

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
July 08, 2022

Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Dates: 3/21/22-3/24/22; 6/1/22;
)	6/7/22; 6/8/22; 6/24/22.
v.)	
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2021-0195
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Multiple Disabilities (Autism Spectrum Disorder, Other Health Impairment). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 6, 2021. The Complaint was filed by the Student’s parents (“Petitioners”). On December 20, 2021, Respondent filed a response. The resolution period expired on January 5, 2022. Later, a resolution meeting was scheduled on January 7, 2022, which did not resolve the case.

II. Subject Matter Jurisdiction

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

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

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

III. Procedural History

A prehearing conference was held on January 28, 2022. Attorney A, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on February 2, 2022, as revised on February 22, 2022, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioners were again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

The matter proceeded to trial on March 21, 2022, March 22, 2022, March 23, 2022, and March 24, 2022. To accommodate these hearing dates, Respondent moved to extend the timelines on February 8, 2022, on consent. The motion was granted on February 17, 2022, and the deadline for the Hearing Officer Determination (“HOD”) was changed to April 14, 2022. As a result, the parties arranged to continue this matter to April 26, 2022, and April 27, 2022. The HOD due date was also extended to May 18, 2022, per a second continuance order. On April 26, 2022, the parties appeared at the hearing, but there is no dispute that Petitioners’ counsel was ill with COVID-19 and could not proceed. On consent, the parties adjourned the two scheduled hearing dates and rescheduled the case for June 1, 2022, and June 7, 2022. On May 17, 2022, Petitioners moved to extend the HOD due date to July 8, 2022, to allow for the scheduled

hearing dates to proceed. The motion was granted on May 18, 2022, and the deadline for the HOD was changed to April 14, 2022.

After completing its case, Respondent moved for a partial directed finding on March 24, 2022. The motion was denied on the record by this Hearing Officer. Closing arguments were presented on June 24, 2022. The parties were invited to submit lists of citations after closing argument. The parties submitted these written statements on June 24, 2022.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-73, exclusive of exhibit P-72, without objection. Respondent moved into evidence exhibits R-1 through R-22 without objection. Petitioners presented as witnesses, in the following order: Witness A, an independent education consultant (expert in special education programming and Individualized Education Program (“IEP”) development); Witness B, a director at Private School A; Witness C, a clinical psychologist (expert in clinical psychology, including conducting and interpreting neuropsychological evaluations); the Student’s mother (“Mother”); and the Student’s father (“Father”). Respondent presented as witnesses: Witness D, a school psychologist (expert in school psychology); Witness E, a speech and language pathologist (expert in speech language pathology, evaluation, and programming and placement as it relates to speech); Witness F, a school director (expert in special education programming and placement and evaluations); Witness G, a school psychologist (expert in special education programming and placement); Witness H, a central IEP specialist (expert in special education programming and placement and general education inclusion); Witness I, a social worker (expert in school-based social work and clinical social work); Witness J, a special

education teacher (expert in special education programming and placement); Witness K, an occupational therapist (expert in occupational therapy); Witness L, a social worker (expert in social work and behavioral support services); Witness M, a special education teacher (expert in special education programming and placement); and Witness N, a resolution specialist (expert in resolving special education disputes).

IV. Issues

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

1. Did Respondent fail to provide the Student with an appropriate Individualized Education Program (“IEP”) on or about April 10, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioners alleged that Respondent denied the Student a FAPE because the IEP:

1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) contained many of the same goals as the prior IEP, signaling a lack of progress that should have led to a revision of the goals and a reconsideration or revision of the services and placement; and/or 3) did not adequately address the Student’s social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 4) did not provide adequate “other classroom aids and services,” accommodations, modifications, and interventions to address the Student’s known deficits; and/or 5) failed to adequately program for the Student’s multiple diagnoses/known deficits resulting from, among other things, anxiety, depression, Attention Deficit Hyperactivity Disorder (“ADHD”), executive functioning deficits, a specific learning disability in written expression (spelling, grammar, punctuation, and organization of

written expression), and a known personal history of psychological trauma; and/or 6) failed to provide appropriate and/or sufficient behavioral support services; and/or 7) provided for an inappropriate/unreasonable Post-Secondary Transition Plan.

2. Did Respondent fail to implement the Student's IEP because it unilaterally developed the September 2020 "IDL P"? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioners alleged that the Student's Individualized Distance Learning Plan ("IDL P"): 1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) contained many of the same goals as the prior IEP, signaling a lack of progress that should have led to a revision of the goals and a reconsideration or revision of the services and placement; and/or 3) did not adequately address the Student's functional, social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 4) did not provide adequate "other classroom aids and services," accommodations, modifications, and interventions to address the Student's known deficits; and/or 5) failed to adequately program for the Student's multiple diagnoses/known deficits resulting from, among other things, anxiety, depression, ADHD, executive dysfunction, specific learning disability in written expression (spelling, grammar, punctuation, and organization of written expression), and a known personal history of psychological trauma; and/or 6) failed to provide appropriate and/or sufficient behavioral support services; and/or 7) was created unilaterally by Respondent without parent involvement, preventing Petitioners from participating in educational decisions for the Student.

3. Did Respondent deny the Student a FAPE by: 1) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of

occupational therapy at least as far back as December 2020; 2) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of speech and language at least as far back as July 2021; and 3) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of assistive technology as far back as January 2021? If so, did Respondent violate 34 C.F.R. 300.304 and related provisions of the law and regulations? If so, did Respondent deny the Student a FAPE?

4. Did Respondent fail to provide the Student with an appropriate IEP on or about May 5, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioners alleged that the IEP: 1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) contained many of the same goals as the prior IEP, signaling a lack of progress that should have led to a revision of the goals and a reconsideration or revision of the services and placement; and/or 3) did not adequately address the Student's functional, social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 4) failed to provide appropriate and/or sufficient related services for the Student (occupational therapy and behavioral support services); and/or 5) did not provide adequate "other classroom aids and services," accommodations, curriculum modifications (such as social learning curriculum), and academic and other individualized interventions to address the Student's known deficits; and/or 6) failed to adequately program for the Student's multiple diagnoses/known deficits resulting from, among other things, Autism Spectrum Disorder ("ASD"), Generalized Anxiety Disorder, Persistent Depressive Disorder, ADHD, executive dysfunction affecting inhibition, planning/organization, working memory, initiation, flexibility, self-monitoring, task-monitoring, emotional control, Speech/Sound Disorder, Unspecified Communication Disorder, specific learning

disabilities with impairments in reading (word reading accuracy), mathematics (accurate or fluent calculation), written expression (spelling, grammar, punctuation, and organization of written expression), and a known personal history of psychological trauma; and/or 7) did not provide for an appropriate placement in the least restrictive environment (Student required more restrictive placement); and/or 8) provided an inappropriate/unreasonable Post-Secondary Transition Plan.

5. Did Respondent fail to provide the Student with an appropriate IEP on or about August 26, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the IEP: 1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) did not adequately address the Student's functional, social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 3) failed to provide appropriate and/or sufficient related services for the Student (occupational therapy, speech and language therapy, and behavioral support services); and/or 4) did not provide adequate "other classroom aids and services," accommodations, curriculum modifications (such as social learning curriculum) and academic and other individualized interventions to address the Student's known deficits; and/or 5) failed to adequately program for the Student's multiple diagnoses/known deficits resulting from, among other things, ASD, Generalized Anxiety Disorder, Persistent Depressive Disorder, ADHD, executive dysfunction affecting inhibition, planning/organization, working memory, initiation, flexibility, self-monitoring, task-monitoring, emotional control, Speech/Sound Disorder, Unspecified Communication Disorder, specific learning disabilities with impairments in

reading (word reading accuracy), mathematics (accurate or fluent calculation), written expression (spelling, grammar and punctuation, and organization of written expression), and a known personal history of psychological trauma; and/or 6) did not provide for a placement in the least restrictive environment (Student required more restrictive placement); and/or 7) provided for an inappropriate/ unreasonable Post-Secondary Transition Plan.

6. Did Respondent deny the Student a FAPE by failing to provide an appropriately restrictive educational placement (since January, 2020) that can provide the Student with an environment where s/he can safely learn without bullying?

7. Did Respondent deny the Student a FAPE by failing to implement his/her April 10, 2020 IEP and his/her May 5, 2021 IEP? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student's assigned school did not provide the required specialized instruction and behavioral support services, and that the Student's accommodations and "other classroom aids and services" were not consistently provided or were not provided at all.

As relief, Petitioners seek an assistive technology evaluation, compensatory education, tuition reimbursement for Private School A for the 2020-2021 school year, and related relief.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a Student with Multiple Disabilities (Autism Spectrum Disorder, Other Health Impairment). The Student has been determined to be above average cognitively, and achievement testing scores, though inconsistent, suggest that the Student could function

on or about grade level. However, the Student's ASD, ADHD, anxiety, and depression issues give the Student increasingly significant issues in school, especially since the inception of the COVID-19 pandemic, including with respect to paying attention and being socially aware and appropriate in public. Loud noises, environmental issues, light, touch, and other sensory concerns affect the Student in the classroom. The Student also has difficulty with transitions. Testimony of Mother; Testimony of Father; Testimony of Witness I; Testimony of Witness C; Testimony of Witness A; Testimony of Witness K; P-39.

2. The Student attended Public School B for several years, including the 2016-2017 and 2017-2018 school years. The Student was lively, had "super good" verbal skills, but was very sensitive and felt bullied. The Student preferred individual instruction. Testimony of Witness F. The Student attended Public School A during the 2018-2019 school year, which is a much larger physical setting than Public School B. Testimony of Witness A. There were bullying incidents during this year, including an incident where the Student was locked in a closet. As a result, a safety plan was put in place. P-1. The IEP that was finalized on April 3, 2019, indicated that the Student was easily distracted, which impacted his/her ability to maintain focus during whole group, small group, and individual instruction. The IEP indicated that the Student demonstrated symptoms of ADHD. A Strengths and Difficulties Questionnaire ("SDQ") indicated that the Student had a slightly raised score for emotional distress. P-4. The Prior Written Notice corresponding to this IEP underscored the importance of having teachers nearby to maintain focus for the Student's benefit. P-7-1. The Student's report card for the 2018-2019 school year at Public School B included final grades in the "B" range in all

academic subjects. The report card included comments that the Student was a pleasure to have in the class and participated well in five subjects: math, science, Spanish, geography, and “Cultures and Art.” Grades of “F” in math and “D+” in science were noted on a different progress report. SRI testing during the year indicated that the Student was reading at or near grade level. i-Ready testing during the year also indicated that the Student was at grade level. P-8; P-9; R-9-1. The Student’s IEP progress reports largely indicated progress on goals that had been introduced, but no progress in emotional, social and behavioral development in the fourth reporting period. P-10. The Student received counseling through Witness I during this school year. P-11.

3. The Student continued at Public School A for the 2019-2020 school year. At the start of the year, SRI and i-Ready testing indicated that the Student was functioning at or near grade level. R-9-1. The Student was either bubbly or withdrawn to the point where s/he might suck his/her thumb, sit in the corner, pick his/her scabs, and write on his/her hands. Testimony of Witness M. The Student also had issues with a Spanish teacher, which resulted in a change to that classroom, and the Student got involved in a few incidents in the school, one of which led to a police report. Testimony of Father; Testimony of Mother; P-27; P-28; P-29. The Student received cognitive behavioral therapy from Witness I, who was beginning to get through to the Student, who nevertheless struggled with generalizing. P-14-3. The Student received behavioral support services from Witness I for both the 2018-2019 and 2019-2020 school years. Witness I provided services beyond the mandate. The focus was on cognitive behavioral therapy, though other programs were used. The Student liked to use the sessions with Witness I to gain control over his/her thoughts, and the Student talked a lot about peer

issues and issues at home. Family therapy was recommended by Witness I, who stressed that outside services were needed. Testimony of Witness I. On January 8, 2020, Witness I expressed concerned with the Student verbalizing suicidal ideation. P-29-1. A Student Safety Plan was written for the Student on January 8, 2020, which allowed him/her, among other things, to request to speak to the school counselor, social worker, dean, or assistant principal at any reasonable time during the school day. The Student also had to check in with Witness I daily to see if the plan was working. P-30. Witness I tried to find outside providers that would help the parents with the Student. P-12-84. Reports from the school indicated that the Student struggled with organization and staying on task, but when s/he was on task, s/he did quite well and was on grade level. The Student fatigued easily, but was able to complete the work. P-14.

4. SRI testing from February 5, 2020, indicated that the Student scored 1194, an increase from testing on September 5, 2019, where the Student scored 1126 on the SRI. R-9-1. On March 12, 2020, at about the time that the COVID-19 pandemic began, Petitioners sought a transfer of the Student from Public School A as a result of the bullying. P-30-2. Another episode of suicidal ideation occurred on March 12, 2020, which was due to a combination of factors, include home-related factors. Testimony of Witness I.

5. In or about March, 2020, the COVID-19 pandemic commenced, and DCPS began to provide students with services virtually. Petitioners continued to complain about the bullying of the Student, which was now allegedly occurring online. Testimony of Father.

6. An IEP meeting was held on April 10, 2020. The IEP indicated that the Student was easily distracted by peers and materials and needed frequent cueing, redirection, and breaks. The IEP indicated that the Student used checklists and cues to address these behaviors and that the Student participated in small group discussions to support his/her peer relationships in the classroom. The IEP also indicated that the Student was advanced in math (according to an “ANET” assessment from January 15, 2020). The IEP included goals in math and emotional, social and behavioral development to address the Student’s issues with, among other things, distractibility, executive functioning, anxiety, and peer issues. The IEP mentioned a February 2020 SDQ, which showed that the Student’s overall score indicated very high emotional distress, hyperactivity, concentration issues, and difficulties with other children. The IEP provided for two hours per week of instruction in written expression inside general education, with sixty minutes per month of behavioral support services inside general education and sixty minutes per month of behavioral support services outside general education. P-13. The Student’s parents did not clearly disagree with this IEP and appeared mainly to object to the Student’s school. Testimony of Witness G.

7. In or about April 13, 2020, Petitioners sought an evaluation of the Student for speech issues. P-19. DCPS felt that, given the pandemic, it was impossible to do formal evaluations at this time. Testimony of Witness D. The Student struggled with virtual instruction and received “F” grades in science and Spanish on his/her final term report card for the 2019-2020 school year, though s/he received “A” grades in English, math, and history and geography. For the year’s final grades, the Student passed all of his/her classes, with “B” grades in all academic classes. P-22. The IEP progress reports

for the Student for the school year indicated progress in all areas (and mastery in both written expression goals in the third reporting period), except for counseling (in the first, second, and fourth reporting periods). P-23.

8. During the summer of 2020, DCPS began to conduct assessments again, virtually. Testimony of Witness D. The Student continued to attend Public School A for the 2020-2021 school year. School commenced with virtual classes four days a week, with no synchronous instruction on Wednesday. Virtually all students, whether eligible for specialized instruction or not, received less services than they otherwise would have during the 2020-2021 school year because of the COVID-19 pandemic. Testimony of Witness J.

9. On or about September 29, 2020, an IDLP was issued for the Student. The IDLP outlined how the IEP would be implemented during remote learning. The IDLP also provided the Student with 120 minutes per month of behavior support services, with specialized instruction for written expression twice a week for thirty minutes and one goal relating to working with peers. P-32.

10. In November 2020, an ASD evaluation was completed virtually by a psychologist who observed that the Student demonstrated deficits in social communication and interaction, signs and symptoms of restricted interests, sensory sensitivities, behavioral rigidity, and repetitive behaviors. The Student was therefore given the diagnosis of ASD Level One, as well as ADHD, Anxiety Disorder, and Unspecified Depression. P-52. On December 8, 2020, Petitioners accordingly asked DCPS for an autism diagnosis of the Student. P-34.

11. During much of the 2020-2021 school year, the Student would tire during virtual classes and perform inconsistently in the classroom, often not turning in assignments or hiding under a blanket, uncooperatively. R-14; Testimony of Witness J. Virtual instruction was not a good fit for the Student, who would not appear on camera or microphone. Testimony of Petitioners; Testimony of Witness D; Testimony of Witness L. Though a meeting was planned by the Student's case manager to address his/her anxiety during the year, and though the Student was offered the chance to join a weekly sensory skills group with an Applied Behavior Analysis ("ABA") specialist, virtually no progress was made in regard to emotional, social and behavioral development, and Witness L felt that there was nothing that he could do to help the Student, who was totally resistant to therapy. Testimony of Witness L.

12. On January 22, 2021, Witness D prepared a confidential psychological evaluation of the Student. Witness D conducted a records review, spoke to the Student, the Student's parent, and the Student's teachers. Witness D also tested the Student on the Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition ("WJC IV") and the Woodcock-Johnson Tests of Achievement, Form B, Fourth Edition ("WJ IV"). Witness D found that the Student felt overwhelmed by school and was thinking of dropping out. Witness D reported that the Student did not want teachers to judge him/her or to be different, and that it was hard for him/her to make friends. Witness D felt that the Student strongly did not want to be different and did not feel like s/he had enough of a peer support group. The Student said that his/her hands hurt him/her when s/he was writing, and Witness D therefore recommended an assistive technology evaluation. Witness D's report included pertinent details from the Student's teachers. The Student's

math teacher said that the Student was willing to work one-on-one and in small groups, but lacked confidence and did not complete work independently or in small groups and would not go to breakout rooms. The Student would “log on” but would not be “present enough” to answer questions. The Student’s science teacher reported that the Student was willing to work hard and could complete math problems, but had to read text multiple times and had not done well at all in the virtual setting, which had caused him/her a lot of anxiety. This teacher felt that virtual learning and the issues that it presented to the Student had negatively contributed to the Student’s emotional well-being. In regard to cognitive testing, the Student’s scores were in the very low to low average range, with particular weaknesses in long term retrieval. In achievement testing, the Student scored in the low average range in reading, the low range in written expression, and the low range in math. Witness D also reported that the Student’s grades were mostly in the “C” or “D” range, and that the Student’s Reading Inventory Testing showed that the Student had been at a basic level on August 30, 2018 (859), and on January 24, 2019 (856), but had improved to the proficient level on June 4, 2019 (997), and then had improved further to the advanced level on September 5, 2019 (1126), and again on February 5, 2020 (1194). The Student’s PARCC scores in English language arts indicated that the Student had been at Level 3 (approaching expectations) in spring 2018, and at Level 4 (meeting expectations) in spring 2019. The Student’s PARCC scores for math met expectations every year from 2016-2019. Witness D did not question the findings from the independent evaluation, which indicated that the Student was experiencing significant stress from ADHD, ASD, anxiety, and unspecified depression, as well as other factors, which impacted his/her performance. Witness D recommended

an increase in specialized instruction hours, an assistive technology referral, consultation with an ABA coordinator to determine which additional supports might be used to improve the Student's overall learning experience, writing interventions such as graphic organizers and editing checklists, tutoring sessions, weekly check-ins, and behavior support services. Witness D also felt that there should be a consultation with the ABA coordinator at Public School A. P-53; Testimony of Witness D.

13. On January 28, 2021, Petitioners asked staff at Public School A for materials to enable the Student to attend Private School A. P-32-118.

14. An independent occupational therapy evaluation was conducted for the Student on February 4, 2021. The evaluator conducted testing, including the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition ("BOT-2"), and found the Student to be well below average in balance and coordination, as well as distractible. On the Beery-Buktenica Developmental Test of Visual-Motor Integration ("Beery VMI"), the Student also scored in the very low range. The evaluation found that the Student had issues with balance, endurance, fine motor skills, motor planning, postural strength and control, regulation, social skills, and overall strength. Occupational therapy was recommended for the Student, and a number of short and long term goals were proposed. P-54.

15. An IEP meeting was held for the Student on February 23, 2021. Petitioners stated that the Student was emotionally regressing, struggled to complete his/her assignments, often complained of his/her hands being sore when writing, and had a lisp that caused trouble with the "SH" sound. The parents also indicated that the Student would like a new school with smaller classes, and they sought a referral to OSSE.

Witness A and Petitioners made a request for reading and math goals to be included in the IEP. DCPS disagreed, based on the existing data, and the team agreed to discuss the issue, if necessary, after receiving the results of an upcoming independent educational evaluation (“IEE”). Witness A and Petitioners voiced concerns regarding the Student’s additional social/emotional issues. Witness L and J stated that the IEP goals were there to address the Student’s then-current needs, as described in the data, and to address the Student’s anxiety. If new data from the IEE provided additional information, it would be considered. The IEP team made edits to the Student’s social/emotional goals to respond to the concerns of the parents and their consultants. R-12-7. In considering whether to increase services for the Student, DCPS staff felt that the social worker’s reports of “no progress” were a factor, but reasoned that the Student would not be able to access additional services, and that they were in the middle of the pandemic, so the progress reports were of lesser impact. DCPS was also not going to change the IEP dramatically if the Student was not in an in-person setting. Testimony of Witness J. There was no discussion of a different environment to address the Student’s sensory needs. Testimony of Witness K.

16. This IEP provided the Student with goals in written expression and emotional, social and behavioral development, and recommended four hours per week of specialized instruction inside general education, with sixty minute per month of behavioral support services inside general education and 120 minutes of behavioral support services outside general education. The IEP indicated that the Student had deficits in social communication and interactions, sensory sensitivities, behavioral rigidity, and repetitive behaviors. It reported that the Student had ASD Level 1, ADHD,

and Unspecified Depression. The IEP also contained “Other Classroom Aids and Services” including movement breaks, repetition and clarification of directions, directions/prompts chunked when provided orally or in writing, limited information on the page, pre-teaching, check-ins, use of an agenda, use of a graphic organizer, an assigned spot with ample room, and other similar interventions. P-38.

17. Witness K reviewed the Student’s occupational therapy evaluation through her own report dated March 18, 2021, and conducted an observation of the Student during which the Student did not turn his/her camera on but participated in pre-class activities and was present for the entire class. Witness K spoke to the Student’s art, general education, and special education teachers, all of whom expressed that the Student was not doing well in class. The Student’s English language arts teacher said that the Student gave minimal effort, rushed to complete work, and was frequently non-responsive. This teacher indicated that the Student benefitted from one-to-one support in completing work. Witness K concluded that the Student had issues with sensory processing that might impact his/her ability to attend classes, and recommended strategies such as an adaptive seat, use of noise-cancelling headphones, and allowing the Student extra time. P-55.

18. IEP meetings were held for the Student on April 21, 2021, and May 5, 2021, to review the occupational therapy evaluation. Petitioners felt that this was a “massive issue,” that the Student was failing every class, and that what was holding him/her back was his/her autism, anxiety, and motor skills. Teacher A discussed the use of a wiggle cushion, noise-cancelling headphones, weighted lap pad, pencil grip, and sitting away from windows and doorways. Witness A suggested the use of adaptive

seating and asked about the noise-cancelling headphones. R-12-11-16. The bulk of the meeting was to discuss the Student's occupational therapy services. Petitioners did not agree with the occupational therapy goals and services at this meeting. The IEP indicated that the Student would likely have difficulty expressing his/her thoughts in a manner that reflected understanding of grade-level content, and again provided the Student with goals in written expression and emotional, social and behavioral development. The IEP added goals for motor skills/physical development. Services in the IEP were the same as in the February, 2021 IEP, except that an additional ninety minutes of occupational therapy were added per month, with thirty minutes of occupational therapy "consultation" per month. There were also additions to the "Other Classroom Aids and Services" section of the IEP, such as an adaptive seat and noise-canceling headphones. P-40.

19. The Student was evaluated by Neuropsychologist A and Witness C, a clinical psychologist who conducted the bulk of the testing of the Student. A report was issued on April 15, 2021. The evaluators reviewed the Student's records and conducted a wide range of tests, including Wechsler Intelligence Scale for Children-Fifth Edition (WISC-VJ), Wechsler Individual Achievement Test-Third Edition (WIA T-4), Rey-Osterrieth Complex Figure Test (RCFT), Oral and Written Language Scales-Second Edition (OWLS-2), Boston Naming Test, Social Language Development Test-Adolescent (SLOT-A), Roberts Apperception Test for Children-Second Edition (Roberts-2) Peabody Picture Vocabulary Test-Fifth Edition (PPVT-5), Behavior Assessment System for Children-Second Edition (BASC-3), Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2), Social Responsiveness Scale-Second Edition (SRS-2), Adaptive Behavior Assessment System-Third Edition (ABAS-3), Multidimensional

Anxiety Scale for Children-Second Edition (MASC-2), and Children's Depression Inventory-Second Edition (CDI-2), as well as interviews with the parents and the Student. On cognitive testing, the Student scored in the very high range before his/her anxiety and stamina gave out. Overall, the cognitive testing showed that the Student exhibited weaknesses in memory, listening comprehension, and attention, among other things. Achievement testing indicated that the Student was in the average range on untimed measures of sight word reading and on reading and comprehending short passages, but the Student's basic reading skills were lower than expected. In math, the Student scored in the average range in some areas and well below average in other areas, such as subtraction, where the Student scored at the 0.1 percentile. The Student's written expression was considered to be below average in the ability to compose sentences and use the rules of grammar. The Student showed an ability to engage in conversation but had difficulty understanding the perspective of others. The Student expressed to the evaluators that s/he felt bullied about his/her appearance and his/her manner of speech, and that s/he was very anxious (consistent with Anxiety Disorder). Autism Diagnostic Observation Schedule ("ADOS") testing indicated that the Student had ASD. The Student's overall depression was found to be at the 99.9 percentile. The Student, who presented as three years younger than his/her chronological age, felt ashamed when s/he could not do the work, and would constantly say that s/he could not do the work. The evaluators recommended a "full-time" academic setting appropriate for individuals with ASD, including ABA, a very low student-to-teacher ratio, and an explicit focus on social skills, speech and language therapy, direct social instruction, occupational therapy,

behavior support services, and assistive technology. The evaluators also recommended the “Unstuck and On Target” program, which Witness I used in therapy. P-50.

20. On May 25, 2021, an independent speech therapy evaluation was conducted of the Student. The evaluation determined that the Student had challenges with speech and language development, social skills, executive functioning, and oral motor issues based on objective findings and administration of the Comprehensive Assessment of Spoken Language-Second Edition (“CASL-2”), on which the Student scored in the average or above average range in half the subtests. The Student was only deemed “deficient” in deriving meaning from context. On the Goldman-Fristoe Test of Articulation-3 (GF-III), the Student scored at the 0.1 percentile, indicating a severe delay. Short-term and long-term goals were proposed, and speech and language therapy was recommended for sixty minutes per week to address the Student’s executive functioning, receptive, expressive, written, and articulation issues. Witness K did not think it was necessary for the Student to receive speech-to-text software, and did not agree with the Student needing assistive technology, generally. P-56.

21. The Student received mostly “C” and “D” academic grades in the first three terms of the 2020-2021 school year, and then received “F” grades in all subjects but one for the fourth term. The Student nevertheless passed all courses. R-10. The report card indicated that the Student’s SRI score on February 3, 2021, was 1016, on grade level. The IEP progress report for the first reporting period indicated progress in all areas. The IEP progress report for the second reporting period reported the Student to be progressing in written expression but regressing in one emotional, social and behavioral development goal, due to rigid thinking and “giving up.” The IEP progress report for the

third reporting period likewise found that the Student made progress in written expression but not in emotional, social and behavioral development. It was noted that the Student was overwhelmed and struggled with online learning. The IEP progress report for the fourth quarter indicated that, in written expression, the Student made “minimal progress,” was occasionally willing to work with a teacher during one-on-one check-ins, but often expressed that s/he was too stressed or anxious to complete work during check-ins. The Student also resisted breakout rooms. In the emotional, social and behavioral section of the report, it was stated that the Student was actively refusing services. P-44.

22. A Prior Written Notice was issued on July 7, 2021, which indicated that Petitioners had no interest in placing the Student at a DCPS school and would be sending the Student to Private School A. P-47-1.

23. Witness D reviewed the independent evaluation of Neuropsychologist A on July 30, 2021. Witness D concluded that the multidisciplinary team (“MDT”) should discuss the criteria that determine eligibility for the disability classifications of Autism Spectrum Disorder, Other Health Impairment, Specific Learning Disability, and Multiple Disabilities, and that the MDT should review the recommendations in the Student’s neuropsychological evaluation and current IEP to ensure that all of the Student’s instructional needs were being met. P-58.

24. DCPS reviewed the Student’s May 25, 2021, speech therapy evaluation through Evaluator A’s report dated July 30, 2021. Evaluator A did not conduct testing herself. Evaluator A concluded that the Student presented with average to above average language skills in numerous areas, with weaknesses in accessing sentence expression, understanding double meaning, and especially understanding context. Evaluator A

indicated that the Student's articulation issues did not impact his/her functional ability in the classroom, and rated his/her overall intelligibility to be at ninety percent in an unknown context. The evaluator felt that the Student's weaknesses could be addressed in the classroom, with accommodations. P-59.

25. On August 11, 2021, Petitioners provided DCPS with notice that they would be placing the Student at Private School A for the 2021-2022 school year. P-46.

26. Another IEP meeting was held on August 26, 2021. This meeting was held mainly to discuss the report of Neuropsychologist A and Witness C. The team did not go through the neurological report recommendations, and they did not discuss what would be adopted from that report. At this meeting, there was no discussion about a therapeutic setting or a different, more intensive type of school for the Student. The Student's math skills were deemed to be average on some subtests, but s/he showed weaknesses in accuracy and fluency, so math goals were added to the IEP. In reading, the Student's performance was reported to fluctuate dramatically because of anxiety and emotional distress, though the Student could function at grade level if regulated, so goals were also added for reading. An "Area of Concern" section, with goals, was added for adaptive/daily living skills to address the Student's issues with anxiety and organization. In written expression, it was determined that the Student would likely experience difficulty expressing his/her thoughts and responding in a manner that reflected his/her understanding and analysis of grade-level content. Goals were included for written expression, emotional, social and behavioral development, and motor skills/physical development, as with earlier IEPs. This IEP recommended six hours per week of specialized instruction inside general education: four hours for written expression, one

hour for math, and one hour for reading. The IEP also recommended 180 minutes per month of behavioral support services (60 minutes inside general education and 120 minutes outside general education) and 120 minutes per month of occupational therapy (ninety minutes inside general education and thirty minutes of consultation). P-49;
Testimony of Witness D.

27. Private School A is a school for students who have issues such as moderate to severe language delays, learning disabilities, and autism. The portion of the school to which the Student is currently assigned has approximately ninety children. Approximately fifty-five to sixty percent of the children at Private School A are on the autism spectrum. DCPS students who attend the school follow the DCPS curriculum. Students need to have, at least, a borderline range IQ to attend the school, which does not accept children who are aggressive or self-injurious. A teaching assistant may be assigned to each classroom. Teachers at the school are state-certified. The school is quiet and nurturing. Virtual instruction is conducted through the “Google Classroom.” Speech-to-text and text-to-speech software is used at the school. For children with sensory needs, the school uses natural light, standing desks, flash passes (need a walk, need a break), and designated quiet spaces. The school uses the “Zones of Regulation” program to address behavior. Social skills instruction is built into the program, including how to greet people, make eye contact, pragmatics, how to take turns, how to listen to your partner, how to hold a conversation so that you show interest in the other person, and how to use words instead of yelling or shutting down. Testimony of Witness B.

28. Witness H observed the Student for ninety minutes in his/her physical education and English classes on March 23, 2022. The Student did well with peers in

physical education, and in English, the Student required a teacher to be close by and to give him/her positive praise. The Student also did well working with peers during English class. Testimony of Witness H; R-21.

29. During the 2021-2022 school year, about ninety percent of the instruction at Private School A has been virtual. The Student is still easily upset by things that other students say, but s/he does well academically at the school. The Student has issues completing homework and rushing through work, and s/he has had a hard time with virtual instruction, but the Student's behavioral episodes occur less often. Previously, the Student had a "breakdown" every few days; now, the breakdowns occur approximately every few weeks. The Student has more difficulty during the unstructured part of the day. The Student attends class in seven academic periods with two homeroom periods per day. Most of the Student's classes have between four and six students in them, with about eight in music. The Student does well with simple writing, but his/her editing and punctuation are not good and s/he has issues with decoding and abstract reasoning. The Student needs repetition and review in order to progress. The Student has a lot of fear and other students don't necessarily pick up on the Student's nonverbal cues or verbal cues. The Student is not really using the strategies that s/he is working on through counseling. The Student gets speech therapy as well as occupational therapy and counseling. The Student uses a weekly planner, gets email reminders, is often given a schedule for each class, and responds positively to the routine-oriented approach at the school. The Student is "doing well" at the school, with mostly "A" and "B" grades, and is participating in class. The Student's biggest issue is turning in homework. The Student is making progress with adult relations, and if s/he resists, it is not willful but an

expression of rigidity. There was a period of time when the Student missed school due to illness. The Student has felt bullied at the school on at least one occasion. Testimony of Witness B.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issues #1, #4, #5, and #6, relating to the appropriateness of the Student’s IEP and placement, the burden of persuasion is on Respondent if Petitioners present a *prima facie* case. On the other issues, the burden of persuasion is on Petitioners.

1. Did Respondent fail to provide the Student with an appropriate IEP on or about April 10, 2020? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 999-

1000. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001-1002.

Moreover, it is imperative that, to “the maximum extent appropriate,” public schools provide students who have disabilities with an education in the least restrictive environment, which, as emphasized by the Supreme Court, “requires that children with disabilities receive education in the regular classroom whenever possible,” Endrew F., 137 S. Ct. at 999. An IEP failing to satisfy these statutory directives may be remedied through an IDEA claim to the extent the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

Petitioners alleged that Respondent denied the Student a FAPE because the IEP: 1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) contained many of the same goals as the prior IEP, signaling a lack of progress that should have led to a revision of the goals and a reconsideration or revision of the services and placement; and/or 3) did not adequately address the Student’s social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 4) did not provide adequate “other classroom aids and services,” accommodations, modifications, and interventions to address the Student’s known deficits; and/or 5) failed to adequately program for the Student’s multiple diagnoses/known deficits resulting from, among other things, anxiety, depression, ADHD, executive functioning deficits, a specific learning disability in written expression

(spelling, grammar, punctuation, and organization of written expression), and a known personal history of psychological trauma; and/or 6) failed to provide appropriate and/or sufficient behavioral support services for the Student; and/or 7) provided for an inappropriate/unreasonable Post-Secondary Transition Plan.

Petitioners said that the Student experienced a wide range of social and emotional issues in school during the winter and spring of the 2019-2020 school year, including several instances of bullying. Petitioners contended, credibly, that this behavior was a function of the Student's documented disabilities, and that this behavior has negatively impacted the Student's academic performance. Petitioners therefore concluded that the Student needs more hours of specialized instruction, among other interventions, to address these issues. However, during the hearing, Witness G said that Petitioners did not disagree with the Student's IEP at the time of the IEP meeting. According to this testimony, which was not clearly rebutted, Petitioners' concern at the time was the location of services for the Student, which was Public School A.

This suggests that Petitioners themselves believed that the IEP could work for the Student, albeit in a different setting. In fact, even at Public School A, the Student had made measurable progress. During the third term of the 2019-2020 school year, in a program that consisted entirely of large general education classes, the Student received an "A" grade in math, Spanish, history and geography, and "B" grades in English and science. Moreover, the Student was tested to be at grade level in both the i-Ready and SRI measures, and DCPS developed a safety plan to address the Student's issues with bullying that unfortunately arose during this school year. Under these circumstances, this

Hearing Officer finds that DCPS's decision to leave the IEP "as is" during the early days of the COVID-19 pandemic was reasonable.

Petitioners also contended that some of the IEP goals were the same as in previous IEPs, noting that the emotional, social, and behavioral development goals were repeated from the previous year. Certainly, "the wholesale repetition" of goals and objectives "indicates an ongoing failure to respond to [a student's] difficulties." See Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016).

However, DCPS did not act unreasonably here. These goals were part of a program that allowed the Student to make progress and receive good grades in general education classes. Moreover, with respect to the goal relating to the cognitive therapy called ANT, Witness I from DCPS credibly testified in support of the repeated cognitive therapy goals, indicating that the Student was then still benefitting from cognitive behavioral therapy and that the goals should be continued to help the Student progress. Finally, DCPS presented a number of expert witnesses who testified that goals can and should be repeated if there is no mastery, including Witness F, who came across as a consummately professional public educator to this Hearing Officer.

Finally, Petitioners did not present a *prima facie* case with respect to the transition services portion of the IEP. Petitioners did not clearly explain their issues with the transition plan. Nor did any witness explain the basis for this part of this claim. In sum, this claim must be dismissed in its entirety.

2. Did Respondent fail to implement the Student's IEP because it unilaterally developed the September 2020 "IDL P"? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioners alleged that the IDLP: 1) contained insufficient hours of specialized instruction outside of the general education setting; and/or 2) contained many of the same goals as the prior IEP, signaling a lack of progress that should have led to a revision of the goals and a reconsideration or revision of the services and placement; and/or 3) did not adequately address the Student's functional, social/emotional, executive functioning, attention/focus, and academic deficits that were known to Respondent; and/or 4) did not provide adequate "other classroom aids and services," accommodations, modifications, and interventions to address the Student's known deficits; and/or 5) failed to adequately program for the Student's multiple diagnoses/known deficits resulting from, among other things, anxiety, depression, ADHD, executive dysfunction, specific learning disability in written expression (spelling, grammar, punctuation, and organization of written expression), and a known personal history of psychological trauma, and/or 6) failed to provide appropriate and/or sufficient behavioral support services; and/or 7) was created unilaterally by Respondent without parent involvement, preventing Petitioners from participating in educational decisions for the Student.

A parent challenging a school district's implementation of a student's IEP must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP or that "deviations from the IEP's stated requirements" were material. Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d

811, 822 (9th Cir. 2007) (“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child’s IEP.”); see also S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 67–68 (D.D.C. 2008); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 (D.D.C. 2011).

Regarding subclaim #1, Witness J said that the Student’s specialized instructional mandate from the IEP was satisfied, without rebuttal. The other claims are not supported by sufficient evidence in the record. There is nothing in the record to clearly state that the Student did not receive services because of the IDLP. Indeed, it was difficult to get the Student to the services at all, as many of the DCPS witnesses pointed out. Also, though Witness L clearly referenced the IDLP in service trackers, this does not prove that Witness L somehow failed to implement the goals in the IEP. Merely because service trackers reference the IDLP does not show that DCPS failed to implement portions of the IEP relating to the Student’s emotional, social and developmental behavior goals, or that DCPS failed to provide the Student with “other classroom aids and services.”

Behavioral support services were not materially changed in the IDLP, since the amount of services was maintained at 120 minutes per month, so the IDLP itself cannot be blamed for Respondent’s failure to provide the Student with his/her mandated behavioral support services (see *infra* at Issue #7).

The final subclaim under this issue is a different claim entirely. Here, Petitioners effectively alleged that they were denied an opportunity to participate with the school district in the formulation of an educational program for the Student, which references the parental rights in 34 C.F.R. Sect. 300.501(b)(1). Districts must ensure that the placement

decision is made by a group of persons, including the parents. 34 C.F.R. Sect.

300.116(a). Moreover, districts should ensure that parents of a child with a disability are members of any group that makes decisions regarding the educational placement of their child. 34 C.F.R. Sect. 300.501. While, of course, school districts have some latitude in discussing a student's school, or "location of services," the record suggested that the IDLP team had the discretion to change the Student's educational placement, and districts must ensure that the placement decision is made by a group of persons, including the parents. 34 C.F.R. Sect. 300.116(a). Parents should be at least invited when there is a meeting to change the way an IEP is going to be read, however temporarily that may be.

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Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020). Moreover, DCPS

presented no reason why parents should not be invited to attend such an important meeting regarding the placement of their child. Accordingly, this Hearing Officer must find that DCPS denied the Student a FAPE by failing to invite Petitioners to the IDLP meeting.

3. Did Respondent deny the Student a FAPE by: 1) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of occupational therapy at least as far back as December 2020; 2) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of speech and language at least as far back as July 2021; and 3) failing to comprehensively evaluate him/her in all areas of suspected disability in the area of assistive technology as far back as January 2021? If so, did Respondent violate 34 C.F.R. 300.304 and related provisions of the law and regulations? If so, did Respondent deny the Student a FAPE?

The IDEA states that a local educational agency ("LEA") shall ensure that a reevaluation of each child with a disability is conducted if: 1) the LEA determines that the educational or related service needs of the child, including improved academic

achievement and functional performance, warrant a reevaluation; or 2) if the child's parents or teacher requests a reevaluation. 28 U.S.C. Sect. 1414(a)(2); 34 C.F.R. Sect. 300.303; see also 5 D.C.M.R. Sect. 3005.7. Reevaluations must be conducted in accordance with the basic IDEA provisions governing evaluations. 28 U.S.C. Sect. 1414(a)(2)(A); 34 C.F.R. §300.303(a). The LEA is accordingly required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b).

However, as stated by the District of Columbia Circuit Court of Appeals: “(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006); see also Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004).

Though Petitioners did not call a witness who is an expert in occupational therapy, there is no dispute that the Student has significant sensory issues that frequently come into play during the school day, to the point where the child picks his/her skin and

covers him/herself in a blanket. Witness K was the only witness called who is an expert on occupational therapy, and she indicated that occupational therapy can be used to address sensory issues for students. Petitioners suggested an occupational therapy evaluation for the Student in December, 2020, and in response, DCPS did a “screening” but did not conduct a whole evaluation. The comprehensiveness of this screening is not established in the record. Petitioners then got an evaluation done themselves, through an independent agency, whose report was reviewed by Witness K. Witness K was in accord with the report and occupational therapy services were included in the Student’s May, 2021 IEP. Under the circumstances, this Hearing Officer must agree with Petitioners that DCPS should have responded positively when Petitioners sought an occupational therapy evaluation for their child in or about December, 2020.

In regard to the need for a speech and language evaluation of the Student in or about July, 2021, Petitioners did not present a witness who is an expert in speech and language issues, and did not explain why they did not present the witness from the independent agency that conducted the evaluation. Respondent did call a witness who was an expert in speech pathology, and Witness E testified credibly that the Student did not need speech and language therapy, and that the services that the Student could get from speech language pathologists might take away from the Student’s instruction in the classroom. Witness E did not necessarily “go out and say” that a speech and language evaluation or assessment was *inappropriate* at this time. Still, Witness E suggested that the Student’s main speech issue is articulation, and that speech therapy is not especially helpful in connection to articulation, and such therapy would not therefore have provided

the Student with any substantive benefit. This Hearing Officer is persuaded by Witness E's testimony, and must deny this part of the claim as, at best, procedural in nature.

Insofar as Petitioners' request for an assistive technology assessment, this specific request was made by one of Respondent's key witnesses. Witness D specifically recommended an assistive technology evaluation because the Student's hands hurt him/her while writing. Witness D indicated that such an evaluation was not possible at the time due to the pandemic, and Petitioners accordingly did not advance this argument during their "Final Citations to the Record" or clearly in their closing argument. As a result, this Hearing Officer agrees that Petitioners were denied a FAPE only when the Student was not evaluated for occupational therapy services as far back as during the 2020-2021 school year. All the remaining claims on this issue must be denied.

4. Did Respondent fail to provide the Student with an appropriate IEP on or about May 5, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

5. Did Respondent fail to provide the Student with an appropriate IEP on or about August 26, 2021? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

Since these IEPs both correspond mainly to the 2020-2021 school year, they are considered together here.

For the May, 2021 IEP, Petitioners alleged that the IEP recommended: 1) insufficient hours of specialized instruction; 2) insufficient goals; 3) insufficient present levels of performance; 4) insufficient occupational therapy and behavioral support services; and 5) inadequate "other classroom aids and services;" and that the IEP 6) failed

to provide the Student with adequate programming that was specific to his/her disability;
7) did not provide for an appropriate placement in the least restrictive environment; and
8) provided an inappropriate/unreasonable Post-Secondary Transition Plan. Similarly,
for the August, 2021 IEP, the meeting for which was reconvened to discuss the report of
Neuropsychologist A, Petitioners repeated many of the same contentions, except for the
contentions relating to goals.

DCPS did not cogently explain how these IEPs were different than the IEPs that
had been written for the Student previously. There are slight changes to specialized
instructional hours in a group sessions (from four in February to six in August), but the
reason for the change was not clarified at the IEP meeting or on the record before me.
The report of Neuropsychologist A was not given much weight, and the IEP team did not
clearly and thoroughly discuss Neuropsychologist A's conclusion that the Student needed
a small school for children with autism because of issues relating to ASD and other
diagnoses. In fact, autism-based interventions were not the focus of any of the IEPs
during this period, though the IEPs do indicate that the Student is autistic.

However, I found the report of Neuropsychologist A to be thorough and
professionally written. Indeed, Witness D's report credits Neuropsychologist A's report
in her review of the report, as follows: "I encourage the MDT to review the
recommendations included in [the Student's] 2021 neuropsychological evaluation and
current IEP to ensure that all of [REDACTED] needs are being met throughout the instructional
day." Moreover, though a number of DCPS's witnesses, including Witness D and
Witness E, said that there were specific DCPS programs designed for students with
autism, there was no discussion of any autism-based interventions at these IEP meetings.

DCPS contended that it wanted to emphasize the use of data before planning services, but the data is there – and it pointed toward the Student needing a new program. Though the Student’s grades were not failing in every subject during the third term of the 2020-2021 school year, the report card throughout the school year was quite poor, included comments such as “Excessive absences” “Poor test scores” and “failing.” The Student’s math teacher said that the Student was willing to work one-on-one and in a small group, but lacked confidence, did not complete work independently or in small groups, and would not go to breakout rooms. The teacher also said that the Student would be logged in but would not be present enough to answer questions, rarely joined lessons and struggled with routine schedule changes. There is persuasive testimony from Petitioners that the Student was in a dark room, under a blanket, and not appearing on video for much of the virtual school year. Additionally, the Student said that his/her hands hurt while writing, and Witness D recommended an assistive technology evaluation, yet no such evaluation was conducted, and no reason was offered as to why.

Respondent contended that the Student’s poor grades at the end of the 2020-2021 school year are a function of a child who was effectively biding his/her time before [REDACTED] private school education comes along. There is no such evidence in the record. DCPS also suggested that it tended to refrain from making big changes in the IEP during the pandemic, but the duty to provide students with an appropriate IEP and a FAPE continued throughout the pandemic. In sum, the Student’s vague, general IEP contained little detail about how the Student’s issues with participation, bullying, and talking in class could be controlled, and provide the Student with programming that was specific to

his/her autism diagnosis and therefore denied the Student a FAPE for the 2020-2021 school year.²

6. Did Respondent deny the Student a FAPE by failing to provide [REDACTED] with an appropriately restrictive educational placement (since January, 2020) that can provide the Student with an environment where s/he can safely learn without bullying?

During the due process hearing, Petitioners testified about disturbing incidents that happened to the Student in school, including one that involved the child being locked in a room. There is no dispute from the record that these incidents in school are at least in part a function of the Student's ASD, Autism, Anxiety and Depression issues, though the record is also clear that the difficulties in the Student's school life and home life cannot be neatly separated. Moreover, there is no real dispute that these incidents triggered a response in the student that amount to suicidal ideation, and that this happened twice, in school.

Different circuits have developed different tests for analyzing bullying claims under the IDEA. Generally, the inquiry is whether a teacher was "deliberately indifferent to bullying and the abuse so severe that a child can derive *no* educational benefit." M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650 (9th Cir.2005). Another court characterized it this way: "whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with

² I was not persuaded Petitioners' argument that the Student's mandate of occupational therapy services or behavioral support services was inappropriate. Petitioner did not call an occupational therapist as a witness, and Petitioner's other witnesses did not argue that the Student's problems would be solved by even more counseling. Petitioner's other contentions with respect to Issue # 5 are also without merit. Petitioners were not clear about why they believe the IEPs lacked important information and, did not show that any lack of information in these IEPs denied the Student any substantive benefit. Finally, the Student's proposed public placement was far less restrictive than Petitioners' proposed private placement.

learning disabilities in her educational opportunities.” T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 316 (E.D.N.Y. 2011)

Courts in the District of Columbia have closely scrutinized FAPE claims based on bullying incidents. In S.S. by & through St. v. D.C., 68 F. Supp. 3d 1, 13 (D.D.C. 2014), an autistic student received physical injuries at a DCPS middle school, resulting in school avoidance. The Student often returned home with scratches and bruises and was involved in about ten incidents at school in which he sustained injuries, including a bruised wrist, a sprain in his arm and neck, and head injuries, but had changes classes and had recently done better. The court affirmed the HOD of the Hearing Officer and dismissed the parent's claims.

Here, I am not convinced that bullying of the Student at the school during the 2019-2020 and 2020-2021 school year rose to the level of FAPE denial. Though bullying is an abhorrent practice that should be strongly discouraged everywhere including and perhaps especially in schools, it is not always the school's fault that a child is being bullied in school. The record does discuss a number of significant incidents involving the Student, but the record also indicates that DCPS tried to act in response to the bullying in a reasonable and responsible way, including by writing a safety plan, and then by looking into the possibility of finding the Student another school. Additionally, it was obvious from the genuine testimony of Witness I that the school was making a sincere effort to address the issues, which is all that is required under the applicable caselaw.

7. Did Respondent deny the Student a FAPE by failing to implement his/her April 10, 2020 IEP and his/her May 5, 2021 IEP? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student's assigned school did not provide the required specialized instruction, behavioral support services, and that his/her accommodations and "other classroom aids and services" were not consistently provided or were not provided. The bulk of Petitioners' contentions were addressed in Issue #2, where I dismissed contentions that Respondent failed to implement the IEPs in regard to specialized instruction or goals or accommodations, since, among other things, the United States Department of Education has found that "school systems must make local decisions that take into consideration the health, safety, and well-being of all their students and staff" when deciding how to address the COVID-19 pandemic.

Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 76 IDELR 104 (OSERS/OCR March 21, 2020).

Even so, I find that Petitioners' contentions pertaining to behavioral support services delivered to the Student during the pandemic to have merit. No service trackers seem to even exist for the Student's behavioral support services between December, 2021, and March, 2021. No explanation was presented by DCPS to rebut the suggestion that no behavioral support services were provided to the Student during this time period, which violated both the IEP and the IDLP. Witness L explained that, as the year progressed, the Student would either not be available or would pick up and say there was nothing he could do for him/her, which is a similar argument to one which convinced this Hearing Officer by in another case. White v. District of Columbia, No. 20-CV-3821 (APM), 2022 WL 971330, at *5 (D.D.C. Mar. 31, 2022) (reversing the HOD, court ruled that it is not enough merely to "offer" the services provided by an IEP; the school district

must “ensure” the child actually receives them). However, even during a school closure, the school district must ensure that students with disabilities also have access to the same opportunities, including the provision of FAPE as identified in the student's IEP developed under IDEA, or a plan developed under Section 504. Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (EDU 2020). The disruption of services over a three-month period is inappropriate even if the instruction is to be provided virtually. DCPS accordingly denied the Student a FAPE.

RELIEF

As relief, Petitioner seeks tuition reimbursement and payment for the 2021-2022 school year at Private School A. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

The LEA may be required to pay for educational services obtained for a student by the student’s parent if the services offered by the school district are inadequate or inappropriate, the services selected by the parent are “proper under the Act,” and equitable considerations support the parents’ claim, even if the private school in which the parents have placed the child is unapproved. Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). In this connection, courts must consider “all

relevant factors” including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Petitioners presented Witness B from Private School A, who candidly testified that, 2021-2022 school year, the Student was still easily upset by things that other students say. Still, the Student does the work at the school, which consists of more than fifty percent of autistic children, which is very comforting to the Student, who does not want to be different. To attend the school, students need to have, at least, a borderline range IQ, and the school does not accept children who are aggressive or self-injurious. A teaching assistant may be assigned to each classroom. Teachers at the school are Maryland state certified. The school is quiet and nurturing. For children with sensory needs, the school uses natural light, standing desks, flash passes (i.e., passes if a student needs a walk or a break), and designated quiet spaces. The school uses the “Zones of Regulation” program to address behavior. Social skills instruction is built into the program, including how to greet people, make eye contact, pragmatics, how to take turns, how to listen to your partner, how to hold a conversation so that you show interest in the other person, and how to use words instead of yelling or shutting down. Most of the Student’s classes have between four and six students in them, with about eight in music. The Student uses a weekly planner, gets email reminders, is often given a schedule for each class, and responds positively to the routine-oriented approach at the school. The Student getting mostly “A” and “B” grades. The Student is making progress with adult

relations, and if s/he resists, it is not seen as willful but as an expression of rigidity. The school was clearly a good fit for the Student for the 2021-2022 school year.

The IDEA states that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. Sect. 1412(a)(10)(C)(iii). In addition, courts have broad discretion to consider the range of all relevant facts in determining whether and to what extent awarding relief is equitable. Carter, 510 U.S. at 16. Among the most important of these is “whether the parents have cooperated with the [district] throughout the process to ensure their child receives a FAPE.” Bettinger v. N.Y.C. Bd. of Educ., No. 06CV 6889(PAC) 2007 WL 4208560, at *6 (S.D.N.Y. Nov. 20, 2007).

The record indicates that Petitioners have cooperated with DCPS’s requests in regard to the Student, except that the Student’s father expressed that he would not put his child into a DCPS school in the summer of 2021. Though this kind of comment makes this Hearing Officer pause, courts in the District of Columbia tend not to reduce tuition reimbursement awards on this basis, especially where, as here, there is no dispute that Petitioners have expressed sincere interest in placing this child in the public school system going back several years. Additionally, there is evidence that Petitioners were open to a public school placement earlier in the process, when they were asking for the Student to be evaluated. Accordingly, this Hearing Officer finds that Petitioners should be reimbursed for the full tuition at Private School A for the 2021-2022 school year, with related expenses and reasonable transportation costs.

Under the theory of compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D. v. District of Columbia, 817 F.3d 792, 797-798 (D.C. Cir. 2016)(quoting Reid, 401 F.3d at 524). The District of Columbia Circuit Court of Appeals has “explicitly disavowed” compensatory education in the form of “cookie-cutter” lump-sum awards when the hearing officer does not explain how the remedy is tailored to provide the services the student was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005). A Petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a Student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 750 F. Supp. 2d 94, 98 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioners, through Witness A, propose as compensatory education: sixty minutes per week of speech and language therapy for one school year; summer enrichment at Private School A; different speech and language services for 1 hour per week up to 7 weeks; occupational therapy services for forty sessions at \$170 per session); “Emotional Support” from Psychologist A; Social/Emotional Support from an outreach center; a self-

advocacy plan; an unstuck and on target program; a social skills training program; and academic tutoring for eighty hours.

Compensatory education should correlate to the FAPE deprivations that the hearing officer found in his or her HOD. I will therefore award Petitioners reimbursement, upon proof of payment, for the benefit of the Student, as follows: forty sessions of occupational therapy; a sixteen-week social skills program, and 80 sessions of academic tutoring. All of these services shall be provided at market rate by an independent provider to be selected by Petitioners.

VII. Order

As a result of the foregoing:

1. Respondent shall reimburse the parents upon proof of payment (or pay the school directly if the parents have not already paid the school) for tuition paid to Private School A for the 2021-2022 school year, included related expenses and transportation;
2. Respondent shall reimburse the parents upon proof of payment for the following: forty sessions of occupational therapy; a sixteen-week social skills program, and 80 sessions of academic tutoring. All of these services shall be provided by trained professionals selected by Petitioners, at the market rate in the community;
3. Within forty-five days, Respondent shall complete an assistive technology evaluation of the Student;
4. All other requests for relief are denied.

Dated: July 8, 2022

Michael Lazan
Impartial Hearing Officer

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2021-0195

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

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Date: July 8, 2022

Michael Lazan
Impartial Hearing Officer