

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 5/21/24, 5/24/24
v.)	Hearing Officer: Michael Lazan
)	Case No. 2024-0035
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 29, 2024. The Complaint was filed by the Student’s parent (“Petitioner”). On March 12, 2024, Respondent filed a response.

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.

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

III. Procedural History

A resolution meeting was held on March 11, 2024. The parties were unable to resolve the case. On March 26, 2024, a prehearing conference took place by telephone, attended by Attorney A, Esq., attorney for Petitioner, and Attorney B, Esq., attorney for DCPS. On April 2, 2024, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

On May 13, 2024, Petitioner moved to extend the timelines for the Hearing Officer Determination (“HOD”) to June 4, 2024. The motion was granted through an order dated May 14, 2024, which extended the deadline for filing the HOD accordingly. The matter proceeded to hearings on May 21, 2024, and May 24, 2024.

The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented oral closing statements on May 24, 2024. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-4; P-6 through P-8; P-10 through P-16; P-18; P-32; P-36; P-41; P-43 through P-46; P-48 through P-50; P-52 through P-72; P-74; P-75; and P-77 through P-85. DCPS objected to the following exhibits on the basis of relevance, hearsay, authentication, and lack of foundation: P-1 through P-3; P-12; P-13; P-46; P-53 through P-70; P-72; P-74; P-75; P-77 through P-80; P-84; and P-85. These objections were overruled. Exhibits P-1 through P-4; P-6 through P-8; P-10 through P-16; P-18; P-32; P-36; P-41; P-43 through P-46; P-48 through P-50; P-52 through P-72; P-74; P-75; and P-77 through P-85 were admitted. Respondent moved into evidence exhibits R-1 through R-35 without objection.

Petitioner presented as witnesses, in the following order: Witness A, a clinical psychologist (expert in psychology as it relates to autism diagnosis needs and psychological evaluations); herself; Witness B, an audiologist/speech-language pathologist (expert in speech and language as it relates to evaluation and student speech and language needs); and Witness C, a special education advocate and educational consultant (expert in special education as it relates to Individualized Educational Program (“IEP”) programming).

Respondent presented, as witnesses, in the following order: Witness D, the Student’s special education teacher (expert in special education); Witness E, a speech-language pathologist (expert in speech/language); and Witness F, a Local Educational Agency (“LEA”) representative (expert in special education).

IV. Issues

As identified in the Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did DCPS fail to timely and comprehensively evaluate the Student by failing to conduct a comprehensive psychological evaluation and a Functional Behavioral Assessment (“FBA”) from the 2022-2023 school year to the present? If so, did DCPS fail to provide the Student with a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that a psychological evaluation must include cognitive, academic, adaptive, and social-emotional testing.

2. Did DCPS fail to provide the Student with an appropriate IEP and/or placement from the 2022-2023 school year to the present? If so, did DCPS fail to provide the Student with a FAPE?

Petitioner contended that the Student’s IEP/placement did not provide sufficient behavioral interventions (no Behavior Intervention Plan, or “BIP”), was not based on

sufficient evaluative data, did not recommend enough speech and language pathology, and did not place the Student in the least restrictive environment (“LRE”).

3. Did DCPS fail to implement the Student’s IEP during the 2022-2023 school year? If so, did DCPS fail to provide the Student with a FAPE?

Petitioner contended that the Student’s speech and language pathology mandate was not implemented.

As relief, Petitioner seeks a finding that DCPS shall conduct (or fund) and review a comprehensive psychological evaluation of the Student that includes cognitive, academic, adaptive, and social-emotional testing and an FBA; that DCPS shall amend the Student’s IEP to increase speech and language therapy services to sixty minutes per week and provide a BIP; that upon completion of the above-referenced evaluations, DCPS shall convene a meeting to review the evaluations and further revise the Student’s IEP as appropriate; that DCPS shall provide the Student with an appropriate placement and/or program based on the results of the evaluations; and that DCPS shall provide the Student with compensatory education for its denials of FAPE to the Student. Petitioner also seeks to preserve the Student’s right to additional compensatory education upon the completion of additional evaluations.

V. Findings of Fact

1. The Student is an X-year old who is eligible for services as a student with autism. The Student can read at a kindergarten level but cannot read material at a first-grade level. The Student also struggles with math, where s/he is at a second-grade level. Testimony of Witness C.

2. The Student likes to go to “specials” classes. The Student makes good eye contact and displays positive body language. Testimony of Witness E. Petitioner wants the Student to be placed in a general education classroom. Testimony of Petitioner.

3. On February 23, 2017, the Student was diagnosed with Autism Spectrum Disorder, Receptive/Expressive Language Disorder, and Developmental Delay by a physician at a medical facility in Florida. The physician wrote that “it is deemed medically necessary for this child to receive Behavior Analysis Services.” The physician recommended speech language therapy and comprehensive special education supports for the Student. P-75.

4. A psychoeducational evaluation of the Student was conducted by a school district in Florida in 2019. The ensuing report of May 7, 2019, found that the Student’s cognitive abilities were above average, at the 91st percentile. P-4. The report included a discussion of an observation of the Student, during which the Student received speech and language pathology in a group of eight. The Student’s performance during the observation was mixed. The Student eagerly waited his/her turn, chose a “hug” image, and then happily embraced the pathologist. But the Student was also observed to engage in hand-flapping and rocking, and had a difficult time with turn-taking. The results of the evaluation indicated that the Student’s cognitive ability fell within the high range on the Wechsler Nonverbal Scale of Ability. However, academic assessment on the School Readiness Composite of the Bracken Receptive test produced scores in the Very Delayed range when compared to same-aged peers. The evaluation included an Autism Spectrum Rating Scale (“ASRS”), which was completed by Petitioner and a teacher. The ASRS yielded a parent score in the Very Elevated range and a teacher score in the Elevated

range. P-4. These scores suggested that the Student had issues with processing information. Testimony of Witness A.

5. An IEP for the Student by a Florida school district, dated September 23, 2021, indicated that the Student needed services to address issues in communication, curriculum, learning environment, and social-behavioral and independent functioning. The Student was offered a general education program with typically developing peers, with small-group instruction in reading and math for thirty minutes per week, speech therapy twice per week for thirty minutes, and language therapy twice per week for thirty minutes. The IEP reported that the Student scored 332 on the i-Ready measure in reading and a 335 on the i-Ready measure for math, both at the kindergarten level. P-14.

6. The Student and Petitioner moved to the District of Columbia in 2021. The Student was then enrolled at a behavioral support-oriented “BES” classroom at Charter School A. Testimony of Petitioner.

7. A speech and language evaluation of the Student was conducted in April 2022 by Hospital A. On the Goldman-Fristoe Tests of Articulation, the Student scored the lowest possible score, at the <0.01 percentile. The Comprehensive Assessment of Spoken Language, Second Edition (“CASL-2”) was also administered. The Student’s scores were all in the deficient range, except in receptive vocabulary, where the Student scored in the below-average range. The evaluator concluded that the Student presented with severe mixed receptive-expressive language disorder, which was characterized by difficulty with complex vocabulary, syntax, and higher order language. Additionally, the evaluator concluded that the Student had a severe phonological disorder characterized by atypical lateral lisp on certain sounds. P-14. The Student’s receptive language skills

were found to be approximately 1.5 standard deviations from the mean, and the Student's expressive skills were found to be approximately 2.0 standard deviations from the mean.

Testimony of Witness B.

8. An IEP was written by Charter School A in September 2022. The IEP indicated that the Student's behavior impeded his/her ability to access instructional content, and that the Student might lose instruction due to emotional tantrums. The IEP indicated that the Student demonstrated weaknesses with expressive and receptive language skills and benefited from having directions repeated and complex directions simplified. The IEP expressed concerns about articulation and indicated that the Student benefitted from an adult model for sounds that s/he had difficulty producing. The IEP indicated that the Student was functioning at the kindergarten level in math and reading. The IEP stated that the Student sometimes got upset easily, which caused him/her to cry and refuse to complete assignments. The IEP stated that the Student required small-group instruction and appropriate strategies for managing emotions to help him/her learn how to regulate his/her emotions and stay on task during instruction. The Student was offered 24.5 hours per week of specialized instruction outside general education, with thirty minutes per week of behavioral support services and sixty minutes per week of speech services. The IEP was amended to add Extended School Year ("ESY") services on February 8, 2023. P-17.

9. Petitioner was not satisfied with the Student's learning at Charter School A. Petitioner therefore arranged for the Student to move to School A. When the Student enrolled in School A, Petitioner told the school's staff that the Student was autistic and had attended Charter School A. The IEP team at School A sought evaluations from

Charter School A, but despite multiple attempts to contact Charter School A, there was no response. DCPS then decided to place the Student in a Communication and Education Support (“CES”) classroom, as this was the only classroom available at School A where the IEP could possibly be implemented. DCPS felt that the classroom would be appropriate, based on the Student’s eligibility classification of autism. Testimony of Witness D.

10. The Student’s i-Ready scores in April 2023 were 393 in both reading and math. P-11-7.

11. In or about April 2023, a meeting was held for the Student during which DCPS proposed reducing his/her speech services by half. P-72. DCPS emphasized that the Student’s articulation issues were not severe. Witness E, a DCPS speech-language pathologist who attended this meeting, indicated that she wanted to review the October 2022 speech evaluation and conduct additional testing of the Student with respect to speech. Witness E noted that the Student was able to engage appropriately with games, take turns, use social language, and follow two-step directions. Witness E also maintained that the Student was able to attend and engage in both structured and non-structured language-based activities. Testimony of Witness E.

12. During the rest of the 2022-2023 school year, the Student demonstrated a desire to learn and interacted well with preferred peers. However, s/he was not always able to handle conflict in a healthy way and did not always use coping strategies when s/he became angry or frustrated. Instead, the Student would sometimes become physically aggressive when provoked. P-20 at 208. The Student’s IEP progress report for the third term of the 2022-2023 school year indicated that s/he was making progress

or mastering all goals. The report mentioned that the Student required constant drill and practice for him/her to even approach mastery of a goal related to blending. P-19.

13. For the 2022-2023 school year, the Student received speech-language pathology services at DCPS in April 2023 (125 minutes), May 2023 (120 minutes), and June 2023 (sixty minutes). Three additional attempts were made to provide the Student with speech-language pathology in May 2023, but the Student was absent. R-34.

14. An eligibility meeting was held for the Student on May 3, 2023. At this meeting, Witness C raised concerns about the Student's placement, but Witness C was told that there was a deadline for placement reviews and that a change of placement could only be considered with respect to the 2024-2025 school year. Testimony of Witness C; Testimony of Petitioner.

15. An IEP meeting was held for the Student on July 31, 2023. Petitioner expressed concerns about the Student's articulation skills and DCPS's proposed reduction in speech-language pathology. DCPS emphasized the Student's improvement in articulation, reported that s/he was accessing materials in class, and concluded that the CES classroom was appropriate for the Student. DCPS was influenced by the fact that the CES classroom is designed for students' communication issues, which made related services, such as speech-language pathology, not as necessary. Testimony of Witness D; P-72. This IEP indicated that the Student's behavior impacted his/her learning and that s/he might lose instruction due to emotional tantrums. The IEP indicated that the Student demonstrated weaknesses with expressive and receptive language skills, benefitted from having directions repeated and complex directions simplified, and had articulation concerns that could impact his/her speech intelligibility. The Student again received a

full-time special education program of 24.5 hours per week of specialized instruction outside general education, with thirty minutes per week of behavioral support services outside general education and sixty minutes per week of speech services outside general education. This IEP was amended with changes to the statements describing the Student's academic levels on August 8, 2023. P-22.

16. On August 17, 2023, Petitioner sent a letter of dissent to Respondent, expressing her concerns that, among other things: 1) the Student's IEP contained too much repetition; 2) the Student's speech and language pathology mandate was improperly reduced without corresponding data; 3) the Student's present levels of performance were not properly described; 4) the IEP did not address the Student's emotional and behavioral issues properly; and 5) the goals on the IEP had issues. P-58.

17. The Student's i-Ready scores in September and October 2023 were 382 in math and 371 in reading. Both scores were below previous scores, indicating that the Student had not gained skills. P-11-7; Testimony of Witness C.

18. For the 2023-2024 school year, the Student has continued in the CES classroom at School A. The CES class contains two non-verbal students and four verbal students, including the Student. Some of these students have assistive technology needs, some function at the kindergarten level, and some function as high as the fourth-grade level in certain areas. Testimony of Witness D.

19. During the 2023-2024 school year, the Student has tended to be shy in class and exhibited significant deficits in communicating and processing information. The Student has also performed well below age and grade level on school-based assessments. In reading, the Student has been able to identify letters of the alphabet and

recognize some sound blends and high frequency words, but has lacked genuine fluency in reading. In written language, the Student has struggled to write letters. The Student's area of strength has been math, where s/he has been able to engage in computing simple addition and subtraction problems. However, computing math word problems has been challenging as a result of the Student's deficits in reading. P-11.

20. The Student's language issues have been apparent in the CES class. In October 2023, DCPS conducted a speech-language pathology evaluation of the Student through Witness E, who administered the Goldman-Fristoe Test of Articulation-III ("GFTA-3"), Peabody Picture Vocabulary Test-5 ("PPVT-5"), Expressive Vocabulary Test-3 ("EVT-3"), and Clinical Evaluation of Language Fundamentals-Fifth Edition ("CELF-5"). Testimony of Witness E; P-8.

21. On the CELF-5, the Student received a Receptive Language Index score of 82. This was a relative area of strength, though the Student was in the below-average range of language functioning. Witness E found that, on the GFTA-3, the Student did not have articulation issues. However, on the PPVT-5, the Student scored at the 5th percentile, and on the EVT-3, s/he scored at the 6th percentile. On the Expressive Language Index, a measure of performance on three tests that probe expressive aspects of language, including oral language expression, the Student received a score of 65, in the below-average range of language functioning. Difficulty was noted in his/her ability to use language to gain new information, analyze text, and share ideas without support from the listener. On the Language Memory Index, the Student scored at the 2nd percentile. Witness E concluded that the Student demonstrated articulation skills and receptive language skills that allowed him/her to participate in his/her education classroom with

appropriate accommodations, though weaknesses were noted in pragmatic language and expressive language. R-15; Testimony of Witness B; Testimony of Witness E.

22. By November 2023, DCPS still did not have any information from Charter School A. P-63-2. At this time, Petitioner sought an FBA and a BIP for the Student. Testimony of Witness C.

23. During the first reporting period of the 2023-2024 school year, the Student's received several "1" grades, signifying below-basic skills in reading, writing, and math. The Student's grades during both the second and third reporting periods were mainly in the "2" range, signifying below-grade skills. P-11. The Student's behavior has improved during the 2023-2024 year, as indicated in progress reports that stated that s/he never threatens or bullies other students, is rarely physically aggressive towards peers, never instigates peer conflicts by teasing or saying put-downs, never challenges teachers' authority, is never reprimanded for bad classroom behavior, rarely argues with classmates, and rarely argues or becomes upset when corrected. P-23.

24. The Student's progress report for the second term of the 2023-2024 school year revealed progress on goals, some of which were mastered. However, two of the four speech goals were not introduced. R-22. The Student's i-Ready scores in March 2024 were 392 in reading (one point below the score from April 2023) and 387 in math (also a decline from the score in April 2023). P-11-7.

25. An IEP meeting was held for the Student on February 12, 2024. The IEP that resulted from the meeting indicated that Student's behaviors did not significantly impact his/her academics but that s/he had expressive and receptive language issues. The IEP indicated that the Student needed help with directions, still had articulation issues,

and needed a role model for language, but had made progress in overall communicative functioning. The Student was again recommended for a full-time program, with 25.5 hours per week of specialized instruction outside general education, two hours per month of behavioral support services in a group outside general education, and ninety minutes per month of speech services in a group outside general education. R-19.

26. A confidential comprehensive psychological reevaluation of the Student was conducted on April 18, 2024. The Student's teacher told the psychologist that the Student could comprehend text written at a second-grade level, read short passages, and answer "wh" questions about key details of the text. The teacher said that the Student was performing at the kindergarten level in phonics and decoding skills. The teacher said that the Student needed small group, one-on-one instruction, computer-based interventions, repetition and clarification of directions, additional opportunities for re-teaching, and hands-on learning to support his/her learning needs. The teacher also said that the Student needed repetition of directions when given a task, especially a multi-step task, but diligently completed assignments. The Student was reported to be on a reward schedule each week and considered well-behaved. An observation of the Student was conducted for approximately one hour to gain information about his/her behavior and interactions in the school setting. The Student was cooperative in class and did his/her assignments. The Student was able to follow three-step directions. No disruptive or off-task behaviors were observed. P-11-10.

27. The Student was also tested as part of this reevaluation. On the Reynolds Intellectual Assessment Scales ("RIAS"), the Student's cognitive scores were below average in verbal skills, but in the average range in non-verbal skills. The Student's

scores on the Woodcock-Johnson Tests of Achievement-IV were in the very low range in every sub-category except in math fluency, where the Student was in the low range. On the Gilliam Autism Rating Scale-III (“GARS-III”), the Student’s teacher gave the Student an Autism Index score of 52, which fell within the “Unlikely/Not ASD” range for the probability of autism. P-11-14-15.

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). Accordingly, on Issue #1 and Issue #3, the burden of persuasion is on Petitioner. On Issue #2, the burden of persuasion is on Respondent if Petitioner presents a *prima facie* case.

1. Did DCPS fail to timely and comprehensively evaluate the Student by failing to conduct a comprehensive psychological evaluation and an FBA from the 2022-2023 school year to the present? If so, did DCPS fail to provide the Student with a FAPE?

A child’s initial evaluation or reevaluation must consist of two steps. First, the child’s evaluators must “review existing evaluation data on the child,” including any evaluations and information provided by the child’s parents, current assessments,

classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. Sect. 300.305(a)(1). Then, based on a review of the existing data and input from the child's parent, the school district must identify what additional data, if any, is needed to assess whether the child has a qualifying disability and, if so, administer such assessments and other evaluation measures as needed. 34 C.F.R. Sect. 300.305(a)(2)(c). The LEA is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." 34 C.F.R. Sect. 300.304(b). A student must be "assessed in all areas related to the suspected disability." 34 C.F.R. 300.304(c)(4).

If a school district violates these provisions, a parent does not necessarily prevail. A parent has the burden to demonstrate that a student was denied a FAPE as a result. Not all procedural violations constitute FAPE denials. Only those procedural violations that affect a student's substantive rights deny that student a FAPE. McLean v. District of Columbia, No. 16-2067, 264 F. Supp. 3d 180, 183-84, 2017 WL 3891669, at *3 (D.D.C. Sept. 5, 2017). A hearing officer may find that a procedural violation caused the denial of a FAPE in any of three circumstances: the procedural inadequacy "(i) [i]mpeded the child's right to a FAPE; (ii) [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) [c]aused a deprivation of educational benefit." 34 C.F.R. Sect. 300.513(a)(2).

There is no dispute that the Student needed a psychological evaluation, which was recently completed. The issue is when this evaluation should have been completed. DCPS argued that there was no reason, and no indication, that the Student should have been evaluated earlier and there was no harm in having him/her evaluated eventually.

During testimony, Witness F stated that, now that the Student's psychological evaluation has been completed, DCPS could consider other placements for the Student. This testimony is significant. Witness F effectively stated that DCPS was previously restricted from considering alternative placements because the Student lacked a psychological evaluation. Effectively, Witness F admitted that DCPS could not have developed a genuinely individualized education program for the Student without a psychological evaluation. DCPS blamed the lack of a psychological evaluation on the unresponsiveness of Charter School A, but DCPS did not provide any convincing data to show that it had made all possible efforts to get the information from Charter School A. And even if DCPS had made every effort possible to obtain the documents, I am aware of no authority to suggest that the duty to reevaluate is suspended when there is a failure to obtain data from another school.

DCPS also argued that no reevaluation was due to the Student, but in fact, in March 2023, DCPS had no clear knowledge of whether the Student had ever been evaluated or not. In fact, the evidence showed that the Student was last evaluated in May, 2019, which suggests that DCPS had a duty to convene a triennial evaluation of the Student in by March, 2023. Under these circumstances, DCPS should have conducted its own evaluation of the Student, so that it could develop a detailed IEP based on data. Instead, the Student's initial and subsequent IEPs from DCPS were based on his/her eligibility classification (which is not supposed to be the basis for services, per OSSE's own guidelines) and the fact that School A had only one class that could implement the Student's IEP from Charter School A.

It should be added that this finding is not based on a conclusion that the Student needed an FBA as part of his/her reevaluation. While the record indicates that the Student did have significant behavioral issues prior to the 2023-2024 school year, the Student was new to DCPS in 2022-2023, and DCPS needed to assess whether the behavior support services were working for the Student before an FBA was necessary. Moreover, the record indicates that the Student has benefitted from the behavior support services that DCPS provided, to the point where the Student now behaves quite well in class for much of the day, though the Student continues to lag academically. A recent progress report indicated that the Student never threatens or bullies other students, is rarely physically aggressive towards peers, never instigates peer conflicts by teasing or saying put-downs, never challenges teachers' authority, is never reprimanded for bad classroom behavior, rarely argues with classmates, and rarely argues or becomes upset when corrected.

Still, DCPS denied the Student a FAPE by failing to evaluate the Student from March 2023 to the filing of the psychological evaluation report on April 18, 2024.

2. Did DCPS fail to provide the Student with an appropriate IEP and/or placement from the 2022-2023 school year to the present? If so, did DCPS fail to provide the Student with a FAPE?

Petitioner contended that the Student's IEP/placement did not provide sufficient behavioral interventions (no BIP), was not based on sufficient evaluative data, did not recommend enough speech and language pathology, and did not place the Student in the LRE.

The IEP is the "centerpiece" of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). In Endrew F. v. Douglas County School District, 580 U.S. 386 (2017), the Court held that

an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 399. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 404. However, the “educational program must be appropriately ambitious in light of...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 objectives.” Id. at 402. An IEP that fails to satisfy these statutory directives may be remedied through an IDEA claim to the extent that the IEP “denies the child an appropriate education.” Z.B. v. District of Columbia, 888 F.3d 515, 519 (D.C. Cir. 2018).

In Questions and Answers on Endrew F. v. Douglas County School District RE-1, 71 IDELR 68 (EDU 2017), the United States Department of Education reinforced the Supreme Court's decision in Endrew F. and clarified that if it turns out that a child is not making progress at the level the IEP team expected, the team must revisit the IEP with the Endrew F. standard in mind and revise it as necessary to ensure the student is receiving appropriate special education and related services and that the goals are individualized and ambitious. The memorandum affirmed that the IDEA provides for revisiting the IEP if the expected progress is not occurring, and that “This is particularly important because of the Court’s decision in Endrew F., which clarifies that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is

appropriate in light of the child’s circumstances.” The memorandum indicated that, if a child is not making expected progress toward his or her annual goals, the IEP team must revise, as appropriate, the IEP to address the lack of progress. Olympia School District, 123 LRP 17977 (SEA WA 05/17/23) (absenteeism and lack of engagement should have caused a district to revisit the IEP); Upper Sandusky Exempted Village Schs., 82 IDELR 40 (SEA OH 2022) (student’s removal from school five times within three weeks should have prompted the IEP team to address the student’s recurrent social and behavioral problems, since they were evident from attendance records, behavior logs, discipline, and removals).

DCPS’s witnesses said that it could not consider all possible placements for the Student without a current psychological evaluation of the Student. In other words, DCPS needed to conduct its own psychological evaluation of the Student to allow the Student full access to its own programs, at least if documents from the prior school were not available. However, DCPS failed to conduct its own psychological evaluation of the Student until April, 2024, which forced the Student into a CES setting solely because of the unavailability of other settings. Not surprisingly, the Student has not succeeded in the CES classroom. When asked about the Student’s academic progress, the Student’s teacher, Witness D, answered indirectly and without conviction. The Student’s i-Ready scores in reading and math declined from last year, suggesting that any progress mentioned in his/her progress reports was not a full picture of his/her performance. DCPS presented little evidence that the instruction in the CES program provided the Student with enough support in math, reading, and speech-language to enable him/her to generalize any meaningful academic skills, which remain far below grade level.

Moreover, this Hearing Officer agrees with Witness B that the reduction of the Student's speech services was inappropriate. This is an autistic student with significant expressive and receptive language delays. On the testing conducted by DCPS's own speech-language pathologist, the Student received an Expressive Language Index score of 65, placing him/her in the below-average range in language functioning. Difficulty was also noted in the Student's ability to use language to gain new information, analyze text, and share ideas without support from the listener. On the Language Memory Index, a measure of performance on three tests designed to probe memory-dependent language tasks, the Student received a score at the 2nd percentile. The IEPs themselves indicated that the Student had expressive and receptive language issues that impacted him/her in the classroom. DCPS argued that the Student was able to functionally communicate in class, but the record instead suggests that the Student has had difficulty expressing him/herself in class. DCPS's own psychological evaluation stated that the Student needed repetition and clarification of directions, additional opportunities for re-teaching, and hands-on learning to support his/her learning needs. DCPS suggested that the CES classroom provided the Student with significant speech intervention, but there is virtually nothing in the record to explain how the Student might have made progress in speech through the CES classroom.

Finally, this Hearing Officer does not agree with Petitioner's contention that the Student was not being educated in the LRE, primarily because Petitioner's own expert witness, Witness C, said as much. This Hearing Officer also does not agree that the Student needed an FBA or a BIP, based on the reasoning set forth in the section devoted to Issue #1.

This Hearing Officer finds that DCPS denied the Student a FAPE when it failed to base the IEPs created during the 2022-2023 and 2023-2024 school years on sufficient data and failed to provide the Student with enough intervention in speech-language pathology.

3. Did DCPS fail to implement the Student’s IEP during the 2022-2023 school year? If so, did DCPS fail to provide the Student with a FAPE?

Petitioner contended that the Student’s speech and language pathology mandate was not implemented.

The IDEA is violated when a school district materially deviates from a student’s IEP. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C.2011). A material failure occurs when there is a “more than a minor” discrepancy between services a school provides to a disabled child and services required by the child’s IEP. Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir.2007). “(T)he materiality standard does not require that the child suffer demonstrable education harm in order to prevail.” Wilson, 770 F. Supp. 2d at 275 (emphasis in original) (quoting Van Duyn, 502 F.3d at 822). Rather, “it is the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” Turner v. District of Columbia, 952 F. Supp. 2d 31, 41 (D.D.C. 2013) (citing Wilson, 770 F. Supp. 2d at 775).

For the 2022-2023 school year through the April, 2023 IEP, the Student was entitled to 240 minutes per month of speech-language pathology. Most of this time period was spent at Charter School A. The Student moved to School A in March, 2023. DCPS then changed the speech-language pathology mandate in the April, 2023 IEP, determining that the Student was entitled to 120 minutes per month of services.

During the 2022-2023 school year at School A, the Student received speech-language pathology services as follows: 125 minutes in April 2023, 120 minutes in May 2023, and sixty minutes in June 2023. DCPS made three additional attempts to provide the Student with speech-language pathology in May 2023, but s/he was absent.

When the Student moved to School A, the Student did not receive speech in March 2023, and did not receive a full amount of services in April, 2023. But DCPS was able to satisfy the mandate in May and June (which is not a full month of school), and it appears that DCPS tried to make up for the missed services by providing the Student with more opportunities for speech services in May, 2023. This Hearing Officer is aware of no caselaw supporting the notion that a one-month or so delay in arranging related services for a new student, especially a new student arriving in the middle of the school year, is tantamount to FAPE denial. Compare Turner, 952 F.2d 41 (D.D.C. 2014) (the District of Columbia’s failure to provide specialized instruction to a transfer student with other health impairment between the time that he enrolled and the time that an IEP was developed five months later was significant, and the district court held that it constituted a denial of FAPE). Moreover, Petitioner presented no specific, on-point caselaw in support of this claim. This claim is dismissed.

RELIEF

During closing argument, Petitioner sought compensatory education, a change in placement, and an increase in the Student’s speech-language pathology mandate.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School

Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

In regard to the request for compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). 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 from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award tailored to the unique needs of the disabled student”). A petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner seeks ninety hours of academic tutoring as compensatory education for the Student’s FAPE denials. Given the extensiveness of the proposed compensatory education plan, the credentials and credibility of the expert who proposed it (Witness C,

whose testimony was reasonable and consistent), and the lack of any compelling testimony to the contrary, this Hearing Officer finds the plan to be a reasonably calculated award, given that the Student was denied a FAPE starting in March 2023 and that the issues related to the Student's program have still not been resolved. It is noted that this Student, who is still apparently having issues even writing letters, appears to be very much in need of compensatory services.

This Hearing Officer also agrees with Petitioner's request to increase the Student's speech-language pathology mandate to 240 minutes per month, for the reasons stated in the section of this HOD relating to Issue #2. In regard to Petitioner's request for a new placement for the Student, this Hearing Officer agrees that a new placement is needed, as indicated earlier in this HOD. However, there is no evidence in the record that describes alternative placements for the Student. This Hearing Officer is therefore constrained to decline to order a specific new placement for the Student. However, the IEP team should clearly consider other placements for the Student for the 2024-2025 school year, in light of the Student's failure to progress pursuant to the pertinent data, and in view of the conclusions expressed in this HOD.

VII. Order

As a result of the foregoing:

1. Respondent shall pay for 90 hours of compensatory tutoring for the Student, to be provided by a certified special education teacher, at a usual and customary rate in the community;
2. Respondent shall amend the Student's IEP to require 240 minutes of speech services per month;

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2024-0035

3. Petitioner's other requests for relief are denied.

Dated: June 4, 2024

Michael Lazan
Impartial Hearing Officer

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

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 4, 2024

Michael Lazan
Impartial Hearing Officer