

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PARENT,
on behalf of STUDENT,¹

Date Issued: June 21, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2021-0025

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: May 24 and June 14, 2021

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or Mother) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to develop appropriate Individualized Education Programs (IEPs) in the 2019-2020 and 2020-2021 school years and failure to conduct a comprehensive triennial reevaluation in 2020.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on March 5, 2021, named DCPS as Respondent. The undersigned hearing officer was appointed on March 8, 2021. On March 15, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On March 24, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was originally scheduled for May 4 and 5, 2021. On April 9, 2021, due to the unavailability of Petitioner's expert witness, I granted Petitioner's unopposed request to continue the hearing to May 24 and June 14, 2021 and to extend the final decision due date to June 27, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on May 24 and June 14, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother testified and called INDEPENDENT PSYCHOLOGIST as an expert witnesses. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST (SLP), SPECIAL EDUCATION TEACHER, LEA Representative and SCHOOL SOCIAL WORKER. Petitioner's Exhibits P-1 through P-25 were admitted into evidence, including Exhibits P-1 through P-3 admitted over DCPS'

objections. DCPS' Exhibits R-1 through R-42 were all admitted into evidence without objection.

On June 14, 2021, after the presentation of evidence was completed, counsel made oral closing arguments. Neither party requested leave to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the March 24, 2021 Prehearing Order, are:

1. Did DCPS fail to provide the Student with appropriate IEP's, specifically regarding the:

January 2, 2019 IEP, in that DCPS failed to provide an adequate level and appropriate setting for both specialized instruction and related services; failed to provide appropriate IEP goals; failed to provide Extended School Year (ESY) services and failed to conduct a Functional Behavioral Assessment (FBA) and provide a Behavior Intervention Plan (BIP);

November 15, 2019 IEP, in that DCPS failed to provide an adequate level and appropriate setting for both specialized instruction and related services; failed to provide appropriate IEP goals; failed to provide Extended School Year (ESY) services and failed to conduct an FBA and provide a BIP;

November 6, 2020 IEP, in that DCPS failed to provide an adequate level and appropriate setting for both specialized instruction and related services; failed to provide appropriate IEP goals; failed to provide Extended School Year (ESY) services and failed to conduct an FBA and provide a BIP.

2. In light of Student's alleged lack of academic progress, did DCPS' review of records for Student's triennial reevaluation in 2020, without any new

comprehensive assessments, constitute a denial of FAPE?

For relief, Petitioner originally requested that the hearing officer order DCPS, within 5 business days, to provide and pay for independent educational evaluation (IEE) comprehensive psycho-educational, speech and language and functional behavior assessments and order DCPS, within 10 school days of receipt of the independent evaluations, to convene an IEP team meeting to discuss an increase Student's specialized instruction and related services with an emphasis on the proper least restrictive environment (LRE) for those services. Petitioner also requested the hearing officer to determine the appropriate amount and type of compensatory education due Student for the denial of FAPE alleged in the complaint.

In the prehearing conference, Petitioner's Counsel clarified that Petitioner was not seeking relief for acts or omissions that occurred more than two years before the due process complaint was filed. Petitioner's Counsel also acknowledged that DCPS had already issued funding authorization for the parent to obtain IEE psychological and speech-language assessments of Student. As of the hearing date, the IEE psychological, but not the speech-language assessment, had been completed.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education under the Specific

Learning Disability (SLD) classification. Exhibit P-21.

2. Student has attended CITY SCHOOL, a DCPS public school, for some four years. Student is currently in GRADE. Since DCPS schools closed in March 2020 due to the COVID-19 outbreak, Student has participated in DCPS' virtual learning program.

Testimony of Mother.

3. In fall 2015, when Student was enrolled in NONPUBLIC SCHOOL, Student was referred to the DCPS' Early Stages Center for a special education evaluation. Upon completion of the evaluation process, the multidisciplinary team at Early Stages found Student eligible for special education services under the disability classification Speech and Language Impaired (SLI). The team developed an IEP that prescribed 120 minutes per month of Speech and Language services for Student outside the general education setting. Exhibit P-8.

4. In November 2017, a DCPS school psychologist, SCHOOL PSYCHOLOGIST, conducted a comprehensive psychological reevaluation of Student to help determine Student's ongoing need for special education services. On cognitive testing using the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2), Student received a Composite Intelligence Index (CIX) of 83, within the low average range. Student scored lower, 76, on the Verbal Intelligence Index (VIX). School Psychologist administered the Woodcock-Johnson Tests of Achievement, Fourth Edition (WJ-IV) to assess Student's level of academic functioning in the domains of Reading, Math, Written Language, Academic Applications and Academic Skills.

Student's composite scores were in the below average range for Mathematics and Reading and in the low average range for Writing. School Psychologist reported that Student presented with diverse cognitive processing and academic skills. Student performed significantly better on nonverbal than verbal processing and academic tasks. Deficits were also evident on memory and speeded processing tasks. Upon her review of school-based assessment data, interviews, and the assessment measures, School Psychologist reported that Student appeared to demonstrate a pattern of performance commensurate with that of a child with a Specific Learning Disability. Exhibit P-8.

5. On January 9, 2018, the MDT team determined that Student was eligible for special education under the SLD classification. The January 9, 2018 IEP identified Mathematics, Reading, Communication/Speech and Language and Emotional-Social-Behavioral Development as areas of concern for Student and provided for Student to receive 11 hours per week of Specialized Instruction, including 8.5 hours outside of general education, 2 hours per month of Speech-Language Pathology and 1 hour per month of Behavioral Support Services. Exhibit P-11.

6. As of November 7, 2018, Student was reported to have "Mastered" two January 9, 2018 IEP Reading Goals and to be "Progressing" in one Mathematics goal and the behavioral goal. The remaining IEP annual goals for Mathematics, Reading and Communication/Speech and Language had just been introduced or, for two Reading goals, Student had made no progress. Exhibit R-25.

7. On January 2, 2019, the City School IEP team met for Student's annual

IEP review meeting. Regarding education-impeding behavior, the completed IEP reported that Student struggled with self-regulation, did not handle disappointments or difficult assignments in an appropriate manner, often shut down and refused to complete assigned tasks. For Mathematics, Student was reported to be two years behind grade level and to know very few math facts. In Reading, Student was also reported to be two years below grade level and to recognize very few sight words. Student was reported to work better in the smaller group setting and to need small group instruction, extended time and modeling. Student was described as “learning to read when . . . peers are reading to learn.” For Communication/Speech and Language, Student was reported to be making slow, but steady, progress toward IEP goals and objectives. The academic annual goals on the January 2, 2019 IEP were substantially repeated from the January 9, 2018 IEP, except to drop one of the Mathematics goals, which had just been introduced in November 2018 and to drop a Reading goal which Student had mastered. The behavior goal from the January 9, 2018 IEP was also repeated. New annual goals were provided for Communications/Speech and Language. Special Education and Related Services were continued, unchanged from the January 9, 2018 IEP – 11 hours per week of Specialized Instruction, including 8.5 hours outside of general education, 2 hours per month of Speech-Language Pathology and 1 hour per month of Behavioral Support Services. Exhibits P-11, P-13.

8. As of October 25, 2019, Student was reported to be Progressing on the Mathematics goals and the behavioral goal in the January 2, 2019 IEP. Student was

reported to have made no progress on annual IEP goals for Reading and Communication/Speech and Language. Exhibit R-25.

9. On November 15, 2019, Student's IEP team at City School met for the annual review of Student's IEP. The November 15, 2019 IEP repeated the prior IEP information about Student's behavior at school which impeded education. Student's Mathematic skills had advanced, but Student was still two years below grade level. In Reading, Student was reported to score in the 1st percentile, below 99% of same grade peers. It was noted that Student was struggling with "retelling the story" for passages just read. For Special Education and Related Services, the November 15, 2019 IEP team revised Specialized Instruction Services to 5 hours per week in the General Education setting and 5 hours per week outside general education. Behavioral Support Services were increased to 120 minutes per month and Speech-Language Pathology was continued at 2 hours per month. Exhibit P-16.

10. DCPS schools have been closed, with some distance learning provided, since March 16, 2020 due to the Coronavirus emergency. Hybrid learning, a mix of in-person and virtual learning, has been offered as an option for some students in the 2020-2021 school year. Hearing Officer Notice. Since March 2020, Student has not returned to school for any in-person classes. Testimony of LEA Representative.

11. On or about September 23, 2020, City School conducted an Analysis of Existing Data concerning Student in anticipation of a special education eligibility reevaluation. The team reviewed the 2017 psychological evaluation, formal norm-based

assessments, results of previous interventions, current progress reports and related services notes. Exhibit P-135. The record does not indicate that DCPS conducted any formal reevaluation assessments of Student.

12. Student's eligibility for special education as a child with Specific Learning Disability (SLD) was affirmed on January 9, 2018. On November 15, 2020, DCPS provided Prior Written Notice (PWN) to Mother that Student continued to be eligible as a student with an SLD and that the eligibility determination was based on formal and informal assessments, including norm-based assessments (TRC, i-Ready, ANet), progress reports, and blended learning reports. According to the PWN, due to Student's tendency to shut down, the eligibility team decided that a virtual assessment of Student would not be beneficial. Exhibits R-10, R-11. City School did offer Mother in-person testing of Student, which Mother did not pursue at the time. Testimony of LEA Representative.

13. As of October 30, 2020, Student was reported to be Progressing on one Mathematics annual goal, one Reading goal and the behavioral goal in the November 15, 2019 IEP. Student had made no progress on the remaining November 15, 2019 IEP annual goals for Mathematics, Reading and Communications/Speech and Language. Exhibit R-25.

14. On November 6, 2020, Student's IEP team at City School met for the annual review of Student's IEP. The November 6, 2020 IEP repeated the prior year IEP information about Student's behavior at school impeding education. In Mathematics,

Student was reported to test 1 to 2 years below grade level, except for 3 years below in measurements. In Reading, based on classroom performance, Student was reported to continue to struggle with decoding Consonant-Vowel-Consonant and with reading high-frequency word phrases. It was reported that based on the Text Reading and Comprehension (TRC) assessment, Student remained basically at the beginning of kindergarten (RB) level. For Special Education and Related Services, the November 6, 2020 IEP team revised Student's Specialized Instruction Services to 8.5 hours per week outside the General Education setting and 2.5 hours per week in general education. Behavioral Support Services were continued at 120 minutes per month and Speech-Language Pathology was continued at 2 hours per month. Exhibit P-20.

15. On March 29, 2021, City School amended Student's IEP to provide for Extended School Year (ESY) services. Exhibit R-42.

16. In spring 2021, Independent Psychologist conducted a comprehensive psychological evaluation of Student. This was an independent educational evaluation funded by DCPS. In his May 14, 2021 evaluation report, Independent Psychologist reported, *inter alia*, that Student has been referred by Mother for an independent comprehensive psychological evaluation of cognitive, academic, emotional, social, and behavioral functioning; that Student is currently identified as a student with Specific Learning Disability and that based on historical and current evaluation data, Student demonstrated a decline in cognitive functions. He reported that the earliest measure of Student's cognitive functions fell within the low average range. Subsequently, in 2017,

Student's verbal abilities fell within the below average range while Student's non-verbal abilities were better developed and fell within the average range. He reported that on current testing, Student's performance indicated that Student's overall cognitive functioning measured in the Very Low range compared to same-aged peers (General Intellectual Ability (GIA) = 46; <0.1 Percentile) and Student's Visualization scale score fell within the average range indicating an area of possible cognitive strength.

Independent Psychologist noted that Student's non-verbal abilities, which likely fall in the below average to average range, could be the best estimate of Student's cognitive functions; that Student demonstrated a severe language-based learning disability which significantly impacts academic functioning and that specifically, oral language, basic reading, written expression, and mathematic skills fell within the extremely low range compared to same age peers. Independent Psychologist noted that Mother's report indicated likely regression of Student's learned skills due to limitations related to remote instruction. Regarding adaptive skills, Independent Psychologist reported that Student demonstrated mild to moderate impairments across the conceptual and social domains of functioning. Independent Psychologist reported that Student's competence in language and core academic skill is very low; that Student's spoken and written language is quite limited in vocabulary and grammar, so social connections with others likely are impacted; that informal teacher-based observations indicated that Student gets along with peers and that observed interactions had been appropriate. Independent Psychologist recommended, *inter alia*, that Student receive full-time specialized

instruction in all academic areas including reading, writing, math, and oral language skills. Exhibit R-35. As of the due process hearing date, Independent Psychologist's May 14, 2021 psychological evaluation report had not yet been reviewed by Student's IEP team.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

I.

Was DCPS' January 2, 2019 IEP inappropriate for Student in that DCPS

failed to provide an adequate level and appropriate setting for both specialized instruction and related services, failed to provide appropriate IEP goals, failed to provide Extended School Year (ESY) services and failed to conduct a Functional Behavioral Assessment (FBA) and provide a Behavior Intervention Plan (BIP)?

Was DCPS' November 15, 2019 IEP inappropriate for Student in that DCPS failed to provide an adequate level and appropriate setting for both specialized instruction and related services, failed to provide appropriate IEP goals, failed to provide Extended School Year (ESY) services and failed to conduct an FBA and provide a BIP?

Was DCPS' November 6, 2020 IEP inappropriate for Student in that DCPS failed to provide an adequate level and appropriate setting for both specialized instruction and related services, failed to provide appropriate IEP goals, failed to provide Extended School Year (ESY) services and failed to conduct an FBA and provide a BIP?

Petitioner's first claims go to the alleged inappropriateness of the DCPS individualized education programs (IEPs) developed for Student by the City School IEP teams. The complaint alleges that Student's IEPs, beginning in January 19, 2019, were inappropriate. At the prehearing conference, Petitioner's Counsel clarified that Petitioner does not seek relief for acts or omissions that occurred more than two years before the due process complaint was filed on March 5, 2021. Therefore, in this decision, I consider only the appropriateness of the November 15, 2019 and November 6, 2020 IEPs.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed

through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128. In the present case, the Petitioner has not asserted a claim that DCPS failed to comply with the IDEA's procedural requirements in developing Student's IEPs. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Were DCPS' November 15, 2019 and November 6, 2020 IEPs for Student inappropriate because the respective IEPs failed to provide an adequate level and appropriate setting for both specialized instruction and related services, failed to provide appropriate IEP goals, failed to provide Extended School Year (ESY) services and because DCPS failed to conduct an FBA and provide a BIP?

Judge Contreras explained in *A.G. v. District of Columbia*, No. CV 19-2148 (RC), 2020 WL 6799139, at *12 (D.D.C. Nov. 19, 2020) how a hearing officer should evaluate the appropriateness of an IEP:

The Supreme Court has stated that to be appropriate and constitute a FAPE, a student's IEP must form the basis for an educational program that is 'reasonably calculated to enable the child to receive educational benefits.' *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 995–96 (2017) (*citing Rowley*, 458 U.S. at 207). When determining if a given IEP is appropriate, a court must undertake a "fact-intensive" inquiry into the "unique circumstances of the child for whom it was created," that ultimately asks not if the IEP is ideal, but rather if it is reasonable. *Id.* at 999, 1001 (internal quotations omitted). This reasonableness standard incorporates deference to school officials due to their subject matter expertise and judgment, though the court still "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his [or her]

circumstances.” *Id.* at 1002.

A.G. at *12.

Special Education and Related Services in the November 15, 2019 IEP

DCPS’ November 15, 2019 IEP, like the prior January 2, 2019 IEP, identified Mathematics, Reading, Communication/Speech and Language and Emotional-Social-Behavioral Development as areas of concern for Student. For Special Education and Related Services, the November 15, 2019 IEP provided for Student to receive 10 hours per week of Specialized Instruction Services (SI Services), divided equally between hours inside and outside of general education. This was a retrenchment from the January 2, 2019 and January 9, 2018 IEPs, which provided for Student to receive 11 hours per week of Specialized Instruction including 8.5 hours outside the general education setting. For related services, the November 15, 2021 IEP provided for Student to receive 120 minutes per month of Behavioral Support Services and 2 hours per month of Speech-Language Pathology. Petitioner contends that the decision of the November 15, 2021 IEP team to reduce, rather than substantially increase, IEP SI Services was not appropriate for Student.

Whether Student made meaningful academic progress under the prior January 2, 2019 IEP is highly probative of whether the November 15, 2019 IEP, with somewhat reduced SI Services, offered Student a FAPE. *See, e.g., Andrew F. by & through Joseph F. v. Douglas Cty. Sch. Dist. RE 1*, 290 F. Supp. 3d 1175, 1184 (D. Colo. 2018), appeal dismissed *sub nom. Andrew F. by & through Joseph & Jennifer F. v. Douglas Cty. Sch.*

Dist. Re-1, No. 18-1089, 2018 WL 4360885 (10th Cir. Apr. 5, 2018) (Minimal progress in prior educational plans insufficient to show that continuation, with minimal changes, reasonably calculated to enable Student to make progress).

In the January 2, 2019 IEP, it was reported that Student struggled with self regulation, did not handle disappointments or difficult assignments in an appropriate manner, often shut down and refused to complete assigned tasks. For Mathematics, Student was reported to be two years behind grade level and to know very few math facts. In Reading, Student was also reported to be two years below grade level and to recognize very few sight words. Student was described as “learning to read when . . . peers are reading to learn.” At the time of the November 15, 2019 IEP review meeting, Student’s self-regulation challenges were reported unchanged. Student’s Mathematic skills had advanced since the January 2, 2019 IEP meeting, but Student was still two years below grade level. In Reading, Student was described as “far below grade level” and reported to score in the 1st percentile, below 99% of same grade peers. The IEP reported that Student would need “intensive intervention and focus to jump three grade bands.”

Petitioner’s expert, Independent Psychologist opined in his testimony that with these continued academic deficits, there was no justification for reducing Student’s SI Services in the November 15, 2019 IEP and that, in fact, Student needed full-time specialized instruction outside the general education setting. DCPS’ expert witness, LEA Representative, as well as Special Education Teacher, opined that the November 15,

2019 IEP was appropriate but neither DCPS witness provided a “cogent and responsive explanation” for the decision of the November 15, 2019 IEP team to reduce, rather than substantially increase, Student’s SI Services, where Student was 3 years below grade level in Reading and 2 years below in Mathematics.

The DCPS witnesses’ explanation for the November 15, 2019 IEP team’s decision to shift most of Student’s SI Services from outside of general education to the regular classroom was also unpersuasive. LEA Representative and Special Education Teacher explained that the IEP team reduced Student’s pull-out instruction, because outside the general education setting, Student “shut down” more when challenged with difficult work. According to Special Education Teacher, when placed with peers in the general education classroom, Student would not shut down so much. However, these educators’ testimony conflicted with the testimony of another DCPS witness, School Social Worker, who provided Student’s Behavioral Support Services. School Social Worker stated that Student felt more comfortable and performed better in a small group setting. Moreover, according to the January 2, 2019 IEP, Student worked better in the smaller group setting and needed small group instruction. I conclude that DCPS has not met its burden of persuasion that the decision of the City School November 15, 2019 IEP team to provide Student only 10 hours per week of SI Services, including 5 hours outside general education, was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Andrew F., supra*, at 1002.

Petitioner also claims that the November 15, 2019 IEP did not offer Student

sufficient Speech-Language Pathology or Behavioral Support Services. However, DCPS' expert, Speech-Language Pathologist opined that the IEP provision for 2 hours per month of Speech-Language Pathology was appropriate. School Social Worker opined that Student had made behavioral progress under the January 2, 2019 IEP and the November 15, 2019 IEP increased those services to 120 minutes per month. Petitioner did not rebut this evidence. I find that DCPS has met its burden of persuasion that the provisions in the November 15, 2019 IEP for the hours of Speech-Language Pathology and Behavioral Support Services were reasonable. *See A.P., supra.*

Special Education and Related Services in the November 6, 2020 IEP

The City School IEP team conducted the next annual review of Student's IEP on November 6, 2020. At the time of this IEP review, DCPS' school buildings had been closed since March 2020 due to the Coronavirus pandemic and Student was receiving only on-line instruction. On current IEP progress reports, Student was reported to have made no progress on November 2019 IEP annual academic goals except for one Mathematics and one Reading goal where Student was reported to be progressing. For Present Levels of Performance, the November 6, 2020 IEP stated that Student had progressed in Mathematics but was still testing at 1 to 3 years below grade level. In Reading, Student scored years below grade level on the Text Reading and Comprehension (TRC) assessment – basically at the beginning of kindergarten (RB) level.

The November 6, 2020 IEP team marginally increased Student's SI Services from

10 hours to 11 hours per week, divided between 8.5 hours outside general education setting and 2.5 hours in the regular classroom. Related services were continued unchanged. Petitioner's expert, Independent Psychologist, opined, as he did with the November 15, 2019 IEP, that given the severity of Student's deficits in fall 2020, 11 hours per week of SI Services was not appropriate and Student needed a full-time, outside of general education special education program. DCPS' expert, LEA Representative, attributed Student's rate of progress to the challenges of virtual instruction and testified that she was satisfied that the services in the November 6, 2020 IEP were appropriate.

While the difficulty of providing a free appropriate public education to Student, and all children with disabilities, during the pandemic is self-evident, local education agencies were not relieved of their obligation to provide FAPE to each child with a disability. *See* U.S. Department of Education: *Questions and Answers on IDEA Part B Service Provision* (September 28, 2020). At the time of the November 6, 2020 IEP team meeting, Student was achieving far below grade level in academics, especially in Reading, and had not made progress on several prior year IEP goals. On these facts, I find that DCPS has not offered a "cogent and responsive explanation" for the decision of the City School IEP team to increase Student's SI Services by only 1 hour per week to 11 hours total. I find that DCPS has not met its burden of persuasion that the SI Services in the November 6, 2020 IEP were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F., supra.*

As with the November 15, 2019 IEP, DCPS' experts, Speech-Language Pathologist and School Social Worker opined, without rebuttal, that the provisions for Speech-Language Pathology and Behavioral Support Services in the November 6, 2020 IEPs were appropriate. I find that DCPS has met its burden of persuasion that the related services provided in the November 6, 2020 IEP were appropriate.

Annual Goals, Extended School Year, Functional Behavioral Assessment

Petitioner claims also that the November 15, 2019 and November 6, 2020 IEPs were further inappropriate because the IEPs did not provide appropriate annual goals, did not provide for Extended School Year (ESY) services and did not include a Behavior Intervention Plan (BIP) based on a Functional Behavioral Assessment (FBA).

In light of my decision that these IEPs did not offer Student appropriate SI Services, it is not necessary to address whether the IEP annual goals were appropriate. *See Adams v. District of Columbia*, 285 F. Supp. 3d 381 (D.D.C. 2018) (“[W]hen an HOD finds an IDEA violation, ‘[w]hether the Hearing Officer based such a finding on one, or two, or three alleged violations is irrelevant—the result would be the same.’” *Id.* at 391, quoting *Green v. District of Columbia*, 2006 WL 1193866, at 9 (D.D.C. May 2, 2006)).

With regard to Extended School Year services, under the D.C. Regs., in determining whether ESY services are necessary for the provision of FAPE, the IEP team must consider and document each of the following:

- (a) The impact of break in service on previously attained or emerging

critical skills;

(b) The likelihood and degree of regression related to previously attained or emerging critical skills; and

(c) The time required for recoupment of previously attained or emerging critical skills.

5E DCMR § 3017.2 (2018). “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008), adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)). See, also *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’”)

Petitioner did not make a showing that at the time of the 2019 and 2020 IEP annual review meetings, the information available to the IEP team showed that Student’s gains during the regular school year would likely be significantly jeopardized without ESY services. Moreover, DCPS’ expert, LEA Representative, testified, without rebuttal, that ESY services were not provided in Student’s 2019 and 2020 IEPs because testing data showed that Student continued to progress from the end of one school year to the beginning of the next. I find that DCPS has established that omitting ESY services in the November 15, 2019 and November 6, 2020 IEPs was not inappropriate. (On

March 29, 2021, City School amended Student's IEP to provide for ESY services for summer 2021.)

With regard to Student's alleged need for a functional behavioral assessment (FBA) at the time of the November 15, 2019 and November 6, 2020 IEPs were developed, Petitioner has the burden of persuasion on this issue. Petitioner's expert, Independent Psychologist, noted that the beginning with the January 2, 2019 IEP, the City School IEP team reported that Student struggled with self regulation, did not handle disappointments or difficult assignments in an appropriate manner, often shut down and refused to complete assigned tasks. Independent Psychologist opined that at minimum, DCPS should have conducted an FBA to assess these behaviors and provide a basis for a Behavior Intervention Plan (BIP). DCPS' expert, School Social Worker disagreed. She testified that an FBA was not needed for Student because school staff knew why Student's behaviors were happening and they were addressing the challenge with Behavioral Support Services. Nor had the parent requested an FBA.

"FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017). With regard to whether City School needed a formal FBA to determine the function or purpose of Student's shut-down behavior, I found School Social Worker's testimony more credible. School Social Worker testified that she has known Student since 2017 and has provided Student's IEP behavioral

support services. Independent Psychologist first became acquainted with Student when he conducted the IEE Comprehensive Psychological Evaluation in spring 2021. He has not attended any of Student's IEP team meetings and has not observed Student in the school setting. I further find that the opinion of School Social Worker, that an FBA was not needed, is entitled to some deference. *Cf. T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.) I conclude that Petitioner did not meet her burden of persuasion that Student required an FBA at the time the November 15, 2019 or November 6, 2020 IEPs were developed. (School Social Worker did conduct an FBA of Student, at Mother's request, in May 2021 after the due process complaint was filed.)

II.

In light of Student's alleged lack of academic progress, did DCPS' review of records for Student's triennial reevaluation in 2020, without any new comprehensive assessments, constitute a denial of FAPE?

Student's eligibility for special education as a child with Specific Learning Disability (SLD) was affirmed on January 9, 2018. On November 15, 2020, DCPS provided Prior Written Notice (PWN) to Mother that Student continued to be eligible as a student with an SLD. The November 15, 2020 eligibility determination was based on formal and informal assessments, including norm-based assessments (TRC, i-Ready, ANet), Progress reports, and Blended Learning reports. According to the PWN, due to Student's tendency to shut down, the eligibility team decided that virtual assessment of Student would not be beneficial. However, Mother did not avail herself of in-person

testing of Student which City School offered. Petitioner alleges that DCPS' failure to conduct formal reevaluation assessments of Student, in connection with the fall 2020 eligibility determination, was a denial of FAPE. Petitioner has the burden of persuasion on this claim.

The IDEA mandates that special education reevaluations must be conducted at least every three years. It is up to the child's MDT team to first review existing data and then identify what additional data are needed for the triennial assessment. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -641. (August 14, 2006) ("The review of existing data is part of the reevaluation process. The IEP Team and other qualified professionals, as appropriate, must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child." *Id.* at 641.)

In this case, Student's MDT team reviewed existing data on Student in September 2020 and decided that it did not need additional data to confirm that Student continued to have a qualifying SLD disability and what were Student's educational needs. At the time, Mother did not request formal reevaluations. When Mother did request IEE psychological and speech and language reevaluations in spring 2021, DCPS authorized funding authorization for the IEE assessments. On this evidence, I find that Mother has not established that the City School MDT team's decision not to request comprehensive

formal assessments of Student in fall 2020 was a denial of FAPE.

Remedy

In this decision, I have determined that DCPS failed to meet its burden of persuasion that its November 15, 2019 or November 6, 2020 IEPs, specifically the IEPs' provisions for Specialized Instruction Services, were appropriate for Student. For relief, Petitioner initially requested that DCPS be ordered to place Student in a non-public therapeutic day school; to conduct additional assessments, including a Psychological and/or Neuropsychological evaluation, a Speech-Language evaluation, an Occupational Therapy (OT) evaluation, an Assistive Technology (AT) evaluation and an FBA, and to revise Student's IEP. Petitioner also sought an award of compensatory education for the denials of FAPE established in this case.

DCPS has already authorized funding for IEE psychological and speech-language reevaluations of Student and the agency has conducted an FBA. At the due process hearing, Petitioner withdrew her request for an OT evaluation and she provided no evidence on the need for an AT assessment. I, therefore, decline Petitioner's request to order DCPS to fund additional assessments.

No evidence was offered at the hearing that Student's least restrictive environment (LRE) is a non-public therapeutic day school. The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities – regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. I find that

the hearing evidence did not establish that Student's LRE is a special school, such as a therapeutic day school, for children with disabilities.

As of the hearing date, Student's IEP team had not yet considered Independent Psychologist's May 14, 2021 comprehensive psychological evaluation of Student or his placement recommendations. At the due process hearing, Independent Psychologist recommended that Student receive full-time specialized instruction outside the general education setting. At this stage, I find that it is appropriate to defer to Student's IEP team to decide, in the first instance, what revisions to Student's IEP are now needed, including whether a full-time self-contained classroom is Student's least restrictive environment (LRE). *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012) (IDEA requires that students with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate.) I will order DCPS to ensure that Student's IEP team is promptly convened to consider the IEE psychological and speech-language reevaluations and to review and revise Student's IEP in light of the additional information and in accordance with this decision.

The Petitioner also seeks compensatory education for Student. The D.C. Circuit Court of Appeals explained the compensatory education remedy in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has "broad discretion to fashion an appropriate remedy," which can go beyond prospectively providing a FAPE, and

can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education “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.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.

An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

B.D., 817 F.3d at 797–98.

Petitioner’s expert, Independent Psychologist, recommended a compensatory education award for Student of 360 hours of academic tutoring. This proposal was intended to compensate Student for not receiving full-time, 25 hours per week, SI Services during the 2018-2019 and 2019-2020 regular and extended school years. According to Independent Psychologist, this totaled 1,136 missed hours of SI Services. His recommendation amounts to an award ratio of approximately .32 hours of compensatory education for each hour of missed services.² But, in this decision, I did not find that the period of harm encompassed the full 2018-2019 and 2019-2020 school years. I found that the denial of FAPE ran from November 16, 2019, when the first IEP

² DCPS did not offer evidence on appropriate compensatory education.

at issue was developed, through the end of the 2020-2021 school year. Also, it was not established that Student required ESY services.

Accepting, for purposes of this analysis, Independent Psychologist's opinion that DCPS' November 15, 2019 and November 6, 2020 IEPs should have provided for Student to receive 25 hours per week of SI Services, I calculate that the amount of "shorted" SI Services was 336 hours (24 weeks x 14 hours) in the 2019-2020 school year and 504 hours (36 weeks x 14 hours) in the 2020-2021 school year, for a total of 840 hours. Following Independent Psychologist's recommended .32 to 1 compensatory education ratio, which I find reasonable, I will award Student 269 hours of academic tutoring as compensatory education for the denials of FAPE in this case.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. To assure completion of a revised IEP for the start of the 2021-2022 school year, DCPS shall ensure that Student's IEP team, including the parent and her representatives, convenes promptly, no later than July 23, 2021 to review Independent Psychologist's IEE psychological reevaluation report and the IEE speech-language reevaluation, if completed, as well all other information needed to update and revise Student's IEP as appropriate and in accordance with this decision. The IEP team shall give careful consideration to Independent Psychologist's recommendation that Student be placed in a full-time special education setting and, should the IEP team decide that Student requires a less restrictive environment, DCPS shall ensure that the justification for that decision is fully and diligently documented;
2. As compensatory education for the denials of FAPE found in this decision, DCPS shall promptly issue funding authorization for the parent to obtain 269

hours of independent academic tutoring for Student to be provided by a qualified special educator and

3. All other relief requested by the Petitioner herein is denied, without prejudice to Petitioner's right to seek future relief for the IEP and placement determinations made hereafter by Student's IEP team, as ordered in this decision.

Date: June 21, 2021

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
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