

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

OSSE
Office of Dispute Resolution
May 19, 2020

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 19, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0065

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

May 6 and May 8, 2020

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (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.”).

Petitioner filed a prior due process complaint on behalf of Student on December 12, 2019 (Cases No. 2018-0327), alleging, *inter alia*, that DCPS had failed to ensure that Student was provided appropriate Individualized Education Programs (IEPs) beginning in March 2017. Following a due process hearing on February 12, 2019, Impartial Hearing Officer Michael Lazan issued a Hearing Officer Determination (the February 25, 2019 HOD), in which Hearing Officer Lazan ordered, *inter alia*, that Student’s DCPS

¹ Personal identification information is provided in Appendix A.

IEP be amended to require that Student receive specialized instruction from a certified special education teacher, outside general education, during all class time involving academic subjects; that Student be educated in a small classroom setting during every academic period of the school day; that Student be required to receive 240 minutes per month of direct behavioral support services outside general education and that Student be assigned a 1-to-1 dedicated aide during the entire school day.

Petitioner's Due Process Complaint in the present case, filed on March 5, 2020, named DCPS as Respondent. Petitioner seeks relief for DCPS' allegedly not timely reevaluating Student in spring 2019 and for the District's alleged failure to develop an appropriate IEP for Student in February 2020. The undersigned hearing officer was appointed on March 6, 2020. On March 24, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. On March 13, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

Due to the closing of hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing in this case was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on May 6 and May 8, 2020. Mother appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified at the hearing and called CLINICAL PSYCHOLOGIST, OCCUPATIONAL THERAPIST, EDUCATIONAL ADVOCATE, HEAD OF SCHOOL and TUTOR as additional witnesses. DCPS called as witnesses SPEECH LANGUAGE PATHOLOGIST and SPECIAL EDUCATION TEACHER. Petitioner's Exhibits P-1 through P-45 and DCPS' Exhibits R-15 through R-18, R-20 through R-22, R-24 through R-28, R-33, R-41, R-44 and R-47 were all admitted into evidence without objection. DCPS did not offer into evidence the remaining exhibits which it disclosed prior to the hearing. At the conclusion of the taking of the evidence, counsel for the respective parties made oral closing arguments.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the March 13, 2020 Prehearing Order, are:

Whether DCPS denied Student a FAPE by the failure to timely evaluate Student with triennial reevaluations by April 6, 2019, as well as failing to timely grant the parent's request to re-evaluate Student in December 2019;

Whether DCPS denied Student a FAPE for the failure to create an appropriate IEP for Student since the February 4, 2020 meeting, because the IEP was not reasonably calculated to enable the Student to make progress in light of the facts that 1) Student was not provided with triennial re-evaluations by April of 2019 and 2) Student has made limited academic and behavior progress since being placed in a full time Behavior and Education Support (BES) program and being provided with a dedicated aide.

For relief Petitioner requests that the hearing officer order the following:

DCPS will develop an appropriate IEP to include specialized instruction to be provided in a separate special education day school or be ordered to convene an IEP team meeting to do so;

DCPS will conduct or fund, at market rates, a Comprehensive Psychological Evaluation, a Speech and Language Evaluation and/or an Occupational Therapy Evaluation;

DCPS will craft an appropriate IEP within 10 days of the decision in this matter;

DCPS will fund, at market rates, an amount of compensatory education specified by the Hearing Officer to be performed by a provider of the parent's choosing; or, in the event that the Hearing Officer finds that more information is needed to craft a compensatory education plan, the Hearing Officer will order additional information be provided at DCPS' expense.

FINDINGS OF FACT

February 25, 2019 HOD

The parties, by counsel, have agreed that I may adopt the relevant findings of fact from the February 25, 2019 HOD. I adopt the following findings from that decision:

A. Student is an AGE youth, who is eligible for services as a student with Other Health Impairment (Attention Deficit Hyperactivity Disorder ["ADHD"] or Attention Deficit Disorder). The Student has deficits in cognitive functioning and significant deficits in reading and writing, which makes it difficult for the Student to understand instructions or complete work in "general education" classes. In such classrooms, the Student lacks focus, elopes, does not take classwork seriously, and is rude to staff.

B. A psychological evaluation was written for the Student on April 16, 2016.

The evaluation, administered by Respondent's staff, indicated that the Student's cognitive ability was at the 12th percentile on the Reynolds Intellectual Assessment Scale, though the evaluator indicated that the Student's cognitive test scores were not necessarily reliable. On the Wechsler Individual Achievement Test-3, the Student's scores reflected "extremely low" functioning in reading and spelling, and "borderline" functioning in mathematics. On the Attention Deficit Hyperactivity Disorder Test-Second Edition, reflecting teacher input, the Student was identified as very likely to have ADHD. A behavior modification plan was recommended to address the Student's inattentiveness, which plan was supposed to include the use of a token economy system and modified classwork.

C. A draft Behavior Intervention Plan (BIP) was written for the Student on November 14, 2018, and revised in January, 2019. The BIP indicated that the Student was defiant and disrespectful multiple times every day and recommended, among other things, 1-to-1 check-ins, modeling, reminders, a journal, praise, calls home, and a daily behavior chart. The BIP recommended that teachers and staff escort the Student during transitions. The BIP also indicated that the Student would have to follow the "KMMS" behavior ladder for consequences if s/he eloped and use a rewards system with "pride points" to keep the Student in class.

D. For the first term of the 2018-2019 school year, the Student received "F" grades in all academic subjects. For the second term of the 2018-2019 school year, the student received "F" grades in three of five subjects, with a "D-plus" in math concepts

and science. The report card indicated that the Student had been absent for seventeen days, and that the Student's reading was at the second-grade level.

E. An IEP meeting was held for the Student on December 6, 2018. At this meeting, Petitioner requested a Functional Behavior Assessment (FBA) and a new BIP, as well as direct behavioral support services and a "full-time" special education IEP with a dedicated aide. Respondent resisted providing the behavioral support services, the "full-time" IEP, and the aide. Respondent was of the view that Student's behaviors were new, and that they could be addressed through accommodations in the classroom. A teacher told the IEP team that the Student told her than s/he does not understand the work at the school. The Student's amended IEP dated December 6, 2018, provided for ten hours of specialized instruction per week outside general education, with 240 minutes per month of consultative behavioral support services. The IEP stated that the Student had issues with leaving the classroom setting, poor social skills, and work avoidance. The IEP said that DCPS had implemented strategies to address these issues through incentives.

F. Reading Inventory testing on December 11, 2018, indicated that the Student was reading at the 1st percentile—i.e., with less proficiency than 99 out of every 100 children taking the test. The Student was considered to be "below basic" level in reading. Math testing indicated that the Student had regressed in math, to the second grade level.

Additional Findings of Fact

After considering all of the evidence received at the May 6 and May 8, 2020 due process hearing in the present case, as well as the argument of counsel, my additional findings of fact are as follows:

1. Student, an AGE child, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education services under the IDEA disability classification Other Health Impairment/Attention Deficit or Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit P-29. Student's February 4, 2020 IEP states that Student's last eligibility meeting was February 7, 2019. Exhibit R-37.

3. On or about February 11, 2019, DCPS completed a "Final Eligibility Determination Report" on Student. This report derives from a functional behavior assessment, two classroom observations of Student conducted in January 2019, a Strengths and Difficult Questionnaire and Middle-of-Year math and Lexile reading assessments. Student's overall score on the math assessment was 425 (second grade). Student's score on the Lexile assessment was 204 (Below Basic). In the report, it is concluded that Student has an OHI-ADHD disability. Exhibit P-10.

4. On March 14, 2019, as ordered in the February 25, 2019 HOD, Student's IEP was amended to provide for 25 hours per week of Specialized Instruction, outside of general education, 240 minutes per month of Behavioral Support Services and a 1 to 1 dedicated aide during the entire school day. Exhibit P-24.

5. On or about April 1, 2020, DCPS changed Student's location of services to SCHOOL C. Stipulation of Counsel, Exhibit P-27.

6. Student's final grades for the 2018-2019 school year at School C were all F's except for a D in Math. Exhibit P-32.

7. Tutor provided 80 hours of academic tutoring to Student from March 2019 to January 2020. In tutoring, Student made marked academic progress in decoding and comprehension. Mother reported to Tutor that she saw behavior improvement at home, notably that Student was able to do homework with less breaks and able to follow steps drawn out for Student. Testimony of Tutor.

8. At School C, Student was placed in a Behavior and Education Support (BES) self-contained classroom. In the BES classroom there were a total of 9 students over the course of the year, taught by 4 adults, including the special education teacher, an instructional aide, a behavior technician and the 1:1 aide for Student. Testimony of Special Education Teacher.

9. Although Student has strong cognitive skills, Student has extremely low self confidence, becomes scared when asked to do class work, has challenging emotional responses, lacks age-appropriate social skills, has temper tantrums, and gets angry and frustrated because Student believes Student cannot do things. Testimony of Special Education Teacher.

10. On the i-Ready diagnostic math test taken on September 12, 2019, Student received an overall score of 406 (Grade 1 level). Exhibit P-11. On the Lexile Reading

Inventory test on September 13, 2019, Student scored at the lowest, Beginning Reader, level. Exhibit P-12.

11. In the February 4, 2020 School C IEP, it was reported that Student lacks both focus and stamina in the academic setting and, because Student has avoided work for two or more years, Student lacks the daily discipline necessary for success in the classroom; that even in the current highly structured school environment, with small class size and additional adults to provide academic and behavior support and a one-on-one aide, Student leaves the classroom from 5 to 10 times a day, and spends up to 80% of the day outside the room; that when in the class, Student refuses to work, complains, and quickly gives up; that Student's lack of focus is severely limiting Student's ability to advance in mathematics and that Student had not advanced in math in the past year; that the last reading assessment that Student completed was in the fall of 2018, and Student tested then at a 2.2 grade level in reading skills [The IEP omits Student's September 13, 2019 Beginning Reader Lexile Reading Inventory score.]; that Student's fluency is low; that Student cannot read grade level texts or below grade level texts with smooth dictation; that Student's vocabulary is limited, as are decoding skills, which is compounding Student's deficits; that Student refuses to read along with the class as text is read aloud, which limits reading growth; that Student refuses to complete work designed to increase comprehension and is frequently out of class; that Student does not process verbal tasks commensurate with the current grade and is limited in the ability to retain and recall information about a specific text or passage; that when encouraged to

think independently, Student begins cursing and yelling; that Student requires frequent redirection and/or prompting to produce a correct answer and that when frustrated, or when Student hears peers in the hallway, or in response to an “unspoken internal prompt,” Student leaves the classroom and refuses to return. Exhibit P-29.

12. Student’s grades at School C for the first two terms of the 2019-2020 school year were all F’s. Exhibit P-32.

13. Educational Advocate visited School C for classroom observations on October 21, 2020 and November 6, 2020. Student’s social worker told her that Student reports to school late almost every day; Student consistently elopes from the classroom; and does not complete classwork. Student’s dedicated aide told Educational Advocate that Student does not remain focused in the classroom and refused to complete classwork, even with support; that Student constantly elopes from the classroom to avoid classwork; that Student interacts well with peers and that Student gets frustrated easily. Educational Advocate observed that when Student eloped from the classroom, the dedicated aide trailed Student into the hallways. Special Education Teacher and Social Worker told Educational Advocate that the behaviors observed were “typical” for Student. Special Education Teacher reported that Student had not completed many assignments and that the longest Student had been in the classroom was for a collective hour in a day. Exhibits P-13, P-14, Testimony of Educational Advocate.

14. At an MDT meeting at School C on December 19, 2019, Petitioner’s Counsel requested that Student receive comprehensive psychological, OT and Speech-

Language assessments. She advised the team that when Student's eligibility had been confirmed in February 2019 at City School B, there was no formal testing done. The school representative did not agree to conduct the requested evaluations. Exhibit P-28.

15. Student's IEP team at School C met on February 4, 2020 for Student's annual IEP review. Educational Advocate reported that the parent and counsel did not believe that School C could meet Student's needs and they were asking for a change in Student's location of services. The LEA Representative responded that the school team could not agree to a more restrictive educational setting and needed to collect data to support that. The dedicated aide reported Student's recent elopements from the classroom; that Student could focus for about 10 minutes in class; that Student worked for approximately three minutes on classroom assignments; that Student likes art and is able to remain in the classroom for the full art period, that is about 25 minutes; that Student is often tardy to class and overall, Student's behaviors and performance are sporadic. Exhibits P-30, R-28.

16. At the February 4, 2020 IEP team meeting, the LEA Representative had already closed the IEP draft and was not able to make any changes. DCPS had not sent a copy of the draft IEP to the parent before the meeting. Testimony of Educational Advocate. The LEA Representative stated that there will be an amendment to the IEP to add baseline data. Exhibit R-28. The amendment was not made. Testimony of Educational Advocate. It appears that a draft amended IEP was developed. See Exhibit R-39.

17. The February 4, 2020 IEP identifies Mathematic, Reading and Emotional, Social and Behavioral Development as areas of concern for Student. The IEP provides for Student to receive 22.5 hours per week of Specialized Instruction outside general education and 1 hour per week of Behavioral Support Services. Exhibit R-37.

18. During the 2019-2020 school year, Student did not progress in Student's reading level. By the second term, Student had made no progress on IEP academic goals or on one of two social-emotional goals. Testimony of Special Education Teacher.

19. Nonpublic School is a private school in the District of Columbia serving children with special needs in grades 7 through 12. The maximum enrollment is 50 to 60 students and there are currently 45 students enrolled. Nonpublic School accepts Students with disabilities including learning disabilities OHI-ADHD, Intellectual Disabilities, Emotional Disturbance and other disabilities. Nonpublic School also has a small number of Students who do not have disabilities. Maximum class size is 8 students with 2 or 3 staff members. Nonpublic School follows the DCPS common core standards and meets requirements for DCPS diplomas. Nonpublic School has an in-house clinical director/therapist who provides behavioral support services. Annual tuition at Nonpublic School is around \$25,000. Nonpublic School currently has a probationary Certificate of Approval (COA) from the D.C. Office of the State Superintendent of Education (OSSE) because OSSE had some compliance concerns. Testimony of Head of School.

20. Student has been conditionally accepted at Nonpublic School based on

Student's paperwork only. Due to the Coronavirus disruption, Nonpublic School has not been able to interview Student or have Student and Mother tour the school. Testimony of Head of School.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

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

Analysis

1. Did DCPS deny Student a FAPE by the failing to timely evaluate Student with triennial reevaluations by April 6, 2019, as well as failing to timely grant the parent's request to re-evaluate Student in December 2019?

DCPS initially evaluated Student for special education eligibility in spring 2016. The initial evaluation included a comprehensive psychological evaluation completed in April 2016. Student was determined eligible for special education in May 2016. In February 2019, at School B, Student's special education eligibility under the OHI-ADHD disability classification was confirmed. The School B determination was based on a Strengths and Difficulties Questionnaire, an FBA, computer-based math and reading assessments and classroom observations. Petitioner contends that this reevaluation was not comprehensive. Beginning December 2019, the parent's representatives requested DCPS to reevaluate Student with a comprehensive psychological evaluation, OT and Speech-Language assessments. DCPS denied this request. Petitioner claims DCPS denied Student a FAPE by not completing a comprehensive reevaluation by April 2019.

The IDEA requires that a special education reevaluation must occur at least once every three years, and not more frequently than once a year, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In addition to conducting triennial reevaluations, the District must also reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. *See* 34 CFR § 300.303(a). If a parent requests a reevaluation and the public agency disagrees that a reevaluation is needed, the public agency must provide prior written notice (PWN) to the parent, consistent with 34 CFR § 300.503, that explains, among other things, why the agency refuses to conduct the reevaluation and the parent's right to contest the

agency's decision through mediation or a due process hearing. *See* U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46640 (August 14, 2006).

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See Assistance to States, supra*, 71 Fed. Reg. at 46643.

Some courts in this jurisdiction have held that a triennial reevaluation, under 34 CFR § 300.303, requires a new round of assessments.

[A] reevaluation requires a new round of tests and analysis to evaluate the child.” *James v. District of Columbia*, 194 F.Supp.3d 131, 143 (D.D.C. 2016); *see also* 20 U.S.C. § 1414(b), (c) (outlining the requirements for a reevaluation). In *James*, the court found that DCPS’ “failure to conduct a *new* comprehensive psychological evaluation of [the student] means that her IEP might not be sufficiently tailored to her special and evolving needs.” 194 F.Supp.3d at 144 (emphasis added).

Wimbish v. District of Columbia, 381 F. Supp. 3d 22, 36–37 (D.D.C. 2019).

I find that by the standard pronounced in *James* and *Wimbish*, School B’s

reevaluation of Student in February 2019 was far from comprehensive. It lacked a new comprehensive psychological evaluation or any updated cognitive and educational achievement testing. Moreover, as Special Education Teacher testified, Student has severe behavioral challenges. But, as Educational Advocate asserted, not in Student's last psychological evaluation conducted in 2016, nor since, has Student been assessed with a formal social-emotional measure, such as the Behavior Assessment System for Children (BASC) rating scales.

An LEA's failure to conduct a comprehensive and appropriate reevaluation of a student is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). *But see James, supra*, 194 F.Supp. 3d at 144 (failure to provide a comprehensive psychological evaluations not a mere procedural inadequacy.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

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

34 CFR § 300.513(a)(2). In *James, supra*, the Court emphasized that the role of an evaluation "is to contribute to the development of a sound IEP." *Id.*, 194 F. Supp. 3d at 143, quoting *Harris v. District of Columbia*, 561 F.Supp.2d 63, 67 (D.D.C.2008). In the

present case, I find that DCPS' failure to comprehensively reevaluate Student by May 25, 2019, the triennial reevaluation due date, impeded Student's right to a FAPE and significantly impeded Mother's opportunity to participate in the decision-making process. This was a denial of FAPE. I will order DCPS to conduct a comprehensive reevaluation of Student, as soon as practicable, to include a comprehensive psychological evaluation.

At the December 19, 2019 MDT meeting at School C, Mother also requested that DCPS conduct Speech-Language and OT assessments of Student. Petitioner's expert, Occupational Therapist, opined that an OT assessment of Student would be appropriate to *rule out* the possibility of sensory processing deficits contributing to Student's behavior challenges. However, Occupational Therapist has neither met Student nor spoken with any of Student's teachers or service providers. DCPS' expert, Speech-Language Pathologist testified, credibly that she had observed Student in the classroom in February 2020 and that Student did not present with language comprehension issues that would warrant a speech-language evaluation. Student's classroom teacher, Special Education Teacher, who qualified as an expert in special education programming, testified she had not witnessed that Student showed any deficits in either the OT or Speech-Language domains.

Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See Assistance to States*, 71 Fed. Reg. at 46643. The exercise of professional judgment by the child's educators as to areas to be assessed is entitled to a

reasonable degree of deference. *See, e.g., County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005). According reasonable deference to Student's educators at School C, I find that Petitioner has not established that Student needs a speech-language or OT assessment as part of the reevaluation at this time. However, DCPS should perform those assessments, if the IEP team, with the parent's input, finds that those additional data are needed to determine Student's educational needs. *See* 34 CFR § 300.305(a)(2).

2. Did DCPS deny Student a FAPE by failing to create an appropriate IEP for Student since the February 4, 2020 IEP team meeting, because the February 4, 2020 IEP was not reasonably calculated to enable Student to make progress in light of the facts that 1) Student was not provided with triennial re-evaluations by April of 2019 and 2) Student has made limited academic and behavior progress since being placed in a full time Behavior and Education Support (BES) program and being provided with a dedicated aide?

Following the issuance of the February 25, 2019 HOD, Student's DCPS IEP was amended to provide for 25 hours per week of Specialized Instruction, outside of general education, 240 minutes per month of Behavioral Support Services and a 1 to 1 dedicated aide during the entire school day. Around April 1, 2019, Student transferred to School C where the amended IEP could be implemented. At School C, Student is in a self-contained Behavior and Education Support (BES) classroom with a small number of Students and a very low Student to Teacher ratio.

Despite the substantial changes to Student's IEP and educational placement made in March 2019, Student is not making academic progress and has shown little, if

any behavioral progress. For much of the school day, Student absconds from the classroom and is not even available for learning. Unsurprisingly, as of the due process hearing date, Student was failing all classes and showing no progress on IEP academic goals. Notwithstanding, at the February 4, 2020 IEP meeting, the IEP team refused the parent's request to move Student to the next more restrictive setting, that is, a special school for children with behavior challenges. Petitioner contends that the IEP team's decision to maintain Student's current educational placement was not appropriate. I agree.

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. Here, the Petitioner's due process claims do not include a failure by DCPS to comply with the IDEA's procedural requirements in developing the February 4, 2020 IEP. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, was the February 4, 2020 IEP appropriate for Student?

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

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *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 "*specially* designed" to meet a child's "*unique* needs" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

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

An IEP must respond to all significant facets of the student's disability, both academic and behavioral. An IEP that fails to address disability-related actions of disruption in the classroom is not reasonably calculated to enable the student to make meaningful progress. *See Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 613 (7th Cir. 2004).

Sadly, it is undisputed that Student has made no academic progress since April 2019 when Student was placed in the BES classroom, with a dedicated aide, at School C.

Yet the February 4, 2020 IEP would not change Student's educational placement and would actually reduce Student's Specialized Instruction Services from 25 hours to 22.5 hours per week. Special Education Teacher explained the IEP team's rationale, namely that, behavior change is long-term work and with Student's social-emotional gaps, in the current educational setting, it would take 3 to 5 years for success to be seen in terms of what Student is capable of.

I found Special Education Teacher to be both candid and credible and her dedication to serving children, like Student, who have severe social-emotional challenges is very evident. But, at least without a comprehensive educational reevaluation, the hearing record does not establish that Student is not capable of making any meaningful academic progress for 3 to 5 years. *Cf. Shaw v. District of Columbia*, No. CV1700738 2019 WL 498731, at 19 (D.D.C. Feb. 8, 2019), report and recommendation adopted, No. 17-CV-0738, 2019 WL 935418 (D.D.C. Feb. 26, 2019) (record does not establish that student was incapable of progressing beyond the academic and functional skills she had attained as of her graduation, and did not support District's assumption that it would have been unrealistic to set any further academic goals.) The IDEA's continuum of placements requirement makes clear that if the nature or severity of a student's disability is such that education in special classes, even with the provision of a full-time dedicated aide, cannot be achieved satisfactorily, the District must consider the removal of the student to separate schooling. *See* 34 CFR § 300.114(a)(2)(ii) (Separate schooling, or other removal of children with disabilities

from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.)

Petitioner's expert, Clinical Psychologist, opined that small school options needed to be explored for Student because, despite the increased services for Student at School C, Student is regressing further below grade level. He opined that Student would deteriorate if not placed in a smaller school setting. Clinical Psychologist has neither met or treated Student and his opinion is entitled to limited weight. However, where as here, even DCPS' special education expert does not foresee near or medium-term progress for Student in the current educational setting, DCPS has not offered "a cogent and responsive explanation" for the IEP team's decision not to remove Student to a more restrictive setting than the BES classroom at School C. *See Andrew F., supra*, 137 S.Ct. at 1002. I conclude that DCPS has not met its burden of persuasion that the February 4, 2020 IEP team's decision to continue Student's educational placement at School C was reasonably calculated to enable Student to make appropriate progress. I will order DCPS to place Student in the more restrictive environment of a suitable separate school, which has therapeutic programming for children with severe behavioral challenges.

Relief

In this decision, I have determined that DCPS denied Student a FAPE by not conducting a comprehensive special education reevaluation by May 25, 2019 and by not

offering Student an appropriate revised IEP in February 2020, with a special school educational placement. For relief in this case, Petitioner requests, among other things, that DCPS be ordered to fund Student's prospective placement at Nonpublic School.

In *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7 (D.C. Cir. 2005), the D.C. Circuit Court of Appeals set forth considerations "relevant" to determining whether a private school is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

Student's IDEA disability is Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). As noted above, Student has not had a comprehensive psychological evaluation since spring 2016 and the prior psychological did not include behavior rating scales, such as the BASC to assess Student's social-emotional profile. Special Education Teacher describes Student as having very serious social-emotional challenges. At School C, Student absconds from the classroom for much of the day, trailed by the dedicated aide, and is not making academic progress.

b. Student's Specialized Educational Needs

According to the opinions of Clinical Psychologist, Student needs the support of a full-time special education setting, in a small school program with small classes and less

distractions. Educational Advocate recommended that Student be placed in a small, highly structured, therapeutic setting.

c. Link between Student's Needs and the Services Offered by Nonpublic School

Nonpublic School is a small private day school in the District of Columbia. Nonpublic School appears to serve children with a range of disabilities from Specific Learning Disabilities to Intellectual Disabilities. Due to the Coronavirus disruptions, Nonpublic School did not interview Student and Head of School appeared to know little about Student's current educational placement at School C or how Student has responded to that setting. Nor was it established that Nonpublic School offers a highly structured, therapeutic setting. Nonpublic School does not have current, non-probationary, COA from OSSE.

d. Cost of Placement at Nonpublic School

The annual tuition at Nonpublic School is approximately \$25,000 per year. DCPS has not shown that Nonpublic School's annual tuition cost is out of line with OSSE-approved day schools for students with similar disabilities.

e. Least Restrictive Environment

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. §

1412(a)(5), 34 CFR § 300.115. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). Nonpublic School is a “special school”, which I have determined to be Student’s least restrictive environment, at the present time.

Considering the factors from the *Branham* decision, notably the lack of evidence that Nonpublic School is a highly structured, therapeutic school, focused on serving children, like Student, with serious social-emotional and behavioral challenges, I conclude that Petitioner has not established that Student’s prospective placement at Nonpublic School would be appropriate. I will therefore order DCPS to identify another suitable special education day school for Student, which offers a highly-structured therapeutic setting to serve children with severe social-emotional and behavioral challenges.

Compensatory Education

Petitioner also requests an award of compensatory education for the denials of FAPE established in this case. “Once a hearing officer finds that a school district has denied the student a FAPE, she is required to craft an award that will place a student ‘in the position she would be in absent the FAPE denial.’ *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016).” *Shaw v. District of Columbia*, No. CV1700738, 2019 WL 498731 (D.D.C. Feb. 8, 2019), *report and recommendation adopted*, No.

17-CV-0738, 2019 WL 935418 (D.D.C. Feb. 26, 2019). An award of compensatory education aims to put a student in the position he or she would be in absent the FAPE denial. *See Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019). *See, also, Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (“[U]ltimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.”)

In her compensatory education proposal, Petitioner’s expert, Educational Advocate, recommends that Student be awarded 200 hours of tutoring, 72 hours of counseling/mentoring and 32 hours of art therapy as compensatory education. The purported justification for this recommendation is that if Student had been comprehensively reevaluated in April 2019, Student’s IEP would have been revised and Student would have made one year’s worth of academic and behavioral progress. However, I find that DCPS cannot be faulted for implementing Hearing Officer Lazan’s requirement in the February 25, 2019 HOD to place Student in a full-time small classroom setting with a dedicated aide for the entire school day.

Student’s location of services was changed to the BES classroom at School C approximately April 1, 2019. It is not credible that if Student had been reevaluated in April 2019, Student’s IEP would have been further revised and Student would have made a year’s gain in academic and behavioral progress. Also, at the hearing, Educational Advocate testified that it would have been reasonable to wait two school

terms to assess Student's progress before making further substantial changes to Student's IEP. She testified that she would not disagree that the period of harm in this case started in December 2019, presumably around the time of the December 19, 2019 MDT meeting, when the parent's representatives requested a more restrictive setting for Student.

Assuming that DCPS had agreed to amend Student's IEP at the December 2019 meeting and Student had been placed in a suitable special school setting in January 2020, following the DCPS winter break, the period of harm in this case runs from early January 2020 through the present, a period of some four months. (I do not take into account that schools in the District have been closed since March 16, 2020 due to the Coronavirus because whether or how the special school would have served Student during this period is too speculative.) In the February 25, 2019 HOD, Hearing Officer Lazan granted Petitioner's request for 80 hours of academic tutoring as compensation for a denial of FAPE extending over two school years. Tutor testified that Student benefitted from those tutoring services. The period of harm in this case is less than one-half of a school year. Accordingly, I will award Student an additional 20 hours of academic tutoring as compensatory education. I decline to award Student compensatory counseling or art therapy services because there was no evidence that at School C, DCPS did not substantially implement the 240 hours per month of behavioral support services ordered in the February 19, 2019 HOD.

ORDER

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

1. Within 10 business days of the date of this order DCPS is ordered to seek

admission for Student in a suitable special school, that offers small class size with reduced distractions and a highly structured, therapeutic, program for students with OHI-ADHD and severe social-emotional-behavioral needs. As soon as such school is located and Student's admission is secured, subject to the school's schedule after the Coronavirus closings, DCPS shall fund Student's enrollment at the school, with special education transportation if needed. DCPS shall collaborate with the special school administrators to determine whether Student would still need a dedicated aide in that setting. If deemed needed by the special school, DCPS shall continue to provide a dedicated aide for Student;

2. Within 20 school days of the date of this order, or within a reasonable period of time after schools are reopened, subject to obtaining parental consent, DCPS, shall conduct a comprehensive special education reevaluation of Student, to include, *inter alia*, a comprehensive psychological evaluation with instruments to assess Student's emotional and behavioral functioning, and such other assessments as may be needed to determine Student's IDEA disability, educational needs, present levels of academic achievement and related developmental needs. *See* 34 CFR § 300.305(a). Upon completion, DCPS shall promptly convene Student's IEP team to review and revise, as appropriate, Student's IEP and educational placement. DCPS shall ensure that Student's updated educational placement provides for a full-time small, structured, therapeutic setting in a public or nonpublic special school, appropriate to Student's emotional-behavioral challenges;
3. As Compensatory Education, DCPS shall promptly provide funding authorization for the parent to obtain for Student 20 hours of individual academic tutoring and
4. All other relief requested by the Petitioner herein is denied.

Date: May 19, 2020

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
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