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OSSE
Office of Dispute Resolution
March 12, 2019

Confidential

<p>Parent on Behalf of Student, Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”),</p> <p>Respondent.</p> <p>Case # 2018-0293</p> <p>Date Issued: March 1, 2019</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: February 8, 2019 February 13, 2019</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to only make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date March 1, 2019, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on February 8, 2019, and February 13, 2019, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 423 and the parties submitted written closing arguments on February 22, 2019.

BACKGROUND AND PROCEDURAL HISTORY:

The student or ("Student") is age _____ and in grade _____.² Student resides with Student's parent ("Petitioner") in the District of Columbia. Student is bilingual and has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of intellectual disability ("ID"). Student's prior disability classification was specific learning disability ("SLD"). District of Columbia Public Schools ("DCPS") is Student's local educational agency ("LEA") and Student currently attends a DCPS school.

On November 9, 2018, Petitioner filed her due process complaint asserting DCPS denied Student a free appropriate public education ("FAPE") by, inter alia, failing to provide Student an appropriate individualized educational program ("IEP"), and failing to timely and comprehensively evaluate Student. On December 7, 2018, and then December 20, 2018, Petitioner's counsel filed motions to amend her complaint along with filing amended complaints. Petitioner seeks as relief that Student be granted compensatory education.³

LEA Response to the Complaint:

The LEA filed a response to the complaint on November 20, 2018, and maintained the same response for the amended complaints. The LEA denies that there has been any failure to provide the student with a FAPE. In its response DCPS asserted, inter alia, the following:

In spring 2015, Petitioner initially referred Student but refused to consent to evaluation for special education eligibility. DCPS made referral again a year later and sought consent to evaluate. DCPS evaluated Student and Petitioner consented to provision of services in May 2016. Student was comprehensively evaluated and determined eligible with SLD. All members of the IEP team agreed with Student's initial IEP. In December 2016, the team convened a meeting, as Student was not progressing as expected, and increased hours of pullout instruction. The IEP also provided numerous other services and supports inside the classroom.

The team met again for annual review of Student's IEP in early 2017, and agreed not to change

² The student's current age and grade are indicated in Appendix B.

³ Petitioner originally sought additional relief that had been provided by DCPS as of the time of the due process hearing.

Student's disability classification. Although there were no behavior issues, Student continued to have challenges of working slowly due to Student's disability. Attendance was an issue, as Student missed over 20 school days by this time in the school year. The team agreed to an increase in Student's out of general education instructional time to 15 hours per week as well as other supports. During the school year, the LEA utilized all necessary and sufficient educational data and information. Parent refused to make Student available for extended school year ("ESY") programming for summer 2017 which negatively impacted Student's progress.

The next annual IEP review occurred in March 2018. Unfortunately, Petitioner did not participate in the meeting, although the meeting was confirmed. DCPS proposed an increase to a full-time out of general education placement with 20 hours of instruction outside of general education per week. Student has made progress, but is still far behind peers. Much of this was attributed to absences and failing to attend ESY as prescribed by Student's IEPs.

As a result of this change in the IEP, Student was moved to School B for school year ("SY") 2018-2019 in the specific learning support ("SLS") classroom. Student was placed at School B by the end of June 2018. Again, Petitioner refused ESY for summer 2018. An annual review of the IEP was held at School B in September 2018. The IEP was updated with Petitioner in attendance, and triennial testing was ordered. DCPS proposed a psychological and speech and language assessment. Student's assessments were completed and an IEP meeting needed to be convened to review them for Student's IEP review, and to revise the IEP, as appropriate. Student's functional behavior assessment ("FBA") and behavior intervention plan ("BIP") were also reviewed and revised in October 2018.

Pre-Hearing Conference and Resolution Meeting:

The undersigned Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on December 14, 2018, prior to the parties holding a resolution meeting. The Hearing Officer issued a pre-hearing order ("PHO") on December 19, 2018, outlining, inter alia, the issues to be adjudicated.

On January 18, 2019, Respondent filed a motion to dismiss the complaint based on Petitioner's alleged failure to participate in a resolution meeting. On January 22, 2019, Petitioner filed an opposition to the motion. The parties participated in a resolution meeting on January 31, 2019. DCPS's Motion to Dismiss was addressed at the outset of the hearing. Because the parties participated in a resolution meeting, DCPS' motion was deemed moot.

The parties did not resolve the complaint and did not mutually agree to shorten the 30-day resolution period. The 45-day period for the first amended complaint began on January 7, 2019, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on February 20, 2019.

At the end of the due process hearing on February 13, 2019, Petitioner's counsel filed a motion to extend the HOD due date to allow for written closing arguments. The motion was unopposed and granted, extending the HOD due date to March 1, 2019.

ISSUES:⁴

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to review and revise Student's IEP by November 2016, in light of Student's failure to make sufficient educational progress, and because the IEP was not amended to include appropriate speech language goals, and/or appropriate math goals, and/or more hours of specialized instruction beyond 7.5 hours per week.
2. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on April 26, 2017, that was reasonably calculated to enable Student to make progress appropriate, in light of Student's circumstances, because the IEP did not include appropriate speech language goals, and/or appropriate math goals, and/or the first four annual goals were repeated and annual goal number two was removed from Student's IEP even though there was no indication that Student mastered the goal, and/or did not prescribe more hours of specialized instruction beyond 7.5 hours per week.
3. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on March 9, 2018, that was reasonably calculated to enable Student to make progress appropriate, in light of Student's circumstances, because the IEP did not include assistive technology and/or a BIP.
4. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on September 18, 2018, that was reasonably calculated to enable Student to make progress appropriate, in light of Student's circumstances, because the IEP did not include assistive technology, a BIP, and speech and language goals.
5. Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student because it failed to perform: (a) an appropriate comprehensive psychological evaluation and/or (b) an occupational therapy evaluation, and/or (c) an assistive technology evaluation and/or (d) an adaptive assessment, and/or (e) an FBA.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 42 and Respondent's Exhibits 1 through 88) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

⁴ The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner presented three witnesses: (1) Student's parent ("Petitioner"), (2) Petitioner's educational advocate employed by the law firm representing Petitioner, testifying as an expert witness, and (3) a psychologist testifying as

SUMMARY OF DECISION:

Respondent held the burden of persuasion on issue #1, #2, #3 and #4, after Petitioner met a prima facie case. Petitioner had both the burden of production and persuasion on issue #5. Based on the evidence adduced, the Hearing Officer concluded that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues #1, #2, #3, #4. Based on the evidence adduced, the Hearing Officer concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #5. The Hearing Officer dismissed Petitioner's case with prejudice.

FINDINGS OF FACT:⁷

1. Student resides with Petitioner in the District of Columbia. DCPS is Student's LEA. Student was first determined eligible for special education and related services pursuant to the IDEA with an SLD disability classification on June 14, 2016, while attending a DCPS school ("School A"). Student's initial individualized educational program ("IEP") prescribed that Student be provided 7.5 hours of specialized instruction outside general education and 3 hours per month of speech language pathology. The IEP included goals in math, reading, written expression and communication/speech and language. Student had five math goals that addressed counting, number sense, addition and subtraction and identifying shapes. Student had three speech and language goals that focused on comparing and contrasting words, following one to two step commands and answering "wh" questions in response to visual prompts. (Petitioner's Exhibit 5-1, 5-3, 5-4, 5-7, 5-8)
2. DCPS conducted a social work assessment in May 2016 that evaluated, among other things, Student's personal functioning and social/behavioral characteristics through interviewing Student's parent. According to Student's parent, Student was capable to taking care of Student's personal hygiene and self-care activities, and had behaviors at home typical of a child Student's age. (Petitioner's Exhibit 6-1, 6-4)
3. DCPS completed a comprehensive psychological evaluation of Student in June 2016. The evaluation assessed Student's cognitive and academic functioning. Student's cognitive functioning was assessed as Below Average with significant weaknesses in Student's cognitive processing abilities. Student had a Fluid-Crystallized index score of 72. Student performed lower than 97% of same aged peers. Student's academic performance in reading, math and spelling was more than one year below Student's grade at the time, and one to two years below average scores for children Student's age at the

an expert witness. Respondent presented two witnesses: (1) a DCPS special educator and Student's case manager, and (2) a DCPS psychologist testifying as an expert witness.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

time. DCPS did not conduct any adaptive testing as a part of Student's initial evaluation. Based on the evaluation data, the DCPS psychologist determined that Student met the criteria as a learning disabled child. (Petitioner's Exhibit 7-1, 7-11)

4. Student's cognitive score of 72 was above the benchmark at which a child is considered for the ID disability classification, thus there was no requirement for Student to have an adaptive assessment at the time to determine if Student met the ID disability classification. (Witness 4's testimony)
5. DCPS conducted a bilingual speech language evaluation in June 2016. Student's voice, fluency, articulation and pragmatic skills were all found to be within normal limits. Student's main weakness was expressive and receptive language, particularly what Student was able to comprehend and self-generate. Student's phonological awareness and ability to notice and manipulate spoken language at the sound level combined with Below Average vocabulary was identified as negatively impacting Student's literacy skills. (Petitioner's Exhibit 8-1, 8-7)
6. On December 16, 2016, DCPS convened a team meeting to review Student's progress with specialized instruction. Student had not made much progress in math, still did not connect letters with sounds, and although Student's first language was [REDACTED], Student did not receive English Language Learners' ("ELL") services. The team determined the next steps would be to increase Student's instruction outside the classroom from 7.5 hours per week to 8 hours per week to include guided reading instruction, rather than guided reading inside the classroom, as previously provided. (Petitioner's Exhibit 10-1)
7. While Student was attending School A, Petitioner asked School A staff whether Student needed to attend a different school. Petitioner was told that School A was providing Student with an appropriate education. At the same time Student received the first IEP in 2016, Student started becoming ill, experienced hair loss and got frequent stomachaches. Student also refused to attend school. Student was not functioning on the same level as Student's classroom peers and Petitioner believes this may have been the cause of Student becoming ill. Student would sometimes come to school excited and then become sad because Student was unable to perform some school task. The school psychologist spoke with Student, and advised Petitioner that Student was suffering from depression. Student has never achieved the academic progress Petitioner believed Student should have attained. No one at School A mentioned to Petitioner the issue of Student's intellectual functioning; however, Petitioner knew that Student had difficulty with the alphabet, counting, and with remembering numbers. (Petitioner's testimony)
8. School A conducted an annual review meeting updating Student's IEP on April 26, 2017. As a result of the meeting, the team increased Student's specialized instruction to 15 hours per week outside general education and maintained the speech language pathology services at 3 hours per month. The IEP prescribed ESY services and ESY transportation. The IEP included goals in math, reading, written expression and communication/speech and language. Student had four of the same math goals as the previous IEP that addressed counting, addition and subtraction, and identifying shapes. One math goal

from the previous IEP was not continued. Student's speech and language goals were modified slightly, and still focused on comparing and contrasting words, following two-step commands and answering "wh" questions in response faded visual prompts. (Petitioner's Exhibit 4-1, 4-4, 4-5, 4-8, 4-9, 4-13, 4-16)

9. During SY 2016-2017 Student had a total of 21 days of absences: 10 excused absences and 11 unexcused absences. (Petitioner's Exhibit 18)
10. School A conducted an annual review meeting updating Student's IEP on March 9, 2018. Petitioner did not attend the IEP meeting. Student had made academic progress but remained far below grade level academically. The team increased Student's specialized instruction to 20 hours per week outside general education and maintained the speech language pathology services at 3 hours per month. The IEP included goals in math, reading, written expression and communication/speech and language. The team agreed Student would benefit from ESY services and would likely regress in skills over the summer if Student's did not receive ESY. Student's IEP prescribed ESY services. (Petitioner's Exhibits 2-1, 2-10, 2-14, 11-1)
11. On June 5, 2018, DCPS provided Petitioner with a letter identifying that Student's IEP would be implemented at another DCPS school ("School B") for SY 2018-2019, and issued a prior written notice ("PWN") to that effect. (Petitioner's Exhibits 14, 15)
12. On June 8, 2018, DCPS amended Student's IEP to add transportation services. (Petitioner's Exhibit 3-1)
13. Student made progress relative to Student's IEP goals during SY 2017-2018 as reflected by Student's IEP progress reports. (Petitioner's Exhibit 24)
14. Petitioner believes that during 2016 and 2017 Student did not make academic progress as evidenced by Student's inability to perform homework. School A informed Petitioner that Student would be transferred to School B, which could provide the supports that Student required. Petitioner saw a bit more academic progress from Student while Student was attending School B. Specifically, Student knew numbers, could define words, and could spell Student's name. Despite Student's academic issues, Petitioner did not send Student to ESY during summers 2016, 2017 or 2018. (Petitioner's testimony)
15. Student began attending School B at the start of SY 2018-2019. DCPS compiled an Analysis of Existing Data ("AED") report that indicated Student was operating academically three grade levels below Student's grade for SY 2018-2019. (Parent's testimony, Respondent's Exhibit 56)
16. Upon Student's arrival at School B, Student struggled to process and understand simple social directions and Student's needs exceeded those of Student's peers. The difficulties Student had with processing and functioning were identified early in the placement. Student demonstrated attention-seeking behavior, verbally taunted peers by name-calling, and became upset when not granted immediate gratification. Student required supports to

address the manner in which Student dealt with social interaction. (Witness 3's testimony)

17. Student experienced problems with the content of speech and, when tested, performed on an early kindergarten level, without any identifiable reading skills. Student's test scores were as low as the test would go. Along with speech and reading issues, Student had difficulty with numbers and struggled to retain content from day-to-day. It was obvious that Student would require ESY services. (Witness 3's testimony)
18. On September 18, 2018, School B conducted an annual review of Student's IEP and maintained Student's level of specialized instruction and related services. The IEP included goals in math, reading, written expression and communication/speech and language. DCPS initiated triennial evaluations of Student and provided Petitioner with a PWN stating that a psychological evaluation and a speech language evaluation would be conducted. (Petitioner's Exhibits 1-1, 1-3, 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, Respondent's Exhibit 57)
19. Student's special education teacher and case manager did not notice any issues with Student's handwriting or fine motor skills, so no occupational therapy and/or assistive technology evaluations were requested. (Witness 3's testimony)
20. In October 2018, DCPS conducted an FBA that notes Student's attention seeking behaviors in the classroom and taunting of peers by name-calling. DCPS developed a BIP to address the targeted behaviors noted in the FBA. (Respondent's Exhibits 58, 59)
21. DCPS completed a speech language evaluation dated November 2, 2018. The evaluation noted that Student had made some progress in speech language goals. The evaluation noted that the classroom teacher stated Student could express basic wants and needs, but had difficulty responding to higher level questions. Student's test results seemed consistent with results obtained in Student's initial speech language evaluation in 2016. The evaluator recommended that Student participate in vocabulary building and recommended strategies to improve Student's receptive and expressive language skills. (Respondent's Exhibit 60)
22. DCPS completed a psychological triennial evaluation dated November 2, 2018. The psychologist evaluated Student's cognitive, academic and behavioral functioning, and conducted the Vineland adaptive assessment. Student's cognitive functioning was Extremely Low with a full-scale IQ score of 45. Student's academic achievement scores were Very Low. The behavioral assessment scales rating reflected clinically significant behaviors in most areas measured, including hyperactivity, aggression, and depression. Student's adaptive skills were rated as Low. (Respondent's Exhibit 61)
23. The DCPS psychologist who assessed Student concluded that Student missing ESY over three consecutive summers had a significant negative influence on Student's ability to make academic progress. The psychologist did not consider Student's inattentiveness as an issue that required additional testing beyond the assessments that were conducted.

The DCPS psychologist believes that Student's drop in IQ score from the initial testing in 2016 may be due to a traumatic brain injury ("TBI"). After hearing Petitioner's testimony during the hearing concerning Student's hair loss, the psychologist believes Student may have suffered a TBI. However, that possibility was not included in her evaluation report and she did not recommend additional testing. (Witness 4's testimony, Respondent's Exhibits 13 page 41, 30, 31, 52 page 274)

24. On December 11, 2018, DCPS convened an IEP meeting at School B and determined Student eligible for specialized instruction and related services, with an ID disability classification. School B revised Student's IEP to reflect the ID classification and prescribed 20 hours of specialized instruction per week outside general education, 60 minutes per month of speech language pathology outside general education, 60 minutes per month speech language pathology in general education, and 120 minutes per month of behavioral support services per month outside general education. DCPS issued Petitioner a PWN noting Student's change in disability classification and that another school placement would be determined. (Respondent's Exhibits 64, 67, Petitioner's Exhibit 34)
25. On December 19, 2018, DCPS issued a letter to Petitioner stating that Student's IEP would be implemented at a different DCPS school ("School C") for the remainder of SY 2018-2019. Student began attending School C on January 7, 2019, a month prior to the due process hearing. (Petitioner's testimony, Respondent's Exhibit 70, Petitioner's Exhibit 35)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking

relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Respondent held the burden of persuasion on issue #1, #2, #3 and #4, after Petitioner met a prima facie case. Petitioner had both the burden of production and persuasion on issue #5.⁸ The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to review and revise Student's IEP by November 2016, in light of Student's failure to make sufficient educational progress, and because the IEP was not amended to include appropriate speech language goals, and/or appropriate math goals, and/or more hours of specialized instruction beyond 7.5 hours per week.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created and ask if it was reasonably calculated at

⁸ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) 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. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

that time to enable the student to receive educational benefits.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, what the IEP offered was reasonably calculated to enable the specific student’s progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

34 C.F.R. § 300.324 (b) Review and revision of IEPs—(1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

The evidence demonstrates Student’s initial IEP, developed on June 14, 2016, prescribed that Student be provided 7.5 hours of specialized instruction outside general education and 3 hours

per month of speech language pathology. The IEP included goals in math, reading, written expression and communication/speech and language. Student had five math goals that addressed counting, number sense, addition and subtraction and identifying shapes. Student had three speech and language goals that focused on comparing and contrasting words, following one to two step commands and answering “wh” questions in response to visual prompts.

On December 16, 2016, DCPS convened a team meeting to review Student’s progress with specialized instruction. Student had not made much progress in math and still did not connect letters with sounds. The team determined the next steps would be to increase Student’s instruction outside the classroom from 7.5 hours per week to 8 hours per week to include guided reading instruction, rather than guided reading inside the classroom, as previously provided.

Although Petitioner asserts that by November 2016, DCPS should have reviewed and revised Student’s IEP to increase specialized instruction and modify Student’s IEP goals, there was insufficient evidence presented that at this early juncture DCPS was obligated to or should have increased Student’s services or modified IEP goals. The testimony of Petitioner’s witnesses in this regard did not sufficiently demonstrate that any change should have been made to Student’s services beyond the adjustments that School A made to Student’s services in December 2016 or that changes should have been made sooner. Consequently, the Hearing Officer concludes that Respondent’s sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on April 26, 2017, that was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances, because the IEP did not include appropriate speech language goals, and/or appropriate math goals, and/or the first four annual goals were repeated and annual goal number two was removed from Student’s IEP even though there was no indication that Student mastered the goal, and/or did not prescribe more hours of specialized instruction beyond 7.5 hours per week.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

As previously noted, in *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The evidence demonstrates that School A conducted an annual review meeting updating Student's IEP on April 26, 2017. As a result of the meeting, the team increased Student's specialized instruction to 15 hours per week outside general education and maintained the speech language pathology services at 3 hours per month. The IEP prescribed ESY services and ESY transportation. The IEP included goals in math, reading, written expression and communication/speech and language. Student had four of the same math goals as the previous IEP that addressed counting, addition and subtraction, and identifying shapes. One math goal from the previous IEP was not continued. Student's speech and language goals were modified slightly, and still focused on comparing and contrasting words, following two-step commands and answering "wh" questions in response faded visual prompts.

Although Petitioner's expert witness testified that some of Student's the IEP goals were above Student's abilities and did not address foundational skills, these witnesses had not observed Student in the classroom, or communicated with Student's teachers to determine how the IEP goals were actually being addressed and implemented in the classroom. Although the witnesses testified as experts the Hearing Officer considered their testimony regarding this Student to be speculative and Monday-morning quarterbacking of the IEP team's determination regarding Student's IEP.

Although the evidence indicates that Student made little if any progress in the first two years with an IEP and that Student's IEP goals did not change, there was clear evidence based on Student's IEP progress reports that student was making some progress, despite the fact that Student missed significant amounts of school during these school years and did not attend ESY any summer, despite Student's IEP prescribing ESY services. Petitioner chose for Student to not take advantage of these services despite their availability including provision of transportation services.

Although Petitioner's witnesses' testimony regarding Student's IEP goals indicate that the goals could have perhaps been more targeted to meet Student's needs, their testimony was not convincing that the substance of Student's IEP goals contributed significantly to Student's lack of academic progress, rather than Student's attendance issues, and Student not taking full advantage of the ESY services that were available to Student each summer. The evidence indicated that DCPS strongly suggested Student would be harmed if the ESY were services were not provided. As a result, each year Student returned to school, as evidenced particularly by the testimony of Student's special education teacher at School B, Student demonstrated significant loss of skills at the start of the school year. Although academic progress is expected and presumed, an IEP is not a guarantee that a student will make academic progress, particularly when a student does not utilize the services that are provided under the IEP.

On the other hand, the evidence demonstrates that School A continually and periodically reviewed Student's IEP and at each juncture increased Student's special education services to address Student's lack of academic progress. Although Student's initial IEP in 2016 provided specialized instruction at only 7.5 hours per week outside general education, that amount was slightly increased half way into the annual IEP period and doubled at Student's next IEP annual review in 2017. DCPS eventually increased Student's services and placement to a full-time, self-contained classroom in 2018.

Consequently, the Hearing Officer concludes that the preponderance of the evidence supports a finding that Student's IEP was reasonably calculated enable Student to make progress appropriate in light of the Student's circumstances.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on March 9, 2018, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP did not include assistive technology and/or a BIP.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

As previously noted, in *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not specifically mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Nonetheless, in the instant case, DCPS conducted an FBA and developed a BIP to address Student's behaviors.

The evidence demonstrates that School A conducted an annual review meeting updating Student's IEP on March 9, 2018. Petitioner did not attend the IEP meeting. Student had made academic progress, but remained far below grade level academically. The team increased Student's specialized instruction to 20 hours per week outside general education and maintained the speech language pathology services at 3 hours per month. The IEP included goals in math, reading, written expression and communication/speech and language. The team agreed Student would benefit from ESY services and would likely regress in skills over the summer, if Student's did not receive ESY.

Petitioner's witnesses testified that Student should have received AT services. However, these witnesses met with Student on limited occasions and there is no indication that either of them

have any expertise in the areas AT beyond that of the DCPS witnesses. On the other hand, Student's special education teacher, who worked with Student in the classroom, credibly testified that Student did not have any identifiable need that would have warranted the use of AT devices. The Hearing Officer found this testimony more convincing as this witness had actually worked with Student in the classroom.

Petitioner's witnesses also suggested that Student's behavior warranted a FBA and BIP prior to when School B conducted the FBA and developed the BIP in fall 2018. Student's special education teacher and case manager noted Student's attention seeking behaviors and difficulty with peer interactions early on when Student arrived at School B; this was immediately addressed with an FBA and BIP. However, there was scant evidence these behaviors were an issue for Student while Student attended School A. Thus, the Hearing Officer does not conclude the weight of the evidence supports a finding that Student should have had a FBA or BIP prior to arriving at School B or that Student's IEP prior to arriving at School B should have included behavior support services.

Consequently, the Hearing Officer also concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's IEP was reasonably calculated to enable Student to make progress appropriate, in light of the Student's circumstances.

ISSUE 4: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on September 18, 2018, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP did not include assistive technology, A BIP and speech and language goals.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

As previously noted, in *Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his 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. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not specifically mandate that an FBA be conducted and/or a BIP be

developed, except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions are not applicable to this case. Nonetheless, in the instant case, DCPS conducted an FBA and developed a BIP to address Student's behaviors.

The evidence demonstrates that on September 18, 2018, School B conducted an annual review of Student's IEP and maintained Student's level of specialized instruction and related services. The IEP included goals in math, reading, written expression and communication/speech and language.

In October 2018, DCPS conducted an FBA that notes Student's attention seeking behaviors in the classroom and taunting of peers by name-calling. DCPS developed a BIP to address the targeted behaviors noted in the FBA. DCPS completed a speech language evaluation in November 2018 and the evaluation noted that Student had made some progress in speech language goals.

As previously stated, Petitioner's witnesses testified that Student should have received AT services. However, these witnesses met with Student on limited occasions and there is no indication that either of them have any expertise in the areas AT beyond that of the DCPS witnesses. On the other hand, Student's special education teacher who worked with Student in the classroom credibly testified that Student did not have any identifiable need that would have warranted the use of AT devices. The Hearing Officer found this testimony more convincing as this witness had actually worked with Student in the classroom.

As previously stated, Petitioner's witnesses also suggested that Student's behavior warranted a FBA and BIP prior to when School B conducted the FBA and developed the BIP in fall 2018. Student's special education teacher and case manager noted Student's attention seeking behaviors and difficulty with peer interactions early on when Student arrived at School B; this was immediately addressed with an FBA and BIP. However, there was scant evidence these behaviors were an issue for Student while Student attended School A. Thus, the Hearing Officer does not conclude the weight of the evidence supports that Student's should have had a FBA or BIP prior to arriving at School B or that Student's IEP prior to arriving at School B should have included behavior support services.

Although Student has not made any significant academic progress, DCPS continually and periodically reviewed Student's IEP, and at each juncture increased Student's special education services to address Student's lack of progress. DCPS eventually increased Student's services and placement to a full-time self-contained classroom in 2018, and has recently moved Student to a more appropriate program at another DCPS school. Consequently, the Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's IEP was reasonably calculated enable Student to make progress appropriate in light of the Student's circumstances.

ISSUE 5: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student and by failing to perform: (a) an appropriate comprehensive psychological evaluation and/or (b) an occupational therapy evaluation and/or (c) an assistive technology evaluation and/or (d) an adaptive assessment, and/or (e) an FBA.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes it clear that, “A local education agency (“LEA”) *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” and that the reevaluation must be conducted at least once every three years. (*Emphasis added*)

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that “a full and individual evaluation is conducted for each child being considered for special education and related services.” D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). “Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required” for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize “a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability.” D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas “related to the suspected disability” should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be “sufficiently comprehensive to identify all of the child’s special education and services needs.” D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Petitioner alleges DCPS initial psychological evaluation should have identified Student as ID and that an adaptive assessment, an OT, AT and FBA should have been conducted.

Although Petitioner’s expert witnesses opined that Student would have been assessed in 2016 for an ID classification due to Student’s cognitive profile, those witnesses’ testimony was no more persuasive than that of the DCPS expert psychologist who evaluated Student and clearly stated that best practices, based on Student’s cognitive scores, did not dictate that Student met the criteria for consideration for ID disability, and an adaptive assessment was not required. In addition, DCPS’ social work evaluation that garnered input from Student’s parent indicated that Student was functioning in daily living skills and other social areas as any typical same age child when Student was initially evaluated. Consequently, the Hearing Officer concludes that DCPS did not deny the Student a FAPE by failing to assess Student for an ID classification in 2016, or prior to when the psychological evaluation was conducted in 2018. There was insufficient evidence that DCPS’ initial psychological evaluation was inappropriate.

Petitioner’s witnesses also testified that Student should have received OT and AT evaluations. These witnesses had met with Student on limited occasions and there is no indication that either of them having any expertise in the areas of OT or AT beyond that of the DCPS witnesses.

However, Student's special education teacher, who worked with Student in the classroom, credibly testified that Student did not have any identifiable need that would have warranted an OT or AT evaluation, or that Student has a need for the use of AT devices. The Hearing Officer found this testimony more convincing, as this witness had actually worked with Student in the classroom. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

The DCPS psychologist who recently evaluated Student opined that the significant reduction in Student's cognitive scores compared to Student's initial evaluation might indicate the possibility that Student suffered at TBI. The Hearing Officer encourages the parties to have an IEP team consider whether additional testing, to explore that possibility, should be conducted.

ORDER:

Based upon the evidence adduced, the Hearing Officer concludes that the preponderance of the evidence does not support a finding that Student was denied a FAPE as to the issues adjudicated. As a result, Petitioner's due process complaint is hereby dismissed with prejudice, and the relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: March 1, 2019

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