District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E., Third Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Petitioners, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing Dates: 6/1/20; 6/2/20;**
	)	**6/5/20**
	)	**Hearing Officer: Michael S. Lazan**
	)	**Case No. 2020-0043**
District of Columbia Public Schools,	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Other Health Impairment (the "Student"). 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 February 14, 2020. The Complaint was filed by the Student's parents. On February 24, 2020, Respondent filed a response. A resolution meeting was held on March 2, 2020. The resolution period expired on March 16, 2020.

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

Respondent filed a motion to dismiss on March 26, 2020. Petitioners filed opposition on April 7, 2020. The motion was denied by order dated April 29, 2020. A prehearing conference was held on April 3, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on April 7, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was revised on April 16, 2020.

The Hearing Officer Determination ("HOD") due date was originally April 29, 2020. On April 21, 2020, Respondent moved on consent for a forty-seven-day continuance to allow the case to proceed on the June hearing dates. On April 24, 2020, the motion was granted and the HOD due date was changed to June 15, 2020.

The matter proceeded to hearing on June 1, 2020, and June 2, 2020. Oral closing arguments were presented on June 5, 2020. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. During the proceeding, Petitioners moved into evidence exhibits P-1 to P-44. There were no objections. Exhibits P-1 to P-44 were admitted. Respondent moved into evidence exhibits R-1 through R-4, R-6 through R-8, R-15, R-16, R-18, R-20, R-21, R-23, and R-25 through R-31. Objections were filed to Exhibits R-6, R-15, R-16, R-20, R-21, R-25, and R-27. These objections were overruled. Exhibits R-1

through R-4, R-6 through R-8, R-15, R-16, R-18, R-20, R-21, R-23, and R-25 through R-31 were admitted.

Petitioners presented as witnesses, in the following order: Witness A, a special education advocate/paralegal; Witness B, an educational behavioral consultant (expert: special education, including testing to determine if a student presents with a disability, IEP development and related services, interpreting test results, and development of compensatory education plans); and Petitioners (the Student's "Mother" and "Father"). Respondent presented as witnesses, in the following order: Witness C, a Local Educational Agency ("LEA") representative and designee for School C; and Witness D, a resolution specialist. Petitioners presented a rebuttal through testimony by the Mother.

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 reevaluate the Student when Petitioner requested an evaluation in September, 2019? If so, did Respondent violate 34 C.F.R. 300.303(a)(2) and related provisions? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?

2. Did Respondent fail to respond to Petitioner's request for an Independent Educational Evaluation ("IEE") in January, 2020, thereby entitling Petitioner to an IEE pursuant to 34 C.F.R. Sect. 300.502?

3. Did Respondent fail to implement the Student's Individualized Education Program ("IEP") during the 2019-2020 school year? If so, did Respondent's act or omission violate principles of law established in cases like Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)? If so, did Respondent deny the Student a FAPE?

Petitioners contended that the Student was not provided with access to the Student's aide during instruction. As relief, Petitioners are seeking an order directing

Respondent to: (1) immediately fund an IEE for the Student, at current market rates, which shall include assessments in all areas of suspected disability; (2) within 10 days of receipt of the reports from the IEE, convene a Multidisciplinary Team meeting to review the reports and determine the Student's eligibility for special education services; and (3) if the Student is determined eligible for special education services, convene an IEP meeting within 10 days and develop an IEP for the Student. Petitioners request that all meetings be scheduled through their counsel. Petitioners also seek an order that the hearing be continued to a mutually agreeable time/date after the issuance of this HOD, so that Petitioners have an opportunity to seek the services of an expert witness to present evidence regarding appropriate compensatory education services, based on the Student's IEE assessments and the impact of failing to implement the Student's IEP by failing to provide a dedicated aide. Petitioners also seek "any other relief that is just and fair."

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Other Health Impairment. The Student is an active, high-energy child who has "severe" behavioral difficulties and has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Post Traumatic Stress Disorder ("PTSD"). The Student gets distracted easily and has behavioral episodes that include impulsive and aggressive behaviors, such as throwing items and kicking. The Student has difficulty attending school and frequently elopes from the classroom. The Student is below grade level in all academic domains, does not yet read with fluency and comprehension, and cannot write his/her name. Testimony of Witness C; Testimony of Mother.

2. On November 21, 2017, the Student was assessed by a psychologist, who administered the Beery-Buktenica Test of Visual Motor Integration-Sixth Edition-Short Form ("Beery-VMI"), the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition ("WPPSI-IV"), and the Young Children's Achievement Test ("YCAT"). On the WPPSI-IV, the Student was found to function in the low average range on the General Anxiety Index. P-18-6. On the YCAT, the Student's performance was in the below average range. P-18-8.

3. The Student was evaluated by a private evaluator from School A PCS on or about March 22, 2018. The evaluator administered testing including the Behavior Assessment System for Children-Third Edition ("BASC-3"). The evaluator concluded that the Student was in the average range for behavioral issues, and that the most concerning behaviors were noted in the home setting. P-19-7.

4. An occupational therapy evaluation of the Student was conducted by School A PCS in April, 2018, as reported on April 18, 2018. The evaluator found that the Student's observed fine motor and visual motor abilities fell within expected ranges, allowing the Student to access the classroom curriculum and environment. The evaluator concluded that school-based occupational therapy services are not warranted, though "strategies and methods" were recommended to improve the Student's writing skills and sensory issues. P-16-5.

5. During the 2018-2019 school year, the Student attended School A PCS. The Student's amended IEP of July 3, 2018, provided for nine hours per week of specialized instruction (four hours outside of general education, five hours inside general education) together with ninety minutes per month of behavior support services and a

dedicated aide. P-12. The Student frequently eloped from class and refused to do independent work. As a result, the school created a Functional Behavioral Assessment ("FBA") for the Student, which concluded that the Student's issues were a function of his/her educational skill deficits. P-26-3.

6. A psychological evaluation of the Student was conducted on December 6, 2018. The evaluator administered the BASC-2 scale, which found that the Student displayed "clinically significant" behaviors reflecting hyperactivity, aggression, internalizing problems, school problems, learning problems, and "behavioral symptoms." Other testing, including the Trauma Symptom Checklist for Young Children ("TSCYC"), The Children's Depression Inventory, 2nd Edition ("CDl-2"), and the Multidimensional Anxiety Scale for Children, Second Edition ("MASC 2"), revealed identical, similar, or related behavioral issues. P-7-11-14; P-20. The evaluator concluded that the Student "appears to continue to present with behavioral, emotional and cognitive regulation issues which are consistent with executive functioning issues." The evaluator found that the Student avoided specific cues, engaged in temper tantrums, and had problems with concentration. P-20-17-18.

7. The Student did not attend school for the latter part of the 2018-2019 school year and was instead home-schooled by Petitioners. Testimony of Witness C.

8. At the start of the 2019-2020 school year, the Student was assigned to School B. The Student expressed to the Mother that s/he wanted to go to school. Testimony of Mother. On August 30, 2019, School B created a behavior plan for the Student. This plan provided that the Student should be spoken to in a calm manner during outbursts, and that it could be helpful to talk to the Student about his/her likes and

refer the Student to a preferred adult. P-25-2. The plan also mentioned talking to the Student about nature and having the Student take deep breaths during a crisis. P-25-6. A schedule was provided for the Student whereby s/he was to work on school-related tasks for five minutes, followed by a three-minute break. A token board was also recommended to track the Student's progress. P-25-3.

9. The Student did not attend classes at School B with regularity. When the Student did attend classes, s/he would often end up wandering the halls and getting in trouble. No personal dedicated aide was assigned to the Student at School B. Testimony of Mother; Testimony of Father.

10. Petitioners sought a reevaluation of the Student's dyslexia issues through an email to Respondent on September 11, 2019. P-41-2; Testimony of Mother.

11. An IEP meeting was held for the Student on September 16, 2019. The IEP created at this meeting indicated that, based on observational data, the Student exhibited "severe maladaptive behaviors," including eloping frequently from known settings and places, exhibiting aggression towards adults, and showing defiance if s/he was not willing to participate. P-7-2. The IEP indicated that the Student was below grade level in mathematical domains and would benefit from intensive intervention in mathematics. P-7-3. The IEP also indicated that the Student was not able to pay attention in school for more than five minutes at a time in a large group setting. During individual sessions with prompts, timers, and frequent breaks, s/he was able to work for five minutes "on" and three minutes "off." P-7-3. The IEP indicated that School B was unable to test the Student's reading or writing skills because of behavior issues, but determined that the Student could not write any words. P-7-5-7. The IEP recommended that the Student

receive twenty-five hours of specialized instruction per week (twenty hours outside general education, five hours inside general education), together with 240 minutes per month of related behavior support services, as well as preferential seating, a "cubed chair," "fidgits," frequent breaks as needed, repeated directions, asking the Student to repeat directions back to an adult, and noise-cancelling headphones as needed. P-7-17. At this IEP meeting, Petitioners again sought testing to assess the Student's dyslexia. P-9-5; Testimony of Witness A.

12. On or about September 19, 2019, the Student was transferred to the "BES" program at School C. This program delivers modified instruction for students with emotional needs, using a reward system and providing students with access to a social worker for group work. At the time of the transfer, the Student's new class at School C had only one other student, as well as a dedicated aide and behavior technician. Two individuals were assigned to help the Student transition from home to school: Teacher A and Social Worker A. These individuals were to meet Petitioners and the Student at the school cafeteria when the Student arrived for the day, then escort the Student into the appropriate classroom. Testimony of Mother; Testimony of Witness C.

13. Most days, the Student would not attend School C. When the Student did attend, the Student would arrive late and take as long as ninety minutes to transition. Petitioners felt that the Student was not able to manage the crowds and noise at the start of the school day. School C staff asked Petitioners to leave after dropping the Student off at school, but Petitioners sometimes resisted this instruction. The Student would not stay at school all day and would get picked up by Petitioners, often at his/her own request. No personal dedicated aide was provided to the Student, but the dedicated aide assigned to

the Student's class acted as his/her dedicated aide when the Student attended school. If that aide was not "available," the behavior technician assigned to the school (not the behavior technician assigned to the Student's class) would act as the Student's dedicated aide. Testimony of Mother; Testimony of Witness C.

14. On September 30, 2019, Petitioners again requested a comprehensive psychological evaluation and dyslexia evaluation, and the Mother consented to testing. Testimony of Witness A; P- 31. Petitioners also followed up on whether a personal dedicated aide was available for the Student. P-39-2. On October 2, 2019, DCPS wrote back that it was still waiting for the assignment of the Student's dedicated aide. P-39-1; Testimony of Witness A.

15. On October 8, 2019, another meeting was held to discuss the Student's difficulties transitioning to school and Petitioners' request for an evaluation. Two transition plans were developed at this meeting, one for when the Student arrived at school on time, and another for when the Student arrived late. The parties agreed that school staff would meet the Student and walk him/her to the classroom every day, and that the Student would be given an opportunity to obtain "behavior bucks" if s/he behaved appropriately. Petitioners were to leave the building within five minutes of the Student's transition. P-14; P-5-1; Testimony of Witness A; Testimony of Witness C; Testimony of Mother; P-6. Additionally, Petitioners again sought a psychoeducational evaluation of the Student with dyslexia testing. P-6-3. Respondent did not disagree with the request for reevaluation, but said it needed to spend more time observing the Student in class before a reevaluation would be appropriate. P-6-4. Petitioners also asked about the Student's personal dedicated aide at this meeting. Respondent indicated that the aide

was not currently available and that there was no word from OSSE about the aide. P-6-5. Respondent's staff did not mention that the classroom dedicated aide would be assigned to the Student. Testimony of Mother. Noise cancelling headphones were added to the IEP on this date, per Petitioners' request. P-4-1.

16. On October 28, 2019, a meeting was held to discuss the Student's school attendance. During this meeting, Respondent's staff told Petitioners that they were still waiting for a personal dedicated aide for the Student, which had to be approved. P-3-4; P-40; Testimony of Witness A. On November 8, 2019, Petitioners sent another email to Respondent inquiring about the status of the aide. P-43.

17. On October 30, 2019, a personal dedicated aide was assigned to the Student. However, the Student did not attend school from October 30, 2019, through November 19, 2019. As a result, the personal dedicated aide was removed because there was no Student to service at the time. Testimony of Witness C. The Student refused to go to school during this period. Testimony of Mother.

18. On December 13, 2019, Petitioners requested a comprehensive reevaluation of the Student to examine all areas of possible disability, including a comprehensive neuropsychological assessment (pertaining to cognitive, academic, behavioral/social/emotional, autism, and executive functioning issues); a comprehensive speech/language assessment (including an assessment of language processing); a comprehensive occupational therapy assessment; an FBA; a comprehensive auditory processing assessment; a comprehensive assessment to examine the issues of dyslexia and dysgraphia; and a comprehensive assistive technology assessment. P-32.

19. Respondent then sought a meeting with Petitioners, which was held on January 23, 2020. The team reviewed data on the Student, including a "Strengths and Difficulties Questionnaire." Petitioners did not ask for a reevaluation at this meeting. Respondent's staff indicated that they were seeking a new personal dedicated aide for the Student. Testimony of Witness C; R-3 at 13; P-2.

20. An IEP meeting was held for the Student on January 23, 2020. The team noted that the Student had not appeared in school for many days, and had not even once attended school for an entire school day during the school year. The team discussed a "transition plan" for the Student, which was to include verbal praise and "behavior bucks" toward having a pizza party. The team noted that the Student sometimes made it to class, then ran back to the main lobby to be with his/her parents. P-2-1. Teacher A indicated that the Student could identify numbers one through twelve independently and was working on being able to write those numbers consistently. Teacher A mentioned that the Student was working on identifying alphabet letters A-Z, but that, when given a writing assignment, the Student was not able to write his/her answers. P-2-3.

21. The IEP corresponding to the meeting of January 23, 2020, described the Student (based on observational data) as engaging in severe maladaptive behaviors, including eloping frequently from known settings. The Student was described as a child who would hit, throw items, kick, stand on objects, and run around the classroom. The IEP indicated that, as a result of these behaviors, the Student needed constant check-ins from staff and additional behavioral supports, including token boards and a dedicated aide throughout the day, to support his/her compliance with school activities. The IEP continued to recommend that the Student receive twenty-five hours of specialized

instruction per week (twenty hours outside general education, five hours inside general education), together with 240 minutes of behavior support services per month, preferential seating, a "cubed chair," "fidgits," frequent breaks as needed, repeated directions, asking the Student to repeat directions back to an adult, and noise-cancelling headphones as needed. P-1-2, P-11.

22. The Student began attending School C again on or about January 29, 2020. By that point, a new dedicated aide had been hired for the Student during the school day. Testimony of Witness C.

23. On January 31, 2020, Petitioner sent a letter to Respondent seeking an IEE for assessments, including a comprehensive neuropsychological assessment (to include cognitive, academic, behavioral/social/emotional, autism, and executive functioning testing); a comprehensive speech/language assessment (to include language processing testing); a comprehensive occupational therapy assessment; an FBA; a comprehensive auditory processing assessment; a comprehensive assessment to examine the issues of dyslexia and dysgraphia; and a comprehensive assistive technology assessment. P-33.

24. An IEP meeting was held for the Student on March 2, 2020. At this meeting, the Student's program was changed to include twenty-seven hours of specialized instruction outside general education, 240 minutes per month of behavioral support services, and a dedicated aide for thirty hours per week. Respondent is currently looking for a non-public school to implement the Student's IEP. R-29

25. On or about March 4, 2020, and March 24, 2020, Respondent sent Petitioners authorizations for the assessments they requested in their letter of January 31, 2020. The assessments were authorized at OSSE-approved rates, which providers in the

District of Columbia generally accept, and indicated that the rates could be adjusted upward upon a showing of need by Petitioners. P-37-1-3; Testimony of Witness D.

26. From September 26, 2019, through March 21, 2020, the Student attended at least some classes at School C on twenty-one days. The Student did not attend classes at all from November 17, 2019, to January 29, 2020. R-7 at 24-25.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia Code now states that "(w)here there is a dispute about the appropriateness of the child's individual educational program or placement, 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 establishes "a *prima facie* case." D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1 and Issue #3 is therefore on Petitioners, since those issues do not directly involve the appropriateness of the child's IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005). However, for parent-initiated IEE claims, the burden of persuasion is on the school district, so the burden of persuasion for Issue #2 is on Respondent. Collette v. D.C., No. CV 18-1104 (RC), 2019 WL 3502927, at *12 (D.D.C. Aug. 1, 2019).

1. Did Respondent fail to reevaluate the Student when Petitioners requested an evaluation in September, 2019? If so, did Respondent violate 34 C.F.R. 300.303(a)(2) and related provisions? If so, did Respondent deny the Student a FAPE?

A public agency must ensure that a reevaluation of each child with a disability is conducted if the agency determines that the child's education warrants a reevaluation, or

if the *child's parent* or teacher requests a reevaluation. 34 CFR Sect. 300.303(a) (emphasis added). Such a reevaluation may occur not more than once per year (unless the parent and the public agency agree otherwise) and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. Sect. 300.303(b)

A "reevaluation" is more than a single assessment. A reevaluation consists of a review of assessments of the child in all areas of suspected disability to assist in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). When conducting a reevaluation, the LEA is directed to use a variety of assessment tools and strategies to gather "relevant functional, developmental, and academic information," including information from the parent, which may assist in determining (i) whether the child is a child with a disability and (ii) the content of the child's IEP. The LEA must also 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. 300.304(b) (emphasis added).

There is no dispute that Petitioners requested a reevaluation of the Student in September, 2019, when Petitioners sought an assessment from School B in regard to the Student's perceived dyslexia. Petitioners repeated the requests for reevaluation to School C through December 19, 2019, when Petitioners requested a comprehensive reevaluation of the Student to examine all areas of possible disability, including a comprehensive neuropsychological assessment (pertaining to cognitive, academic, behavioral/social/ emotional, autism, and executive functioning issues), a comprehensive speech/language

assessment (including an assessment of language processing), a comprehensive occupational therapy assessment, an FBA, a comprehensive auditory processing assessment, a comprehensive assessment to examine the issues of dyslexia and dysgraphia, and a comprehensive assistive technology assessment. Witness B pointed out that this reevaluation was necessary to understand why the Student's behaviors were so severe and why the Student's education has not been successful, to address his/her sensory issues, and to determine if the Student was on the autism spectrum.

Respondent acknowledged the need for the reevaluation given the Student's extreme behaviors at its schools. However, Respondent felt that the reevaluation had to wait until after the Student had attended School C for thirty days. Respondent thought it needed to compile data pertaining to the Student's performance at School C, and noted that the Student was unavailable for testing because the Student was not attending school.

However, courts find that a parent has a right to an unconditional reevaluation under 34 C.F.R. Sect. 300.303(a)(2), without exceptions. A federal court was faced with a comparable case in Herbin ex rel. Herbin v. District of Columbia, 362 F. Supp. 2d 254, 264–65 (D.D.C. 2005). An HOD found that an LEA could delay a parental request for reevaluation for four months because of the existence of current evaluations, the lack of emergency conditions, and the failure by the parent to provide reasons for the request. The court reversed the hearing officer, finding that a parental request for reevaluation must result in an immediate reevaluation. The court indicated that the LEA's obligation to conduct reevaluations upon parent request must be distinguished from a reevaluation if "conditions warrant," where more flexibility can be appropriate. Id. at 263-264 (citing

to *Policy Letter in Response to Inquiry of Deborah S. Tinsley,* 16 Education for the Handicapped Law Report 1076, 1078 (1990)).

Furthermore, as pointed out by Witness B, the Student did not have to attend school at all to be assessed by Respondent. Respondent could have assessed the Student at home or in a public space if s/he was unable to attend school. Indeed, Respondent's reevaluation could have, and should have, focused on getting the Student back in school.

Respondent did not present any support for its conclusion that a student's attendance issues can override the school district's duty to conduct a reevaluation upon parental request. Nor has this Hearing Officer found support for this position in the caselaw, which suggests that a school district should take a proactive role in addressing a student's attendance issues. M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 256 (S.D.N.Y. 2014) ("(t)he government must find ways to open the school house doors, by helping children who suffer from emotional problems to attend school"); Lexington Cty. Sch. Dist. One v. Frazier ex rel. D.T., No. CA 3:10-01808-MBS, 2011 WL 4435690, at *9 (D.S.C. Sept. 22, 2011) (State Review Officer's ruling that district failed to assess student's truancy issue upheld); Independent Sch. Dist. No. 284, Wayzata Area Sch. v. A.C., 258 F.2d 769 (8th Cir. 2001) (neuropsychological assessment conducted of truant student; assessment was relied upon by court to determine appropriate educational program for Student); see also Urban Pathways Charter School, 112 LRP 27526 (Pennsylvania, 2012) (district had duty to explore reasons behind absences); Corpus Christi Ind. Sch. Dist., 57 IDELR 240 (Texas, 2011) (district denied FAPE when truancy was not properly assessed by district).

Still, Respondent's failure to reevaluate the Student does not necessarily entitle Petitioners to relief. A failure to timely reevaluate is, at base, a procedural violation of IDEA. Schoenbach v. District of Columbia, 309 F. Supp. 2d 71, 78 (D.D.C.2004); 20 U.S.C. Sect. 1415(f)(3)(E)(ii). But this record suggests that Respondent's failure to reevaluate the Student was substantive. This Student had unsettling experiences at two different schools in the span of a few months in the autumn of 2019. As stated by Witness B, a reevaluation was needed to "have a good understanding of why" the Student was refusing to go to school. Respondent felt that the issues were Petitioners' fault, at least in part. But Respondent did not investigate the situation to gain a deeper understanding of what was happening to the Student. Moreover, Respondent did not call any expert witness to contradict Witness B's testimony on this issue. While Petitioners were not as cooperative as they could have been when they insisted on maintaining a presence at School C, the FBA conducted by School A PCS suggested that the Student's difficulties with attendance were mainly a function of the Student's academic difficulties, not Petitioners' resistance to sending the Student to school.

It is noted that a parent's right to a reevaluation is only effective if there was no previous evaluation of the child during the past year. 34 C.F.R. Sect. 300.303(b)(1). The Student was assessed by School A PCS through a clinical psychoeducational assessment in December, 2018, less than a year prior to Petitioners' first request for a reevaluation. However, there is nothing in the record to indicate that this was anything more than a single assessment. Furthermore, Respondent did not argue that the Student was assessed within a year of Petitioners' request for an evaluation. Accordingly, Respondent denied

the Student a FAPE when it failed to reevaluate the Student upon Petitioners' requests from September, 2019, through January, 2020.

2. Did Respondent fail to respond to Petitioner's request for an IEE in January, 2020, thereby entitling Petitioner to an IEE pursuant to 34 CFR Sect. 300.502?

Federal regulations provide that a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. 34 C.F.R. Sect. 300.502(a), (b). If a parent requests an IEE at public expense, a school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate, or that the evaluation obtained by the parent does not meet the school district criteria. 34 C.F.R. Sect. 300.502(b)(2)(i)-(ii). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense. 34 C.F.R. Sect. 300.502(b)(3).

After Petitioners sought an IEE on January 31, 2020, Respondent neither authorized the IEE nor filed a due process complaint to challenge the IEE request. Nevertheless, Respondent argued that an IEE should not be authorized for the Student because it never had a chance to evaluate the Student. However, as stated in the section of this HOD devoted to Issue #1, even though the Student was not regularly attending school, Respondent could have tried to assess the Student by going to his/her home or meeting in a public facility, such as a library. Respondent instead told Petitioners that the Student needed to attend School C for thirty days before it would conduct a reevaluation. This approach would likely have resulted in the Student going through the entire 2019-2020 school year without an evaluation, since by March 21, 2020, the Student had only attended School C for portions of twenty-one days.

Respondent also argued that Petitioners did not act in good faith during the subject time period. Respondent contended that it did convene meetings in response to Petitioners' requests for assessments, first on October 8, 2019, then on January 23, 2020. Respondent argued that Petitioners were not cooperative at these meetings, particularly the meeting in January, during which Petitioners did not ask for a reevaluation. But it was already clear at that point that Respondent was not going to reevaluate the Student until s/he attended school for more days. And there is no contention that Petitioners withdrew their request for a reevaluation at this meeting. It is also noted that school districts cannot require parents to discuss an IEE request at an IEP meeting before the parents obtain an IEE. See Letter to Anonymous, 55 IDELR 106 (OSEP 2010).[2] This Hearing Officer finds that Respondent failed to evaluate the Student during the 2019-2020 school year and denied the Student a FAPE, and that Petitioners are therefore entitled to an IEE at public expense.[3]

3. Did Respondent fail to implement the Student's IEP during the 2019-2020 school year? If so, did Respondent's act or omission violate principles of law established in cases like Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)? If so, did Respondent deny the Student a FAPE?

"Failure to implement" claims may be brought if an LEA cannot "materially" implement an IEP. A parent "must show more than a *de minimis* failure to implement all

[2]Respondent also contended that it was incumbent on Petitioners to specify the nature of the IEE request in detail, indicating, for instance, how long the assessments would take. However, Respondent did not point to any authority to support the proposition that a parent's request for an IEE must include a bill of particulars describing the nature of the assessment requests. Respondent also suggested that the Student was "untestable," referencing the testimony of Witness B. While Witness B did indicate that the Student was difficult to test, neither he nor any other witness indicated that the Student was untestable.

[3]Respondent's offer to provide authorizations for the assessments requested by Petitioners resulted in a motion to dismiss this claim on mootness grounds. This motion was denied by this Hearing Officer by decision dated April 29, 2020.

elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). There is no requirement that a student must suffer "demonstrable educational harm" for the parent to prevail. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Petitioners claimed that no dedicated aide was provided to the Student during the 2019-2020 school year. There was no dispute that the Student was not provided with any aide while s/he was at School B during the 2019-2020 school year. In fact, Respondent did not call any witness with any personal knowledge of the Student's education at School B. The claim as applied to School C, however, is another matter.

Witness A's testimony supported Petitioners' claim that no dedicated aide was provided to the Student during the 2019-2020 school year at School C, and several emails in the record make it clear that School C sought a dedicated aide for the Student from Respondent's central office during the fall and winter of the 2019-2020 school year.

However, Witness C insisted that the dedicated aide assigned to the Student's classroom worked exclusively with the Student during the time periods when the Student had no personal aide assigned. Petitioners objected to Witness C's testimony, pointing to the absence of documents in the record that corroborated the contention that the dedicated aide for the classroom acted as the Student's dedicated aide when s/he was at school. Petitioners are correct that there are no documents in the record that corroborate this part of Witness C's testimony. Yet Petitioners did not establish any reason why Witness C might prevaricate on this issue, and Witness C's credible testimony about the classroom's dedicated aide included details that suggested veracity. For instance, Witness C testified that if the "temporary" classroom dedicated aide was absent on a day that the Student came to school, the behavior technician assigned to the school (a different behavior technician than the one assigned to the Student's classroom) would take the classroom dedicated aide's place for the day.

Petitioners contended that Respondent did not call the classroom dedicated aide, or the classroom teacher, as a witness in this case. But the burden of persuasion is on Petitioners for this claim, not Respondent. Petitioners did not present any witnesses to rebut Witness C's contentions, though Petitioners were given an opportunity to present a rebuttal case on the second day of the hearing.[4]

[4]Witness C also testified that a personal dedicated aide was provided for the Student at School C on October 30, 2019, but this aide was removed on November 19, 2019, because of the Student's absence from school. Then, at the end of January, another personal dedicated aide was provided for the Student. However, courts have ruled that an LEA cannot eliminate services from a Student's IEP if that Student does not attend classes. Courts focus solely on whether the school district provided the student with the opportunity to receive the prescribed educational services and not whether the student actually took advantage of those services. Joaquin v. Friends Pub. Charter Sch., No. 1:14–01119 (RC), 2015 WL 5175885, at *8 (D.D.C. Sept. 3, 2015).

Parenthetically, the arrangement devised by School C to provide the Student with a "temporary" classroom dedicated aide did not violate any other provisions of the Student's IEP. Other than the requirement for a dedicated aide, the IEP recommended that the Student receive twenty-five hours of specialized instruction per week (twenty hours outside general education, five hours inside general education), together with related services and accommodations. This is what the Student received. It is also noteworthy that, even without a personal dedicated aide for the Student, the Student's classroom initially consisted of three adults (the teacher, the classroom dedicated aide, and the classroom behavior technician) and only two children including the Student (although by the date of hearing, five children were assigned to the classroom).

In sum, the Student was denied access to his/her dedicated aide while at School B during the 2019-2020 school year. Respondent did not present any testimony to rebut Petitioners' claim applied to School B. This Hearing Officer finds that this denial of access was significant enough to constitute FAPE denial, even though the denial of the Student's access to the dedicated aide lasted for just less than one month. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (student did not receive a month's worth of extended school year services and the court found that the LEA denied the Student a FAPE, holding that the failure to provide the ESY services represented a material discrepancy between the services provided and the services required by the IEP). For Petitioners' claim about School C, however, this Hearing Officer finds that the Student's classroom dedicated aide fulfilled the Student's IEP requirement for a personal dedicated aide on the dates that the Student was at school.

RELIEF

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 confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

1. IEE.

Petitioners seek an IEE consisting of six assessments[5] at "market rates." Respondent argued that any such assessments should be paid for at "OSSE rates," i.e., rates set by OSSE with respect to each such assessment. 34 C.F.R. Sect. 300.502(e)(2)

In its comments on the applicable regulations, the United States Department of Education (the "Department") specifically authorized school districts to set caps on certain evaluations sought for IEEs. 71 Fed. Reg. 46689 (2006). The Department remarked that school districts "should not be required to bear the cost of unreasonably expensive IEEs" and that it "is appropriate for a public agency to establish reasonable cost containment criteria" applicable to personnel used by the agency, as well as to personnel used by parents, so long as the school district provided "a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator

[5]The assessments consist of: a comprehensive neuropsychological assessment (to include cognitive, academic, behavioral/social/emotional, autism, and executive functioning testing); a comprehensive speech/language assessment (to include language processing testing); a comprehensive occupational therapy assessment; an FBA; a comprehensive auditory processing assessment; a comprehensive assessment to examine the issues of dyslexia and dysgraphia; and a comprehensive assistive technology assessment.

whose fees fall outside the agency's cost containment criteria." The Department stressed that an LEA cannot impose requirements for the private evaluator that could deny the parents' right to the IEE. Letter to Petska, 35 IDELR 191 (OSEP 2001).

Petitioners argued that Respondent waived its right to this argument when it failed to file its own due process complaint on the issue. Courts disagree as to whether Sect. 300.502(b)(2)(ii) requires the agency to initiate a due process hearing to challenge the rates in an IEE. Compare Collette v. D.C., No. CV 18-1104 (RC), 2019 WL 3502927, at *12 (D.D.C. Aug. 1, 2019) (collecting cases and assessing whether the LEA's rate caps were reasonable); with Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 59 (D.D.C. 2016) ("to the extent the district believed that plaintiffs' reimbursement request was unreasonably high, it was obligated to initiate a due process hearing, which it did not"). But the majority view appears to be that a school district can raise the issue of cost in a parent-initiated proceeding. In Seth B. v. Orleans Parish School Bd., 810 F.3d 961, 968-970 (5th Cir. 2016), the parents argued that the school district had waived the right to object to the rate because it did not file a due process complaint challenging the IEE request. The Fifth Circuit Court of Appeals disagreed, stating that:

> Sect. 300.502(b)(2)(ii) excuses an agency from paying for an IEE if the agency simply "*demonstrates* in a hearing ... that the evaluation obtained by the parent did not meet agency criteria."[15] It does not require the agency to "initiate" or "request" the hearing. In contrast, under (b)(2)(i), the agency must "file" a complaint and "request" a hearing if it wishes to decline reimbursement on the ground that its own evaluation was appropriate. This distinction strongly favors reading Sect. 300.502(b)(2)(ii) *not* to require the agency to initiate a hearing.

810 F.3d at 968; see also Shafi v. Lewisville Indep. Sch. Dist., No. 4:15-CV-599, 2016 WL 7242768, at *10 (E.D. Tex. Dec. 15, 2016) (permitting challenge to IEE rate in parent-initiated action); M.V. v. Shenendehowa Cent. Sch. Dist., No. 1:11-CV-00701 GTS, 2013 WL 936438, at *7 (N.D.N.Y. Mar. 8, 2013) (same).

To establish a "market rate," Petitioners relied on the testimony of Witness B, an expert in "Special Education, including testing to determine if a student presents with a disability, IEP development including related services, interpreting test results, and development of compensatory education plans." Witness B reviewed the OSSE rates and indicated that "if you use these rates you have to wait a long time" get an evaluator to work with you, highlighting that the rate for the neuropsychological assessment ($2,944.28) was low because such assessments cost $4,000.00, that the rate for the speech and language assessment ($875.40) was low because such assessments cost $1,200.00-$1,500.00, and that the rate for the occupational therapy assessment ($782.28) was low because such assessments ordinarily cost $1,200.00. In response, Respondent called Witness D, who testified that the rates set forth in Respondent's authorization in March, 2020, are standard market rates created by OSSE that will allow Petitioners to find providers. Witness D testified that she had never heard of a provider rejecting any of the rates stated in the authorizations. Moreover, Witness D testified that Petitioners have themselves used providers that have accepted these rates for speech and language assessments and occupational therapy assessments.

Since Witness D did not specifically rebut Witness B's contention that the rate for the neuropsychological evaluation was too low, the rate for this assessment shall be set at $4,000.00, per the suggestion of Witness B. Otherwise, the rates for the assessments

shall be set at the OSSE rate, except for the dyslexia assessment, the cost of which is not clearly addressed in the record. For the dyslexia assessment, the rate must be deemed to be the usual and customary rate in the community.

2. Compensatory Education.

Petitioners also seek compensatory education. 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 ex Rel. 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 a 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 7, 11 (D.C. Cir. 2005). Moreover, the court has emphasized that, in determining the "complicated work" of fashioning such a remedy, a hearing officer should play close attention to the question of assessment. B.D., 817 F.3d at 800.

Petitioners do not seek a direct compensatory education award from this Hearing Officer. Instead, Petitioners seek an additional evaluation so that an independent evaluator can determine what an appropriate compensatory education award would be. This approach was explicitly adopted by the District of Columbia Circuit Court of

Appeals in B.D., where the court stated that if further assessments are needed, "the district court or Hearing Officer should not hesitate to order them." Id. This is the appropriate course of action for this case. Neither side suggested a specific compensatory education award for the Student. Moreover, the record does not lend itself to a hearing officer's *sua sponte* fashioning of a compensatory education award. As pointed out by Witness B, the record does not contain any current assessments of the Student. Nor does the record contain information on how much progress the Student should have made during the 2019-2020 school year, or on the appropriate way to remedy the Student's lack of progress during the 2019-2020 school year. Accordingly, this Hearing Officer will order an evaluation per Petitioners' request. Such evaluator shall have at least ten years of professional experience in assessing students with disabilities. The parties shall work together to select such expert, who must not have an actual or perceived bias that might favor one party. Such expert shall then recommend an appropriate compensatory education award for the FAPE deprivation found here, including the Student's time at School B during the 2019-2020 school year.

VII. Order

As a result of the foregoing, the following is hereby ordered:

1. Petitioners are awarded an IEE consisting of the following assessments: a comprehensive neuropsychological assessment (to include cognitive, academic, behavioral/social/emotional, autism, and executive functioning testing) (maximum cost $4,000.00); a comprehensive speech/language assessment (to include language processing testing) (maximum cost $728.28); a comprehensive occupational therapy assessment (maximum cost $782.28); an FBA (maximum cost $1,200.00); a

comprehensive auditory processing assessment (maximum cost $1,200.00); a comprehensive assessment to examine the issues of dyslexia and dysgraphia (usual and customary rate in the community); and a comprehensive assistive technology assessment (maximum cost $1,550.00);

2. After completion of the assessments, the IEP team shall reconvene within fifteen calendar days to revise the Student's IEP as appropriate;

3. Respondent shall pay for an evaluation of the Student to determine an appropriate compensatory education award. Payment shall be at the usual and customary rate in the community. Such evaluation shall be conducted by an evaluator with at least ten years of professional experience in assessing students with disabilities. The parties shall work together to select such expert, who must not have an actual or perceived bias that might favor one party. Such expert shall then recommend an appropriate compensatory education award for the FAPE deprivation (including the Student's time at School B during the 2019-2020 school year);

4. All other requests for relief are denied.

Dated: June 15, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
[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 (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: June 15, 2020

Michael Lazan
Impartial Hearing Officer