

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
March 08, 2021

Confidential

Parent on behalf of Student¹)	Case No. 2020-0154
)	
Petitioner,)	Hearing Dates: January 26-27, 2021
)	February 22, 2021
)	March 4, 2021
)	
)	Conducted by Video Conference
v.)	
)	Date Issued: March 8, 2021
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the father of a [REDACTED]-year-old student ("Student") attending School A. On August 31, 2020, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging, *inter alia*, that the District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") by failing to evaluate Student in all areas of suspected disability, failing to provide an appropriate Individualized Education Program ("IEP"), failing to provide an appropriate placement, failing to provide Petitioner the opportunity to participate in an IEP meeting, failing to implement Student's IEP, and failing to provide Petitioner access to Student's education records. On September 10, 2020, DCPS filed *District of Columbia Public School's Response to Petitioner's Administrative Due Process Complaint* ("*Response*") denying that it had denied Student a FAPE in any way.

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

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

On August 31, 2020, Petitioner filed the *Complaint* alleging, *inter alia*, that DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, failing to provide an appropriate Individualized Education Program (“IEP”), failing to provide an appropriate placement, failing to provide Petitioner the opportunity to participate in an IEP meeting, failing to implement Student’s IEP, and failing to provide Petitioner access to Student’s education records. On September 10, 2020, DCPS filed its *Response* denying that it had denied Student a FAPE in any way.

On October 16, 2020, Petitioner filed *Petitioner’s Motion to Amend the Due Process Complaint* due to receipt of supplemental records after the original filing date. The *Amended Complaint* was filed with the motion. DCPS did not file a formal response to the motion, but Respondent’s counsel notified the Hearing Officer by email on October 21, 2020 that “The District does not consent to the amendment.” On October 22, 2020, I issued an order granting *Petitioner’s Motion to Amend the Due Process Complaint*. The *Amended Complaint* alleged that DCPS denied Student a FAPE by (1) failing to conduct a comprehensive psychological evaluation, an occupational therapy (“OT”) evaluation, an assistive technology (“A/T”) evaluation, and an updated functional behavior assessment (“FBA”); (2) failing to implement Student’s IEPs by failing to provide 37% of her/his behavior support service (“BSS”) hours from October 2018 to May 2020; failing to provide an appropriate IEP and placement on or about April 12, 2018, March 21, 2019, May 9, 2019, June 6, 2019, and April 13, 2020, because the IEPs did not include the changes recommended in a May 2017 HOD, i.e., either a more restrictive therapeutic school setting or other aids and services including a dedicated aide; and failing to provide Petitioner access to Student’s May 2016 evaluation, current functional behavior plan (“FBA”), current behavior intervention and safety plans, meeting notes for the 2018-19 school year, disciplinary referrals for the 2018-19 and 2019-20 school year, and behavior monitoring data for the 2018-19 and 2019-20 school years.

On October 26, 2020, DCPS filed its *Amended Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE as follows: (1) Student’s April 2019 comprehensive psychological evaluation was timely as the previous evaluation was completed in May 2016, DCPS used appropriate procedures prescribed by IDEA to conduct the evaluation, and DCPS evaluated Student in all areas of suspected need; specifically, DCPS denies that OT, A/T, and functional behavior assessments were necessary; (2) DCPS denied that it failed to provide Student all prescribed BSS during the 2018-19 and 2019-20 school years, (3) DCPS denied that the IEPs developed on May 9 and June 6, 2019 were not appropriate, (4) Petitioner’s reliance on a

2017 HOD was time-barred, and (5) DCPS denied that it denied Student a FAPE by failing to provide requested records.

The parties participated in resolution meetings on September 9, 2020 and November 17, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on November 20, 2020, and the Prehearing Order was issued that day. In response to an invitation to do so in the *Prehearing Order*, Petitioner's counsel filed *Petitioner's Legal Memorandum* on December 11, 2020 to address issues of law I raised in the prehearing conference. Respondent filed *District of Columbia Public School's Response to Petitioner's Legal Memorandum* on December 18, 2020.

The due process hearing was conducted on January 26 and 27, 2021, and on February 22, 2021 by video conference. The hearing was closed to the public at Petitioner's request. Petitioner filed Disclosures on January 15, 2021 containing a witness list of eight witnesses and proposed Exhibits P1-P55. Petitioner filed proposed Exhibit 56 on January 17, 2021, two days after the deadline for filing disclosures. DCPS filed objections to Petitioner's disclosures on January 21, 2021. DCPS objected to Witness A, but gave no reason for the objection. DCPS objected to Witness B on the grounds that she does not have first-hand knowledge of the issues in the case. I deferred ruling on these objections until the witnesses' testimony was offered. I overruled objections to proposed Exhibits P4-P21, P38-P42, P52, and P56.² I deferred ruling on proposed Exhibits P48 and P51, but overruled those objections when the documents were presented during the hearing. Therefore, Petitioner's Exhibits P1-P56 were admitted into evidence.

Respondent's Disclosures, also filed on January 15, 2020, contained a witness list of seven witnesses and documents R-1 through R-22. Petitioner filed no objection to Respondent's disclosures. Accordingly, Respondent's Exhibits R-1 through R22 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Student, Petitioner, Witness B, Witness C, Witness D, Witness E, and Witness J. Witness A was accepted as an expert in OT and A/T Assessments, Witness B was accepted as an expert in Special Education Programming and IEP Development, and Witness J was accepted as an expert in special education and psychology. Respondent presented as witnesses in chronological order: Witness F, Witness G, Witness H, Witness-I, and Witness K. Witness F was accepted as an expert in special education planning and placement, Witness G was accepted as an expert in social work and IEP development, Witness H was accepted as an expert in school social work, Witness I was accepted as an expert in special education programming and placement, and Witness K was accepted as an expert in school psychology. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

² I overruled the objection to DCPS' objections to documents that were created before the effective date of the two-year statute of limitations because the statute precludes claims, not documents, and documents created prior to the limitation date may be relevant to claims arising after that date. I overruled the objection to proposed Exhibit P56 because although it was late-filed, Respondent lost no business days to review the document and, therefore, was not prejudiced by the late filing.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive psychological evaluation, an OT evaluation, an A/T evaluation, and an FBA.
2. Whether DCPS denied Student a FAPE by failing to implement Student's IEPs by failing to provide 37% of her/his BSS hours from October 2018 to May 2020.
3. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement on or about April 12, 2018, March 21, 2019, May 9, 2019, June 6, 2019, and April 13, 2020, because the IEPs did not include the changes recommended in a May 2017 HOD, i.e., either a more restrictive therapeutic school setting or other aids and services including a dedicated aide.
4. Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's May 2016 evaluation, current FBA, current behavior intervention and safety plans, meeting notes for the 2018-19 school year, disciplinary referrals for the 2018-19 and 2019-20 school year, and behavior monitoring data for the 2018-19 and 2019-20 school years.

FINDINGS OF FACT

1. Student is X years old and is in grade H at School A.³
2. On April 10, 2014, when Student was in grade A at School B, DCPS completed an IEP Annual Review meeting. Student was classified with Other Health Impairment ("OHI").⁴ In the area of Motor Skills/Physical Development, the Present Levels of Academic Achievement and Functional Performance ("PLOP") provided that visual motor integration was a relative area of strength, while s/he scored in the Below Average range on the Visual Motor subtest. S/he held her/his pencil with an inefficient grasp pattern and inconsistently stabilized his/her paper with her/his left hand. "Based on results from the Sensory Processing Measure, [Student] demonstrates behaviors that are indicative of sensory processing and self-regulating difficulties that are impacting [her/his] school functioning. [S/he] demonstrates a relative strength in Planning and Ideation... [S/he] scored in the Significant Dysfunction range on Social Participation, Vision, Body Awareness, and Total Sensory Scales. [Student] is inconsistent in [his/her] to self-regulate and in [her/his] ability to respond to behavior modification strategies."⁵ The IEP team prescribed 15 hours per week of specialized instruction outside general education, four hours per month of behavioral support services ("BSS"), two hours per month of speech and language pathology, and

³ Petitioner's Exhibit ("P:") 19 at page 1 (292). The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P19:1 (292).

⁴ P11:1 (142).

⁵ *Id.* at 9 (150).

one hour per month of OT therapy, with all three related services performed outside general education.⁶

3. On January 20, 2015, DCPS completed a Psychological Triennial Reevaluation.⁷ At that time, Student was in grade B at School B. S/he was receiving special education services classified with Other Health Impairment (OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). On the Woodcock Johnson Tests of Achievement, Student scored in the Average range in Broad Reading and in all Reading subtests except Reading Fluency (Standard Score of 78). Examiner A opined that "These scores suggest that [Student] has a solid grasp in [his/her] ability to identify words, decode words, and understand speed, accuracy, and expression (Reading Fluency)." S/he also scored in the Average range in Broad Math, with subtest standard scores ranging from 91 to 107. In Written Expression, Student scored in the Average range, but scored in the Low range (79) in Writing Fluency.⁸ Teacher interviews revealed "no academic concerns in reading, writing, and math." Student's behavior was "fine" as long as s/he took her/his medication consistently, but had difficulty self-regulating his/her behavior and "wants to fight everyone" when not medicated, including lacking focus, becoming hyperactive, and wandering around the classroom.⁹ Examiner A concluded that Student continued to meet the criteria to be classified as a student with Other Health Impairment.¹⁰

4. On March 16, 2015, DCPS completed an IEP Annual Review meeting. The IEP reduced Student's specialized instruction from 15 hours to 8 hours per month outside general education, prescribed two hours per month of BSS in general education, two hours per month of speech and language pathology outside general education, and one hour per month of OT consultation services.¹¹

5. On July 25, 2015, DCPS completed an Occupational Therapy Assessment Report.¹² Examiner B found that Student's neuromotor/musculoskeletal functionality was within normal limits in Muscle Tone, Range of Motion, Muscle Strength and Endurance, Motor Planning, Postural Control, Oculomotor Skills, and Dominance/Fine Motor Skills.¹³ Nevertheless, s/he needs assistance navigating the school environment safely due to behavior concerns including off-task behaviors, poor safety habits, impulsivity, and poor judgment.¹⁴ On the Beery-Buktenica Developmental Test of Visual-Motor Integration, Student was Average in Overall Visual Motor Integration and Visual Perception, and was Above Average in Motor Coordination.¹⁵ On the Bruininks-Ooseretsky Test of Motor Proficiency, Student scored in the Average range in Fine Motor Precision, Fine Motor Integration, Fine Manual Control, Manual Dexterity, Upper-Limb Coordination, and Manual Coordination.¹⁶ Examiner B concluded as follows:

⁶ *Id.* at 11 (152).

⁷ P4:1 (41).

⁸ *Id.* at 4-5 (44-45).

⁹ *Id.* at 4:5 (45).

¹⁰ *Id.* at 4:8 (48).

¹¹ P12:11 (168).

¹² P5:1 (51).

¹³ *Id.* at 4-5 (54-55).

¹⁴ *Id.* at 6 (56).

¹⁵ *Id.* at 6-7 (56-57).

¹⁶ *Id.* at 8 (58).

[Student] presents with average skills in the areas of visual motor integration, visual perception, motor coordination, handwriting, fine motor integration, fine motor precision, manual dexterity, and upper limb coordination. These skills support rather than interfere with [Student's] ability to participate and succeed in the general educational environment. [Student] presents with difficulty interpreting and processing sensory information in the educational environment. These difficulties may interfere with [Student's] ability to fully access and participate in the learning environment. [Student] may require supports to fully access and participate in learning.¹⁷

Examiner B recommended, *inter alia*, reducing or eliminating unpleasant sensory input in the learning environment, preferential seating to reduce behavioral overreactions to overwhelming sensory input, presentation of information visually and verbally rather than through touch, limiting large group exposure and finding opportunities for small group and one-on-one interactions, limiting long, unstructured time, encouraging increased flexibility and less behavioral overreactions through a consistent implementation of a reward system, and managing aggressive and depressive behaviors.¹⁸

6. On July 29, 2015, DCPS completed a Comprehensive Psychological Reevaluation.¹⁹ The evaluation was conducted to address the concerns of Petitioner and Student's grandmother that Student's behavioral issues were indicative of an emotional disturbance ("ED").²⁰ On the Reynolds Intellectual Assessment Scales, Student scored in the Average range on the Composite Intelligence Index ("CIX"), the Verbal Intelligence Index ("VIX"), the Nonverbal Intelligence Index ("NIX"), and the Composite Memory Index ("CMX").²¹ Because his/her CMX exceeded his/her CIX, Examiner C opined that Student is able to use immediate recall and working memory functions at a level that significantly exceeds his/her ability to engage in intellectual problem solving and general reasoning tasks. His/her performance in the verbal memory domain significantly exceeded that within the nonverbal domain, leading to the conclusion that Student functions at a significantly higher level when asked to recall or engage in working memory tasks that are easily adapted to verbal linguistic strategies rather than tasks relying on visual-spatial cues and other nonverbal memory features.²² On the Woodcock-Johnson Tests of Achievement ("WJ-III"), Student scored in the Average range in Broad Reading, Broad Math, Spelling, Writing Fluency, and Writing Samples, and in the Low range in Reading Fluency and Writing Fluency.²³ On the Devereux Behavior Rating Scale-School Form, the interview of Student's general education teacher resulted in a finding that Student demonstrates behaviors that are typical of children or adolescents who have been classified as having an emotional disturbance. An interview of Student's special education teacher yielded the same conclusion.²⁴ Petitioner did not submit to an interview, but Petitioner's grandmother completed The Scales for Assessing Emotional Disturbance. Her responses indicated that Student does not exhibit characteristics of emotional

¹⁷ *Id.* at 10 (60).

¹⁸ *Id.*

¹⁹ P7:1 (76).

²⁰ *Id.*

²¹ *Id.* at 8 (83).

²² *Id.* at 9 (84).

²³ *Id.* 10-11 (85-86).

²⁴ *Id.* at 12 (87).

disturbance at home.²⁵ Examiner C noted that in making a determination of eligibility for services, a student must demonstrate ED behaviors both at home and at school, “which does not appear to be the case in the current evaluation.”²⁶ Examiner C opined that Student continued to be eligible as OHI:

[Student’s] struggles appear to be directly correlated with [her/his] struggles with Hyperactivity, Inattention, Impulsivity, and Peer Relations. These are traits of a student that exhibits characteristics of ADHD... [Student’s] limitations are not related to any emotional/behavioral, environmental, cultural, linguistic, sensory, or cognitive/adaptive concerns... As a result of [Student’s] impairment, [s/he] continues to require specialized instruction and Behavior Support services. Based on the results of this assessment as well as pre-existing documented diagnosis of ADHD, [Student] continues to meet eligibility criteria for classification as a student requiring special education services under Other Health Impairment Category.²⁷

7. On May 19, 2016, DCPS completed a Psychological Triennial Reevaluation of Student.²⁸ Examiner D recounted an incident he witnessed when he was attempting to conduct a classroom observation. A formal observation was not conducted due to disruptive behavior on Student’s part throughout the day including physical aggression towards classmates on three occasions and a school administrator, disruptive behavior in the classroom, and insubordination towards the special education teacher and the administrator.²⁹ Examiner D conducted The Scale for the Assessment of Emotional Disturbance (“SAED-2”). Responses from Student’s special education teacher and social worker led to scores “Indicative or Highly Indicative of Emotional Disturbance.” Student’s father’s and grandmother’s responses led to scores “Indicative of Emotional Disturbance: Inappropriate Behavior, Unhappiness or Depression and Physical Symptoms/Fears.”³⁰ Student’s current Report Card revealed that s/he had made progress in reading, moving from Below Basic to Basic during the second and third advisories. S/he was Below Basic in math, but it was noted that his/her grades may have been affected by absences. Examiner D stated that Student “continues to demonstrate behaviors that are impacting [his/her] ability to achieve at grade level standards,” citing 37 disciplinary referrals since the beginning of the school year.³¹ Examiner D concluded that Student met the criteria to be classified as a student with an Emotional Disturbance.³²

8. On June 10, 2016, when Student was in grade C at School B, DCPS completed an IEP Annual Review; s/he was classified ED.³³ The team prescribed 24 hours per week of specialized instruction outside general education, six hours per month of BSS in general education, 30 minutes per month of speech-language pathology outside general education, and 30 minutes per month of OT consultation services.

²⁵ *Id.* at 12 (87).

²⁶ *Id.* at 13 (88).

²⁷ *Id.* at 13-14 (88-89).

²⁸ P8:1 (93).

²⁹ *Id.* at 8 (98).

³⁰ *Id.* at 8-9(100-01).

³¹ *Id.* at 9-10 (101-02).

³² *Id.* at 10-11 (102-03).

³³ P14:1 (189).

9. On May 30, 2017, Hearing Officer Peter B. Vaden issued a Hearing Officer Determination (“HOD”) in which Petitioner had alleged, *inter alia*, DCPS’ failure to provide an appropriate IEP and placement.³⁴ Hearing Officer Vaden found that DCPS should have reviewed Student’s IEP by January 2017 to determine what additional supports and services were needed to address his/her unsafe behaviors. Rather than grant Petitioner’s request for a non-public school placement, Hearing Officer Vaden ordered DCPS to consider less restrictive measures:

I will order DCPS to convene Student’s IEP team to review [his/her] IEP to determine what additional supports and services are needed to address [his/her] verbal and physical outbursts in a way that is reasonably calculated to curb [his/her] unsafe behaviors. If the IEP team decides that Student does not require placement at a therapeutic special school, as has been requested by the parent, the IEP team must provide other aids and services, which would likely include a dedicated aide, to assure the safety of Student, as well as other children and staff...³⁵

10. On June 12, 2017, the IEP team met as ordered in the May 30, 2017 HOD. The team determined that “a more restrictive therapeutic special school setting” was not necessary, but increased Student’s BSS hours and added a dedicated aide. DCPS placed Student at School D.³⁶ The Prior Written Notice (“PWN”) that was issued on June 15, 2017 made no mention of a dedicated aide: “The MDT (Multi-Disciplinary Team) proposes to move forward with development of Amended IEP to reflect increase in Out of General Education Classroom Support in Behavior Support Services from 240 minutes per month to 300 minutes per month and reducing In-General Education classroom support from 120 minutes per month to 60 per month.”³⁷

11. On August 21, 2017, Petitioner’s Attorney C notified DCPS that Student’s family feared for his/her safety at School D and opined that School E was “the only appropriate placement, given that their physician has documented [his/her] need for a very small, therapeutic environment for behaviorally challenged students.”³⁸ On August 29, 2017, DCPS denied Petitioner’s request for placement at School E.³⁹

12. On April 12, 2018, when Student was in grade E at school C, DCPS completed an IEP Annual Review.⁴⁰ The Consideration of Special Factors – Positive Behavior Interventions and Support was as follows:

[Student] displays various impulsive, disruptive, and off-task behaviors in the classroom and overall school setting. Enrolled in a Behavior Emotional Support classroom, [Student] currently receives a structured classroom setting, Behavioral

³⁴ Case No. 2017-0081; P49:1, 3 (470, 472).

³⁵ *Id.* at 18 (487).

³⁶ P48:1 (464).

³⁷ Respondent’s Exhibit (“R:”) 1 at page 1 (001). The exhibit number and exhibit page number (where provided) are followed by the electronic page number in the disclosure in parentheses, i.e., P1:1 (001).

³⁸ P48:2-3 (465-66); *see also*, email from Attorney C dated August 29, 2017, *id.* at 2 (465).

³⁹ *Id.* at 1 (464).

⁴⁰ P15:1 (204).

Support Services, which includes crisis intervention. [Student] has a Behavioral Intervention Plan and Safety Plan which includes detailed strategies and incentives (i.e. Classroom Dojo).⁴¹

In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) provided that “[Student] is able to add single and double-digit numbers with and without regrouping in numeric form. [S/he] understands the concept of subtraction but sometimes has to be reminded to check the operation. When given word problems [s/he] again has to be sometime prompted to determine the operation by using key cue words in the problem. [S/he] is able to identify and recognize numbers up to 120... Once reminded, [s/he] is able to complete an assignment, sometimes with frequent prompting. The baselines were: (1) Once a problem is modeled, Student is able to model place values of 2-digit numbers and determine how many 1’s and 10’s there are, (2) Student has used different units to measure items. Selection of the correct tool is a new skill, (3) Student is able to complete several operations with frequent assistance, (4) Student is able to solve word problems with assistance. The goals were: (1) when given a glossary that shows base ten blocks and their corresponding amounts, Student will represent the number using base ten blocks and then write the digit that is in the hundreds place, tens place, and the ones place, (2) after receiving teacher instruction with a dry erase board that demonstrates selecting and using measurement tools when measuring objects, and when given 6 objects to measure, Student will select the appropriate tool (ruler, yardstick, meter stick, measuring tape) and correctly measure the length of each object scoring 5/6 correct measuring tools selected and object measurements in 4 out of 5 measurement activities, (3) given a multiplication chart, calculator and multiplication problems where a 1-digit number is multiplied by up to a 4-digit number, or a 2-digit number is multiplied by another 2-digit number, Student will reference an exemplar problem to solve and show the work through a written equation, array, and/or area model, and (4) when given modified, multi-step, whole-number word problems, Student will solve the problem correctly for problems presented 4 out of 5 times.⁴²

In Reading, the PLOP provided that Student was reading at level L. S/he becomes frustrated trying to decode words and will either get angry and refuse to continue reading or completely quit that task and throw a tantrum, requesting to play a game instead of using the current learning time for learning and waiting for the break time to begin. The baselines were: (1) Student answers who and where questions with proficiency, (2) Student tends to state details instead of the main idea, (3) S/he has challenges with sentence fluency, and (4) Student is able to provide some details to stories read. The goals were: (1) when asked 10 “wh” questions regarding a familiar grade-level story with one visual support on each page, Student will answer 8 out of 10 questions correctly 80% of the time, (2) after participating in a read aloud, Student will identify the main idea and retell 3 key detailed events, (3) given one part of an instructional-level passage with pictorial support, Student will read aloud fluently with appropriate intonation and expression with no more than five errors 80% of the time, and (4) when given an independent level text a his/her reading level, s/he will participate in a class discussion about the events and answer 4 out of 5 comprehension questions relating to multiple series of events, verbally explaining what happened and why the events happened.⁴³

⁴¹ *Id.* at 2 (205).

⁴² *Id.* at 3-4 (206-7).

⁴³ *Id.* at 4-6 (207-9).

In Written Expression, the PLOP provided that his/her writing is very neat and legible, but s/he does not like writing. S/he is very hesitant during writing sessions and uses avoidance tactics during writing assignments. Student can verbally generate sentences when receiving adult support, but is slow when writing independently. The baselines were: (1) s/he needs reminders to capitalize the beginning of a sentence, proper names, and help determine the proper sentence ending punctuation, (2) s/he is hesitant to write and usually needs a lot of prompting, (3) s/he is able to discuss stories that are read to him/her with some consistency. The goals were: (1) Student will demonstrate the Standards of English Language by capitalizing, names, dates, and the beginning of a sentence and applying correct punctuation at the end of a sentence, (2) when given a topic prompt, Student will work with a peer and use a paragraph template to write a 3-sentence paragraph that includes one topic sentence, states one relevant detail, and includes one concluding sentence, and (3) Student will use a paragraph template and a word bank to compose a five sentence opinion piece with one topic sentence, linking words/phrases, temporal words/phrases, detail sentences that are directly in support of opinions, and a concluding sentence.⁴⁴

In Emotional, Social, and Behavioral Development (“Behavior”), the PLOP provided:

[Student] has shown marginal progress with improving positive peer interactions. Peer discord, as well as physical and verbal confrontation frequently occur in the classroom setting and during transitional periods. Whenever [Student] experiences frustration with a subject matter, is unable to receive immediate assistance or cannot engage in a preferred activity, [his/her] behaviors can quickly escalate and [s/he] becomes verbally or physically confrontational... A Strengths and Difficulties Questionnaire (SDQ) was completed for this reporting period by the classroom teacher... Data from the SDQ are as follows: Overall Stress (28) and Emotional Distress (6) were in the very high-risk range for [Student]. Behavioral Difficulties score (6) was in the very high-risk range. Hyperactivity/Concentration Difficulties score (8) was notably in the high-risk range for [Student]. Peer Relationship Difficulties score (8) was in the very high-risk range for [Student]. Diagnostic predictions indicate that [Student] was in the high-risk range for both a behavioral and hyperactivity/concentration disorder.

[Student’s] disability impedes [her/his] ability to access the general education curriculum. The level of support and interventions implemented will continue during counseling sessions as [Student] accesses his/her educational program. It is, therefore, recommended that [Student] continue to receive behavioral support services.

The baselines were: (1) Student exhibits difficulty sustaining his/her attention and maintaining positive peer interactions, becoming off-task, and often getting into conflicts with peers, (2) although s/he is aware of various calming strategies, s/he is unable to apply them consistently, (3) s/he has difficulty complying with adult directives, and sometimes becomes oppositional, and (4) Student has difficulty making appropriate physical contact with her/his peers when s/he desires their attention, resulting in her/his peers becoming agitated, which may lead to verbal or physical

⁴⁴ *Id.* at 6-7 (209-10).

conflict. The goals were: (1) During instruction or other school activity, Student will select at least one self-regulation strategy to remain on-task and refrain from inappropriate verbal and/or physical contact for 15 minute increments, (2) after an unpleasant interaction with a peer or an adult, Student will use at least one calming strategy to calm [REDACTED] down and refrain from reacting in an inappropriate manner, (3) when receiving a disciplinary intervention and/or redirection from a teacher, Student will use one self-control strategy and will refrain from using negative communication, and (4) s/he will demonstrate acceptable physical contact such as a handshake, pat on the back, high-five, etc., when appropriate.⁴⁵

The IEP team prescribed 24 hours per week of specialized instruction outside general education, five hours per month of BSS outside general education and one hour per month inside general education, and 30 minutes each of consultation services in OT and speech and language. The IEP did not prescribe a dedicated aide,⁴⁶ but did provide extended year services (“ESY”).⁴⁷

13. During the 2018-19 school year, Student was assigned to Witness F’s class at School C. Witness F’s class was one of DCPS’ Behavior & Education Support (“BES”) classes. BES classes are self-contained classrooms for student who have been identified with ED or who have challenging behaviors and require a more therapeutic environment.⁴⁸ There were seven students in the class, and Witness F had an assistant. To encourage positive behaviors, Witness F used a reward system, Positive Behavior Intervention (“PBI”). PBI had six levels of achievement. Student was the only student in the class to reach the top level, Level 6. There were no behavioral referrals for Student during the 2018-19 school year.⁴⁹

14. During the 2018-19 school year, DCPS provided Student 325 minutes of BSS in September,⁵⁰ 270 minutes in October,⁵¹ 135 minutes in November,⁵² 195 minutes in December,⁵³ 240 minutes in January,⁵⁴ 270 minutes in February,⁵⁵ 205 minutes in March,⁵⁶ 220 minutes in April,⁵⁷ and 190 minutes in June.⁵⁸

15. On November 6, 2018, when Student was in grade F at School C, DCPS issued an IEP Progress Report for the first reporting period.⁵⁹ In Math, Student was reported to be “Progressing” on the first and third goal, while second goal was “Just Introduced” and the fourth

⁴⁵ *Id.* at 9-12 (212-15).

⁴⁶ *Id.* at 13 (216).

⁴⁷ *Id.* at 17 (220).

⁴⁸ https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/Family-Programs_Resources-Guide-SY20-21.pdf.

⁴⁹ Testimony of Witness F.

⁵⁰ P24:1-3 (324-26).

⁵¹ P25:1-2 (328-29).

⁵² P26:1 (331).

⁵³ P27:1-2 (334-35).

⁵⁴ P28:1-2 (337-38).

⁵⁵ P29:1-2 (340-41).

⁵⁶ P30:1-2 (343-44). BSS was not provided on March 28, 2019 “due to student being placed in the self-regulation room. Services will resume upon [her/his] availability.” *Id.* at 2 (344).

⁵⁷ P31:1-2 (346-47).

⁵⁸ P32:1 (349).

⁵⁹ R5 (60).

was “Not Introduced.”⁶⁰ In Reading, Student was progressing on all four goals.⁶¹ In Written Expression, s/he was progressing on the first two goals, while the third was not yet introduced.⁶² In Behavior, Student was progressing on the first goal, but the three other goals had not been introduced.⁶³ On January 31, 2019, DCPS issued an IEP Progress Report for the second reporting period. S/he was reported to be progressing on all four Math, Reading, and Written Expression goals.⁶⁴ In Behavior, s/he was progressing on the first goal, the second and third had not been introduced, and the fourth was just introduced.⁶⁵

16. On March 21, 2019, DCPS convened an IEP Annual Review Meeting.⁶⁶ The Consideration of Special Factors – Positive Behavior Interventions and Support was unchanged from the April 12, 2018 IEP.⁶⁷ The Math PLOP revealed that on the I-Ready assessment on January 9, 2019, s/he scored one grade below his/her grade level.⁶⁸ The baselines were: (1) s/he is able to complete several operations with frequent assistance, (2) s/he is able to solve word problems with assistance, and (3) s/he can multiply single digit numbers with the assistance of a calculator. The goals were: (1) given real-world problems involving multiplying a fraction by a whole number and pictures or objects that represent the problem, Student will correctly solve 4 out of 5 problems by modeling the scenario, (2) when given modified multi-step, whole number word problems, a problem-solving checklist and a calculator, s/he will solve the problem correctly 4 out of 5 times, and (3) given a multiplication problem with two multi-digit whole numbers up to three digits each, Student will work with a peer tutor and use a multiplication chart and the standard algorithm to solve the problem in three minutes or less.⁶⁹ In Reading, the PLOP indicated that Student was reading on a grade A level, five grades below his/her grade level. The first, third, and fourth goals from the previous IEP were unchanged, and the second was changed to: after reading a nonfiction text, Student will identify more than one main idea and explain in 3-5 sentences how key ideas from the text support the main idea.⁷⁰ In Written Expression, the PLOP was unchanged from the previous IEP, and there were but two baselines and goals instead of the three in the previous IEP. the two baselines were the same as the first two in the previous IEP. The two new goals were: (1) when given a typed list of at least five sentences containing a subset of proper nouns and a specific verbal prompt, Student will correctly identify the words that need capitalization, and (2) given informational text, a writing prompt with a specified topic, a report organizer with sentence starters and after a shared writing of the introductory sentence and the first supporting detail, Student will write a second supporting detail and a concluding statement.⁷¹

In Behavior, the PLOP from the previous IEP was updated to indicate that Student had shown some progress with improving positive peer interactions, but peer discord as well as verbal

⁶⁰ *Id.* at 60-62.

⁶¹ *Id.* at 62-63.

⁶² *Id.* at 64-65.

⁶³ *Id.* at 66-68.

⁶⁴ *Id.* at 69-75.

⁶⁵ *Id.* at 75-78.

⁶⁶ P16:1 (226).

⁶⁷ *Id.* at 2 (227).

⁶⁸ *Id.* at 3 (228).

⁶⁹ *Id.* at 4 (229).

⁷⁰ *Id.* at 4-6 (229-31).

⁷¹ *Id.* at 6-7 (231-32).

and physical confrontations continue in the classroom and during transitional periods due to his/her inability to self-regulate. As in the previous IEP, whenever [Student] experiences frustration with a subject matter, is unable to receive immediate assistance or cannot engage in a preferred activity, [his/her] behaviors can quickly escalate and [s/he] becomes verbally or physically confrontational. Another SDQ was completed. Data from the SDQ are as follows: Overall Stress (20), Behavioral Difficulties (5) and Hyperactivity/Concentration Difficulties (10) scores were in the high-risk range for Student. As in the previous IEP, diagnostic predictions indicated that Student was in the high-risk range for both a behavioral and hyperactivity/concentration disorder. In comparison to the data for the first advisory scores, although still quite significant, Student showed improvement in the areas of Overall Stress and Peer Relationship Difficulties. The baselines and goals from the April 12, 2018 IEP were unchanged.⁷²

The only change in prescribed services from the previous IEP was the termination of OT consultation services.⁷³

17. On April 25, 2019, when Student was in grade F at School C, the examiner, Witness K, completed a Comprehensive Psychological Reevaluation.⁷⁴ Witness K reported that on January 9, 2019, Student's I-Ready math scores placed him/her on the grade E level, one grade below his/her current grade level.⁷⁵ In reading, Student was found to be on a grade A level, five grades below his/her current grade, but the Examiner noted that Student was reported not to have given full effort on the assessment.⁷⁶ Witness K interviewed Student and Student's homeroom teacher, Teacher A, but Petitioner "was not available for a clinical interview."⁷⁷ On the Wechsler Intelligence Scales for Children ("WISC-V"), Student's full scale IQ was 76, in the Very Low range. His/her Processing Speed was Extremely Low, Verbal Comprehension and Fluid Reasoning were Low Average, and Visual Spatial and Working Memory were Average.⁷⁸ On the WJ-IV, Student scored two grades below level in Broad Reading and Broad Math, and five grades below level in Written Expression.⁷⁹ On the Conner's Comprehensive Behavior Rating Scales ("CBRS-P"), Witness K interviewed Witness F, Student's teacher, whose responses indicated Very Elevated scores for Student in Emotional Distress, Upsetting Thoughts/Physical Symptoms, Separation Fears, Defiance/Aggressive Behaviors, Academic Difficulties, Language A D Scale, and ADHD. The scores in Hyperactivity, Social Problems, Conduct Disorder, and Oppositional Defiant Disorder were Elevated, and were High Average in Generalized Anxiety Disorder.⁸⁰ Witness K concluded that "Data gleaned during this current evaluation support an ED disability category."⁸¹

18. On May 9, 2019, DCPS convened an IEP Annual Review meeting.⁸² The

⁷² *Id.* at 8-12 (233-37).

⁷³ *Id.* at 13 (238).

⁷⁴ P9:1 (107).

⁷⁵ *Id.* at 2 (108).

⁷⁶ *Id.* at 3 (109).

⁷⁷ *Id.* at 4 (110); testimony of Petitioner.

⁷⁸ *Id.* at 7-9 (115-17).

⁷⁹ *Id.* at 12-15 (118-121).

⁸⁰ *Id.* at 15-17 (121-23).

⁸¹ *Id.* at 19 (125).

⁸² P17:1 (248).

Consideration of Special Factors – Positive Behavior Interventions and Support was unchanged from the April 12, 2018 and March 21, 2019 IEPs.⁸³ The Math, Reading, Written Expression, and Behavior PLOP, baselines, and goals were unchanged from the March 21, 2019 IEP.⁸⁴ The team made no change in services from the March 21, 2019 IEP.⁸⁵

19. During the 2018-19 school year, Student completed the Reading Comprehension Assessment of the Reading Inventory on August 29, 2018, December 11, 2018, January 6, 2019, and May 17, 2019. All four scores were in the Beginning Reader level of performance, all at the first percentile.⁸⁶ Subsequent assessments on September 9, 2019, January 9, 2020, and September 1, 2020, resulted in scores remaining at the Beginning Reader level,⁸⁷ ranging from the second, fifth and first percentile, respectively.⁸⁸ On the Math Assessment, from August 20, 2018 through May 14, 2019, Student's Placement & Scale Score rose from 427 (grade C level) to 482 (grade F level), placing her/him at grade level.⁸⁹ On the Math Assessment on January 7, 2020, Student's Placement & Scale Score fell to 439, three grades below her/his level.⁹⁰ On the Math Assessment on September 14, 2020, Student's Placement & Scale score was three grades below her/his level.⁹¹

20. On June 6, 2019, DCPS completed an Amended IEP for Student to "Decrease existing related service hours (time/frequency)."⁹² The team terminated Student's BSS inside generalized education and reduced Student's BSS outside general education from five hours per month to four hours per month.⁹³

21. For the 2018-19 school year, Student's grades at School C were as follows: Basic in Reading, Speaking & Listening, and Math, Proficient in Writing & Language, Music, Art, and Health & Physical Education, and Advanced in Social Studies, and Science. In the twelve "Work Habits, personal and social skills" categories, s/he needed "frequent prompting" to comply in nine, "limited prompting in two, and complied "independently" in one category. The year-end teacher comments were as follows: "During the school year [s/he] has made excellent growth. [S/he] made growth in the following areas (socially, emotionally, academically). There are some areas s/he needs to continue to work on such as fluency in reading and math..."⁹⁴ On the Text Reading and Comprehension ("TRC") assessment, s/he was at the Grade D level, two grades below his/her year-end level.⁹⁵

22. For the 2019-20 school year, Student was assigned to Witness-I's BES class at School A. There were 10 students in the class, a paraprofessional assistant, and a behavior

⁸³ *Id.* at 2 (249).

⁸⁴ *Id.* at 3-7 (250-254), and at 8-12 (255-259).

⁸⁵ *Id.* at 13 (260).

⁸⁶ P47:2 (462).

⁸⁷ R16 (192).

⁸⁸ *Id.* (193).

⁸⁹ R15 (171).

⁹⁰ *Id.* (172).

⁹¹ *Id.* (172).

⁹² P18:1 (270).

⁹³ *Id.* at 13 (282).

⁹⁴ P34:1 (356).

⁹⁵ *Id.* at 4 (359).

specialist throughout the day. There were no referrals or in-school suspensions for Student for disruptive behavior during the 2019-20 school year. Like Witness F, Witness-I used a behavioral reward system to encourage good behavior.⁹⁶

23. On November 10, 2019, DCPS issued an IEP Progress Report of the first reporting period of the 2019-20 school year. The math fraction multiplication goal had not been introduced, there was no progress on word problems, and Student was progressing on whole number multiplication. In Reading, s/he was progressing on the “wh” questions goal, the main topic goal, and the class participation goal, while the reading fluency goal had not been introduced. In Written Expression, s/he was progressing on the capitalization goal, but the writing goal had not been introduced. In Behavior, s/he was progressing on using calming strategies after an unpleasant interaction, but the other three goals had not been introduced.⁹⁷

24. On September 9, 2019 and January 9, 2020, when Student was in grade G, s/he completed the Reading Comprehension Assessment of the Reading Inventory. The raw score rose from 395 in September to 447 in January, but both scores were in the Below Basic range for Student’s grade level, at the second and fifth percentile, respectively.⁹⁸

25. On January 7, 2020, Student completed the i-Ready Math Diagnostic Assessment. Her/his overall score was at the grade D level, three grades below his/her actual grade. S/he scored two grades below level in Number and Operations and in Measurement and Data, and s/he scored four grades below level in Algebra and Algebraic Thinking and in Geometry.⁹⁹

26. On February 3, 2020, DCPS issued an IEP Progress Report for the second reporting period of the 2019-20 school year. The math fraction multiplication goal still had not been introduced, but s/he was progressing on both word problems and on whole number multiplication. In Reading, the reading fluency goal had been introduced, and s/he was progressing on all four goals. In Written Expression, the writing goal had been introduced, and s/he was progressing on both goals. In Behavior, there was no change from the first reporting period; s/he was progressing on using calming strategies after an unpleasant interaction, but the other three goals had not been introduced.¹⁰⁰

27. On April 13, 2020, when Student was in grade G at School A, DCPS conducted an IEP Annual Review meeting.¹⁰¹ The Consideration of Special Factors – Positive Behavior Interventions and Support was unchanged from the previous IEPs.¹⁰² The Math PLOP was updated to reflect the change in schools and the latest I-Ready scores:

Based on the most recent I-Ready diagnostic performance assessment administered on 1/7/20, [Student] continues to perform significantly below grade level in all

⁹⁶ Testimony of Witness I.

⁹⁷ R6 (79-85).

⁹⁸ P45:1-2 (455-56).

⁹⁹ P44:1 (437).

¹⁰⁰ R6 (86-91).

¹⁰¹ P19:1 (292).

¹⁰² *Id.* at 2 (293).

areas of math. Across all domains, [s/he] is currently performing at the [grade D] level and scored 439 scale score. His/her strengths are in the area of numbers and operations and measurement and data. Although [Student] earned this score on the I-Ready Assessment, this is a 22-point increase from his/her BOY assessment where [s/he] earned a 417 scale score which is equivalent to a [grade C] level.¹⁰³

The reported grade D performance was three grades below his/her/current level, and the grade C score was four grades below her/his level. His/her first baseline was changed to an inability to find the areas of shapes. The second and third baselines were substantially the same as in the 2019 IEPs. The goals were: (1) Student will find the area of various polygons by composing them into rectangles or decomposing them into triangles and other shapes, (2) given word problem scenarios involving multiplying and dividing rational numbers and a pictorial representation, Student will correctly apply the properties of operations to all forms of rational numbers and label the answer with the proper unit, and (3) given five multi-step, real-life problems involving all forms of rational numbers (*e.g.*, whole numbers, fractions, and decimals), Student will use the properties of operations and a calculator to solve the problems.¹⁰⁴

In Reading, the PLOP revealed that her/his Reading Fluency was at a grade C level, four grades below her/his level. Student read with a mix of word-by-word and two-word phrases and pauses between sentences as indicated by an Oral Reading Fluency Scale. Student's Reading Comprehension was scored at a grade B level, five grades below her/his current grade level. "[Student's] disability of emotional disturbance affects the ability to self-regulate behavioral responses under normal circumstances, resulting in acting or speaking inappropriately (*e.g.*, speaking out of turn, being in constant motion), poor decision making, and difficulty learning from experience. This impacts access to reading-related instructions, and tasks..."¹⁰⁵ Two previous baselines were unchanged: (1) tending to state details instead of the main idea, and (2) s/he is able to provide some details of stories read. The goals were all new: (1) given an independent level informational text, Student will write the central idea of the text and list three supporting details in a graphic organizer, (2) given an independent level informational text and a graphic organizer with a claim about the text, Student will support the claim by writing three quotations from the text in the graphic organizer, (3) after reading two informational texts, Student will effectively compare and contrast the text using the three most important points and three key details from each text using a Venn Diagram, and (4) after receiving a lesson on identifying context clues, after reading an instructional-level text, Student will determine the meaning of five teacher-selected words by identifying a replacement word that maintains the figurative, connotative or technical meaning from a list of three options.¹⁰⁶

The Written Expression PLOP and baselines were unchanged from the 2019 IEPs. The two previous goals were replaced with the following: (1) after reading an informational text, and given a research topic question, Student will list three facts or details to answer the question, and (2) given an explanatory prompt, a short text, a paragraph organizer, and a list of sentence starters, Student will write a paragraph in order with one opening sentence, four supporting detail

¹⁰³ *Id.* at 3 (294).

¹⁰⁴ *Id.* at 3-4 (294-95).

¹⁰⁵ *Id.* at 5 (296).

¹⁰⁶ *Id.* at 5-6 (296-97).

sentences, an one closing sentence.¹⁰⁷ In Behavior, the PLOP was unchanged except to update the change in schools. Three of the previous four baselines were carried over from the previous IEPs: the inability to apply calming strategies, difficulty complying with adult directives, and difficulty making appropriate physical contact with peers. The goals for these baselines were also carried forward.¹⁰⁸

The IEP team maintained Student's instructional services at 24 hours per week outside general education, four hours per month of BSS outside general education, and 30 minutes per month of speech and language consultation services.¹⁰⁹ The team did not prescribe ESY.¹¹⁰

28. On June 1, 2020, DCPS issued an IEP Progress Report for the fourth reporting period of the 2019-20 school year. The goal relating to the area of polygons had not been introduced, s/he was progressing on the goal of multiplying and dividing rational numbers, and on the multi-step problem solving goal. In Reading, Student was progressing on all four new goals. In Written Expression, s/he was progressing on both goals. In Behavior, none of the goals had been introduced.¹¹¹

29. For the 2019-20 school year at School A, Student's grades were as follows: A- in Self-Advocacy, B+ in English, B- in Concepts of World History and Geography, B- in Science, B- in Math, and A in Health & Physical Education.¹¹²

30. During the 2019-20 school year, DCPS provided Student 180 minutes of BSS in September, 180 minutes in October, 90 minutes in November, 240 minutes in February, 120 minutes in March, 300 minutes in April, and 240 minutes in May.¹¹³

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the

¹⁰⁷ *Id.* at 7-8 (298-99).

¹⁰⁸ *Id.* at 10-11 (301-02).

¹⁰⁹ *Id.* at 12 (303).

¹¹⁰ *Id.* at 15 (306).

¹¹¹ R6 (98-104).

¹¹² P36:1-2 (366-67).

¹¹³ P33:1-4 (351-354).

public agency. The burden of persuasion shall be met by a preponderance of the evidence.¹¹⁴

Petitioner's third issue presented involves the alleged failure to provide appropriate IEPs and placements. Under District of Columbia law, the Respondent bears the burden of persuasion as to these issues. Petitioner bears the burden as to all other issues presented.

Whether DCPS denied Student a FAPE by failing to conduct a comprehensive psychological evaluation, an OT evaluation, an A/T, and an FBA.

IDEA regulations require local education agencies ("LEA") to conduct evaluations to determine the eligibility for special education services for children suspected of having disabilities.¹¹⁵ Once a child is determined to be eligible for services, 34 C.F.R. §300.303 provides that reevaluations must be conducted if the child's parent or teacher requests a reevaluation, not more than once a year unless the parent and public agency agree otherwise, and at least once every three years unless the parent and public agency agree that a reevaluation is unnecessary.

A child with, or suspected of having a disability, must be evaluated in all areas of suspected disability.¹¹⁶ The purpose of evaluation is two-fold: (1) to determine a child's eligibility for services, and (2) to inform the development of the child's IEP.¹¹⁷

The courts treat violations of these provisions as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it "(1) impeded the child's right to a [FAPE], (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents' child; or (iii) caused the deprivation of educational benefits."¹¹⁸

Petitioner argues that Student's failure to make academic progress can be attributed to DCPS' failure to address Student's disruptive behavior.¹¹⁹ Petitioner also argues that Student had been shown to have deficits that warranted additional evaluation in OT and A/T.

Petitioner further submits that Petitioner's low processing speed identified on the Psychological Reevaluation, achievement scores in written expression, behavior struggles, organizational challenges, visual errors, written work deficits, and an atypical pencil grip warranted an OT evaluation. Petitioner also argues that due to Student's persistent struggles with reading and writing, DCPS should have administered an A/T evaluation. Finally, Petitioner contends that Student's behavioral issues, including "attention, lashing out, aggression, anger, frustration, peer discord, physical and verbal confrontation, and inability to self-regulate" and physical and verbal aggression warranted an updated FBA no later than 2019.¹²⁰

¹¹⁴ D.C. Code §38-2571.03(6)(A)(i).

¹¹⁵ 34 C.F.R. §300.301.

¹¹⁶ 34 C.F.R. §300.304(c)(4).

¹¹⁷ 34 C.F.R. §300.304(b)(1).

¹¹⁸ 20 U.S.C. §1415(f)(3)(E)(ii).

¹¹⁹ P1:13 (20).

¹²⁰ *Id.* at 12-13 (19-20).

Comprehensive Psychological Reevaluation

In his April 15, 2019 Comprehensive Psychological Reevaluation, Witness K reviewed Student's academic records from 2018 to the present, observed Student in the classroom, interviewed Student, and interviewed Student's special education teacher. Witness K conducted the Mini Mental State Examination to assess orientation, attention, immediate and short-term recall, language, and the ability to follow simple verbal and written commands.¹²¹ He conducted the WISC-V to assess Student's cognitive ability, the WJ-IV to assess academic achievement, and the CBRS-P to assess a wide range of behavioral, emotional, social, and academic concerns.¹²² Witness K provided an extensive list of recommendations to address his findings including measures to address vocabulary deficits, math, reading, written language and spelling, attention/task initiation and completion, and planning.¹²³

Petitioner faults Witness K's Reevaluation because it did not include a parent interview for the Conners Rating Scale. Petitioner also argues that narrow-band assessments should have been conducted, and social cognition and emotion recognition skills were not assessed. The evaluation noted that "Several attempts were made by the evaluator to reach the parent by phone and the parent was unavailable to provide information regarding family, developmental, medical, and school history. In addition, the Conners 3 Parent Rating Scale was not returned by the parent."¹²⁴ At the hearing, Petitioner conceded that he did not participate in the Conners assessment. Petitioner testified from his car on his smartphone, and did not participate in the hearing after providing his testimony. Witness K testified that his findings on the Conners were reliable because as Student was already classified ED, Witness K was only tasked to determine Student's continued eligibility under this classification. Under these circumstances, Witness K testified that his interview of Witness F was sufficient to establish reliability, as Witness F was Student's resource room teacher with whom Student spent up to 24 hours per week.

Witness K's explanation ignored his dual obligation to provide adequate assessment data to facilitate the development of an appropriate IEP for Student. Nevertheless, Witness K took appropriate measures to arrange an interview with Petitioner, to which Petitioner made no affirmative response. Moreover, the evaluation assessed Student's cognitive ability, her/his academic achievement, and her/his behavioral and social/emotional concerns. Witness K's recommendations addressed all areas of academic weakness as well as Student's low processing speed and executive functioning deficits. I conclude that Petitioner has failed to meet his burden of proving that the Witness K's reevaluation was not comprehensive.

Occupational Therapy Evaluation

On Student's April 10, 2014 IEP the team prescribed one hour per month of OT therapy. However, on the March 16, 2015 IEP, direct OT services were eliminated and replaced with 30 minutes per month of OT consultation services. Student's only OT evaluation was conducted four

¹²¹ P9:5 (111).

¹²² *Id.* at 15 (121).

¹²³ *Id.* at 19-24 (125-130).

¹²⁴ *Id.* at 2 (108).

months later on July 25, 2015. S/he presented with average skills in the areas of visual motor integration, visual perception, motor coordination, handwriting, fine motor integration, fine motor precision, manual dexterity, and upper limb coordination, but had difficulty interpreting and processing sensory information in the educational environment. Examiner B recommended reducing or eliminating unpleasant sensory input in the learning environment, preferential seating to reduce behavioral overreactions to overwhelming sensory input, presentation of information visually and verbally rather than through touch, limiting large group exposure and finding opportunities for small group and one-on-one interactions, limiting long, unstructured time, encouraging increased flexibility and less behavioral overreactions through a consistent implementation of a reward system, and managing aggressive and depressive behaviors. OT consultation services were terminated on the March 21, 2019 IEP.

Witness A testified on Student's behalf that an OT evaluation was warranted due to Student's poor handwriting, self-regulation deficits, poor motor skills, deficits in executive functioning, low organization skills, and low processing speed. However, the Written Expression PLOP on Student's April 12, 2018 IEP, it was reported that although s/he does not like writing, his/her writing was very neat and legible. Student's deficits in processing and executive functioning were identified in Witness K's reevaluation on April 15, 2019, and Witness K provided recommendations to address these deficit areas. In addition, ever since Student's April 12, 2018 IEP, Student has been in a small class environment. Thus, several of Examiner B's recommendation in the July 25, 2015 OT evaluation were incorporated into Student's IEP including limiting large group exposure, small group and one-on-one interactions, and limiting long, unstructured time. Moreover, Witness F, Student's self-contained classroom teacher at School C, testified that Student's inattention was significantly mitigated when his/her seat was moved close to Witness F's desk. Witness F also discussed the Positive Behaviors Intervention ("PBI") reward system utilized in his class, to which Student responded better than all other students in the class. Witness F also testified that Petitioner was highly motivated to maintain her/his status in the PBI reward system.

Based on their observations of Student, the IEP team at School B terminated direct OT services in 2015. Shortly thereafter, the July 2015 OT evaluation revealed that Student had average skills in most areas tested, but Examiner B made recommendations to address Student's difficulty interpreting and processing sensory information, many of which have been incorporated into Student's programs at School A and School C. Witness K also evaluated Student and made recommendations to address processing and executive functioning. I conclude that the Petitioner has failed to meet his burden of proving that DCPS denied Student a FAPE by failing to conduct an OT evaluation.¹²⁵

Assistive Technology Evaluation

Petitioner relies primarily on the testimony of Witness B to support the need for an A/T evaluation. Witness B testified that an A/T evaluation is warranted because of Student's low grade level performance in written expression. When I asked Witness B her opinion as to when an A/T evaluation is indicated, she stated that one is warranted whenever a student is struggling in reading,

¹²⁵ At the inception of DCPS' direct case, Respondent's attorney stated that DCPS was willing to conduct an OT evaluation.

writing, and math and has a poor pencil grip. This threshold is too broad to be sustainable. I suspect that a significant portion of the special education population struggles in reading, writing, and math, but are not suspected of requiring the need for A/T to access the curriculum. In fact, Petitioner did not specify the physical or cognitive deficits that would be addressed by A/T. I conclude that Petitioner has failed to meet his burden of proving that DCPS denied Student a FAPE by failing to conduct an A/T evaluation.

Functional Behavior Assessment

Witness B, Student's educational advocate, testified that Student's behavior had not improved over the years, warranting an updated FBA and behavior intervention plan. However, Witness B also testified that she was not aware of any new behaviors that were not addressed in her/his current FBA. Witness J, a second educational advocate, also testified that DCPS should have developed a new FBA by April 2019. Witness J did not cite any specific behaviors that needed to be addressed in the FBA, but stressed the fact that Student had not met any BSS goals on her/his IEPs. Neither Witness B nor Witness J observed Student in a classroom setting.

Witness F, Student's special education teacher during the 2018-19 school year at School C, testified that Student was an eager student who always raised her/his hand to participate in class. Student was the only student in the class to reach the highest level on the PBI behavior reward system. Student behaved impulsively only after the Christmas break. There were no behavioral referrals of Student during the school year. S/he had good relationships with all of his/her other teachers. Witness F never observed Student engage in physical aggression except on the playground, and that was with "high flyer types," i.e., poorly behaved, aggressive general education students. Witness F witnessed no verbal aggression in class by Student. Student had no problem obeying school rules.¹²⁶ Witness F never had occasion to call Student's parent due to behavior issues. This very favorable testimony from Witness F contrasts with his responses to Witness K, when Witness F was interviewed for Student's Comprehensive Psychological Reevaluation in late April of the 2018-19 school year. At that time, Witness F's responses indicated Very Elevated scores for Student in Emotional Distress, Upsetting Thoughts/Physical Symptoms, Separation Fears, Defiance/Aggressive Behaviors, Academic Difficulties, Language A D Scale, and ADHD. The scores in Hyperactivity, Social Problems, Conduct Disorder, and Oppositional Defiant Disorder were Elevated, and were High Average in Generalized Anxiety Disorder.¹²⁷

Witness G, Student's social worker at School C during the 2018-19 school year, confirmed that Student never mastered a Behavior goal, but s/he consistently made progress. Witness G testified that she normally saw Student seated and behaving appropriately. Student's most significant issue was impulsivity, which was more of a problem immediately after breaks, such as the Christmas holidays and spring break. Student was never disrespectful to Witness G. Witness G was unaware of any behavior referrals, and unaware of any physical aggression instigated by Student. Witness has seen Student curse and be verbally aggressive with classmates, but never towards an adult. Witness G testified that she has observed Student using self-calming techniques in the cafeteria – deep breathing and walking away - to avoid confrontations. Witness G did not

¹²⁶ Testimony of Witness F.

¹²⁷ *Id.* at 15-17 (121-23).

believe Student needed an FBA, needed to be in a BES class, or needed more than 240 minutes per month of BSS.¹²⁸

Witness-I was Student's special education teacher in a BES classroom for the 2019-20 school year. Witness I testified that there were no referrals or in-school suspensions of Student during the school year. Student was motivated to do well, with the possibility that s/he could be placed in some general education classes. Student was also motivated not to get in trouble because s/he was on the football team, and the coach had high standards. Witness-I never saw Student exhibit the level of disruptive behaviors that normally earns placement in a BES class; she "wondered why" Student was ever assigned to the BES program. Student presented no behavior concerns in class other than daydreaming, and staying on track. S/he did not require constant redirection – once or twice a day - and s/he responded immediately. S/he was immature at the beginning of the school year and cursed a lot; the immaturity lasted about a month and the cursing stopped. Witness-I never observed Student fighting. Student would walk away from confrontations; s/he liked being acknowledged for good behavior.¹²⁹

Witness H was Student's social worker and BSS provider for the 2019-20 school year at School A. She characterized Student as a mild-mannered, respectful, and "sweet kid." S/he matured throughout the school year. S/he was being bullied, but his/her behavior was appropriate; s/he needed to be more assertive, which occurred. Witness H opined that Student presented no behavioral concerns. Student engaged in horseplay, but no aggressive physical behavior or fights. There were no behavior referrals during the school year. Student's behavior in group sessions was appropriate; s/he was able to self-regulate. Witness H saw no behavior that she believed warranted an FBA, and she did not believe Student needed to be in BES.¹³⁰

The evidence supporting the need for an FBA was presented through testimony from Student, Petitioner, and Student's grandmother. Student testified that he's always fighting with his/her classmates, and was encouraged to do so by School A staff members. S/he also testified that s/he does not feel safe at School A. Petitioner testified that Student is a jokester at school and fights his/her classmates. However, Petitioner conceded that Student was not suspended during the 2019-20 school year. Witness D, Student's grandmother, testified that she has to pick up Student every other day from School A due to his/her fighting. In direct testimony, she echoed Student's testimony that the teachers at School A encourage fighting, but still call her three times a week to come and get Student. In response to questions from me, Witness D stated that Student lives with his/her father, and she has picked up Student from school 10 times in the 2019-20 school year, but did not know the teacher's name.

The testimony from Student, Petitioner, and Witness D was categorically refuted by DCPS' witnesses. On the issue of Student's behavior warranting the development of and FBA, I find DCPS' witnesses' testimony more persuasive. Student testified that s/he would prefer not to be at School A, and is thus motivated to provide testimony to facilitate his/her departure. Petitioner conceded that Student was not suspended throughout the 2019-20 school year. Witness D testified

¹²⁸ Testimony of Witness G.

¹²⁹ Testimony of Witness-I.

¹³⁰ Testimony of Witness H.

that she picked up Student three times a week, but then conceded that she did not know Student's teacher's name, and had only picked him/her up 10 times during the 2019-20 school year.

The DCPS witnesses' testimony from two schools was consistent. Petitioner had not been suspended during the 2018-19 or 2019-20 school year. His/her teachers those years, Witness F and Witness-I, and her/his social workers, Witness G and Witness H, all describe S Student as generally well behaved, except for impulsivity after breaks from school. Although the tone of Witness F's testimony is somewhat inconsistent with the high scores on the Conners based on Witness F's responses, the record supports that Student was never a disciplinary problem at School C or School A. To the extent Student was easily frustrated and could become verbally aggressive, the issue is whether Student is capable of redirection. The testimony of the four DCPS witnesses indicate that Student is responsive to the teachers' redirection. The DCPS witnesses describe Student as solicitous of praise for his/her behavior and motivated to behave well because of the rewards program and participation on the football team. The staff testimony is consistent that Student does not engage in aggressive physical behavior and presents no behaviors that are concerning or warrant an FBA. Witness H and Witness-I did not believe Student's behavior warranted her/his placement in the BES program.

I conclude that the weight of the evidence supports the conclusion that Petitioner has failed to meet his burden to prove that DCPS denied Student a FAPE by failing to conduct an FBA.

Whether DCPS denied Student a FAPE by failing to implement Student's IEPs by failing to provide 37% of her/his BSS hours from October 2018 to May 2020.

Student's April 12, 2018 IEP prescribed five hours per month of BSS outside general education and one hour per month inside general education. This was unchanged in the March 21, 2019 IEP and the May 9, 2019 IEP. However, the Amended IEP on June 6, 2019 terminated Student's BSS inside generalized education, and reduced Student's BSS outside general education from five hours per month to four hours per month.

Thus, from October 2018 through June of 2019, Student was entitled to receive six hours per month of BSS, or 54 hours. In fact, during the 2018-19 school year, DCPS provided Student 325 minutes of BSS in September,¹³¹ 270 minutes in October,¹³² 135 minutes in November,¹³³ 195 minutes in December,¹³⁴ 240 minutes in January,¹³⁵ 270 minutes in February,¹³⁶ 205 minutes in March,¹³⁷ 220 minutes in April,¹³⁸ and 190 minutes in June.¹³⁹ This amounts to 30.75 hours over nine months, or 3.42 hours per month instead of 6 hours per month.

¹³¹ P24:1-3 (324-26).

¹³² P25:1-2 (328-29).

¹³³ P26:1 (331).

¹³⁴ P27:1-2 (334-35).

¹³⁵ P28:1-2 (337-38).

¹³⁶ P29:1-2 (340-41).

¹³⁷ P30:1-2 (343-44). BSS was not provided on March 28, 2019 "due to student being placed in the self-regulation room. Services will resume upon her/his availability." *Id.* at 2 (344).

¹³⁸ P31:1-2 (346-47).

¹³⁹ P32:1 (349). No data was provided for May 2019.

From September 2019 through May 2020, Student was entitled to receive four hours per month. During the 2019-20 school year, DCPS provided Student 180 minutes of BSS in September, 180 minutes in October, 90 minutes in November, 0 minutes in January and February 2020, 240 minutes in February, 120 minutes in March, 300 minutes in April, and 240 minutes in May.¹⁴⁰ This amounts to 22.5 hours over nine months, or 2.5 hours per month instead of four hours per month.

I conclude that DCPS has denied Student a FAPE by failing to provide Student 23.22 hours of BSS during the 2018-19 school year and 13.5 hours during the 2019-20 school year.

Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and placement on or about April 12, 2018, March 21, 2019, May 9, 2019, June 6, 2019, and April 13, 2020, because the IEPs did not include the changes recommended in a May 2017 HOD, i.e., either a more restrictive therapeutic school setting or other aids and services including a dedicated aide.

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.¹⁴¹ The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" ¹⁴² Rather, the Court ruled that "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child..." ¹⁴³ Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."¹⁴⁴

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.¹⁴⁵ The Tenth Circuit had denied relief, interpreting *Rowley* "to mean that a child's IEP is adequate as long as it is calculated to confer an 'educational benefit [that is] merely... more than *de minimis*.'" ¹⁴⁶ The Court rejected the Tenth Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious

¹⁴⁰ P33:1-4 (351-354).

¹⁴¹ 458 U.S. 176, 187 (1982).

¹⁴² *Id.* at 189-90, 200

¹⁴³ *Id.* at 200.

¹⁴⁴ *Id.* at 203-04.

¹⁴⁵ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

¹⁴⁶ *Id.* at 997.

for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.¹⁴⁷

Petitioner alleges that Student's IEPs are inappropriate because goals and baselines were repeated in subsequent IEPs, demonstrating a lack of progress warranting remediation. In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When 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. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁴⁸

The parties present with starkly different realities. Student, Petitioner, and Student's grandmother paint a picture of constant violence and chaos. All three testified that Student is engaged in fights with classmates on a daily basis. The grandmother testified that she was required to pick up Student from school every other day due to his/her fighting. DCPS' witnesses were Student's BES teachers for SY 2018-19 and SY 2019-20 and BSS service providers for those two years. As previously documented and discussed above, DCPS' witnesses were consistent in portraying Student as a generally well-behaved, eager to please student who evinces disruptive tendencies in the aftermath of school breaks. The witnesses were also consistent in denying that Student poses a disciplinary problem, denying that s/he had been in any fights or even initiates physical aggression other than on the playground with his/her physical peers.

In his May 30, 2017 HOD, Mr. Vaden ordered the parties to convene an IEP team to determine what additional supports and services are needed to address Student's verbal and physical outbursts in a way that is reasonably calculated to curb his/her unsafe behaviors. "If the IEP team decides that Student does not require placement at a therapeutic special school, as has been requested by the parent, the IEP team must provide other aids and services, which would likely include a dedicated aide, to assure the safety of Student, as well as other children and staff."

Petitioner's position is that Student has not made academic progress since that decision, so the relief suggested in the alternative by Mr. Vaden, placement at a therapeutic special school, should now be ordered. This argument fails based on the clear purposes of Mr. Vaden's order, to address verbal and physical outbursts and "to assure the safety of Student, as well as other children and staff." The record does not support that during the 2018-19 and 2019-20 school years, there were genuine issues as to verbal or physical outbursts, or as to Student's safety or the safety of others. Although a dedicated aide was never prescribed by an IEP team after Mr. Vaden's order,

¹⁴⁷ *Id.* at 1000-01 (citations omitted).

¹⁴⁸ 137 S.Ct. at 1000-01.

the record now supports the conclusion that Student would not have benefitted from a dedicated aide. During the hearing, Petitioner's witnesses made no case for an aide, while DCPS' Witness G and Witness H both testified that Student was quite capable of performing independently during transitions and in the classroom, and would not benefit from the use of a dedicated aide.

As previously discussed, Student's teachers and social workers for the two years at issue testified that s/he was generally well behaved and easily redirected on those occasions when s/he became frustrated and disruptive. The request for relief on this issue is based on the suggestion that since Student has not progressed since Mr. Vaden's order was issued, Petitioner is entitled to the alternative remedy. However, that remedy, a therapeutic private school, was deemed necessary to address verbal and physical outbursts affecting the safety of Student and others. The current record does not support that Student presented a behavioral problem that was not amenable to prompt redirection by the staff.

It is also apparent that Student has made some progress during the years in question. First, her/his behavior improved to the point that Witness F testified that s/he was the most well-behaved child in the class. Student was reported to be an eager learner, wanting to please her/his teachers and be acknowledged for good behavior. For the 2018-19 school year, Student's grades at School C were as follows: Basic in Reading, Speaking & Listening, and Math, Proficient in Writing & Language, Music, Art, and Health & Physical Education, and Advanced in Social Studies, and Science. For the 2019-20 school year at School A, Student's grades were as follows: A- in Self-Advocacy, B+ in English, B- in Concepts of World History and Geography, B- in Science, B- in Math, and A in Health & Physical Education.

Petitioner argues that on standardized tests, Student remains well below grade level in Reading, Math, and Written Expression, warranting a more restrictive placement. The record supports this argument. On Student's April 13, 2020 IEP, the Math PLOP indicated that s/he was performing at the grade D level, three grades below her/his current level. In Reading, s/he was performing four grades below his/her current level. In Written Expression, the PLOP was unchanged from the April 12, 2018 IEP where s/he needed reminders to capitalize the beginning of sentences, and was hesitant to write without prompting. Witness J, Petitioner's expert in special education and psychology, provided persuasive testimony about the critical role reading plays in education at Student's age. Witness J testified that when a student is in grade H or I but reading at a grade C level (four grades below grade H), s/he is not able to acquire knowledge reading material on a grade H level. At this point in his/her development, the child should be "reading to learn, not learning to read."

Despite Student's markedly improved behavior, Student has made no meaningful progress in improving his/her grade level performance in Math, Reading, and Written Expression. Therefore, I conclude that DCPS has failed to provide an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances for the 2018-19 and 2019-20 school years.

Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's May 2016 evaluation, current FBA, current behavior intervention and safety plans, meeting notes for the 2018-19 school year, disciplinary referrals for the 2018-19 and 2019-20 school year, and behavior monitoring data for the 2018-19 and 2019-20 school years.

The regulations require the local education agency to allow parents to examine their student's records:

(a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.¹⁴⁹

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.¹⁵⁰

During Petitioner's closing argument, I asked Petitioner's counsel to identify those records that DCPS has not provided that impaired his ability to prepare for the hearing. Counsel stated that DCPS had not provided behavior monitoring data that was collected in connection with PBI, the behavior reward system employed by Witness F and Witness-I. Respondent's counsel argued that these daily records are created by the teacher, are not required to be retained, and no longer exist.

I have no reason to suspect the veracity of Respondent's counsel's representation that these records no longer exist. They are not records that are ordinarily retained among a student's education records. Further, in light of the testimony about the rewards program, I cannot discern

¹⁴⁹ 34 C.F.R. §300.501.

¹⁵⁰ 34 C.F.R. §300.613.

any harm to Petitioner for DCPS' failure to produce the records. Witness F and Witness-I both testified about the rewards system and were available for cross-examination. They both testified that they used a rewards system; Witness F testified that Student was the only student in the class to reach the sixth and highest level, exemplifying positive behaviors over time. Witness-I testified that Student liked to be acknowledged for good behavior. If Petitioner had any reason to doubt this testimony, he had the opportunity to present rebuttal testimony, but elected not to do so.

RELIEF

For relief, Petitioner requested, *inter alia*, (1) funding for a non-public placement or, in the alternative, a dedicated aide, (2) order DCPS to complete an OT evaluation, an A/T evaluation, a psychological evaluation, an FBA, or fund compensatory education evaluations in the alternative, (3) order DCPS to hold an evaluation meeting and revise the IEP to reflect then need for a separate day school, (4) an order for DCPS to provide all requested records, (5) reservation of compensatory education, (5) an order allowing Petitioner to file another due process complaint based on any issues found in records not previously provided, (6) attorneys' fees, and (7) compensatory education.

In *Reid v. District of Columbia*, the D. C. Circuit held that in determining awards of compensatory education services, Hearing Officers could not simply award services on an hour-for-hour basis, or by use of a standard formula.

We reject... appellants'... mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.¹⁵¹

Thus, Petitioner has the burden of showing that (1) as a result of DCPS' failure to provide transportation, Student suffered an educational deficiency, (2) but for the violation, s/he would have either maintained his/her current level of academic performance or progressed to a higher level, and (3) that there exists a type and amount of compensatory education services that would bring him/her to the level s/he would have been but for DCPS' violation.

Hearing Officers may not award compensatory education services based solely on the amount of services a local education agency ("LEA") failed to provide.

[W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

More specifically, as the Fourth Circuit has explained, "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy

¹⁵¹ *Id.* at 18.

what might be termed an educational deficit created by an educational agency's failure over a give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet “the essence of equity jurisdiction” is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it...” In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that “there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA...”¹⁵²

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.¹⁵³

Petitioner submitted a Compensatory Education Proposal that recommended 432 hours of tutoring in Math, Reading, and Written Expression and 36 hours of counseling.¹⁵⁴ The proposal and materials submitted by Petitioner to support 432 hour of tutoring do not address the central questions of (1) how much academic growth can be reasonably be expected of Student with an appropriate IEP, and (2) what kind and amount of services would put Student in the academic position s/he would have been in had s/he been placed in a full-time specialized instruction program on September 27, 2018. More recently, in *B.D. v. District of Columbia*,¹⁵⁵ the D.C. Circuit suggested that assessments addressed at determining the nature and amount of service to address the appropriate compensation for a specific student could ameliorate the fact-specific requirement. “Nothing in the Hearing Officer's Decision required updating or supplementing the compensatory education award upon completion of the new assessments.”¹⁵⁶ To that end, I will order a limited amount of compensatory education services as well as an assessment funded by DCPS to determine the nature and amount of additional services necessary to compensate Student for the denial of FAPE found herein.

¹⁵² *Id.*, 401 F.3d at 523-24, citations omitted.

¹⁵³ *Id.* at 524.

¹⁵⁴ P56 (11).

¹⁵⁵ 817 F.3d 792 (D.C. Cir. 2016).

¹⁵⁶ *Id.* at 799.

ORDER

Upon consideration of the *Amended Complaint*, DCPS' *Amended Response*, *Petitioner's Legal Memorandum*, *District of Columbia Public School's Response to Petitioner's Legal Memorandum*, the exhibits from the parties' disclosures that were admitted into evidence, and the testimony presented during the hearing, and the arguments of opposing counsel, it is hereby

ORDERED, that

- (1) DCPS shall fund a total of 100 hours of independent tutoring services for Student in Reading, Mathematics, and Written Expression, with no restrictions as to the time of day or deadlines for the completion of such services.
- (2) DCPS shall fund an independent evaluation to determine the type and amount of independent educational services would be necessary and appropriate to improve Student's performance in mathematics, reading, and written expression by two grade levels.
- (3) DCPS shall fund a total of 36 hours of psychological counseling, with no restrictions as to the time of day or deadlines for the completion of such services.
- (4) Within thirty (30) days of receipt of the independent evaluations, DCPS shall convene a Multidisciplinary Team meeting to review the evaluation, to determine whether there are evidence-based intervention programs that could be used to address Student's deficits Math, Reading, and Written Expression, and to revise the IEP as necessary, including a consideration of appropriate compensatory education services for the lack of appropriate IEPs for the 2018-19 and 2019-2020 school years.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: March 8, 2021

Copies to: Attorney A, Esquire
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