

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
June 23, 2020

Confidential

Parent on behalf of Student¹)	Case No. 2020-0078
)	
Petitioner,)	Hearing Dates: June 8-9, 2020
)	Conducted by Video Conference
v.)	
)	Date Issued: June 22, 2020
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of an X-year-old student (“Student”) attending School A. On March 25, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to develop appropriate Individualized Education Programs (“IEP”) since May 2018, failing to evaluate the student in all areas of suspected disability, failing to provide an appropriate and timely Behavior Intervention Plan (“BIP”), failing to provide adequate support during suspension, and failing to provide the parent access to the students educational records. On April 3, 2020, DCPS filed *District of Columbia Public Schools’ Response to Parent’s Administrative Due Process Complaint Notice* (“*Complaint*”), asserting that the student had not been denied a FAPE.

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 March 25, 2020 alleging that DCPS denied Student a FAPE by (1) failing to develop appropriate IEPs since May 2018, (2) failing to evaluate the student for social and emotional problems, deficits in executive functioning, and attentiveness, (3) failing to provide an appropriate BIP since the last one was developed in 2016, (4) failing to provide adequate support during suspensions, and (5) failing to provide the parent access to the student's last two years of educational records.

Respondent filed a response to the *Complaint* on April 3, 2020 asserting that Student has been appropriately evaluated in all areas of concern, and that his/her programming and placement have been appropriate. DCPS also asserted that it responded to Petitioner's requests for records to extent the records were available to DCPS personnel.

The parties participated in a resolution meeting on April 3, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on April 10, 2020, and the Prehearing Order was issued that day.

The due process hearing was conducted on June 8-9, 2020 by video conference. The hearing was closed to the public. Petitioner's counsel disclosed Exhibits P1-P43. There were no objections and Petitioner's Exhibits 1-43 were admitted into evidence. Respondent's Disclosures contained a witness list of six witnesses and documents R-1 through R-72, and a supplemental disclosure listing an additional witness. On June 4, 2020, Petitioner filed an objection to the additional witness and to Exhibits R63 and R64 on the grounds of relevance. I overruled the objection to the witness as that witness' resume was included in Respondent's first disclosure statement, and DCPS was not unjustly disadvantaged by allowing the witness' testimony. I also deferred ruling on the admissibility of Respondent's Exhibits R63 and R64. At the conclusion of the hearing, Respondent's counsel withdrew those exhibits. Thus, Respondent's Exhibits R-1 through R62 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, and Petitioner. Respondent presented Witness C. Petitioner offered Witness A as an expert in IEP Programming and Development. I overruled Respondent's objection to Witness A testifying as an expert. I also overruled Respondent's objection to Witness B testifying as an expert in Special Education Programming. Respondent offered Witness C as an expert in Special Education Programming and IEP Development without objection. 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 the student a FAPE by failing to develop appropriate IEPs since May 2018 due to repeated goals, goals that were

not challenging or attainable, goals that were not measurable, inappropriate baselines, inappropriate present levels of performance, and no adaptive goals.

2. Whether DCPS denied the student a FAPE by failing to evaluate the student comprehensively.
3. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate and timely BIP and failed to provide necessary supports and services during his/her suspensions.
4. Whether DCPS denied the student a FAPE by failing to provide Petitioner access to the student's educational records since the beginning of the 2017-18 school year upon requests: specifically, iReady, statewide testing, behavior incident reports, and behavior related documents for the 2019-20 school year.

FINDINGS OF FACT

1. Student is X years old and is in grade K at School A.²

2. On March 24, 2016, DCPS conducted a Comprehensive Psychological Re-evaluation of Student.³ On the Woodcock-Johnson Tests of Achievement ("WJ-IV"), in Reading, Student scored in the Average range in Letter-Word Identification, Low Average to Average in Word Attack, and Very Low in Passage Comprehension and Broad Reading.⁴ In Mathematics, Student scored in the Very Low range in Calculation, Applied Problems, and Math Abilities. Overall, Student's Academic Skills fell in the Below Average range.⁵ In cognitive testing, Student scored in the Very Low range in General Intellectual Ability, Comprehension-Knowledge, Oral Vocabulary, General Information, Fluid Reasoning, Concept Formation, Short-Term Working Memory, Verbal Attention, Numbers Reversed, Auditory Processing, Phonological Processing, Long-Term Retrieval, Story Recall, Visual-Auditory Learning, Letter Pattern Matching, in the Low range in Nonword Repetition and Visualization, and in the Low Average range in Number Series.⁶ Student's score in General Intellectual Ability corresponded to a child six to seven years younger than Student.

[Student's] performance yielded an overall General Intellectual Ability standard score of <40. This falls in the Very Low range, and indicates performance that is similar to that of a student age [B]. [Student's] cognitive profile appears to be unevenly developed. [His/her] area of personal strength was measured on tasks of Fluid Reasoning, with Very Low to Average performance. Areas where [Student] consistently earned Low scores included

² Petitioner's Exhibit ("P:") 1 at page 2 (6) and at page 6 (10). The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P1:2 (6), P1:6 (10).

³ P16 (230).

⁴ *Id.* at 8 (241).

⁵ *Id.*

⁶ *Id.* at 10 (243).

comprehension knowledge, short-term and long-term memory [Student] appears to demonstrate cognitive processing deficits in these areas, all of which are likely impacting [his/her] ability to achieve on grade level across academic subjects.⁷

In October 2008, Student's Full-Scale IQ was measured at 69.⁸ On the Adaptive Behavior Assessment System ("ABAS"), Student's overall adaptive abilities fell within the Extremely Low range.⁹ "Overall, the current scores suggest the possibility of an Intellectual Disability."¹⁰

3. On March 28, 2016, when Student was attending School B in grade H, DCPS convened an annual IEP Review Meeting. Student was classified as a student with an Intellectual Disability.¹¹ The Consideration of Special Factors provided that Student had difficulty remaining on task, managing his/her emotions and appropriately resolving conflicts. S/he struggled with understanding appropriate social cues, and often imitate peers' negative behaviors to gain acceptance.¹² In the Present Levels of Academic Achievement and Functional Performance ("PLOPs"), in Mathematics, Student was performing at a grade B level in math (six grades below grade level), grade E level in Numbers and Operations (three grades below), at grade B level for Algebra and Algebraic Thinking, and at grade A level for Measurement and Data and Geometry (seven grades below). In class, s/he worked at a slow pace, could multiply and add "with a degree of fluency," struggled with subtraction and regrouping, and had significant problems with division. There were three math goals, involving measuring items, telling time with analog and digital clocks, and the ability to determine in word problems the correct amount of change and to write the amount using appropriate monetary symbols. His/her baselines were the ability to identify a ruler, ability "to identify on the hour on analog and digital clocks, and the ability to identify different parts of currency."¹³

In Reading PLOPs, on the Reading Inventory, Student scored at the grade B level. On the Woodcock-Johnson Test of Achievement ("WJ-IV"), Student scored in the Average range in Letter-Word identification, in the Low Average range in Word attack, and in the Very Low range in Passage Comprehension and Word Reading Fluency. Student was unmotivated in the classroom, often groaning with his/her head down and often irritated.¹⁴ Student's baselines were (1) struggling to understand the central message of a text and inability to identify appropriate key details when a central message is given to him/her, (2) an inability to answer questions about a nonfiction text with 100% accuracy. There were two goals: (1) to be able to describe verbally the central message and retell three key details after receiving a preview of a story, and (2) after reading a familiar nonfiction text, when prompted, Student will respond with a question or statement about the text.¹⁵ In Written Expression,

⁷ *Id.* at 16 (245).

⁸ *Id.* at 5 (238).

⁹ *Id.* at 13 (246).

¹⁰ *Id.* at 15 (248).

¹¹ P4:1 (33).

¹² *Id.* at 2 (34).

¹³ *Id.* at 3-4 (35-6).

¹⁴ *Id.* at 4 (36).

¹⁵ *Id.* at 5 (37).

Student's writing samples were "very limited in quality and quantity." Student did "not have grade-level knowledge of grammar, punctuation and sentence structure in [his/her] writing." On the WJ-IV, s/he scored in the Average range in Spelling, Very Low in Writing Fluency, and Low in Writing Samples. Student's baselines were an inability to add details to sentences or to construct an opinion essay. The two goals were (1) to add two written details to a sentence related to a previously read grade-level text, and (2) after reading two articles posing differing opinions, Student will write a three-sentence opinion on the subject including one claim supported by evidence.¹⁶

In Emotional, Social, and Behavioral Development ("Behavior"), Student's PLOPS were that at times, Student gets into physical confrontations with peers, and engages in negative behaviors to be liked by his/her peers. S/he had received discipline for refusing to comply with directions, displaying off-task behaviors, leaving class without permission, and fighting. S/he tested in the Low Severity range in internalizing disorders, the High Severity range on externalizing disorders, and the low severity range for substance disorders and on the crime/violence sub-screeners. S/he reported being a bully two or more times in the past month. Student also had significant problems with lying, conning to get things s/he wanted or to avoid having to do something, a hard time paying attention, and a hard time listening to instructions. Student's baselines were difficulty managing his/her emotions, being in the High Severity range on externalizing disorders, including a hard time paying attention, listening to instructions, and waiting his/her turn. The goals were to learn various emotional states, such as anger and sadness and practice using coping skills, and increase his/her ability to remain on task for twenty minutes.¹⁷

The IEP team prescribed eighteen hours per week of specialized instruction outside general education and 120 minutes per month of behavioral support services and extended year services ("ESY").¹⁸ The least restrictive environment was "a small class environment to more closely supervise behaviors..."¹⁹ The IEP prescribed two hours per week of transition services,²⁰ and provided transition goals: "Given access to the internet and with assistance from an instructor, [Student] will identify three areas of interest for postsecondary education and develop a visual display of his/her findings to present to the case manager.²¹ Student will also explore three opportunities to live independently after high school and enhance self-advocacy skills.²²

4. On October 27, 2016, DCPS completed a Functional Behavior Assessment.²³

5. On September 26, 2017, DCPS developed a Behavior Intervention Plan ("BIP").²⁴ The targeted behaviors include disruptiveness and non-compliance. "[Student's] behaviors impede [his/her] academic growth and learning due to having tantrums when given

¹⁶ *Id.* at 6 (38).

¹⁷ *Id.* at 8 (40).

¹⁸ *Id.* at 9, 13 (41, 45).

¹⁹ *Id.* at 10 (42).

²⁰ *Id.* at 20 (52).

²¹ *Id.* at 18 (50).

²² *Id.* at 20 (52).

²³ P18:1 (265).

²⁴ P19:1 (271)

academic tasks, refusal to comply/follow directions and [his/her] refusal to complete classwork. When [Student] refuses to comply with directions or completes classwork [s/he] can become disruptive at times and/or [s/he] does not complete the academic task thus impeding [his/her] ability to progress in the academic setting.”²⁵ The antecedents to the behaviors were a teacher or staff member giving Student a directive that was unfavorable, an assignment that s/he found challenging, or when s/he feels as if s/she was being singled out or teased. The strategies to correct the behavior were to “Allow [Student] access to breaks non-contingently or on a time schedule. Provide [Student] shorter work session if/when possible. Frequent communication with parent and school staff about [Student’s] behavior of non-compliance or disruptiveness.” The incentives would be computer time, free time with an identified staff person, earning rewards, and positive affirmations.²⁶

6. On October 27, 2016, when Student was in grade I at School B, DCPS convened an annual IEP Review Meeting.²⁷ The consideration of Special Factors was virtually unchanged from the March 28th IEP.²⁸ In Mathematics, the PLOPs, baselines, and goals were unchanged from the March IEP.²⁹ In Reading, the PLOPs and first two goals were unchanged, but a third baseline was added: Student is unable to identify text features. The new goal was to locate key facts using text features such as table of contents, glossaries and indices.³⁰ In Written Expression, the only change was a new second goal: given a topic prompt, Student will complete a paragraph with a topic sentence, sentences stating an opinion on the topic with at least two supporting reasons, and a conclusion sentence.³¹

In Behavior, the PLOPs had additional information: s/he had received two discipline referrals for disruption and refusal to comply, both in Spanish class, s/he completed Strengths and Difficulties Questionnaire (“SDQ”) in October 2016 and self-reported having hyperactivity and concentration difficulties with a score in the high range. An FBA was conducted that concluded that Student’s behavior of defiance and tantrums, not wanting to complete academic work and engaging in off-task peer interactions are a result of a desire to avoid academic tasks that s/he deems challenging. Student’s baselines were new: (1) Student’s behaviors are a result of the desire to avoid academic tasks that s/he deems challenging, and (2) Student’s ABAS social skills were in the Low range, and s/he struggles to interact appropriately with peers and adults, and in seeking support when interacting with peers in negative social situations. The previous goal of increasing his/her ability to remain on task for twenty minutes was replaced with learning how to ask for help or take breaks when confronted with overwhelming academic assignments or working in a group. The previous goal of learning various emotional states was replaced with two new goals: (1) refrain from putting his/her head down and shutting down instead of asking for assistance 60% of the time, and (2) learning how to seek support from adults when needed in negative peer social situations or adult interactions, and learning how to relate to peers and adults during social interactions 60% of the time.³²

²⁵ *Id.*

²⁶ *Id.* at 1-4 (271-4).

²⁷ P5:1 (54).

²⁸ *Id.* at 3 (56).

²⁹ *Id.* at 4 (57).

³⁰ *Id.* at 7-8 (60-61).

³¹ *Id.* at 9 (62).

³² *Id.* at 9-10 (62-3).

The IEP team increased Student's specialized instruction outside of general education from 18 to 22 hours per week. The 120 minutes of BBS per month remained unchanged.³³

7. On November 11, 2017, DCPS completed an IEP Progress Report.³⁴ Student was reported as progressing on his/her Math goal regarding currency, the linear equation goal was not introduced, Student was progressing on the goal of shape identification, progressing on the Reading goal of retelling three key details, progressing on being able to respond with a question or statement about nonfiction text, progressing on the goal of locating key facts using text features, progressing on the Written Expression goal of adding two details to sentences, and progressing on the goal of writing a paragraph.³⁵ In Behavior, the goal of increasing on-task behaviors was "Just Introduced," as was the goal of learning to seek support from adults.³⁶ S/he was progressing on his/her transition goals of (1) developing a visual display, (2) exploring five careers s/he is interested in pursuing, and (3) exploring three opportunities to live independently after high school.³⁷

8. On March 13, 2018, Student was suspended for six days for fighting on school premises.³⁸

9. On May 22, 2018, when Student was enrolled in School A, DCPS convened an annual IEP Review Meeting.³⁹ For mathematics, the PLOPs indicated that s/he scored very low on grade C on the Brigance skills assessment test on August 27, 2017. Based on the i-Ready, s/he is performing at a grade B level. Student scored at a grade E level in Numbers and Operations, at grade B level for Algebra and Algebraic Thinking, and at grade A for Measurement and Data and Geometry. As in the March 28, 2016 IEP, in class, s/he worked at a slow pace, could multiply and add "with a degree of fluency," struggled with subtraction and regrouping, and had significant problems with division. His/her baselines were the ability to add like terms using the inverse operation, the ability to identify different parts of currency, and the ability to identify geometric shapes. The goals were (1) in linear equations, s/he will use inverse operations to isolate the variable correctly 80% of the time, (2) the same currency goal from the 2016 IEP, and (3) identify geometric shapes with 80% accuracy.⁴⁰

In Reading, for PLOPs, s/he scored at the grade E level for reading and comprehension on the Brigance Skills Inventory. The Reading Inventory and WJ-IV scores were unchanged from the 2016 IEPs. Student's baselines and goals were unchanged from the October 2016 IEP.⁴¹ In Written Expression, the PLOPs were unchanged. The two baselines and goals from the October 2016 IEP remained.⁴²

³³ *Id.* at 12 (65).

³⁴ Respondent's Exhibit ("R:") 36 at page 194. The exhibit number is followed by the electronic page number, i.e., R36:194.

³⁵ *Id.* at 194-199.

³⁶ *Id.* at 199-200.

³⁷ *Id.* at 200-1.

³⁸ P29:3, 8 (331, 335), .

³⁹ P7:1 (95).

⁴⁰ *Id.* at 3-4 (97-8).

⁴¹ *Id.* at 4-6 (98-100).

⁴² *Id.* at 7-8 (101-2).

In Behavior, while s/he had demonstrated that s/he was capable of interacting with his/her peers and establishing relationships, s/he continued to have problems with peer interaction in the academic setting. Student's attendance in behavior support sessions was inconsistent. An FBA was developed that attributed his/her defiance, tantrums, unwillingness to complete classwork, and engaging in off-task peer interactions were done to avoid challenging academic assignments. Scores from SDQs in September 2017 were in the low range for kind and helpful behavior and in the normal range for stress, hyperactivity and concentration difficulties. Student's baselines were unchanged from the October 2016 IEP, but the three previous goals were replaced by two: (1) Student will improve his/her self-regulation by increasing on-task behaviors and compliance with rules 75% of the time, and (2) Student will increase his/her ability to make appropriate choices during social interactions with peers and staff 80% of the time by understanding the consequences of his/her actions.⁴³

Student's specialized instruction and related services were unchanged from the October 2016 IEP,⁴⁴ and ESY was prescribed.⁴⁵ Student's accommodations were extended time, flexibility as to when s/he takes tests, and frequent breaks during testing.⁴⁶ Student's Transition goals and services were unchanged from the March 2016 IEP.⁴⁷

10. On June 14, 2018, DCPS completed an IEP Progress Report.⁴⁸ Student was reported as having mastered his/her Math goal regarding currency by the second reporting period, the linear equation goal was not introduced, s/he was progressing on the goal of shape identification, progressing on the Reading goal of retelling three key details, progressing on being able to respond with a question or statement about nonfiction text, progressing on the goal of locating key facts using text features, had made no progress on the Written Expression goal of adding two details to sentences, but was progressing on the goal of writing a paragraph.⁴⁹ In Behavior, as in the previous report, the goal of increasing on-task behaviors was "Just Introduced," as was the goal of learning to seek support from adults.⁵⁰ S/he was progressing on all of his/her transition goals.⁵¹

11. Student's final grades for the 2017-18 school year were B in Independent Living Skills, D in LL General Exploration, D in English C1, C in Foundational Math C1, A in Individual Dual Sports I, D in Concepts of Physical Science CE, and B- in Marching Band I A. S/he had 4 unexcused absences.⁵²

12. On January 8, 2019, Student was reprimanded for causing a disruption.⁵³

⁴³ *Id.* at 8-9 (102-3).

⁴⁴ *Id.* at 11 (105).

⁴⁵ *Id.* at 15 (109).

⁴⁶ *Id.* at 14 (108).

⁴⁷ *Id.* at 18 (112).

⁴⁸ R39:224.

⁴⁹ *Id.* at 224-8.

⁵⁰ *Id.* at 228-9.

⁵¹ *Id.* at 230.

⁵² P26:1-3 (317-19).

⁵³ P29:13 (340).

13. On January 30, 2019, DCPS completed an IEP Progress Report.⁵⁴ The Math goal regarding currency, mastered in by the second reporting period in the previous school year, remained mastered, the linear equation goal was not introduced in the first reporting period, but was progressing in the second reporting period, Student was progressing on the goal of shape identification, progressing on the Reading goal of retelling three key details, progressing on being able to respond with a question or statement about nonfiction text, progressing on the goal of locating key facts using text features, was progressing in the first two reporting periods on the Written Expression goal of adding two details to sentences, and was progressing on the goal of writing a paragraph.⁵⁵ In Behavior, s/he made no progress on the goal of increasing on-task behaviors in the first reporting period, but was progressing in the second reporting period, as was the goal of making appropriate choices during social interactions with peers and adults.⁵⁶ S/he was progressing on all of his/her transition goals.⁵⁷

14. On February 5, 2019, DCPS developed a BIP. The BIP was relatively unchanged from the September 26, 2017 BIP; instead of computer time, free time with an identified staff person, earning rewards, and positive affirmations, the incentives would be gym time, listening to music while working, free time with an identified staff person, earning rewards, and positive affirmations.⁵⁸

15. On February 5, 2019, DCPS convened an IEP Annual Review Meeting.⁵⁹ The Consideration of Special Factors indicated that the behaviors observed in 2016 persisted.⁶⁰ In Mathematics, Student's PLOPs were unchanged from previous IEPs except for the report that behaviors precluded the completion of a Brigance skills assessment in October 2018. His/her baselines and goals were unchanged from the May 22, 2018 IEP.⁶¹ In Reading, Student's PLOPs, baselines, and goals were unchanged from the previous IEP.⁶² In Written Expression, the PLOPs were substantively unchanged from the previous IEP. The two baselines and goals from the October 2016 IEP remained.⁶³ In Behavior, the PLOPs reported no significant change from previous IEPs. "[Student] continues to display behaviors that [s/he] thinks are expected to be acceptable by [his/her] peers."⁶⁴ The baselines and goals from the previous IEP remained.⁶⁵ The specialized instruction and related services,⁶⁶ accommodations,⁶⁷ ESY,⁶⁸ and transition goals and services remained the same from the previous IEP.⁶⁹

⁵⁴ R39:239.

⁵⁵ *Id.* at 239-44.

⁵⁶ *Id.* at 244-5.

⁵⁷ *Id.* at 245-7.

⁵⁸ P20:4 (280).

⁵⁹ P8 (116).

⁶⁰ *Id.* at 2 (117).

⁶¹ *Id.* at 3-4 (118-9).

⁶² *Id.* at 5-6 (120-1).

⁶³ *Id.* at 7-8 (122-3).

⁶⁴ *Id.* at 8-9 (123-4).

⁶⁵ *Id.* at 9-10 (124-5).

⁶⁶ *Id.* at 11 (126).

⁶⁷ *Id.* at 14 (129).

⁶⁸ *Id.* at 15 (130).

⁶⁹ *Id.* at 19 (134).

16. On February 25, 2019, Student was suspended for three days for sexual misconduct.⁷⁰

17. On March 1, 2019, the IEP team amended the IEP to reduce ESY services from 30 minutes per day of BSS to 30 minutes per week.⁷¹

18. On March 28, 2019, April 8, 2019, April 9, 2019, April 11, 2019, April 22, 2019, and May 8, 2019, Student was reprimanded for causing a disruption on school premises.⁷² On May 2, 2019, Student was suspended for one day for disruption.⁷³ On June 3, 2019, Student was suspended for four days for assaulting a classmate.⁷⁴

19. On June 13, 2019, DCPS completed an IEP Progress Report.⁷⁵ The Math goal regarding currency, mastered by the second reporting period in the previous school year, remained mastered, s/he was progressing on the linear equation goal since the first reporting period, Student was progressing on the goal of shape identification, progressing on the Reading goal of retelling three key details, progressing on being able to respond with a question or statement about nonfiction text, progressing on the goal of locating key facts using text features, was progressing on the Written Expression goal of adding two details to sentences, and was progressing on the goal of writing a paragraph.⁷⁶ In Behavior, s/he made no progress in the last two reporting periods on both goals.⁷⁷ S/he was progressing on the transition goal of developing a visual display, and on the goal of creating a visual representation of the knowledge, skills, and abilities needed to complete a specific job, and progress in the first three reporting periods on the goal of exploring three opportunities for independent living after high school, but no progress in the fourth reporting period.⁷⁸

20. Student's final grades for the 2018-19 school year were F in Algebra I-B, F in World History & Geography: Middle Ages, No Mark in Independent Living Skills, F in Argument Writing, D in English I, F in Biology, F in Algebra I-A, No Marks in Real World App II and Concepts of World History and Geography, C+ in Marching Band, C in Drawing and Painting. S/he had 13 unexcused absences.⁷⁹

21. On July 24, 2019, DCPS issued a Prior Written Notice ("PWN") noting Petitioner's decision not to make Student available for ESY.⁸⁰

22. On August 28, 2019, DCPS conducted an Administrator/parent conference due to Student's physical confrontation with another student.⁸¹

⁷⁰ P29:15-19 (342-6).

⁷¹ P9:15 (152).

⁷² P29:23, 25, 32, 34-5, 42 (350, 352, 359, 361-2, 369).

⁷³ *Id.* at 36 (363).

⁷⁴ *Id.* at 44-9 (371-5).

⁷⁵ R49:304.

⁷⁶ *Id.* at 304-9.

⁷⁷ *Id.* at 309-10.

⁷⁸ *Id.* at 310-11.

⁷⁹ P25:1-4 (309-12).

⁸⁰ R50:314.

⁸¹ P29:56 (382).

23. On August 29, 2019, Student's score on the Reading Inventory Test was that of a beginning reader.⁸²

24. On October 1, 2019, Student was reprimanded for directing profanity towards a staff member.⁸³ On October 2, 2019, DCPS convened a conference with the parent for a similar incident.⁸⁴ On October 8, 2019, Student was suspended for two days for multiple disruptions.⁸⁵

25. On October 2, 2019, DCPS issued a PWN changing Student's graduation track from certificate of IEP to a high school diploma.⁸⁶

26. On October 7, 2019, Petitioner's counsel requested Student's education records for the previous two years.⁸⁷ On December 9, 2019, Petitioner's counsel notified DCPS of records that had not yet been received.⁸⁸ On December 10, 2019, DCPS forwarded additional records to Petitioner's counsel.⁸⁹ On December 31, 2019, Witness A notified DCPS of additional records that had not been received.⁹⁰ On January 7, 2019, DCPS forwarded Progress Reports from 2017-19 and 2017-19 report cards to Petitioner's counsel.⁹¹ On February 4, 2020, Witness A requested all school documents for the 2019-2020 school year, standardized testing reports for 2017-2020, and disciplinary records for 2017-20.⁹² Witness A asserted that as of June 1, 2020, Petitioner had not received i-Ready Score Reports and disciplinary records.⁹³

27. On October 10, 2019, Petitioner gave consent for a functional behavior assessment.⁹⁴

28. On October 16, 2019, Student was temporarily removed from the classroom due to disruption.⁹⁵ On October 17, 2019, Student was reprimanded for disruption.⁹⁶

29. On November 6, 2019, DCPS completed the first reporting period IEP Progress Report.⁹⁷ On the Math goal regarding currency, mastered in by the second reporting period in school year 2017-18, s/he was now making no progress, s/he was no longer progressing on the linear equation goal or the goal of shape identification, and making no

⁸² R51:317.

⁸³ P29:58 (384).

⁸⁴ *Id.* at 60 (386).

⁸⁵ *Id.* at 62-4 (388-90).

⁸⁶ P10:1 (160).

⁸⁷ P39:2 (525).

⁸⁸ P37:12 (516).

⁸⁹ P37:11-12 (515-6).

⁹⁰ *Id.* at 9-10 (513-4).

⁹¹ *Id.* at 6-7 (510-1).

⁹² *Id.* at 3-4 (507-8).

⁹³ P436 (547).

⁹⁴ R52:322.

⁹⁵ P29:70 (396).

⁹⁶ *Id.* at 72 (398).

⁹⁷ R53:324.

progress on any of his/her Reading or Written Expression goals.⁹⁸ In Behavior, the goals were reported as “Just Introduced.”⁹⁹ S/he was making no progress on the transition goal of developing a visual display or on the goal of exploring three opportunities for independent living after high school. On the goal of creating a visual representation of the knowledge, skills, and abilities needed to complete a specific job, on which s/he made progress throughout the previous school year, it was reported as “Just Introduced.”¹⁰⁰

30. On November 19, 2019, DCPS completed a Functional Behavior Assessment.¹⁰¹ Examiner A found that Student “has a history of distractibility, hyperactivity and defiant behavior in the educational setting. [Student] can be very restless at times and prone to be in an agitated state of mind when asked to complete a task. [S/he] has low frustration tolerance and is easily distracted. The behaviors vary in intensity, duration and frequency. The behaviors impact [his/her] academic progress, can disrupt the learning environment and results in failing grades.”¹⁰² Examiner A concluded:

Off task behaviors are a function of [Student’s] ADHD. [Student’s] verbally aggressive behaviors appear to be for the purpose of attention seeking and gaining assistance from [his/her] peers as well as a function of [his/her] low cognitive ability. [Student’s] non-compliance may be the function of tasks being difficult for him/her as well as giving [Student] the appearance that s/he is unbothered or unconcerned by the adult’s comments or potential for receiving consequences. [Student’s] elopement from class may be in response to [his/her] difficulty with assignments as well as serving as a vehicle for him/her to gain or obtain approval and attention from [his/her] peers.

It appears that the preliminary function of [Student’s] behavior is multifaceted and is a manifestation of [his/her] untreated ADHD, low frustration tolerance, and need to gain attention from others. [Student] is more likely to be compliant and remain engaged in the academic environment when s/he is feeling calm and engaging in preferred activities. The environment and life situations play a significant role in that external variables can impact [Student’s] ability to remain engaged and on task.¹⁰³

31. On November 19, 2019, DCPS convened an Analysis of Existing Data (“AED”) Team Meeting.¹⁰⁴ The analysis of formal assessments revealed that Student was performing at a grade B level in math. The Summary of Strengths for Academic-Mathematics indicated that Student is “able to complete [his/her] basic math addition, subtract and multiplication facts. [S/he] requires calculator to complete facts with regrouping. [Student] is working on [grade I] level material solving algebra expressions. When goals are given to [Student] that are very concrete and modified to [his/her] academic performance level, [Student] is able to progress and even master goals. [Student] is able to multiply and add with

⁹⁸ *Id.* at 324-9.

⁹⁹ *Id.* at 330.

¹⁰⁰ *Id.* at 330-31.

¹⁰¹ R57:354; P22:1 (289).

¹⁰² P22:2 (290).

¹⁰³ *Id.* at 3 (291).

¹⁰⁴ R54:333.

a degree of fluency.” The Summary of Concerns were that s/he is “at a [grade B] level in Mathematics. According to the Woodcock Johnson Test of Achievement, [s/he] is performing at an age level that is well below [his/her] grade-level peers. This low performance continues after years of receiving special education services.”¹⁰⁵

In Reading, on an 2018-19 Brigance assessment, Student scored on the grade E level (6 grades below his/her current level), grade I level in word recognition, and grade D in vocabulary placement. The Summary of Strengths was that Student “is able to read on [grade I] level using word recognition. [Student] has strong reading comprehension skills has improved with strategies. [Student] is strong in the area of Letter-Word Identification. S/he is able to sound out words very well and can even sound out nonsense words.” The Summary of Concerns included: “[Student] is unable to comprehend anything [s/he] reads, which is showcased in his/her comprehension scores. It is the reason [s/he] continues to read on a [grade B] level even though [s/he] is able to sound out words accurately. [S/he] struggles significantly with retaining information and being able to use strategies.”¹⁰⁶ In Written Expression, Student was not making progress with his/her writing goals. Student’s “writing is very low and continues to be illegible and confusing.” The Summary of Concerns was that Student “is writing at a [grade A/B] level. [His/her] written work is very unorganized and [s/he] often just writes random sentences to fill a page that do not make sense or correspond with the written task.”¹⁰⁷ In Behavior, SDQs in September 2018 revealed low behavioral risks except for getting along with other children, which scores were “slightly raised.” The Summary of Concerns were that s/he presents with behavior challenges which include failure to follow directions, refusal to comply with the rules, being easily distracted and distracting for others and difficulty with concentration. Student often requires repeated directions and prompts during instructional time.”¹⁰⁸

32. On January 6, 2020, DCPS developed a Behavior Intervention Plan (“BIP”).¹⁰⁹ The targeted behaviors were being off-task, non-compliance, and attention-seeking. The antecedents to the behaviors were (1) receiving a directive that is unfavorable, (2) being given assignments that s/he deems challenging, and (3) being singled out or teased. Strategies and resources included (1) Working with student to implement effective coping skills/SPARCS Group, and (2) “Proximity Control/Student will receive additional reminders/ Weekly Tracker will be utilized/redirection/small group instruction.” Incentives included time in the gym, computer time, free time with an identified staff person, earning rewards, and positive affirmations. In cases of verbal aggression, staff would consistently remind Student of appropriate ways to express [REDACTED], and include Student in SPARCS to assist [him/her] identifying effective coping strategies. In response to attention-seeking and non-compliance, the staff would consistently impose pre-determined consequences, and review and modify the incentives to ensure that they are relevant for the student.¹¹⁰

33. On January 6, 2020, DCPS convened an IEP Annual Review Meeting.¹¹¹ In

¹⁰⁵ *Id.* at 334.

¹⁰⁶ *Id.* at 335.

¹⁰⁷ *Id.* at 335-6.

¹⁰⁸ *Id.* at 336.

¹⁰⁹ R56:347.

¹¹⁰ *Id.* at 347-51.

¹¹¹ P13 (185).

Mathematics, the PLOPs indicated that Student performed below Basic on the MAP assessment and on the Edulastic test. The PLOPs also indicated age equivalent scores in Mathematics, Broad Mathematics, and Math Calculation Skills on a WJ-IV assessment that were five to seven years below Student's age.¹¹² The baselines were struggling with basic math calculation at the grade D level, seven grades below his/her current grade level, and struggling with "the main idea and questions about math symbols and figures." The two goals were (1) the ability to identify types of angles by their angle relationships with at least 80% accuracy, and (2) the ability to draw perpendicular bisectors of a segment with at least 80% accuracy and to name points, lines, and planes with at least 80% accuracy.¹¹³

In Reading, Student could not comprehend grade B text, nine years below his/her current grade.¹¹⁴ The baseline was that his/her Lexile score was of a beginning reader. The goals were (1) to read books within a target range of 50 Lexiles "above and below Lexile measure," (2) to build vocabulary by reading and discussing 25 books per year, and (3) to evaluate, synthesize and use information from a variety of sources including journals, technical documents newspapers, online materials, and reference guides with at least 80% accuracy.¹¹⁵ In Written Expression, the PLOP was that s/he performs at the level of a beginning reader and his/her performance is Below Basic,¹¹⁶ as was the baseline. The one goal was the ability to write comparison and contrasting statements after reading major literary material of various eras, evaluating in writing the philosophical, political and social influences with at least 80% accuracy, given minimal assistance from an adult.¹¹⁷

In Behavior, the PLOPs provided September 25, 2019 self-reported SDQ scores in the Average range for overall stress, emotional distress, behavioral difficulties, hyperactivity and concentration difficulties, difficulties with other youth, and impact of any difficulty in his/her life. S/he scored in the Low range for kind and helpful behavior. The baselines were new: (1) Student displays attention seeking and avoidance behaviors; s/he self-reported distraction which leads to impulsive behaviors, and (2) Student displays impulsive behavior which hinders his/her academic performance and requires redirection or prompting from staff 4 out of 5 days per week. The previous first goal, improving self-regulation by increasing on-task behaviors, was changed to utilizing self-regulation skills to increase ability to remain on task and work independently 80% of the time. The previous second goal of increasing the ability to make appropriate choices was replaced with: Student will identify actions that trigger an increase in impulsivity and hinder his/her academic performance 80% of the time.¹¹⁸ Special Education services, related services, accommodations, and transition goals and services remained unchanged, but ESY was deemed not to be required.¹¹⁹

34. On January 14, 2020, Witness A sent a Letter of Dissent to the January 6, 2020 IEP to DCPS.¹²⁰

¹¹² *Id.* at 4 (188).

¹¹³ *Id.* at 4-5 (188-9).

¹¹⁴ *Id.* at 6 (190).

¹¹⁵ *Id.* at 8 (192).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 9 (193).

¹¹⁸ *Id.* at 10 (194).

¹¹⁹ *Id.* at 11- 17 (195-201).

¹²⁰ P38:3 (520).

35. On February 5, 2020, DCPS completed the second reporting period IEP Progress Report.¹²¹ The Math goal regarding currency, mastered in by the second reporting period in school year 2017-18, in which s/he was making no progress in the first quarter, was not listed, nor was the linear equation goal, and Student was making no progress on the goal of shape identification and the goal of drawing perpendicular bisectors. In Reading, Student was making no progress on the goal of reading books within the target Lexile range, was making progress on building vocabulary by reading and discussing at least 25 books per year. In Written Expression, s/he was making progress in being able to write comparisons and contrasting statements after reading “major literary material of various eras.”¹²² S/he was making no progress on any behavior goals.¹²³ S/he was making no progress on the transition goal of developing a visual display. S/he making progress on the goal of exploring three opportunities for independent living after high school. On the goal of creating a visual representation of the knowledge, skills, and abilities needed to complete a specific job, on which s/he made progress throughout the previous school year, and “Just Introduced” in the first reporting period, s/he was making progress.¹²⁴

36. On February 5, 2020, DCPS issued Student’s second term report card. His/her grades were B- in English II, D in Geometry Part A, C- in World History and Geography; Modern World, F in Principles of U.S. Government, D in Environmental Science, F in U.S. History, B- in Advanced Argument Writing, and No Mark in Geometry Part B. S/he had 31 unexcused absences; 15 unexcused absences trigger a referral to Court Social Services/ Office of the Attorney General.¹²⁵

37. DCPS completed an FBA on February 7, 2020¹²⁶ but did not amend the January 6, 2020 BIP.

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

¹²¹ R62:383.

¹²² R 62:383 -389.

¹²³ *Id.* at 389.

¹²⁴ *Id.* at 390-91.

¹²⁵ P24:1-3 (303-5).

¹²⁶ P42:1 (535).

the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹²⁷

The first issue in this case involves the appropriateness of Student's IEPs. As to this issue, Respondent bears the burden of persuasion.¹²⁸ As to all other issues, Petitioner has that burden.

Whether DCPS failed to provide the student a FAPE by failing to develop appropriate IEPs since May 2018 due to repeated goals, goals that were not challenging or attainable, goals that were not measurable, inappropriate baselines, inappropriate present levels of performance, and no adaptive 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*.¹²⁹ 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.'" ¹³⁰ 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... ¹³¹ 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."¹³²

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.¹³³ 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*.'" ¹³⁴ The Court rejected the Tenth Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging

¹²⁷ D.C. Code Sect. 38-2571.03(6)(A)(i).

¹²⁸ *Schaffer v. Weast*, 546 U.S. 49 (2005).

¹²⁹ 458 U.S. 176, 187 (1982).

¹³⁰ *Id.* at 189-90, 200

¹³¹ *Id.* at 200.

¹³² *Id.* at 203-04.

¹³³ *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹³⁴ *Id.* at 997.

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.¹³⁵

Petitioner alleges that Student's IEPs are inappropriate because goals or baselines were repeated in subsequent IEPs, demonstrating a lack of progress warranting remediation. Petitioners also fault the IEPs for a lack of adaptive or daily living goals, goals were either not sufficiently challenging while others were unattainable, and others not measurable. Petitioner cites *Damarcus S. v. District of Columbia*,¹³⁶ for the proposition that repeated annual goals or baselines in two or more successive IEPs will be a sign that the student is not making adequate gains. The court noted an "alarming number" of goals and objectives were cut and pasted from one IEP to the next. "As multiple District witnesses acknowledged, this repetition of goals demonstrated a lack of progress and likely frustrated Damarcus... The IEP Team was, therefore, required to "revise[] the IEP as appropriate to address ... [that] lack of expected progress toward the annual goals."¹³⁷

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."¹³⁸

Endrew requires an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. This student's particular circumstances include a classification of Intellectual Disability and behavioral concerns that significantly impair his/her ability to participate in the academic setting.

When the May 22, 2018 IEP was developed, Student was generally performing on a grade B level, seven grades below his/her grade level at that time. S/he struggled with subtraction and regrouping, and had significant problems with division. Thus, Student was making no objective progress in math. Though s/he was performing at a grade B level, one of his/her goals involved solving linear equations, which was clearly unattainable. The currency goal was still being carried over from the March 28, 2016 IEP. In Reading, for PLOPs, s/he scored at the grade E level for reading and comprehension on the Brigance Skills Inventory. The Reading Inventory and WJ-IV scores were unchanged from the 2016 IEPs. Student's baselines and goals were unchanged from the October 2016 IEP. In Written

¹³⁵ *Id.* at 1000-01 (citations omitted).

¹³⁶ 190 F.Supp.3d 35 (D.D.C. 2016).

¹³⁷ *Id.* at 53.

¹³⁸ 137 S.Ct. at 1000-01.

Expression, the PLOPs were unchanged. The two baselines and goals from the October 2016 IEP remained. In Behavior, s/he continued to have problems with peer interaction in the academic setting and his/her attendance in behavior support sessions was inconsistent. An FBA was developed that attributed his/her defiance, tantrums, unwillingness to complete classwork, and engaging in off-task peer interactions were done to avoid challenging academic assignments. Student's baselines were unchanged from the October 2016 IEP. Although no Behavior goals were reported mastered on the latest Progress Report, the three previous goals were replaced by two: (1) Student will improve his/her self-regulation by increasing on-task behaviors and compliance with rules 75% of the time, and (2) Student will increase his/her ability to make appropriate choices during social interactions with peers and staff 80% of the time by understanding the consequences of his/her actions.

In the January 30, 2019 IEP Progress Report, the Math goal regarding currency, mastered in by the second reporting period in the previous school year, remained mastered, the linear equation goal was not introduced in the first reporting period, but Student was progressing in the second reporting period. In Behavior, s/he made no progress on the goal of increasing on-task behaviors in the first reporting period, but was progressing in the second reporting period, as s/he was on the goal of making appropriate choices during social interactions with peers and adults. S/he was progressing on all of his/her transition goals. When DCPS convened an IEP Review Meeting on February 5, 2019, the Consideration of Special Factors indicated that the behaviors observed in the 2016 IEPs persisted. In Mathematics, Student's PLOPs were unchanged from previous IEPs. His/her baselines and goals were unchanged from the May 22, 2018 IEP. In Reading, Student's PLOPs, baselines, and goals were unchanged from the previous IEP. In Written Expression, the PLOPs were substantively unchanged from the previous IEP. The two baselines and goals from the October 2016 IEP remained. In Behavior, the PLOPs reported no significant change from previous IEPs. "[Student] continues to display behaviors that [s/he] thinks are expected to be acceptable by [his/her] peers." The baselines and goals from the previous IEP remained.

On the June 13, 2019 Progress Report, Student was reportedly making progress on all but Behavior and a transition goal. However, when final grades were released, Student failed Algebra I-B, World History & Geography: Middle Ages, Argument Writing, Biology, and Algebra I-A, and had a D in English I, along with thirteen unexcused absences. On August 29, 2019, Student's score on the Reading Inventory Test was that of a beginning reader.

On the November 6, 2019 first reporting period IEP Progress Report, the Math goal regarding currency that was mastered in by the second reporting period in school year 2017-18, s/he was now making no progress, s/he was no longer progressing on the linear equation goal or the goal of shape identification, and was making no progress on any of his/her Reading or Written Expression goals. In Behavior, the goals were reported as "Just Introduced." S/he was making no progress on the transition goal of developing a visual display or on the goal of exploring three opportunities for independent living after high school, despite that fact that that goal was still being carried over from March 2016. On the goal of creating a visual representation of the knowledge, skills, and abilities needed to complete a specific job, on which s/he made progress throughout the previous school year, it was reported as "Just Introduced."

The AED meeting on November 19, 2019 produced inconsistent findings. The analysis of formal assessments revealed that Student was performing at a grade B level (nine grades below level) in math, but working on [grade I] (only two grades below grade) level material solving algebra expressions. Yet, the Summary of Concerns was that s/he was “at a [grade B] level in Mathematics. In Reading, on an 2018-19 Brigance assessment, Student scored on the grade E level (6 grades below his/her current level), grade I level in word recognition, and grade D (seven grades below) in vocabulary placement. Although the Summary of Strengths was that Student “is able to read on [grade I] (two grades below) level using word recognition, the Summary of Concerns included: “[Student] is unable to comprehend anything [s/he] reads, which is showcased in [his/her] comprehension scores...” In Written Expression, Student was not making progress with his/her writing goals. Student’s “writing is very low and continues to be illegible and confusing.” The Summary of Concerns was that Student “is writing at a [grade A/B] level. [His/her] written work is very unorganized and [s/he] often just writes random sentences to fill a page that do not make sense or correspond with the written task.”¹³⁹ In Behavior, s/he presented with behavior challenges which included failure to follow directions, refusal to comply with the rules, being easily distracted and distracting for others and difficulty with concentration.

At the January 6, 2020 IEP Annual Review Meeting, in Mathematics, the PLOPs indicated that Student performed below Basic on the MAP. Although previous math goals were not reported to be mastered, the two new goals were (1) the ability to identify types of angles by their angle relationships with at least 80% accuracy, and (2) the ability to draw perpendicular bisectors of a segment with at least 80% accuracy and to name points, lines, and planes with at least 80% accuracy. For a student performing at a grade B level, these goals appear to be as equally unattainable as the linear equations goal that was dropped without comment. In Reading, Student could not comprehend grade B text, nine years below his/her current grade. The baseline was that his/her Lexile score was of a beginning reader. In Written Expression, the PLOP was that s/he performs at the level of a beginning reader and his/her performance is Below Basic, as was the baseline. The one goal was the ability to write comparison and contrasting statements after reading major literary material of various eras, evaluating in writing the philosophical, political and social influences with at least 80% accuracy, given minimal assistance from an adult. For someone who is “unable to comprehend anything [s/he] reads,” this goal was clearly unattainable. In Behavior, the baselines were new: (1) Student displays attention seeking and avoidance behaviors; s/he self-reported distraction which leads to impulsive behaviors, and (2) Student displays impulsive behavior which hinders his/her academic performance and requires redirection or prompting from staff 4 out of 5 days per week. However, this information is not meaningfully different from the PLOPs in the March 2016 IEP: “Student gets into physical confrontations with peers, and engages in negative behaviors to be liked by [his/her] peers. S/he had received discipline for refusing to comply with directions, displaying off-task behaviors, leaving class without permission, and fighting.”

In the February 5, 2020 IEP Progress Report, the Math goal regarding currency, mastered in by the second reporting period in school year 2017-18, in which s/he was making no progress in the first quarter, was not listed, nor was the linear equation goal, and Student was making no progress on the goal of shape identification and the goal of drawing

¹³⁹ *Id.* at 335-6.

perpendicular bisectors. In Reading, Student was making no progress on the goal of reading books within the target Lexile range. In Written Expression, s/he was making progress in being able to write comparisons and contrasting statements after reading “major literary material of various eras.” Again, the reported progress on this goal is highly suspect in light of the finding that s/he does not understand anything s/he reads. S/he was making no progress on any behavior goals.¹⁴⁰ S/he was making no progress on the transition goal of developing a visual display that, again, was carried over since March 2016. Student’s second term grades include failures in U.S. History and Principles of U.S. Government, and D’s in Geometry and Environmental Science. Even the two barely passing marks are questionable in light of the objective record of Student’s capabilities in math and reading.

The record supports the conclusion that Student has not benefitted within the meaning of *Rowley*. And despite promotions from grade-to-grade, s/he has not actually made the grade-level advancement mandated by *Endrew* since his/her March 2016 IEP was developed. S/he remains at a grade B level in mathematics, and cannot understand anything s/he reads. The record reflects that goals and baselines were carried over from year to year, some going back to 2016. Some goals, such as the transition display, were not challenging, yet consistently repeated. Others were hopelessly unattainable, such as the linear equations math goal or the goal of a beginning reader to write comparison and contrasting statements after reading major literary material of various eras. Student’s achievement scores have not improved since 2016. Under these circumstances, *Damarcus S.* requires the IEP team to revise the IEP as necessary to address the manifest lack of educational progress.

Whether DCPS denied the student a FAPE by failing to evaluate the student comprehensively.

34 C.F.R. §300.303 provides that reevaluations must be conducted if the child’s parent or teacher requests a reevaluation, not more than once a year unless the parent and public agency agree otherwise, and at least once every three years unless the parent and public agency agree that a reevaluation is unnecessary. The courts treat violations of this provision as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it “(1) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.”¹⁴¹ Petitioner argues that Student’s IEPs are inherently defective because they are not based on recent evaluative data. Petitioner also asserts that Respondent has the burden of persuasion on this issue. However, the failure to evaluate in all areas of suspected disability is a separate violation of IDEA¹⁴² for which the District of Columbia imposes the burden on the Petitioner.

Here, DCPS conducted a Comprehensive Psychological Evaluation in March 2016. While Petitioner has completed Brigance Skills Assessments in 2017 and 2018, and i-Ready assessments since 2016,¹⁴³ it does not appear that a triennial comprehensive Psychological Evaluation has been conducted. There is no indication in the record that the parent deemed a

¹⁴⁰ *Id.* at 389.

¹⁴¹ 20 U.S.C. §1415(f)(3)(E)(ii).

¹⁴² 20 U.S.C. §1414(b)(1)-(3) and §1412(a)(6)(B).

¹⁴³ R42:254.

reevaluation to be unnecessary. On January 14, 2020, Petitioner's educational advocate specifically objected to the failure to evaluate, but the triennial period ended in March 2019. In light of Student's stagnant educational progress, a comprehensive evaluation could yield valuable data and recommendations that could inform a new approach to the delivery of academic services to Student. Thus, I conclude that DCPS' failure to conduct a triennial Comprehensive Psychological Evaluation impedes Student's right to a FAPE.

Whether DCPS denied the student a FAPE by failing to provide the student an appropriate and timely BIP and failed to provide necessary supports and services during his/her suspensions.

DCPS developed BIPs on September 26, 2017, February 5, 2019, January 6, 2020, and February 7, 2020.¹⁴⁴ The *Complaint* alleges that DCPS has failed to conduct an FBA since 2016 and that, therefore, BIPs are not based on reliable updated information. However, DCPS completed an FBA on November 19, 2020 and it is included in Petitioner's disclosures.¹⁴⁵ Witness A, Petitioner's Educational Advocate submitted a critique of the FBA to DCPS on January 6, 2020, the day of the IEP Review Meeting. Witness A conceded in her testimony that DCPS had conducted the recent FBA, but testified that it was not "adequately incorporated" into the BIP. Witness A's January 14, 2020 letter of dissent to the IEP does not suggest changes in Behavior goals, but does request an increase in BSS.

On March 13, 2018, Student was suspended for six days for fighting on school premises. Except for the March 13, 2018 suspension, there is no record of discipline prior to January 8, 2019. Thereafter, Student was involved in numerous incidents until October 17, 2019. Witness A testified that the BIP should have addressed Student's elopement. Her January 6th "FBA/BIP Feedback" complains that the FBA says Student "Leaves the classroom," but suggests that the behavior should have been treated as elopement behavior¹⁴⁶ rather than listing the behavior as "off-task." However, in my review of the FBA, I found elopement addressed in several sections of the report. While Witness A's suggestions as to how the FBA should have been developed are instructive, the issue is whether DCPS' BIPs were so deficient as to constitute a denial of FAPE.

The October 2016 FBA was the basis for the September 26 2017 BIP. As previously noted, Student had no documented disciplinary problems until March 13, 2018, and then none again until January 2019. Thus, the February 2019 BIP was developed, albeit with minimal changes from the previous BIP, but with a history of but one disciplinary action. The subsequent FBA was conducted in November 2019, with the BIP on January 6, 2020. DCPS developed another FBA on February 7, 2020, but there was no explanation for why it was done, and no new BIP was prepared.

While Student has had numerous incidents of disruption and aggressive behavior, none have been reported since October 2019. The BIPs define the targeted behaviors, identify antecedents to the behaviors, suggest methodologies to address the behavior, and propose incentives. While the BIP was not successful in 2019 in reining in Student's impulsive

¹⁴⁴ P19, P20, P21, P42.

¹⁴⁵ P22, P23.

¹⁴⁶ P38:6 (523).

behaviors, the record does not clearly establish that the BIP was so deficient as to constitute a denial of FAPE.

Finally, Petitioner offered no evidence of the supports provided, or not provided, to Student during suspensions. I conclude that Petitioner has failed to meet her burden on this issue.

Whether DCPS denied the student a FAPE by failing to provide Petitioner access to the student's educational records since the beginning of the 2017-18 school year upon requests: specifically, iReady, statewide testing, behavior incident reports, and behavior related documents for the 2019-20 school year.

The regulations require the local education agency to allow parents to examine their student's records:

(a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.¹⁴⁷

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.¹⁴⁸

¹⁴⁷ 34 C.F.R. §300.501.

¹⁴⁸ 34 C.F.R. §300.613.

On October 7, 2019, Petitioner's counsel requested Student's education records for the previous two years. On December 9, 2019, Petitioner's counsel notified DCPS of records that had not yet been received. On December 10, 2019, DCPS forwarded additional records to Petitioner's counsel. On December 31, 2019, Witness A notified DCPS of additional records that had not been received. On January 7, 2019, DCPS forwarded Progress Reports from 2017-19 and 2017-19 report cards to Petitioner's counsel. On February 4, 2020, Witness A requested all school documents for the 2019-2020 school year, standardized testing reports for 2017-2020, and disciplinary records for 2017-20. ¹⁴⁹ In her Compensatory Education Plan, Witness A asserted that DCPS never provided i-Ready Reports or disciplinary records.

As with triennial evaluations, the failure to provide access to education records is a procedural violation that entitles a petitioner to relief only if it “(1) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.” ¹⁵⁰

At the hearing, Petitioner offered only Witness A’s assertion that DCPS never provided i-Ready Reports or disciplinary records . Petitioner’s counsel did not argue that the lack of these records limited Petitioner’s ability participate meaningfully in IEP meeting or to prepare for the hearing. In his closing statement, Petitioner’s counsel did not argue that the lack of these records impaired his ability to prepare for the hearing or impaired the parent’s opportunity to participate in the decision-making process. Nor did he state any basis for believing that education records of Student exist that DCPS has not provided. Therefore, I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to provide her an opportunity to inspect and review Student’s education records.

RELIEF

For relief, Petitioner requests, *inter alia*, that DCPS be ordered (1) to provide the records since the beginning of 2017 that have not been provided, (2) to fund compensatory education for FAPE violations since the beginning of the 2017-18 school year, (3) to evaluate the student’s social, emotional, and behavior needs as well as his/her attention and executive functioning needs, and conduct a cognitive assessment, and (4) a finding that the student’s current IEP is inappropriate. Petitioner also requests the right to preserve additional claims for compensatory education for two years from the date of the filing of the *Complaint* and attorney’s fees.

In *Reid v. District of Columbia*, the D. C. Circuit held that in determining awards of compensatory education services, Hearing Officers could not simply award services on an hour-for- hour basis, or by use of a standard formula.

We reject... appellants'... mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place

¹⁴⁹ *Id.* at 3-4 (507-8).

¹⁵⁰ 20 U.S.C. §1415(f)(3)(E)(ii).

disabled children in the same position they would have occupied but for the school district's violations of IDEA.¹⁵¹

Thus, Petitioner has the burden of showing that (1) as a result of DCPS' failure to provide transportation, Student suffered an educational deficiency, (2) but for the violation, s/he would have either maintained his/her current level of academic performance or progressed to a higher level, and (3) that there exists a type and amount of compensatory education services that would bring him/her to the level s/he would have been but for DCPS' violation.

Hearing Officers may not award compensatory education services based solely on the amount of services a local education agency ("LEA") failed to provide.

[W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

More specifically, as the Fourth Circuit has explained, "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet "the essence of equity jurisdiction" is "to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it..." In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that "there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA..."¹⁵²

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued

¹⁵¹ *Id.* at 18.

¹⁵² *Id.*, 401 F.3d at 523-24, citations omitted.

from special education services the school district should have supplied in the first place.¹⁵³

In this case, Petitioner offered testimony from Witness A that Student required 150 hours of independent tutoring, 50 hours of independent counseling, and 25 hours of mentoring to make up for the denial of appropriate services over the last two years.¹⁵⁴ However, Witness A offered no empirical support for her proposal, referencing studies that were not offered into evidence. Thus, Petitioner has failed to meet her burden of proving that there is a type and amount of compensatory services that will bring Student to the level s/he would have been had DCPS provided an appropriate program. Therefore, the Hearing Officer will authorize an independent evaluation to determine an appropriate compensatory education program to enable Student to improve his/her performance in mathematics, reading, and written expression by two grade levels.

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

- (1) DCPS shall fund an independent comprehensive psychological reevaluation that will include cognitive, attentional, executive functioning, and social emotional analyses.
- (2) DCPS shall fund an independent evaluation to determine the type and amount of independent educational services would be necessary and appropriate to improve Student's performance in mathematics, reading, and written expression by two grade levels.
- (3) Within thirty (30) days of receipt of the independent evaluations, DCPS shall convene an Multidisciplinary Team meeting to review the evaluation and to revise the IEP as necessary, including a consideration of appropriate compensatory education services for the lack of appropriate IEPs for the 2018-19 and 2019-2020 school years.

¹⁵³ *Id.* at 524.

¹⁵⁴ P43:6 (547).

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 22, 2020

Copies to: Attorney A, Esquire
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OSSE Office of Dispute Resolution
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