

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Guardian, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 2/11/20; 2/25/20;
)	2/28/20
)	Hearing Officer: Michael S. Lazan
)	Case No. 2019-0305
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with a Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 23, 2019. The Complaint was filed by the Student’s legal guardian (“Petitioner”). On January 9, 2020, Respondent filed a response. A resolution meeting was held on January 13, 2020. The resolution period expired on January 22, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference was held on January 31, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on February 3, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was revised on February 11, 2020. The Hearing Officer Determination (“HOD”) due date was March 7, 2020.

The first hearing date was February 11, 2020. Before opening statements, the parties and this Hearing Officer discussed the appropriate burden of persuasion for claims alleging that DCPS did not implement the Student’s Individualized Education Program (“IEP”). The matter was adjourned without testimony so that the parties could present briefs on this issue. On February 18, 2020, Respondent filed its brief on this issue. On February 21, 2020, Petitioner filed opposition on this issue. This Hearing Officer issued an interim order on this issue on February 24, 2020, placing the burden of persuasion on Petitioner for this issue.

The hearing continued on February 25, 2020, and February 28, 2020. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. After testimony, closing arguments were presented. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 to P-46. There were no objections. Exhibits P-1 to P-46 were admitted. Respondent moved into evidence exhibits R-2 to R-6, R-8 to R-9, R-11, R-13 to R-18, R-22 to R-26, R-28, and

R-30 to R-35. There were no objections. Exhibits R-2 to R-6, R-8 to R-9, R-11, R-13 to R-18, R-22 to R-26, R-28, and R-30 to R-35 were admitted. Petitioner presented as witnesses, in the following order: Witness A, a special education advocate (expert: special education programming); herself; Witness B, an occupational therapist (expert: occupational therapy and assistive technology evaluations pertaining to occupational therapy); Witness C, a former attorney for Petitioner; and Witness D, a neuropsychologist and advocate (expert: neuropsychology). Respondent presented as witnesses, in the following order: Witness E, a special education teacher and case manager for DCPS; Witness F, Special Education Coordinator at School B (expert: school psychology); and Witness G, an occupational therapist (expert: occupational therapy).

IV. Issues

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

1. Did Respondent fail to provide the Student with an appropriate IEP on or about October 9, 2019? If so, did Respondent act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the Student needed more hours of specialized instruction and occupational therapy per week.

2. Did Respondent fail to comprehensively evaluate the Student in all areas of suspected disability in or about September-October, 2019? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student required additional evaluations, including by a behavioral optometrist, a developmental optometrist, and/or by an expert in assistive technology.

3. Did Respondent fail to implement the Student's May, 2019, IEP? If so, did Respondent's act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent failed to implement the IEP's requirement for twenty hours of specialized instruction per week outside general education.

V. Findings of Fact

1. The Student is an X-year-old currently eligible for services as a student with Specific Learning Disability. The Student is functioning well below grade level in reading, mathematics, and written expression, and s/he can become frustrated in class. The Student accordingly requires breaks during instruction. Nevertheless, the Student often has a positive attitude in school and very much wants to do well. Testimony of Witness A; Testimony of Petitioner; P-5.

2. The Student was first evaluated for special education services in 2017 as a result of teacher concerns with, among other things, the Student's distractibility and attention span. At that time, the Student was attending School A. The Student was evaluated by a DCPS psychologist on March 16, 2017, and March 24, 2017. The corresponding report, issued on March 30, 2017, revealed that general education interventions (including small group and 1:1 instruction) were not working for the Student, who was functioning below grade level in school-wide testing. The psychologist tested the Student's cognitive ability on the Reynolds Intellectual Assessment Scales ("RIAS"). This test was an outdated version of the RIAS. The Student scored 89 on the composite intelligence index, in the below average range. The psychologist also tested the Student's academic functioning. On the Woodcock-Johnson Tests of Achievement-IV ("WJ-IV"), the Student scored in the average range in both broad reading and broad

written expression, but in the very low range in broad mathematics. The psychologist asked the Student's teacher to describe the Student through the Conners-3 Assessment ("Conners-3"). The teacher expressed that the Student was "significantly elevated" in Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Defiance/Aggression, and Peer Relations. Moreover, the teacher's description of the Student for the Conners-3 Attention Deficit Hyperactivity Disorder ("ADHD") Index score revealed the probability of an ADHD diagnosis. The teacher indicated that the Student's behavior "very frequently" affected the Student's grades/schoolwork and friendships/social relationships. The psychologist also administered the Behavior Rating Inventory of Executive Function, Second Edition ("BRIEF-2"), also through the Student's teacher. The test scores showed that the Student was significantly "elevated" in most areas, particularly in planning. P-4; Testimony of Witness A; Testimony of Petitioner; Testimony of Witness D.

3. The Student received an occupational therapy evaluation from a DCPS occupational therapist on March 17, 2017. The corresponding report, dated April 14, 2017, found that the Student had sensory needs that were impacting him/her in the classroom. The evaluator suggested "sensory integration" in the classroom (such as fidgets, sensory breaks, movement breaks, and classroom adaptations). The evaluator also tested the Student on the Wide Range Assessment of Visual Motor Abilities ("WRAVMA"). The Student scored in the average/low average range for fine motor skills and visual motor skills, and in the low range for visual spatial skills. P-6.

4. The Student's initial IEP, dated May 5, 2017, determined that the Student was eligible for services as a student with a Specific Learning Disability, and

recommended that the Student receive fifteen hours per week of specialized instruction outside general education, with academic goals in reading, mathematics, and written expression. The IEP indicated that the Student was in the low average range in overall mathematics problem skills, and that the Student's basic reading skills were strong. Though the Student performed in the average range in writing, the Student's sentences had issues with structure and punctuation. P-12.

5. The Student continued at School A for the 2017-2018 school year. Petitioner felt that the Student was doing well with the recommended program. The Student's next IEP, dated May 3, 2018, continued to recommend that the Student receive fifteen hours of specialized instruction per week outside general education, with academic goals in reading, mathematics, and written expression. In describing the Student's skill levels, this IEP used much of the same language as the prior IEP. P-13; Testimony of Petitioner.

6. The Student continued at School A for the 2018-2019 school year, during which Petitioner became concerned that the Student was not making adequate progress. The Student's IEP was not fully implemented during the school year. Testimony of Petitioner.

7. Another psychological evaluation of the Student was conducted by a DCPS psychologist on April 1, 2019, and April 2, 2019. The corresponding report, dated April 22, 2019, indicated that the Student had been on task in class during the two observations. However, school-wide testing indicated that the Student's reading levels were no longer in the average range. On the Scholastic Reading Inventory, the Student's Lexile score in August, 2018, and January, 2019, was "Below Basic." School-wide

testing on the i-Ready measure found that the Student's mathematics skills were well below grade level. Cognitive testing was administered to the Student through the Kaufman Assessment Battery for Children-Second Edition ("KABC-II"). The Student's full scale IQ was determined to be 80, in the 9th percentile. Academic testing was administered to the Student through the Kaufman Test of Educational Achievement-Third edition ("KTEA-III"). The Student was found to be in the below average range in reading composite, and in the low range in mathematics composite and written expression composite. The Behavior Assessment System for Children-Second Edition ("BASC-3") was administered to the Student through input of the Student's teacher. The Student's teachers did not express any significant concerns with behavior. Exh. 5; Testimony of Witness D.

8. The Student was again evaluated by a DCPS occupational therapist on April 26, 2019. The report dated May 3, 2019, found that the Student's visual tracking, visual fixation, and visual convergence scores were all within normal limits. The Student's writing sample indicated that his/her letter formation scores were at the ninety-six percent completion rate. On the Developmental Test of Visual Perception-Third Edition, the Student scored in the average range in all measures except for hand-eye coordination, which was deemed to be very poor. Testing on the Beery-Buktenica Developmental Test of Visual-Motor Integration ("VMI") found that the Student's hand-eye coordination was below average. Nevertheless, the evaluator concluded that the Student's functional skills were not impacted by his/her low visual motor integration scores on these assessments. The evaluator stressed that the Student's writing fluency and legibility scores were within normal limits. P-7.

9. An IEP meeting was held for the Student on May 28, 2019, during which Petitioner sought additional hours of specialized instruction for the Student. The IEP team reviewed the Student's psychological evaluation report at this meeting, noting that the Student's achievement testing scores had decreased in reading. Teachers expressed concern about the Student's performance. Petitioner sought an occupational therapy evaluation for the Student. DCPS agreed to provide the Student with an occupational therapy evaluation by a provider of Petitioner's choice. DCPS also agreed to provide the Student with behavioral support services. After the meeting, DCPS agreed to provide the Student with an additional five hours of specialized instruction per week. Testimony of Petitioner; Testimony of Witness C; Testimony of Witness D.

10. The IEP that was then issued for the Student provided twenty hours per week of specialized instruction outside general education. The IEP again contained academic goals in reading, mathematics, and written expression. Additionally, the IEP recommended goals in motor skills/physical development. The IEP indicated that the Student required explicit instruction and scaffolding in reading, mathematics, and writing. The IEP also recommended sixty minutes of behavioral support services per month, thirty minutes of speech and language pathology "consultation" services per month, and thirty minutes of occupational therapy "consultation" services per month. The services in the IEP were set to expire on May 27, 2020. P-18.

11. The Student received an authorization for 200 hours of academic tutoring on June 7, 2019, at the rate of \$65.00 per hour, with a maximum cost of \$13,000.00. The deadline for completion was December 31, 2020. The Student has used few of these tutoring services, due to difficulty with retaining providers. R-6; Testimony of Petitioner.

12. Another occupational therapy evaluation of the Student was conducted on July 10, 2019, by a private evaluator under the supervision of Witness B. This evaluation tested the Student on the Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (“BOT-2”), Developmental Test of Visual Perception-Third Edition (“DTVP-3”), Test of Visual Perception Skills-Fourth Edition (“TVPS-4”), and the WOLD Sentence Copying Test. The Student’s fine motor test scores on the BOT-2 were all average to above average, but the Student scored in the poor range on the DTVP-3 on eye hand coordination, and in the very poor range on visual motor integration. TVPS-4 and WOLD scores were entirely within the average range. The evaluation report found that the Student had significant ocular motor issues, which required additional assessment. The evaluator recommended that a developmental optometrist evaluate the Student immediately. P-8; Testimony of Witness A; Testimony of Witness B.

13. By September, 2019, the Student was able to add and subtract three-digit numbers with regrouping, but was still functioning several grade levels below his/her current grade in mathematics, per the i-Ready measure. In reading, the Student was struggling to read text and pronounce vocabulary correctly, though the Student could explain details and the main idea of a text. According to the Scholastic Reading Inventory (“SRI”) test, the Student was functioning at a “below basic” level in reading, several grade levels below his/her grade. In written expression, the Student was able to write a three- to five-sentence paragraph with a graphic organizer, but struggled with grammar, punctuation, syntax, capitalization and spelling. P-40; P-46-9; P-46-14.

14. For the 2019-2020 school year, the Student moved to School B. School B has not provided the Student with twenty hours of specialized instruction per week

outside general education. The Student's science and Spanish classes each contain approximately twenty children and one teacher. The Student has been able to maintain a "C" average in science, in part due to help from peers. However, the Student has had difficulty understanding anything in Spanish and geography, and is failing both classes. The Student has also been pulled out of Spanish class for counseling, which has made the Student's Spanish instruction more difficult. The Student has also suffered from headaches in school. Testimony of Witness A; Testimony of Petitioner; Testimony of Witness E; Testimony of Witness F.

15. The parties scheduled an IEP meeting for the Student on September 17, 2019. The IEP team discussed the Student's academic functioning and needs. Petitioner was surprised that a draft IEP, which she had not seen before, proposed to reduce the Student's specialized instruction to nine hours per week. Petitioner asked for an evaluation of the Student by a "behavioral optometrist." but Respondent denied this request. The IEP team felt that it could not properly review the Student's occupational therapy evaluation report because the evaluator was unavailable. As a result, the meeting had to be continued at a later date. Testimony of Petitioner; Testimony of Witness D; Testimony of Witness E.

16. The parties continued the IEP meeting on October 9, 2019, and again discussed the Student's specialized instruction hours. DCPS now proposed that the Student receive twelve hours of specialized instruction per week outside general education. DCPS staff indicated that School B had not implemented, and indeed could not implement, the current IEP's requirement for twenty hours of specialized instruction per week outside general education for the 2019-2020 school year. Petitioner contended

that the Student needed the twenty hours of specialized instruction per week outside general education. The team also discussed the Student's recent occupational therapy evaluation report. Petitioner requested 240 minutes per month of occupational therapy, which Respondent did not agree to. Petitioner also sought an evaluation by a developmental optometrist, but DCPS would not agree to this evaluation because it felt that the Student's optometric issues were medical in nature. P-21; Testimony of Petitioner; Testimony of Witness C; Testimony of Witness D; Testimony of Witness E.

17. The IEP ended up recommending that the Student receive twelve hours of specialized instruction per week outside general education: four hours in mathematics, five hours in reading, and three hours in written expression. The IEP recommended sixty minutes of behavioral support services per month and thirty minutes of occupational therapy "consultation" services per month. The IEP also recommended a calculator, small group instruction, manipulatives, extra time, close proximity to the teacher, organizational support, a daily "homework agenda," lined paper for writing, movement breaks, a writing checklist, preferential seating, and repetition of information and directions. The IEP indicated that the Student was several grade levels behind in mathematics, according to the i-Ready measure, and in the "below basic" range for reading. The IEP did indicate that the Student had made some improvement in reading comprehension, but also indicated that the Student was struggling with grammar, punctuation, syntax, capitalization, and spelling. The IEP again contained academic goals in reading, mathematics, written expression, and motor skills/physical development, and added goals in emotional, social and behavioral development. The IEP referenced a Strength and Difficulties Questionnaire ("SDQ") filled out by the Student,

which indicated that the Student had high stress and emotional distress levels at school. P-21.

18. During the 2019-2020 school year, a prior written notice dated October 9, 2019, noted that the Student had received a grade of 100 percent on a geography quiz, and that there was not much writing in the geography class. However, the prior written notice also indicated that Petitioner was concerned that the Student had an “F” grade in the class. The prior written notice further indicated that the Student’s math skills were much better when s/he used a calculator, and that the Student “gets stuck” in reading when s/he does not understand vocabulary. R-12.

19. The Student’s IEP progress report for the first reporting period of the 2019-2020 school year indicated that three of the Student’s four math goals had not been introduced. The Student was working on multiplying and dividing numbers to better understand ratios. The Student was reported to be progressing in reading and working on vocabulary and fluency in reading resource class, a self-contained special education class. The Student’s written expression goals had not been introduced. At that time, the Student was “still” working to complete a three- to five-sentence paragraph. P-35-1-9.

20. Presently, the Student is not as engaged in school as s/he was at the start of the school year, when the Student sought extra supports, such as tutoring. The Student’s grades are poor in general education classes, particularly geography, where there is more independent work. Teachers have expressed that the poor grades are a reflection of the Student’s inability to complete homework, but that the work the Student does complete is acceptable. The Student has made excellent progress in mathematics. The Student has

experienced one year's worth of growth in mathematics, according to the i-Ready measure. Testimony of Witness F.

VI. Conclusions of Law

The burden of persuasion in District of Columbia special education cases was changed by the District of Columbia Special Education Student Rights Act of 2014, which states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a prima facie case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #2 and Issue #3 therefore must be on Petitioner, as more fully discussed in the interim order issued on February 24, 2020. Schaffer v. West, 546 U.S. 49 (2005). Since Issue #1 does directly relate to the appropriateness of the Student’s program or placement, the burden of persuasion must be on Respondent, provided that Petitioner presents a prima facie case.

1. Did Respondent fail to provide the Student with an appropriate IEP on or about October 9, 2019? If so, did Respondent act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court explained that an 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 substantively appropriate? Petitioner does not allege that DCPS failed to comply with IDEA’s procedural requirements when

the Student's IEP was developed. Therefore, this inquiry moves to the second prong of the Rowley inquiry, where the Court found that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. In Rowley, the Court emphasized that a reviewing court may not “substitute [its] own notions of sound educational policy for those of the school authorities.” Id. at 206.

In the District of Columbia, courts stress that an IEP should be both comprehensive and specific, and target the Student's “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533 (D.C. Cir. 1985); 34 CFR Sect. 300.324(a)(1)(iv) (the IEP must address the academic, developmental, and functional needs of the child). As stated in S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008), the measure and adequacy of an IEP should be determined as of the time it was offered to the student.

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). The Court held that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” Id. at 1001. The Court made clear that the standard is “markedly more demanding than the ‘merely more than *de minimis*’ test” applied by many courts. Id. at 1000. The Court stated 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.” Id. at 1000.

The testimony and evidence in this case revealed that School B cannot provide learning-disabled students with an educational program requiring twenty hours of specialized instruction per week outside general education. At the IEP meeting in October, 2019, DCPS staff told this to Witness C and Witness D after being asked why the Student's specialized instructional hours were being reduced. DCPS did not present any witness to contest the testimony of Witness C and Witness D. To the contrary, Witness F testified to the effect that, indeed, School B does not have the resources to provide the Student with twenty hours per week of specialized instruction outside general education. School districts should formulate an IEP before making a placement decision, since placement determinations must be "based on the child's IEP." 34 C.F.R. Sect. 300.116(b)(2). In other words, a student's IEP must determine whether an educational placement is appropriate; the placement does not dictate the IEP. S.S. by & through St. v. District of Columbia, 68 F. Supp. 3d 1, 18 (D.D.C. 2014); Spielberg by Spielberg v. Henrico Cty. Pub. Sch., 853 F.2d 256, 259 (4th Cir. 1988). The approach taken by School B in this case can be considered predetermination or "shoehorning." Letter to Williams, 21 IDELR 73 (OSEP 1994) (under the IDEA, students with disabilities are entitled to receive FAPE, which requires a district to meet the individual educational needs of each child and precludes shoehorning these children into inappropriate placements).

Witness E, the Student's special education teacher, and Witness F, an expert in school psychology, testified that the Student did not need twenty hours of specialized instruction per week. Witness E based her opinion on hearsay conversations with the Student's 2019-2020 general education teachers, who told her that the Student is able to

complete the work but has trouble with homework, which accounts for the Student's low grades. However, Respondent did not call any of the Student's general education teachers as witnesses to allow for cross-examination on this issue, even though it has the burden of persuasion on this issue. Nor did Respondent's witnesses clearly explain how the Student, who is functioning several years below grade level, could function in general education classes, especially without a special education teacher in the room. Indeed, Witness F, the Special Education Coordinator at School B, testified that the Student's IEP needed to be adjusted, explaining that the Student's "Other Classroom Aids and Services" were insufficient to ensure that the Student could benefit from general education classes.

Witness F also testified that the Student's attitude toward school has changed for the worse since the start of the school year, when the Student was "so much more on it." Witness F indicated that the Student has struggled recently in the general education setting, particularly in geography class, which requires a significant amount of independent work, and which the Student is failing. This testimony is consistent with a statement in the record from an occupational therapy evaluation report conducted by DCPS, which indicated that the Student "tends to get lost in groups of more than 10-12 students." P-7-2.

Witness F emphasized the importance of placing students in their least restrictive environment ("LRE"), an important requirement in the IDEA. Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) (setting forth stringent standards for school districts in connection to their duties to provide an education to students with disabilities in the least restrictive environment). Witness F indicated that the Student would be distraught if s/he

had to spend all of his/her academic time with special education students in special education classes. However, there is no other statement in the record that corroborates the testimony of Witness F to the effect that the Student would be negatively affected by placement in specialized instruction outside general education for twenty hours per week. Indeed, this level of services was recently recommended by staff at School A, which has far more experience with the Student than the staff at School B. While the mandate to provide an education in the LRE is an important requirement, maintaining a less restrictive placement at the expense of educational benefit is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994).

Petitioner also contended that Respondent denied the Student a FAPE when it refused to provide Petitioner with direct occupational therapy services. Petitioner relied heavily on the testimony of Witness B, an expert in occupational therapy, who referenced an occupational therapy evaluation of the Student conducted by one of her staff. Witness B opined that the Student's visual motor integration and ocular motor issues "likely" affect his/her visual processing, which impacts his/her academics. Witness B contended that the Student should receive an evaluation from a developmental optometrist, as discussed below, and that the Student should receive one hour of occupational therapy per week. Witness B contended that the Student's ability to perform academically is "likely impacted" by the lack of occupational therapy, and that, if the Student receives this therapy, his/her skills are likely to improve. Witness B also testified that the developmental optometrist should perform a comprehensive evaluation, after which the

optometrist would “concur or not concur” with the recommendation for occupational therapy and, if in concurrence, come up with a treatment plan.

Witness B’s testimony was not convincing. First, Witness B did not unequivocally state that the Student needed occupational therapy. Instead, Witness B stated that the Student needed an evaluation, and that the evaluator might then end up agreeing that the Student needed occupational therapy.

Second, Witness B did not establish that the Student’s visual motor deficits had any impact on the Student’s academic instruction. Indeed, the evaluation report written by one of Witness B’s staff found that the Student performed well at many visual tasks. The evaluation report found that the Student was in the average range in all sub-tests of the TVPS-4 (which tests visual perception) and in the average to above-average range in all sub-tests of the BOT-2 (which tests fine motor skills). The evaluator stated that the provision of occupational therapy services would help the Student with handwriting, but the evaluator also wrote that the Student’s handwriting is appropriate. The evaluation report also suggested that occupational therapy would improve the Student’s executive functioning and organization and help with the Student’s difficulties in lining up mathematics problems. But the evaluation report did not explain *how* occupational therapy would improve the Student’s executive functioning, organization, and mathematics. There is no mention of what the occupational therapy sessions would consist of, or how such services would be helpful to the Student in school.

More credible than this evaluation report, or the testimony of Witness B, was the DCPS evaluation that consisted of an observation, a teacher interview, and testing. The DCPS evaluation report indicated that the Student’s legibility and organization did not

concern the Student's teachers (who were not interviewed by Witness B's firm). The DCPS evaluator also tested the Student on the DTVP-3, which identifies concerns in visual processing and visual motor integration. As pointed out by Witness G, an expert in occupational therapy, this test indicated that the Student scored in the average range in four out of five sub-tests. The DCPS evaluation report also stated that the Student performed well in visual skills, including visual tracking, visual fixation, and visual convergence.

In sum, Petitioner failed to present a prima facie case that the IEP mandate to provide the Student with thirty minutes per month of occupational therapy consultation was inappropriate. However, Respondent denied the Student educational benefit, and therefore a FAPE, when it reduced the Student's specialized instruction to twelve hours per week in the IEP issued on October 9, 2020.

2. Did Respondent fail to comprehensively evaluate the Student in all areas of suspected disability in or about September-October, 2019? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student required evaluations, including by a behavioral optometrist, a developmental optometrist, and/or an expert in assistive technology. A reevaluation of a child with a disability must occur when conditions warrant, or if the parent or teacher requests a reevaluation. 34 C.F.R. Sect. 300.303(a). A Local Educational Agency ("LEA") is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining: (i) whether the child is a child with a disability; and (ii) the content of the child's IEP, including information related to enabling the child to be involved and progress in the general

education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and it should use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b). The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the assessment tools and strategies used provide relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). The failure to conduct a reevaluation can amount to a procedural violation unless the Student's substantive education is impacted. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006) (“(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights”); Hill v. D.C., No. 14-CV-1893 (GMH), 2016 WL 4506972, at *18 (D.D.C. Aug. 26, 2016) (failure to conduct vocational assessment and speech and language assessment).

Petitioner contended that an evaluation of the Student by a developmental optometrist or behavioral optometrist was necessary because of the Student's visual motor deficits, as recommended by the occupational therapy evaluation report conducted by Witness B's firm. However, as discussed in regard to Issue #1, *supra*, there is insufficient evidence that the Student's low scores on certain sub-tests relating to visual motor skills have any significant connection to the Student's academic weaknesses. Petitioner did not connect these sub-tests with any deficits that the Student may have in

reading, mathematics, or writing, and there is nothing in the record to suggest that the Student's teachers at School A or School B have indicated that the Student's visual issues create problems for the Student in class.

Moreover, Petitioner did not call a developmental or behavioral optometrist as a witness to explain what such an evaluation would consist of, or how it might impact the Student's issues in school. Instead, Petitioner called Witness B, an occupational therapist, who did not meet the Student. Neither Witness B nor the occupational therapy evaluation report that recommended a developmental or behavioral optometric evaluation clearly explained what such an optometric evaluation is, or why it would be necessary for the development of the Student's educational plan. The occupational therapy evaluation did discuss how a developmental optometrist could provide vision therapy to address vision deficits, but there is nothing in the evaluation report to explain how vision therapy would help the Student with academics. Notably, neither Witness B nor Petitioner argued that the Student might need vision therapy going forward.

It is underscored that visual motor deficits, by themselves, are not an "area of suspected disability" that must be explored by a school district in the absence of any clear connection to schoolwork. An area of suspected disability should be directly related to an area of academic skill, such as reading, mathematics, or writing. Avila v. Spokane Sch. Dist. 81, 686 F. App'x 384, 385 (9th Cir. 2017) (school district properly assessed student with autism).

Petitioner also contended that the Student required an assistive technology evaluation, again relying on the testimony of Witness B. However, Witness B's testimony did not focus on the need for an assistive technology evaluation for the

Student, and Petitioner did not explain what assistive technology she wanted for the Student. Nor did the occupational therapy evaluation report written by Witness B's staff clearly discuss the Student's need for assistive technology, and Petitioner did not raise this issue during her closing argument.

Accordingly, all claims relating to the Student's reevaluation must be dismissed.

3. Did Respondent fail to implement the Student's May, 2019, IEP? If so, did Respondent's act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent failed to implement the IEP's requirement for twenty hours of specialized instruction per week outside general education.

"Failure to implement" claims may be brought if an LEA cannot "materially" implement an IEP. The parent "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."

Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day than was required by the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard 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. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013).

Petitioner presented undisputed testimony from Witness C and Witness D to the effect that School B did not, and could not, implement the Student's May, 2019, IEP, which required the Student to receive twenty hours of specialized instruction per week outside general education. The record indicates that during the 2019-2020 school year, School B provided the Student with, at most, twelve hours of specialized instruction per week outside general education. Respondent's witnesses did not address this issue, and Respondent did not argue that it provided, or could have provided, the Student with twenty hours per week of specialized instruction outside general education at any time during the school year. Nor did Respondent argue that its failure to provide the Student with at least eight hours of specialized instruction per week can be deemed de minimis and/or immaterial to the Student's education.

Petitioner contended that the IEP of May 28, 2019, developed at School A, was in effect through November 20, 2019, because the IEP states, "document created on 11/20/19." However, this reference, which is in a different font than the rest of the IEP, appears to be a date stamp reflecting the date the document was printed. Witness F testified that the IEP developed at School B was in effect starting on October 9, 2019, which is the date of the second IEP meeting.

Under the circumstances, Respondent denied the Student a FAPE by failing to implement the Student's May 28, 2019, IEP from the start of the 2019-2020 school year through October 9, 2019.

RELIEF

When a hearing officer concludes that a school district has failed to provide a student with a FAPE, s/he has "broad discretion to fashion an appropriate remedy,"

which can include compensatory education. B.D. v. District of Columbia, 817 F.3d 792, 797–98 (D.C. Cir. 2016) (quoting Boose v. District of Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). Under the theory of compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid, 401 F.3d at 521-23. An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D., 817 F.3d at 797-798 (quoting Reid, 401 F.3d at 524). The District of Columbia Circuit Court of Appeals has “explicitly disavowed” compensatory education in the form of “cookie-cutter” lump-sum awards when the hearing officer does not explain how the remedy is tailored to provide the services the student was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005). Moreover, the court emphasized that, in determining the “complicated work” of fashioning such a remedy, the hearing officer should play close attention to the question of assessment. B.D., 817 F.3d at 800.

Petitioner seeks compensatory education, submitting a plan from Witness A, an expert in special education programming, and Witness D, an expert in neuropsychology. The plan recommends 180 hours of academic tutoring to compensate the Student for receiving approximately twelve hours of specialized instruction per week, instead of twenty, for the approximately 6.5-month period of FAPE denial. However, the plan does not clearly explain how 180 hours is an equitable calculation, especially given that individualized tutoring is more intensive than instruction in a classroom setting.

Upon further questioning, Witness D noted that reliable studies indicate that one to two hours of individual tutoring, three times per week, can be equivalent to a full week of learning in a classroom outside general education. Respondent did not dispute this testimony. This Hearing Officer therefore calculates that the Student should be able to make up for the missed instruction outside general education by receiving three hours of individual tutoring per week for approximately twenty-six weeks, which totals seventy-eight hours of tutoring. This tutoring should be provided by a certified special education teacher at a reasonable and customary rate in the community.

Respondent objected to a tutoring award, contending that the Student was awarded tutoring in June, 2019, but did not use much, if any, of the award. However, Respondent did not present any authority to suggest that a compensatory education award should be voided because a Student failed to use compensatory education hours that were awarded previously.

Finally, Petitioner also seeks to amend the Student's IEP to require that the Student receive twenty hours of specialized instruction per week outside general education. As discussed previously in this HOD, the record indicates that the original recommendation of twenty hours of specialized instruction per week outside general education by School A should be honored, given the Student's academic difficulties. Accordingly, the Student's IEP will be amended to require that the Student receive twenty hours of specialized instruction per week outside general education.²

²Petitioner also requests that the Student be compensated with occupational therapy, developmental optometry and assistive technology assessments, and that the Student's IEP be amended to require 240 minutes of occupational therapy per month. However, no FAPE denial was found in connection to the Student's occupational therapy or reevaluation. For the reasons set forth in the analysis of Issue #1 and Issue #2, these requests must be denied.

VII. Order

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay for seventy-eight hours of 1:1 academic tutoring for the Student, to be provided by a certified special education teacher at a rate that is usual and customary in the community;
2. All services shall be used by March 7, 2021;
3. The Student's IEP is hereby amended to require twenty hours of specialized instruction per week outside general education;
4. Petitioner's other requests for relief are denied.

Dated: March 7, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Dated: March 7, 2020

Michael Lazan
Impartial Hearing Officer