

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
1050 First Street, N.E., Third Floor  
Washington, D.C. 20002

OSSE  
Office of Dispute Resolution  
May 22, 2020

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<i>Student,</i> <sup>1</sup>	)	Case No.: 2020-0024
through <i>Parent,</i>	)	
<i>Petitioner,</i>	)	Date Issued: 5/22/20
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Date: 5/13/20
("DCPS"),	)	Video Platform: Microsoft Teams
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to lack of comprehensive reevaluation and lack of appropriate Individualized Education Programs ("IEPs") to address academic and behavioral needs. DCPS responded that the reevaluation decisions and IEPs were reasonable, so there was no denial of FAPE, but that in any case it had already authorized more independent educational evaluations ("IEEs") and more compensatory education than Petitioner had sought in this case.

**Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

**Procedural History**

Following the filing of the due process complaint on 1/31/20, the case was assigned to the undersigned on 2/3/20. On 2/10/20, Respondent filed a timely response and did not

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

## Hearing Officer Determination

Case No. 2020-0024

challenge jurisdiction. The resolution meeting occurred on 2/27/20, but did not resolve the case or shorten the 30-day resolution period, which ended on 3/1/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 40-day continuance, which requires a Hearing Officer Determination (“HOD”) by 5/25/20.

The prehearing conference was held on 3/3/20 and the Prehearing Order issued the same day. On 5/6/20 the Prehearing Order was amended *sua sponte* by the undersigned to address the anticipated use of a videoconference platform to conduct the due process hearing, after providing an opportunity for counsel to give input on the modifications. The due process hearing took place on 5/13/20 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for the hearing.

Petitioner’s Disclosures, submitted on 3/11/20, contained documents P1 through P48, which were admitted into evidence without objection (as an attempt to make objections did not meet the requirements of the Prehearing Order). Respondent submitted Disclosures dated 3/11/20 and Amended Disclosures on 5/6/20, offering into evidence R1, R2, R3, R4, R5, R6, R9, R11, R14, R15, R18, R21, R22 and R24, which were all admitted into evidence without objection.

Petitioner’s counsel presented 2 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified over objection as an expert in School Psychology and Evaluating Students with Special Needs for Purposes of Determining Programming)
2. Parent

Respondent’s counsel presented 1 witness in Respondent’s case (*see* Appendix A): *Special Education Teacher at Public School* (qualified without objection as an expert in Special Education and IEP Programming)

Petitioner’s counsel did not present any rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

**Issue 1:** Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation in February 2018 when it did not conduct (a) an occupational therapy assessment, (b) a speech-language reassessment, (c) a functional behavioral assessment (“FBA”), and/or (d) an assistive technology assessment. *Petitioner has the burden of persuasion on this issue.*

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 2/1/18 due to (a) lack of assistive technology, (b) lack of written expression as an area of concern, (c) an inadequate adaptive goal, (d) failure to include baselines for behavior goals, and/or (e) insufficient hours of specialized instruction outside

## Hearing Officer Determination

Case No. 2020-0024

general education.<sup>2</sup> *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

**Issue 3:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 10/17/18 due to lack of (a) assistive technology, (b) updated goals and baselines, (c) written expression as an area of concern, (d) an adequate adaptive goal, and/or (e) sufficient related service hours, as speech was reduced from 120 to 90 minutes/month and behavioral support services (“BSS”) were reduced from 150 to 60 minutes/month. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

**Issue 4:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 9/26/19 due to lack of (a) assistive technology, (b) updated goals and baselines, (c) written expression as an area of concern, (d) an adequate and updated adaptive goal, and/or (e) sufficient related service hours in speech and BSS. *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. Within 10 days, DCPS shall amend Student’s IEP to provide (a) appropriate goals and baselines, and (b) an increase in related service hours.
3. DCPS shall conduct or fund (a) an occupational therapy assessment that includes sensory and executive functioning testing, and testing of motor skills, handwriting, and visual perception, (b) a speech-language assessment, (c) an assistive technology assessment, and (d) a functional behavioral assessment, all to be completed within 45 days (and which DCPS has already agreed to conduct).
4. DCPS shall convene Student’s IEP team to review the results of the assessments required by the prior paragraph and revise Student’s IEP as appropriate.
5. For any denials of FAPE, DCPS shall fund a compensatory education evaluation and provide appropriate compensatory education, with reservation of Petitioner’s right to additional compensatory education once the assessments required in paragraph 3 are completed.<sup>3</sup>

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<sup>2</sup> At the due process hearing, Petitioner withdrew without prejudice (over Respondent’s objection) subpart (a) as set forth in the Amended Prehearing Order, which was the “failure to identify Student as a child with an Intellectual Disability (‘ID’).”

<sup>3</sup> So far as Petitioner’s request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student’s assessments and a determination of eligibility for additional special education services.

With regard to any request for compensatory education to be awarded in the HOD, Petitioner’s counsel was put on notice at the prehearing conference that at the hearing

## Hearing Officer Determination

Case No. 2020-0024

6. Any other just and reasonable relief.

DCPS sought a finding of frivolousness at the beginning of the due process hearing, pursuant to D.C. Code § 38-2571.03, which was renewed at the end of the hearing based on Petitioner not resolving the case despite DCPS having provide IEEs for all of the assessments sought as well as a comprehensive psychological evaluation, and having provided more hours of compensatory education than Petitioner sought. However, the request for a frivolousness finding is hereby denied, as Petitioner claims that assessments should have been conducted in February 2018 and might have yielded services over the last 2 years for which DCPS has not provided compensatory education. The Order below expressly reserves a claim for such compensatory education on the 2 assessments the undersigned concludes should have been conducted in 2018.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>4</sup> are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>5</sup> Student is *Age*, *Gender* and in *Grade* at Public School.<sup>6</sup> Student had a hard time transitioning from Prior Public School to Public School and takes a long time to trust anyone.<sup>7</sup> Student often falls asleep in class, so is unavailable to learn.<sup>8</sup>

2. IEPs. As background, Student's 3/16/16 IEP included a disability classification of Specific Learning Disability ("SLD") and provided 5 hours/week of reading and 5 hours/week of math, along with 120 minutes/month of speech-language and 120

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Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged to be prepared at the hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

<sup>4</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>5</sup> P4-1; Parent.

<sup>6</sup> Parent; P4-1.

<sup>7</sup> R1-2; Parent.

<sup>8</sup> Special Education Teacher.

## Hearing Officer Determination

Case No. 2020-0024

minutes/month of BSS, all outside general education.<sup>9</sup> Student's 2/15/17 IEP kept the SLD classification and provided 10 hours/week of specialized instruction outside general education and 2 hours/week of specialized instruction inside general education, along with 120 minutes/month of speech-language outside general education and 120 minutes/month of BSS inside general education.<sup>10</sup>

3. Student's 2/1/18 IEP – the first IEP in issue in this case – continued the SLD classification and provided somewhat more services, with 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with 120 minutes/month of speech-language outside general education, 90 minutes/month of BSS outside general education and 60 minutes/month of BSS inside general education.<sup>11</sup> At the 2/1/18 Multi-disciplinary Team (“MDT”) meeting, DCPS noted that goals were updated and agreed on, specialized instruction hours were increased and agreed on, and BSS hours were increased and agreed on.<sup>12</sup> Extended School Year (“ESY”) was again added to Student's IEP on 2/1/18, although Parent stated that she hadn't sent Student to ESY for the past 2 years.<sup>13</sup> At the 2/1/18 MDT meeting, DCPS determined that it could still program for Student at Prior Public School and that it was an appropriate placement.<sup>14</sup> According to the IEP Progress Report on 11/21/17 (prior to the 2/1/18 IEP), Student had mastered 1 goal (in Reading) and progressed in many others.<sup>15</sup>

4. Student's 10/17/18 IEP – the second in issue – changed the disability classification to Intellectual Disability (“ID”) and provided all 15 hours/week of specialized instruction outside general education and reduced related services to 90 minutes/month of speech-language outside general education and 60 minutes/month of BSS outside general education.<sup>16</sup>

5. Student's 5/31/19 IEP (which was not challenged) continued the ID classification and provided additional services, with 20 hours/week of specialized instruction outside general education, and the same level of related services: 90 minutes/month of speech-language outside general education and 60 minutes/month of BSS outside general education.<sup>17</sup> Student's IEP team shifted Student to a Specific Learning Support (“SLS”) classroom in DCPS to provide small group instruction outside general education.<sup>18</sup> Prior

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<sup>9</sup> P9-1,9.

<sup>10</sup> P8-1,10.

<sup>11</sup> P7-1,11.

<sup>12</sup> R6-4.

<sup>13</sup> R6-4.

<sup>14</sup> R6-4,5.

<sup>15</sup> P13.

<sup>16</sup> P6-1,12.

<sup>17</sup> P5-1,12.

<sup>18</sup> R5-1,3.

## Hearing Officer Determination

Case No. 2020-0024

Public School did not have an SLS classroom, so Public School was identified for Student and a new location of services letter sent to Parent on 6/25/19.<sup>19</sup>

6. Student's 9/26/19 IEP – the third and final IEP at issue – continued the ID classification and provided identical services: 20 hours/week of specialized instruction outside general education, along with 90 minutes/month of speech-language outside general education and 60 minutes/month of BSS outside general education.<sup>20</sup>

7. Cognitive Abilities. In the 2/1/18 psychological reevaluation, Student's overall cognitive functioning was in the moderately below average range on the Reynolds Intellectual Assessment Scales, 2<sup>nd</sup> Ed. ("RIAS-2") and the extremely low range on the Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") (Full Scale IQ ("FSIQ") of 64).<sup>21</sup> Student's Verbal Intelligence Index ("VIX") score (56, significantly below average range) was significantly lower than the Nonverbal Intelligence Index ("NIX") score (103, average range), which was similar to Student's December 2014 psychological evaluation.<sup>22</sup>

8. Academic Achievement. The 2/1/18 psychological reevaluation reported the results of the Woodcock-Johnson IV Tests of Achievement ("WJ-IV ACH") in which Brief Achievement, Broad Achievement, Broad Math and Broad Written Language were all in the very low range, while Broad Reading was in the low range.<sup>23</sup> Standardized testing and report cards indicated that Student had made no academic progress in math or reading over a period of years and remained far below grade level.<sup>24</sup> Student's reading was "way off" and not where it should be.<sup>25</sup>

9. In reading, Student was nearly 4 years below grade level as of the 2/1/18 IEP.<sup>26</sup> On 10/5/16, Student's math iReady score was a 373 and then declined to 362 on 2/2/17, which were 4 years below grade level.<sup>27</sup> In September 2019, Student took the Reading Inventory and scored at lexile 348, which was 4 years below grade level.<sup>28</sup> In September 2019, Student took the iReady Math Diagnostic and scored 383, which was 6 years below grade level.<sup>29</sup> In 2019/20,<sup>30</sup> Student made no progress in reading from September to January; Student grew 1 grade level in math, but was still 4 or 5 years behind.<sup>31</sup> Educational

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<sup>19</sup> R5-1,3; R14-10.

<sup>20</sup> P4-1,12.

<sup>21</sup> P23-20.

<sup>22</sup> *Id.*

<sup>23</sup> P23-22.

<sup>24</sup> P32; P33; P34; P31; P45-1; P46-1.

<sup>25</sup> Parent.

<sup>26</sup> P7-5.

<sup>27</sup> P7-3.

<sup>28</sup> P4-5.

<sup>29</sup> P4-3.

<sup>30</sup> All dates in the format "2019/20" refer to school years.

<sup>31</sup> Special Education Teacher.

## Hearing Officer Determination

Case No. 2020-0024

Advocate's informal assessment in working with Student in March 2020 suggested that Student may be somewhat more capable than formal academic testing suggested.<sup>32</sup>

10. 2018 Reevaluation. An Analysis of Existing Data was completed by the MDT on 11/29/17.<sup>33</sup> Student's team agreed that more information was needed in all areas about Student, so ordered a psychological reevaluation.<sup>34</sup> Educational Advocate acknowledged that the assessments for the reevaluation of Student were determined by the IEP team and that the IEP team was in the best position to know what Student needed.<sup>35</sup> The team based its decision to conduct a psychological reevaluation on teacher and parent input, speech-language pathologist input, record review, classroom observation, and classroom based assessment.<sup>36</sup>

11. The psychological reevaluation report was completed on 2/1/18 and focused largely on whether Student should continue with the disability classification of SLD, or whether ID or Emotional Disturbance ("ED") would be more appropriate.<sup>37</sup> Parent stated at the 2/1/18 MDT meeting that she wanted to have an independent comprehensive psychological evaluation, but did not mention other assessments.<sup>38</sup> Parent stated at the 2/27/20 resolution session meeting ("RSM") that she had wanted a "full" reevaluation in 2018.<sup>39</sup>

12. Occupational Therapy Assessment. Student can write complete sentences and handwriting is legible; Student does not have handwriting issues or occupational therapy concerns.<sup>40</sup> Educational Advocate explained that low scores for visual spatial and processing speed showed the need for an occupational therapy evaluation.<sup>41</sup> Educational Advocate stated that sensory processing issues (hyperactivity and inattention) could be part of occupational therapy and behavior concerns.<sup>42</sup>

13. Speech-Language Assessment. Student was administered the Clinical Evaluation of Language Fundamentals: Preschool – Second ("CELF-P2") on 12/12/14 which revealed adequate core language, receptive language, expressive language, and language structure skills to access the general education curriculum and perform adequately in the classroom.<sup>43</sup> Student's main areas of need were expressive vocabulary, following directions and word

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<sup>32</sup> Educational Advocate; P48-1.

<sup>33</sup> P23-1.

<sup>34</sup> R6-6 (12/6/17 Prior Written Notice ("PWN")).

<sup>35</sup> Educational Advocate.

<sup>36</sup> R6-6.

<sup>37</sup> P23-1,2.

<sup>38</sup> R6-4.

<sup>39</sup> R1-1.

<sup>40</sup> Special Education Teacher (2019/20).

<sup>41</sup> R1-1.

<sup>42</sup> P37-1; R1-1.

<sup>43</sup> P24-10.

## Hearing Officer Determination

Case No. 2020-0024

classes.<sup>44</sup> Student met the criteria for speech therapy services as oral language functioning contributed to Student's academic struggle.<sup>45</sup>

14. The 11/29/17 Analysis of Existing Data ("AED") reported that Student progressed in expressive and receptive language skills, although Student continued to have delays.<sup>46</sup> At the 2/1/18 MDT meeting the speech-language pathologist reported on current progress and that she was expanding goals so Student could continue making progress; Student's services remained at 120 minutes/month; Parent agreed with goals and hours.<sup>47</sup> At the RSM, Public School was willing to evaluate Student, but was concerned that Student would not adequately participate, so evaluation would measure behavior rather than ability.<sup>48</sup>

15. FBA. At the 2/1/18 MDT meeting, the social worker noted that Student was not a behavior problem "at all" and was not physically or verbally aggressive, but tried to attract the least possible amount of attention; some behavior difficulties were reported in the AED.<sup>49</sup> The 11/29/17 AED noted that Student had missed 2 of 76 days of school and was tardy 1 time.<sup>50</sup> The MDT increased BSS on 2/1/18 by 30 minutes/month to include a social skills group.<sup>51</sup>

16. Work avoidance was the biggest issue for Student.<sup>52</sup> Student's behavior of slumping down and not responding in class usually happened when the work was too hard; Student would shut down whenever Student did not get what Student wanted.<sup>53</sup> In both ELA and math class, Student would walk out of class and not do the work.<sup>54</sup> Work avoidance can be behavior or academics; the team agreed on an FBA to determine the cause of Student's work avoidance.<sup>55</sup> It was difficult to do an FBA, as Student was not receptive to receiving related services and was often asleep or silent when approached by an adult.<sup>56</sup> Student often slept at school; Student had to get on the school bus at 6:46 to arrive at Public School by 8:30 AM.<sup>57</sup> At the 2/1/18 MDT meeting, Parent stated that Student often stayed out past curfew and was up in the middle of the night so is very sleepy and "out of it" during the day.<sup>58</sup>

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<sup>44</sup> R3-4 (AED).

<sup>45</sup> P24-11.

<sup>46</sup> R11-4; P23-5.

<sup>47</sup> R6-2.

<sup>48</sup> R1-2.

<sup>49</sup> R6-3; R11-5.

<sup>50</sup> R11-2.

<sup>51</sup> R6-3.

<sup>52</sup> Special Education Teacher.

<sup>53</sup> P23-5.

<sup>54</sup> P23-5,6 (walked out of class during observation).

<sup>55</sup> Special Education Teacher.

<sup>56</sup> R1-2.

<sup>57</sup> *Id.*

<sup>58</sup> R5-4.



## Hearing Officer Determination

Case No. 2020-0024

17. Assistive Technology Assessment. All students at Public School have computers; Student can participate and navigate a computer.<sup>59</sup> Student likes computer games.<sup>60</sup> Educational Advocate noted concerns about the split in Student's cognitive abilities with deficient verbal intelligence compared with low average nonverbal intelligence.<sup>61</sup> The 2/1/18 psychological reevaluation recommended that Student could be helped by computer-based programs or other digital interventions.<sup>62</sup>

18. Written Expression. Based on the WJ-IV ACH in the 2/1/18 psychological reevaluation, Student's Written Expression standard score was 61 (very low range), Broad Written Language was 67 (very low range), and Written Language was 72.<sup>63</sup> Broad Reading was 72.<sup>64</sup> According to the psychological reevaluation, the 11/29/17 AED completed by the MDT indicated interventions for written expression as well as math and reading.<sup>65</sup>

19. Goals and Baselines. Student's adaptive goal concerned increased participation in class; neither the goal nor the baseline had changed in substance since 2016 to the present.<sup>66</sup> The 2/1/18 psychological reevaluation stated that Student was making no progress on the adaptive goal.<sup>67</sup> At the 2/1/18 MDT meeting, Student's adaptive goal was reviewed and agreed on.<sup>68</sup> Communication is Student's biggest adaptive issue; there is no issue with adaptive functioning.<sup>69</sup> Shifting Student to Public School and from inclusion to SLS was part of the plan to address Student's adaptive goal.<sup>70</sup>

20. Student's math and reading goals and baselines were repeated from IEP to IEP.<sup>71</sup> In the 2/1/18 IEP, Student had 4 goals under the Emotional, Social, and Behavioral Development area of concern, none of which contained a baseline.<sup>72</sup>

21. Related Services. Student's 11/29/17 AED noted progress in related services.<sup>73</sup> The 2/1/18 psychological reevaluation recommended that Student receive counseling services to address motivation in academic activities.<sup>74</sup> Speech-language services were decreased at

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<sup>59</sup> P37-2; R1-2.

<sup>60</sup> P23-6.

<sup>61</sup> P37-2; R1-2.

<sup>62</sup> P23-23.

<sup>63</sup> P23-19; P35-1.

<sup>64</sup> P35-1.

<sup>65</sup> P23-4.

<sup>66</sup> Educational Advocate; P9-6,7; P8-6,7; P7-7; P6-7,8; P5-7,8; P4-8; P44.

<sup>67</sup> P23-5.

<sup>68</sup> R6-3.

<sup>69</sup> Special Education Teacher.

<sup>70</sup> *Id.*

<sup>71</sup> Educational Advocate; P44.

<sup>72</sup> P7-9,10.

<sup>73</sup> R11-4.

<sup>74</sup> P23-22

## Hearing Officer Determination

Case No. 2020-0024

Prior Public School due to Student's refusal to participate.<sup>75</sup> Public School speech provider spoke to Student one time and Student said the related services classroom was for "babies."<sup>76</sup> Student was embarrassed to see the assigned related service provider and may not have wanted to be seen as a special education student.<sup>77</sup> Educational Advocate acknowledged that related service providers gather data, but did not know what was gathered here; a formal evaluation is not needed to change goals and services.<sup>78</sup>

22. Compensatory Education. At the 2/27/20 RSM, DCPS agreed to conduct the 4 assessments (occupational therapy, speech-language, assistive technology and FBA) raised by Petitioner (although Petitioner's 2/20/20 Compensatory Education Proposal only listed 3 assessments, omitting speech-language).<sup>79</sup> DCPS did not agree to immediately increase related service hours as Petitioner requested, but agreed to meet to review the assessments when complete and revise Student's IEP.<sup>80</sup>

23. The RSM notes did not discuss Petitioner's request for "outside comp ed" of 40 hours of speech-language, 30 hours of BSS and 30 hours of occupational therapy.<sup>81</sup> On 3/10/20, DCPS unilaterally authorized all of the compensatory education services sought by Petitioner's Compensatory Education Proposal (the 40 hours of speech-language, 30 hours of BSS and 30 hours of occupational therapy), plus another 50 hours to be used for tutoring and/or mentoring services; the authorization did not require Petitioner to settle or take any other action.<sup>82</sup> The 2/20/20 Compensatory Education Proposal discussed at the RSM did not contain a request for any tutoring, but 100 hours of independent tutoring was added to the 3/9/20 version of the Compensatory Education Proposal submitted in Petitioner's disclosures.<sup>83</sup> Educational Advocate testified that the compensatory education sought in her Proposal would restore Student to the approximate position Student would have been in but for the denials of FAPE.<sup>84</sup>

24. On 3/27/20, DCPS authorized IEEs for the 4 assessments sought by Petitioner, as well as a comprehensive psychological evaluation that Petitioner had not sought; the authorization was not contingent on settlement or any other action by Petitioner.<sup>85</sup> The shift from DCPS conducting the evaluations to IEEs was the result of schools closing from

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<sup>75</sup> Special Education Teacher.

<sup>76</sup> R1-2.

<sup>77</sup> *Id.*

<sup>78</sup> Educational Advocate.

<sup>79</sup> R1-13; P26-1 (PWN).

<sup>80</sup> R1-3.

<sup>81</sup> *Id.*

<sup>82</sup> R18-1,2; Educational Advocate.

<sup>83</sup> Educational Advocate; P43.

<sup>84</sup> Educational Advocate.

<sup>85</sup> R22-3,5 (comprehensive psychological evaluation added to be "prudent"); Special Education Teacher (comprehensive psychological evaluation was to "make sure not missing anything" and ensure accurate disability classification).

## Hearing Officer Determination

Case No. 2020-0024

3/16/20 due to Covid-19.<sup>86</sup> After the IEEs are completed, the MDT will schedule a meeting to review the IEEs and revise Student's IEP as appropriate.<sup>87</sup>

### Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Endrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely

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<sup>86</sup> R22-5; Special Education Teacher.

<sup>87</sup> R22-5; R1-3.

## Hearing Officer Determination

Case No. 2020-0024

more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, the Local Education Agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, 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. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at \*3 (D.D.C. 2018).

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation in February 2018 when it did not conduct (a) an occupational therapy assessment, (b) a speech-language reassessment, (c) an FBA, and/or (d) an assistive technology assessment. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did meet her burden on the initial issue of reevaluation of Student as to the need for an FBA and assistive technology assessment, but failed to meet her burden of persuasion on the need for an occupational therapy or speech-language assessment in February 2018. DCPS’s counsel noted at the beginning of the due process hearing that DCPS has already authorized IEEs for all assessments that Parent is seeking in this case. However, this issue was not withdrawn and remains in the case as Petitioner asserts that the assessments should have been conducted more than 2 years ago, which might have resulted in Student receiving additional special education and related services beginning in 2018, so compensatory education may be required to make up for the delay, as discussed below.

## Hearing Officer Determination

Case No. 2020-0024

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The Appellate Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student’s parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student’s parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a). As the Court emphasized in *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016), “a reevaluation requires a new round of tests and analysis to evaluate the child.”

Here, in accordance with 34 C.F.R. § 300.305(a), the MDT for Student completed an AED on 11/29/17. Student’s team agreed that more information was needed about Student and ordered a psychological reevaluation, but no other assessments. When the psychological reevaluation report was completed, Parent stated at the 2/1/18 MDT meeting that she wanted an independent comprehensive psychological evaluation, but did not request other assessments. Educational Advocate acknowledged that the IEP team was in the best position to know what assessments were needed, but continued to assert that all 4 assessments should have been conducted in February 2018. The specific assessments which Petitioner claims should have been provided in 2018 are considered in turn.

(a) Occupational Therapy Assessment. Petitioner first asserts that an occupational therapy assessment should have been conducted in February 2018, but did not claim that an assessment was requested then or that there was sufficient data to demonstrate that the MDT erred in not proceeding with an occupational therapy assessment at that time. Petitioner did not rely on an occupational therapy expert, although Educational Advocate stated that low scores for visual spatial and processing speed showed the need for an occupational therapy assessment, as did sensory processing issues (hyperactivity and inattention). From a more practical perspective, Special Education Teacher credibly testified based on her work with Student in 2019/20 that Student can write complete sentences with legible handwriting and does not have occupational therapy concerns. The undersigned does not believe that the team erred in its determination and finds no violation from DCPS not conducting an occupational therapy assessment in 2018. As noted, DCPS has authorized IEEs for assessments to be conducted now.

(b) Speech-Language Assessment. Student has been receiving speech-language services at all times relevant to this case and was administered the CELF-P2 on 12/12/14 which found that Student met the criteria for speech services as oral language functioning

## Hearing Officer Determination

Case No. 2020-0024

contributed to Student's academic struggle. The 11/29/17 AED reported that Student progressed in expressive and receptive language skills, although Student continued to have delays. At the 2/1/18 MDT meeting, the speech-language pathologist reported on current progress and that she was expanding goals so Student could continue making progress, while Student's services remained at 120 minutes/month. Parent reportedly agreed with the speech-language goals and hours. The undersigned is not persuaded that the team erred and finds no violation here from lack of a 2018 assessment.

(c) FBA. The IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i); *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 146 (D.D.C. 2018). *See Z.B.*, 888 F.3d at 524 (failing to conduct an FBA is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student's behaviors).

Student was not a "behavior problem," or verbally or physically aggressive, but work avoidance was Student's biggest issue. Student's team agreed to conduct an FBA in 2020 to determine the cause of work avoidance. But the problem has existed throughout the relevant timeframe, as the 2/1/18 psychological reevaluation noted Student's behavior of slumping down and not responding in class, and that Student would shut down whenever Student did not get what Student wanted. In both ELA and math class, Student would walk out of class and not do the work, even during observation. In these circumstances, this Hearing Officer concludes that failing to conduct an FBA – followed if necessary by a BIP – is at least a procedural violation. *See, e.g., Z.B.*, 888 F.3d at 524. However, whether this was a denial of FAPE resulting in compensatory education depends on the outcome of the FBA IEE that has been authorized. *See Smith v. Dist. of Columbia*, 2010 WL 4861757, at \*4,5 (D.D.C. 2010). The possibility of compensatory education is reserved in the Order below.

(d) Assistive Technology Assessment. Finally, turning to assistive technology, it is noteworthy that all students at Public School have computers and that Student likes computers, which were used as an incentive for Student and others in the classroom. But an assistive technology assessment is not required unless something indicates it is needed. To start, OSSE encourages assistive technology generally to aid in the areas of reading and written composition. But in this case specifically, the 2/1/18 psychological reevaluation recommended that Student could be helped by computer-based programs or other digital interventions. Further, Educational Advocate emphasized the split in Student's cognitive abilities, with deficient verbal intelligence compared with low average nonverbal intelligence, requiring an assistive technology assessment.

Thus, the undersigned is persuaded that an assistive technology assessment was necessary in 2018 to determine whether assistive technology was needed by Student at that point, given Student's low academic functioning and unusual cognitive abilities. As with the FBA, above, the IEE for assistive technology that is being conducted may find that assistive technology would have been appropriate causing Student's education to be different and thus affecting Student's substantive rights. *See Smith v. Dist. of Columbia*,

## Hearing Officer Determination

Case No. 2020-0024

2010 WL 4861757, at \*4,5 (D.D.C. 2010). Prior to the assessment, however, it cannot be determined whether any compensatory education is due, so compensatory education based on assistive technology is also reserved as a possible future claim.

In sum, DCPS has authorized assessments and has even included a comprehensive psychological evaluation in addition to the 4 assessments sought by Petitioner. Further, when DCPS's ability to itself administer assessments was delayed by the school shutdown due to Covid-19, DCPS to its credit promptly authorized IEEs for the testing it had agreed to do.

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 2/1/18 due to (a) lack of assistive technology, (b) lack of written expression as an area of concern, (c) an inadequate adaptive goal, (d) failure to include baselines for behavior goals, and/or (e) insufficient hours of specialized instruction outside general education. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Through expert testimony and documents, Petitioner established a prima facie case on the 3 IEP issues, although not every subpart, shifting the burden to Respondent which failed to meet its burden of persuasion that the 3 IEPs at issue were reasonably calculated for Student to make appropriate progress, as detailed below.

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”). The measure and adequacy of each IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEPs are analyzed by considering the specific concerns raised by Petitioner, which are considered in turn.<sup>88</sup> *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Assistive Technology. As discussed in Issue 1, above, the undersigned is persuaded that an assistive technology assessment should have been conducted in February 2018 and an IEE has been authorized which will shed light on whether assistive technology should have been included in Student’s 2/1/18 IEP. A claim for compensatory education is

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<sup>88</sup> A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Procedural violations are discussed herein, but were not separately alleged in this matter.

## Hearing Officer Determination

Case No. 2020-0024

being reserved on this element as discussed above, but in the meantime assistive technology does not contribute to the 2/1/18 IEP being inappropriate.

(b) Written Expression. Petitioner next challenges the omission of Written Expression as an area of concern in Student's 2/1/18 IEP, which means that there were no written expression goals and possibly fewer specialized instruction hours. Student's Written Expression standard score on the WJ-IV ACH on 2/1/18 was 61 (very low range), Broad Written Language was 67 (very low range), and Written Language was 72. Moreover, according to the psychological reevaluation, the 11/29/17 AED completed by the MDT indicated interventions for written expression as well as math and reading. Thus, this aspect of Student's IEP contributes to the conclusion that the 2/1/18 IEP was not reasonably calculated to enable Student to make appropriate progress in the circumstances.

(c) Adaptive Goal. Communication is Student's biggest adaptive issue, and Student had no issue with adaptive functioning. Student's adaptive goal concerned increased participation in class, which was important as Student was very quiet and often refused to engage with adults. The 2/1/18 psychological reevaluation found that Student was making no progress on the adaptive goal, but neither the goal nor the baseline for the goal had changed since 2016 – or indeed has changed since then. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2), while the Supreme Court in *Endrew F.*, 137 S. Ct. at 996, explained that largely carrying over the same goals from one year to the next indicated failure to “make meaningful progress,” which was the case with Student's adaptive goal. Accordingly, this contributes modestly to the conclusion that the 2/1/18 IEP denied Student a FAPE.

(d) Baselines for Behavior Goals. The 2/1/18 IEP has 4 goals under the Emotional, Social, and Behavioral Development area of concern, but none of them contains a baseline. The IDEA does not expressly require “baselines” in IEPs, but does require a description of how progress toward meeting a student's IEP goals will be measured, in 34 C.F.R. § 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a child begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. The failure to provide any baselines would be a procedural violation by itself, but contributes somewhat to the conclusion that the 2/1/18 IEP denied Student a FAPE.

(e) Specialized Instruction. Petitioner next challenges the fact that Student's 2/1/18 IEP provided only 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with related services, which was an increase of only 3 hours/week inside general education from Student's 2/15/17 IEP. The question is whether this level of specialized instruction was reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, and to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4). See *Damarcus S.*, 190 F. Supp. 3d 35; *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013). On the other hand, the law is clear that to the maximum extent appropriate children with disabilities must be educated with children who are nondisabled. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000



## Hearing Officer Determination

Case No. 2020-0024

(children with disabilities should receive education in the regular classroom to the extent possible).

Here, however, Student was in the very low range in Brief Achievement, Broad Achievement, Broad Math and Broad Written Language and in the low range in Broad Reading. Student's present levels of performance on the 2/1/18 IEP indicate that in reading, Student was nearly 4 years below grade level while in math Student was a full 4 years below grade level. Accordingly, the undersigned concludes that Student needed more specialized instruction, and that the hours on Student's 2/1/18 IEP were not sufficient to enable Student to make appropriate progress in the circumstances.

Placement. The applicable legal standard for educational placement under the IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton*, 312 F. Supp. 3d at 143, *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP"). Here, the undersigned concludes that there was not a failure to appropriately implement Student's IEPs at Prior Public School and Public School, but simply a need for more restrictive IEPs, which might have resulted in a shift sooner to Public School. Student's 2019/20 placement in a full-time self-contained SLS program afforded Student a meaningful opportunity to make appropriate progress in Student's circumstances. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), *quoting James*, 194 F. Supp. 3d at 139.

FAPE. In considering the concerns set forth by Petitioner above, the undersigned is cognizant of the fact that the analysis is not about achieving perfection, but merely an IEP and placement reasonably calculated to enable Student to make appropriate progress in the circumstances. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). *See also Hill v. Dist. of Columbia*, No. 14-cv-1893, 2016 WL 4506972, at \*21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). On balance, this Hearing Officer concludes that taken as a whole DCPS failed to meet its burden of persuasion that Student's 2/1/18 IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances, contributing to compensatory education as discussed below.

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 10/17/18 due to lack of (a) assistive technology, (b) updated goals and baselines, (c) written expression as an area of concern, (d) an adequate adaptive goal, and/or (e) sufficient related service hours, as speech was reduced from 120 to 90 minutes/month and BSS was reduced from 150 to 60 minutes/month. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner establishing a prima facie case and the legal framework for this issue – and certain of Petitioner's assertions – are the same as Issue 2, above.

## Hearing Officer Determination

Case No. 2020-0024

(a) Assistive Technology. Just as in Issue 2, the claim that Student's IEP should have included assistive technology carries no weight in advance of the assistive technology assessment required by Issue 1.

(b) Goals and Baselines. Goals and baselines are a more general concern in the 10/17/18 IEP, expanding on the discussion above. In addition to non-academic goals, numerous math and reading goals and baselines were repeated from IEP to IEP, as Petitioner clearly demonstrated in a compelling spreadsheet. Repetition of goals does indicate a lack of progress by Student. *See Endrew F.*, 137 S. Ct. at 996 (largely carrying over the same goals from one year to the next indicated failure to "make meaningful progress"). Although not every student progresses as anticipated, if the goals must be repeated, the IEP team is to address the lack of progress in the revised IEP. *See* 34 C.F.R. § 300.324(b). The undersigned concludes that this contributes significantly to the conclusion that the 10/17/18 IEP was not reasonably calculated to enable Student to make appropriate progress in the circumstances.

(c) Written Expression. This is the same claim discussed in Issue 2, and DCPS presented no evidence that Student's written expression was less of a problem in the 10/17/18 IEP than earlier in the year. Thus, as above, this aspect of Student's IEP contributes to the conclusion that the 10/17/18 IEP denied Student a FAPE.

(d) Adaptive Goal. For the same reasons discussed above, the adaptive goal here contributes modestly to the conclusion that the 10/17/18 IEP denied Student a FAPE.

(e) Speech-Language and BSS. Petitioner did not dispute the specialized instruction hours in the 10/17/18 IEP, but raised concerns about the scope of related services, as speech-language was reduced from 120 to 90 minutes/month and BSS was reduced from 150 to 60 minutes/month. Speech-language and BSS are "related services" that must be provided if required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). The issue is whether, with the lower level of related services, the 10/17/18 IEP was still reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances.

Student's 11/29/17 AED noted progress in related services. The 2/1/18 psychological reevaluation recommended that Student receive counseling services to address motivation in academic activities. Speech-language services were decreased at Prior Public School due to Student's refusal to participate, which was in line with the later evidence that Public School speech provider heard from Student that the related services classroom was for "babies." Based on this, the undersigned concludes that DCPS met its burden as to the reduction of speech-language, but not the dramatic reduction in BSS, which contributes modestly to the conclusion that the 10/17/18 IEP was not reasonably calculated to enable Student to make appropriate progress in the circumstances. However, the undersigned does not order a specific increase in BSS herein, given the battery of IEEs under way, and will leave it to the IEP team to adjust Student's BSS appropriately based on current data.

## Hearing Officer Determination

Case No. 2020-0024

Placement. The placement claim and outcome is the same as Issue 2, above.

FAPE. While the analysis is not about achieving perfection, as discussed above, on balance this Hearing Officer concludes that taken as a whole DCPS failed to meet its burden of persuasion by a preponderance of the evidence that Student's 10/17/18 IEP was reasonably calculated to enable Student to make appropriate progress in the circumstances, contributing to compensatory education as discussed below.

**Issue 4:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP and/or placement on 9/26/19 due to lack of (a) assistive technology, (b) updated goals and baselines, (c) written expression as an area of concern, (d) an adequate and updated adaptive goal, and/or (e) sufficient related service hours in speech and BSS. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner establishing a prima facie case and the legal framework for this issue – and certain of Petitioner's assertions – are the same as Issues 2 and 3, above.

(a) Assistive Technology. Just as in Issue 2, the claim that Student's 9/26/19 IEP should have included assistive technology carries no weight in advance of the assistive technology assessment required by Issue 1.

(b) Goals and Baselines. As discussed in Issue 3, above, numerous math and reading goals and baselines were once again repeated in the 9/26/19 IEP, so the IEP team should have addressed the lack of progress. *See* 34 C.F.R. § 300.324(b). Thus, the undersigned concludes that this contributes notably to the conclusion that the 9/26/19 IEP was not reasonably calculated to enable Student to make appropriate progress in the circumstances.

(c) Written Expression. This claim and outcome is the same as in Issues 2 and 3, above.

(d) Adaptive Goal. This claim and outcome is the same as in Issues 2 and 3, above.

(e) Speech-Language and BSS. This claim and outcome is the same as Issue 3, above.

Placement. This claim and outcome is the same as Issue 2, above.

FAPE. While the analysis is again not about achieving perfection, as discussed above, on balance this Hearing Officer concludes that taken as a whole DCPS failed to meet its burden of persuasion that Student's 9/26/19 IEP was reasonably calculated to enable Student to make appropriate progress in Student's circumstances, contributing to compensatory education as discussed next.

## Hearing Officer Determination

Case No. 2020-0024

### Remedies

Having analyzed the issues in this case, what remains is to consider appropriate remedies that flow from the denials of FAPE. This case is in an unusual posture, however, for DCPS has already authorized more than Petitioner was seeking.

The undersigned concluded in Issue 1, above, that DCPS should have conducted an FBA and assistive technology assessment in February 2018. Petitioner sought 4 assessments in her complaint and DCPS has authorized IEEs for all 4, plus an additional comprehensive psychological evaluation. Further, DCPS has committed to convening an IEP team meeting to review the assessment reports and revising Student's IEP as appropriate. In the view of this Hearing Officer, all that is appropriate to order in these circumstances is the reservation of a future compensatory education claim for any loss of services or benefits that might have resulted if the FBA and assistive technology assessment had been conducted in February 2018.

As for the 3 IEP issues, the undersigned found that many, but not all, of the challenged aspects of the IEPs contributed to each IEP on balance being a denial of FAPE for which compensatory education is appropriate. However, in determining compensatory education for the denials of FAPE herein, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse).

Here, Petitioner shared a 2/20/20 Compensatory Education Proposal with DCPS in which Petitioner sought 40 hours of speech-language services, 30 hours of BSS, and 30 hours of occupational therapy services. Prior to the hearing, DCPS authorized all of the compensatory education services sought by Petitioner, plus another 50 hours to be used for tutoring and/or mentoring services. Petitioner did further increase her demand in the Compensatory Education Proposal that was submitted in Petitioner's disclosures by adding 100 hours of tutoring. But this Hearing Officer determines as a matter of equity that since Petitioner did not prevail on all aspects of her case that the amount of compensatory education authorized by DCPS is entirely appropriate and that no more should be awarded. Because these compensatory education hours have already been authorized in good faith by DCPS, there is no need for the undersigned to order what has already been carried out.

Further, Petitioner's expert witness testified that the compensatory education hours sought in the proposal would put Student in the position Student should have been but for the denials of FAPE in this case. These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp.

## Hearing Officer Determination

Case No. 2020-0024

3d 42, 55 (D.D.C. 2016), *quoting Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

### **ORDER**

Petitioner has largely prevailed in this case and has already received authorization for all appropriate relief, as discussed above. Accordingly, based on the only remaining aspect of this case, **it is hereby ordered that:**

- A claim for compensatory education following the completion of a Functional Behavioral Assessment (FBA) and Assistive Technology assessment shall be reserved for subsequent resolution.

Any and all other claims and requests for relief are **dismissed with prejudice.**

**IT IS SO ORDERED.**

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.  
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).

Copies to:

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