

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
June 13, 2020

<i>Student</i> , ¹)	Case No.: 2020-0077
through <i>Petitioner</i> ,)	
)	Date Issued: 6/13/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 6/2/20 & 6/3/20
("DCPS"),)	Video Platform: Microsoft Teams
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") by DCPS failing to meet its Child Find obligations and then failing to include Behavioral Support Services ("BSS") on the Individualized Education Program ("IEP") developed for Student. DCPS responded that *Parent* had refused to move forward with evaluation of Student and services at various times.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 3/23/20, the case was assigned to the undersigned on 3/24/20. Respondent filed a response on 4/7/20 and did not challenge jurisdiction apart from noting that the IDEA statute of limitations bars any claim prior to 3/24/18. A resolution meeting was held on 4/7/20, which did not resolve the dispute or

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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shorten the 30-day resolution period, which ended on 4/22/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 10-day continuance, which requires a Hearing Officer Determination (“HOD”) by 6/16/20.

The prehearing conference was held on 5/7/20 and the Prehearing Order issued on 5/14/20, which addressed the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 6/2/20 and 6/3/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner and Parent were present by videoconference for the hearing.

Petitioner’s Disclosures, submitted on 5/26/20, contained documents P1 through P58, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 5/26/20, contained documents R1 through R13, Supplemental Disclosures were submitted on 5/26/20 with R14, and Second Supplemental Disclosures were submitted on 6/1/20 with R15, all of which were admitted into evidence without objection.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see Appendix A*):

1. *Teacher in Public School*
2. Petitioner
3. Parent
4. *Educational Advocate* (qualified over objection as an expert in School Psychology and IEP Programming)

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see Appendix A*):

1. *Principal* at Public School (qualified without objection as an expert in Public School Administration)
2. *School Social Worker* at Public School (qualified without objection as an expert in Social, Emotional and Behavior Support)
3. *Special Education Coordinator* at Public School (qualified without objection as an expert in Special Education Programming and Placement)
4. *Resolution Specialist*

Petitioner’s counsel recalled both Parent and Petitioner as rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

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Issue 1: Whether DCPS denied Student a FAPE by failing to timely evaluate and find Student eligible for special education services from 3/24/18 through 12/9/19 pursuant to its Child Find obligations, based on lack of progress or regression from 2016 and contact by Parent in January 2018. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to develop and/or provide an appropriate IEP and/or placement from 1/7/20 to present when it failed to provide BSS despite Student's psychological evaluation recommending counseling due to anxiety and low self-esteem. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

The relief² requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall fund or provide compensatory education for any denial of FAPE.³
3. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

² At the start of the due process hearing, Petitioner withdrew the second paragraph of relief requested in the Prehearing Order, which was, "DCPS shall amend Student's IEP to provide 120 minutes/month of BSS," as that occurred prior to the due process hearing.

³ Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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1. Student is a resident of the District of Columbia; Petitioner and Parent are Student's Parents.⁵ Student is *Age*, *Gender* and in *Grade* at Public School.⁶ Student is "kind, resilient, [and] a hard worker."⁷

2. Relationship. Parent testified that she has a learning disability herself and needed Petitioner's assistance to help her read and understand, and to write for her; they share a family email account from which Petitioner often wrote emails for Parent.⁸ Both Parent and Petitioner make decisions for Student and usually speak with the "same voice"; Parent often raised concerns and Petitioner drafted emails for her.⁹ Principal knew for years that Parent had given Petitioner a power of attorney.¹⁰ Principal acknowledged that if DCPS was confused or concerned about who had the power to consent, it could have asked both Petitioner and Parent to sign consent forms.¹¹

3. IEP. Student's initial IEP on 1/7/20 provided for 7.5 hours/week of specialized instruction outside general education and 2.5 hours/week of specialized instruction inside general education, but no related services.¹² Parent had consented to the initial evaluation of Student in mid-November 2019.¹³ The IEP team had met on 12/9/19 and found Student eligible for special education services, with the disability classification of Specific Learning Disability ("SLD").¹⁴ Although represented by counsel, before giving consent for the initial provision of special education services on 1/23/20, Petitioner had many written questions for Public School that delayed services.¹⁵

4. Student's IEP was amended on 5/7/20 to add 60 minutes/month of BSS, and amended again on 5/26/20 to increase BSS to 120 minutes/month.¹⁶ Student's IEP was amended on 6/1/20 to increase specialized instruction to 20 hours/week outside general education.¹⁷

5. Cognitive Ability. A 12/4/19 comprehensive psychological evaluation used the Reynolds Intellectual Assessment Scales, 2nd Ed. ("RIAS-2") to determine that Student had a Composite Intelligence Index ("CIX") of 92, in the Average range; a Verbal Intelligence Index ("VIX") of 76, in the Moderately Below Average range; a Nonverbal Intelligence

⁵ Parent; 34 C.F.R. § 300.30(a).

⁶ Parent; P6-1.

⁷ P6-3 (math teacher).

⁸ Parent.

⁹ *Id.*

¹⁰ Principal.

¹¹ *Id.*

¹² P6-1,14; R7-1,14.

¹³ P4-1.

¹⁴ P5-1.

¹⁵ R7B-1.

¹⁶ P11-1,16; R9-1,16; R10-1.

¹⁷ R15-1,16.

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Index (“NIX”) of 113, in the Above Average range; and a Composite Memory Index (“CMX”) of 110, in the Above Average range.¹⁸

6. Academic Achievement. The 12/4/19 comprehensive psychological evaluation indicated that Student was far behind peers; the Woodcock-Johnson IV Tests of Achievement (“WJ-IV ACH”) showed that Student was in the Extremely Low range on Broad Reading (standard score 47), Broad Math (67), and Broad Written Language (56), performing worse on each of these than 99% of peers.¹⁹ Student had never been retained in a grade at school, but performed significantly below grade level.²⁰ Student had struggled in all academic areas since Pre-K and had difficulty completing work.²¹ Student’s reading, math, and writing skills were more than 4 years below Grade.²² Student needs remediation in foundational skills, and skills related to counting to 100.²³

7. Reading. Student is 4 years below Grade in reading, has weak phonic skills and cannot read independently, despite years at Public School.²⁴ In 2015/16²⁵ and 2016/17, Student’s DIBELS composite scores indicated serious deficits in reading, and regression from 2015/16 to 2016/17; Student’s End of Year (“EOY”) 2015/16 score was 71 words per minute (“wpm”), which declined to 44 at Beginning of Year (“BOY”) 2016/17, then declined further to 31 at Middle of Year (“MOY”) and 22 at EOY 2016/17, while the benchmark grew from 89 to 111 wpm over that time.²⁶ Student’s regression in DIBELS continued in 2017/18, as the composite score of 22 wpm at EOY 2016/17 dropped to 6 at BOY and then 5 at MOY before finally increasing to 57 wpm at EOY in 2017/18, although by that time the benchmark was 238.²⁷ A data compilation shows how low Student’s reading fluency had been in 2016/17, 2017/18 and 2018/19 with mostly single digits by Student (on 4 of 6 data points) and how far Student was behind what was expected, which increased from 23 to 86.²⁸ Nor can Student write complete sentences consistently, or use proper punctuation; Student used a human scribe.²⁹

8. Math. A data compilation of Student’s iReady math scores shows how consistently low Student’s scores had been from BOY 2016/17 through BOY 2019/20; the 10 data points are all 4 years below Student’s Grade, showing no significant progress over that time.³⁰ Student’s highest score (396) was in MOY 2016/17; in 2018/19 Student’s EOY score (388)

¹⁸ P24-10,11.

¹⁹ P24-13; Educational Advocate.

²⁰ P23-3.

²¹ P24-3; P6-3.

²² P24-7,8.

²³ P6-3,6.

²⁴ Teacher; Educational Advocate; P6-7,8.

²⁵ All dates in the format “2015/16” refer to school years.

²⁶ P26-1; Educational Advocate.

²⁷ P28-1; Educational Advocate.

²⁸ P13-1.

²⁹ P6-11,13.

³⁰ P15-1.

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was lower than either BOY (392) or MOY (393), and Student regressed further by BOY (362) in 2019/20.³¹ By contrast, the expected scores are all consistently much higher, growing from 402 to 517.³²

9. Teacher Referrals for Evaluation. Special Education Coordinator testified that no Public School teacher ever referred Student for an initial evaluation.³³ Student's teacher in 2015/16 told Petitioner that Student was so far behind that Student may need special education testing.³⁴ Parent testified that she never refused special education in 2016/17 because no one asked about special education then.³⁵ Parent complained to Principal by email on 1/24/18 that Student's teacher approached her on the playground and said that Student "needs to be in special education" and that the teacher said she had previously discussed placement of Student in special education with Parent but that Parent had declined (which Parent disputed).³⁶

10. From working with Student informally toward the end of 2017/18, Teacher thought that Student had a learning disability and needed an initial evaluation, a suggestion which Teacher was careful to share with the family first.³⁷ Even though Student was struggling with the alphabet and letter sounds, Teacher testified that in 2017/18 the family took the "path of tutoring" in hopes that Student could catch up and avoid any socio-emotional impacts due to special education.³⁸ But by October 2018, the family supported special education services for Student and wanted an evaluation of Student.³⁹

11. Parental Requests for Evaluation. On 10/1/18, Petitioner emailed Principal and Special Education Coordinator requesting an evaluation of Student, stating that over the last 3 years she had "continuously" asked Principal for an evaluation and a Response to Intervention ("RTI") plan based on referrals from teachers, poor test scores and assessments, and Petitioner's own educational concerns, which were not addressed.⁴⁰ Since Public School had not responded and Student needed special education assistance, Petitioner sought an independent educational evaluation ("IEE").⁴¹ Special Education Coordinator testified that she didn't know of the need for an evaluation of Student until the Fall of 2019, but Special Education Coordinator responded to Petitioner's 10/1/18 email by holding a meeting with Petitioner and Parent and others Public School staff the next day, on 10/2/18.⁴² Special Education Coordinator testified that there was no request for evaluation at the

³¹ P14-1; P46-1,3; P38-1.

³² P14-1.

³³ Special Education Coordinator.

³⁴ Petitioner.

³⁵ Parent.

³⁶ P51-1.

³⁷ Teacher.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ P52-1.

⁴¹ *Id.*

⁴² P53-1; Special Education Coordinator.

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10/2/18 meeting, but Parent credibly testified that she and Petitioner did ask for an evaluation.⁴³

12. BSS. School Social Worker conducted a social work assessment of Student in October 2019 and testified that there clearly was “enough there” to support Student’s eligibility for BSS.⁴⁴ Student and family needed therapy, which School Social Worker recommended as he was trying to support the family.⁴⁵ The 12/4/19 comprehensive psychological evaluation also recommended that Student would benefit from counseling to help enhance self-esteem and coping skills.⁴⁶ Teacher informally noted Student’s anxiety concerning time to complete work, low self-esteem, and that Student would simply shut down.⁴⁷

13. BSS was initially delayed for Student as there was confusion about whether the family wanted counseling for Student and then Petitioner stated that the family preferred services outside the school.⁴⁸ In the absence of BSS, Teacher offered to provide support to Student and be the point of contact on a safety plan.⁴⁹ After further back and forth, 60 minutes/month of BSS was added to Student’s IEP by amendment on 5/7/20, which was increased to 120 minutes/month by amendment on 5/26/20, as noted above.⁵⁰ With the delay in Petitioner or Parent agreeing to special education and related services, a week-long school break in February, and the closing of school on 3/13/20, DCPS asserted that only a couple of hours of BSS services were missed.⁵¹

14. Assistive Technology. Public School provided Student with a tablet for distance learning and a text-to-speech device in the form of pen.⁵² While the record contains numerous statements by DCPS referring to Student receiving “2 laptops and a tablet,” the 2 laptops were for Student’s siblings and only the tablet was for Student.⁵³ All of the Assistive Technology (“AT”) DCPS provided for Student was available for Student to use while school was closed in the spring, during the summer, and into the future as long as Student is a DCPS student.⁵⁴

15. Increase in Specialized Instruction. DCPS issued a PWN on 6/1/20 stating that Student’s team proposed to increase the specialized instruction hours on Student’s IEP to 20 hours/week outside general education and provide full-time supports and services for

⁴³ Special Education Coordinator; Parent.

⁴⁴ School Social Worker.

⁴⁵ *Id.*

⁴⁶ P24-20.

⁴⁷ Teacher.

⁴⁸ Teacher; P18-9 (Educational Advocate notes from 1/7/20 IEP meeting).

⁴⁹ Teacher; P18-10.

⁵⁰ P11-1,16; R9-1,16.

⁵¹ School Social Worker; Resolution Specialist.

⁵² Teacher; Special Education Coordinator.

⁵³ Administrative Notice; Principal.

⁵⁴ Principal; Special Education Coordinator.

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Student in a Specific Learning Support (“SLS”) classroom (which would not be at Public School, as it does not have an SLS classroom).⁵⁵ This increase in hours and shift to an SLS classroom were carried out by DCPS to narrow the issues in the complaint.⁵⁶

16. Compensatory Education. Educational Advocate testified that Public School should have met its Child Find responsibilities with an evaluation of Student as early as 2016/17.⁵⁷ Educational Advocate developed a compensatory education plan in this case seeking 1,300 hours of private tutoring, although the initial version provided to DCPS sought 4,000 hours of private tutoring based on a math error indicating that 5,940 hours of specialized instruction had been missed.⁵⁸ When testifying, Educational Advocate recommended tutoring for Student of no more than 1-2 hours/week during the school year (and during Extended School Year (“ESY”)) and 5 hours/week during the summer (when not in ESY) over a 2-year period, which would be enough to make meaningful progress and put Student where Student would have been apart from the denial of FAPE.⁵⁹ Parent agreed that Student could do a “couple” of hours/week of tutoring; Petitioner believed that Student should receive 20 hours/week of tutoring both when school was in session and during the summer.⁶⁰

17. Principal testified that a typical child often does not have the stamina to participate in after-school tutoring; Principal thought that Student could probably only do 1 hour/week of tutoring.⁶¹ Special Education Coordinator testified that 1-2 hours/week of tutoring were sufficient to make up what Student needed, and that Student could handle a little more tutoring during the summer, maybe 2-3 times/week based on what Student could do, but believed that children need a break in the summer and should have an opportunity to learn different things then.⁶² Tutoring is more intense than classroom work.⁶³ With compensatory education limited as a practical matter by Student’s stamina and motivation to do the work, it is better to err on the side of awarding too much rather than too little, as unused hours are not billed to DCPS.⁶⁴

18. As for compensatory education for missed BSS services, it is hard to make up BSS; School Social Worker testified that providing the actual amount of BSS missed should be

⁵⁵ R15-20.

⁵⁶ Principal.

⁵⁷ Educational Advocate.

⁵⁸ Educational Advocate; P21-10; R14-10.

⁵⁹ Educational Advocate.

⁶⁰ Parent; Petitioner.

⁶¹ Principal.

⁶² Special Education Coordinator.

⁶³ *Id.*

⁶⁴ Resolution Specialist (although Respondent’s counsel argued that DCPS has to carry the hours as a liability, so it’s not without cost).

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the maximum amount of compensatory education.⁶⁵ Cognitive Behavior Therapy would be helpful for Student and DCPS could provide it.⁶⁶

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely

⁶⁵ School Social Worker.

⁶⁶ *Id.*

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more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the Local Education Agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to timely evaluate and find Student eligible for special education services from 3/24/18 through 12/9/19 pursuant to its Child Find obligations, based on lack of progress or regression from 2016 and contact by Parent in January 2018. (Petitioner has the burden of persuasion on this issue.)*

Petitioner has clearly met her burden of persuasion on this issue, overcoming DCPS’s effort to focus the case on whether Petitioner or Parent is the proper decision-maker (possibly to draw attention from the fact that Student has been at Public School for years without learning how to read). The U.S. Court of Appeals for the District of Columbia emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to identify, locate and evaluate every child in need of special education. *See* 34 C.F.R. § 300.111. The Child Find obligations of an LEA are triggered either by awareness of the child’s circumstances or by parental request. *See Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 57 (D.D.C. 2011).

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Here, DCPS should have been aware of Student's need for an initial evaluation through both parental requests and Student's circumstances. Serious deficits in reading were clear as early as 2016/17. Student's DIBELS composite score at EOY 2015/16 was 71 words per minute while the benchmark was 81, but Student regressed to 44 at BOY 2016/17, then declined further to 31 at MOY and 22 at EOY 2016/17. Remarkably, Student regressed even further in 2017/18, dropping to 6 wpm and then 5 before beginning to increase a little. With testing showing average cognitive abilities, Student was definitely in need of help.

Nor was reading the only area in which there should have been concern. Student's iReady math scores show ongoing lack of progress as Student was 1 year behind peers in 2016/17, but 2 years behind the next year, and then 3 years behind the following year, and 4 years behind in 2019/20. In other words, despite Student's years at Public School, Student had not learned to read or show any meaningful progress in math.

Challenges of this magnitude did not go unnoticed at Public School, even though Special Education Coordinator testified that no Public School teacher ever referred Student for an initial evaluation. Student's teacher in 2015/16 did tell Petitioner that Student was so far behind that Student may need special education testing. Parent complained to Principal in early 2018 that Student's teacher said that Student needed to be in special education and that the teacher said she had previously discussed placement of Student in special education but that Parent had declined, which Parent disputed. Teacher worked informally with Student toward the end of 2017/18 and shared with the family that she thought Student had a learning disability and needed evaluation. But even though Student was struggling with the alphabet and letter sounds, Teacher explained that the family had taken the "path of tutoring" rather than special education in 2017/18 and didn't want Student to be evaluated until the fall of 2018.

On 10/1/18, Petitioner emailed Principal and Special Education Coordinator plainly requesting an evaluation of Student. Petitioner claimed that over the last 3 years she had "continuously" asked for evaluation of Student based on referrals from teachers, poor test scores and assessments, and Petitioner's own educational concerns. Since Public School had not addressed past requests, Petitioner sought an IEE. Special Education Coordinator testified that she didn't know of the need for evaluation of Student until the fall of 2019, even though she responded to Petitioner's 10/1/18 email by holding a meeting with Petitioner, Parent and other Public School staff the very next day, on 10/2/18. Special Education Coordinator further testified that there was no request for an evaluation of Student at the 10/2/18 meeting, which the undersigned does not find credible under the circumstances, and credits Parent's testimony that she and Petitioner sought evaluation of Student at the meeting. This Hearing Officer concludes that this must certainly be viewed as a parental request under Child Find, yet DCPS inexplicably delayed another year after receiving it.⁶⁷

⁶⁷ Respondent's counsel repeatedly stated that the law allows DCPS 120 days for an initial evaluation, but that was only true until 7/1/18, when the initial evaluation timeline in the

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DCPS's delay in moving forward with an initial evaluation of Student by at least a year is a serious violation of DCPS's Child Find obligations and a denial of FAPE, by denying Student the educational benefits to which Student was entitled. 34 C.F.R. § 300.513(a). Indeed, the delay would be considered longer than a year if not for the question of whether Parent and Petitioner rejected earlier efforts to evaluate Student. Ultimately, however, the undersigned is clear that it makes no meaningful difference, as the compensatory education awarded is limited as a practical matter by the amount of tutoring from which Student can benefit, as discussed below. In sum, this Child Find violation is the basis for the significant award of independent tutoring hours as compensatory education, below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to develop and/or provide an appropriate IEP and/or placement from 1/7/20 to present when it failed to provide BSS despite Student's psychological evaluation recommending counseling due to anxiety and low self-esteem. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden to DCPS, which failed to meet its burden of persuasion, as discussed below. The issue here is whether without the provision of BSS, the IEP for Student was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. *See also Z.B.*, 888 F.3d at 517; *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016). The focus here is on the related service of BSS. "Related services" must be provided if required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984).

Here, there was no question that School Social Worker believed that Student should be eligible for BSS based on his assessment. The dispute has simply been a matter of when Petitioner and Parent were willing for BSS to be included on Student's IEP, about which there was confusing and conflicting testimony. This Hearing Officer concludes that BSS should have been added to Student's IEP soon after 1/7/20 – if not on the initial IEP itself on 1/7/20 – and in the circumstances it was a denial of FAPE for Student to not be provided the BSS that Student needed to deal with anxiety and learn coping skills in order to be successful in school, which results in compensatory education and an award of independent counseling, as discussed below.

Remedies

Having found a denial of FAPE on each issue, the only remaining question is the amount of compensatory education necessary to put Student in the position in which Student

District of Columbia decreased to 60 days. D.C. Code § 38-2561.02(a)(2); 5-E D.C.M.R. § 3005.2; *see DL v. Dist. of Columbia*, 860 F.3d 713, 727 (D.C. Cir. 2017).

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would have been but for the denials of FAPE. There is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the undersigned considers it undeniable that Student has a very substantial deficit caused by DCPS’s delay in Child Find and providing special education and related services. Petitioner’s expert, Educational Advocate, sought 1,300 hours of private tutoring in her compensatory education plan, but then testified that Student could benefit as a practical matter from no more than 1-2 hours/week of tutoring during the school year (and any ESY) and 5 hours/week during the summer (when not in ESY) over a 2-year period, amounting to some 200-280 hours. Educational Advocate testified that this would be enough for Student to make meaningful progress and put Student where Student would have been apart from the denial of FAPE. Parent agreed that Student could handle a “couple” of hours/week of tutoring, although Petitioner believed that Student should receive 20 hours/week of tutoring whether or not school was in session. DCPS differed little from Educational Advocate’s perspective, recognizing that Student’s stamina and motivation were the constraints on the level of tutoring that would be appropriate.

The undersigned agrees that compensatory education tutoring hours are limited as a practical matter to how many would benefit Student. Indeed, it will take all of Student’s effort and perseverance to progress toward catching up with peers as a result of the academic hole Student is in due to not receiving special education services in the past. Resolution Specialist testified that if services are authorized but not used, DCPS is not billed for those services (although they are not costless), so it is better to err on the side of authorizing too much tutoring, rather than underestimating Student and providing too little. Accordingly, the undersigned authorizes below a total of 450 hours of independent academic tutoring that can be used over a period of 3 years. This is roughly based on the expectation that Student might use an average of 2 hours/week during the school year and 6 hours/week during summers, although possibly weighted more on the front end. Importantly, the award is for 3 years in case Student is not able to catch up adequately in 2 years. Parent testified that Student likes tutoring and is hard working, so there is hope.

As for compensatory education for missed BSS services, the parties’ arguments come down to whether Student missed only a couple of hours of BSS as DCPS asserts, or a few hours more from Petitioner’s perspective. But the goal of compensatory education is not to mathematically calculate and make up missed services on an hour for hour basis, but to restore Student to the position in which Student would be but for the denial of FAPE. Here, based on the testimony from School Social Worker and others on both sides about Student’s needs, the undersigned concludes that 10 hours of independent counseling of Student (individually and/or with family) is appropriate as compensatory education for the missed BSS, recognizing that it can often take some time to develop rapport in a counseling

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relationship and that Student's needs are substantial and would not be met by only a few hours. As for the type of counseling, Educational Advocate's compensatory education plan proposed Cognitive Behavior Therapy, which School Social Worker testified that would be helpful for Student. The undersigned authorizes independent counseling below and leaves it to Petitioner and her advocates to determine that best path for Student.

These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 3 years, although the undersigned encourages Petitioner to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without undue delay.

ORDER

Petitioner has prevailed in this case, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, DCPS shall provide a letter(s) of authorization for (a) 450 hours of academic tutoring, and (b) 10 hours of counseling, from independent providers chosen by Petitioner, with such letter(s) to be provided within 10 business days after Petitioner's request(s). All hours are to be used within 3 years; any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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 (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)

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ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov