

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

PARENT,
on behalf of STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: May 20, 2018

Hearing Officer: Peter B. Vaden

Case No: 2018-0075

Hearing Date: April 19, 2018

Office of Dispute Resolution, Room 112
Washington, D.C.

HEARING OFFICER DETERMINATION (Corrected)²

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE youth, is a resident of the District of Columbia. In her March 15, 2018 due process complaint, Petitioner alleged that DCPS denied Student a free appropriate public education (FAPE) by failing to timely and comprehensively evaluate Student for initial special education eligibility, failing to provide Student an appropriate Individualized Education Program (IEP) in spring 2017 and failing to fully implement Student's IEPs in the 2016-2017 and 2017-2018 school years.

¹ Personal identification information is provided in Appendix A.

² Decision corrected to correct the date of the due process hearing.

Petitioner and DCPS met for a resolution session on April 17, 2018 but DCPS was unable to resolve the dispute that was the basis for the due process complaint. On April 11, 2018, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The final decision in this case is due by May 29, 2018. The due process hearing was convened before this Impartial Hearing Officer on April 19, 2018 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Mother appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by SPECIAL EDUCATION DIRECTOR and by DCPS' COUNSEL.

Mother testified and called as additional witnesses EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses CASE MANAGER and Special Education Director. Petitioner's Exhibits P-1 through P-17, P-19, P-23 through P-27 and P-29 were admitted into evidence, including Exhibits P-1, P-19, P-23 and P-25 which were admitted over DCPS' objections. Petitioner withdrew Exhibits P-18, P-20, P-21, P-22, P-28 and P-30. DCPS' Exhibits R-1 through R-28 were admitted into evidence without objection. Counsel for the respective parties made opening statements. In lieu of making closing arguments, counsel for both parties filed written briefs

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the April 11, 2018

Prehearing Order:

- a. Whether District of Columbia Public Schools (DCPS) failed to timely evaluate and/or identify the student as eligible pursuant to their “Child Find” obligation by spring 2016, and/or timely provide the student with an appropriate IEP;
- b. Whether DCPS denied the student a FAPE by failing to conduct a comprehensive initial evaluation of the student during the 2016-2017 school year;
- c. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP or placement on or about May 16, 2017, in that the IEP was not based on comprehensive evaluations and does not fully address the student’s needs, the hours of support provided were inadequate in light of the student’s academic deficits, the IEP does not provide adaptive goals, and the IEP does not address the student’s need for extended school year (ESY) services and
- d. Whether DCPS failed to fully implement the student’s IEP by failing to introduce writing goals during the 2016-2017 school year, and in the 2017-2018 school year to date, by providing push-in rather than pull-out services as required by the student’s IEP and ceasing services altogether just prior to Thanksgiving break due to the absence of the special education teacher.

For relief in this case, Petitioner requests as follows:

- a) That DCPS be ordered to amend the student’s IEP to provide the student with not less than 10 hours of Specialized Instruction per week, in an outside general education setting, and 5 hours of push in services per week, as well as, additional goals to address academic weaknesses and weaknesses in adaptive functioning;
- b) That DCPS be ordered to conduct and/or fund a comprehensive psychological evaluation that addresses clinical functioning as well as, academic and cognitive functioning including assessments to ascertain whether the student has ADHD or other attention issues that are negatively impacting the student’s education, as well as, a speech and language evaluation, and upon completion of comprehensive evaluations, that DCPS shall convene the multidisciplinary team for the student;
- c) That the student be awarded compensatory education for the alleged denials of FAPE that occurred as a result of DCPS’ delays in conducting evaluations and identifying the student as eligible prior to the commencement of the 2016/2017 school year or that DCPS shall be ordered to fund a compensatory education

evaluation.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments and legal memoranda of counsel, this hearing officer's findings of fact are as follows:

1. Student resides with Mother in the District of Columbia. Testimony of Mother. Student is eligible for special education and related services as a student with a Specific Learning Disability (SLD). Exhibit R-3.

2. Since pre-kindergarten, Student has been enrolled in DCPS' CITY SCHOOL. Student is currently in GRADE. Testimony of Mother.

3. In spring 2014, Student was referred by the parents for evaluation at DCPS' Early Stages assessment center due to the parents' concerns regarding their child's hyperactivity and difficulty with letter/number identification. The assessor, ES PSYCHOLOGIST, was informed by Student's classroom teacher that Student excelled with fine motor tasks, such as writing and drawing, as well as gross motor tasks. The teacher reported that in the classroom, Student consistently participated and was very engaged, that Student was able to differentiate between letters and numbers, that Student could retell a familiar story with adult support, and that Student played well with classmates and demonstrated age-appropriate interaction skills. The teacher was most concerned about Student's difficulty remaining focused in the classroom. On Student's report card, Student was meeting all learning standards/objectives, but the teacher reported that Student was having difficulty with letter names/sounds and recognizing the numbers 1-10. Exhibit P-8.

4. Early Stages conducted cognitive and academic testing of Student. On the

cognitive measure, Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), Student's composite scores were all in the Average range, except for Visual Spatial (VSI), which was Low Average. An Early Stages Evaluation Coordinator conducted the Young Children's Achievement Test (YCAT) to measure Student's educational achievement. She concluded that Student's overall score on the YCAT indicated that Student was performing in the Average range for Student's age. Student's scores were in the Average range for General Information, Writing and Spoken Language. Student's skills in the area of math were assessed to be within the Low Average range. Student had the most difficulty on the Reading subtest where Student scored in the Poor range. Student's total Early Achievement Composite score fell in the Low Average range. Exhibits P-8, P-9.

5. Due to concerns regarding Student's inattention and distractibility, ES Psychologist had Student's teacher complete the Behavior Rating Inventory of Executive Functioning - Preschool Version (BRIEF-P) rating scale. (ES Psychologist also gave the BRIEF-P questionnaire to the parents to complete, but the parents did not return the rating scale.) The teacher's responses to the BRIEF-P suggested that in the school setting, Student exhibited appropriate executive functioning skills. In the classroom, Student exhibited age-appropriate skills to modulate emotions, control impulsivity, make transitions, tolerate change, retain information and plan/organize tasks. Exhibit P-8.

6. ES Psychologist concluded in his June 24, 2014 report that except for visual-spatial abilities, Student had average cognitive abilities. In the visual-spatial areas, he recommended that Student may benefit from additional prompting on tasks that involved understanding of simple part-to-whole relationships. ES Psychologist

reported that Student's executive functioning and behavior, compared to same aged children, were both in the average range. He recommended that Student's behavior should continue to be monitored and that a referral should be made to the Student Support Team should Student's inattention be a concern the following school year. ES Psychologist recommended that Student did not meet criteria for special education eligibility under the Developmental Delay disability category. Exhibit P-8.

7. At an eligibility team meeting on June 26, 2014, the City School eligibility team determined that Student did not exhibit severe developmental delays and did not meet eligibility criteria for the IDEA Developmental Delay classification. Exhibit R-19.

8. In the 2015-2016 school year, City School implemented Response to Intervention (RTI) strategies for Student, because Student was struggling with the Wilson Foundations reading program. By the end of the school year, Student was reported to have made great strides on the Dibels TRC reading level, making 1.65 years growth with the RTI Support. The RTI interventions were deemed successful. Testimony of Case Manager, Exhibit P-10.

9. In the 2016-2017 school year, Case Manager observed, mid-year, that Student was not making the amount of progress which Case Manager had expected. Case Manager recommended to Mother and the classroom teacher that Student be evaluated again for special education eligibility. Testimony of Case Manager.

10. On or about January 17, 2017, Mother submitted a written request for an educational evaluation of Student. Exhibit R-14.

11. At an Analysis of Existing Data (AED) team meeting on February 2, 2017, the team discussed Student's performance in class and in small group instruction and concluded that Student was making only minimal progress. The school psychologist

recommended that Mother follow up with Student's pediatrician to assess for Attention Deficit/Attention Deficit Hyperactivity Disorder. Mother agreed that she would contact the team after she spoke with Student's physician. Exhibit R-12.

12. At the time the decision was made to evaluate Student in January 2017, Mother had expressed a concern about Student's speech. The school's speech-language pathologist conducted a speech and language screener and reported that Student did not need further evaluation in the area of Speech and Language. Testimony of Case Manager.

13. Beginning March 30, 2017, SCHOOL PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student. The psychologist administered the Reynolds Intelligence Assessment Scale - Second Edition (RIAS-2), the Test of Nonverbal Intelligence - Fourth Edition (TONI-4), the Woodcock-Johnson Tests of Achievement - Fourth Edition (WJ-IV ACH) and the Adaptive Behavior Assessment System (ABAS-II). This assessor concluded in her April 20, 2017 report that Student's ability to learn, as described in the RIAS-2 was very low. However, Student's performance in nonverbal speeded processing domain significantly exceeded Student's level of performance within the verbal speeded processing domain. Student's heightened nonverbal ability was also reflected in Student's High Average performance on the TONI-4. On the WJ-IV ACH, Student showed academic weakness with reading fluency achievement, word identification skills, as well as an academic difficulty in reading rate, which required both reading-writing and cognitive processing speed abilities. On the ABAS-II, Student's adaptive behavior tested Below Average. However based on staff interviews, behavior observation and review of developmental history, School Psychologist concluded that this score did not appear to represent an accurate

presentation of Student's conceptual adaptive behavior. School Psychologist reported that it appeared that Student met criteria for special education services, as a student with an SLD, specifically in the area of mathematics. Exhibit P-7.

14. On May 11, 2017, the City School MDT team determined that Student met special education eligibility criteria for the SLD disability in Mathematics, Reading and Written Expression. Exhibits R-9, R-10. None of the team members disagreed with the SLD eligibility determination. Testimony of Case Manager.

15. The City School IEP team met on May 16, 2017 to develop Student's initial IEP. The May 16, 2017 IEP identified Mathematics, Reading and Written Expression as areas of concern and provided for Student to receive 5 hours per week of Specialized Instruction, outside General Education. Exhibit P-2. The initial IEP goal for reading was for Student to read aloud, correctly, a given text, including consonant blends, long and short vowel patterns, prefixes and suffixes. The annual goal in math was for Student to calculate correctly one digit addition and subtraction problems in math fluency activities. In writing, the annual goal was to write a one paragraph opinion piece, with phonetically correct spelling, that would incorporate linking words and a conclusion. Exhibit P-2.

16. The May 16, 2017 IEP provided in the Least Restrictive Environment section that Student would be "removed from the general education classroom" to receive Specialized Instruction Services for 5 hours per week. Exhibit P-2.

17. Mother attended both the May 11, 2017 eligibility meeting and the May 16, 2017 IEP team meeting. The IEP team decided that Student did not qualify for Extended School Year (ESY) services because Student has not been losing gains in progress over school breaks. Neither Mother nor other team members expressed any

disagreement with the eligibility determination or the content of the initial IEP.

Testimony of Case Manager.

18. Student's May 16, 2017 IEP, except for the written expression goal, was implemented for the rest of the 2016-2017 school year. The written expression goal, opinion-based writing, was not introduced because it was the last month of school and because Student was not ready to start on that goal while Student was still finishing up the Wilson Foundations instruction. Testimony of Case Manager.

19. Over the 2017 summer break, Student did not experience significant regression. Student's Dibels TRC score dropped only one level, from H to G, from which Student more than recovered by mid year, reaching Level K, which was close to grade level. Exhibit R-7, Testimony of Case Manager.

20. In the current 2017-2018 school year, Case Manager provided Specialized Instruction to Student, with 2 to 3 other children who also had IEPs, at a separate table in the back of the regular education classroom. This included phonics instruction, guided reading intervention, and math intervention. Student has responded very well and made huge gains in all aspects. Between August 2017 and January 2018, Student advanced two grade levels in math, per the I-Ready assessment. In reading over the same period, on the DIBELS Text Reading and Comprehension (TRC) measure, Student made a little under one year of growth. Testimony of Case Manager, Exhibit R-7. At the end of the second reporting period for the 2017-2018 school year, Student was reported to be progressing on all IEP goals. Exhibit R-6. Student's grades for the second term were all Basic or higher. Exhibit R-4. "Basic" means average in the classroom – doing what the student is supposed to. Testimony of Case Worker.

21. In the 2017-2018 school year, Case Manager implemented Student's IEP special education services until she went on maternity leave around January 25, 2018. Testimony of Case Manager. After that, Student's regular education teacher, who is also a special education teacher, continued to provide Student's special education services. Approximately one month after Case Manager went on leave, the school brought in a substitute teacher, who now provides special education services on the same schedule that Case Manager followed. Testimony of Special Education Director.

22. Student's IEP team at City School met on March 20, 2018 to revise Student's IEP. Student's Specialized Instruction Services were increased to 11.75 hours per week, including 5 hours in general education and 6.75 hours outside general education. Exhibits R-1 through R-3. (The appropriateness of the March 20, 2018 IEP is not at issue in this proceeding.)

CONCLUSIONS OF LAW

Based upon the above findings of fact, argument and legal memoranda of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case

before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

a. Did DCPS fail to timely evaluate and/or identify Student as eligible for special education pursuant to its “Child Find” obligation by spring 2016, and/or timely provide the student with an appropriate IEP?

Student was first determined eligible for special education in May 2017 as a child with a Specific Learning Disability (SLD). Student had previously been evaluated in 2014 by DCPS’ Early Stages and determined not to have a qualifying disability. Petitioner does not claim that the 2014 determination was not correct. However, the Petitioner alleges that by the spring of 2016, DCPS had sufficient information to suggest that Student should have been evaluated again and determined eligible. DCPS maintains that until the middle of the 2016-2017 school year, Student responded satisfactorily to City School’s RTI interventions and that a new evaluation was not warranted earlier. Petitioner has the burden of persuasion on this issue.

Under the IDEA’s child-find requirement, the District of Columbia must “ensure that ‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005); 20 U.S.C. § 1412(a)(3). “As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011).

For a child suspected of having an SLD, the IDEA regulations require that a state must permit the use of a process based on the child’s response to scientific,

research-based intervention – Response to Intervention (RTI) – as criteria for determining whether the child has an SLD. *See* 34 CFR § 300.307(a)(2). The Federal regulations, under 34 CFR § 300.309(c), require that if a child has not made adequate progress after an appropriate period of time with RTI, a referral for an IDEA eligibility evaluation must be made. However, the regulations do not specify a timeline for using RTI or define “adequate progress.” U.S. Department of Education, Office of Special Education and Rehabilitative Services, *Questions and Answers On Response to Intervention (RTI) and Early Intervening Services (EIS)*, Question C-5 (OSERS January 2007). The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation. *Memo to State Directors of Special Education*, 56 IDELR 50 (Jan. 21, 2011). *See, also*, Office of Special Education and Rehabilitative Services, *Letter to Ferrara*, 112 LRP 52101 (Feb. 29, 2012) (The implementation of an RTI process is not a reason to fail to respond to a parent’s request for an initial evaluation.)

In the 2015-2016 school year, City School implemented RTI strategies for Student, because Student was struggling with the Wilson Foundations reading program. By the end of the school year, Student had made more than one year of growth in reading and the RTI interventions were deemed successful. However, in the 2016-2017 school year, Case Manager observed, mid-year, that Student was no longer making the amount of progress which Case Manager had expected. On the recommendation of Case Manager, in January 2017, the parent requested a new eligibility evaluation. Upon receiving Mother’s request, City School conducted the initial evaluation and, on May 11, 2017, determined that Student was eligible for special education as a child with an SLD. This was within the 120-days time limit for completing the initial evaluation mandated

by District law. *See* D.C. Code § 38–2561.02(a)(1) (2015).

DCPS' expert, Case Manager, opined that prior to the middle of the 2016-2017 school year, there was no reason to evaluate Student again for special education because RTI had been successful for Student. Petitioner's expert, Educational Advocate 1, agreed that if RTI is working, a child may not need a special education referral. The parent's other expert, Educational Advocate 2, opined that City School's June 15, 2016 RTI progress report suggested that RTI was not effective for Student indicating a need for further evaluation. However, the reports indicated that Student had made "some progress" with RTI, including 1.65 years' growth in the TRC reading level as well as more limited gains in math. City School staff decided to continue to provide RTI interventions to Student for the 2016-2017 school year. Based upon this record, I find that the Petitioner did not meet her burden of persuasion that by the end of the 2015-2016 school year, Student had not made expected progress with RTI, such that a referral for an IDEA eligibility evaluation was required.

b. Did DCPS deny Student a FAPE by failing to conduct a comprehensive initial evaluation during the 2016-2017 school year?

As discussed in the preceding section, City School conducted an initial eligibility evaluation of Student in spring 2017 and the MDT team determined on May 11, 2017 that Student was eligible for special education as a child with an SLD. In her due process complaint, Petitioner alleged that the spring 2017 evaluation was not sufficiently comprehensive, because the psychological evaluation did not include any testing to address the Student's attention issues and because DCPS did not conduct a Speech and Language evaluation. DCPS responds that its spring 2017 eligibility evaluation of Student was appropriately comprehensive. Petitioner has the burden of persuasion on

this issue.

The IDEA regulations require that the District's special education evaluation of a child be sufficiently comprehensive to determine whether the child is a child with a disability, the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether any additions or modifications to the special education and related services are needed to enable child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. *See* 34 CFR § 300.305(a). Decisions regarding the areas to be assessed are determined by the suspected needs of the student. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). Generally, when a student has been evaluated for special education eligibility and the adequacy of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the student's special education and related services needs to determine the content of the IEP in all areas of suspected disability and whether the evaluation was sufficiently comprehensive to identify all of the student's needs. *See* 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. § 300.304(b)(1–3), (c)(4, 6).

Petitioner's expert, Educational Advocate 2, opined that School Psychologist's April 2017 comprehensive psychological evaluation of Student was not comprehensive because it failed to address Student's challenges with inattention, hyperactivity and self-regulation. She also opined that in light of the verbal deficits noted by School Psychologist, Student should have been referred for a speech and language assessment.

For her April 2017 evaluation of Student, School Psychologist interviewed the

classroom teacher, who expressed concern about Student's difficulty remaining focused in the classroom and being "distracted by everything." However, the teacher related that when she was teaching concepts that Student knew about or enjoyed, Student was able to give the task "undivided attention." School Psychologist conducted a classroom observation. She observed that at times, Student fidgeted and moved around in the seat. However, she observed that did not impact Student's ability to still remain focused on the tasks that were involved. During Student's evaluation sessions with School Psychologist, Student was compliant and focused throughout the testing.

To assess Student's executive functioning, School Psychologist administered the BRIEF-P, which measures the child's inhibitory control; ability to move freely from one situation or activity or aspect of a problem to another; emotional control; working memory and ability to manage current and future oriented task demands. The classroom teacher's BRIEF-P ratings of Student's behavior indicated that Student did not experience difficulty in the classroom in any of these areas. Specifically, the teacher's responses indicated that Student did not have a difficult time in the classroom with making transitions, tolerating changes, or switching/alternating attention. I conclude that on its face, School Psychologist's comprehensive psychological evaluation of Student, notably her classroom observation and administration of the BRIEF-P, did consider and assess reports that Student had difficulties remaining focused in the classroom and being "distracted by everything."

With regard to Student's need for a Speech and Language assessment, Case Manager testified that at the time the decision was made to evaluate Student in January 2017, Mother had expressed a concern about Student's speech. The school's speech-language pathologist conducted a speech and language screener and reported that

Student did not need further evaluation in the area of Speech and Language.

At the time DCPS evaluated Student in spring 2017, the parent did not disagree with the determination that Student was eligible under the SLD classification or request an Independent Educational Evaluation (IEE). Educational Advocate 2 was not part of the initial eligibility process. She has never worked as a school psychologist or a speech-language pathologist. Although she holds a doctorate in clinical psychology, she is not a licensed psychologist and does not currently work in that field. I discount her opinion that DCPS' evaluation of Student was not sufficiently comprehensive to identify Student's needs and to determine the content of Student's initial IEP. I conclude that Petitioner has not met her burden of persuasion that DCPS denied Student a FAPE by failing to conduct a sufficiently comprehensive initial evaluation in spring 2017.

c. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP or placement on May 16, 2017, in that the IEP was not based on comprehensive evaluations and did not fully address the student's needs, the hours of support provided were inadequate in light of the student's academic deficits, the IEP does not provide adaptive goals, and the IEP does not address the student's need for extended school year (ESY) services?

City School's initial, May 16, 2017 IEP identified Mathematics, Reading and Written Expression as areas of concern and provided for Student to receive 5 hours per week of Specialized Instruction, outside General Education. Mother contends that this IEP was inadequate to address Student's needs. DCPS has the burden of persuasion as to the appropriateness of the initial IEP and educational placement.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

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

involves two inquiries:

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

Moradnejad at 274-75. The Petitioner's claim that the initial IEP was not based on comprehensive evaluations implicates a procedural violation by DCPS. In the preceding section, I determined that Mother did not meet her burden of persuasion that DCPS denied Student a FAPE by failing to conduct a sufficiently comprehensive eligibility evaluation in spring 2017.

Turning to the second prong of the *Rowley* inquiry, in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017), the U.S. Supreme Court elaborated on the standard for what constitutes an appropriate IEP:

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 999. . . . The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is

appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

Andrew F., *supra* (emphasis in original). The D.C. Circuit, applying the Supreme Court's decision in *Andrew F.*, instructed in *Z.B. v. District of Columbia*, No. 16-7113, 2018 WL 2011461 (D.C. Cir. May 1, 2018), that the hearing officer "must ask whether, in developing the [proposed IEP], DCPS adequately evaluated [the student's] particular needs and offered [the student] an IEP tailored to what it knew or reasonably should have known of [the student's] disabilities at the time." *Id.*

Petitioner's expert, Educational Advocate 1, opined that DCPS' May 16, 2017 IEP for Student was not appropriate because the annual goals were not adequate, the hours of Specialized Instruction were not sufficient and the IEP lacked services to address Student's attention challenges. With regard to the annual goals, the IDEA requires that each child's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) 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

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i).

Case Manager explained that she drafted Student's initial IEP goals to enable Student to work on structural needs and, specific to Reading, decoding was more of a challenge for Student than comprehension. For Mathematics and Written Expression,

Student's scores on the WJ-IV ACH were in the Average range. The initial IEP goal for reading was for Student to read aloud, correctly, a given text, including consonant blends, long and short vowel patterns, prefixes and suffixes. The annual goal in math was for Student to calculate correctly one digit addition and subtraction problems in math fluency activities. In writing, Student was reported to struggle with producing a complete response to a prompt or a question. The annual goal was to write a one paragraph opinion piece, with phonetically correct spelling, that would incorporate linking words and a conclusion.

Educational Advocate 1, opined that the initial IEP goals were insufficient to address Student's areas of weakness and specifically, Student needed reading goals to address letter-word identification, word recognition and velocity, math goals to address reading word problems and measuring and data challenges, and written expression vocabulary goals. Educational Advocate did not participate in the initial IEP meeting or speak with any of Student's teachers prior to the initiation of this case. She has not been a special education teacher for 10 years. Case Manager, who drafted the IEP goals, has been a special education teacher since 2010. She had interacted with Student's class since the beginning of the 2016-2017 school year and had provided RTI instruction to Student since the middle of that school year. She developed Student's IEP goals in collaboration with Student's classroom teacher. Her opinions on Student's initial IEP needs are entitled to more weight than those of Educational Advocate 1. According due deference to the expertise of DCPS' special education personnel, I find that DCPS has established that the annual academic goals in Student's initial IEP were appropriate. *See, e.g., T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

Educational Advocate 1 also opined that the initial IEP should have included adaptive functioning goals, based on Mother's and the classroom teacher's responses to the Adaptive Behavior Assessment System (ABAS-II) administered by School Psychologist in spring 2017. The rating scale responses of Mother and the teacher indicated that Student's adaptive behavior was Below Average. School Psychologist interpreted their responses with caution because of an excessive number of "guessed" answers. Considering staff interviews, her behavioral observation of Student and her review of developmental history, School Psychologist concluded that the teacher's "Below Average" score for this domain did not appear to represent an accurate presentation of Student's conceptual adaptive behavior as viewed by the teacher. Informed by School Psychologist's report, the IEP team did not provide annual goals for adaptive functioning in Student's initial IEP. Again, according due deference to the expertise of DCPS' special education personnel, I conclude that DCPS has met its burden of persuasion that adaptive functioning goals were not required in the May 16, 2017 IEP.

Educational Advocate 1 opined that the May 16, 2017 IEP should have included Extended School Year (ESY) services for Student because Student had experienced some regression in reading over the preceding summer break. "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (quoting *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38 (4th Cir.2002)).

In her hearing testimony, Case Manager explained that the initial IEP team

decided that Student did not qualify for ESY because Student had made progress in the 2016-2017 school year and had not lost any progress during the school breaks. It was suggested to Mother that she enroll Student in regular DCPS summer school. At the time, neither Mother nor any other IEP team member expressed disagreement with this decision. In fact, over the summer of 2017, Student did not experience significant regression. Student's Dibels TRC score only dropped one level, from H to G, from which Student more than recovered by mid year, reaching Level K, which was close to grade level. I find that DCPS has met its burden of persuasion that the IEP team's decision not to provide ESY services to Student did not make the May 16, 2017 IEP inappropriate. *See Johnson, supra* (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’” *Id.* (quoting *M.M.*, citing *Polk v. Centr. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988))).

Finally, with respect to the May 16, 2017 IEP, Educational Advocate 1 opined that based upon Student's RTI experience, the provision of only 5 hours per week of Specialized Instruction Services was not sufficient and that Student should have been provided at least 10 hours per week of special education services. Case Manager explained in her testimony that based on Mother's and the classroom teacher's concerns for Student, she decided that it would be best for Student to receive more targeted interventions in a small group setting and she recommended to the IEP team that Student receive 5 hours of Specialized Instruction, outside general education. As noted above in this section, Case Manager had been providing RTI services to Student since the middle of the 2016-2017 school year and had collaborated closely with Student's

regular education teacher. This witness was better informed as to Student's initial special education needs than Educational Advocate 1, who only became involved with Student in the fall of 2017. Further, according to Case Manager's un rebutted testimony, in the 2017-2018 school year, Student made huge gains under the initial IEP. *See, J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 322 (D.D.C. 2010) (Academic progress is strong, though not dispositive, evidence that an IEP provides educational benefit.) I find that the provision of 5 hours per week of Specialized Instruction Services in Student's initial May 16, 2017 IEP was reasonably calculated to enable Student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum. *See* 34 CFR § 300.320(a)(4). In sum, I conclude that DCPS has met its burden of persuasion that the City School May 16, 2017 IEP was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances. *See Andrew F., supra*, 137 S. Ct. at 999.

d. Did DCPS fail to fully implement Student's IEP by failing to introduce writing goals during the 2016-2017 school year; in the 2017-2018 school year to date, by providing push-in rather than pull-out services as required by Student's IEP and by ceasing Specialized Instruction services altogether just prior to Thanksgiving break due to the absence of the special education teacher.

Lastly, Petitioner alleges that City School failed to implement Student's May 16, 2017 IEP by not introducing services toward Students' writing goals at the end of the 2016-2017 school year; by providing Student's Specialized Instruction services through push-in, rather than pull-out services and by not providing Specialized Instruction Services since late November 2017. DCPS responds that it has fully implemented Student's initial IEP. The Petitioner has the burden of persuasion on this issue.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S. District Court analyzed when a failure to fully implement an IEP results in a denial of

FAPE:

To establish a deprivation of educational benefits, a moving party “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.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) To meet this standard, a moving party need not prove that the student suffered “educational harm” because “the Court has no way of knowing how much more progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). Generally, in analyzing whether a student was deprived of an educational benefit, “courts . . . 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.” *Wilson*, 770 F.Supp.2d at 275.

Beckwith, supra, 208 F. Supp. 3d at 49.

With regard to Student’s IEP written expression goal, DCPS agrees that implementation of this goal was deferred until the start of the 2017-2018 school year. Case Manager explained that after the May 16, 2017 IEP team meeting, there was only one month of school left and Student was not ready then to begin working on the written expression goal, because Student was still finishing up the Wilson Foundations reading program. Case Manager implemented the IEP service hours, focusing on reading and math for the rest of the school year. So long as City School provided the hours of Specialized Instruction required by Student’s IEP, it would be inappropriate for the hearing officer to second guess the special education teacher’s pedagogical decision on when to introduce the written expression goal to Student. *See, e.g., Springer v. Fairfax Cty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (“[T]he task of education belongs to the educators who have been charged by society with that critical task.”)

Petitioner alleges that City School curtailed Student’s Specialized Instruction Services prior to the November 2017 Thanksgiving break. However, Case Manager testified, credibly, that she fully implemented Student’s IEP special education services

until she went on maternity leave around January 25, 2018. Special Education Director testified that Student's regular education teacher, who is also a special education teacher, continued to provide Student's special education services after Case Manager went on leave. Approximately one month later, the school brought in a substitute teacher, who now provides special education services on the same schedule that Case Manager implemented. Petitioner offered no evidence to refute this testimony. I find that Petitioner has not met her burden of persuasion that City School stopped implementing Student's IEP before the Thanksgiving break or after Case Manager went on maternity leave.

Petitioner also objects that in the current school year, City School has provided Specialized Instruction Services to Student at a separate table in the back of the general education classroom, rather than in a separate classroom. Student's May 16, 2017 IEP provided that Student would be "removed from the general education classroom" to receive Specialized Instruction Services for 5 hours per week. Special Education Director testified that the school was providing special education to children with IEPs in Student's classroom at a separate table away from other students – instead of pulling special education students out of the classroom – to avoid loss of time moving the children from classroom to classroom. Case Manager testified that Student has responded very well to this set up.

By not removing Student from the general education classroom for Specialized Instruction, City School has been not been fully implementing Student's IEP in the 2017-2018 school year. However, because City School has been providing Student all of the services required by the IEP, and because the evidence was undisputed that providing Specialized Instruction to Student at a separate table, away from the nondisabled peers,

works well for Student, I find that City School's failure to physically remove Student from the general education classroom, does not amount to a failure to implement substantial or significant provisions of Student's IEP. *See Beckwith, supra.* This was not a denial of FAPE. Notwithstanding, I will order DCPS to ensure either that Student's IEP is revised to provide for not removing Student from the general education classroom or that City School complies with that IEP requirement.

In summary, in this decision, I find that Petitioner did not meet her burden of persuasion that DCPS failed to comprehensively evaluate Student or that DCPS failed to implement substantial or significant provisions of the Student's IEP. I find that DCPS met its burden of persuasion that its April 16, 2017 IEP was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.

ORDER

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

ORDERED:

1. Within 10 school days of the date of this order, DCPS shall ensure that Student's Specialized Instruction Services are provided outside the general education classroom as required by Student's IEP, unless Student's IEP is revised, in accordance with IDEA regulations, to eliminate the removal from the general education classroom requirement;
2. All other relief requested by the Petitioner herein is denied.

Date: May 20, 2018

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

NOTICE OF RIGHT TO APPEAL

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

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