

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
March 04, 2024

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 2/16/24, 2/26/24
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0253
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Autism. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 20, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). DCPS filed a response on January 3, 2024. A resolution meeting was held on January 18, 2024, which did not result in a settlement. The resolution period expired on January 19, 2024.

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.

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

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

III. Procedural History

A prehearing conference was held on January 23, 2024. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on January 30, 2024, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The hearings were 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.

After a series of emails, the parties agreed to set hearing dates for February 16, 2024, and February 26, 2024. Hearings proceeded on those dates. Closing arguments were presented at the close of testimony on February 26, 2024. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-44 without objection. DCPS moved into evidence exhibits R-1 through R-32 without objection.

Petitioners presented as witnesses, in the following order: herself; Witness A, a special education advocate (expert in special education); Witness B, a neuropsychologist (expert in psychology and neuropsychology); Witness C, a special education teacher at School A; and Witness D, a special education teacher at School A. Respondent presented as witnesses, in the following order: Witness E, a speech and language pathologist (expert in speech and language pathology); Witness F, a psychologist at School A (expert in psychology); Witness G, a coordinator for Program A at DCPS; and Witness H, a resolution specialist.

IV. Issues

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

1. Did Respondent fail to write an appropriate Individualized Educational Plan (“IEP”) for the Student on March 28, 2022, and December 19, 2023? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the March 28, 2022, IEP: was not based on comprehensive evaluative data; failed to adequately address the Student’s assistive technology needs; failed to provide sufficient speech and language services and support, both in and out of the general education setting, and/or to provide goals in pragmatic language skills; failed to provide sufficient accommodations; failed to adequately address the Student’s adaptive needs; failed to adequately address the Student’s behaviors and deficits in social skills; and failed to adequately identify the Student’s placement and/or allow for Petitioner to fully participate in the placement process for her child. Petitioner also alleged that Respondent did not provide an appropriate placement or location of service for the Student from March 2022 through the date that the Complaint was filed.

Petitioner contended that the December 19, 2023, IEP: was not based on comprehensive evaluative data; failed to adequately address the Student’s assistive technology needs; failed to provide sufficient speech and language services and support, both in and out of the general education setting, and/or to provide goals in pragmatic language skills; failed to provide sufficient accommodations; failed to adequately address the Student’s adaptive needs; failed to adequately address the Student’s behaviors and deficits in social skills; failed to provide the Student with appropriate and revised academic goals in the areas of reading, writing, and mathematics; and failed to address

the Student's need for extended school year ("ESY") services. Petitioner also alleged that the Student was not provided with the Communication & Education Support ("CES") program, as promised at the IEP meeting.

2. Did Respondent fail to timely revise the Student's March 28, 2022, IEP? If so, did Respondent deny the Student a FAPE?

3. Did Respondent fail to timely and comprehensively evaluate the Student in or about February-March 2022?

Petitioner contended that Respondent failed to conduct a comprehensive initial evaluation of the Student in February and/or March 2022. Petitioner contended that, in addition to the testing conducted, the Student's evaluation should have consisted of a more comprehensive psychological evaluation that including adaptive and cognitive data, an occupational therapy reevaluation, and an assistive technology evaluation.

4. Did Respondent fail to implement the Student's IEPs during the 2022-2023 school year? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent did not provide the Student with his/her mandate of speech and language pathology services.

As relief, Petitioner sought compensatory education and for DCPS to conduct or provide independent funding for the following: a full comprehensive psychological evaluation or adaptive, social emotional/behavior, and executive functioning assessments; an assistive technology evaluation; an occupational therapy evaluation; a speech and language evaluation; and a Functional Behavioral Assessment ("FBA"). Petitioner also sought a meeting to review these evaluations/assessments and revise the Student's IEP, as appropriate; the development of an appropriate Behavior Intervention Plan ("BIP") for the Student; and compensatory education for the Student.

V. Findings of Fact

1. The Student is an active X-year-old who is currently eligible for services as a student with Autism. The Student's ability to play independently is a strength, but the Student has little ability to speak so that s/he is understood. Testimony of Petitioner. The Student needs assistive technology to communicate in school. Testimony of Witness C. The Student generally enjoys being around his/her peers. Testimony of Witness E.

2. In or about 2022, the Student was referred for special education services. A "screeener," known as the Ages and Stages Questionnaire, 3rd Edition ("ASQ-3") was completed for the Student by Petitioner. The Student received a passing score in the areas of gross motor and "personal social" skills, a "monitor" score in the areas of fine motor and problem-solving skills, and a "refer" score in communication skills, indicating potential developmental delays. Petitioner estimated that the Student had 20-50 words in expressive vocabulary, and she indicated that the Student's speech was limited and difficult to understand. P-11; Testimony of Witness G.

3. On February 24, 2022, Petitioner was interviewed by Witness G to obtain more information about the Student. Petitioner told Witness G that the Student was playing independently and completing puzzles. Petitioner reported that her main concern was the Student's communication. Petitioner told Witness G that the Student was able to wash his/her hands and had "emerging" dressing skills. P-15-1.

4. On March 8, 2022, one of the five "screeners" associated with the Battelle Developmental Inventory, 3rd edition ("BDI-3"), was administered to the Student. These screeners assess milestones in the following domains: adaptive, social-emotional, communication, motor, and cognitive. The adaptive screener focused on two sub-

categories: self-care and personal responsibility. The Student fell into the “pass” range, which indicates that his/her adaptive skills were typical for a child his/her age. The screener indicated that the Student had mastered the adaptive skills of communicating the need or desire for food, removing his/her shoes by untying or unfastening them without assistance, and brushing his/her teeth. The Student was deemed to be “emerging” in the following adaptive skills: washing and drying his/her hands independently; sleeping through the night without wetting; dressing independently; putting shoes on the correct feet without assistance; and other areas. P-12.

5. Based on its initial impressions of the Student, DCPS felt that s/he might have Autism Spectrum Disorder. DCPS consulted with Witness F, who, on March 15, 2022, filed a report on a psychological evaluation of the Student, based on video interviews. The evaluation included the Behavior Assessment System for Children-3rd Edition (“BASC-3”) and the Autism Spectrum Rating Scales (“ASRS”), with scales completed by Petitioner. On the ASRS, the Student’s overall score was “very elevated.” P-13.

6. The Student was unable to participate in formal testing. The evaluator, Witness F, had to use scales. Witness F concluded that the Student had many behavioral characteristics similar to children diagnosed with Autism Spectrum Disorder. The BASC-3 indicated average scales in several areas, but the Student had trouble responding to questions, starting conversations, and describing his/her feelings appropriately, with a “clinically significant” scale in atypicality. Witness F’s evaluation indicated that the Student often stared blankly, did odd things, and babbled to him/herself. The evaluation noted that the Student sometimes seemed unaware of others and said things that made no

sense. The Student frequently needed reminders to visually attend to the screen, engaged in stereotypical behaviors such as hand-flapping, opening/closing fists, facial grimacing, and eye squinting. The Student presented with very limited, fleeting eye contact and often appeared unaware of other people's attempts to initiate interaction. The Student labeled colors when requested, labeled a picture of a duck and imitated "quack quack," and followed simple one-step directions with the use of gestures. P-13. The Student was also stuck on playing with toys in a specific way, which included repetitively lining objects up and stacking them. Testimony of Witness F.

7. Witness F's evaluation indicated that the Student displayed delays in several areas of development, including communication, problem-solving, and social-emotional skills. The evaluation indicated that the Student did not yet use compensatory strategies to communicate. The evaluation explained that, typically, nonverbal children use eye contact, joint attention, and gestures to communicate their wants and needs and to show and share their interests. The evaluation also depicted the Student as struggling with the social aspect of language and the social interactions expected of a child his/her age. The evaluation indicated that the Student did not yet engage in reciprocal interactions, that his/her play skills appeared to be delayed and repetitive, and that s/he would benefit from targeted interventions to address his/her weaknesses and facilitate development of age-appropriate skills in these areas. P-13.

8. The evaluator also concluded that the Student would benefit from the explicit teaching of important play skills, including, but not limited to, copying simple actions, sharing objects and attention with others, imagining what other people think and feel, and taking turns. P-13. The evaluation suggested that teachers should use the

Student's favorite toys and topics to expand his/her play schemes; gradually introduce games and activities; provide a variety of toys for the Student to play with, and frequently recognize and reward the Student for taking turns with others.

9. A Speech and Language Evaluation Initial Assessment Report, dated March 22, 2022, assessed the Student through the Developmental Assessment of Young Children-2nd Edition ("DAYC-2"). The Student scored in the very poor range in both expressive and receptive language, and deficits were indicated in pragmatic language. The Student's articulation and fluency were average. The Student could not answer "yes" to closed questions, could not follow two-step related directions or directions that included spatial concepts and size concepts, and could not verbalize more than fifteen words. The Student relied primarily on gestures to communicate. The assessment's recommendations included: modeling; hand-over-hand assistance; visual cues to aid in task completion and ensure that the Student "has your attention" before asking questions, teaching new concepts, or giving spoken directions; a structured picture schedule to enable the Student to anticipate and respond to daily routines; frequent opportunities for the Student to imitate sounds and words; and arranging the learning environment to meet the Student's needs to communicate. P-14-5-6.

10. No assistive technology was recommended at the time because DCPS felt that it should encourage the Student to become more verbal. DCPS decided there was no need to conduct further evaluations, because the Student passed the adaptive screener. Testimony of Witness G.

11. At an IEP meeting for the Student on March 28, 2022, DCPS indicated that s/he belonged in the CES program for autistic students, and the IEP was designed

with the CES program in mind. DCPS did not consider placing the Student in the Early Learning Support (“ELS”) program, which is geared for higher functioning children. Testimony of Petitioner. Two goals were written with respect to the Student’s social and emotional development. Testimony of Witness F. The IEP stated that the Student engaged in odd behaviors, would benefit from support to communicate and learn via multiple means, should have access to repeated spoken language models paired with visual support, and might need support to engage with classmates. The IEP did not describe the Student as a child who needed assistive technology devices and services to access the curriculum, but indicated that this area should continue to be monitored. The IEP contained sections, including goals, in “cognitive” and speech and language/communications. The goals related to the Student’s play skills, issues with paying attention, issues with following one-step directions, and issues with making requests, among other areas. The IEP recommended that the Student receive twenty-six hours of specialized instruction per week, outside general education, with 240 minutes of behavioral support services per month. P-17.

12. On or about April 19, 2022, DCPS notified Petitioner that the Student would be placed in the ELS program at School B. This placement was different than what had been shared at the IEP meeting and was never discussed with Petitioner. The Student did not go to school during the 2022-2023 school year because Petitioner felt that the recommended ELS program was too advanced for the Student. P-32; Testimony of Petitioner.

13. For the 2023-2024 school year, Petitioner sought to enroll the Student at School C, a “lottery” school. Petitioner told School C that the Student had an IEP. The

Student was accepted at School C but then told not to attend, because the school did not have a program for the Student. Testimony of Petitioner.

14. In or about October 2023, Petitioner learned that the Student would be placed at School B, and School B assigned the Student to the ELS program on or about October 10, 2023. The Student attended, but the cognitive levels of the students in the ELS program were too high for the Student to be educated with them, and the work was too difficult for the Student. The Student made no progress “whatsoever” from the ELS program and would simply play all day and then come home soiled. No speech was provided to the Student either, and s/he was not responding to any questions posed by teachers or staff. When the Student was given workbook pages, s/he would scribble on them. Testimony of Witness C; Testimony of Witness D.

15. Speech started for the Student about the second week in December. Testimony of Witness D. The Student missed about eight hours of speech during this time. Testimony of Witness C.

16. Since December 2023, speech and language pathology services have been a success for the Student, and s/he gets excited when it is time to go to therapy sessions. The Student’s speech and language services currently include an assistive technology device, which s/he seems to enjoy using. Testimony of Witness E.

17. School A staff concluded that that it was an inappropriate placement for the Student and filed a “more restrictive environment consultation request.” The Student was then observed by “someone from central office.” Testimony of Witness C.

18. On December 18, 2023, an IEP meeting was held, in part to change the IEP to reflect the Student’s need to participate in the CES program. Testimony of

Witness A. At this IEP meeting, Witness A asked for a comprehensive evaluation of the Student, including for assistive technology, occupational therapy, and behavior and adaptive skills. The team decided to meet again after the holidays. Witness C shared that DCPS had begun the consultative process for assistive technology, but that a formal evaluation could be conducted only after an Analysis of Existing Data (“AED”) meeting was held. Witness C expressed support for more testing in the areas of cognitive, adaptive, occupational therapy, assistive technology, and speech and language. Witness C also expressed support for the creation of an FBA. Petitioner and Witness A asked DCPS staff about increasing the Student’s speech mandate. DCPS said that the Student was “receiving the max” and that an exception for the Student to receive more services would have to come from the central office. P-22.

19. The Student’s IEP dated December 18, 2023, contained sections relating to speech and language and “cognitive.” The IEP had three speech and language goals related to following one- and two-step directions, identifying objects and actions, and making requests. The IEP also had three cognitive goals related to increasing vocabulary through the use of picture cues, following directions, and sorting. The IEP indicated that the Student would benefit from support to communicate and learn via multiple means (e.g., signing, pointing to pictures/objects, gesturing, nodding, and speaking), as his/her receptive and expressive spoken language skills were significantly delayed. The IEP said that the Student should have access to “repeated models of spoken language paired with visual support” and that s/he might need support to engage with classmates. The IEP indicated that the Student continued to have difficulty with communication, as demonstrated by his/her difficulties completing written academic tasks, responding to

teacher inquiries, and communicating his/her wants and needs. The IEP indicated that the following interventions had been attempted, without success: visual organizational strategies, closed strategies, choice strategies, yes/no strategies, and alternative response strategies. Since these strategies did not work, the IEP team was “considering” assistive technology to support the Student in the area of communication. The IEP said that the Student required a “single switch type” device to communicate and demonstrate academic progress. The IEP recommended twenty-six hours per week of specialized instruction outside general education, plus four hours per month of speech and language services. This IEP also recommended a location with minimal distractions. P-19.

20. On February 7, 2023, a “transition” meeting was held to enable the Student to attend the CES program. Petitioner has visited the proposed CES program and approves of it, indicating that the Student was promised an assistive technology device at the CES program site. Testimony of Petitioner.

21. After the Complaint was filed, DCPS agreed to provide the Student with a communication device, authorizations for an assistive technology evaluation, an occupational therapy evaluation, and a psychological evaluation (R-24), and an authorization for compensatory education for missed speech services. R-26.

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, on Issue #1, relating to the appropriateness of the Student’s IEP and placement, the burden of persuasion is on Respondent if Petitioner presents a *prima facie* case. On Issues #2, #3, and #4, the burden of persuasion is on Petitioner.

1. Did Respondent fail to write an appropriate IEP for the Student on March 28, 2022, and December 19, 2023? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the March 28, 2022, IEP: was not based on comprehensive evaluative data; failed to adequately address the Student’s assistive technology needs; failed to provide sufficient speech and language services and support, both in and out of the general education setting, and/or to provide goals in pragmatic language skills; failed to provide sufficient accommodations; failed to adequately address the Student’s adaptive needs; failed to adequately address the Student’s behaviors and deficits in social skills; and failed to adequately identify the Student’s placement and/or allow for Petitioner to fully participate in the placement process for her child. Petitioner also alleged that Respondent did not provide an appropriate placement or location of service for the Student from March 2022 through the date that the Complaint was filed.

In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an “appropriate” level of education to children with disabilities. Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Andrew F., the Court held that an IEP must

be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. at 1001. The Court made clear that the standard is “markedly more demanding than the ‘merely more than *de minimis*’ test applied by many courts.” Id. at 1000. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. at 1002. As stated by the District of Columbia Circuit Court of Appeals: “the key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress.” Z. B. v. District of Columbia, 888 F.3d 515, 524 (D.C. Cir. 2018)

During closing argument, Petitioner focused on the contention that Respondent did not provide an appropriate placement or location of services for the Student between March 2022 and the date that the Complaint was filed. There is no dispute in the record that this is true. Petitioner and her child were promised the CES program, which is geared for children with autism, like the Student. Instead, the Student received an offer for an ELS program at School B, which was entirely inappropriate for the Student.

Petitioner decided to find a placement herself and got the Student admitted into School C through a lottery system. Though Petitioner told School C that the Student needed an IEP, School C told Petitioner that they could not implement the Student’s IEP. Then, in October 2023, DCPS finally offered School A, which appeared to have space for the Student.

However, the space at School A was also for an ELS classroom. The Student attended but would simply play all day and then come home with his/her pants soiled. No speech services were provided to the Student either, though s/he was basically non-verbal. In fact, the Student was not responding to any questions posed by teachers or staff, and the Student could not access any of the curriculum. The March 15, 2022, IEP should have indicated that the Student needed to be placed in the CES program.

Petitioner also contended that the IEP was based on insufficient data. This Hearing Officer agrees with Petitioner's witnesses that all five screeners of the Battelle inventory should have been administered for this child, who has delays in every area. This issue is addressed in greater length in Issue #3, *infra*.

Petitioner also argued that there should have been more accommodations for the Student in the March 28, 2022, IEP. In fact, the IEP contained virtually no accommodations, even though both a speech therapist and a psychologist recommended a wide variety of interventions for the Student. It was suggested that teachers should use the Student's favorite toys and topics to expand his/her play schemes and gradually introduce games and activities. It was suggested that the Student should have a variety of toys play with, that taking turns with others should be frequently recognized and rewarded, and that the Student would benefit from explicit teaching of important play skills, including, but not limited to, copying simple actions, sharing objects and attention with others, imagining what other people think and feel, and taking turns. Also recommended were modeling; hand-over-hand assistance; visual cues to aid in task completion and to ensure that the Student "has your attention" before asking questions, teaching new concepts, or giving spoken directions; a structured picture schedule to

enable the Student to anticipate and respond to daily routines; frequent opportunities for the Student to imitate sounds and words; and arranging the learning environment to meet the Student's needs to communicate. None of these accommodations were in the IEP, and Respondent did not clearly defend the lack of these accommodations, except to suggest that a teacher might employ these measures anyway.

Petitioner also argued, correctly, that the March 28, 2022, IEP lacked goals and services related to the Student's adaptive needs, and Witness C agreed that the IEP should have included adaptive goals. This lack of goals related to adaptive skills, as well as pragmatic language, might not have been a problem if the IEP had assigned the Student to a CES classroom, which is designed for children who function at a low level. But the IEP was vague and did not indicate the kind of program that the Student should be assigned to. As a result, the Student was assigned to an ELS classroom, which is designed for children with learning disabilities, not autistic children with adaptive or pragmatic language issues.

This Hearing Officer also agrees with Petitioner, Witness A, and Witness B that the IEP should have addressed this non-verbal Student's communication deficits through assistive technology. DCPS witnesses argued that, at the time, they wanted the Student to learn to speak first, but Witness C indicated then that the Student needed to work on an assistive technology device, and there is nothing in the record to explain why the Student would not be able to both work on expressive speech and work with assistive technology. DCPS denied the Student a FAPE through its March 28, 2022, IEP.²

² Petitioner's other contentions were unpersuasive. Petitioner's contention that the IEP failed to mention or address the Student's behaviors resulting from autism is incorrect. The record indicates that in this IEP, the Student's behavioral interventions were contained in a section entitled "cognitive." The IEP noted that the

Petitioner contended that the December 19, 2023, IEP was not based on comprehensive evaluative data; failed to adequately address the student's assistive technology needs; failed to provide sufficient speech and language services and support, both in and out of the general education setting, and/or to provide goals in pragmatic language skills; failed to provide sufficient accommodations; failed to adequately address the Student's adaptive needs; failed to adequately address the Student's behaviors and deficits in social skills; failed to provide the Student with appropriate and revised academic goals in the areas of reading, writing, and mathematics; and failed to address the Student's need for ESY services.

This IEP corrected the main problems with respect to the March 28, 2022, IEP. This IEP recommended the CES program with assistive technology, which Petitioner is apparently happy about, albeit with some reservations. This IEP also added a requirement for a location with minimal distractions. School A was familiar enough with the Student at that point that the lack of data in March 2022 was no longer a problem, as evidenced by the detail in the present levels of performance sections of the IEP. The IEP also indicated that the Student would benefit from placement in a program that offers an Applied Behavior Analysis ("ABA") framework, which is what the CES program does. Petitioner's closing argument therefore focused on the need for more behavioral interventions and adaptive goals.

Student engaged in odd behaviors, such as staring blankly and babbling to him/herself, had issues with social situations, engaged in stereotypical behaviors, and had difficulty tolerating changes in routine. Petitioner also contended that the speech and language mandate in the IEP was too low, but the evidence, through Witness E, suggested that the Student was making progress when s/he attended speech therapy at School A. Finally, claims relating to parental participation in the IEP were unproven and not mentioned during closing argument.

However, the IEP provided behavioral goals in its cognitive section, stating that the Student “refrain[ed] from displaying maladaptive behaviors as observed in eighty percent of transition opportunities.” Additionally, teachers in a CES classroom with young autistic students are more than likely to work on all the things the Student needs: adaptive skills, pragmatic language skills, behavior issues, and speech issues. CES teachers are also more than likely to use accommodations like the ones suggested by Witness E for the Student. Moreover, Petitioner agreed with this IEP and is looking forward to the Student attending the new placement.

Finally, during closing argument, Petitioner did not raise issues relating to academic goals in the areas of reading, writing, and mathematics or the Student’s need for ESY services, nor does the record support these claims.

This claim with respect to the December 19, 2023, IEP must be dismissed.

2. Did Respondent fail to timely revise the Student’s March 28, 2022, IEP? If so, did Respondent deny the Student a FAPE?

Pursuant to 34 C.F.R. Sect. 324(b)(1), the IEP team reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 C.F.R. Sect. 300.323(a). The IEP dated March 28, 2022, expired one year later, on March 27, 2023, and DCPS did not revise the IEP (which this Hearing Officer has found to be inappropriate) until December 2023. DCPS did not clearly defend this claim in its closing argument. Respondent denied the Student a FAPE by failing to revise the Student’s IEP after it expired on March 27, 2023.

3. Did Respondent fail to timely and comprehensively evaluate the Student in or about February-March 2022?

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

Petitioner contended that Respondent failed to conduct a comprehensive initial evaluation of the Student in February and/or March 2022. Petitioner argued, relying on the testimony of Witness A and Witness B, that DCPS's initial evaluation of the Student was not thorough enough. Petitioner contended that, in addition to the testing that DCPS conducted, the Student's evaluation should have consisted of a more comprehensive psychological evaluation that included adaptive and cognitive data, an occupational therapy reevaluation, an FBA, and an assistive technology evaluation.

However, DCPS's 2022 psychological evaluation of the Student indicated that s/he was not testable through formal means. The record is unclear on how meaningful an occupational therapy evaluation, assistive technology evaluation, cognitive evaluation, or adaptive evaluation would have been for the Student at that time. Moreover, this Hearing Officer agrees with DCPS that there is not enough evidence in the record to determine if an FBA was warranted at the time, because the Student had spent little time in school. This Hearing Officer also agrees that an FBA should be conducted only after a student has behavior problems in school.

But initial evaluations are important, especially when a student is new to an institution and there is not much data in the Student's file. With this needy Student, who was relatively new to DCPS, the school district should have done all it could to evaluate him/her, so that his/her teachers would have an idea of what to expect. And DCPS simply could not explain why only one screener of the Battelle measure was filled out at that time, when the Battelle has five screeners. In addition to the Student's adaptive skills, which were assessed by DCPS, the Battelle can also assess milestones in the social-emotional, communication, motor, and cognitive domains.

The Student appears to have issues in all five areas that the Battelle assesses. Witness G's explanation as to why only one screener was used was confusing, and at one point Witness G seemed to suggest that this young Student did not have delays in the areas assessed by the Battelle. DCPS argued that the psychological report reviewed the Student's social and emotional abilities, suggesting that the social-emotional screener was not necessary, but there is nothing in the record to explain why the motor screener was not done, and there is also not much to explain why the cognitive screener was not done, especially when one section of the IEP was called "Cognitive." Importantly, neither DCPS nor Witness G, who did the screening, argued that the Student was untestable on the four other Battelle screeners. Petitioner met her burden by presenting a preponderance of evidence on this issue. DCPS denied the Student a FAPE through the insufficient evaluation of the Student that it conducted in February-March 2022.

4. Did Respondent fail to implement the Student's IEPs during the 2023-2024 school years? If so, did Respondent deny the Student a FAPE?

Petitioner contended that Respondent did not provide the Student with his/her mandate of speech and language pathology. "Failure to implement" claims may be brought if the LEA cannot "materially" implement an IEP. A parent must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP). Courts applying the materiality standard have focused on the proportion of services mandated to those

actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). There is no requirement that a student must suffer “demonstrable educational harm” for the parent to prevail. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

There is no dispute that the Student missed speech services during the 2023-2024 school year until December 2023, and DCPS did not argue that the failure to implement was immaterial. DCPS did not mention this claim during the closing. To the contrary, on February 8, 2024, DCPS authorized ten hours of makeup speech services for the Student to make up for the speech services s/he missed during the 2023-2024 school year. DCPS denied the Student a FAPE by failing to provide him/her with speech and language pathology services during the 2023-2024 school year.

RELIEF

As relief, Petitioner seeks compensatory education. Evaluations were not requested during closing argument, probably in light of DCPS’s decision to conduct evaluations of the Student.

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). These words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” Courts and hearing officers may award “educational services to be provided prospectively to compensate for

a past deficient program.” Reid ex Rel. Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D. v. District of Columbia, 817 F.3d 792, 797-798 (D.C. Cir. 2016) (quoting Reid, 401 F.3d at 524).

Witness A’s compensatory education plan recommended 540 hours of independent tutoring (fifteen hours per week for thirty-six weeks), with specialized tutoring to be provided outside the school setting to support the Student’s academic deficits. Petitioner also seeks 400 hours of ABA therapy (twenty hours per week for twenty weeks), sixty hours of independent speech therapy (three hours per week for twenty weeks), and that the compensatory education award be reserved pending results of an occupational therapy evaluation.

However, Witness A’s testimony was premised on FAPE denials that were not found by this Hearing Officer Determination (“HOD”). This HOD did not find that DCPS failed to conduct an FBA or an occupational therapy evaluation, and this HOD did not find that the December 2023 IEP denied the Student a FAPE. Additionally, Witness A did not explain why she recommends two substantial awards at once: fifteen hours per week of tutoring for thirty-six weeks and twenty hours per week of ABA services for twenty weeks. Moreover, as DCPS pointed out, such a large amount of after-school and weekend services are not realistic, given the Student’s disabilities. Under the circumstances, exercising the discretion afforded to hearing officers, I find it fair to reduce the proposed award by half. The Student shall receive 270 hours of tutoring and

200 hours of ABA services, to be provided by a qualified professional at a reasonable and customary rate in the community.

Finally, in regard to compensatory speech and language services, Witness A's proposal for sixty hours far exceeds the eight or so hours that the Student missed, and Witness A has no background in speech therapy. She also did not clearly explain how she arrived at sixty hours. The compensatory speech-language pathology services award will be reduced to ten hours (the same number of hours that DCPS offered to the Student through an authorization) to make up for DCPS's failure to provide the Student with such services from August 2023 through December 2023.

VII. Order

As a result of the foregoing:

1. As compensatory education for the Student, Respondent shall fund: a) 270 hours of tutoring; b) 200 hours of ABA services; and 3) ten hours of speech-language pathology services;

2. The tutoring services shall be provided by a certified special education teacher, the ABA services shall be provided by a professional with substantial experience working with children with autism, and the speech-language pathology services shall be provided by an experienced professional practitioner, all at respective customary rates in the community;

3. All other requests for relief are hereby denied.

Dated: March 4, 2024

Michael Lazan
Impartial Hearing Officer

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2023-0253

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

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, 2024

Michael Lazan
Impartial Hearing Officer