

**District of Columbia**  
**Office of the State Superintendent of Education**

Office of Dispute Resolution  
1050 First Street, N.E., Washington, DC 20002  
(202) 698-3819 www.osse.dc.gov

---

<b>Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 1/13/22; 1/14/22; 2/11/22</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No. 2021-0178</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

---

**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student (the “Student”) who is currently eligible for special education services as a student with Multiple Disabilities (Intellectual Disability, Other Health Impairment). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 29, 2021. The Complaint was filed by the Student (“Petitioner”). A resolution meeting was held on November 8, 2021. Although an agreement was not reached at the resolution meeting, DCPS and Petitioner agreed to continue to attempt to resolve the Complaint prior to the end of the 30-day resolution period. On November 10, 2021, Respondent filed a response. The 45-day timeline began after the 30-day resolution period expired on November 28, 2021.

---

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

## **II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

## **III. Procedural History**

A prehearing conference was held on December 13, 2021. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on December 16, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

The parties appeared at hearings on January 13, 2022, and January 14, 2022. To accommodate these dates, Petitioner moved to extend the due date of this Hearing Officer Determination (“HOD”) from January 12, 2022, to February 1, 2022. Petitioner’s motion for a continuance was granted without objection on January 10, 2022.

Testimony and evidence were not completed on January 14, 2022. As a result, the parties agreed to finish testimony on February 10, 2022. On January 26, 2022, Petitioner moved on consent to extend the timelines of the case to accommodate the February 10, 2022, hearing date. The motion was granted by an order dated January 28, 2022, extending the HOD due date to March 4, 2022.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-41 without objection. Respondent moved into evidence R-1 through R-7; R-9 through R-14, R-17 through R-19, R-21 through R-25, and R-28. An objection to exhibit R-28 was overruled. Exhibits R-1 through R-7; R-9 through R-14, R-17 through R-19, R-21 through R-25, and R-28 were admitted.

Petitioner presented as witnesses, in the following order: Witness A, an educational advocate (expert in special education programming and placement); the Student's mother; and Witness B, a psychologist (expert in clinical psychology, reviewing evaluations, and providing recommendations regarding the social and emotional well-being of students). Respondent presented as witnesses: Witness C, a social worker (expert in school social work); Witness D, Special Education Coordinator at School A (expert in special education programming and placement); Witness E, a resolution specialist; and Witness F, a psychologist (expert in school psychology). Petitioner then presented brief rebuttal testimony from him/herself. After the conclusion of testimony, the parties presented oral closing arguments.

#### **IV. Issues**

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

**1. Did Respondent fail to implement the Student's Individualized Education Programs ("IEPs") during the 2019-2020 and 2020-2021 school years? If so, did Respondent's act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?**

Petitioner contended that the Student did not receive mandated behavior support services during this time. For this issue, the burden of persuasion is on Petitioner.

**2. Did Respondent fail to conduct a comprehensive reevaluation of the Student? If so, did DCPS violate 34 C.F.R. Sect. 300.304, 34 C.F.R. Sect. 300.305, and related provisions, and therefore deny the Student a FAPE?**

Petitioner contended that the Student has not been comprehensively evaluated since 2011 and that, during the past two years, the Student has required a comprehensive psychological assessment and a Functional Behavior Assessment (“FBA”).

**3. Did Respondent fail to develop appropriate IEPs and assign the Student to appropriate placements/locations from 2019-2020 through the present? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEPs and placement(s)/locations should have: 1) recommended more specialized instruction hours; 2) recommended additional behavior support services; 3) been based on updated assessments of the Student; 4) included an “Area of Concern” section on adaptive/daily living skills; 5) included appropriate goals and baselines in all academic and social-emotional areas; and 6) recommended additional/any occupational therapy services.

As relief, Petitioner is seeking compensatory education, together with a comprehensive psychological assessment, an FBA, and related relief.

## **V. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) when s/he was young, and the Student has struggled for many years with emotional, social, and academic issues, including frustration tolerance, interpersonal conflicts, ongoing dysregulation in home, misperceiving other people’s intentions, and

anger issues. The Student has grown discouraged about his/her education and has “given up.” Testimony of Mother.

2. The Student benefits from small classes, extra time, clear explanations, and teachers who clearly go through the steps of an assignment. P-35-1. With a male teacher, the Student may attend class more frequently. The Student tends to pay attention more if the class format focuses on discussion. S/he tends to struggle with reading and written work that is done in class. Testimony of Witness C; Testimony of Witness D.

3. DCPS conducted a Comprehensive Psychological Evaluation of the Student during the 2010-2011 school year. The evaluation report, issued on March 11, 2011, indicated that the Student was tested for cognitive ability and visual-motor integration, and examined through behavior rating scales, adaptive scales, and other measures. The testing indicated that the Student’s intellectual functioning and adaptive skills were in the low range, and that the Student displayed “considerable” symptoms of ADHD. The evaluator recommended intensive instruction in reading, math, and written expression, as well as psychological counseling and related interventions. P-7.

4. A Confidential Data Evaluation Review was conducted for the Student by a DCPS psychologist on February 17, 2014. The ensuing report, dated April 10, 2014, was based on cognitive testing through the Woodcock-Johnson Test of Academic Achievement III and the Wechsler Intelligence Scales for Children-Fourth Edition. The evaluator also conducted a classroom observation, a parent interview, a Student interview, and a record review. The Student’s academic testing scores were mostly in the very low range. S/he was below the 1st percentile in broad reading and broad writing, and below the 2nd percentile in broad mathematics. A teacher reported that the Student

often fought with other students who were smaller than him/her, and did not work well in a group setting. The Student also sometimes slept and made negative comments in class. The evaluator found that the Student lacked confidence and had a limited ability to develop peer connections or self-advocate. P-8; Testimony of Witness A.

5. The Student's IEP of March 2, 2016, reported achievement testing levels from October 2012, when the Student scored at the 1.4 grade level equivalent ("GLE") in reading, 2.5 GLE in broad mathematics, and 1.6 GLE in written expression. The Student was recommended for 25.5 hours per week of specialized instruction outside general education, with 120 minutes per week of behavioral support services outside general education and ninety minutes per week of occupational therapy outside general education. The IEP indicated that the Student's behavior did not impede him/herself or other children. The IEP included an "Area of Concern" section discussing the Student's "Emotional, Social and Behavioral" issues, and reported that the Student could be polite and helpful, made an effort in class but was distracted, had confidence issues, spoke in a very low voice, and often made threats and had difficulties with other students. P-14.

6. During this time period, the Student received academic instruction in self-contained special education classes with a maximum of twelve students. These classes sometimes had a paraprofessional in them. Testimony of Witness D. As of February 9, 2017, the Student was functioning at approximately the third-grade level in reading and written expression, according to DCPS teachers. P-25-6.

7. An occupational therapy evaluation of the Student was conducted in 2017. The subsequent report, dated February 16, 2017, reflected a record review, interviews, clinical observations, and testing measures, including standardized testing. The Student's

visual perceptual skills were scored in the low average range, and his/her fine motor control was scored in the below average range, though s/he scored in the average range in manual coordination. The evaluator concluded that the Student was having difficulty with handwriting and processing, but the evaluator did not recommend occupational therapy for the Student. P-9.

8. The Student's February 27, 2017, IEP referenced October 2012 testing in reading, mathematics, and written expression, and included "Area of Concern" sections in reading, mathematics, written expression, and emotional, social, and behavioral development. The IEP indicated that the Student's behavior did not impede him/herself or that of other children, but reported that the Student scored high on hyperactivity, concentration, and behavioral difficulties, according to an Strengths and Difficulties Questionnaire ("SDQ"). The Student's specialized instruction was decreased to twenty hours per week outside general education, though his/her related services mandate stayed the same. P-16.

9. A Behavior Intervention Plan ("BIP") was written for the Student on March 2, 2017. It indicated that the Student was distracting others to avoid work and to gain attention from staff and peers. The BIP recommended that the Student should be seated alone or in a small group with access to assistance from staff, with alternative work available. A points system was to have been implemented for monitoring. P-10.

10. On April 2, 2017, a Psychological Triennial Evaluation of the Student was completed. The evaluation did not involve testing, observations, or interviews; it mainly addressed the appropriateness of the Student's eligibility category. The document reported that the Student was reading on the first-grade level as of August 24, 2016, and

that by January 25, 2017, the Student was reading on the second-grade level. P-11;

Testimony of Witness A.

11. The Student attended School A, a DCPS high school, for the 2017-2018 school year. Testimony of Witness C. As of September 7, 2017, the Student was reading at the first-grade level, per SRI testing, according to the Student's 2021-2022 report card. P-30-10.

12. The Student's February 26, 2018, IEP again referenced testing from October 2012 in reading, mathematics, and written expression, and again contained "Area of Concern" sections in reading, mathematics, written expression, and emotional, social, and behavioral development. The IEP indicated that the Student's behavior did not impede him/herself or that of other children, that the Student was often distracted and inattentive during class but easily redirected, and that s/he had difficulties with peers. The IEP reported that the Student was failing English and algebra but passing his/her other classes. The IEP reflected an SDQ dated September 29, 2017, which indicated that the Student was stressed and had issues with hyperactivity and concentration. Another SDQ, dated January 25, 2018, indicated that the Student had behavioral difficulties. The Student's specialized instruction hours and behavior support services were kept at the same level as in the prior IEP, with twenty hours of specialized instruction per week and 120 minutes of behavioral support services per month. The Student's occupational therapy services, however, were removed. P-18. An IEP amendment dated March 23, 2018, added reading, mathematics, and written expression goals and objectives. P-19. Another amendment dated October 4, 2018, changed the amount of time the Student was spending outside the classroom to reflect the actual services. P-20.



13. For the 2018-2019 school year, the Student went to a public charter school and received services similar to those s/he received at DCPS. For the 2019-2020 school year, the Student went back to DCPS and again attended School A. Testimony of Witness A.

14. During the 2019-2020 school year, the Student would often “hang out” in the hallways of the school building and get into altercations with peers. The Student avoided most classes during this school year, mainly because s/he did not want anyone to know about his/her deficits. Testimony of Witness C. The Student’s attendance history record indicated that s/he was absent seventy-one days, three of which were excused. P-26-1-2. The Student was not interested in attending counseling sessions, though Witness C, the school counselor, tried to track the Student down so as not to embarrass him/her in front of his/her peers. When the Student did attend counseling sessions, they were not especially productive. It was considered a “success” when the Student talked at all. Witness C would also talk to the Student briefly in the halls and engage the Student’s parent with respect to his/her issues in school. Testimony of Witness C.

15. The Woodcock-Johnson IV Tests of Achievement, Form B and Extended, was administered to the Student at School A on February 3, 2020. The Student scored far below grade level, at the early elementary school level, in broad reading and mathematics, with written expression scores approximately one to two grade levels higher. The testing indicated that the Student “(a)ppared to read sentences at a rate typical for peers” and that sentences were “simple but adequate.” The testing determined that the Student was at age equivalent 8.2 in mathematics (second-grade level), age equivalent 7.5 in broad reading, and age equivalent 9.6 in written expression. As of

February 3, 2020, the Student had a “C” grade in algebra and “F” grades in both of his/her English classes. P-25; P-12; Testimony of Witness A.

16. An IEP meeting was held for the Student on February 6, 2020. The IEP team based its findings on the Student’s recent testing, grades, social worker information, behavioral records, and historical data. R-4-46; R-5-48; Testimony of Witness F. At the IEP meeting, concerns were raised regarding the Student’s ability to earn a high school diploma, and DCPS sought to evaluate the Student. DCPS suggested that the Student would do better in a “certificate track” program, such as DCPS’s Integrated Learning System (“ILS”) program. “Certificate track” means, among other things, that students are taught functional academic skills and general life skills to prepare them to enter the workforce. The ILS program also provides job training and access to the community. Testimony of Witness F. In this program, students go to electives with a paraprofessional. Testimony of Witness C.

17. The Student’s February 6, 2020, IEP again indicated that his/her behavior did not impede him/herself or that of other children, and it contained the same “Area of Concern” sections as earlier IEPs. In mathematics, it was reported that the Student’s greatest need was in the area of applied problems. In reading, it was reported that the Student should continue his/her daily practice of sight word vocabulary, and s/he required small group instruction, scaffolding, modeling, graphic representation, and simplification of directions. The IEP indicated that the Student could be distracted and inattentive in class, as well as confrontational and combative in situations that did not have any relevance to him/her. The IEP noted that the Student had missed forty-nine days of school, forty-two of which were unexcused. It reported that, for the then-current marking

period, the Student received “F” grades in all classes except a “B” in mathematics and a “C” in “College Summit.” The IEP reported that an SDQ from October 1, 2019, and January 15, 2020, indicated that the Student was stressed, had difficulties with other children, and was affected by issues that took place outside the school building. The IEP indicated that the Student did not participate in behavioral support services on a consistent basis. The IEP recommended ninety minutes per month of behavioral support services, a decrease of thirty minutes per month, with the same twenty hours per week of specialized instruction outside general education. P-21.

18. The Student’s parent consented to an evaluation of the Student on February 6, 2020. P-25-11. DCPS sought to test the Student to determine an appropriate IEP and placement, and to determine the Student’s eligibility. The plan was to conduct cognitive testing, testing of the Student’s academics, verbal and nonverbal abilities, phonological processing ability, and visual processing ability, among other things. Witness F tried to test the Student, including incentivizing him/her with gift cards and food, but the Student would either elope or refuse the testing. Witness F did not call the Student’s mother to arrange for the evaluation. An ABAS scale completed by a teacher was also sent to the Student’s mother, who did not respond. During this approximate time, Witness F and other DCPS staff tried to explain to the Student’s mother that the Student would be better in a program where s/he was working on a certificate track.

Testimony of Witness F.

19. After the start of the COVID-19 pandemic, in or about March, 2020, the Student’s instruction became virtual. The Student’s behaviors and disengagement became worse in the virtual setting. Witness C reached out to the Student’s parent to see

if she could get the Student to log in for counseling, but the Student was resistant.

Testimony of Witness C.

20. The Student's IEP Progress Report/Annual Goals for the 2019-2020 school year, reporting period 1, indicated that the Student was progressing in all areas, without specifics, except those written by Witness C in emotional, social, and behavioral development. P-28. For reporting period 2, progress was reported in mathematics, but no progress was reported in reading or written expression goals, and progress was reported in only one of two emotional, social, and behavioral development goals and only one of three transition goals. For reporting period 3, progress was reported in mathematics, reading, and written expression, without specifics, and no progress was reported for emotional, social, and behavioral goals or transition goals. P-28-1-19.

21. The Student was offered behavioral support services during the 2019-2020 school year as follows: September, 2019, 60 minutes; October, 2019, seventy-five minutes; November, 2019, 120 minutes; December, 2019, zero minutes; January, 2020, 120 minutes; February, 2020, 120 minutes; March, 2020, sixty minutes; April, 2020, forty-five minutes; and May, 2020, fifteen minutes. P-31-1-6; R-9 at 059; R-28;

Testimony of Witness C.

22. The Student continued at School A for the 2020-2021 school year. The Student continued to resist going to counseling and would often not log on. Testimony of Witness C. The Student's electives included general music, financial literacy, French, and acting. Testimony of Witness A; P-30. On January 6, 2021, Petitioner asked for a comprehensive evaluation for the Student, including a comprehensive psychological evaluation and an FBA. P-37-4.

23. An IEP meeting was held for the Student on February 5, 2021, with Attorney A and Attorney B present. An attendance counselor indicated that virtual learning is not “good” for the Student. P-23. DCPS staff again mentioned that the Student might be better off in a certificate track program. DCPS suggested to the Student’s parent that general education classes, with or without co-teaching, might be difficult for the Student, but the parent did not agree. Testimony of Witness F. Neither Petitioner nor the Student’s parent nor their representatives asked for additional behavioral support services at the meeting. Emotional, social, and behavioral goals were repeated for the Student because the counselor was not previously able to implement the strategies. No concerns were voiced about any of the goals. Testimony of Witness C; Testimony of Witness F. Petitioner asked for records and evaluations. It was reported that the Student was failing classes and that “twilight” classes were offered. Issues with the Student’s attendance were discussed. The Student stated that s/he did not attend or pass French class because it was hard, and that s/he did not want to take French. S/he was therefore assigned to a Spanish class. It was also reported that the Student was dropped from his/her physics class due to lack of attendance. R-19-170-172. Neither Petitioner nor the Student’s parent nor their representatives voiced disagreement with this IEP. Testimony of Witness D.

24. The Student’s February 5, 2021, IEP indicated that his//her behavior did impede him/herself and/or other children. It indicated that the Student’s behavior inhibited him/her from engaging in the learning process and that the Student frequently engaged in avoidant behaviors, such as lack of attendance and engagement. The IEP contained the same “Area of Concern” sections as earlier IEPs and reported on the results

of Woodcock-Johnson IV Tests of Achievement testing of the Student from February 3, 2020. The IEP reported that the Student had accumulated twenty-four absences in reading and writing, logged in infrequently, and was getting an “F” in “D.C. History and Government.” The emotional, social, and behavioral section of the IEP indicated that the Student did not participate and/or was not engaged in virtual learning, and that his/her physics teacher reported that the Student was not attending class at all. Other teachers indicated that the Student had attended once or twice. Specialized instruction and behavioral support services were not changed in this IEP. P-22.

25. The Student’s report card for term 3 of the 2020-2021 school year awarded the Student an “A-” (“excellent initiative”) in English, though the Student received “F” grades in “Acting” and “U.S. History and Geography,” and a “D+” in “Anatomy and Physiology.” For term 4 of the 2020-2021 school year, the Student received a “C-” in English because of absences, and “F” grades in all other classes. P-30-1 through P-30-6.

26. The IEP Progress Report/Annual Goals for the 2020-2021 school year, reporting period 1 and reporting period 2, indicated no progress in any area and almost no attendance in any virtual classes. P-28-20-34. For reporting period 3, no progress was reported in mathematics, and the Student was not enrolled in any math course. Progress was noted in both reading goals, and the Student was said to be attending English class more frequently and turning in half of the assigned work, though the Student progressed minimally toward the goal of answering comprehension questions after reading. Progress was also reported in one of two written expression goals, and the Student was determined to be making progress in writing compound sentences. The progress report indicated that

the Student received a “B” grade in English for this reporting period. Progress was also reported with respect to two of three emotional, social, and behavioral goals (with one not introduced). No progress was reported with respect to transition goals. P-28-35-44. For reporting period 4, no progress was reported in any area, and the Student was rarely present in class. P-28-25-53.

27. The Student was offered behavioral support services for the 2020-2021 school year as follows: September, 2020, thirty minutes; October, 2020, seventy-five minutes; November, 2020, seventy-five minutes; December, 2020, ninety minutes; January, 2021, sixty minutes; February, 2021, 105 minutes; March, 2021, forty-five minutes; April, 2021, sixty minutes; May, 2021, sixty minutes; June, 2021, sixty minutes. P-31-7-17.

28. The Student changed settings and was assigned to School B for the 2021-2022 school year. School B provides a more flexible structure and a more mature student population. Testimony of Witness C. The IEP Progress Report/Annual Goals for the 2021-2022 school year, reporting period 1, indicated that no goals were introduced and that the Student only attended twice. P-28-54-62. The Student’s report card for reporting period 1 of the 2021-2022 school year indicated that the Student was reading at the first-grade level, per SRI testing on September 7, 2017. The Student received no grades for the first term except “NM” (no mark), “L” (late entry), and an “F” in “Advisory.” P-30-6-10. For the second term, the Student received a “C” in “Principles of Information” and an “L” in algebra. P-30-10-11.

## **VI. Conclusions of Law**

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 public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, for both Issue #1 and Issue #2, the burden of persuasion is on Petitioner, whereas for Issue #3, the burden of persuasion is on Respondent provided that Petitioner presents a *prima facie* case.

**1. Did Respondent fail to implement the Student’s IEP(s) during the 2019-2020 and 2020-2021 school years? If so, did Respondent’s act or omission violate 34 C.F.R. Sect. 300.323(a) and principles established in cases such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?**

A party challenging a school district's implementation of an IEP must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP or that “deviations from the IEP’s stated requirements were material. Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th



Cir. 2007) (“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child’s IEP.”); see also S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 67–68 (D.D.C. 2008); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 (D.D.C. 2011).

Petitioner presented service tracking forms in support of his/her position. The Student’s mandate for behavioral support services for the 2019-2020 school year was 120 minutes per month until the February 5, 2020, IEP, at which point the mandate was reduced to ninety minutes per month. The service trackers, together with the testimony of Witness C, indicated that the Student was offered behavioral support services during the 2019-2020 school year as follows: September, 2019, sixty minutes; October, 2019, seventy-five minutes; November, 2019, 120 minutes; December, 2019, zero minutes; January, 2020, 120 minutes; February, 2020, 120 minutes; March, 2020, sixty minutes; April, 2020, forty-five minutes; May, 2020, fifteen minutes. These records establish that the Student was offered a total of approximately 585 minutes of behavioral support services during the 2019-2020 school year, well short of the mandate of 120 minutes per month through the date of the February 5, 2020, IEP, and ninety minutes per month thereafter through to the end of the 2019-2020 school year.

For the 2020-2021 school year, when the Student’s mandate was ninety minutes of behavioral support services per month, the Student was actually offered services as follows: September, 2020, thirty minutes; October, 2020, seventy-five minutes; November, 2020, seventy-five minutes; December, 2020, ninety minutes; January, 2021, sixty minutes; February, 2021, 105 minutes; March, 2021, forty-five minutes; April,

2021, sixty minutes; May, 2021, sixty minutes; June, 2021, sixty minutes. P-31-7-17.

This means that the Student received a total of approximately 650 minutes of services for the 2020-2021 school year, again well short of the mandate of ninety minutes of behavioral support services per month.

The question here is whether these shortfalls are “material” under the standards set forth in the caselaw. The materiality standard does not require that the child suffer demonstrable educational harm. Rather, courts applying the materiality standard have focused on the proportion of services actually provided to those mandated, and the goal and import of the specific service that was withheld. Wilson, 770 F. Supp. 2d at 275. Courts also factor in a student’s resistance to services in determining the importance of the services, in order to determine whether a school district has denied a student a FAPE. In Wade v. District of Columbia<sup>2</sup>, 322 F. Supp. 3d 123, 134–35 (D.D.C. 2018), the hearing officer determined that the student consistently refused behavioral support services and that the DCPS public high school even changed the student’s social worker “to try to get him to accept services, without success.” Id. at 134. Though DCPS did not provide services that matched the IEP mandate, the court agreed with the hearing officer and found that the student was not denied a FAPE on this basis, and that the DCPS public school made good-faith efforts to provide the behavioral support services.

Similarly, in Catalan, the student’s speech therapist missed a handful of sessions and cut others short because the student’s fatigue was making the therapy unproductive. The court found that “technically, the IEP was violated” but ruled that the student was not

---

<sup>2</sup> Other courts view this kind of scenario differently. For instance, in Joaquin v. Friendship Pub. Charter Sch., No. CV 14-01119 (RC), 2015 WL 5175885, at \*8 (D.D.C. Sept. 3, 2015), the court found a failure to provide transition services denied the student a FAPE even though the student was truant.

denied a FAPE, finding that the failure to meet the IEP's specifications to the letter was "warranted under the circumstances." 478 F. Supp. 2d at 75.

Additionally, in T.M. v. District of Columbia, 75 F. Supp. 3d 233, 242 (D.D.C. 2014), the student received twenty-four hours of occupational therapy and missed ten hours over the course of a school year. The court found that the deviation from the IEP was not material and denied the failure-to-implement claim. The court said that "the few missed occupational therapy sessions did not constitute a failure to provide *significant* provisions of the IEP." Id. (emphasis in original); see also J.B. by & through Belt v. District of Columbia, No. 17-CV-1298 (CRC/GMH), 2018 WL 10399853, at \*17 (D.D.C. May 8, 2018), report and recommendation adopted, 325 F. Supp. 3d 1 (D.D.C. 2018) (a parent must demonstrate "more than a mere difference between the hours of service provided by the school district and the hours proscribed in the student's IEP").

In this case, the Student's resistance to counseling should be considered a factor in determining whether DCPS materially deviated from the IEP, especially since the school year was interrupted by the COVID-19 pandemic. Even with the adversity of the pandemic, Witness C tried her best to provide the Student with counseling, going beyond the mandate and talking to the Student outside of sessions, working to make sure that the Student was logged in, and speaking to the Student's parent to try to convince the Student to participate. Witness C also tried to avoid situations where the Student might be embarrassed to go to counseling. Even so, the Student would often simply refuse to go. Witness C testified that she was "fortunate enough" to get a response from the Student sometimes, but the Student would usually say "I'm busy" or something to that effect.

Petitioner argued that some of the proof relating to the delivery of the behavioral support services was unconvincing, in particular exhibit P-28, which indicated that additional counseling was provided to the Student during the 2019-2020 school year, beyond that which was indicated in the service trackers. However, there is no reason to believe that DCPS simply made up the documents contained in P-28. Under the circumstances, this Hearing Officer agrees with DCPS that it did not deny the Student a FAPE when it provided the Student with behavioral support services during the 2019-2020 and 2020-2021 school years.

**2. Did Respondent fail to conduct a comprehensive reevaluation of the Student? If so, did DCPS violate 34 C.F.R. Sect. 300.304, 34 C.F.R. Sect. 300.305 and related provisions, and therefore deny the Student a FAPE?**

Petitioner contended that the Student has not been comprehensively evaluated since 2011 and that, during the past two years, the Student has required a comprehensive psychological assessment and an FBA.

Pursuant to 34 C.F.R. Sect. 300.303 (a), a public agency must ensure that a reevaluation of each child with a disability is conducted if the public agency determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. To obtain relevant functional, developmental, and academic information about a child, a public agency must conduct a comprehensive reevaluation, using a variety of assessment tools and strategies. 34 C.F.R. Sect. 300.304(b)(1). The public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 C.F.R. Sect. 300.304(c)(4).

The IDEA does not mandate that a public agency administer additional testing as part of a reevaluation. 34 C.F.R. Sect. 300.305(d); Z.B. v. District of Columbia, 888 F.3d 521, 523 (D.D.C. 2018). Additionally, there is no provision in the IDEA that gives a parent or student the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation. Letter to Unnerstall, 68 IDELR 22 (OSEP Apr. 25, 2016). However, the IEP team must review existing evaluation data on the child to determine the present levels of academic achievement and related developmental needs of the child, and whether any additions or modifications to the IEP are needed. 34 C.F.R. Sect. 300.305(a).

There is no dispute that the Student needed to be reevaluated during the 2019-2020 school year, given the Student's difficulties with attendance and lack of progress in academic areas. DCPS therefore reviewed the Student's classroom data and tested the Student through the Woodcock-Johnson IV Tests of Achievement, Form B and Extended, and found that the Student scored far below grade level in broad reading and mathematics (at an early elementary school level), with written expression scores approximately one to two grade levels higher.

Petitioner argued that the academic achievement testing was insufficient, and that the Student needed a more comprehensive psychological assessment as well as an FBA. Witness A testified that the academic testing conducted on February 3, 2020, was not sufficiently comprehensive, particularly because it did not involve an assessment of the Student's cognitive, social, and emotional behavior. Witness A requested an FBA for similar reasons. However, as Witness C clearly and credibly explained, it was clear in 2020 that the Student's behavioral issues were linked to his/her difficulties in class,

which is why DCPS staff recommended that the Student be assigned to a certificate track program. The parent and Petitioner rejected this program. No rebuttal testimony was offered to respond to Witness C's contention that an FBA was not necessary because DCPS already knew that programmatic concerns were the Student's main problem.

Similarly, in Hart v. District of Columbia, 323 F. Supp. 3d 1 (D.D.C. 2018), the court found a parent was not statutorily entitled to a new comprehensive psychological assessment even though the parent's expert witness recommended a new psychological evaluation. The witness, an expert in social work who taught the student in question, testified that the additional psychological testing was warranted, but was not very specific as to the reason for the additional testing. The court found that the parent made no serious attempt to show how the absence of a comprehensive psychological examination resulted in a loss of educational opportunity for the student. Even though, as in the instant case, the petitioner's expert witness testified that a new assessment would have shown why the student could not get to school, the court found this testimony to be "too generic" to be of much probative value in determining whether a new evaluation would have translated into actual educational opportunities for the student. 323 F. Supp. 2d at 2-6; Z.B., 888 F.3d at 525 (finding error in the district court's failure to "address what DCPS would have known had it met its own obligation to evaluate" the student and noting that "it is not clear from the proceedings below whether DCPS would have learned anything more or different").

Moreover, DCPS tried to conduct a comprehensive psychological assessment of the Student. Witness F sought to reevaluate the Student through a comprehensive psychological evaluation, including testing of the Student's academics, verbal and

nonverbal abilities, phonological processing ability, and visual processing ability, among other things. However, the Student refused to be tested by Witness F. The Student would either elope or refuse to the testing, even though Witness F went so far as to try to incentivize the Student through gift cards and food. On rebuttal, the Student testified that s/he did not remember meeting Witness F, but there is nothing in the record to suggest a reason why Witness F would fabricate his testimony.

Finally, Petitioner also argued that the local education agency (“LEA”) must respond to a parental request for an evaluation. On January 6, 2021, through counsel, Petitioner requested that DCPS complete a comprehensive psychological evaluation and an FBA of the Student, and DCPS never responded. Pursuant to 34 C.F.R. Sect. 300.303(a)(2), if a child’s parent requests a reevaluation, an LEA must provide that evaluation. However, the Student was evaluated by DCPS in or about February, 2020. Pursuant to 34 C.F.R. Sect. 300.303(b)(1), a reevaluation may occur not more than once per year, unless the parent and the public agency agree otherwise. Additionally, as already established, any such lack of response must at best be considered a procedural violation, since Petitioner was unable to meet his/her burden to show why the lack of a more comprehensive evaluation denied the Student a FAPE. Accordingly, this claim must be dismissed.

**3. Did Respondent fail to develop appropriate IEPs and assign the Student to appropriate placements/locations from 2019-2020 through the present? If so, did Respondent act in contravention of 34 C.F.R. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEPs and placement(s)/locations should have: 1) recommended more specialized instruction hours; 2) recommended additional behavior

support services; 3) been based on updated assessments of the Student; 4) included an “Area of Concern” section on adaptive/daily living skills; 5) included appropriate goals and baselines in all academic and social-emotional areas; and 6) recommended additional/any occupational therapy services. Issues relating to occupational therapy were withdrawn on the first hearing date.

The term “free appropriate public education” means special education and related services that have been provided at public expense, under public supervision and direction and without charge, meet the standards of the State Educational Agency, include an appropriate preschool, elementary school, or secondary school education in the state involved, and have been provided in conformity with the individualized education program. 20 U.S.C. Sect. 1401(9). As the Court pointed out in Board of Education v. Rowley, 458 U.S. 176, 188 (1982), drawing on legislative history and other sources, the FAPE duty does not require public schools to maximize the potential of each child with a disability, but instead requires that the IEP, “if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Id. at 203–04.

More recently, in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (Mar. 22, 2017), the Supreme Court vacated and remanded a Tenth Circuit decision that had applied a “merely more than de minimis” standard for determining what constituted appropriate education. The Court said that Rowley embodied a general approach: “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.” Endrew F., 137 S. Ct. at 998. The Court rejected a standard of requiring that the child be provided opportunities to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to opportunities afforded children without disabilities, and said there was a need to defer to the expertise and exercise of judgment by school authorities. But the Court stressed that, “A reviewing court may fairly expect those 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. at 1002.

In this case, as the testimony of Witness F and Witness D made clear, DCPS has, since the 2019-2020 school year, sought to place the Student in its ILS program, a certificate track program that would allow the Student to learn functional academics and to focus on developing job skills. This decision was driven by the Student’s difficulty in understanding the material in the diploma-bound program. Petitioner and the parent, understandably, wanted the Student to have a chance to obtain a high school diploma, and therefore rejected DCPS’s overtures toward a certificate track program.

However, Petitioner’s own expert, Witness A, did not clearly expound on how the Student could possibly benefit from a diploma-bound program. Indeed, Witness A contradicted the point of view of Petitioner and the parent and said that the Student needed the exact kind of program recommended by DCPS: an ILS classroom, which is a certificate track program. Consistent with this testimony, Witness A, an expert in special education programming and placement, did not clearly say that the Student was capable of making further academic progress. When asked whether the Student had “plateaued” academically, Witness A said that she could not answer yes or no. Petitioner is therefore

alleging FAPE denial even though their expert recommended the very same program that DCPS effectively recommended, and DCPS could not include that program in the Student's IEP because the parent and Petitioner would not consent to it.

A similar, though not identical, issue was discussed in Wade v. District of Columbia, 2021 WL 3507866, No. 19-cv-2101-TJK-ZMF (D.D.C.) (February 11, 2021), where a parent objected to an IEP that sought to keep a District of Columbia high school student on a diploma track. Just as in the instant case, the student was in a program that served over-age students seeking to graduate with a diploma. The parent was aware of the option of the certificate track but chose to send the student to a school that did not offer a certificate track. The parent then filed a due process complaint challenging the IEP that recommended the diploma track program. The hearing officer concluded that the parent could not object to the IEP because she “voluntarily” sought placement at a school whose purpose was to graduate students with a diploma. The court specifically found that the hearing officer’s analysis was “correct.”

Moreover, here, Petitioner and the parent did not disagree with the IEPs at the times of the IEP meetings, and the second time they did not disagree to an IEP, on February 5, 2021, Petitioner was represented by Attorney A. While agreement to an IEP is not necessarily dispositive of a FAPE claim [Letter to Lipsitt, 52 IDELR 47 (OSEP 2008)], it can be considered a factor in determining whether an IEP is “reasonably calculated,” especially where a parent is represented by an educational expert or counsel. Hinson ex rel. N.H. v. Merritt Educ. Ctr., 579 F. Supp. 2d 89, 103 (D.D.C. 2008) (“the Court finds that Plaintiff participated in the process and agreed to the IEP at the time it was developed”). It is hard to argue that an IEP was not “reasonably” calculated when

the parent and the Student's attorney both agreed with the IEP at the time it was created, including the recommendation for twenty hours per week of specialized instruction outside general education, which allowed the Student to participate in "specials" inside general education and provided the Student with access to typically developing peers.

At the hearing, Petitioner contended that the Student needed specialized instruction in "specials." However, neither Petitioner nor the parent clearly testified that the Student was having particular trouble in classes that did not involve reading and writing. In fact, Witness C testified that the Student did better when classes involved discussion. IDEA requires that children with disabilities be placed in the "least restrictive environment" ("LRE") so that they can be educated in an integrated setting with children who are not disabled, to the maximum extent appropriate. See 20 U.S.C. Sect. 1412(a)(5)(A). "Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment" should occur only if "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. Sect. 300.114(a)(2)(ii); see also Roark ex rel. Roark v. Dist. of Columbia, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) ("mainstreaming" of children eligible for special education services under the IDEA is "not only a laudable goal but is also a requirement of the Act"); Rowley, 458 U.S. at 202 ("The [IDEA] requires participating States to educate handicapped children with nonhandicapped children whenever possible"). While the record suggests that DCPS was right when it recommended that the Student be placed in a certificate track program, DCPS's reasoning was based on the Student's difficulty with academic classes, not with "specials." As a result of the foregoing, this Hearing Officer

concludes that DCPS did not deny the Student a FAPE through its recommendations for specialized instruction in the February 6, 2020, and the February 5, 2021, IEPs.

Petitioner also contended that s/he was not provided with enough behavioral support services in both IEPs. However, Petitioner resisted attending behavioral support services at DCPS throughout the 2019-2020 and 2020-2021 school years. Witness C hoped the Student would attend the counseling sessions and came up with strategies to try to get the Student to attend, such as approaching him/her when peers were not around, to avoid embarrassing the Student. Even so, Witness C testified that the Student would usually tell her that s/he was busy (or something similar) and would not go to counseling. Witness C also pointed out that nobody asked her, or DCPS, to increase the Student's behavioral support services at the IEP meetings in question. In fact, there is little to nothing in the record to suggest that the Student benefitted from the behavioral support services that were offered to him/her during his/her career at DCPS. This Hearing Officer therefore finds that it was not necessary for DCPS to recommend more behavioral support services in either of the Student's IEPs.

Petitioner also contended that the IEPs were not based on sufficient data, which is similar to the claim addressed in Issue #2. However, DCPS did review the Student's existing data and was able to test the Student's academic abilities through the administration of the Woodcock-Johnson IV Tests of Achievement, Form B and Extended. Additionally, as found with respect to Issue #2, the record does not establish that a more comprehensive evaluation would have materially affected the services on the Student's two IEPs. Moreover, as also found with respect to Issue #2, DCPS was

thwarted in its attempts to comprehensively evaluate the Student by the Student's resistance to testing.

Petitioner also contended that the IEPs lacked an "Area of Concern" section about adaptive/daily living skills. This issue was not raised in the IEP meetings, and Petitioner did not explain what adaptive/daily living skills s/he needed to work on. While the Student was functioning at a low level academically, it cannot be simply assumed that the Student had adaptive/daily living skills issues that needed a separate section in the IEP, especially since none of DCPS's witnesses indicated that the Student had any special needs in regard to adaptive/daily living skills, and none of Petitioner's documents established that the Student had any special needs with respect to adaptive/daily living skills. Jackson v. District of Columbia, No. CV 19-197 TJK/DAR, 2020 WL 3318034, at \*12 (D.D.C. June 2, 2020), report and recommendation adopted, No. CV 19-197 (TJK/DAR), 2020 WL 3298538 (D.D.C. June 18, 2020) (rejecting claim that student needed adaptive/daily living skills goals even where parent identified areas of need).

Petitioner also argued that the IEPs did not include appropriate goals and baselines in all academic and social-emotional areas. An IEP must include "a statement of measurable annual goals, including academic and functional goals." 20 U.S.C. Sect. 1414(d)(1)(A). The goals are "designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and to "meet each of the child's other educational needs that result from the child's disability." Id. Like other aspects of an IEP, annual goals are suitable if they are "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." Andrew F., 137 S.Ct. at 999. In reviewing the substantive

adequacy of IEP goals, a court “must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” Id. at 999.

Most of the testimony relating to IEP goals and baselines came from Witness A, who said that the Student needed adaptive/daily living skills goals and occupational therapy goals. During closing argument, Petitioner focused on the lack of goals in adaptive/daily living skills in the IEPs, since claims relating to occupational therapy in Issue #3 were withdrawn. However, as already discussed, Petitioner did not explain why the Student needed adaptive/daily living skills goals except to state generally that s/he functions at a low level in many areas. None of Petitioner’s witnesses explained the Student’s deficits in this area. Additionally, none of Petitioner’s witnesses clearly explained that the IEP’s existing goals were unmeasurable, vague or generic, or otherwise unsuitable for the Student. In fact, Petitioner and the parent did not disagree with any of the goals at the two IEP meetings, including one meeting that included their counsel.

As a result of the foregoing, this Hearing Officer finds that DCPS offered the Student a FAPE through its February 6, 2020, and February 5, 2021, IEPs.

## **VII. Order**

As a result of the foregoing, this case is dismissed with prejudice.

Dated: March 4, 2022

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
OSSE

/DCPS  
/DCPS

### **VIII. Notice of Appeal Rights**

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

Dated: March 4, 2022

*Michael Lazan*  
Impartial Hearing Officer