

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

PARENT,
on behalf of STUDENT,¹

Date Issued: March 27, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0223

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: March 22-23, 2021

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or Mother) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to comprehensively reevaluate Student for special education needs, failure to develop appropriate Individualized Education Programs (IEPs) and failure to provide the parent access to Student’s complete education records.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on December 31, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on January 4, 2021. On January 12, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On January 29, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was originally scheduled for February 18 and 22, 2021. On February 17, 2021, Petitioner's counsel requested to continue the hearing dates because of weather conditions. The hearing was continued to March 22 and 23, 2021. On February 17, 2021, to accommodate the new hearing dates, I granted Petitioner's unopposed motion to extend the final decision due date to April 9, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on March 22 and 23, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Mother testified and called as witnesses EDUCATIONAL ADVOCATE 1, PROGRAM DIRECTOR and EDUCATIONAL ADVOCATE 2. At the conclusion of Petitioner's case in chief, DCPS' Counsel made an opening statement. Petitioner's Exhibits P-1 through P-44 and DCPS' Exhibits R-2

through R-32 were admitted into evidence without objection. DCPS called no witnesses.²

Following presentation of the evidence, counsel for the respective parties made oral closing arguments. Neither party requested leave to file written closings.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the January 29, 2021 Prehearing Order, are:

- a. Whether DCPS failed to comprehensively evaluate the student in all areas of suspected disability from the 2017-2018, 2018-2019 and 2019-2020 school years, up until the June 15, 2020 funding for evaluations, by failing to timely conduct triennial evaluations and/or failing to evaluate when Student did not progress academically, and regressed psychologically during 2019-2020 school year, thereby denying Student a FAPE?
- b. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP and/or Placement and/or Location of Service, for the 2018-2019 school year to the present denying Student a FAPE because DCPS failed: (1) to provide a full time outside of general education setting where Student is pulled out of general education for all academic courses, all specials, all transitions, lunch and recess; (2) to provide placement in a therapeutic special education day school; (3) to provide measurable goals and baselines for all academic goals on the IEP; and/or (4) to provide present levels of performance, goals and baselines in the area of written expression;

² DCPS' Counsel informed the hearing officer that DCPS had intended to call Student's DCPS case manager as its only witness, but that individual was out on medical leave and it was not known when she would be available to testify. DCPS elected to rest on the record and not to request that the hearing be continued.

c. Whether DCPS denied Student a FAPE by failing to allow the parent access to Student's complete cumulative educational records used or maintained by DCPS pursuant to the parent's numerous written requests in the 2019-2020 school year.

For relief, Petitioner requests that DCPS be ordered to ensure that an appropriate IEP is developed for Student to include appropriate and updated present levels of performance (PLOPs), goals and baselines, goals and services for Written Expression, speech and language goals and services, occupational therapy goals and services, and an appropriate level of services to include specialized instruction in an outside of general education setting for all academic courses, specials, transitions, recess, etc.; that DCPS be ordered to fund Student's placement in a separate, therapeutic special education day school; that DCPS be ordered to provide the parent all of the requested education records; and that Student be awarded compensatory education for the denials of FAPE alleged in the complaint. Parent also seeks to reserve the right to seek additional compensatory education when the additional evaluations of Student are completed.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education under the Specific Learning Disability (SLD) classification. Exhibit R-8.

2. Student has attended DCPS public schools since pre-kindergarten. Since

the 2017-2018 school year, Student has been enrolled in CITY SCHOOL where Student is currently in GRADE. Testimony of Mother.

3. Student was first determined eligible for special education on March 9, 2015. In DCPS' February 12, 2015 comprehensive psychological evaluation, it was reported that on the Wechsler Intelligence Scale for Children (WISC IV), Student achieved scores in the average to low average range in all indexes with the exception of perceptual reasoning. Student displayed a relative weakness with perceptual reasoning abilities. On the Wechsler Individual Achievement Test - Third Edition (WIAT-III), Student achieved scores for Reading Comprehension in the low range, Mathematics in the below average range and Written Expression in the low range. At the time this evaluation was conducted, Student was reported to be performing at the beginning of the 1st grade level in both Reading and Math, years below Student's actual grade level. Student's DCPS English teacher reported that Student displayed difficulties with writing a written response and was unable to write a complete a thought or idea. The teacher reported that Student could use some assistance with decoding, reading and writing. Exhibit P-5.

4. In October 2017, City School administered the Woodcock Johnson Tests of Achievement (WJ-IV) to Student. Student received composite scores of 444 (Grade Equivalent 1.6) in Reading, 480 (Grade Equivalent 3.2) in Mathematics and 494 (Grade Equivalent 4.2) in Written Language. Exhibit P-6.

5. On November 14, 2017, the City School multidisciplinary team (MDT)

affirmed Student's continued special education eligibility as a student with a Specific Learning Disability. To make that determination, the MDT team consider the WJ-IV, classroom performance, work samples and Student's scores on norm-referenced assessments. The team reported that Student struggled with written expression when writing independent thoughts, had little stamina for writing and had difficulty with verbs. The team determined that Student's disability had an impact on Student's participation in the general education curriculum for Reading and Math, but not for Written Expression. Exhibits P-32, P-33.

6. Student's initial March 9, 2015 DCPS IEP identified Mathematics and Reading as areas of concern and provided for Student to receive 15 hours per week of Special Education Services, including 10 hours for Reading outside the general education setting. Exhibit P-9.

7. Student's DCPS IEPs were revised or amended on January 19, 2016, December 15, 2016, May 16, 2017, November 14, 2017, October 19, 2018, December 18, 2018, September 20, 2019 and November 13, 2020. Until 2020, the IEP areas of concern remained Mathematics and Reading. In the December 15, 2016 IEP, Student's IEP special education services were reduced to 13 hours per week, including 8 hours outside general education. In a May 16, 2017 IEP Amendment, Student's special education services were increased to 20 hours per week, all outside general education. This level of special education services was maintained in subsequent IEPs. In the November 13, 2020 IEP, Emotional-Social-Behavioral Development was added as an

area of concern and the IEP provided for Student to receive 180 minutes per month of Behavioral Support Services. Exhibits P-10, P-11, P-12, P-13, P-14, P-15, P-16 and R-8.

8. Student's achievement in Mathematics and Reading, as measured periodically using the norm-referenced assessments, i-Ready, Measures of Academic Progress (MAP) and Scholastic Reading Inventory (SRI), remained at 1st grade level or lower through the 2016-2017 school year. From the 2017-2018 school years through the 2019-2020 school years, Student attained scores at the levels expected for 2nd or 3rd grade. Exhibits P-10, P-11, P-12, P-13, P-14, P-15, P-16.

9. In the fall of 2019, Student's in-school behavior deteriorated. Problems behaviors including cursing, hitting, being off task, bullying other students, entering unscheduled classroom and building spaces and being tardy or absent. In January 2020, the City School social worker conducted a functional behavior assessment (FBA) and developed a behavior intervention plan (BIP) for Student. The social worker also attempted to reach Mother to obtain consent to add Behavioral Support Services to Student's IEP, but was not able to obtain Mother's consent before a May 2020 IEP team meeting. Exhibits P-7, P-8, R-30, P-19.

10. DCPS schools have been closed, with some distance learning provided, since March 16, 2020 due to the Coronavirus emergency. Hearing Officer Notice. As of the due process hearing date, DCPS was offering hybrid instruction with the opportunity for students to attend school, in person, for part of the school week. Mother has not sent Student back to school for in person classes. Testimony of Mother.

11. Student's final grades at City School for the 2018-2019 school year were all C+ or higher, despite having 35 unexcused absences. Exhibit R-23. Student's final grades for the 2019-2020 school year were Pass (P) or B+, except for a D in World History. That school year, Student accrued 32 unexcused absences. Exhibit R-18. Student received F's in all courses for the first term of the 2020-2021 school year. Student had 15 unexcused absences for the term. Exhibit R-11. In light of Student's minimal progress on norm-referenced assessments and Student's numerous unexcused absences, I do not find Student's report-card grades to be an accurate indication of Student's academic progress.

12. In early 2020, LAW FIRM began representing Mother and Student. On February 13, 2020, Law Firm requested City School to provide copies of Student's education records. City School provided records on February 18, March 6 and May 14, 2020. Exhibit P-34.

13. On April 3, 2020, Law Firm employee, Educational Advocate 1, requested the school team at City School to conduct a comprehensive psychological reevaluation of Student to include behavior assessment rating scales, and an Occupational Therapy evaluation.

14. On June 15, 2020, DCPS issued funding authorization for the parent to obtain Independent Educational Evaluation (IEE) assessments of Student including a comprehensive psychological evaluation, an OT evaluation and a Speech-Language evaluation. Exhibit R-3. Petitioner's Counsel represented at the due process hearing

that due to the Coronavirus pandemic, Law Firm had been unable to schedule the IEE assessments.

15. On July 21, 2020, DCPS issued funding authorization for the parent to obtain independent services for Student, including 250 hours of tutoring and 40 hours of counseling by a social worker. Exhibit R-4. DCPS' Counsel represented that as of the due process hearing date, none of the independent service hours had been used.

16. In November 2020, PRIVATE PSYCHOLOGIST conducted a Child Vocational Rehabilitation Neuropsychological Evaluation of Student to determine whether Student was eligible for D.C. Rehabilitation Services Agency (RSA) services. Private Psychologist conducted an interview and a mental status exam of Student and administered a battery of cognitive, academic achievement and adaptive behavior assessments. In her November 18, 2020 report (the RSA Evaluation), Private Psychologist reported that she was diagnosing Student with an intellectual disability, mild in severity and a learning disorder in reading, moderate in severity. Student's IQ tested in the borderline range. Student had weakness in all subtests of intelligence, except for rote verbal memory. Results were suggestive of an intellectual disability. Student's executive functioning was below expectations. Student had no deficiencies in language. Student had significant memory deficits. Student scored in the extremely low range in all memory indexes, with the exception of visual memory that was in the borderline range. Student's visual spatial skills were in the average range. Student had no deficiencies in visual motor integration skills. Student did not present any

psychological symptoms or conditions. Student's academic achievement was at a third grade level. Private Psychologist reported that Student needs remedial learning skills, preferably one to one in-person for reading, writing, spelling, and arithmetic; that Student learns best in person, preferably in a one-to-one setting; that Student's adaptive functioning is below what is expected when compared to other same-aged youths; that Student presented with the skills and abilities to participate in education and training programs with significant accommodations and that Student can find and maintain competitive employment with assistance. Private Psychologist recommended, *inter alia*, that Student will need a lot of repetition, that Student needs to learn skills to improve memory and that Student needs academic supports, including remedial learning skills, in all areas. Exhibit P-4. The RSA Evaluation was not provided to DCPS until January 2021 and has not been considered by Student's IEP team. Representation of Counsel.

17. Student has been wait-list admitted to NONPUBLIC SCHOOL, a private special education day school in suburban Virginia, subject to space becoming available. As of the due process hearing date, Nonpublic School did not have a space available for Student and did not expect to have an opening before the 2021-2022 school year. Nonpublic School cannot confirm that there would be an opening for Student in the 2021-2022 school year. Testimony of Program Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this

hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

- A. Did DCPS fail to comprehensively evaluate Student in all areas of suspected disability from the 2017-2018, 2018-2019 and 2019-2020 school years, up until the June 15, 2020 funding for IEE evaluations, by failing to timely conduct triennial evaluations and/or failing to evaluate when Student did not progress academically, and regressed psychologically during 2019-2020 school year, thereby denying Student a FAPE?

Student was initially determined eligible for special education, under the Specific Learning Disability (SLD) classification, in March 2015. In November 2017 and November 2020, the City School MDT team determined Student's continued special

education eligibility, without conducting a comprehensive reevaluation, notably a psychological reevaluation. Petitioner contends this was a denial of FAPE.

For both initial evaluations and reevaluations of students with disabilities, the IDEA requires that evaluators must (1) use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent”; (2) use multiple measures and assessments; (3) use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”; (4) “[r]eview existing evaluation data on the child,” including information from parents, classroom or state assessments of the child, and teacher observations; and (5) identify whether and what additional data needs to be obtained and reviewed. *See* 34 C.F.R. §§ 300.304 and 300.305.

Student was initially evaluated and determined eligible for special education in March 2015. In the six years since DCPS’ initial eligibility evaluation, Student has shown minimal academic progress, advancing only one or two years on norm-referenced measures in reading and math. In the 2019-2020 school year, Student began showing behavior problems which had not been observed in previous years.

Except for administering a Woodcock Johnson test of academic achievement in October 2017, DCPS has not reevaluated Student using formal cognitive, academic or behavioral assessments. Petitioner’s expert in school psychology, Educational Advocate 1, opined in her testimony that the best practice would have been to conduct a

comprehensive reevaluation of Student every three years, especially because of Student's lack of expected progress in reading and math and Student's later behavior challenges. I found this witness credible and her opinions were not rebutted by DCPS, which called no witnesses. I conclude that Petitioner has met her burden of persuasion that since the 2015 initial evaluation, DCPS has not met its obligation to comprehensively reevaluate Student, with "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" in order to determine Student's special education needs and to inform the content of Student's IEP. *See* 34 C.F.R. § 300.304(b)(1).

An LEA's failure to conduct comprehensive and appropriate special education reevaluations is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;
or
- (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2). Had DCPS conducted sufficiently comprehensive reevaluations of Student, that would have assisted Student's IEP teams to respond to Student's lack of expected academic progress since 2015. Moreover, when the D.C.

Rehabilitation Services Agency had Student evaluated by Private Psychologist in November 2020, Private Psychologist diagnosed Student with a mild intellectual disability, a condition not previously recognized by DCPS. I find, therefore, that DCPS' failure to comprehensively reevaluate Student by spring 2018 likely caused a deprivation of educational benefit and impeded Student's right to a FAPE. This procedural violation must be deemed a denial of FAPE.

- B. Did deny Student a FAPE by failing to provide Student with an appropriate IEP and/or Placement and/or Location of Service, from the 2018-2019 school year to the present denying Student a FAPE because DCPS failed: (1) to provide a full time outside of general education setting where Student is pulled out of general education for all academic courses, all specials, all transitions, lunch and recess; (2) to provide placement in a therapeutic special education day school; (3) to provide measurable goals and baselines for all academic goals on the IEP; and/or (4) to provide PLOPs goals and baselines in the area of written expression?

Petitioner next contends that DCPS' IEPs for Student have been inappropriate due to inappropriate goals and baselines for Reading and Mathematics, omission of annual goals in the area of Written Expression and failure to place Student in a full-time, outside of general education setting or to place Student in a separate therapeutic day school. In her closing argument, Petitioner's Counsel clarified that, in light of the IDEA's 2-year statute of limitations, the parent's inappropriate IEP claims go back only to the September 20, 2019 IEP.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael

Harvey, which explained how a hearing officer must assess an IEP:

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

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

Moradnejad at 274-75.

In this case, Petitioner has not alleged that DCPS failed to comply with the IDEA's procedural requirements in developing Student's IEPs. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry: Were DCPS' September 20, 2019 and November 13, 2020 IEPs appropriate for Student? I find that Petitioner has established a *prima facie* case that neither the September 20, 2019 nor the November 13, 2020 IEP was appropriate for Student. Therefore, the burden of persuasion as to the appropriateness of these IEP falls on DCPS.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*, the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, *supra*, for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the

question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specially* designed” to meet a child’s “*unique* needs” through an “*individualized* education program.” An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

See, also, Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018).

I find that DCPS has not shown that its IEPs were appropriate for Student for a number of reasons. First, the U.S. Supreme Court instructs that “[u]nderstanding the particulars of a child’s current skills and needs is critical to developing an individualized educational plan.” *Endrew F.*, 137 S.Ct. at 999. As I found in the preceding section of this decision, DCPS failed to comprehensively reevaluate Student in order to understand Student’s needs after the initial eligibility evaluation in 2015, despite Student’s dismal academic progress. Notwithstanding, the City School September 20, 2019 IEP team carried over the Present Levels of Performance (PLOPs) for Mathematics and Reading from the December 18, 2018 IEP, left the annual goals for Reading essentially unchanged and made no changes to Student’s special education services or placement. In the November 13, 2020 IEP, the City School IEP team did update Student’s PLOPs and annual goals, but did not change Student’s special education services or educational placement despite Student’s lack of expected progress in Reading and Mathematics.

Educational Advocate 1 also opined that Student's IEPs were inappropriate because the IEPs did not identify Written Expression as an area of concern. I agree. When Student was initially evaluated in March 2015, Student's English teacher reported that Student displayed difficulties with writing a written response and was unable to write a complete a thought or idea. In November 2017, when the City School MDT team affirmed Student's continued special education eligibility as a student with a Specific Learning Disability, the team reported that Student struggled with Written Expression when writing independent thoughts, had little stamina for writing and had difficulty with verbs. Yet neither the September 20, 2019 IEP nor the November 13, 2020 IEP identified Written Expression as an area of concern for Student or provided Specialized Instruction Services for Written Expression. In light of these IEP shortcomings and of Student's not making more than minimal progress in Reading or Mathematics since the initial IEP was developed in 2015, I find that DCPS has not provided a cogent and responsive explanation for its IEP teams' decisions that show that either the September 20, 2019 IEP or the November 13, 2020 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

- C. Did DCPS deny Student a FAPE by failing to allow the parent access to Student's complete cumulative educational records used or maintained by DCPS pursuant to the parent's numerous written requests in the 2019-2020 school year??

On February 13, 2020, Law Firm requested City School to provide copies of Student's education records. City School provided records on February 18, March 6 and

May 14, 2020. In her complaint, Petitioner contends that DCPS has failed to provide the parent's representatives access to all of Student's education records used or maintained by DCPS.

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, DCPS must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. *See* 34 C.F.R. §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006). The D.C. Regs. provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. *See* 5E DCMR § 2600.6.

At the due process hearing, Petitioner did not establish which, if any, of Student's education records maintained by DCPS had not been provided to Law Firm. I find that Petitioner did not meet her burden of persuasion on this claim. However, DCPS' obligation to allow the parent and her representatives to inspect and review Student's education records is an ongoing requirement and the parent may renew her request to inspect Student's education records at any time.

Remedy

For relief in this case Petitioner initially requested that DCPS be ordered to place Student in a non-public therapeutic day school; to conduct additional assessments, including a Psychological and/or Neuropsychological evaluation, a Speech-Language evaluation, an Occupational Therapy (OT) evaluation, an Assistive Technology (AT)

evaluation and an FBA and to revise Student's IEP. Petitioner also seeks an award of compensatory education for the denials of FAPE established in this case. At the due process hearing, Petitioner's Counsel withdrew the request for OT and Speech-Language evaluations.

In support of Petitioner's request for a private school placement, Petitioner's experts, Educational Advocate 1 and Educational Advocate 2, both opined that Student requires placement in a therapeutic special education day school. Educational Advocate 2 elaborated in her testimony that Student needed a small school setting which could provide intense remediation. As of the hearing date, Petitioner had not secured Student's admission to a private school that currently has an opening for Student.

The IDEA requires that students with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5).

In this case, the hearing evidence does not establish the causes for Student's lack of academic progress since Student was found eligible for special education in 2015 – only that Student has not made expected progress and that DCPS has not ensured that Student's IEP teams have responded to this lack of progress by revising Student's IEPs

as appropriate. The testimony of Petitioner's experts that Student requires a private school placement was not backed by credible evidence that the nature or severity of Student's disability mandates a private, special school placement.

It is also significant that in a recent neuropsychological evaluation of Student conducted for the D.C. Rehabilitation Services Agency, not yet reviewed by Student's IEP team, the psychologist diagnosed Student, for the first time, with a mild intellectual disability. In this situation, I find it is appropriate to direct DCPS to ensure that Student is comprehensively reevaluated and that Student's IEP team, informed by complete evaluation data and the parent's input, revises Student's IEP as appropriate, including determining whether Student requires more restrictive placement, whether in a different special class program within DCPS or in a separate school.

DCPS conducted an FBA of Student in January 2020 and Petitioner has not shown the need for an updated FBA. Nor has Petitioner established that an AT evaluation is warranted, but Student's IEP team may request an AT assessment if needed. *See Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), report and recommendation adopted *sub nom. Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), *citing County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005) (IDEA evaluations depend upon the exercise of professional judgment by the child's educators, which is entitled to a reasonable degree of deference.)

The Petitioner also seeks compensatory education for Student. The D.C. Circuit

Court of Appeals explained the compensatory education remedy in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016):

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has “ broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As we held in *Reid ex rel. Reid v. District of Columbia*, an award of compensatory education “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.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial.

An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

B.D., 817 F.3d at 797–98.

On July 21, 2020, DCPS unilaterally issued funding authorization for the parent to obtain independent services for Student, including 250 hours of tutoring and 40 hours of counseling by a social worker. DCPS’ Counsel represented that as of the due process hearing date, none of the independent service hours had been used.

In this decision, I have found that DCPS denied Student a FAPE by not ensuring that Student was comprehensively reevaluated after the March 2015 initial evaluation and by failing to provide Student appropriate IEPs in fall 2019 and fall 2020.

Petitioner's witness, Educational Advocate 1, proposed a compensatory education plan, in which she projected that if Student had been comprehensively reevaluated and had been provided with the appropriate IEPs with academic, behavior, social, and emotional supports, Student should have been able to demonstrate meaningful progress sufficient to make one year's academic and behavioral growth. Educational Advocate proposed a compensatory education award of approximately 660 hours of private tutoring, 20 hours of Speech and Language therapy, 70 hours of Cognitive Behavioral Therapy and 20 hours of Occupational Therapy.

Educational Advocate's recommendation for compensatory education was not rebutted by DCPS, which did not call any witnesses. Although DCPS issued funding authorization for the parent to obtain IEE speech and language and OT evaluations of Student, these evaluations have apparently not been scheduled and Student's need for Speech and Language or OT services has not been confirmed by specialists in those areas. I find that Petitioner has not established that Student needs compensatory speech and language or OT services to put Student in the position Student would be in absent the FAPE denials in this case. Otherwise, I find Educational Advocate's compensatory education recommendation to be credible. In closing argument, Petitioner's Counsel agreed that the compensatory education award should be reduced by the hours of services already funded by DCPS on July 21, 2020. Therefore, I will award Student, as compensatory education, an additional 410 hours of academic tutoring and 30 hours of counseling services.

ORDER

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

ORDERED:

1. DCPS is ordered to conduct a comprehensive special education reevaluation of Student, in accordance with 30 C.F.R. §§ 300.300, *et seq.* and this decision, to determine Student's appropriate disability classification and IEP areas of need. Subject to obtaining the parent's consent, within 10 school days of Student's being made available for in-person assessments by DCPS personnel, DCPS shall begin a comprehensive reevaluation of Student, to include, but not be limited to, a comprehensive psychological evaluation with cognitive, academic, behavior and adaptive behavior components. Upon completion of these evaluations and other assessments deemed appropriate, DCPS shall ensure that Student's IEP team, including the parent and her representatives, is promptly convened to review and revise, as appropriate, Student's IEP, including Student's educational placement and least restrictive environment on the continuum of alternative educational placements;

2. As compensatory education for the denials of FAPE found in this decision, DCPS shall promptly issue funding authorization for 410 hours of independent academic tutoring and 30 hours of counseling for Student, in addition to the hours of independent services previously funded by DCPS, to be provided by professionals chosen by the parent and

3. All other relief requested by the Petitioner herein is denied, without prejudice to Petitioner's right to seek further relief for the IEP and placement determinations made hereafter by Student's IEP team, as ordered in this decision.

Date: March 27, 2021

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

NOTICE OF RIGHT TO APPEAL

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

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