education Proposal on January 19, 2022 proposing 650

⁶⁴ P45-471.

⁶⁵ Respondent's Exhibits ("R:") 13 at page 1 (126). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R13:1 (126).

⁶⁶ P35-438.

⁶⁷ Id. at 439-440.

⁶⁸ R20:1 (151).

⁶⁹ R22:1 (198).

⁷⁰ R13:1 (126).

⁷¹ R26:2 (210).

hours of tutoring, 36 hours of violin lessons, 72 hours of counseling, and comprehensive psychological, S/L, and occupational therapy evaluations. As justification, Witness A opined, “Since [Student] has consistently scored in the Average Range cognitively, but for the denials of FAPE, [s/he] should have been able to progress by one year academically and behaviorally.”⁷²

25. Petitioner testified that Student suffered from psychological problems throughout the 2020-21 school year. Due to hair loss from alopecia, s/he was too embarrassed to turn on his/her camera during distance learning. Student would “shut down” at home, sometimes locking him/herself in his/her room. Petitioner also testified that after spending all of her/his previous academic career at School B, Student was “uncomfortable” with the new staff and students at School A during the 2020-21 school year.

26. Witness B, Student’s special education teacher during the 2020-21 school year, testified that Student had difficulty participating in virtual learning and in turning in assignments. Student was taking Honors Algebra; s/he was able to handle the content, but s/he did not turn in assignments timely or consistently. The IEP team believed that the six hours of specialized instruction it prescribed was sufficient for Student to make progress; the issue was his/her difficulty transitioning to virtual learning. When s/he did not make progress on her/his goals, it was due to her/his failure to complete work. Student exhibited no social/emotional behaviors that were atypical from his/her peers, and Petitioner expressed no concerns about Student’s behavior. During virtual learning, Student received the prescribed specialized instruction outside general education in two forty-five-minute sessions per week. The specialized instruction inside general education was provided in two eighty-minute sessions. Student resumed in-person classes in February 2021. While he did not believe Student had ever been diagnosed with ADHD, Witness B testified that the School A IEP addressed Student’s attentional issues through classroom accommodations: breaks, teacher check-ins, extended time, and repeated oral directions.

27. Witness C testified that at the October 14, 2021 IEP meeting, at which Petitioner was represented by counsel and Witness A,⁷³ there was minimal discussion of and no objection to the level of specialized instruction services proposed by DCPS’ representatives on the IEP team. The team agreed to suggested revisions to goals by Witness A. When Witness A requested that BSS be added to the IEP, the DCPS representatives on the IEP team indicated that such was not appropriate until that issue was considered at an AED meeting, which the DCPS representatives proposed to convene.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s legal research, the Conclusions of Law 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:

⁷² P48:448-89

⁷³ R3:1-2 (32-32).

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.⁷⁴

In this case, one of the issues is the appropriateness of IEPs. Under District of Columbia law, DCPS bears the burden as to this issue. Petitioner bears the burden as to all other issues.⁷⁵

Whether DCPS denied Student a FAPE by failing timely and comprehensively to reevaluate Student after his/her enrollment in DCPS at the beginning of the 2020-21 school year.

IDEA regulations require that LEA evaluate children with disabilities in all areas of suspected disabilities:

Each public agency must ensure that... the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities...⁷⁶

The regulations also require reevaluations if a teacher or parent requests them, and at least once every three years:

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.⁷⁷

In the *Complaint*, Petitioner asserted that School B's triennial reevaluation was not comprehensive because it did not include "behavioral, social emotional testing, occupational therapy

⁷⁴ D.C. Code § 38-2571.03(6)(A)(i).

⁷⁵ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁷⁶ 34 C.F.R. §300.304 (c)(4).

⁷⁷ 34 C.F.R. §300.303.

testing, speech language testing, or any tests specific to [Student's] ADHD diagnosis.”⁷⁸ In her closing argument, Petitioner's counsel argued that when Student transferred into a DCPS school, DCPS should have realized that Student's evaluative data was inadequate and should have unilaterally conducted comprehensive evaluations.

The regulations provide relief for parents who believe that an LEA's evaluation is inadequate. If a parent disagrees with an LEA's evaluation, he or she may request authorization from the LEA for an independent evaluation. The LEA must either grant the request or file a due process complaint to confirm the validity of its evaluation.⁷⁹ Petitioner did not exercise this option with School B. It appears that by the time she was represented by counsel, this option would have been precluded by the two-year statute of limitations.

When Student enrolled at School A in the fall of 2020, the January 2019 reevaluation by School B was less than two years in the past. Thus, DCPS was not obligated to conduct a triennial evaluation unless the Petitioner or a teacher requested one; neither Petitioner nor a teacher requested reevaluation in the fall of 2020. Therefore, DCPS can be faulted for failing to evaluate Student at the beginning of the 2020-21 school year only if it failed to evaluate Student in all areas of *suspected* disability.

When Student enrolled at School A, s/he brought a February 5, 2020 IEP in which s/he was classified with an SLD. The Areas of Concern were Math, Reading, Written Expression, and Communication, and Student was prescribed 12.45 hours per week of specialized instruction and one hour per month of S/L services. Student's final 2019-20 grades in core subjects at School B included B's in Writing and Science, and C's in English, Social Studies, and in Math. Thus, Student had passing grades in all core subjects and was receiving specialized instruction for nearly half of his/her academic schedule.

While Petitioner alleges that DCPS should have immediately evaluated Student upon enrollment in 2020 for “behavioral, social emotional testing, occupational therapy testing, speech language testing, or any tests specific to [Student's] ADHD diagnosis,” Petitioner offered no evidence that DCPS was aware of inadequate evaluation of these conditions. Student's last School B IEP stated that his/her behavior did not impede his/her learning or that of his/her classmates. Not only was Student not receiving behavioral services when s/he left School B, those services had been specifically terminated during the previous school year, and there was no testimony that Petitioner ever objected to the termination of those services. Therefore, there is no evidence that DCPS should have suspected that Student had behavioral issues that warranted evaluation upon her/his enrollment at School A.

Student was prescribed S/L services on his/her last School B IEP, and there was no testimony that Petitioner has at any time believed that this level of services was inadequate. In fact, Examiner B's 2018 Speech and Language Assessment found Student to be 90% intelligible, Student scored in the Average range in most areas, Examiner B checked none of the boxes on the Speech and Language Therapy Eligibility Criteria Checklist that would have determined eligibility, and he made no recommendation as to Student's need for services. Moreover, in School B's June 9, 2020 IEP Progress Report, Student was reported to have mastered his/her only Communication goal. Finally, on the 2019 reevaluation, Examiner C found that Student had adequately developed visual-motor memory abilities.

⁷⁸ P1-16.

⁷⁹ 34 C.F.R. §300.502(b)(2).

There was no testimony or documentation of any information provided to DCPS at the beginning of the 2020-21 school year that would have suggested the need for an occupational therapy evaluation.

For all of these reasons, I conclude that Petitioner has failed to establish a *prima facie* case that DCPS failed timely and comprehensively to reevaluate Student after his/her enrollment in DCPS at the beginning of the 2020-21 school year.

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP for Student on or about October 28, 2020, November 10, 2020, and October 13, 2021. Specifically, Petitioner alleges that the IEP was inappropriate because of insufficient hours of specialized instruction in light of Student’s lack of progress, there was insufficient evaluative data to support the IEP, and there were no supports to address Student’s Attention Deficit Hyperactivity Disorder (“ADHD”).

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*.⁸⁰ 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.’”⁸¹ 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...”⁸² 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.”⁸³

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.⁸⁴ 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*.’”⁸⁵ 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

⁸⁰ 458 U.S. 176, 187 (1982).

⁸¹ *Id.* at 189-90, 200

⁸² *Id.* at 200.

⁸³ *Id.* at 203-04.

⁸⁴ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁵ *Id.* at 997.

most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁶

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."⁸⁷

October 28, 2020 and November 12, 2020 IEPs

Thus, to meet her burden of establishing a *prima facie* case of a violation of IDEA, Petitioner must introduce some evidence that the IEP was not reasonably calculated to enable Student to make progress. IDEA regulations specifically address how students who transfer from one local education agency ("LEA") to another within the same state must be served:

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either—

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.⁸⁸

Petitioner argues that the October 2020 IEP was inappropriate because the amount of specialized instruction was reduced from that prescribed by School B on the previous IEP, Student was clearly struggling at the time the IEP was developed, and the IEP did not address Student's ADHD symptoms. The record reveals that Student failed to make progress during distance learning during last three months at School B. The Math PLOP on DCPS' October IEP revealed that while Student was taking Honors Algebra, s/he had a low grade at the beginning of the year due to his/her inability to begin and complete work. The baseline also indicated that Student "struggles with grade level math." In Reading, Student was earning a 50% grade due to several missing assignments, and the baseline was that s/he struggles to read and interpret grade-level text. In Written Expression, the PLOP indicated

⁸⁶ *Id.* at 1000-01 (citations omitted).

⁸⁷ 137 S.Ct. at 1000-01.

⁸⁸ 34 C.F.R. §300.323(e).

that Student needed support to carry out certain phases of the writing process for longer essays. Student's final IEP at School B provided 4.15 hours per week of specialized instruction in general education in each of Math, Reading and Written Expression, for a total of 12.45 hours per week. DCPS' first IEP for Student, on October 28, 2020, provided 4 hours per week of specialized instruction outside general education, and 2 hours per week inside general education, for a total of six hours of specialized instruction per week.

The evidence is incontrovertible that Student was not doing well at that beginning of the 2020-21 school year. The Math and Reading PLOPs indicated that s/he was not handling grade level work and was not consistently turning in assignments, and the Written Expression PLOP revealed that s/he needed support to write longer essays. The 2019 reevaluation also revealed that Student was Below Average range in Total Reading (71), Reading Comprehension and Fluency (75), Written Expression (73), Mathematics (82), and Total Achievement (75), and Low in Basic Reading (67). The only reason Witness B gave for believing the IEP was appropriate was his belief that Student could handle Honors Math but was earning low grades due only to his/her failure to turn in assignments.

The fact remains that DCPS cut Student's previously prescribed specialized instruction by more than one-half despite his/her documented weaknesses in all three core subjects and poor performance leading up to his/her first DCPS IEP team meeting. The October 28, 2020 IEP was ostensibly amended two weeks later on November 12, 2020, but there was no change in the amount or setting of Student's prescribed specialized instruction. I conclude that DCPS has failed to meet its burden of proving that its October 28, 2020 and November 12, 2020 IEPs were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.

October 14, 2021 IEP

Student's October 14, 2021 IEP provided the identical specialized instruction that was provided on the October and November 2020 IEPs: four hours per week outside general education and two hours per week inside general education. Having already found that this level of service was inappropriate a year earlier, it could only be appropriate a year later if Student had demonstrated significantly improved academic progress. In short, s/he did not. The 2020-21 year-end Progress Report revealed that s/he made no progress on either math goal. While s/he was reported to have made progress on all of her/his Reading and Written Expression goals, there were no teacher comments to substantiate the progress. Moreover, s/he performed poorly in his/her academic courses; s/he failed Biology and Honors Algebra, earned a D in French, and earned C's in English and World History & Geography. On a Reading Assessment on September 8, 2021, Student scored at the Basic Performance Standard. The Math PLOP noted that his/her grades deteriorated throughout the year and s/he needed support to complete grade level math tasks. The Reading baseline revealed that s/he struggled when trying to read and comprehend grade-level text. The Written Expression PLOP indicated that while s/he earned passing grades, s/he "managed to get through these classes without completing any large writing assignments." The baseline indicated that s/he needed support in clarifying ideas and substantiating claims in his/her writing.

In the absence of any objective measure that Student made meaningful academic progress during the 2020-21 school year, I conclude that DCPS has failed to meet its burden of proving that the October 14, 2021 IEP, which offered the same level of services and setting as the October and

November 2020 IEPs, was reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances.

Whether DCPS denied Student a FAPE by failing to implement Student's 2020-21 IEP during distance learning. Specifically, Petitioner alleges that DCPS provided Student only one-third of the specialized instruction prescribed on the IEP.

Student's last IEP at School B prescribed 12.45 hours per week of specialized instruction inside general education. 34 C.F.R. Section 300.323(e) required DCPS to provide services comparable to those described in the child's IEP from the previous public agency. Instead, DCPS issued an IDLP stating its intention to provide 90 minutes per week of reading support, but no other specific details as to the duration and frequency of any services were provided.

The IDLP was issued in response to the COVID-19 pandemic that compelled DCPS to conduct classes virtually. In its *Response* to the *Complaint*, DCPS argued that it provided Student specialized instruction and related services to the greatest extent possible, consistent with U.S. Department of Education guidelines. However, during the hearing, DCPS offered no testimony to explain why it was not possible to provide more than 90 of the 360 minutes per week of specialized instruction during distance learning; distance learning was implemented from the beginning of the 2020-21 school until sometime in February 2021. Witness B testified that Student received the prescribed specialized instruction outside general education in two forty-five-minute sessions per week. However, this was 150 minutes less than the four hours prescribed in the IEP. Witness B testified that the specialized instruction inside general education was provided in two eighty-minute sessions, which would have exceeded the prescribed amount, two hours per week, by forty minutes per week.

I conclude that Petitioner has met her burden of proving that DCPS failed to implement Student's 2020-21 IEP by failing to provide 150 minutes per week of specialized instruction outside general education from the beginning of the 2020-21 school year until the end of the second week of February 2021. During the 2020-21 school year, the DCPS school calendar reveals that there were approximately 22 weeks of school between the beginning of the school year and Friday, February 12, 2021. Thus, Student was deprived of approximately 55 hours of the specialized instruction outside general education that were prescribed in his/her IEP.

RELIEF

For relief, Petitioner requests, *inter alia*, an order (1) requiring DCPS to conduct or fund independent evaluations to include a comprehensive psychological evaluation to address Student's social/emotional and attentional needs, an A/T evaluation, a S/L evaluation, and an OT evaluation; (2) an order requiring DCPS to convene an IEP team to develop an appropriate IEP including an increase in specialized instruction and behavioral support services (3) attorney's fees, and (4) compensatory education.

As is indicated in the Statement of Facts, DCPS completed a Comprehensive Psychological

Triennial Reevaluation on January 20, 2022 and a Speech and Language Reevaluation on January 17, 2022. On April 6, 2022, DCPS issued a PWN indicating that it would conduct an OT evaluation and a Conners to evaluate ADHD symptoms. Thus, despite failing to establish a *prima facie* case on her evaluation claim, Petitioner has already received substantially all of the relief she requested on that claim.

As for Petitioner's request for compensatory education services, "whether" a successful petitioner is entitled to compensatory education is not discretionary to a Hearing Officer. In the very first paragraph of *Reid v. District of Columbia*,⁸⁹ the court stated that where there has been a violation of IDEA, "a court fashioning 'appropriate' relief, as the statute allow, may order compensatory education, i.e., replacement of educational services the child should have received in the first place... We... adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA."⁹⁰

Subsequently, in *Boose v. District of Columbia*, the court made it clear that compensatory education should be awarded whenever a denial of FAPE has occurred.

If a school district fails to satisfy its 'child-find' duty or offer the student an appropriate IEP, and if that failure affects the child's education, then the district has necessarily denied the student a free appropriate public education... And when a school district denies a child a FAPE, the courts have 'broad discretion' to fashion an appropriate remedy... That equitable authority, this court has held, must include the power to order "compensatory education" – that is, education services designed to make up for past deficiencies in a child's program. If compensatory education were unavailable, after all, a child's access to appropriate education could depend on his parents' ability to pull him out of the deficient public program and front the cost of private instruction – a result "manifestly incompatible with IDEA's purpose of 'ensuring that *all* children with disabilities have available to them a free appropriate public education."⁹¹

The court was even more emphatic in *B.D. v. District of Columbia*,⁹² where a Hearing Officer failed to award compensatory education services despite a finding of a denial of FAPE. The court held that "the Hearing Officer had an obligation either to fashion a compensatory education program to redress that harm or to provide an adequate explanation for his decision not to do so." The court suggested that evaluations might be used to develop compensatory education plan.⁹³

The *Reid* court rejected compensatory education plans proposed both by the parents and the Hearing Officer that were based on a day-for-day-lost formulation. "[W]e agree with the Ninth Circuit that '[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA."⁹⁴

⁸⁹ 401 F.3d 516 (D.C. Cir. 2005).

⁹⁰ *Id.* at 518.

⁹¹ *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir (2015).

⁹² 817 F.3d 792 (D.C. Cir. (2019).

⁹³ *Id.* at 799.-800.

⁹⁴ *Reid*, 401 F.3d at 524.

The court required that the determination of appropriate compensatory education services must be based on a “fact-specific” record to determine what the student actually lost as a result of the denial of FAPE. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.⁹⁵

Thus, a record must be developed to demonstrate (1) what educational harm Student suffered as a result of the alleged denial of FAPE, and (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE.

Petitioner offered no credible evidence of the type and amount of compensatory services Student requires to put her/him in the position s/he would be had there been no denial of FAPE. Witness A prepared a Compensatory Education Plan requesting 650 hours of tutoring services, 36 hour of violin lessons, and 72 hours of counseling. In support of the proposal, Witness B testified that the plan would put Student in the position s/he would have been but for the denial of FAPE. The plan is based on Witness A’s assertion that since Student has consistently scored in the average range cognitively, but for the denials of FAPE, s/he would be expected to make a year of growth in academic progress with adequate support during a school year. This assertion appears to be inherently suspect. All SLD students are different, with different learning patterns, different learning rates, different backgrounds, different deficits, and varied cognitive skills. Student also has deficits in all three core subjects, while many SLD students have deficits in but one area. Thus, I cannot accept Witness A’s mere assertion that Student would be expected to achieve a year of academic growth each school year with appropriate supports. In addition, Witness A offered no empirical support for the request for 650 hours of tutoring and violin lessons. In light of Petitioner’s failure to meet her burden on the evaluations claim, she is not entitled to the requested counseling services.

In prior cases in which successful petitioners failed to substantiate their compensatory education proposals, consistent with the direction in *B.D.*, I have ordered DCPS to fund evaluations to determine the type and amount of services required to compensate for the denial of FAPE. I then ordered the parties to reconvene in a multidisciplinary team (“MDT”) meeting to review the evaluations and to determine an appropriate amount of compensatory education services. Either the parties would agree on an appropriate amount or the petitioners would have support for a subsequent due process complaint to recover the compensatory education services recommended in the evaluation. However, in *District of Columbia International Public Charter School v. Lemus*,⁹⁶ District Judge Lamberth ruled that ordering an MDT to participate in the determination of compensatory education services as the result of a denial of FAPE constituted an improper delegation of authority.⁹⁷ The

⁹⁵ *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). See also, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

⁹⁶ Civ. Action No. 1:21-cv-0023 – RCL, 2022 WL 873549 (D.D.C. March 24, 2022).

⁹⁷ *Id.* at 3.

dilemma posed by this ruling is as follows: (1) the courts require Hearing Officers to award compensatory education upon a findings of a denial of FAPE, (2) the award must be based on fact-specific evidence and the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place, (3) in the event petitioners fail to make a fact-specific showing to support an award, the Hearing Officer must develop such a record, for example, through a compensatory education evaluation, but (4) IDEA requires Hearing Officer Determinations to be issued within 45 days after the 30-day resolution period. Since the entitlement to compensatory education services is not established until the Hearing Officer determines that there has been a denial of FAPE, there is insufficient time after this determination to order a compensatory education evaluation, await its completion, then consider the findings and conclusions of the evaluation before making a determination of the appropriate amount of services to award.

While the *Boose* court conferred “broad discretion to fashion an appropriate remedy,” that discretion does not contemplate arbitrariness. *Reid* still requires the decision to be fact-based. Therefore, until such time as the courts carve out a compensatory education exception to the 45-day deadline to issue decisions, I will continue to attempt to create a record by ordering the completion of compensatory education plans to form a basis for the determination of the appropriate type and amount of services to put the students at the academic level they would have been in but for the denials of FAPE.

For DCPS’ failure to provide Student the prescribed amount of specialized instruction during distance learning during the 2020-21 school year, I will award 55 hours of tutoring in Math, Reading, and Written Expression. Student is also entitled to compensatory education for DCPS’ failure to provide student at least 12.45 hours of specialized instruction on the three IEPs at issue. I will award an additional 45 hours of tutoring now and order DCPS to fund an independent evaluation to determine the type and amount of compensatory education services that would bring Student to the academic level s/he would have attained but for DCPS’ failure to provide an additional 6.45 hours of specialized instruction throughout the 2020-21 school year.

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, the closing arguments of the parties’ counsel, it is hereby

ORDERED, that DCPS shall fund 100 hours of compensatory education tutoring services in Math, Reading Comprehension, and Written Expression for Student with no restrictions as to the time of day or deadlines for the completion of such services.

IT IS FURTHER ORDERED, that Respondent shall fund an independent educational evaluation with the specific purpose of determining (1) what educational harm Student suffered by being denied 6.45 hours per week of specialized instruction throughout the 2020-21 school year, and (2) the appropriate type and amount of compensatory education services Student requires to make one year of grade level improvement in Math, Reading, and Written Expression. DCPS shall fund any

additional evaluations necessary for the evaluator to make the desired recommendations. The evaluation should discuss Student's expected annual academic growth with and without special education services, the bases for his/her opinion as to Student's academic growth, and specific reasons for the proposed services to address the denial of services.

IT IS FURTHER ORDERED, that within fifteen (15) business days of receipt of the independent evaluation, DCPS shall schedule an IEP team meeting through Petitioner's counsel to update the IEP, and to consider the need for additional compensatory education services for Student for the denial of FAPE for the failure to provide an appropriate IEP for the 2020-21 school year.

APPEAL RIGHTS

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

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: July 6, 2022

Copies to: Attorney A, Esquire
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