

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

OSSE  
Office of Dispute Resolution  
March 20, 2019

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PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: March 20, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0346

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: February 25, 26 and 27, 2019

Office of Dispute Resolution, Room 423  
Washington, D.C.

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not ensuring that Student was comprehensively reevaluated and provided appropriate Individualized Education Programs (IEPs) and by not fully implementing Student's IEPs. The parent also alleges that DCPS has not provided her full access to Student's education records.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on December 28, 2018, named DCPS as respondent. The undersigned impartial hearing officer was appointed on December 31, 2018. On January 9, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

The due process hearing was held before me on February 25, 26 and 27, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called INDEPENDENT PSYCHOLOGIST, EDUCATIONAL ADVOCATE and INDEPENDENT OT as additional witnesses. DCPS called as witnesses BES PROGRAM MANAGER, CASE MANAGER, SPEECH-LANGUAGE PATHOLOGIST (SLP), ASSISTANT PRINCIPAL, PROGRAM MANAGER and DCPS OT. Petitioner's Exhibits P-1 through P-29 and P-31 through P-116 were admitted into evidence without objection. I sustained DCPS' objection to Exhibit P-30. DCPS' Exhibits R-1 through R-61 were admitted into evidence without objection.

In lieu of making closing arguments, counsel agreed to submit written closings. Over the objection of Petitioner, I granted DCPS' on-the-record oral motion for a 7-day extension of the final decision due date, to March 20, 2019, to allow time to review the evidence and prepare my final decision after counsel submitted their written closings.

## **JURISDICTION**

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

## **ISSUES AND RELIEF SOUGHT**

The issues for determination, as certified in the January 9, 2019 Revised Prehearing Order, are:

- A. Whether DCPS has denied the student a FAPE due to its failure to develop an appropriate IEP for Student beginning with the March 2017 IEP and failure to fully implement the special education and related services on the student's IEPs since the 2016-2017 school year;
- B. Whether DCPS failed to comprehensively evaluate the student as part of its ongoing obligation to provide supports to special needs students due to its failure to adequately complete the triennial evaluations for the student in 2017 (specifically, an AT evaluation - the last one being done in 2014); failure to provide an appropriate comprehensive psychological reevaluation in 2017 by taking into consideration current data and provide social/emotional evaluations; failure to provide an adaptive assessment to address the potential needs of a student with Autism; failure to provide an appropriate SLP evaluation that took into consideration the pragmatic language skills the student struggles with and that were known to DCPS as issues at the time of the student's reevaluation;
- C. Whether DCPS has denied the student a FAPE by failing to provide the parent with access to all of the educational records of the student that the parent requested within the 45-day time frame provided under the IDEA.

For relief, the parent requested in her due process complaint that the hearing officer order as follows:

- a. DCPS shall authorize independent evaluations be conducted in order to determine the appropriate amount of special education services to be provided to the student;
- b. DCPS shall place and/or fund the student's being placed in an appropriate Autism program;
- c. DCPS shall conduct a functional behavioral assessment (FBA) and create and implement an appropriate behavior intervention plan (BIP) for Student;
- d. DCPS shall hold a meeting with the IEP team to develop, finalize, and

implement an appropriate IEP, taking into consideration the appropriately recommended amount of services to be provided to the student, and determine the proper educational placement for Student and

e. DCPS shall fund any necessary evaluations, compensatory education, and/or behavior support services to be provided to Student.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument and legal memoranda of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education and related services under the IDEA Autism Spectrum Disorder (ASD) disability. Exhibit P-13.
2. Student is currently enrolled in GRADE at CITY SCHOOL 2, where Student has attended since the beginning of the 2018-2019 school year. Testimony of Program Manager. Previously, Student attended CITY SCHOOL 1. Testimony of Case Manager.
3. Student was initially evaluated by DCPS for special education eligibility in the fall of 2011. Student was found then to have a full scale IQ in the Low Average range which indicated that cognitive abilities were in the expected range for Student's age. Student was noted to have difficulties primarily in the areas of communication and "acting-out" behaviors. Exhibit P-3. Student was determined eligible for special education under the Developmental Delay classification in January 2012. Student's October 24, 2012 revised IEP provided for Student to receive 4 hours per month of Speech-Language Pathology and 4 hours per month of Occupational Therapy. The October 24, 2012 IEP did not provide for Specialized Instruction Services. Exhibit P-21.
4. On October 10, 2013, Student's IEP was revised to reduce Occupational

Therapy services to 2 hours per month. Speech-Language Pathology was continued at 4 hours per month. Exhibit P-20. At the September 11, 2014 IEP annual review meeting, no changes were made to Student's special education and related services. Exhibit P-19.

5. Student's triennial special education reevaluation was conducted in October 2014 at City School 1. This reevaluation included an Educational Evaluation (Woodcock- Johnson III Normative Update Tests of Achievement), Speech and Language Reevaluation, Occupational Therapy Assessment, observations and classroom-based assessments. For this triennial, City School 1 did not conduct a comprehensive psychological reevaluation or updated testing of Student's intellectual functioning. Exhibits R-5, R-6, R-7, P-2.

6. At an eligibility meeting on October 30, 2014, Student's disability classification was changed to Specific Learning Disability (SLD). Student's October 30, 2014 IEP identified Mathematics, Reading, Communication/Speech and Language and Motor Skills/Physical Development as areas of concern. The October 30, 2014 IEP provided for Student to receive 10 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology and 2 hours per month of Occupational therapy. Exhibit P-18.

7. Student's IEP was revised at City School 1 on October 21, 2015. The October 21, 2015 IEP continued to provide for Student to receive 10 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology and 2 hours per month of Occupational therapy. For the academic areas of concern, Student's annual IEP goals were carried over, unchanged, from the October 30, 2014 IEP. Exhibit P-17.

8. Student's IEP was revised at City School 1 on October 12, 2016. The

October 12, 2016 IEP continued to provide for Student to receive 10 hours per week of Specialized Instruction outside general education, 2 hours per month of Speech-Language Pathology and 2 hours per month of Occupational Therapy. For the academic areas of concern, most of Student's annual goals were carried over, unchanged, from the October 21, 2015 IEP. Exhibit P-16.

9. In October 2017, City School 1 obtained Mother's consent to conduct a special education reevaluation of Student in the areas of Academic, Psychological and Speech. Exhibits R-14, R-16. The areas of concern identified for Student included delays in social learning, functional communication and expressive language, poor classroom performance and problems with changes in routines. Exhibit R-36.

10. SCHOOL PSYCHOLOGIST conducted a Comprehensive Psychological Reevaluation of Student in September 2017. Student's cognitive and academic abilities were evaluated. On the Woodcock-Johnson Tests of Cognitive Ability, Fourth Edition (WJ IV), Student received a General Intellectual Ability (GIA) standard score of 63, which fell in the Very Low range. Student's Gf-Gc Composite standard score of 70 fell in the Low range. Student's Comprehensive Knowledge, Fluid Reasoning and Short Term Memory standard scores and Cognitive Efficiency scores all fell in the Low range. On the 2017 assessment, Student's cognitive abilities tested lower than in 2011, when Student's measured Full Scale IQ of 90 was the Average range. In the 2017 testing, Student's academic abilities had not regressed and Student continued to demonstrate average reading, spelling and comprehension skills and below average to average math skills. Case Manager, Student's classroom teacher, reported to School Psychologist that Student was not demonstrating academic abilities in the classroom and often put forth very little effort. School Psychologist reported that overall, Student's academic abilities

were much higher than predicted, given tested cognitive abilities, and that these data did not support Student's classification for a Specific Learning Disability. Case Manager reported that Student responded well in a small group setting, but performance could sometimes fluctuate based on Student's mood. In larger settings, Student was often very quiet, had problems relating to others, had difficulty with functional communication and rarely participated in classroom discussions. Student presented with behaviors such as poor activity level and attending skills, selective interests and poor social relatedness. School Psychologist reported that these behaviors often interfered with Student's classroom performance and were characteristic of a student with an Autism Spectrum Disorder. Exhibit R-36.

11. A DCPS speech-language pathologist conducted a Speech and Language Reevaluation of Student on September 28, 2017. The speech-language pathologist reported that Student achieved below average to significantly below average scaled scores on the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5) subtests. Student received Low Average or Average range scores on Expressive and Receptive Vocabulary tests. Student's overall pragmatic language skills were judged to be age-appropriate. Exhibit R-15.

12. At an eligibility team meeting on October 13, 2017, the City School 1 eligibility team determined that Student met eligibility criteria for the ASD disability. Student's IEP special education and related services were left unchanged at 10 hours per week of Specialized Instruction and 2 hours per month each of OT and Speech-Language Pathology services. Exhibit R-18.

13. Student's IEP team met at City School 1 on May 16, 2018 for an annual IEP review. Student's disability was identified on the revised IEP as ASD. Student's

academic and OT annual goals were left mostly unchanged from the October 12, 2016 IEP. Student's Special Education and Related Services and Classroom Aids and Services were also not changed from the October 12, 2016 IEP. Exhibit P-14.

14. At City School 1, Student made some progress but not as much as staff would have liked to have seen. Testimony of Assistant Principal. From August 2016 through June 2018, Student mastered only two IEP annual goals. Exhibit R-33.

15. Student enrolled in City School 2 for the 2018-2019 school year. Student's multidisciplinary team (MDT) convened at City School 2 on November 8, 2018 at the request of Mother. Mother, Petitioner's Counsel and Educational Advocate participated. Mother requested the meeting because she was concerned that Student was not keeping up with peers, because some teachers did not know about Student's IEP and because Mother believed that the classroom was too large. Exhibit P-29. On November 28, 2018, Educational Advocate wrote the principal at City School 2 to request that Student be placed in an autism program, that Student be given a new Speech and Language evaluation and OT evaluation and to request Student's education records. Exhibit R-28. City School 2 agreed to conduct an OT assessment, a Speech/Language screener and a Physical Therapy Screener. Mother provided her consent to conduct these evaluations on December 14, 2018. Exhibit R-27. Program Manager emailed the completed evaluation and screener reports to Mother and her representatives on February 5, 2019. Exhibit R-44.

16. At City School 2, there are no concerns about Student's behavior. There are concerns about Student's spotty attendance. Student's 2018-2019 Scholastic Reading Inventory (SRI) scores are Below Basic and do not show significant progress this school year. Testimony of Program Director, Exhibit P-113. Student's i-Ready



overall Diagnostic scores in math declined from September 2018 to February 2019 and indicate that Student is performing 4 years below grade level. Exhibit P-114.

17. Socially, Student has the social skills to respond to peers and adults and benefits from exposure to typically developing students. Student is able to access the curriculum in the current educational setting at City School 2. Testimony of Program Director.

18. On February 7, 2019, DCPS issued funding authorization for the parent to obtain an Independent Educational Evaluation (IEE) comprehensive psychological reevaluation of Student. Exhibit R-56.

19. Per the DCPS Service Trackers, from December 2016 through December 2018, DCPS failed to provide Student some 10 hours each of OT services and Speech-Language Pathology services prescribed by Student's IEPs. Exhibit R-34. To an extent, these missed services were due to Student's spotty school attendance. *Id.*, Testimony of Program Manager.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the

burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

### Analysis

#### A.

Was DCPS' fall 2017 triennial reevaluation of Student inadequate because it did not include an Assistive Technology (AT) assessment, because the psychological evaluation did not consider current data, did not include a social-emotional component and did not assess adaptive functioning and because the speech and language evaluation did not take into consideration Student's pragmatic language challenges?

Student's triennial reevaluation was conducted in fall 2017 when Student attended City School 1. Petitioner contends that this reevaluation was not sufficiently comprehensive because the psychological and speech-language reassessments were inadequate and because there was no AT reassessment. DCPS responds that the triennial reevaluation of Student was appropriate. The parent has the burden of persuasion on this claim.

The IDEA regulations require that the District's special education reevaluation of a student be sufficiently comprehensive to determine whether the student continues to need special education and related services and whether any additions or modifications to the special education and related services are needed to enable Student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. See 34 CFR § 300.305(a)(2)(B). Decisions regarding the areas to be assessed are determined by the suspected needs of the student. See

Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). Generally, when a student has been evaluated for special education eligibility and the adequacy of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the student's special education and related services needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the student's needs. *See* 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. § 300.304(b)(1–3), (c)(4, 6).

Petitioner alleges that the 2017 triennial was deficient for want of an AT reevaluation. An IEP team must consider whether a student needs assistive technology devices and services to address the student's unique needs resulting from the student's disability or to assist the student to benefit from special education or as a supplementary aid or service. *See* 34 CFR § 300.105, 300.324(a)(2). Student's March 10, 2017 Amended IEP, the most recent IEP before the fall 2017 triennial reevaluation, stated that Student did not require the need of AT services or devices. Nor was there any evidence at the due process hearing that at the time of the triennial reevaluation, Student was suspected to require AT devices or services to address needs resulting from Student's disability or to assist Student to access special education services. I find that Petitioner did not meet her burden of persuasion that Student's IEP team required an AT evaluation to determine Student's needs in all areas of suspected disability or to determine the content of Student's IEP.

DCPS did conduct a comprehensive psychological reevaluation of Student in September 2017. That evaluation included cognitive and educational tests, an autism

rating scale, a classroom observation and interviews with Mother and Student's teacher. School Psychologist concluded that Student's cognitive functioning had regressed since last tested in 2011 and that Student's classroom behaviors were characteristic of a student with an Autism Spectrum Disorder (ASD). Following the triennial reevaluation, the City School 2 IEP team changed Student's disability classification from Specific Learning Disability (SLD) to ASD.

Petitioner's experts, Independent Psychologist and Educational Advocate, testified that the fall 2017 psychological reevaluation was not sufficiently comprehensive. Independent Psychologist opined that the evaluation could have been more comprehensive in assessing Student's emotional functioning and in delving into why Student's intellectual functioning had apparently regressed. Educational Advocate opined that the evaluation should have included social-emotional-behavioral assessments and further that the evaluation should have included an assessment of Student's adaptive functioning. DCPS did not have an expert in psychological evaluations testify.

Federal IDEA law and regulations do not impose any specific requirements on the content of a psychological evaluation. *See Richardson v. District of Columbia*, 273 F. Supp. 3d 94, 100. *See, also, Hill v. District of Columbia*, No. 14-CV-1893 (GMH), 2016 WL 4506972 (D.D.C. Aug. 26, 2016) ("In fact, the IDEA lacks specific parameters regarding the content of psychological evaluations, or for that matter, of other evaluations. It merely requires that such evaluations 'use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.' 20 U.S.C. § 1414(b)(2)(C). Its implementing regulations provide only that students be 'assessed in all areas related to the suspected

disability’ and that such evaluations use ‘[a] variety of assessment tools and strategies . . . to gather relevant functional and developmental information about the child [ . . . ] that may assist in determining – [t]he content of the child’s IEP.’ 34 C.F.R. § 300.304(b)(1), (c)(4).”)

As to *why* Student’s intellectual functioning in 2017 had apparently regressed from when Student had been evaluated in 2011, that inquiry goes beyond the IDEA’s mandate to gather relevant functional and developmental information about the student that may assist in determining the content of the student’s IEP. *See Hill, supra*.

With regard to the need for further assessment of Student’s emotional functioning, in addition to obtaining the autism rating scales from Mother and Student’s teacher, School Psychologist interviewed Student, Mother and the teacher and conducted a classroom observation. From these inquiries, School Psychologist learned that Student was often very quiet in class and had poor activity level and attending skills, selective interests and poor social relatedness. Neither Independent Psychologist nor Educational Advocate disputed School Psychologist’s statement that Student’s behaviors were characteristics of a student with ASD. Notwithstanding, DCPS did not rebut the testimony of Petitioner’s experts that further assessment of Student’s social-emotional-behavioral challenges was needed or that Student should be assessed for adaptive functioning. I, therefore, conclude that Petitioner met her burden of persuasion that the fall 2017 psychological evaluation was not sufficiently comprehensive in those respects.

Petitioner also alleged in her complaint that DCPS’ October 9, 2017 speech and language reevaluation of Student was not comprehensive because the assessment did not take into consideration Student’s pragmatic language challenges. DCPS’ speech

expert, SLP, testified that at the November 8, 2018 MDT meeting, there were no concerns raised about the comprehensiveness of her 2017 speech and language evaluation of Student and that, at Petitioner's Counsel's request, she had conducted a speech and language "screener" in the current school year to update the 2017 evaluation. At the due process hearing, Petitioner did not offer competent evidence from a speech expert that the October 9, 2017 speech and language assessment was not adequate. I find that Petitioner has not met her burden of persuasion on this claim.

B.

Did DCPS deny Student a FAPE by failing to ensure appropriate IEPs were developed for Student since March 2017?

Petitioner alleges that beginning with the March 10, 2017 IEP developed for Student at City School 1, DCPS has failed to ensure that appropriate IEPs were offered to Student. In her Compensatory Education Proposal, Exhibit P-110, Educational Advocate asserts that since the 2015-2016 school year, DCPS' IEPs for Student did not include appropriately updated goals and objectives or present levels of performance, and that the IEP provisions for special education and related services, as well as Student's educational placement were not appropriately revised, despite Student's not mastering basic skills or in response to the change in Student's disability classification in fall 2017 from SLD to ASD. DCPS argues that Student is a slow learner and that the IEPs were appropriate to address Student's needs.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP

involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Moradnejad* at 274-75. Petitioner does not allege that DCPS failed to comply with procedural requirements when Student's IEPs were developed at City School 1 or City School 2. Therefore, I move to the second prong of the *Rowley* inquiry. Were DCPS' IEPs, beginning with the March 10, 2017 Amended IEP, appropriate for Student?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated *Rowley, supra*, for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . in *Endrew F. . . .*, raised the bar on what counts as an adequate education under the IDEA. *Endrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’” standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ), the Court in *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000. *Z. B.*, 888 F.3d at 517. Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034. *Z. B.*, 888 F.3d at 519.

...

Understanding the particulars of a child’s current skills and needs is critical to

developing an “individualized” educational plan: “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) ). *Z. B.*, 888 F.3d at 522.

...

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999. *Z. B.*, 888 F.3d at 524. . . . 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, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated. *Z. B.*, 888 F.3d at 524 (internal quotations and citations omitted.)

DCPS has the burden of persuasion as to the appropriateness of Student’s IEPs.

As the Supreme Court explained in *Endrew F.*, an “IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Id.*, 137 S.Ct. at 999. As part of the IEP development process, the IEP annual goals form the basis for IEP team’s determination of what special education and related services, supplementary aids, services, and other supports are needed for the student to advance appropriately. *See* 34 CFR § 300.320(a)(4). From August 2016 through June 2018, Student mastered only two IEP annual goals. Notwithstanding, as Educational Advocate observed in her Compensatory Education proposal, since the 2013-2014 school year, Student’s IEP teams have carried over Student’s academic annual goals, mostly unchanged, from IEP to IEP. Nor were Student’s special education and related services altered during this period, even after School Psychologist reported in October 2017 that Student’s



intellectual functioning had regressed significantly between evaluations in 2011 and 2017, from the Average range to the Very Low range, and Student's disability classification was changed in fall 2017 from SLD to Autism Spectrum Disorder. DCPS' argument that Student is just a slow learner is unavailing. A child's educational program must still be "appropriately ambitious in light of his circumstances." *Endrew F.*, 137 S.Ct. at 1000. I find that on these facts, the IEPs at issue were not individualized based on Student's then-current skills and needs. *See Z. B.*, 888 F.3d at 522. I conclude that DCPS has not met its burden of persuasion that Student's IEPs, since March 2017, have been reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Endrew F.*, 137 S.Ct. at 1001.

C.

Did DCPS fail to fully implement the special education and related services on Student's IEPs since the 2016-2017 school year?

Since the 2014-2015 school year, Student's DCPS IEPs have provided for Student to receive 2 hours per month each of Speech Language Pathology and Occupational Therapy (OT) related services. In her compensatory education proposal, Educational Advocate reported that between October 30, 2016 and June 15, 2018, DCPS failed to provide Student 14.5 hours of IEP Speech-Language Pathology services and 8.5 hours of IEP Occupational Therapy (OT) services. Based on my review of DCPS' Service Trackers, over the two years preceding the filing of the due process complaint in this case, Student missed some 10 hours each of OT and Speech Language Services or 1/4 of the total related services hours due under Student's IEPs.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), U. S. District Judge Lamberth analyzed when a failure to fully implement an IEP results in a

denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) . . . . To meet this standard, a moving party need not prove that the student suffered “educational harm” because “the Court has no way of knowing how much *more* progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). Generally, in analyzing whether a student was deprived of an educational benefit, “courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson*, 770 F.Supp.2d at 275. For example, in *Sumter County School District 17 v. Heffernan*, the court held that a 33% gap of 60 minutes per day between the required and provided hours of applied behavioral analysis therapy was substantial. 642 F.3d 478, 486 (4th Cir.2011). On the other hand, in *Savoy v. District of Columbia*, the court held that a 3% gap of 10 minutes per day between the required and provided hours of specialized instruction was not substantial. 844 F.Supp.2d 23, 34–35 (D.D.C.2012).

*Beckwith, supra*, 208 F. Supp. 3d at 49. Petitioner has the burden of proof on failure to implement claims.

I find that the 25% gap, between the IEP OT and Speech-Language Pathology services due Student and those services actually provided in the two school years before the due process complaint was filed,<sup>2</sup> was substantial and resulted in a denial of FAPE.

D.

Did DCPS deny Student a FAPE by failing to provide the parent with access to all of Student’s educational records upon request?

Lastly, Petitioner alleges that DCPS has denied Student a FAPE by failing to provide Student’s education records as requested by the parent. Specifically, in an email

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<sup>2</sup> Alleged violations of the IDEA that occurred more than two years before the due process complaint was filed, are barred by the Act’s two-year statute of limitations. *See* 34 CFR § 300.511(e).

dated February 13, 2019, Petitioner's Counsel wrote Program Manager that the parent's representatives had not been provided grades for Student after November 15, 2018 or standardized assessment or test results. The parent has the burden of persuasion on this allegation.

In the District of Columbia, special education records for students with IDEA disabilities are compiled in the central Special Education Data System (SEDS) maintained by the D.C. Office of the State Superintendent of Education (OSSE), pursuant to D.C. Code § 38-2609. *See DL v. District of Columbia*, 194 F. Supp. 3d 30, 43 (D.D.C. 2016), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). DCPS is obliged to permit the parent to inspect and review any education records relating to Student that are collected, maintained, or used by the school, to include special education records accessible in SEDS. *See* 34 CFR § 300.613(a). Program Manager testified that City School 2 had printed up and provided to the parent's representatives whatever records were in Student's SEDS file. Educational Advocate testified at the due process hearing that the parent's representatives had not received all of Student's report cards, school-wide test data, meeting notes and other requested documents, but the evidence did not establish which of such records maintained by DCPS had not been provided as of the hearing date. I find that Petitioner has not met her burden of persuasion that DCPS has not permitted the parent to inspect Student's education records.

### Remedy

In this decision, I have found that DCPS' fall 2017 psychological evaluation of Student was not sufficiently comprehensive, for want of a full assessment of Student's social-emotional-behavioral challenges and the lack of an adaptive functioning assessment. An appropriate remedy would be to order DCPS to ensure that the

evaluation is supplemented as appropriate. However, on February 7, 2019, DCPS issued funding authorization for the parent to obtain an Independent Educational Evaluation (IEE) comprehensive psychological reevaluation of Student. No further relief is warranted for DCPS' failure to conduct a sufficiently comprehensive psychological evaluation.

I have also found that DCPS did not establish that its IEPs for Student since March 2017 were appropriate. I will order DCPS to ensure that an appropriate IEP for Student is developed, taking account of the 2019 IEE psychological reevaluation and other data available to the IEP team.

The parent also seeks an award of compensatory education for the denials of FAPE in this case. The D.C. Circuit pronounced in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), that if a hearing officer concludes that the school district denied a student a FAPE, he has "broad discretion to fashion an appropriate remedy, which may include compensatory education." *Id.* at 800. "That inquiry requires 'figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.'" *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799.

In her compensatory education proposal, Educational Advocate recommends that Student be awarded 200 hours of independent tutoring to remedy alleged denials of FAPE in this case. Educational Advocate also recommended that Student be awarded 65 hours of OT services, 70 hours of Speech/Language services and 100 hours of counseling mentoring services as compensatory education. Educational Advocate's recommendation is based on allegations that DCPS' denials of FAPE to Student included inappropriate IEPs since December 2016, an inappropriate OT reevaluation, reduction

of IEP OT and Speech-Language Pathology services, failure to implement OT and Speech-Language Pathology services, failure to conduct a functional behavioral assessment (FBA) and develop a Behavior Intervention Plan (BIP) and failure to provide the parent all of Student's education records. In this decision, I have found more limited denials of FAPE to Student. I have concluded that DCPS denied Student a FAPE by failing to provide an appropriate IEP since March 2017 and failing to implement some 10 hours each of OT and Speech-Language Pathology, as well as by not conducting a sufficiently comprehensive psychological reevaluation in fall 2017. The most egregious of these violations was DCPS' failure to ensure that Student's IEP was regularly reviewed and updated based upon the particulars of Student's changing skills and needs. *See Z. B., supra*, 888 F.3d at 522. I will therefore award Student as compensatory education 150 hours of independent tutoring and 10 hours, each, of compensatory OT and Speech-Language services.

Petitioner also requests that DCPS be ordered to place Student in an appropriate program for students with ASD. The hearing evidence in this case does not support Student's need for such a restrictive placement. However, Student's IEP team shall not be precluded from placing Student in a more restrictive environment, if warranted.

### **ORDER**

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

1. As compensatory education for the denials of FAPE in this case, not later than 10 school days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain 150 hours of independent academic tutoring for Student. DCPS shall also provide Student 10 hours of supplemental Occupational Therapy services and 10 hours of supplemental Speech-Language Pathology services. DCPS may provide these related services directly or provide funding authorization for the

parent to obtain OT and speech-language services from outside providers;

2. Upon completion of the Independent Educational Evaluation comprehensive psychological reevaluation of Student, DCPS shall promptly convene Student's IEP team to comprehensively review Student's IEP and make revisions, as appropriate, in accordance with this decision and 34 CFR § 300.324 *et seq.* The revised IEP must be based upon the IEP team's careful consideration of Student's present levels of achievement, disability and potential for growth, *see Endrew F., supra*, 137 S.Ct. at 999, and shall set out a plan for pursuing academic and functional advancement. DCPS must ensure that the IEP team is provided all of the data and information on Student which the team reasonably requires to determine Student's current education needs and to review and revise, as appropriate, Student's IEP and educational placement.
3. All other relief requested by the Petitioner herein is denied.

Date: March 20, 2019

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

### **NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE - SPED  
DCPS Resolution Team