

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
March 15, 2019

<i>Student</i> , ¹)	Case No.: 2018-0347
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 3/15/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/1/19 & 3/5/19
("DCPS"),)	ODR Hearing Room: 423 & 111
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student had not been provided appropriate Individualized Education Programs ("IEPs"), nor adequately reevaluated, among other things. DCPS responded that the IEPs were appropriate and it had sufficiently reevaluated Student.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 12/31/18, the case was assigned to the undersigned on 1/2/19. Respondent filed a response on 1/15/19, which did not challenge jurisdiction. The resolution meeting occurred on 1/10/19, but did not resolve the dispute or shorten the 30-day resolution period, which ended on 1/30/19. A final decision in

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 3/16/19.

The due process hearing took place on 3/1/19 and 3/5/19 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present for the entire hearing.

Petitioner’s Disclosures, submitted on 2/21/19, contained documents P1 through P24, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 2/22/19, contained documents R1 through R69, which were admitted into evidence with the exception of (a) R61p194-213, (b) R64p244-247, (c) R64p272-284, (d) R64p293-309, and (e) R64p327-336, to which objections were sustained as the documents related to confidential settlement negotiations between the parties; in addition, Respondent’s counsel withdrew R64p255-261 as having been inadvertently included in DCPS’s disclosures.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Educational Advocate* (qualified as an expert in School Psychology and IEP Programming (Respondent took no position))
3. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
4. Student

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *Director of Special Education at Public School* (qualified without objection as an expert in Special Education)
2. *Special Education Teacher* at Public School
3. *LEA Representative* at Public School (qualified without objection as an expert in Special Education)

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages, separated by commas). By contrast, Respondent’s documents are consecutively page numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the page number(s), omitting any leading zeros.

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4. *School Psychologist* for DCPS (qualified without objection as an expert in School Psychology)

Petitioner's counsel presented Parent as the sole rebuttal witness.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 12/16/16, 11/29/17, 3/8/18 and/or 12/14/18 to address deficits in reading, written expression and math, and which lacked suitable goals and baselines. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and/or timely triennial reevaluation, where Student's initial evaluation occurred in March 2015 but in 2018 the only assessment was an achievement measure and no cognitive or social-emotional testing was conducted. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to provide appropriate behavior supports when it did not perform a Functional Behavioral Assessment ("FBA") and develop a Behavioral Intervention Plan ("BIP") beginning in 2017/18³ despite Student's inappropriate behaviors which impede Student's educational progress. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall provide compensatory education for any denial of FAPE.⁴
3. DCPS shall conduct a comprehensive reevaluation, including an FBA/BIP.
4. DCPS shall convene the IEP team to modify Student's IEP by (a) revising the baselines, (b) increasing the hours of specialized instruction, and (c) including a

³ All dates in the format "2017/18" refer to school years.

⁴ Petitioner's request for compensatory education did not seek to reserve any claim for compensatory education relating to evaluations not yet conducted. Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

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special education teacher and a general education teacher in all of Student's academic classes or self-contained classes.

5. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 2018/19, after a year at Prior School; neighborhood schools were avoided to try to keep Student safe.⁷ Student lives with *Mother* and siblings during the week in a chaotic situation that is not always a "learning atmosphere"; Parent calls every morning to try to get Student up, but Student usually misses the first class at school.⁸ Student has experienced emotional trauma from numerous events, ranging from friends being shot and in fatal car accidents to an uncle with PTSD committing suicide.⁹

2. Background. During the relevant timeframe and IEPs at issue, Student had the disability classification of Specific Learning Disability ("SLD").¹⁰ SLD eligibility was confirmed on 3/8/18 for Student, which impacts reading, math and written expression.¹¹ Based on the Wechsler Intelligence Scale for Children – Fourth Edition ("WISC-IV") in a 1/9/15 psychological evaluation, Student's full scale IQ was 81, which is Borderline, while the cognitive components ranged from processing speed of 73 to working memory of 104.¹² The evaluation stated that Student exhibits a "slow cognitive tempo," but is capable of being a solid C or B student.¹³

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

⁸ P12-4; Parent.

⁹ Parent; P10-3.

¹⁰ P4-1; P5-1; P6-1; P7-1.

¹¹ P11-1,2.

¹² P10-5,6 (report erroneously (per Clinical Psychologist) stated that all scores were "average"; other data in the report also appears questionable to the undersigned, such as standard scores of 101 for reading fluency and 111 for writing samples).

¹³ P10-15.

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3. IEPs. Student's 12/16/16 IEP provided 4 hours/week of special education services in reading outside general education, and no other specialized instruction or related services.¹⁴ Student's 11/29/17 IEP provided 5 hours/week of special education services in reading inside general education, and no other specialized instruction or related services.¹⁵ Student's 3/8/18 IEP added goals for math and written expression in addition to reading, and continued to provide 5 hours/week of specialized instruction inside general education (and no related services).¹⁶ Educational Advocate credibly testified that 5 hours/week was not sufficient for reading, much less with written expression and math.¹⁷

4. Student's 12/14/18 IEP provided 5 hours/week of specialized instruction inside general education and another 5 hours/week outside general education (and no related services); DCPS's proposed 12/12/18 IEP offered only 5 hours/week inside general education (and no other specialized instruction or related services) before Parent and advocates sought more hours.¹⁸ Student asked at the IEP meeting about a self-contained class and said more help was needed.¹⁹ The team waited until term 3 to implement the new IEP so the shift to resource classes would not prevent Student from finishing classes and receiving credit in term 2.²⁰ Educational Advocate credibly testified that in addition to intensive remediation, especially in reading and writing, Student needs specialized instruction for all classes which involve reading and writing, which would include everything except so-called "specials," such as music, art, PE and JROTC.²¹

5. Reading Deficits. Student's SRI on 8/25/16 was at Lexile level 459.²² Student's 6/6/17 Lexile score was 548, which is a 3rd grade level; Student should have been at Lexile level 1050 or above.²³ As noted in the 3/8/18 IEP present levels, the 2/13/18 Woodcock-Johnson IV ("WJ-IV") found Student's Reading at 3.2 Grade Equivalent ("GE"); Broad Reading at 3.6 GE; Basic Reading Skills at 3.5 GE; Passage Comprehension at 3.3 GE; the 3/8/18 IEP noted that Student appeared to read very slowly.²⁴ Student's 8/30/18 SRI Lexile score was 696, which is a 3rd grade level.²⁵ Educational Advocate recently administered an informal reading assessment and found Student on a 3rd grade level, many years behind.²⁶

¹⁴ P4-5.

¹⁵ P5-5.

¹⁶ P6-7; Clinical Psychologist.

¹⁷ Educational Advocate.

¹⁸ P7-9; P24-1,9; Educational Advocate.

¹⁹ Educational Advocate.

²⁰ R1p3,5; Director of Special Education.

²¹ Educational Advocate.

²² P4-3; P7-5.

²³ P5-3; P7-5; P15-4.

²⁴ P6-4; P13-1 (WJ-IV score report).

²⁵ P7-5; R53p173; P17-4.

²⁶ Educational Advocate.

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The 11/29/17, 3/8/18 and 12/14/18 IEPs noted that “Student needs additional help” in reading because of weakness in reading comprehension and fluency.²⁷

6. IEP Goals. Student only had goals in reading in the 11/29/17 IEP, but also needed written expression and math to be included in the IEP with goals.²⁸ Student’s 2/13/18 WJ-IV found Written Fluency at 2.5 GE, Broad Written Language at 3.9 GE, Written Expression at 3.9 GE, among others.²⁹ Student’s WJ-IV on 2/13/18 found that Student’s Broad Math was 3.9 GE, although other areas of math were higher; Student was more than 2 years behind in math.³⁰

7. IEP Baselines. The baselines in Student’s IEPs were improper and insufficient to show where Student was performing.³¹ The baselines in Student’s 11/29/17 IEP stated only that Student “is performing below grade level” in reading.³² The baselines in Student’s 3/8/18 IEP stated only that Student “is performing below grade level” in math and “is performing below grade level” in reading, and “has basic reading skills” and “has basic written expression skills.”³³

8. The baselines in Student’s 12/14/18 IEP for math stated only that the “skill will be introduced this school year but is upcoming in the next term” and “is a required skill for this course but is upcoming for the next term.”³⁴ In reading, the 12/14/18 baselines stated that student is working on the skill or exposed to vocabulary practice, yet “has not demonstrated mastery.”³⁵ Similarly, in written expression the 12/14/18 baseline was “a skill that is required and has not been mastered.”³⁶

9. Grades. In 2017/18, Student’s grade point average was 2.17 (just over a “C” average), with 3 grades of “A” or “A-” and 2 of “F,” out of 16 grades.³⁷ On 11/9/18, Student received a progress report for term 1 stating that 5 of Student’s 8 grades were an “F.”³⁸ Student’s 2018/19 term 1 report card ended up with 3 grades of “F” and 2 grades of “D” for a Grade Point Average (“GPA”) of 1.12 (just over a “D” average).³⁹ On 12/19/18,

²⁷ P5-6; P6-8; P7-10.

²⁸ Educational Advocate.

²⁹ P6-5.

³⁰ P6-3; P11-5.

³¹ Educational Advocate.

³² P5-3,4,5.

³³ P6-3,4,5,6.

³⁴ P7-4,5.

³⁵ P7-6,7.

³⁶ P7-8.

³⁷ P15-1,2,3.

³⁸ P16-1,2.

³⁹ P17-2,3.

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Student received a progress report for term 2 stating that 4 of 8 grades were an “F” and 2 others were a “D.”⁴⁰

10. School Approach. Reading has long been a challenge for Student; the 1/9/15 psychological evaluation noted that with Student’s extensive reading difficulty, the school might consider a classification of Reading Disability.⁴¹ Student’s general education history teacher completed an Excused IEP Meeting Participant Written Input Form on 1/19/16 which stated that “reading comprehension is a major issue” for Student.⁴²

11. A Student Participant Written Input Form that Student completed in December 2016 noted that support could be improved by “more small groups” and recognized that Student needed to “do Homework.”⁴³ On 11/16/18, Student completed another Student Participant Written Input Form stating that Student likes all subjects in school “because they can get you some where (sic) in life”; Student further stated that a classroom change to make learning easier for Student would be “Making the classroom smaller.”⁴⁴ Student testified that geometry is hard and having a special education teacher working with Student helps; also having a special education teacher in English was helpful, as Student prefers to have assistance.⁴⁵ Student attended IEP meetings and stated that more special education services would be helpful.⁴⁶

12. The school team stated on 1/10/19 that Student could be transitioned to a full-time pull-out course load but it was unknown if the “dramatic change” would have a positive impact.⁴⁷ Petitioner’s counsel sought 10 hours/week of specialized instruction outside general education, rather than 5 hours, and the school team stated that “such a dramatic change” could prevent Student from graduating with a diploma and result in a certificate.⁴⁸

13. Triennial. Educational Advocate’s 12/21/18 letter of dissent to DCPS after the 12/14/18 IEP meeting (which School Psychologist did not attend) sought a comprehensive psychological evaluation including cognitive, educational and social/emotional/behavioral assessments.⁴⁹ Clinical Psychologist testified that the triennial psychological evaluation was not adequate.⁵⁰ On 1/10/19, School Psychologist was “happy to agree” to a comprehensive evaluation because there was not enough data; School Psychologist suggested the 12/14/18

⁴⁰ P18-1,2.

⁴¹ P10-15.

⁴² R2p7.

⁴³ R16p60.

⁴⁴ R46p156.

⁴⁵ Student.

⁴⁶ *Id.*

⁴⁷ R1p4.

⁴⁸ *Id.*

⁴⁹ P9-1; Educational Advocate.

⁵⁰ Clinical Psychologist.

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IEP might be just the right balance of push-in and pull-out, but if the evaluation indicated that more pull-out hours were needed, the IEP could be amended.⁵¹

14. Need for FBA/BIP. Student attends school consistently, but has a large number of school absences and tardy days.⁵² In 2017/18, Student had a total of 32 days absent, all of which were unexcused, and 73 days tardy.⁵³ In term 1 of 2018/19, Student had 5 days absent, all unexcused, and 17 days tardy.⁵⁴ Educational Advocate credibly testified that an FBA was needed to determine the reasons behind Student being late, followed by a BIP to attempt to change the behavior.⁵⁵ Student has no other behavior issues, and is pleasant, respectful and nice.⁵⁶

15. The 1/9/15 psychological evaluation of Student noted the reasons for referral were Student's teachers' concerns with frequent tardiness to class and failure to complete class and homework assignments in a timely manner.⁵⁷ Student's academic performance is "greatly impacted" by late arrival to class.⁵⁸ The 1/9/15 evaluation recommended that it be determined why Student is tardy.⁵⁹

16. Student acknowledged that Student needs help getting to class on time.⁶⁰ Student testified that Prior School did nothing to assist Student in overcoming tardiness and absences; they provided no attendance contract and the guidance counselor did not speak with Student.⁶¹

17. Educational Advocate's 12/21/18 letter of dissent to DCPS noted Student's history of frequent tardiness to class and failure to complete class and homework assignments, seeking an FBA and BIP.⁶² Student was set up at Public School to use attendance trackers, but had not done so by 1/10/19; it is important to see the impact of the intervention.⁶³

18. Tutoring. Student could obtain tutoring assistance from teachers at Public School at lunch or after school, but generally does not do so; Student acknowledged at the IEP team meeting that instead of tutoring, Student sleeps and plays video games after school.⁶⁴ Special Education Teacher stated on 1/10/19 that Student had not attended any after school

⁵¹ R1p5.

⁵² P11-7; P12-2.

⁵³ P15-1.

⁵⁴ P17-1.

⁵⁵ Educational Advocate.

⁵⁶ Director of Special Education.

⁵⁷ P10-1.

⁵⁸ P10-4.

⁵⁹ P10-16.

⁶⁰ Student.

⁶¹ *Id.*

⁶² P9-3.

⁶³ R1p5; School Psychologist (daily tracker introduced 1/11/19).

⁶⁴ P20-2; Director of Special Education; Special Education Teacher.

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extra credit sessions or other 1:1 instructional opportunities.⁶⁵ Student's history teacher reported that Student slept through the last exam despite multiple prompts, so grade will drop from D to F; teacher texted *Father* to say Student could come in at lunch to make up the exam, but Student never came.⁶⁶

19. Educational Advocate provided a detailed Compensatory Education Proposal seeking "72 weeks" of tutoring, "20 weeks" of counseling/mentoring, support from *Reading Specialist*, and online credit recovery.⁶⁷ Educational Advocate provided expert testimony that Student should receive (a) 2 hours of tutoring a day, 4 days a week, for the 72 weeks, which would total 576 hours, (b) 2-4 hours/week of counseling/mentoring over 20 weeks, which would be 40-80 hours, and (c) see what Reading Specialist's recommends and whether the 50 hours authorized by DCPS (below) are sufficient.⁶⁸ Educational Advocate testified that her proposal is uniquely tailored to address Student's specific needs.⁶⁹ Educational Advocate further testified that without the denial of FAPE, Student should have made a year's worth of academic and behavioral progress and mastered IEP goals.⁷⁰

20. Without settling the case or making express admissions, DCPS gave Parent an authorization letter on 2/22/19 for independent services for Student, providing 75 hours of tutoring (at \$65.95/hour), 50 hours of Reading Specialist instruction (at \$132.00/hour), and 30 hours of mentoring/counseling (at \$65.95/hour).⁷¹

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services

⁶⁵ R1p3; *cf.* R55p176 (Student does well going to after-school tutoring, according to chemistry teacher).

⁶⁶ R55p177; P20-1.

⁶⁷ P23-5.

⁶⁸ Educational Advocate.

⁶⁹ Educational Advocate; P23-5.

⁷⁰ Educational Advocate; P23-4.

⁷¹ R63p220.

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are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly 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) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), quoting *N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of*

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Columbia, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on 12/16/16, 11/29/17, 3/8/18 and/or 12/14/18 to address deficits in reading, written expression and math, and which lacked suitable goals and baselines. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden to DCPS, which failed to meet its burden of persuasion, as discussed below after analyzing the statute of limitations.

As an initial matter, the statute of limitations must be addressed given that one of the IEPs about which Petitioner raises claims was developed on 12/16/16, more than 2 years prior to the filing of the due process complaint. The IDEA requires that a due process hearing must be requested within 2 years after the date the petitioner “knew or should have known about the alleged action that forms the basis” of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 43-44 (D.D.C. 2016) (affirming 2-year statute of limitations from the date petitioner knew or should have known of action and rejecting “2+2” construction). Petitioner did not assert any defense or claim the applicability of an exception to the statute of limitations pursuant to 34 C.F.R. § 300.511(f). Since IEPs are to be judged as of the time they are developed and not with the benefit of hindsight, Parent knew or should have known of any deficiencies in the 12/16/16 IEP as of that date. *See Z.B. v. Dist. of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018). Thus, Petitioner is barred from challenging the 12/16/16 IEP, although the facts relating to that IEP are admissible as they relate to the reasonableness of later IEPs.

The applicable legal standard for analyzing the appropriateness of the remaining IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S.*, 190 F. Supp. 3d at 51 (IEP must be “reasonably calculated to produce meaningful educational benefit”).

As noted above, the measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at

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524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). Moreover, the analysis is not about achieving perfect IEPs, but IEPs reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (the IDEA “stops short of requiring public schools to provide the best possible education”). See also *Hill*, 2016 WL 4506972, at *21, quoting *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). The appropriateness of Student’s IEPs is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.⁷² See 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

Specialized Instruction. Student’s schools have been aware of Student’s reading needs throughout the relevant timeframe (and even before). The 11/29/17, 3/8/18 and 12/14/18 IEPs each noted that Student “needs additional help” in reading because of weakness in reading comprehension and fluency. Student has been stuck at a 3rd grade reading level, many grades below where Student should be, despite having a full scale IQ of 81 and the capacity to be a solid C or B student. Student’s 6/6/17 Lexile score was 548 (a 3rd grade level); the 2/13/18 WJ-IV found Student’s Reading at 3.2 GE; Broad Reading at 3.6 GE; Basic Reading Skills at 3.5 GE; and Passage Comprehension at 3.3 GE; Student’s 8/30/18 Lexile score was 696, which is also a 3rd grade level. Even Educational Advocate’s recent informal reading assessment found Student on a 3rd grade level.

However, knowledge about Student’s reading problems did not result in meaningful increases in special education services for Student. Instead, the 4 hours/week of reading support outside general education in Student’s 12/16/16 IEP was only increased to 5 hours/week of reading support inside general education in Student’s 11/29/17 IEP. In the subsequent 3/8/18 IEP, even though written expression and math goals (see below) were added, Student’s specialized instruction remained at only 5 hours/week. When Student’s IEP was reviewed again in December 2018 the school team proposed to leave Student at only 5 hours/week, but Parent’s advocates succeeded in increasing services by 5 hours/week outside general education along with the 5 hours inside general education, which still may not be sufficient.

Educational Advocate and Clinical Psychologist both credibly testified that more specialized instruction is needed for Student, as suggested by the lack of reading and other academic skills. Further, Student’s grades turned markedly worse between 2017/18 and the early terms of 2018/19. In 2017/18, Student’s grade point average was 2.17, with 3 grades of “A” or “A-” and only 2 “Fs” out of 16 grades, but in 2018/19 Student’s term 1 report card had 3 “Fs” and 2 “Ds” for a GPA of 1.12, while Student’s 12/19/18 progress report for term 2 stated that 4 of 8 grades were “Fs” and 2 others were “Ds”. Given the very low level of

⁷² A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), quoting *Rowley*, 458 U.S. at 206-07. No specific procedural violations were alleged in this case, although Issues 2 and 3 involve evaluations.

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Student's reading and writing, it is hardly surprising for academic subjects in higher grade levels to exhibit very low results. As ordered below, Student needs specialized instruction in all classes that involve reading and writing, which is everything other than so-called "specials" (music, art, PE and JROTC).

Goals. Nor is reading the only area in which Student has deficits. Student's 2/13/18 WJ-IV found Written Fluency at 2.5 GE, Broad Written Language at 3.9 GE, and Written Expression at 3.9 GE, among others. Given these deficits and how many years Student is behind in written expression, there is no doubt that Student should have had written expression goals on the earlier IEP. Statements of measurable annual goals are required by 34 C.F.R. § 300.320(a)(2). In addition, the 2/13/18 WJ-IV indicated that Student was more than 2 years behind in math, which needed to be included in Student's IEP with suitable goals as well. When math and written expression were finally added to Student's 3/8/18 IEP, Student clearly needed to have additional specialized instruction hours included to assist in making up those deficits, but received no increase as noted above.

Baselines. The IDEA does not expressly require "baselines" in IEPs, but in 34 C.F.R. § 300.320(a)(3) does require a description of how progress toward meeting a student's IEP goals will be measured. That measurement is typically in the form of baselines stating the level at which a child begins so one can determine whether the special education services provided were sufficient to meet the goals and bring about the desired improvement. Here, the baselines in Student's IEPs are plainly insufficient. The baselines in Student's 11/29/17 IEP simply stated that Student "is performing below grade level" in reading, while the 3/8/18 IEP baselines stated only that Student "is performing below grade level" in math and reading and "has basic reading skills" and "has basic written expression skills." This gives no meaningful information against which to measure progress on the particular goals listed.

Even less related to meaningful baselines are the statements in Student's 12/14/18 IEP for math that the "skill will be introduced this school year but is upcoming in the next term" and "is a required skill for this course but is upcoming for the next term." In reading, the 12/14/18 baselines stated that Student is working on the skill or exposed to vocabulary practice, yet "has not demonstrated mastery." Similarly, in written expression the 12/14/18 baselines are "a skill that is required and has not been mastered." Clearly, if Student had already mastered the goal it would not be appropriate for inclusion in the IEP. While Respondent's counsel asserted that information in the present levels section would have made appropriate baselines if moved to the appropriate box, in fact the present levels do not contain information relating to the particular goals that appropriate baselines would have to show where Student began in the effort to make progress and ultimately master each goal.

In sum, this Hearing Officer concludes that the insufficiency of specialized instruction, goals and baselines in the 11/29/17, 3/8/18 and 12/14/18 IEPs are a denial of FAPE as the lack of specialized instruction directly caused a deprivation of educational benefit, while the inadequate goals and baselines significantly impeded Parent's

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opportunities to participate in decision-making regarding a FAPE for Student. *See* 34 C.F.R. § 300.513(a). This denial of FAPE is the basis for requiring Student's IEP to be modified to provide specialized instruction in all classes involving reading and writing, along with other adjustments, and substantially contributes to the compensatory education awarded below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to conduct a comprehensive and/or timely triennial reevaluation, where Student's initial evaluation occurred in March 2015 but in 2018 the only assessment was an achievement measure and no cognitive or social-emotional testing was conducted. (Petitioner has the burden of persuasion on this issue.)*

Petitioner prevails on this issue for the reasons set forth below. At the beginning of the due process hearing, Petitioner's counsel noted that the previous day DCPS had authorized a comprehensive psychological evaluation of Student, which provided the additional assessments that Parent was seeking in this issue.⁷³ This issue was not withdrawn at the hearing, however, as Petitioner's counsel asserted that the evaluation should have been administered by March 2018 and that compensatory education is needed to make up for the delay of about a year. Thus, the initial question remains whether the comprehensive psychological evaluation was required as part of the triennial reevaluation.

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a). As the Court emphasized in *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016), "a reevaluation requires a new round of tests and analysis to evaluate the child."

Here, Educational Advocate wrote a letter of dissent dated 12/21/18 after the 12/14/18 IEP meeting (which School Psychologist did not attend) seeking a comprehensive psychological evaluation including cognitive, educational and social/emotional/behavioral assessments. Clinical Psychologist also testified for Parent that the triennial psychological evaluation was not adequate. On 1/10/19, School Psychologist stated she was "happy to agree" to a comprehensive evaluation due to a lack of data.

Thus, the undersigned concludes that the comprehensive psychological evaluation should have occurred a year ago, and the delay of the needed evaluation was a denial of FAPE as it significantly impeded Parent's opportunity to participate in decision-making

⁷³ DCPS also authorized an FBA at the same time, which relates to Issue 3, below.

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pursuant to 34 C.F.R. § 300.513(a). This denial of FAPE also contributes to the compensatory education awarded below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to provide appropriate behavior supports when it did not perform a Functional Behavioral Assessment and develop a Behavioral Intervention Plan beginning in 2017/18 despite Student's inappropriate behaviors which impede Student's educational progress. (Petitioner has the burden of persuasion on this issue.)*

Petitioner prevails on this final issue as well. Petitioner's counsel also noted at the beginning of the due process hearing that an FBA had been authorized by DCPS the previous day, which provided the assessment that Parent was seeking for this issue. As with Issue 2 above, however, this issue was not withdrawn as Petitioner's counsel continued to assert that an FBA should have been conducted in 2017/18, followed by development of a BIP, so compensatory education is required to make up the delay. Thus, the initial question is whether the FBA was required to address Student's difficulties in showing up for school and getting to class on time.

The IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 146 (D.D.C. 2018). More specifically, the IDEA requires that school districts respond to a student frequently missing school or being tardy. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if not in school, student could not be said to be receiving "a free appropriate public education"). The question is whether DCPS has given Student all the supports that are reasonable in the circumstances to address Student's significant absences and tardiness.

Here, there was little evidence of actions to address Student's tardiness or absences other than beginning in January 2019 to use a tracker for Student to have signed by teachers. Yet even as early as the 1/9/15 psychological evaluation, the referral question was based on teachers' concern about Student's frequent tardiness. The evaluation noted that Student's academic performance is "greatly impacted" by late arrival to class and recommended that it be determined why Student is tardy. Even Student acknowledged in testimony at the due process hearing that Student needs help getting to class on time, but that Prior School did nothing to assist Student in overcoming tardiness and absences. In 2017/18, Student had a total of 32 days absent (all unexcused) and 73 days tardy, while in term 1 of 2018/19, Student had 5 days absent, all unexcused, and 17 days tardy. Educational Advocate credibly testified that an FBA was needed to determine the reasons behind Student being late, followed by a BIP to attempt to change that behavior.

Here, the failure to conduct an FBA and develop a BIP caused a deprivation of educational benefit to Student and is thus held by the undersigned to be a substantive

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violation and a denial of FAPE pursuant to 34 C.F.R. § 300.513(a). In the view of the undersigned, the FBA should have been conducted in 2017/18 at least at the time the team determined what assessments were needed for the triennial reevaluation in March 2018. This denial of FAPE contributes to the compensatory education awarded below.

Remedies

In determining compensatory education for denials of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Here, Educational Advocate’s Compensatory Education Proposal suggested remedies that extend back to the 12/16/16 IEP that is barred by the statute of limitations, and seeks many weeks of remedies that Educational Advocate quantified in response to questioning from the undersigned to be some 576 hours of tutoring and 40-80 hours of counseling/mentoring, along with an unspecified amount of services from Reading Specialist. Importantly, the undersigned has also considered the services that DCPS has provided for Student pursuant to an authorization letter dated 2/22/19, comprised of 75 hours of tutoring, 50 hours of Reading Specialist instruction, and 30 hours of mentoring/counseling.

Based on all the evidence and the various factors discussed in this case, this Hearing Officer has determined that the following terms are appropriate as set forth in the order below:

First, DCPS must promptly convene Student’s IEP team once the comprehensive psychological evaluation and the FBA are completed to carefully consider the results and determine what IEP and other adjustments may be necessary for Student. Modification of Student’s IEP should include an increase in specialized instruction hours to provide support in all classes involving reading and writing (which are all classes except so-called “specials”), consistent with this decision, as well as updated goals and appropriate baselines.

Second, as compensatory education Student is to receive (a) 150 hours of academic tutoring, counseling and/or mentoring (in addition to the hours already authorized by DCPS), with the blend of services to be determined by Petitioner according to what Student needs, with input and guidance from Petitioner’s advocates, and (b) 50 hours of services from Reading Specialist (in addition to the hours authorized by DCPS) to the extent

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Petitioner determines the hours are needed, with input and guidance from Reading Specialist and Parent's advocates, and if not needed, any (or all) of these 50 hours can be shifted to academic tutoring on a one-for-two basis (converting 1 hour of Reading Specialist services to 2 hours of tutoring, in order to avoid loss in the value of the services) at the option of Petitioner with input from her advocates.

These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity and place Student in the position Student would be in but for the denials of FAPE found above. Because the needs of Student may change during the period when these compensatory education services are rendered, the undersigned authorizes Petitioner to decide among the various services, with input from her educational advocate and counsel, to best apply the hours awarded to Student's current and ongoing needs.

ORDER

Petitioner has prevailed on the claims in this case, as set forth above. Accordingly, **it is hereby ordered that:**

1. Within 10 school days after receiving the reports from both the comprehensive psychological evaluation and Functional Behavior Assessment, DCPS shall convene the IEP team to modify Student's IEP as appropriate based on the evaluations, including at a minimum (a) an increase in the hours of specialized instruction to provide support in all classes involving reading and writing (all classes except "specials"), consistent with this HOD, (b) updated goals, and (c) appropriate baselines.

2. DCPS shall provide letters of authorization within 10 business days after Petitioner's request(s) for:

(a) a total of 150 hours of academic tutoring, counseling, and/or mentoring (with the blend at Petitioner's option) from independent providers chosen by Petitioner, and

(b) 50 hours of services from Reading Specialist, although if any of the hours are not needed (as determined by Petitioner), they may be shifted to academic tutoring on a one-for-two basis (converting 1 hour of Reading Specialist services to 2 hours of tutoring).

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
Hearing Officer

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NOTICE OF RIGHT TO APPEAL

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

Copies to:

Counsel of Record (Appendix A, by email)

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