

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

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OSSE
Office of Dispute Resolution
June 03, 2020

Confidential

Parent on behalf of Student1)	Case No. 2019-0027
)	
Petitioner,)	Hearing Dates: May 11-12, 2020
)	Conducted by Video Conference
v.)	
)	Date Issued: June 3, 2020
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is an X-year-old student attending School A [REDACTED]). On February 3, 2020, Petitioner filed a Due Process Complaint Notice alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to provide appropriate Individualized Education Programs (“IEP”) for the 2018-19 and 2019-20 school years. On February 12, 2020, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint Notice*, asserting that the student’s IEPs for those two years were appropriate.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

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

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on February 3, 2020 alleging that DCPS denied the student a FAPE when it (1) failed to develop appropriate IEPs for the 2018-19 and 2019-20 school years because the IEPs repeated goals and objectives from previous IEPs, and contained inappropriate present levels of performance (“PLOP”), (2) failed to develop an appropriate IEP for the 2018-19 school year by failing to include goals for written expression, (3) failed to provide a certified special education teacher from August 2018 until January 22, 2019, and (4) failed to provide 16 hours of Student’s behavioral support services (“BSS”) during the 2018-19 school year,

Respondent filed a response to the *Complaint* on February 12, 2020 asserting (1) the September 27, 2018 IEP is appropriate, (2) the March 14, 2019 IEP is appropriate, and (3) DCPS appropriately implemented the September 27, 2018 IEP.

The parties participated in a resolution meeting on March 4, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on March 12, 2020, and the Prehearing Order was issued that day.

The due process hearing was conducted on May 11-12, 2020 by video conference. The hearing was closed to the public. Petitioner’s counsel disclosed Exhibits P1-P82 (“P:”). There were no objections and Petitioner’s Exhibits 1-82 were admitted into evidence. Respondent’s counsel disclosed Exhibits R1-R41 (“R:”). There were no objections and Respondent’s Exhibits 1-41 were admitted.

Petitioner presented as witnesses in chronological order: Witness A and Witness B. Petitioner offered Witness A as an expert in Special Education, IEP Programming, Placement, and Processes and Procedures. I overruled Respondent’s objection to Witness A testifying as an expert. Petitioner offered Witness B as an expert in Psychology, Neuropsychology, Special Education, and Special Education Programming and Placement. I overruled Respondent’s objection to Witness B testifying as an expert in these areas. Respondent offered no testimonial evidence. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

ISSUES

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

1. Whether DCPS failed to provide a FAPE by failing to provide appropriate IEPs for the 2018-19 and 2019-20 school years.
2. Whether the September 27, 2018 IEP was inappropriate for failing to address the student’s writing needs by not providing written expression goals.

3. Whether DCPS denied the student a FAPE by failing to implement the September 27, 2018 IEP for the 2018-19 school year by failing to provide a certified special education teacher, and failing to provide all of the prescribed behavioral support services.,

FINDINGS OF FACT

1. Student is an X-year-old, in grade C at School A.²

2. During the 2017-18 school year, Student was attending School B. On February 26, 2018, School B completed an amendment to Student's 2017-18 IEP. Student was in Grade A and was classified with a Specific Learning Disability ("SLD").³ Under "Consideration of Special Factors," "[Student] continues to display behavior which may depress [Student's] ability to function while in a regular classroom setting. [Student] has deficits in the areas of self-regulation as well as remaining on task during instructional periods."⁴ In mathematics, Student could count to 100, answer questions involving graphs that are represented by pictures, add single digit number sums up to 20, but was unable to subtract. Student had two mathematics goals, one involving one-step word problems with 3-digit adding and subtracting, the other was recalling multiplication facts through the nine times table. Student's baselines were (1) being able to add single digit number with the use of manipulatives and task analysis, and (2) being unable to demonstrate progress in the area of understanding the relationship between numbers and quantities.⁵

In Reading, Student scored in the 48 to 72 months range, could name upper and lower case letters, identify letter-sounds and was able to rhyme words. Student could write consonant digraphs but was unable to write or read vowel digraphs. Student's baselines were (1) able to read color and number words, able to read 4 out of the first 100 Fry words, and (2) knew only short vowel sounds, and (3) was unable to identify the elements of a story. Student's goals were (1) to be able to identify the main idea when presented with fictional text on [Student's] instructional level, (2) to be able to respond to comprehensive questions that include inferential, critical thinking, and analytical thinking with 80% accuracy, and (3) to be able to identify setting and characters of fiction and nonfiction text.⁶

In Emotional, Social and Behavioral Development, PLOPs were not specific; Student was new to the school when the annual IEP was developed in September 2017,⁷ and the PLOPs were not updated for the February 26, 2018 amended IEP.⁸ Student's goals were (1) to demonstrate growth in peer relationships, self-regulation and knowing identifying information, and (2) demonstrate appropriate play skills, peer relations, cooperative learning by engaging in appropriate behavior, (3) identify and express feelings about self as measured by stating [Student's] feelings using effective vocabulary and nonverbal cues, and (4) given a maximum of one verbal cue and behavioral cues, Student would attend to a non-preferred ,

² Petitioner's Exhibit ("P:") 62 at 626. The page references are to the electronic disclosure provided by Petitioner's counsel.

³ P14:183.

⁴ *Id.* at 185.

⁵ *Id.* at 186.

⁶ *Id.* at 187-88.

⁷ See P10.

⁸ P14:188.

small group activity or independent assignment without protest, and remain on task with no task avoidance for 10 minutes, 75% of the time.⁹

In Motor Skills/Physical Development, Student was able to use dictation software to express Student's ideas and then copy the words into handwritten work, demonstrated the ability to differentiate coins, but had difficulty counting them, had difficulty with the legibility of Student's handwriting and understanding spatial concepts, and had significant difficulty with visual memory.¹⁰ Student's baselines were a significant inconsistency in pencil control, particularly when copying text, and moving and getting up frequently when performing academic tasks. Student's goals were (1) to compose written work of at least four sentences or twenty-five word with at least 90% correct placement, sizing, and case when given assistance for spelling, and (2) to utilize given sensory strategies to assist with maintaining Student's energy and focus with moderate assistance to choose the strategies.¹¹

The IEP prescribed 26 hours of specialized instruction outside general education per week, 30 minutes per week of occupational therapy ("OT") outside general education, and 30 minutes per week of behavioral support services ("BSS"). Other classrooms aids included air-filled seat cushion, adapted paper-Handwriting Without Tears block paper, then 2-lined paper, and a weighted vest 20 minutes on, 20 minutes off.¹² Student was prescribed extended year services.¹³

The February 2018 amendments to the IEP added additional mathematics goals: (1) Student will rote count to 15 by ones with 85% accuracy, and (2) Student will be able to recognize written numbers 1-10 when given number cards with 85% accuracy. The new reading goal was to identify 16/21 consonant sounds in 4/5 repeated trials.¹⁴ In Emotional, Social, and Behavioral Development, Student would demonstrate appropriate play skills, peer relations, and cooperative learning by engaging in appropriate behavior when confronted with inappropriate behavior. In Motor Skills/Physical Development, Student will be proficient with writing "frog jump" and "center starter" letters.¹⁵

3. Student enrolled in School C for grade B. DCPS conducted an annual IEP Review on August 30, 2018.¹⁶ Student's PLOP in mathematics was the ability to rote count to 5 and identify shapes and colors. Student's baselines were (1) an inability to count to 10 by ones with consistent accuracy, and (2) able to add single digit numbers with the use of manipulates and task analysis, (3) unable to recognize numbers 1-10, and (4) unable to demonstrate progress in the area of understanding the relationship between numbers and quantities. Student's goals were (1) to count to 15 by ones, (2) the one-step word problem goal from the previous IEP, (3) to be able to recognize written numbers 1-10 when given

⁹ *Id.* at 189-90.

¹⁰ *Id.* at 190.

¹¹ *Id.* at 191.

¹² *Id.* at 192.

¹³ *Id.* at 195.

¹⁴ *Id.* at 197.

¹⁵ *Id.* at 198.

¹⁶ P15.

number cards, (4) to demonstrate progress in the area of understanding the relationship between numbers and quantities, and (5) the multiplication goal from the previous IEP.¹⁷

In Reading, Student displayed borderline to low average skills in phonemic awareness and phonological memory. In addition to the baselines from the previous IEP, Student knew only the “m” sound, and was unable to write any letters of the alphabet or Student’s name. In addition to the goals from the previous IEP, Student will identify and write Student’s first and last name and identify rhyming words.¹⁸

In Adaptive/Daily Living Skills, Student had Very Low visual motor integration skills compared to Student’s peers, had a history of falling, and was unable to identify shapes and letters. Student’s baselines were an inability to write any letters, could identify a penny and a dime, but struggled with nickels and quarters, did not know spatial concepts, had difficulty with impulse control, knew a few Pre-Primer and Primer Dolch sight words, was unable to recall, form, or identify letters or write Student’s name, and could not identify or write numbers. Student’s goals were (1) the handwriting goal from the 2017-18 amendment, (2) Student will improve the ability to identify spatial concepts, functional use of coins, and independence with writing and copying, (3) Student will be able to write Student’s first and last name in upper case or mixed case letters, and (4) be able to write at least 50% of numbers 1-10 at least 2 out of 5 treatment sessions.¹⁹

In Emotional, Social, and Behavioral Development, Student displayed significant deficits in self-regulation and remaining on task; Student was unable to attend during classroom instruction. Student’s baselines were copied from the previous IEP including “Student is a new student to [School A]...” However, three additional baselines were added: unable to display appropriate play skills when interacting with peers, unable to express feelings about self in a setting, and unable to attend to a small group activity and display attending skills. Student’s goals were virtually unchanged from the previous IEP.²⁰ Student’s specialized instruction and related services were unchanged from the previous IEP.²¹

4. DCPS conducted an Occupational Therapy Re-Assessment Report on September 12, 2018.²² On the Beery-Buktenica Developmental Test of Visual-Motor Integration, Student was Below Average in Overall Visual Motor Skill, Average in Visual Perception, and Low in Motor Coordination.²³ On the Bruininks-Oseretsky Test of Motor Proficiency (“BOT-2”), Student scored Below Average in Fine Motor Precision, and Average in Fine Motor Integration, Fine Manual Control, Manual Dexterity, Upper-Limb Coordination, Manual Coordination. Examiner A found that Student “is able to copy information from both near and far points with accuracy. When [Student] composes sentences Student’s handwriting is neat and legible, making it easy for [REDACTED] and Student’s teachers to read. [Student] is an engaging student who asked many questions and was eager to show off [Student’s] skills... At this time, [Student] appears to be able to function within the

¹⁷ *Id.* at 203-4.

¹⁸ *Id.* at 205-6.

¹⁹ *Id.* at 207.

²⁰ *Id.* at 208-10.

²¹ *Id.* at 211.

²² P57.

²³ *Id.* at 567.

classroom with current supports in place (assistance with spelling). [Student] has met all Motor/Physical Development goals from [Student's] previous IEP.”²⁴

5. DCPS completed a Comprehensive Psychological Reevaluation on September 27, 2018.²⁵ On the Woodcock-Johnson IV Tests of Cognitive Abilities (“WJ-IV”), Student scored Extremely Low in Verbal, Non-Verbal, and Processing. Student was Low in Memory. Student’s full scale IQ, 61, was also in the Extremely Low range.²⁶ Student scored 61 in General Intellectual Ability (“GIA”), which is in the Extremely Low range when compared to same-aged peers. Examiner B characterized the GIA as “the best single-score predictor of overall school achievement or other life outcomes that have a relationship to cognitive ability.”²⁷ In Comprehension – Knowledge and Fluid Reasoning, an estimate of intellectual ability based on the ability to reason, form concepts, and solve problems using unfamiliar information, Student scored in the Extremely Low range.²⁸ Short-Term Working Memory is the ability to apprehend and hold information in immediate awareness then use or manipulate that information to carry out a goal. Student demonstrated low attentional control and short-term memory when compared to peers. These deficits affect the ability to decode worse, which cause Student to struggle in reading; Student reads at grade D level, six grades below Student’s current level.²⁹ In Cognitive Efficiency, which measures controlled attention, the capacity to hold information, to perform automatic tasks rapidly and accurately, and manipulating information to achieve a goal, Student was Below Average, two points from Average.³⁰

On the WJ-IV Tests of Achievement, Student scored Extremely Low in every measured category. Broad Reading, Letter-Word Identification, Reading Fluency, Passage Comprehension, Word Attack, Sentence Reading Fluency, Oral Reading, Broad Math, Applied Problems, Calculation, Math Facts Fluency, Broad Written Language, Spelling, Writing Samples, and Sentence Writing Fluency. ³¹ In Reading, Student performed at a grade D level, six years below Student’s current grade. The same was true for Mathematics and Writing.³²

On the Vineland assessment of Adaptive Functioning, Student’s scores on the Adaptive Behavior Composite demonstrated adequate adaptive functioning in the home and Moderately Low in school.³³ In Socialization, Student displayed adequate skills at home, but had difficulty in school.³⁴

Examiner B reported that Student’s classroom “does not have a special education teacher on staff to provide specialized instruction.”³⁵

²⁴ *Id.* at 569.

²⁵ P58.

²⁶ *Id.* at. 578.

²⁷ *Id.* at 580.

²⁸ *Id.*

²⁹ *Id.* at 581.

³⁰ *Id.* at 581-2.

³¹ *Id.* 582-3.

³² *Id.* at 585.

³³ *Id.* at 586.

³⁴ *Id.* at 587.

³⁵ *Id.* at 576.

Examiner B opined that:

Based on formal assessment [Student] continues to exhibit significant delays in cognitive processing, verbal attention, comprehension knowledge and working memory. This impacts [Student's] ability to excel in the classroom across all academic areas. In the classroom [Student] continues to perform significantly below grade level expectation. Cognitive delays impact [Student's] ability to decode, problem solve and reason efficiently in areas of reading and math... Findings suggest concern in the areas of communication across home and school This suggests that [Student] has difficulty listening and understanding, expressing through speech and reading and writing... [Student] continues to meet eligibility for special education services as a Specific Learning Disabled student.³⁶

6. The IEP team conducted a review of the IEP on September 27, 2018.³⁷ The Mathematic, and Emotional, Social, and Behavioral Development sections of the IEP were virtually unchanged. However, the baselines and goals from the previous month's IEP, which indicated that Student could not write letters of the alphabet or ■ name, were not included in this IEP. A Motor Skills/Physical Development section was added. On the OT reevaluation, Student scored in the average range on the Grasping subtest and below average for overall visual motor integration, average visual perception skills, and low motor coordination skills. Student scored within the average range in Fine Motor Integration.³⁸ Student's baseline was that Student demonstrates neat and legible handwriting when copying and composing sentences. The goal was the same as the first goal on the February 2018 amended IEP, to compose written work of at least four sentences or twenty-five word with at least 90% correct placement, sizing, and case when given assistance for spelling.³⁹ Student's specialized instruction and BSS remained the same as in the previous IEP. However, Student's 30 minutes per week of OT services was changed to 30 minutes per month of OT consultation services.⁴⁰

7. DCPS issued an IEP Progress Report on March 5, 2019. In Emotional, Social, and Behavioral Development, Student was reported to be progressing on the goal of demonstrating appropriate interpersonal behavior, on the goal of attending a non-preferred small group activity or independent assignment, on the goal of demonstrating grow relating to peer relationships, and on the goal of identifying and expressing feelings about self, the goal of writing four sentences of twenty-five words. With respect to all other goals, the report indicated that the goals were "Just Introduced."⁴¹

8. DCPS conducted an annual IEP review on March 14, 2019.⁴² Student's Mathematics PLOP and baselines were unchanged from the February 2018 IEP, and the two

³⁶ *Id.* at 587-8.

³⁷ P16.

³⁸ *Id.* at 223.

³⁹ *Id.* at 224.

⁴⁰ *Id.* at 225.

⁴¹ P36.

⁴² P17.

goals were the (1) one-step word problem, and (2) nine times table goals from that IEP.⁴³ In Reading, three prior goals were repeated.⁴⁴ A new Area of Concern was added in Written Expression. Student's PLOP was being below grade level in writing. Student's baseline was the ability to copy a sentence from the board that was written by the teacher, but an inability to construct sentences independently. Student's goal was to be able to make a complete paragraph when given 5 scrambled sentences.⁴⁵ In Emotional, Social, and Behavioral Development, Student's PLOP was the need for several redirections to stay on task, being easily distracted by peers, has difficulty understanding text and instruction and needs directions read over and over, and is friendly and works well with peers. Students baselines were (1) needing redirections to stay on task, and (2) has low self-confidence and self-esteem. Student's goals were unchanged. In Motor Skills, Student's PLOP and goal were unchanged.⁴⁶ Student's specialized instruction and related services were unchanged,⁴⁷ but the IEP team prescribed ESY.⁴⁸

9. Student's final grades for the 2018-19 school year were Below Basic in Mathematics, Basic in Reading, Writing & Language, Speaking & Listening, Social Studies, Science, and World Language, and Proficient in Music, Art, and Health & Physical Education. Student needed "Frequent Prompting" to comply in all 12 behavioral categories. Student's reading fluency was 3 words per minute "with a goal of 130 words per minute read."⁴⁹

10. On December 11, 2019, DCPS completed a Comprehensive Occupational Therapy Re-Evaluation.⁵⁰ On the BOT-2, Student scored Below Average in Fine Motor Precision, and Average in Fine Motor Integration, Fine Manual Control, Manual Dexterity, Upper-Limb Coordination, and Manual Coordination.⁵¹

The Motor-Free Visual Perception Test, 4th Edition ("MVPT-4"), measures the ability to perceive, process and respond to information within the environment in order to discriminate position, shapes, colors, and letter-like forms. The purpose of the MVPT-4 is to measure the brain's ability to understand and interpret what the eyes see.⁵² Student's visual perception was average compared to same-aged peers.⁵³ Student demonstrated appropriate fine and visual motor skills to manipulate small motor items, such as lacing beads, manipulating playing cards, etc.⁵⁴ Student's functional motor skills were adequate for the academic setting, Student had normal bilateral coordination skills, and was able to produce legible handwriting with appropriate placement on the baseline, sizing, and case usages, with assistance as needed for spelling.⁵⁵ In the area of Sensory Processing Skills, Student

⁴³ *Id.* at 233.

⁴⁴ *Id.* at 234.

⁴⁵ *Id.* at 235.

⁴⁶ *Id.* at 237.

⁴⁷ *Id.* at 238.

⁴⁸ *Id.* at 244.

⁴⁹ P69:778.

⁵⁰ P59.

⁵¹ *Id.* at 597.

⁵² *Id.* at 598.

⁵³ *Id.* at 599.

⁵⁴ *Id.* at 601.

⁵⁵ *Id.* at 602.

presented as typically processing with respect to hearing and touch processing, the awareness of Student's body, and with a sense of balance and motion. Student was able to stay engaged and on task for up to 40 minutes at a time in an environment with limited distractions and 1:1 attention.⁵⁶

Examiner C reported that:

In comparison to [Student's] performance on [Student's] last occupational therapy re-assessment a year ago, [Student's] scores have remained consistent with [Student's] previous performance. When the BOT-2 was previously administered, [Student] scored "below average" on the fine motor precision subtest, and "average" on all other subtests... including [Student's] fine manual control composite score and [Student's] manual coordination composite score. During this assessment, [Student] again score "below average" on the fine motor precision subtest, and average to above average on all other scores.⁵⁷

Examiner C opined:

Overall, it appears that [Student] has the fine motor, visual motor, visual perception, sensory processing, and functional life skills needed to access instruction and participate in classroom activities within the self-contained classroom setting. [Student] presents with difficulties with higher order cognitive skills including problem solving and multistep planning/execution, but given [Student's] scores on the SPM, it is likely related to attention and cognitive delays associated with [Student's] ADHD diagnosis and learning disability, rather than difficulties with sensory processing. [Student] performs best in a smaller setting with limited distractions and more individualized attention; it appears unstructured time/lowered demands and social distractions are frequent contributors to [Student's] difficulties with staying on task in the classroom environment.⁵⁸

11. On December 15, 2019, DCPS completed a Speech and Language Reevaluation.⁵⁹ Examiner D found Student to have functional voice, oral motor, articulation, and speech fluency skills. On the Receptive One-Word Picture Vocabulary Test ("ROWPVT-4") and The Expressive One-Word Picture Vocabulary Test ("EOWPVT-4"), Student's receptive and expressive vocabulary skills deteriorated from average in 2013, to Borderline/Below Average in expressive vocabulary skills and to below average in expressive vocabulary skills.⁶⁰ On the Clinical Evaluation of Language Fundamentals ("CELF-5"), Student scored Below Average on the Language Memory Index, the Expressive Language Index, the Receptive Language Index, and Core Language.⁶¹ Examiner D opined that

⁵⁶ *Id.* at 602-3.

⁵⁷ *Id.* at 604.

⁵⁸ *Id.*

⁵⁹ P60.

⁶⁰ *Id.* at 614.

⁶¹ *Id.* at 610.

Below average receptive language skills indicate that [Student] will experience difficulty completing classroom assignments, following directions in the classroom, and understanding academic discussions in the classroom. Below average expressive language skills may indicate that [Student] will have difficulty formalizing grammatically correct sentences of increasing length and complexity, expressing thoughts during classroom discussions and written assignments, taking notes during teacher instruction, and rephrasing information during classroom activities... Based on [Student's] current speech and language skill functioning, [Student's] delays impact [Student's] ability to access the general educational environment.⁶²

12. Petitioner enrolled in School A for grade C. DCPS issued an IEP Progress Report on February 14, 2020.⁶³ In Mathematics, the report indicated that the one-step word problem goal was “Not Introduced” in the first reporting period, and “Just Introduced” in the second period.⁶⁴ The nine times multiplication facts goal was “Just Introduced” in the first period, and Student was “Progressing” in the second period.⁶⁵ In Reading, the identification of 16/21 consonant sounds goal, and identification of the main idea in fictional text, and the goal of responding to comprehension questions, were “Just Introduced” in the first period, and Student was reported to be progressing in the second period.⁶⁶ In Written Expression, the five scrambled sentences goal was “Just Introduced” in the first period and Student was “Progressing” in the second.⁶⁷ In Emotional, Social, and Behavioral Development, the goal of demonstrating appropriate play skills, etc., Student was progressing in both reporting periods, but Social Worker A conceded that progress was “minimal.” “When regulated [Student] is able to engage in age appropriate social interactions. [Student] is challenged by responding to inappropriate behavior from [Student's] peers in an appropriate manner. For instance, if a student is antagonizing [Student], [Student's] response is confrontation.”⁶⁸ Student also made minimal progress in both periods on the goal of expressing feelings about self.⁶⁹ In Motor Skills/Physical Development, Student mastered the four sentences/twenty-five words goal in the second reporting period.⁷⁰

13. On February 18, 2020, DCPS completed a Psychological Re-evaluation of Student.⁷¹ On the Reading Inventory Assessment given on August 28, 2019, Student score of Beginning Reader (“BR”) which placed Student below basic at the grade D level, six grades below Student's current grade. Student scored BR again on the mid-year assessment. Student also scored at a grade D level in all domains on the I-Ready Beginning of the Year Assessment. In the Number and Operations domain, Student could count to 10 and count backwards from 10. Student remained at a grade D level on the Middle of the Year

⁶² *Id.* at 614-15.

⁶³ P38.

⁶⁴ *Id.* at 445.

⁶⁵ *Id.* at 445-6.

⁶⁶ *Id.* at 446-7.

⁶⁷ *Id.* at 447.

⁶⁸ *Id.* at 448.

⁶⁹ *Id.* at 449.

⁷⁰ *Id.*

⁷¹ P.62.

Assessment on February 10, 2020.⁷² On the WJ-IV, Student score six grades below grade level in Broad Reading, Letter-Word Identification, Reading Fluency, Writing Fluency, Broad Math, Calculation, and Math Fluency, and five grades below grade level in Passage Comprehension, Broad Written Language, Written Expression, Spelling, Writing Samples, Calculation, and Applied Problems.⁷³

On the Conners 3rd Edition (“Conners-3”), which measures Attention Deficit/Hyperactivity Disorder, Student scored Highly Significant in Inattention, Hyperactivity, Learning Problems/Executive Functioning, and the Conners 3 Global Index, and At-Risk in Aggression and Peer Relations.⁷⁴ On the Behavior Assessment System for Children (“BASC-3”), Student’s scores indicated significant problems with Aggression, Conduct Problems, and Hyperactivity.⁷⁵

Examiner E opined:

[Student] will continue to benefit from accommodations, differentiated instruction, structured learning environments, and specific interventions, in an effort to increase [Student’s] academic and behavioral performance. A review of records consisting of report cards, previous psychological reports, interviews, classroom benchmark assessments reveal that [Student] is academically functioning in the Low range as evidenced by the Woodcock Johnson Tests of Achievement, iReady, ANET, Reading Inventory and class-work assessments. Teacher BASC-2, BRIEF-2 and Conners-3 Behavior rating scales indicate concerns especially in the areas of school conduct, learning problems, focus, inattention, executive function, impulsivity and hyperactivity. Based upon the information obtained in the psychological report, [Student] will experience academic and behavioral difficulty in the classroom. Therefore, interventions should include but not be limited to academic interventions to address reading, writing, and mathematics; interventions should also be provided in the areas of behavior to address feelings of inattention, executive functioning, hyperactivity, inattention, learning problems, focus and impulsivity. It should be note that distractibility and inattentiveness were observed during the classroom sessions.⁷⁶

14. Student’s 2019-20 mid-year grades were A in Dance, B’s in Math, English, and Graded Advisory MS, and C+ in Science and Concepts of Work History & Geography.⁷⁷

15. On March 24, 2020, DCPS authorized Student to obtain 200 hours of independent tutoring services at \$65.95 per hour (\$13,190.00), and 16 hours of mental health counseling at \$67.38 per hour (\$1,078.08).⁷⁸

⁷² *Id.* at 629-30.

⁷³ *Id.* at 630.

⁷⁴ *Id.* at 637.

⁷⁵ *Id.* at 642.

⁷⁶ *Id.* at 643. *See* iReady and Reading Inventory scores at P68:682-88.

⁷⁷ P69:682-3.

⁷⁸ R3:9

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

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.⁷⁹

The first two issues in this case involve the appropriateness of a developed IEP. Therefore, the burden of persuasion is on DCPS as to these issues presented.⁸⁰ The burden is on Petitioner on the issue relating to the alleged failure to implement the IEP.

Whether DCPS failed to provide a FAPE by failing to provide appropriate IEPs for the 2018-19 and 2019-20 school years. Whether the September 27, 2018 IEP was inappropriate for failing to address the student's writing needs by not providing written expression goals.

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*.⁸¹ 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.'"⁸² 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...⁸³ 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."⁸⁴

⁷⁹ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁸⁰ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁸¹ 458 U.S. 176, 187 (1982).

⁸² *Id.* at 189-90, 200

⁸³ *Id.* at 200.

⁸⁴ *Id.* at 203-04.

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.⁸⁵ 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*.”⁸⁶ 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 circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁸⁷

The regulations require the following in the development of an IEP:

(a) Development of IEP—

(1) General. In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must—

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP...

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.⁸⁸

When Student enrolled in School C in August, Student’s PLOP in mathematics were

⁸⁵ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁸⁶ *Id.* at 997.

⁸⁷ *Id.* at 1000-01 (citations omitted).

⁸⁸ 34 C.F.R. §300.324.

the ability to rote count to 5 and identify shapes and colors. Student's baselines were (1) an inability to count to 10 by ones with consistent accuracy, and (2) able to add single digit numbers with the use of manipulatives and task analysis, (3) unable to recognize numbers 1-10, and (4) unable to demonstrate progress in the area of understanding the relationship between numbers and quantities. In Reading, Student displayed borderline to low average skills in phonemic awareness and phonological memory. Student's baselines were (1) able to read color and number words, able to read 4 out of the first 100 Fry words, and (2) knew only short vowel sounds, and (3) was unable to identify the elements of a story, (4) Student knew only the "m" sound, and (5) Student was unable to write Student's name. In Emotional, Social, and Behavioral Development, Student displayed significant deficits in self-regulation and remaining on task; Student was unable to attend during classroom instruction⁸⁹

DCPS immediately completed a Psychological Reevaluation On the WJ-IV Tests of Achievement, Student scored Extremely Low in every measured category. In Reading, Mathematics, and Writing, Student performed at a grade D level, six years below Student's current grade.⁹⁰ The IEP team conducted a 30-day review of the IEP on September 27, 2018,⁹¹ but the Mathematic, Reading, and Emotional, Social, and Behavioral Development sections of the IEP were virtually unchanged. Student's specialized instruction and BSS remained the same as in the previous IEP. However, Student's 30 minutes per week of OT services was changed to 30 minutes per month of OT consultation services.⁹²

DCPS conducted an annual IEP review on March 14, 2019.⁹³ Student's Mathematics PLOP and baselines were unchanged from School B's February 2018 IEP, and the two goals were the (1) one-step word problem, and (2) nine times table goals from that IEP.⁹⁴ In Reading, three prior goals were repeated.⁹⁵ A new Area of Concern was added in Written Expression. Student's PLOP was being below grade level in writing. Student's baseline was the ability to copy a sentence from the board that was written by the teacher, but an inability to construct sentences independently. Student's goal was to be able to make a complete paragraph when given 5 scrambled sentences.⁹⁶ Student's specialized instruction and related services were unchanged,⁹⁷ but the IEP team prescribed ESY.⁹⁸ DCPS has not developed an IEP since March 14, 2019.

Student's final grades for the 2018-19 school year were Below Basic in Mathematics, Basic in Reading, Writing & Language, Speaking & Listening, Social Studies, Science, and World Language, and Proficient in Music, Art, and Health & Physical Education. Student needed "Frequent Prompting" to comply in all 12 behavioral categories. Student's reading fluency was 3 words per minute "with a goal of 130 words per minute read."⁹⁹

⁸⁹ P15.

⁹⁰ P58:585.

⁹¹ P16.

⁹² *Id.* at 225.

⁹³ P17.

⁹⁴ *Id.* at 233.

⁹⁵ *Id.* at 234.

⁹⁶ *Id.* at 235.

⁹⁷ *Id.* at 238.

⁹⁸ *Id.* at 244.

⁹⁹ P69:778.

At School C on February 14, 2020, DCPS issued an IEP Progress Report.¹⁰⁰ In Mathematics, the report indicated that the one-step word problem goal was “Not Introduced” in the first reporting period, and “Just Introduced” in the second period.¹⁰¹ The nine times multiplication facts goal was “Just Introduced” in the first period, and Student was “Progressing” in the second period.¹⁰² In Reading, the identification of 16/21 consonant sounds goal, and identification of the main idea in fictional text, and the goal of responding to comprehension questions, were “Just Introduced” in the first period, and Student was reported to be progressing in the second period.¹⁰³ In Written Expression, the five scrambled sentences goal was “Just Introduced” in the first period and Student was “Progressing” in the second.¹⁰⁴

On February 18, 2020, DCPS completed a Psychological Re-evaluation of Student.¹⁰⁵ On the Reading Inventory Assessment and iReady assessments, Student was performing six years below grade level in Math and Readings. In Math, Student’s level was the ability to count to 10 and count backwards from 10. On the WJ-IV, Student score six grades below grade level in Broad Reading, Letter-Word Identification, Reading Fluency, Writing Fluency, Broad Math, Calculation, and Math Fluency, and five grades below grade level in Passage Comprehension, Broad Written Language, Written Expression, Spelling, Writing Samples, Calculation, and Applied Problems.¹⁰⁶

DCPS offered no testimonial evidence in its defense. Thus, it relies on its disclosures to meet its burden of persuasion on these issues. In her brief closing argument, Respondent’s counsel noted that Student had no grade below C, and that DCPS had already provided Petitioner funding for a reasonable amount of compensatory education services.

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.”¹⁰⁷

Endrew requires an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. Student’s particular circumstances include Full Scale IQ and GIA scores of 61, both in the Extremely Low range. Student’s testing

¹⁰⁰ P38.

¹⁰¹ *Id.* at 445.

¹⁰² *Id.* at 445-6.

¹⁰³ *Id.* at 446-7.

¹⁰⁴ *Id.* at 447.

¹⁰⁵ P.62.

¹⁰⁶ *Id.* at 630.

¹⁰⁷ 137 S.Ct. at 1000-01.

reveals that Student is performing five to six grades below current grade level. In the Psychological Reevaluation on February 18, 2020, Student's level of math achievement was the ability to count to ten. In March 2019, Student was unable to construct simple sentences independently. At the end of the 2018-19 school year, Student's reading fluency was 3 words per minute "with a goal of 130 words per minute read." I recognize that Student is already in a self-contained classroom, receiving the maximum amount of specialized instruction available. Nevertheless, Student did not make objective progress during the 2018-19 school year, and has not made objective progress during the 2019-20 school year. Therefore, I conclude that DCPS denied Petitioner a FAPE by failing to provide an appropriate IEP for the 2018-19 and 2019-20 school years.

Whether DCPS denied the student a FAPE by failing to implement the September 27, 2018 IEP for the 2018-19 school year by failing to provide a certified special education teacher, and failing to provide all of the prescribed behavioral support services.

Petitioner alleges that DCPS failed to provide a certified special education teacher from the beginning of the 2018 school year in August until January 22, 2019.¹⁰⁸ In the Psychological Re-evaluation, Examiner B reported on September 27, 2018 that Student's classroom "does not have a special education teacher on staff to provide specialized instruction."¹⁰⁹ Witness A testified that no certified teacher signed Student's Progress Report for the first Reporting Period of the 2018-19 school year. Comments on Student's progress were provided by Special Education Coordinator A on December 4, 2018, not a special education teacher.¹¹⁰ Teacher A, a special education teacher, provided comments on January 22, 2019 for the second reporting period ending on January 18, 2019.¹¹¹ DCPS did not deny the allegation in its *Response*, and provided no testimonial evidence.

Petitioner alleges that DCPS failed to provide 16 hours of BSS from September 27, 2018 through June 14, 2019.¹¹² Witness A cited the absence of service tracking forms as evidence that no services were provided.¹¹³ DCPS did not deny these allegations in its *Response*, and provided no testimonial evidence.

For the reasons discussed above, I conclude that DCPS denied Student a FAPE for failing to provide a certified special education teacher for the first two reporting periods of the 2018-19 school year, and for failing to provide 16 hours of BSS during the 2018-19 school year.

RELIEF

For relief, Petitioner requests, *inter alia*, (1) an order for DCPS provide or to fund compensatory education services, and (2) attorney's fees.

¹⁰⁸ P1:23.

¹⁰⁹ *Id.* at 576.

¹¹⁰ R32.

¹¹¹ R31.

¹¹² P1:23; Testimony of Witness A; P81:963.

¹¹³ *See* P79:933.

ORDER

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

ORDERED, that DCPS shall fund 200 hours of independent tutoring services in Mathematics, Reading, and Written Expression.¹¹⁴

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: June 3, 2020

Copies to: Attorney A, Esquire
Attorney B, Esquire
OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED]/DCPS
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¹¹⁴ The amount of tutoring services ordered herein is in addition to the 200 hours DCPS authorized on March 24, 2020 in R3:9. BBS was not ordered as DCPS provided the 16 hours requested by Petitioner. See P81:964.