

**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 28, 2020

<i>Student</i> , ¹)	Case No.: 2020-0019
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 5/28/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: May 12, 15, 22, 2020
("DCPS"),)	Video Platform: Microsoft Teams
Respondent.)	
)	

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 sufficient direct occupational therapy services. DCPS responded that Student was receiving all occupational therapy services needed.

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 1/28/20, the case was assigned to the undersigned on 1/29/20. On 2/7/20, Respondent filed a timely response and did not challenge jurisdiction. The resolution meeting occurred on 2/13/20, but did not resolve the case or shorten the 30-day resolution period, which ended on 2/27/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period,

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

Hearing Officer Determination

Case No. 2020-0019

as extended by a 50-day continuance, which requires a Hearing Officer Determination (“HOD”) by 6/1/20.

The prehearing conference was held on 3/11/20 and the Prehearing Order issued the same day. On 4/29/20 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 5/12/20, 5/15/20 and 5/22/20 using the MS Teams platform 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 part of the hearing.

Petitioner’s Disclosures, submitted on 5/5/20, contained documents P1 through P34, which were all admitted into evidence over objection to certain documents. Respondent’s Disclosures, submitted on 5/5/20, contained documents R1 through R22, which were all admitted into evidence over objection to certain documents.

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

1. *Private Occupational Therapist* (qualified without objection as an expert in Occupational Therapy, Including Development of the Occupational Therapy Portion of IEPs)
2. *Supervisor* (qualified without objection as an expert in Occupational Therapy)

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see* Appendix A):

1. *Special Education Teacher at Public School* (qualified over objection as an expert in Special Education and Educational Programming)
2. *School Occupational Therapist* (qualified over objection as an expert in School-Based Occupational Therapy and Development of IEP Goals in Occupational Therapy)

Petitioner’s counsel did not present any rebuttal witnesses.

The issue² to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP:

² A second issue was withdrawn by Petitioner without prejudice at the beginning of the due process hearing: “Whether DCPS denied Student a FAPE by failing to provide complete and/or timely access to education records, where DCPS failed to provide complete school records in response to Parent’s 1/15/20 request.”

Hearing Officer Determination

Case No. 2020-0019

(a) on 2/6/19 due to (1) insufficient direct occupational therapy services, (2) insufficient occupational therapy goals, and/or (3) inappropriate review procedure and schedule; and/or

(b) on 1/9/20 due to (1) lack of any direct occupational therapy services, (2) inappropriate occupational therapy “access” statement, (3) insufficient occupational therapy goals and inappropriate baselines, (4) inappropriate review procedure and schedule, and/or (5) lack of occupational therapy in extended school year (“ESY”). (*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. DCPS shall amend Student’s IEP to provide (a) an appropriate access statement with occupational therapy goals, baselines, and review procedures, and sufficient direct occupational therapy services, and (b) appropriate occupational therapy goals and sufficient direct occupational therapy services during ESY for 2020.
3. DCPS shall fund an independent occupational therapy assessment and any other assessments that the occupational therapy assessment recommends, at market rates.
4. DCPS shall convene an IEP team meeting within 10 days after receiving the final report from the paragraph above, and review and revise Student’s IEP as appropriate.
5. For any denials of FAPE, DCPS shall fund a compensatory education evaluation at market rates to determine appropriate compensatory education, if DCPS is not able to discuss and determine appropriate compensatory education to the satisfaction of Parent at the IEP team meeting required above.³

³ 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 due process hearing 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 due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

Hearing Officer Determination

Case No. 2020-0019

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender* and in *Grade* at Public School.⁶ Student is a hard worker, but easily distracted.⁷

2. IEPs. Student's 9/29/16 IEP provided for 180 minutes/month of occupational therapy services outside general education and 4 occupational therapy goals.⁸ Student's 4/25/17 IEP provided for 120 minutes/month of occupational therapy services outside general education and 2 occupational therapy goals.⁹ Student's 3/5/18 IEP provided for 120 minutes/month of occupational therapy services outside general education and 2 occupational therapy goals.¹⁰ The disability classification in Student's prior IEPs was Speech or Language Impairment ("SLI"); on the 2/6/19 IEP – the first IEP in issue in this case – the classification was Multiple Disabilities ("MD"), due to SLI and Other Health Impairment ("OHI") – Attention Deficit Hyperactivity Disorder ("ADHD").¹¹

3. The 2/6/19 IEP provided for 10 hours/week of specialized instruction inside general education, 240 minutes/month of speech-language pathology ("SLP") outside general education, 240 minutes/month of behavior support services ("BSS") outside general education, 30 minutes/month of occupational therapy inside general education and 30 minutes/month of occupational therapy consultation, with 1 occupational therapy goal.¹² The 2/6/19 IEP contained a long list of Other Classroom Aids and Services, along with other Classroom Accommodations.¹³ The occupational therapy goal in the 2/6/19 IEP was for Student to improve self-regulation by identifying how Student's body felt and choosing a

⁴ 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.

⁵ Petitioner.

⁶ *Id.*

⁷ Special Education Teacher.

⁸ P12-1,17,18,19.

⁹ P13-1,15,16.

¹⁰ P14-1,19,20.

¹¹ P15-1; R22-328 (2/12/19 PWN).

¹² P15-22,23.

¹³ P15-24,27.

Hearing Officer Determination

Case No. 2020-0019

strategy to improve regulation; the baseline stated that Student was unable to identify how body felt and select a strategy to improve self-regulation.¹⁴

4. The parties engaged in much discussion, had many email communications and generated multiple draft IEPs in an effort to arrive at an acceptable 2020 IEP; extensive discussion focused on whether to use the prior occupational therapy goal or a new goal while another assessment was conducted, and what baseline and service level would be used with each goal.¹⁵

5. Student's 1/9/20 IEP (finalized on 1/14/20) – the other IEP being challenged in this case – provided 10 hours/week of specialized instruction inside general education, 240 minutes/month of SLP outside general education, 120 minutes/month of BSS outside general education, and 30 minutes/month of occupational therapy consultation; there were no direct occupational therapy services, but there was 1 occupational therapy goal.¹⁶ The occupational therapy goal in the 1/9/20 IEP was to improve self-regulation by incorporating previously learned strategies; a lengthy baseline stated that Student was able to verbally convey appropriate self-regulation strategies, but required infrequent verbal prompting to complete assignments.¹⁷ The IEP contained a long list of Other Classroom Aids and Services, along with other Classroom Accommodations.¹⁸ The “access” statement for the 1/9/20 IEP stated that the disability “does not affect [Student's] ability to access the general education population.”¹⁹

6. Evaluation Procedures and Schedule. In the 2/6/19 IEP, the Evaluation Procedures and Schedule box provided in italics for “Practice and Drill / Each Nine Weeks,” while the same box on the 1/9/20 IEP stated, “Log / Each Nine Weeks” and “Observation / Each Nine Weeks.”²⁰ School Occupational Therapist testified that Public School documented every time service was provided to Student in Service Trackers and that an IEP Progress Report was prepared every 9 weeks (quarterly).²¹

7. ESY. Both the 2/6/19 and 1/9/20 IEPs provided ESY for Student generally, but only the 2/6/19 IEP included an occupational therapy goal and 30 minutes/month of direct occupational therapy services, the same level as during the school year.²² In the 12/5/19 draft IEP (created on 12/9/19), Student was also provided 30 minutes/month of direct occupational therapy services and the same amount for ESY.²³ When the 1/9/20 IEP was finalized there were no direct occupational therapy services during the school year or during

¹⁴ P15-22.

¹⁵ P20-31,32,33,36,37; P25; P26; P27; P28; P29; P17; P18.

¹⁶ P19-18,20.

¹⁷ P19-18,19.

¹⁸ P19-21,24.

¹⁹ P19-18.

²⁰ P15-22; P19-19.

²¹ School Occupational Therapist.

²² P15-30,33; P19-30,31.

²³ P17-1,20,25,32.

Hearing Officer Determination

Case No. 2020-0019

ESY.²⁴ According to Private Occupational Therapist, Student needs 30 minutes/week (120 minutes/month) of direct occupational therapy services in ESY.²⁵

8. Academic Ability. Student's PARCC results in Spring 2019 were Level 1 in English Language Arts ("ELA") with performance that was better than only 1% of students at Public School, and Level 3 in math, scoring better than 68% of students at Public School.²⁶

9. Handwriting. Petitioner was primarily concerned about Student's handwriting, which Petitioner called "atrocious" and School Occupational Therapist considered "amazing."²⁷ According to Private Occupational Therapist, Student's poor handwriting and grip have a negative educational impact.²⁸ The undersigned found some, but not all of Student's handwriting to be legible from samples provided in the record.²⁹

10. Key Occupational Therapy Assessments. The independent occupational therapy assessment by Private Occupational Therapist on 11/16/15 found that Student had clear deficits in sensory processing, visual motor integration, motor planning of fine motor coordination tasks, as well as cutting, drawing, and handwriting skills; Student's difficulty with fine motor and visual motor tasks would impact accuracy when copying from the board, copying from a text, forming letters, and forming and copying shapes in drawing and math.³⁰ Specifically, the 11/16/15 assessment found that based on the Miller Functional and Participation Scales ("M-Fun") Student's visual motor and fine motor skills were both in the 5th percentile (compared to peers).³¹ Student's performance on the 11/16/15 assessment indicated that school-based and community services were needed to remediate delays and that Student would benefit from 240 minutes/month, delivered weekly with 30 minutes inside general education and 30 minutes outside general education.³²

11. The 1/30/19 occupational therapy assessment conducted by DCPS found that Student was "below average" in fine motor precision, fine motor integration, and manual dexterity, and also had "some problems" with sensory processing.³³ Specifically, the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition ("BOT-2") showed that Student's Fine Manual Control, which was a combination of Fine Motor Precision and Fine Motor Integration, was at the 4th percentile, a slight decline from the 11/16/15 assessment.³⁴ The assessment found that Student was able to complete functional fine motor activities in the classroom, including shoe tying, managing clothes fasteners, and isolating index fingers

²⁴ P19-20,31.

²⁵ Private Occupational Therapist.

²⁶ P23.

²⁷ Special Education Teacher; School Occupational Therapist.

²⁸ Private Occupational Therapist.

²⁹ R13; R14.

³⁰ P9-5.

³¹ P9-3.

³² P9-5.

³³ P10-9,10.

³⁴ P10-6; P9-3.

Hearing Officer Determination

Case No. 2020-0019

for keyboarding; this finding was called into question by Private Occupational Therapist and the 4/30/20 occupational therapy assessment.³⁵

12. The parties engaged in a great deal of communication about the need for another occupational therapy assessment of Student leading up to the 1/9/20 IEP; Petitioner opposed School Occupational Therapist conducting the assessment, thinking that she was not open-minded about Student's occupational therapy needs; LEA Representative recommended reaching out to see if another DCPS occupational therapist could conduct the assessment other than School Occupational Therapist, but that if School Occupational Therapist did conduct the assessment that Petitioner could, if necessary, seek an independent educational evaluation ("IEE").³⁶ Petitioner's counsel and Petitioner were to discuss and inform the team whether they would pursue an independent assessment or let DCPS proceed.³⁷ Petitioner's counsel emailed on 1/15/20 that Petitioner had agreed to a DCPS occupational therapy assessment and would be signing and returning the consent form, which did not occur.³⁸ There was no discussion about the assessment being at public expense or Petitioner being reimbursed for an IEE.³⁹

13. An independent occupational therapy assessment ultimately occurred on 4/30/20, again conducted by Private Occupational Therapist; the assessment had been delayed as another occupational therapist planned to conduct the assessment before she was exposed and quarantined due to covid-19, causing Private Occupational Therapist to step in to conduct the assessment.⁴⁰ The initial assessor had expected to conduct the assessment at Public School where she could have spoken with teachers, but LEA Representative, who is the assistant principal of Public School, on 3/13/20 rescinded use of the school after being informed it was not permissible for a private occupational therapist to do an assessment or even an observation at Public School.⁴¹

14. The 4/30/20 assessment found that Student had clear deficits in sensory processing, visual motor integration, motor planning of fine motor coordination tasks, as well as cutting, drawing, and handwriting skills; Student's difficulty with fine motor and visual motor tasks would impact accuracy when copying from the board, copying from a text, forming letters, and forming and copying shapes in drawing and math.⁴² Student had fewer sensory needs

³⁵ P10-10; Private Occupational Therapist; P11-4,7.

³⁶ R5-89; *see also* fn. 15, above.

³⁷ *Id.*

³⁸ P29-2; *see also* fn. 15, above.

³⁹ P20-44,45,47; Administrative Notice.

⁴⁰ Supervisor; Private Occupational Therapist.

⁴¹ P32-1 (the undersigned notes that this limits DCPS's criticism of Private Occupational Therapist for not speaking to teachers and observing Student in the classroom for the 4/30/20 assessment).

⁴² P11-11 (identical to 2015 assessment).

Hearing Officer Determination

Case No. 2020-0019

than in 2015, but was still “wiggly” and needed to move body around.⁴³ Student’s poor handwriting and grip for writing was also a problem with educational impact.⁴⁴

15. On the Beery Developmental Test of Visual-Motor Integration (“Beery-VMI”) in the 4/30/20 assessment, Student ranked in the 4th percentile for the VMI, in the 12th percentile for Visual Perception and in the 0.3 percentile for Motor Coordination, while on the BOT-2 test of Fine Manual Control Student was in the 1st percentile, a decline from 4% and 5% in the previous assessments.⁴⁵ Visual perceptual ability was a concern in the 4/30/20 assessment because Student had declined to the 12th percentile from the 30th percentile in the 1/30/19 assessment.⁴⁶ These low scores were a concern to School Occupational Therapist, although she would not look only at the scores.⁴⁷ Based on Petitioner’s input, the 4/30/20 assessment found that Student had difficulty with functional daily activities including buttoning or tucking in a shirt, putting on gloves, using a knife to cut up food and spread butter on bread, insert laces in shoes and tying shoes.⁴⁸

16. The 4/30/20 assessment indicated that Student had significant difficulty with most aspects of handwriting for age/grade, as Student could not print all letters and frequently stopped to determine which letter was next (by singing the “ABC” song).⁴⁹ School Occupational Therapist agreed this would not be appropriate for Student’s age and grade.⁵⁰ School Occupational Therapist had not observed Student using whole arm to write as Private Occupational Therapist had, although School Occupational Therapist had seen Student writing.⁵¹ Private Occupational Therapist persuasively testified that Student’s needs could not be met through consultation alone, but required direct services of 135 minutes/month of direct occupational therapy services comprised of 30 minutes/week outside general education for handwriting and keyboarding, plus 15 minutes/month inside general education to address executive functioning/organizational issues.⁵² The independent 4/30/20 occupational therapy assessment cost \$900, the standard rate of the firm involved.⁵³

17. Other Developments. The 2/6/19 IEP was developed after the 1/30/19 occupational therapy assessment, but Private Occupational Therapist was concerned that the IEP contained only 1 goal when there also should have been goals for visual motor and fine motor skills.⁵⁴ Private Occupational Therapist credibly testified that in working with other

⁴³ Private Occupational Therapist.

⁴⁴ *Id.*

⁴⁵ P11-4; P10-6; P9-3.

⁴⁶ P11-4; P10-5.

⁴⁷ School Occupational Therapist.

⁴⁸ P11-7.

⁴⁹ P11-11.

⁵⁰ School Occupational Therapist.

⁵¹ School Occupational Therapist; Private Occupational Therapist.

⁵² Private Occupational Therapist; P11-12.

⁵³ Supervisor.

⁵⁴ Private Occupational Therapist.

Hearing Officer Determination

Case No. 2020-0019

students with similarly low scores, she had never seen a student with such scores not affected in the school setting.⁵⁵

18. Student “mastered” the single occupational therapy goal (self-regulation) in the first term of 2019/20.⁵⁶ In the IEP Progress Report, School Occupational Therapist recommended “reevaluation to upgrade/discharge goal/services.”⁵⁷ Service trackers for late 2019 also reflected that Student had mastered the goal.⁵⁸ In the 1/9/20 IEP, the parties agreed to include the old goal, the old baseline and the old service level, as long as there was a new assessment; however Petitioner wanted the new goal that had been developed.⁵⁹

19. Private Occupational Therapist testified that on the 1/9/20 IEP Student needed more than 1 goal and needed goals to address visual motor and fine motor deficits, as noted above; the baseline for the existing self-regulation goal was not appropriate and was not measurable.⁶⁰ Private Occupational Therapist disputed the 1/9/20 IEP “access” statement based on Student’s level of dysfunction.⁶¹

20. Conflicting Experts. The independent 4/30/20 assessment conflicted in notable ways with DCPS’s 1/30/19 assessment, from whether Student could readily perform functional daily activities (tying shoes, buttoning shirt, using scissors) to whether Student had strabismus (was cross-eyed), which Private Occupational Therapist noted in her assessment, but was not mentioned in the DCPS assessment, and School Occupational Therapist testified she had never seen (but did not dispute).⁶² Private Occupational Therapist has 25 years of experience as an occupational therapist working with students.⁶³ School Occupational Therapist has nearly 6 years of experience as an occupational therapist, with less than 2 years working with students.⁶⁴ Public School’s assistant principal acknowledged “bad blood” between the parties because of previous interactions through the years, but noted that the team was concerned about Student’s development.⁶⁵ In the 2/6/19 IEP team meeting, the school’s occupational therapist sought to discontinue occupational therapy services entirely, but LEA Representative took the occupational therapist into the hall to confer and returned to propose 30 minutes/month of direct occupational therapy and 30 minutes/month of consultation.⁶⁶

⁵⁵ *Id.*

⁵⁶ R8-156; All dates in the format “2019/20” refer to school years.

⁵⁷ *Id.*

⁵⁸ R10-192,193,194.

⁵⁹ School Occupational Therapist.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² P11-4,7; P10-3,9,10; School Occupational Therapist.

⁶³ P33; Private Occupational Therapist.

⁶⁴ R20-317; School Occupational Therapist.

⁶⁵ P20-38.

⁶⁶ P16-2.

Hearing Officer Determination

Case No. 2020-0019

21. Compensatory Education. Private Occupational Therapist testified that Student should have received 120 minutes/month of direct occupational therapy services on the IEPs at issue.⁶⁷ As compensatory education to restore Student to the position Student would have enjoyed but for the denial of FAPE, Student should receive an extra 30 minute session of direct 1:1 occupational therapy services each week (for a total of two 30-minute sessions each week) until missed hours are restored or Student significantly improves on standardized occupational therapy testing, suggesting a target of the 16th or 25th percentile (compared to peers).⁶⁸ Private Occupational Therapist stated that Public School's occupational therapist could provide the additional direct occupational therapy services for compensatory education, and suggested working on Student's visual perceptual and visual motor needs.⁶⁹

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).

⁶⁷ Private Occupational Therapist.

⁶⁸ *Id.*

⁶⁹ *Id.*

Hearing Officer Determination

Case No. 2020-0019

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

In addition, the 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; *Endrew 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. 9/26/18).

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: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP:*

(a) on 2/6/19 due to (1) insufficient direct occupational therapy services, (2) insufficient occupational therapy goals, and/or (3) inappropriate review procedure and schedule; and/or

Hearing Officer Determination

Case No. 2020-0019

(b) on 1/9/20 due to (1) lack of any direct occupational therapy services, (2) inappropriate occupational therapy “access” statement, (3) insufficient occupational therapy goals and inappropriate baselines, (4) inappropriate review procedure and schedule, and/or (5) lack of occupational therapy in ESY. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)

Petitioner established a prima facie case on this issue through expert testimony and documents, shifting the burden to DCPS, which failed to meet its burden of persuasion on the key elements challenged, as discussed 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.⁷⁰ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

This case is entirely focused on the related service of occupational therapy. “Related services” 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 definition of “occupational therapy” includes improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function. 34 C.F.R. § 300.34(c)(6).

In this case occupational therapy services began for Student in 2016 but were reduced to 30 minutes/month of direct services in the 2/6/19 IEP and no direct services (but some consultation) in the 1/9/20 IEP, which are the core dispute of this case. The issue is whether with the level of occupational therapy support provided, Student’s 2/6/19 and 1/9/20 IEPs were reasonably calculated to enable Student to make appropriate progress in light of Student’s circumstances, so that Student was able to access the curriculum to advance toward meeting Student’s annual goals pursuant to 34 C.F.R. § 300.320(a)(4).

⁷⁰ 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. 2020-0019

Related services, as with any other service in an IEP, are determined on an individual basis by the student's IEP team. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

2019 IEP

(1) Insufficient Direct Occupational Therapy Services. The 1/30/19 occupational therapy assessment conducted by DCPS was key to DCPS's decisions on occupational therapy services in both IEPs at issue in this case. The recent independent occupational therapy assessment by Private Occupational Therapist on 4/30/20 occurred after the two IEPs and thus has no direct bearing on the service decisions by DCPS. However, the 4/30/20 assessment does shed light on the 1/30/19 assessment, calling into question some of its conclusions and showing that Student's occupational therapy needs have not been remedied in important ways since Private Occupational Therapist conducted the 2015 occupational therapy assessment of Student.

To begin, the 1/30/19 assessment found that Student was "below average" in fine motor precision, fine motor integration, and manual dexterity, and also had ratings of "some problems" with sensory processing. Considering the specifics, the BOT-2 showed that Student's Fine Manual Control – a combination of Fine Motor Precision and Fine Motor Integrations – was at the 4th percentile (compared to peers), which is a very low ranking and was a slight decline from the 11/16/15 assessment. Private Occupational Therapist credibly testified that in working with other students with similarly low scores, she has never seen a student who was not impacted in the school setting by such scores.

The 1/30/19 assessment found that Student was able to complete functional fine motor activities in the classroom, including shoe tying, managing clothes fasteners, and isolating index fingers for keyboarding. But this finding was undermined by Private Occupational Therapist and the 4/30/20 occupational therapy assessment which essentially made opposite findings that Student had difficulty buttoning or tucking in a shirt, putting on gloves, using a knife to cut up food and spread butter, and tying shoes. Further, Petitioner's primary concern was Student's handwriting, which Petitioner called "atrocious," but School Occupational Therapist stated was "amazing." Based on her experience, Private Occupational Therapist explained that Student's poor handwriting and grip when holding a pen or pencil had negative educational impacts, as well as Student moving whole arm to write, causing fatigue. Student was not getting by academically despite challenges, but was in fact performing very poorly in ELA, where Student's PARCC results in Spring 2019 revealed that Student's ELA performance was better than only 1% of students at Public School, although Student was average in math.

In weighing the testimony of the occupational therapy experts on each side in this case, the undersigned finds the experience and credibility levels to be significantly different, with Private Occupational Therapist having more than ten times the years of occupational therapy experience with students that School Occupational Therapist does. The undersigned also notes that while Private Occupational Therapist flagged Student's strabismus (being cross-eyed) in her report, School Occupational Therapist had never noticed it, but made no assertion that the condition did not exist.

Hearing Officer Determination

Case No. 2020-0019

This Hearing Officer concludes that more direct occupational therapy services were required on Student's 2/6/19 IEP for Student to be able to access the curriculum and receive a FAPE, and orders 120 minutes/month below. The lack of this level of services on the 2/6/19 IEP contributes to the award of compensatory education in the order below.

(2) Insufficient Occupational Therapy Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). The question here is what occupational therapy goals Student needed on the 2/6/19 IEP, which only contained a "self-regulation" goal in place of 2 or more goals on prior IEPs. Since the 2/6/19 IEP was developed after the 1/30/19 occupational therapy assessment, Private Occupational Therapist was concerned that the IEP contained only the single goal for self-regulation when there should have been goals for visual motor and fine motor skills.

Building on the conclusion above that more direct occupational therapy services were needed based on the 1/30/19 assessment, this Hearing Officer is persuaded by Petitioner's expert that the self-regulation goal was not sufficient and orders below that at least 2 occupational therapy goals be included on Student's revised IEP, one of which should be a fine motor goal, although how the goals are articulated will be left to Student's IEP team. This also contributes to the award of compensatory education in the order below.

(3) Inappropriate Review Procedure and Schedule. The IDEA requires IEPs to describe how a child's progress toward meeting annual goals will be measured and when periodic reports on progress will be provided, with the suggestion in the IDEA of "quarterly" or other periodic reports concurrent with report cards. 34 C.F.R. § 300.320(a)(3). The IEPs in this case each contain a box for "Evaluation Procedure and Schedule," which was completed for the 2/6/19 IEP with the phrase, "Practice and Drill / Each Nine Weeks." School Occupational Therapist persuasively testified that Public School documented every time service was provided to Student in the occupational therapy Service Trackers and that an IEP Progress Report was prepared every 9 weeks (quarterly). The undersigned views this as a reasonable and acceptable way to keep track of Student's occupational therapy services and finds no violation here.

2020 IEP

(1) Lack of Any Direct Occupational Therapy Services. The 1/9/20 IEP further reduced direct occupational therapy services from 30 minutes/month in the 2/6/19 IEP to no direct services at all, even though there had not been any new assessment since the one conducted by DCPS on 1/30/19. One new data point was that Student reportedly mastered the single occupational therapy goal of "self-regulation" in the first term of 2019/20; Service Trackers for late 2019 also reflected that Student had mastered the goal. Thus, in the IEP Progress Report, School Occupational Therapist recommended reevaluation to "upgrade/discharge goal/services" and at the IEP meeting did not consider any direct services necessary. But there were many other concerns raised by the 1/30/19 assessment that were not covered by the self-regulation goal that Student mastered. Private Occupational Therapist was persuasive that Student continued to need direct occupational therapy services to address visual motor and fine motor deficits.

Hearing Officer Determination

Case No. 2020-0019

Moreover, the 4/30/20 assessment makes clear that the concerns of the 1/30/19 assessment had not been resolved by the time of the 1/9/20 IEP, but remained and had even worsened in some areas, showing that Student definitely needed direct occupational therapy services to continue. Accordingly, this Hearing Officer concludes that direct occupational therapy services were still required on Student's 1/9/20 IEP for Student to be able to access the curriculum and to receive a FAPE, and the undersigned orders 120 minutes/month below. This lack of direct services on the 1/9/20 IEP contributes to the award of compensatory education in the order below.

(2) Inappropriate Occupational Therapy "Access" Statement. Petitioner next challenges the statement in the 1/9/20 IEP on how Student's disability affects access to general education, which stated that Student's disability "does not" affect Student's ability to access general education. DCPS's statement here is in line with its view that no direct occupational therapy services were needed in the previous claim, and was disputed by Private Occupational Therapist based on Student's level of dysfunction. As stated above, the undersigned is persuaded that direct occupational therapy services were needed for Student to access the curriculum, thus the "access" statement must be corrected to be harmonized as well, but this has very little impact on the denial of FAPE and compensatory education below.

(3) Insufficient Occupational Therapy Goals and Inappropriate Baselines. It should first be noted that 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. Here, as Private Occupational Therapist explained, the baseline for the self-regulation goal in the 1/9/20 IEP was not appropriate and was not measurable.

Building on the discussion of goals above, and in line with the need for direct occupational therapy services on the 1/9/20 IEP, the undersigned is persuaded that the single occupational therapy goal on the 1/9/20 IEP was not sufficient and that additional occupational therapy goals were needed to address visual motor and fine motor deficits, with each goal having an appropriate baseline. This conclusion contributes modestly to the denial of FAPE and the award of compensatory education below.

(4) Inappropriate Review Procedure and Schedule. This issue was not substantively different in 2020 than in 2019, although the wording differed slightly. In 2020 the IEP team stated "Log / Each Nine Weeks" and "Observation / Each Nine Weeks." Although there was extensive testimony over exactly what those words meant, the undersigned is persuaded by the testimony of School Occupational Therapist that there was no failure here to comply with 34 C.F.R. § 300.320(a)(3), especially when there were no direct services on which to report. When the IEP is revised to add direct occupational therapy services, the undersigned expects that those services will be reported by Public School on Service Trackers in the usual manner.

Hearing Officer Determination

Case No. 2020-0019

(5) Lack of Occupational Therapy in ESY. ESY is necessary to provide a FAPE under 34 C.F.R. § 300.106(a) when the benefits a disabled child gains during a regular school year will be “significantly jeopardized” if the child is not provided with an educational program during the summer months. *Johnson v. Dist. of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012), *quoting MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002); *see also S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008) (adopting standard from *MM*).

Here, the 1/9/20 IEP provided ESY for Student generally, but did not provide any direct occupational therapy services, consistent with DCPS removing direct occupational therapy services from the rest of the 1/9/20 IEP. But with the conclusion above that Student continues to need direct occupational therapy services, it follows that an occupational therapy goal (or goals) and direct services should be restored for ESY as well. Indeed, this was the approach of the 12/5/19 draft IEP which provided Student 30 minutes/month of direct occupational therapy services during the school year and the same amount for ESY. Accordingly, the undersigned includes 120 minutes/month of direct occupational therapy services during ESY in the order below. Since ESY for 2020 has not yet occurred, no services have been missed and no compensatory education need be considered for the ESY claim.

IEE Reimbursement. The final claim to be addressed is whether Petitioner is entitled to reimbursement for the independent 4/30/20 assessment. The basic framework for IEEs is straightforward. Under 34 C.F.R. § 300.502(b), with certain limitations Parent has a right to seek an IEE at public expense if she disagrees with a public agency evaluation. *See Taylor v. Dist. of Columbia*, 770 F. Supp. 2d 105, 109 (D.D.C. 2011); *Letter to Baus*, 115 LRP 8855 (OSEP 2/23/15). Once an IEE at public expense is requested, the public agency must without unnecessary delay either (i) file a due process complaint to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense. *Id.*; 34 C.F.R. § 300.502(b).

Here, Petitioner did not disagree with a public agency evaluation or seek an IEE at public expense. While there was a great deal of discussion about Petitioner seeking an independent assessment, there was apparently no discussion about whether it would be at public expense. In circumstances such as these, the IDEA expressly contemplates that parents may share with the public agency evaluations “obtained at private expense” which must be considered by the agency (as long as they meet agency criteria). 34 C.F.R. § 300.502(c). The undersigned concludes that this was the situation here, so no reimbursement is required for the 4/30/20 assessment.

Conclusion

As the Court explained in *Smith v. Dist. of Columbia*, CV 16-1386, 2018 WL 4680208 at *5 (D.D.C. 2018), *quoting Endrew F.*, 137 S. Ct. at 1002, “[a] reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions,” and this explanation should show why “the IEP is reasonably calculated” to ensure that the child will “make progress appropriate in light of [their] circumstances.” DCPS has not offered a cogent and responsive explanation for its

Hearing Officer Determination

Case No. 2020-0019

occupational therapy decisions here and thus, on balance, failed to meet its burden of persuasion by a preponderance of the evidence that Student's 2/6/19 IEP and 1/9/20 IEP had sufficient direct occupational therapy services and occupational therapy goals to provide Student a FAPE.

Remedies

DCPS is ordered below to revise Student's IEP to provide direct occupational therapy services during both the school year and ESY in line with this HOD. Further, compensatory education is awarded to make up for the denials of FAPE in both IEPs at issue. In determining compensatory education 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). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, Petitioner's expert explained that to restore Student to the position Student would have enjoyed but for the denial of FAPE, Student should receive an extra 30 minute session of direct 1:1 occupational therapy services each week (for a total of two 30-minute sessions each week) until missed hours are restored (which would be about 24 hours) or until Student significantly improved as measured by standardized occupational therapy testing. Given that there is no way to know whether Student would have been at any given level even without a denial of FAPE, this Hearing Officer has taken into account the missed services and carefully determined an appropriate level of occupational therapy hours to make up for what was missed. Private Occupational Therapist also recommended that the compensatory education hours be used to work on Student's visual perceptual and visual motor needs, which the undersigned considers appropriate but is not specifically ordering below to give the occupational therapy professionals some latitude on what to focus on and how best to proceed for the benefit of Student.

Private Occupational Therapist further recommended that compensatory education be provided through Public School's occupational therapist, so that Student would have an extra occupational therapy session each week from the same provider. However, with the uncertainty about how school will be provided going forward, the undersigned has included an option for Petitioner to obtain authorization for an independent occupational therapist to provide the services, in case that becomes advantageous to ensure that Student obtains the occupational therapy services needed.

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. 3d 42, 55 (D.D.C.

Hearing Officer Determination

Case No. 2020-0019

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

ORDER

Petitioner has substantially prevailed in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 15 business days from the date of this HOD, DCPS shall convene Student's IEP team and revise Student's current IEP to include (a) 120 minutes/month of direct occupational therapy services; (b) at least 2 occupational therapy goals, 1 of which shall be a fine motor goal; and (c) 120 minutes/month of direct occupational therapy services during ESY for 2020, along with appropriate occupational therapy goals.
- (2) As compensatory education for the denials of FAPE found herein, DCPS shall provide 30 hours of direct occupational therapy services delivered through Public School's occupational therapist by providing an additional 30-minute session each week of direct occupational therapy services so that Student is receiving a total of two 30-minute occupational therapy sessions per week for 60 weeks (to make up a total of 30 hours). Any time during the first year from the date of this HOD, Petitioner may request and obtain from DCPS a letter of authorization to receive any remaining compensatory education hours from an independent occupational therapist. All hours authorized from an independent occupational therapist are to be used within 2 years from the date of this HOD; any unused hours shall be forfeited.

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:

Counsel of Record (Appendix A, by email)

Hearing Officer Determination

Case No. 2020-0019

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