

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
June 03, 2023

Parent, by and through Student¹,)	
Petitioner,)	
)	
v.)	Michael Lazan, Hearing Officer
)	Hearing Dates: 5/9/23; 5/11/23
)	Case No.: 2023-0048
District of Columbia Public Schools,)	
Respondent.)	
District of Columbia Public Schools,)	
Petitioner,)	
)	
v.)	Michael Lazan, Hearing Officer
)	Hearing Dates: 5/9/23; 5/11/23
)	Case No.: 2023-0070
Parent, by and through Student,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a pair of cases involving an X-year-old student (the “Student”) who is not currently eligible for services. A due process complaint (“Complaint”) was filed by the Student’s parent (“Parent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) and received by District of Columbia Public Schools (“DCPS”) on March 20, 2023. This case (# 2023-0048) was assigned to this Hearing Officer on March 21, 2023. The Hearing Officer Determination (“HOD”) was due on June 3, 2023.

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

On March 31, 2023, DCPS filed a response for Case # 2023-0048. A resolution meeting was held on March 31, 2023, for Case # 2023-0048, without an agreement being reached. The resolution period for Case # 2023-0048 expired on April 19, 2023.

A second due process complaint notice was filed by DCPS against Parent on April 21, 2023. This case (# 2023-0070) was assigned to this Hearing Officer on April 24, 2023. There was no resolution period because the claims were brought by the Local Educational Agency (“LEA”). The HOD for this case was due on June 5, 2023.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

On April 18, 2023, a prehearing conference was held for Case # 2023-0048. Attorney A, Esq., counsel for Parent, appeared. Attorney B, Esq., counsel for DCPS, appeared. On April 21, 2023, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

On April 24, 2023, Parent requested Notices to Appear for Witness A and Witness B. On April 26, 2023, Parent filed a motion for summary judgment with respect to Case # 2023-0048. On May 5, 2023, DCPS opposed the motion. On May 5, 2023, Parent replied to the opposition. Also on May 5, 2023, a second prehearing conference was held which focused on the claims raised in Case # 2023-0070. Appearing were Attorney A, Esq., attorney for Parent, and Attorney B, Esq., attorney for DCPS. On May

8, 2023, the original prehearing conference order was revised to reflect the consolidated cases and to add issues relating to Case # 2023-0070.

On May 9, 2023, the Notices to Appear for Witness A and Witness B were signed. The matter proceeded to trial through the Microsoft Teams videoconferencing platform on May 9, 2023. Attorney A, Esq., counsel for Parent, appeared. Attorney B, Esq., counsel for DCPS, appeared. The motion for summary judgment was denied and testimony and evidence were presented. All testimony and evidence concluded on May 9, 2023. On May 11, 2023, the parties presented closing arguments. The Parent filed a written citation list on May 17, 2023. DCPS filed a written citation list on May 18, 2023.

During the proceeding, Parent moved into evidence exhibits P-1 through P-10 without objection. DCPS moved into evidence exhibits R-1 through R-10 without objection. Parent presented as witnesses, in the following order: Witness A, a teacher at School B; Witness B, a special education coordinator and LEA representative for School B (expert in special education programming and placement); and herself. DCPS presented as witnesses, in the following order: Witness C, a school psychologist; and Witness D, a social worker (expert in social work).

IV. Issues

As identified in the revised Prehearing Conference Order and in the due process complaints, the issues to be determined in these cases are as follows:

1. Did DCPS fail to respond to the Parent's requests for an evaluation of the Student between September 2020 and June 2022? If so, did DCPS violate 34 C.F.R. Sect. 300.301(b) and related authority? If so, did DCPS deny the Student a Free Appropriate Public Education ("FAPE")?

2. Did DCPS violate "Child Find" by failing to identify, locate, and evaluate the Student for IDEA eligibility between September 2020 and June 2022?

If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related authority? If so, did DCPS deny the Student a FAPE?

3. Did the Parent improperly fail to consent to an evaluation of the Student in April 2023?

At the hearing, the parties agreed to modify Issue #3 as follows:

3. Should the Hearing Officer override the Parent's revocation of consent to evaluate the Student in April 2023?

The Parent seeks an evaluation of the Student (including an independent comprehensive psychological assessment, a speech assessment, and an occupational therapy assessment) and an eligibility meeting to discuss the assessments. Parent also requests that this Hearing Officer retain jurisdiction for the purposes of determining whether compensatory education is due.

DCPS's position is that there were no such requests for an evaluation and that there was no evidence before it that the Student needed to be identified and evaluated for special education services. DCPS pointed out that it is currently seeking to evaluate the Student, but that the Parent withdrew consent for the evaluation. DCPS requests that this Hearing Officer override Parent's failure to consent to DCPS's evaluations.

V. Findings of Fact

1. The Student is an X-year-old who is currently ineligible for services. Recent testing indicated that the Student functions below grade level in math, particularly in math calculation. The Student also exhibits a clinically significant level of depression at school. The Student's teachers report that s/he is withdrawn, pessimistic, and/or sad. The Student quickly loses motivation or interest in classroom tasks. The Student works best in small groups and with verbal prompts, manipulatives, and visual cues. R-8.

2. On August 23, 2016, DCPS determined the Student to be eligible for services as a student with speech or language impairment. R-3-1. The Student transferred out of DCPS to School A PCS, which determined the Student to be ineligible for services in or about December 2017. Testimony of Witness B; R-3.

3. During the 2019-2020 school year, the Student moved back to DCPS and attended School B, a DCPS public school with a dual language component. During this school year, the Student's parents both actively participated in the Student's education. Testimony of Witness B. Early in the school year, Witness A, the Student's then-teacher, spoke to the Student's father about the Student's performance in the classroom. The Student's father felt that the Student's emotions ran "extremely hot and cold" and that s/he had trouble negotiating his/her personal space, among other issues of concern. Witness A also spoke with the Student's mother, the Parent, who said that the Student had had an IEP and that she had concerns about the Student's emotional state and ability to regulate him/herself. The Parent told Witness A that she would like to talk to someone in the special education department about her concerns. Witness A communicated with the school psychologist about two conversations that Witness A had with the Parent, and Witness A asked about next steps. Testimony of Witness A; P-8-1.

4. During the 2019-2020 school year, Witness A did not feel the need to refer the Student for an evaluation. Witness A was influenced by the fact that the Student was new to School B and his/her reading scores were at grade level. In March 2020, DCPS transitioned to virtual instruction. The Student passed all his/her classes for the 2019-2020 school year. Testimony of Witness A.

5. On DCPS report cards, “4” means “advanced” or “exceeds expectations,” “3” means “proficient” or “meets expectations,” “2” means “basic” or “approaches expectations,” and “1” means “below basic” or “significantly below grade level.” During the 2019-2020 school year, the Student’s grades were generally “3” or “2,” with a “4” in reading for term two. It was noted that the Student needed limited prompting in areas such as completing work on time, following directions, and returning homework. In reading, the Student was deemed to be at the “S” (secure) or “D” (developing) level. In writing and language, the Student was deemed to be at the “B” (basic) or “D” level. By the third term of the school year, the Student’s writing was deemed to be at the “D” level. In math, the Student was deemed to be at the “S”, “B,” or “D” level during the school year. By the third term, the Student was deemed to be at the “D” level in math in most areas. P-2; R-4. Parent began having concerns about the Student at School A during the 2019-2020 school year. Parent was concerned about the Student’s cognitive ability, learning ability, and behaviors. Testimony of Parent.

6. The Student continued at School B during the 2020-2021 school year, which was largely conducted virtually. On October 1, 2020, on the i-Ready measure in reading, the Student scored 505, at grade level. On the next i-Ready reading test, administered on February 17, 2021, the Student’s score decreased to 437, below grade level. On the following i-Ready reading test, administered on June 8, 2021, the Student’s score was 442, below grade level, and his/her vocabulary was found to be well below grade level. R-4A-1. On October 4, 2020, on the i-Ready measure in math, the Student scored 358, well below grade level. On February 16, 2021, the Student’s i-Ready math score decreased to 335. On June 15, 2021, the Student’s i-Ready math score increased to

388, but that score was still below grade level. The Student scored at the kindergarten level in measurement and data. R-4A-3.

7. During the 2020-2021 school year, the Student received mostly “3” grades in reading. The Student received lower grades in writing, including a “1” for the second term. The Student received “2” grades in math. The Student’s report card noted that s/he had issues with completing and returning homework and needed limited prompting to follow directions, use time wisely, listen to others, and exhibit self-control. Teacher comments indicated that the Student grew as a reader, writer, and mathematician during the school year. The report card also put the Student’s reading at above grade level. In reading and writing and language, the Student was deemed to be at the “D” level for most of the year. The Student was deemed to be at the “D” level in most academic areas at the end of the school year. P-3; R-4.

8. The Student continued at School B for the 2021-2022 school year. During the first part of this school year, Parent expressed concerns to DCPS staff about the Student, particularly about a low test score. Also, the Student’s teacher was “complaining” to Parent about the Student. Testimony of Parent.

9. During the 2021-2022 school year, the Student’s grades were “2” in writing and language, “2” in reading, and “1” in math for every term. The Student often required prompting to turn in homework and complete work on time, and needed limited prompting in areas such as following directions. The teacher indicated that the Student showed “great effort.” In reading and writing and language, the Student was at the “B” or “D” level during the year. The Student was deemed to be at the “D” level in all

reading and writing areas at the end of the school year. In math, the Student was deemed to be at the “B” level in most areas at the end of the school year. P-4; R-4.

10. The Student continued to attend School B for the 2022-2023 school year. On October 20, 2022, a meeting was held to discuss placement changes for the Student. Parent wanted the Student to move from Program X to Program Y within School B. Discussion topics at the meeting included the Student’s academic data, proposed “MTSS” supports, and how to gather additional data for a future “AED” meeting to explore if the Student should be identified as a student with a Specific Learning Disability in mathematics. Witness C reported that the Student performed within normal limits socially and emotionally. A special education teacher reported that the Student exhibited growth in math. An English language arts teacher indicated that the Student exhibited growth in reading and writing. Witness B asked Parent if she was aware of any referrals and if she wanted to take the Student out of Program X. Parent communicated a desire to pull the Student out of Program X because s/he needed more instruction in math. Witness B asked Parent if she could wait two months for the team to gather data through MTSS, since the Student’s teachers did not suspect a disability. The team and Parent agreed to gather data for eight weeks and use that data to move forward with testing. During this October 20, 2022, meeting, Parent noted that she had been frustrated for years by DCPS’s inaction. Parent referred to the Student’s report cards and progress reports as evidence to support the need to evaluate the Student. Testimony of Witness B; Testimony of Witness C; R-5. The Student transferred to Program Y at School B in November 2022. R-8-5.

11. During the 2022-2023 school year, in math, the Student often had a positive attitude toward school but frequently avoided nonpreferred activities by withdrawing and crying. The Student had issues with focus and effort in the classroom. R-8-5. The Student's report cards indicated that the Student struggled this school year. The Student received "1" math grades and also a "1" in writing for the second term, though his/her ELA grade was "2" overall. R-8-15. Middle-of-year data indicated that the Student functioned well below grade level on the HMH Reading Inventory measure, one year below grade level on the i-Ready reading measure, and two years below grade level on the i-Ready math measure. R-8-15.

12. All students at School B receive "Tier 1" universal support in the classroom. Tier 1 interventions include daily attendance taking, core instruction with differentiation, the "Class DoJo" behavior management system, and a "Seven Habits of Highly Effective People" curriculum. Based on the Student's beginning-of-year benchmark assessments, s/he was identified as needing additional "Tier 2" MTSS intervention through small groups. The Student completed one six-week cycle of "Tier 2" math intervention to improve computation skills. The Student's goal was to score at least 80% on the Eureka Equip assessment, but s/he did not meet that goal. The Student's lack of effort and poor attitude affected his/her participation and motivation in the small group interventions. R-8-5. By December 2022, the Student no longer received MTSS math instruction. R-8-17.

13. Parent signed a consent to evaluate the Student on February 23, 2023. Parent was given a copy of procedural safeguards at the time, and DCPS then conducted a psychological evaluation of the Student. Witness C administered the Woodcock

Johnson-Fourth Edition Tests of Cognitive Abilities (“WJ-IV Cog”), Woodcock Johnson-Fourth Edition Tests of Achievement (“WJ-IV Ach”), and Behavior Assessment Scale for Children-Third Edition (“BASC-3”) Teacher Report and Self Report Clinical Interviews (teachers, Parent, and Student). Witness C also conducted observations and a record review. The Student’s General Ability Index on the WJ-IV Cog was 78, in the low range. On the WJ-IV Ach, the Student’s reading and writing were in the average range, but the Student’s math skills were in the low range, with math calculation in the very low range. BASC-3 scales from the Student’s teacher showed that the Student had clinically significant scores in internalizing problems, externalizing problems, behavioral symptoms index, anxiety, depression, school problems, aggression, atypicality, and withdrawal. R-8-13-14. The Student’s score for depression was much higher (signifying greater deficits) than the scores in all other areas. Witness C said that she thought the Student was ineligible for IDEA services based on the data available. Witness C felt that the evidence did not show a discrepancy between cognition and achievement, and that the Student therefore did not meet the eligibility criteria as a student with a Specific Learning Disability. Witness C deemed the “scientific research-based interventions method” to be inapplicable due to insufficient MTSS data. Witness C indicated that the Student’s low math calculation score did not “align” with his/her quantitative reasoning and ability to manipulate stimuli, but Witness C also indicated that she could not determine if the Student had a pattern of strengths and weaknesses in performance, achievement, or both, because MTSS was not implemented with fidelity. R-8-11-R-8-18.

14. As part of the evaluation, Witness C observed the Student for thirty minutes during a math class with fifteen students. The Student started working

appropriately but then appeared confused and worked slowly. Witness C observed the Student looking away from the board and struggling to follow the lesson. The Student did not participate in the class discussion. At one point, the Student was asked to go the board to finish the problem, and s/he stated, "I give up." The teacher provided encouragement and prompted him/her step-by-step. The Student then correctly solved the problem. R-8-6.

15. Parent withdrew consent for DCPS's evaluation of the Student on April 4, 2023. R-9A-1. The Student currently goes to an after-school program that evaluates the Student. Testimony of Parent.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement" provided that "the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency." D.C. Code Sect. 38-2571.03(6)(A)(i). Otherwise, the burden of persuasion is on the party filing the due process complaint. Since neither Issue #1 nor Issue #2 directly involves a challenge to the Student's IEP or placement, the burden of persuasion is on the Parent. On Issue #3,

while relates to Case # 2023-0070, the burden of persuasion rests on the LEA, which filed the second due process complaint.

1. Did DCPS fail to respond to the Parent’s requests for an evaluation of the Student between September 2020 and June 2022? If so, did DCPS violate 34 C.F.R. Sect. 300.301(b) and related authority? If so, did DCPS deny the Student a FAPE?

D.C. Code Section 38–2561.02 is entitled “Assessment and placement of a students with a disability—General.” Section (a)(2)(a) states that, beginning on July 1, 2018, the LEA is required to “assess and evaluate any student who may have a disability and who may require special education services within 60 days from the date that the student’s parent or guardian provides consent for the evaluation or assessment.” The section also states that “a referral for an evaluation or assessment for special education services may be oral or written. An LEA shall document any oral referral within 3 business days of receipt.”

D.C. Code Section 38–2561.02 also states that the “LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation.” Consistent with the consent requirements in 34 C.F.R. Sect. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

There is no credible evidence that Parent requested an evaluation of the Student from DCPS between September 2020 and June 2022. Instead, Parent argued that she requested an evaluation from DCPS in 2019, when she spoke to Witness A, the Student’s teacher, who communicated with a school psychologist about the Student’s parents’ concerns with the Student’s education. The Student’s father spoke to Witness A about the Student’s performance in the classroom because his/her emotions ran “extremely hot

and cold” and s/he had trouble negotiating his/her personal space, among other issues.

The Parent told Witness A that the Student had had an IEP and that she had concerns about the Student’s emotional state and his/her ability to self-regulate. The Parent told Witness A that she would like to talk to someone in the special education department. Witness A communicated with the school psychologist about these conversations and asked the psychologist about next steps, but Witness A did not receive a response.

These activities all occurred in or about September 2019, as the correspondence in the record that memorialized these conversations was dated September 20, 2019.

Pursuant to 34 C.F.R. Sect. 300.507(a)(2), a “due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.” Parents can sometimes allege claims based on facts that occurred more than two years earlier if the parents did not understand their hearing rights. The question is then whether a parent knew or should have known (“KOSHK”) that they could request a due process hearing for a student during the subject time period.

Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 45 (D.D.C. 2016) (citing K.H. v. N.Y. City Dep’t of Educ., No. 12-cv-1680 (ARR)(MDG), 2014 WL 3866430, at *16 (E.D.N.Y. Aug. 6, 2014)). However, generally, a new KOSHK date is set only where a parent was prevented from acting because of specific misrepresentations by the LEA.

There is nothing in the record to suggest that DCPS or any LEA misrepresented anything to Parent in regard to her due process rights. To the contrary, prior to September 2019, Parent received at least one Prior Written Notice informing her of her rights under the IDEA. R-3-2. Parent was told that parents of a student with a disability have specific

rights under IDEA, as outlined in the procedural safeguards notice. Parent was told to contact the school to receive assistance with understanding the procedural safeguards notice or obtain more information about the process. But there is no record of the Parent ever contacting DCPS to ask if she had the right to file a due process complaint regarding an evaluation of the Student.

Moreover, Parent clearly understood at least some of her IDEA rights because she had requested an evaluation of the Student from an earlier LEA. The Parent contended that she thought that she had no right to request an evaluation from DCPS, but she apparently reached this conclusion on her own, not because of anything DCPS did. This Hearing Officer agrees with DCPS that Parent should have known that she had the right to file a due process complaint on this issue at the time of the occurrence in September 2019. As a result, claims relating to the events in September 2019 needed to be filed by September 2021 to satisfy the statute of limitations. These claims were not so filed and must therefore be dismissed.

2. Did DCPS violate “Child Find” by failing to identify, locate, and evaluate the Student for IDEA eligibility between September 2020 and June 2022? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related authority? If so, did DCPS deny the Student a FAPE?

The Child Find provisions of the IDEA require each state to have policies and procedures to ensure that all children with disabilities who reside in the state and who need special education services are identified, located, and evaluated. 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find is an “affirmative obligation.” Montuori v. District of Columbia, No. CV 17-2455 (CKK), 2018 WL 4623572, at *6 (D.D.C. Sept. 6, 2018). The District of Columbia Circuit Court of Appeals has stated that

the “Child Find” obligation is among IDEA’s “most important” requirements for an LEA. D.L. v. District of Columbia, 860 F.3d 713, 717 (D.C. Cir. 2017).

While an LEA cannot disregard clear signs that a student might have a disability, it does not have to evaluate at the first sign of problems. LEAs may consider factors such as the student's age and recent life events when determining whether a special education evaluation is necessary. Ja.B. v. Wilson Cnty. Bd. of Educ., No. 3:20-CV-00955, 2022 WL 326273, at *1 (M.D. Tenn. Feb. 2, 2022), report and recommendation adopted (Apr. 28, 2022), aff'd, 61 F.4th 494 (6th Cir. 2023) (student's noncompliant behaviors were not entirely unusual for a child who recently moved to a new state). Moreover, evidence of a student’s improved academic performance due to Section 504 or MTSS interventions can bolster a school district’s argument that a special education evaluation was unnecessary or premature. Legrís v. Capistrano Unified Sch. Dist., No. 20-56261, 2021 WL 4843714, at *1 (9th Cir. Oct. 18, 2021) (by highlighting a student’s ability to earn A’s, B’s, and C’s in the general education curriculum with Section 504 accommodations, the school district showed it had no reason to suspect a need for special education).

Parent contended that the Student should have been evaluated by DCPS by September 2020. However, as in the analysis of Issue #1, claims accruing prior to March 20, 2021, must be dismissed because of the two-year statute of limitations. Parent’s claims are therefore live only with respect to the portion of the 2020-2021 school year starting on March 20, 2021.

Parent said that she spoke with the Student’s teacher during the 2020-2021 school year about whether the Student might be autistic, and whether another teacher might be more appropriate for the Student. i-Ready testing also showed that the Student had some

issues during the 2020-2021 school year. On October 1, 2020, on the i-Ready measure in reading, the Student scored 505, at grade level. After a full year of school, the Student's score was 442, below grade level.

However, during the 2020-2021 school year, the Student's grades were mostly "3" in reading, and the final report card indicated that the Student was reading above grade level. While the Student had lower grades in writing, including a "1" for the second term, and "2" grades in math, the teacher's comments indicated that the Student exhibited growth during the year as a reader, writer, and mathematician. The Parent did not present any witnesses who taught the Student during the 2020-2021 school year, so there is no testimony to explain why the Student's i-Ready scores that year were low. The Student's grades and scores suggest that DCPS should have kept a close eye on this Student during the 2020-2021 school year, especially since much of the instruction that year was virtual. However, given the teacher's effusive comments on the Student's report card, this Hearing Officer is not convinced that Parent has met the burden to show that DCPS needed to evaluate the Student for special education services during the 2020-2021 school year.

But if there was a question about whether the Student should have been evaluated during the 2020-2021 school year, that question was resolved during the 2021-2022 school year. The Student's math scores were below grade level coming into the 2021-2022 school year. Then, during the 2021-2022 school year, the Student's grades in math were "below basic" or "significantly below grade level" for every term. Accordingly, in the section of the report card that detailed the Student's skill levels in academic areas, the Student was reported to be at the basic level in math on every measured skill during the

first two terms. Nothing suggests that these issues were a question of “effort.” To the contrary, the Student’s final report card for the 2021-2022 school year indicated that s/he showed great effort during the school year.

DCPS contended that it did not need to evaluate the Student because s/he has a relatively low IQ, and academic issues should be expected with children who have lower cognitive ability. DCPS did not fail to evaluate the Student because it felt that the Student had a low IQ. There is nothing in the record to suggest that DCPS knew or even suspected that the Student had a low IQ during the 2020-2021 and 2021-2022 school years. To the contrary, the record suggests that the LEA was not concerned about the Student’s intelligence, since the Student tested in the high average range in letter-word identification and in the average range in reading and writing. No testing prior to the testing by Witness C indicates that the Student had cognitive issues. Indeed, the psychological assessment of the Student that DCPS recently conducted referenced testing from 2016 that determined that the Student was functioning in the average range cognitively. R-8-4.

DCPS argued that its witnesses, who are experts, said that the Student has successfully accessed the general curriculum, including in math. But these experts did not even try to explain the Student’s below basic math skills during the 2021-2022 and 2022-2023 school years, which should have served them as evidence of the Student’s deficit. Moreover, these witnesses did not have personal knowledge of the Student’s performance during the 2020-2021 and 2021-2022 school years.

DCPS also suggested that there was no need to refer the Student for evaluation because s/he had been promoted from grade to grade, but this position is not supported by

law. Child Find must include any child suspected of being a child with a disability and in need of special education, even if they advance from grade to grade. 34 C.F.R. Sect. 300.111(c)(1); Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008).

Finally, DCPS suggested that the Student's real problem was that s/he was assigned to general education classes in Program Y, the Student's current placement, when s/he belonged in Program X. However, the difference between these two programs is language-based. The Student's main issue, math calculation, is not language-based. There is virtually nothing in the record to support a finding that Program X would solve the Student's problems in math any better than Program Y.

As a result of the foregoing, this Hearing Officer concludes that DCPS violated Child Find when it failed to evaluate the Student during the 2021-2022 school year.

3. Should the Hearing Officer override the Parent's revocation of consent to evaluate the Student in April 2023?

If a parent refuses to consent to an evaluation, or does not respond to requests for such consent, a school district may, but is not required to, pursue an initial evaluation of a child under the procedural safeguards in the IDEA. 34 C.F.R. Sect. 300.300(a)(3)(i). However, if a district shows that interventions are not working and recommends an IEP, a hearing officer may grant the district's request to override consent. Maritime Acad. Charter Sch., 121 LRP 20255 (SEA PA 05/06/21).

As relief for the Child Find violation, Parent is effectively seeking an Independent Educational Evaluation ("IEE"), consisting of a private psychological assessment, speech and language assessment, and occupational therapy assessment. In its due process

complaint, DCPS argued that no IEE should be granted because it alone has the right to evaluate the Student, pointing to Z. B. v. District of Columbia, 888 F.3d 515, 527 (D.C. Cir. 2018). DCPS also argued that Parent improperly stopped it from completing an evaluation of the Student when she revoked consent to such evaluation in April 2023.

However, as the Supreme Court has stated, the IDEA statute directs hearing officers to “grant such relief as [the hearing officer] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” 20 U.S.C. Sect. 1415(i)(2)(C)(iii). It is therefore appropriate for a hearing officer to order a school district to implement an existing IEP, revise an IEP to meet a student’s needs, develop an IEP, comply with a hearing officer’s order, evaluate a student, or institute a particular placement. Sch. Bd. of Manatee Cnty., Fla. v. L.H. ex rel. D.H., No. 808-CV-1435-T-33MAP, 2009 WL 3231914, at *3 (M.D. Fla. Sept. 30, 2009) (requiring a district to permit an independent evaluator to observe a student with Asperger’s syndrome in school for at least two hours).

There is nothing in Z.B. that suggests that the court intended to strip hearing officers of their authority to remedy violations, including through an IEE. 34 C.F.R. Sect. 300.502(d). When hearing officers order IEEs, these evaluations must be at public expense. 34 C.F.R. Sect. 300.502(d). Circumstances in which a hearing officer orders an evaluation will vary, but hearing officers have ordered new evaluations of students “so that the team has a comprehensive understanding of [a student’s] current strengths and needs, before it can consider where the special education and related services should be

provided.” Luo v. Roberts, No. CV 14-6354, 2016 WL 6831122, at *7 (E.D. Pa. Oct. 27, 2016), on reconsideration in part sub nom. Luo v. Owen J. Roberts Sch. Dist., No. CV 14-6354, 2016 WL 6962547 (E.D. Pa. Nov. 28, 2016), and aff’d sub nom. Jenn-Ching Luo v. Owen J. Roberts Sch. Dist., 737 F. App’x 111 (3d Cir. 2018); cf. Butler v. District of Columbia, 275 F. Supp. 3d 1, 5 (D.D.C. 2017).

DCPS contended that there is no need to perform an IEE of the Student, noting that it already conducted a psychological assessment of the Student and s/he does not need to be evaluated in speech or occupational therapy. However, this Hearing Officer finds the psychological assessment performed by Witness C to be unpersuasive.

Witness C found the Student’s math calculation skills to be in the very low range. Witness C said that the Student works “very slowly” on math calculation tasks and relies on the use of strategies that seem inefficient for his/her grade level. Witness C reviewed a report card for the 2021-2022 school year that indicated that the Student made no progress in math at all during the entire the school year; the Student was at the below basic level in math for all four terms. For the first two terms of the 2022-2023 school year, the Student has continued to receive “1” grades, indicating that s/he was still performing math at the below basic level. Witness C effectively suggested that the Student was not eligible for services because there was not a severe discrepancy between his/her math calculation score of 61 and his/her IQ of 78, in the low range.

However, the District of Columbia has directed LEAs not to over-rely on the discrepancy approach. As pointed out in a comprehensive decision by United States District Court Judge James Boasberg in Davis v. District of Columbia, 244 F. Supp. 3d (D.D.C. 2017), the United States Congress has expressed concerns with the discrepancy

approach, including that there was “no evidence that the IQ–achievement discrepancy formula can be applied in a consistent and educationally meaningful (*i.e.*, reliable and valid) manner.” S. Rep. 108–185, at 26 (2003). Judge Boasberg pointed out that, in the Specific Learning Disability context, these rules require a “holistic inquiry.” See also Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 80 (1st Cir. 2016); E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings, 652 F.3d 999, 1004 (9th Cir. 2011) (district must make a reasonable choice after “considering all relevant material available on a pupil”); Greenwich Bd. of Educ. v. G.M., No. 13-235, 2016 WL 3512120, at *12 (D. Conn. June 22, 2016) (finding that reliance on “one evaluative tool,” such as the intervention model, would “prematurely and improperly cut-off the disability review process”).

Accordingly, Witness C’s evaluation of the Student should have carefully considered his/her lack of progress in math over the past two years, including through MTSS interventions. Students can be determined to be eligible for services if they do not achieve when a school district employs scientific-based interventions, such as those used in MTSS classes. 34 C.F.R. Sect. 300.309(2)(i). Witness C contended that this section did not apply to make the Student eligible for services even though his/her MTSS intervention was not successful because s/he received interventions for only six weeks, and alternative interventions were not provided. However, there is no requirement for MTSS interventions to last more than six weeks. All that is required pursuant to 34 C.F.R. Sect. 300.309(2)(i) is a finding that the child does not make sufficient progress when using scientific, research-based interventions. 34 C.F.R. Sect. 300.309(a)(2)(i).

Moreover, Witness C's report did not carefully assess the applicability of the provisions in 34 C.F.R. Sect. 300.309(a)(2)(ii), which ask whether the child at issue exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, using appropriate assessments. It certainly appears that the Student has exhibited a pattern of strengths and weaknesses in performance, since his/her recent letter-word identification score was in the high average range and his/her math calculation score was in the very low range, at the level of a six-year-old. Indeed, Witness C indicated that the Student's low math calculation score does not "align" with his/her quantitative reasoning and ability to manipulate stimuli. But instead of comparing the Student's scores and concluding that the Student was exhibiting a pattern of strengths and weaknesses in performance, the evaluator dismissed the applicability of this provision because MTSS had not been implemented with fidelity and inadequate data had been collected. However, 34 C.F.R. Sect. 300.309(a)(2)(ii) does not reference MTSS, research-based interventions, or methods of instruction at all.

DCPS contended that it must conduct its own full evaluation before an IEE may be ordered. However, even aside from a hearing officer's authority pursuant to 34 C.F.R. Sect. 300.502(d), the failure of a school district to conduct an assessment can lead to an order directing the school district to authorize an IEE. Letter to Carroll, 68 IDELR 279 (OSEP 2016) (the failure to conduct an evaluation can result in an IEE); A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534 (D. Conn. 2002) (requiring reimbursement for evaluation when district did not conduct educational assessment); J.G. v. Douglas Cnty. Sch. Dist., 552 F.3d 786 (9th Cir. 2008) (reversing decision to refuse full reimbursement

of private evaluations of twins with autism when district did not promptly evaluate twins after special education referral, even though parents refused to share private evaluations with school district).

DCPS also said that it was not given a chance to conduct an evaluation of the Student, because Parent improperly withheld consent after granting it, and that it is ready to finish its comprehensive evaluation of the Student. However, in addition to the questions raised about the psychological evaluation performed by Witness C, the testimony of Witness B and Witness C made clear that DCPS did not plan to perform assessments in speech and language and occupational therapy, even though the psychological evaluation reported that the Student may have some difficulty processing language-based information efficiently in the classroom, and that the Student likely has a lot of difficulty with recalling. Moreover, Witness C testified during the hearing that it is possible that an occupational therapy assessment could relate to learning disability, suggesting that an assessment of the Student in this area is also needed.

Parent should therefore be granted an IEE for the Student's psychoeducational assessment, speech and language assessment, and occupational therapy assessment. Since these evaluations would be conducted independently,² there is no need to override the Parent's failure to consent to further DCPS evaluations pursuant to 34 C.F.R. Sect. 300.300(a)(3)(i).

² Parenthetically, the record includes references to the Student needing a Functional Behavior Assessment ("FBA") or Behavior Intervention Plan ("BIP"). Recent BASC-3 scales indicated that the Student is significantly affected by depression in school. Clearly, any assessments of the Student going forward should include some assessment of the Student's behaviors. However, the record does not contain a sufficient explanation of why the Student needs an FBA or BIP, and Parent did not mention the need for an FBA or BIP in the prehearing conference.

RELIEF

Most of the issues relating to relief involve Issue #3. In addition to the IEE, this Hearing Officer will order the eligibility team to reconvene to discuss the IEE. Parent asked this Hearing Officer to “retain jurisdiction” to preserve any compensatory education rights relating to the time period in question, apparently due to statute-of-limitations concerns. However, Parent did not clearly explain why this kind of order is necessary, and Parent provided no authority authorizing this kind of approach. This request is accordingly denied.

VII. Order

As a result of the foregoing:

1. DCPS shall authorize an IEE for the Student, which shall consist of an independent psychological assessment, speech and language assessment, and occupational therapy assessment;
2. Within thirty days of completion of the IEE, DCPS shall convene the eligibility team to discuss the assessments and determine the Student’s eligibility for special education services;
3. All other requests for relief by the Parent and by DCPS are denied.

Dated: June 3, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE

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[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Dated: June 3, 2023

Michael Lazan
Impartial Hearing Officer