

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 5/1/23; 5/2/23; 5/3/23;</b>
	)	<b>5/12/23</b>
<b>v.</b>	)	<b>Hearing Officer: Michael S. Lazan</b>
	)	<b>Case No. 2022-0215</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

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## **HEARING OFFICER DETERMINATION**

### **I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with Emotional Disturbance (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 12, 2022. The Complaint was filed by the Student’s parent (“Petitioner”). This Hearing Officer was appointed to the case on December 13, 2022. On December 21, 2022, Respondent filed a timely response. A resolution meeting was held on December 21, 2022. The resolution period expired on January 11, 2023.

### **II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

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

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

### **III. Procedural History**

A prehearing conference was held on January 18, 2023. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioner, appeared. Attorney C, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on January 23, 2023, summarizing the rules to be applied in the hearing and identifying the issues in the case. A revised prehearing conference order was issued on January 30, 2023, per the January 25, 2023, email from Petitioner. On February 16, 2023, Respondent moved to extend the timeline for the Hearing Officer Determination (“HOD”) to May 22, 2023, on consent. On February 23, 2023, an order was issued extending the HOD timeline to May 22, 2023.

On April 3, 2023, Petitioner moved for an observation of the Student. On April 5, 2023, Respondent opposed the motion for an observation and filed a partial motion to dismiss on statute-of-limitations grounds. On April 6, 2023, Petitioner moved for additional time to respond to the motion to dismiss and also moved for notices to appear to be signed. On April 10, 2023, Petitioner filed a response to the motion to dismiss. On April 19, 2023, an order was issued denying the motion to dismiss, granting the motion for an observation, and granting the motion for notices to appear to be signed.

The hearing proceeded on May 1, 2023, May 2, 2023, and May 3, 2023. Petitioner was again represented by Attorney A, Esq., and Attorney B, Esq. Respondent was again represented by Attorney C, Esq. After testimony, closing arguments were presented on May 12, 2023. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-86, without objection.

Respondent moved into evidence exhibits R-1 through R-24 without objection. Petitioner presented as witnesses: Witness A, a board-certified behavioral analyst (expert in special education and behavior); Witness B, a special education consultant; Witness C, a teacher at School D; Witness D, a teacher at School D; Witness E, principal of School D; and Petitioner. Respondent presented as witnesses: Witness F, a special education teacher and leader at School D (expert in special education); Witness G, a school counselor at School D (expert in counseling); and Witness H, a special education teacher and local educational agency (“LEA”) representative at School E (expert in special education). Both sides presented citation lists to the Hearing Officer on May 12, 2023.

#### **IV. Issues**

As identified in the Prehearing Conference Summary and Order and in the Complaint, the issue to be determined in this case is as follows:

**Did DCPS fail to identify, locate, and/or evaluate the Student for special education services pursuant to the IDEA “Child Find” requirements, Sect. 34 C.F.R. 300.111, and related authority during the 2020-2021, 2021-2022, and 2022-2023 school years? If so, did DCPS deny the Student a Free Appropriate Public Education (“FAPE”)?**

This claim encompasses assertions that the Student should have been found eligible for services, that Individualized Education Programs (“IEPs”) should have been developed for the Student, and that Petitioner was denied the right to meaningfully participate in the development of the Student’s educational programs. Claims relating to Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act are dismissed without prejudice, since there is no dispute that a Hearing Officer does not have jurisdiction over these claims. As relief, Petitioner seeks compensatory education, development of a new IEP, and related relief.

## **V. Findings of Fact**

1. The Student is an X-year-old who, as of March 6, 2023, is eligible for services as a student with Emotional Disability. P-8. The Student has a history of behavioral challenges at school, including eloping from class, being disrespectful to staff and students, and becoming aggressive toward other students. The Student has also experienced symptoms of anxiety and Attention Deficit/Hyperactivity Disorder (“ADHD”) in school. P-62-2. The Student currently functions below grade level in all academic areas. Testimony of Witness C; Testimony of Witness D.

2. In or about 2017, following an evaluation by DCPS, staff at School A determined the Student to be eligible for services as a Student with Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). On June 8, 2017, DCPS developed an IEP for the Student, including “Area of Concern” sections and corresponding goals for mathematics and emotional, social and behavioral development. The Student was recommended for two hours of specialized instruction per week inside general education and 120 minutes of behavioral support services per month. P-3. At this time, Petitioner received several “Prior Written Notices” advising her of her IDEA rights. P-13; P-14.

3. The Student attended School B PCS during the 2017-2018 school year, during which the Student was held back in grade. Testimony of Witness A. At an IEP meeting on December 15, 2017, the Student was recommended for “Area of Concern” sections and corresponding goals for mathematics and emotional, social and behavioral development, with 1.5 hours of specialized instruction per week outside general education and 120 minutes of behavioral support services per month. P-4. Petitioner

received a Prior Written Notice advising her of her IDEA rights on or about August 10, 2018. P-15.

4. The Student continued at School B PCS during the 2018-2019 school year. At an IEP meeting on December 18, 2018, the Student was again recommended for “Area of Concern” sections and corresponding goals for mathematics and emotional, social and behavioral development. The Student was recommended to receive 2.5 hours of specialized instruction per week outside general education and 120 minutes of behavioral support services per month. This IEP indicated that the Student was functioning at the 8th percentile on the “RIT” math measure. P-6-3.

5. The Student continued at School B PCS during the 2019-2020 school year. An IEP meeting was held for the Student on November 22, 2019. P-7. According to classroom math assessments for the first quarter of the school year, the Student scored a 58% on “ANET” testing (below the average score of 64%). On the fall 2019 “MAP” test in math, the Student placed at the 46th percentile. These results suggested to School B PCS that the Student had made progress in math. P-12-2.

6. School B PCS evaluated the Student in or about January 2020 and reported that the Student was able to succeed on grade-level tasks. The Student progressed to a level “M” in literacy. A psychological evaluation determined that the Student was functioning in the low average range, was below level in math and writing, had a learning disability, and had major issues with attention, focusing, and self-regulation, among other things. P-60. School B PCS determined that the Student was no longer eligible for services in or about February 2020. Special education staff verified that the Student’s parent/guardian received a copy of the procedural safeguards. P-12.

Petitioner received a Prior Written Notice advising her of her IDEA rights on or about March 6, 2020. P-16; R-12-43.

7. The Student transferred to DCPS during the 2020-2021 school year and was assigned to School C. P-65; P-67. During transfers between LEAs, the school district that receives the child has a duty to obtain educational records from the previous LEA. Testimony of Witness A. During the 2020-2021 school year, in which school was mostly conducted virtually due to the COVID-19 pandemic, the Student had issues with respect to behavior, math, reading, and written expression. P-61-1. The Student's report card at the end of the school year indicated that s/he had had challenges with online learning; the Student received "1" grades in reading, writing, and language and "2" grades in math for every term. P-67; Testimony of Witness A. Testing on the "SRI" reading measure on February 18, 2021, scored the Student's reading at the first-grade level. P-69-5; Testimony of Witness C. The Student was absent for twenty-nine days during this school year. P-65.

8. The Student moved to School D, another DCPS school, for the 2021-2022 school year. The Student enrolled in School D on November 3, 2021. P-62-3. The Student frequently visited a School D counselor, Witness G, to the point that the visits became excessive. Witness G created a pass for the Student to use a limited number of times each week, when the Student needed a "brain break." P-26-1; Testimony of Witness G. Even so, the Student attended school significantly less than half of the school days during the year. Testimony of Witness A. The Student was constantly out of location, refused to go to class, bullied other students, and engaged in reckless behavior. When redirected, the Student's behavior could become even more egregious toward peers

and staff. The Student was caught stealing from a classroom and pulling fire alarms during instructional time. The Student also threatened staff members and attempted to follow them to their cars during dismissal. The Student threatened a coordinator at the school as follows: “My uncle is going come up here and shoot you.” P-72-1.

9. During the 2021-2022 school year, the Student’s teachers, administrator, and counselor at School D attempted to call Petitioner for a meeting, to no avail. On December 15, 2021, a school social worker called Petitioner to say that the Student had been roaming the halls after lunch, and that when the social worker asked the Student whose class s/he was supposed to be in, the Student had given the social worker three different stories. P-74-1.

10. On February 2, 2022, the school social worker called Petitioner and recommended school-based counseling for the Student. Petitioner declined the counseling. P-74-1. School D tried a “conduct sheet” to address the Student’s behavioral concerns. The Student’s teachers were instructed to create and implement intervention plans for the Student in their respective classes. However, these plans did not work, and the Student did not participate in instruction much. Testimony of Witness C; Testimony of Witness G. On an end-of-the-year (“EOY”) Reading Inventory test in May 2022, the Student scored well below assigned grade level. On an EOY i-Ready math diagnostic, the Student also scored well below current grade level. P-26-2. The Student’s EOY PARCC assessment for the 2021-2022 school year showed that the Student was at the lowest level, Level 1, with a score of 685. P-70-1.

11. The Student continued at School D for the 2022-2023 school year. The Student would attempt to skip class, and when s/he was in class, the Student was

“combative.” The Student would stay in class only a few minutes, then simply walk out. Completing an assignment was “a rarity”; the Student never once stayed in class or completed an assignment with Witness C. The Student did have good relationships with the school psychologist and behavior technicians. Testimony of Witness F. Though the Student was not interested in having contact with adults about academics, the Student was more willing to talk with adults about other issues. Testimony of Witness D.

12. On or about November 21, 2022, the Student was involved in an assault of another student. The Student was in a stairwell during instructional time and, without provocation, pushed the other student with both hands from the top of the stairwell to the bottom. The victim had minor injuries to the head, neck, and legs. P-72. A Functional Behavior Assessment (“FBA”) was written for the Student in or about November 2022. The FBA indicated that the Student was extremely disrespectful when told to go to class, was often out of location, and might verbally assault the person who redirected him/her. P-76. An undated Behavior Intervention Plan (“BIP”) was written for the Student. The BIP included the use of a daily conduct sheet, incentives, calls home, and privileges to address the Student’s behavior. P-75-1.

13. On or about December 1, 2022, the Student was involuntarily transferred to School E. School D was concerned about the emotional well-being of the Student and others around him/her. P-72. On or about December 12, 2022, Petitioner referred the Student to be evaluated for special education services. R-15-1. The Student’s favorite teacher, a history teacher, was interviewed in January 2023. It was reported that when the Student first transferred to School D, s/he regularly attended class, but recently s/he had been arriving to class late and leaving class more often. The Student had also had



outbursts in the classroom, including verbal abuse, cursing, and kicking a chair, and had not turned in any long-term assignments. P-62-7-8.

14. The Student was observed in his/her co-taught English class on January 19, 2023. The Student listened to instructions but then stated that s/he needed to get his/her charger, and then s/he left the classroom with his/her computer and binder in hand. The Student had no pass. The Student did not return to class. P-62-8.

15. The Student was assessed through a comprehensive psychological assessment, which was the subject of a report issued on February 3, 2023. A Kaufman Test of Educational Achievement (“KTEA-3”) indicated that the Student was in the low range in academics, at the 2nd percentile, with a very low score in written expression, at the 0.1 percentile. P-62-12. A Behavior Assessment System for Children, Third Edition (“BASC-3”), indicated that the Student had issues with, among other things, aggression, hyperactivity, conduct, depression, atypical behavior, withdrawal, and functional communication. P-62-13-14.

16. An IEP was written for the Student on March 27, 2023. The IEP contained “Area of Concern” sections and corresponding goals for mathematics and emotional, social and behavioral development. The IEP indicated that the Student was functioning significantly below level in math relating to real life situations, including skills in number concepts, multiplication, division, time, money, and written calculation. The IEP stated that the Student’s score on the i-Ready mathematics assessment was 418, corresponding to far below grade level. The IEP stated that the Student was functioning below basic level in reading, noting a Reading Inventory test score from February 27, 2023, that was 68 points lower than the Student’s score from May, 2022. The Student

was recommended for twenty hours of specialized instruction per week outside general education and 240 minutes of behavioral support services per month. P-8.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed in 2014. The law states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that the party requesting the due process hearing establishes “a *prima facie* case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The issue in this case does not directly relate to the appropriateness of the Student’s program or placement, and the parties agreed, per the prehearing conference order, that Petitioner bears the burden of persuasion on this claim. As a result, the burden of persuasion is on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

**Did DCPS fail to identify, locate, and/or evaluate the Student for special education services pursuant to the IDEA “Child Find” requirements, Sect. 34 C.F.R. 300.111, and related authority, during the 2020-2021, 2021-2022, and 2022-2023 school years? If so, did DCPS deny the Student a FAPE?**

This claim encompasses assertions that the Student should have been found eligible for services, that IEPs should have been developed for the Student, and that Petitioner was denied the right to meaningfully participate in the development of the Student’s educational programs. Petitioner contended, and there is no dispute, that since at least the 2020-2021 school year, the Student engaged in school refusal, eloping, not going to class, failing to comply with directives, engaging in fights, ringing fire bells, stealing, trespassing, and most recently pushing another student down the stairs.

Petitioner contended that the Student's attendance issues and in-school behaviors, together with the Student's academic deficits, were triggers for an evaluation for services.

1. Statute of Limitations

Pursuant to 20 U.S.C. Sect. 1415(f)(3)(C), 20 U.S.C. Sect. 1415(b)(6), and 34 C.F.R. Sect. 300.507(b), a parent can "request an impartial due process hearing within two years" of a complaint's filing date. However, parents can allege claims based on facts that occurred more than two years earlier, if the parent did not understand their hearing rights. The question in most cases, including this case, is whether the parent "knew or should have known" that she could have requested an evaluation during the subject time period. In particular, the question is whether Petitioner knew or should have known that she had the right to request an evaluation of the Student during the 2020-2021 school year, when instruction was virtual. Petitioner posited that she did not know or should have known that she had the right to request an evaluation during the 2020-2021 school year, and therefore suggests that the so-called "KOSHK" date for statute-of-limitations accrual purposes must therefore be reset to allow the older claims. Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 45 (D.D.C. 2016) (citing K.H. v. N.Y. City Dep't of Educ., No. 12-cv-1680 (ARR) (MDG), 2014 WL 3866430, at \*16 (E.D.N.Y. Aug. 6, 2014)).

However, in general, a new KOSHK date is set for a case only where a parent was prevented from acting because of specific misrepresentations by the LEA. Here, Petitioner alleged that DCPS withheld information from her, suggesting that she therefore did not know that she had the right to ask for an evaluation of the Student while instruction was being provided virtually. However, Petitioner did not show that DCPS

withheld any information relating to her rights to request an evaluation during virtual instruction during the time of the pandemic. To the contrary, the record suggests that Petitioner received multiple notices from School B PCS explaining the Student's IDEA rights, including just prior to the start of the pandemic. Petitioner was told that parents of a student with a disability have specific rights under IDEA, which are outlined in the procedural safeguards notice. Petitioner was told that she could contact the school to receive assistance with the procedural safeguards notice or receive additional information about the process. However, there is no record of Petitioner ever calling DCPS to ask if she had the right to an evaluation of the Student during virtual instruction during the time of the pandemic, and Petitioner did not so allege. This Hearing Officer therefore agrees with DCPS that all claims accruing prior to December 12, 2020, must be dismissed.

## 2. Child Find Claims

The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that all children with disabilities who reside in the state and who need special education services are identified, located, and evaluated. 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find must include any child suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. Sect. 300.111(c)(1); Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Child Find is an “affirmative obligation.” Montuori v. District of Columbia, No. CV 17-2455 (CKK), 2018 WL 4623572, at \*6 (D.D.C. Sept. 6, 2018). The District of Columbia Circuit Court of Appeals has stated that the Child

Find obligation is among IDEA's "most important" requirements for the LEA. D.L. v. District of Columbia, 860 F.3d 713, 717 (D.C. Cir. 2017).

While the LEA cannot disregard clear signs that a student might have a disability, it does not have to evaluate at the first sign of behavioral problems. LEAs may consider factors such as the student's age and recent life events when determining whether a special education evaluation is necessary. Ja.B. v. Wilson Cnty. Bd. of Educ., No. 3:20-CV-00955, 2022 WL 326273, at \*1 (M.D. Tenn. Feb. 2, 2022), report and recommendation adopted (Apr. 28, 2022), aff'd, 61 F.4th 494 (6th Cir. 2023) (the student's disrespectful, noncompliant, and disruptive behaviors were not entirely unusual for a 13-year-old boy who recently moved to a new state). Moreover, evidence of a student's solid academic performance because of Section 504 or "MTSS" interventions can bolster a school district's argument that a special education evaluation was unnecessary or premature. Legris v. Capistrano Unified Sch. Dist., No. 20-56261, 2021 WL 4843714, at \*1 (9th Cir. Oct. 18, 2021) (by highlighting the student's ability to earn A's, B's, and C's in the general education curriculum with Section 504 accommodations, the school district showed that it had no reason to suspect a need for special education).

#### 2020-2021 School Year

During the 2020-2021 school year, the Student moved to School C, a DCPS public school. Petitioner argued that DCPS knew about the Student's prior issues at School A and School B PCS before the Student went on to attend more DCPS schools, and DCPS should have therefore evaluated the Student almost immediately when s/he started at School C. This Hearing Officer agrees that DCPS should have known about the Student's issues at School A, a DCPS school, and School B PCS when it received this

student at School C in the 2020-2021 school year. As pointed out by Witness A, the LEA has a duty to get educational records from a prior LEA, a duty that DCPS disregarded in this case.

Petitioner argued that the most recent documentation from School B PCS shows that the Student needed to be evaluated during the 2020-2021 school year. Petitioner pointed out that this documentation, including psychological testing, reveals academic and behavioral deficits. However, this documentation does not conclusively establish that the Student needed to be evaluated during the 2020-2021 school year. To the contrary, staff at School B PCS determined that the Student was ineligible for services after these assessments were completed. Petitioner pointed to the Student's report card from School C for the 2020-2021 school year as evidence of the Student's poor performance that year. However, there is virtually no other documentation in the record about the Student's academic performance during the 2020-2021 school year at School C, and no witnesses were called from School C to explain how the Student was educated at the time. Nor did Petitioner call any fact witnesses to rebut DCPS's suggestion that the Student's poor performance at School C was at least in part a function of the Student attending a new school. While testing on the SRI reading measure from February 18, 2021, put the Student's reading at the first-grade level, there is also credible testimony in the record from Witness D (called by Petitioner) to the effect that the Student did not always try on tests. Petitioner did not meet the burden to show that the LEA should have requested an evaluation of the Student during the 2020-2021 school year.

#### 2021-2022 School Year

Petitioner called several credible witnesses who corroborated her claims that the Student needed an evaluation during the 2021-2022 school year. The Student started classes at School D on November 3, 2021. Witness C, who taught the Student at School D, said that he had “never encountered anything like [him/her] before.” Witness C said that the Student had “no real grasp” on academics, and that his/her reading was not on grade level. Witness D from School D said much the same thing. Witness D said that “there is something going on” with the Student and that s/he was not coming to class and did not want to be in class.

Witness D also said that the Student was willing to talk to adults, but not about academics. To this Hearing Officer, this behavior suggests that the Student might be experiencing school avoidance, especially since the Student was constantly out of location and constantly refused to go to class. Indeed, on December 15, 2021, a social worker called Petitioner to say that the Student had been roaming the halls after lunch, and that when the social worker had asked the Student whose class s/he was supposed to be in, the Student offered three different stories. The social worker tried to escort the Student to class, but s/he refused to enter the classroom and walked away.

DCPS contended that the Student’s attendance issues were effectively his/her own fault, and that if the Student had attended, s/he would have functioned well in class. DCPS assumed that the Student’s attendance issues had nothing to do with his/her disability, even though the Student had been diagnosed as having ADHD and was functioning below grade level. But when a student engages in anti-social behavior during the school day, the student’s grades are poor, there are signs that the student is not progressing academically, and the student does not want to go to class, an evaluation is

ordinarily required. This issue recently came up when a student was not evaluated by DCPS, despite not regularly attending classes. In defending its decision not to evaluate this student, DCPS relied on the fact that the student had passed some classes. But the student had poor test scores, failing grades, countless unexcused absences, and various instances of classroom misconduct. A court found that “(t)hough the long list of red flags may not have led to interventions and classroom accommodations under the IDEA, at a minimum they provided a more than adequate basis for an evaluation, consistent with the school district’s child find obligation.” Malloy v. District of Columbia, No. 20-CV-03219 (DLF), 2022 WL 971208, at \*7 (D.D.C. Mar. 30, 2022).

It is underscored that an IEP should address a student’s attendance issues if they relate to the student’s disability. In M.M. v. New York City Dep’t of Educ., 26 F. Supp. 3d 249, 256 (S.D.N.Y. 2014), a federal judge reversed a state review officer who focused on an assessment of a student’s grades without considering the more fundamental question of whether the student could even attend school. In reversing the state review officer, the court found that the student, who had significant attendance issues, needed home instruction in order to be educated, and that such home instruction was a form of specialized instruction. The court stated that: “(t)he government must find ways to open the school house doors, by helping children who suffer from emotional problems to attend school.” See also Middleton v. District of Columbia, 312 F. Supp. 3d 113, 146 (D.D.C. 2018); Garris v. District of Columbia, 210 F. Supp. 3d 187, 191–92 (D.D.C. 2016); Presely v. Friendship Pub. Charter Sch., No. 12-0131, 2013 WL 589181, \*8–9 (D.D.C. Feb. 7, 2013).



DCPS also argued that Petitioner was uncooperative during the IEP process and pointed out that she was not always attentive at the hearing. However, a student's right to an appropriate education should not be a function of the skills or abilities of that student's parent. DCPS also argued that the Student has experienced periods of improvement, such as at the start of the 2022-2023 school year. However, any such improvement is not borne out by the documentation in the record. More convincing was the testimony of the Student's math teacher, Witness C, who said that the Student never stayed in the room for the entire period, even once, during the 2022-2023 school year.

Parenthetically, this Hearing Officer agrees with Petitioner that DCPS should have provided the Student with an IEP during the 2021-2022 school year. The testimony of some of the DCPS witnesses, to the effect that the Student would not benefit from an IEP, is inconsistent with DCPS's own IEP, which was written for the Student in March 2023. This initial IEP recommended twenty hours of specialized instruction, a robust program in light of the Student's previous ineligibility. At a minimum, this suggests that a similar program recommendation would have been appropriate for the Student during the 2021-2022 school year, since s/he was then, and still is, unable to manage a large classroom, functioning below grade level, and frequently engaging in disruptive behavior.

### 3. Parental Involvement

The IDEA statute requires LEAs to establish and maintain procedures in accordance with the statute to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE. 20 U.S.C. Sect. 1415(a). The IDEA requires that school districts offer "[a]n opportunity for the

parents of a child with a disability ... to participate in meetings with respect to the ... educational placement of the child.” 20 U.S.C. Sect. 1415(b)(1). The IDEA emphasizes the importance, and indeed the necessity, of parental participation in the development of the IEP and any subsequent assessments of its effectiveness. Honig v. Doe, 484 U.S. 305, 311 (1988). The IDEA requires local educational agencies to provide “[a]n opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.” 20 U.S.C. Sect. 1415(b)(1); Malloy, 2022 WL 971208, at \*1.

Parents may therefore bring claims against LEAs contending that their child was denied a FAPE because student records were not provided to them. However, such claims should be premised on clear, substantive harm to the Student. As explained by a federal magistrate: “Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing.” The magistrate continued: “Rather, she paints in the broadest of strokes, asserting that the evidence ‘would have provided the basis for services’ and that they ‘related to the identification, evaluation, and educational placement’ of [the subject student].” Simms v. District of Columbia, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at \*23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB) (GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d

877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by the student's parents or IEP team).

Petitioner contended that DCPS did not provide her with information about the 2020-2021, 2021-2022, and 2022-2023 school years, including Prior Written Notices and procedural safeguards, and that DCPS did not tell her about her right to request an evaluation. Petitioner also argued that she was not adequately informed about the MTSS process at the Student's school. However, during testimony, Petitioner expressed that she knew her IDEA rights well. Moreover, during closing argument, Petitioner did not specifically and clearly explain which documents were missing, or how the missing documents affected the Student or this litigation. These claims are thus without merit.

In sum, this Hearing Officer finds that DCPS violated Child Find and the IDEA when it failed to identify, locate, and evaluate the Student as a student with a disability during the 2021-2022 school year.

### **RELIEF**

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

Petitioner seeks compensatory education for the failure to provide the Student with an IEP during the 2020-2021, 2021-2022, and 2022-2023 school years. Courts and hearing officers may award "educational services to be provided prospectively to

compensate for a past deficient program.” Reid ex Rel. Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” B.D. v. District of Columbia, 817 F.3d 792, 797-798 (D.C. Cir. 2016) (quoting Reid, 401 F.3d at 524). If compensatory education were unavailable, a child’s access to appropriate education could depend on the parent’s ability to pull the child out of the deficient public program and front the cost of private instruction. This is a result incompatible with IDEA’s purpose of ensuring that all children with disabilities have available to them a free appropriate public education. Boose v. District of Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015); Glass, next friend of A.G. v. District of Columbia, No. CV 19-2148 (RC), 2020 WL 6799139, at \*8 (D.D.C. Nov. 19, 2020).

Petitioner presented two competing compensatory education plans for the Student, one from Witness A and one from Witness B. Both plans call for over 3,000 hours of compensatory education, premised on three years of FAPE denial for the entirety of the 2020-2021, 2021-2022, and 2022-2023 school year. Since Witness A was the more impressive and credentialed witness in this case, this Hearing Officer is inclined to credit the plan of Witness A over the plan of Witness B.

However, both plans relate to time periods that exceed the time period of FAPE denial in this case. The time period for the FAPE denial that was proven in this case was just over one year. Staff at School D should have noticed that the Student may have needed special education services shortly after the Student entered School D, which was

in November 2021. Since the LEA is allowed approximately thirty days to determine eligibility (34 C.F.R. Sect. 323(c)(1)), and sixty days to evaluate the student after consent (D.C. Code 38-2561.02(a)(2)(A)), the Student should have started receiving services through an IEP by February-March, 2022. DCPS created an IEP for the Student on 27, 2023. A corresponding reduction in the proposed compensatory education award is therefore apt.

Moreover, Witness A testified that about half of the compensatory education award was meant to help the Student manage his/her current academic environment, irrespective of the FAPE deprivation. Petitioner did not explain how this portion of the award could be considered to be consistent with the requirements in Reid, which looks to past deprivation in determining the award. Witness A also did not mention that an hour of one-to-one academic tutoring would appear to be more intense than an hour of academic instruction in a large general education classroom. Under the circumstances, an award of 750 hours of compensatory tutoring in reading, math, and writing is a more appropriate award. The tutoring should be provided by a special education teacher at a reasonable and customary rate in the community.

Petitioner also seeks compensatory behavioral support services for the Student, including cognitive behavioral therapy, psychiatric services, and parent training. School districts do not ordinarily provide students with psychiatric services or cognitive behavioral therapy, and compensatory education awards rarely include such services. However, this Hearing Officer agrees that an award of behavioral support services is appropriate for the Student. Witness A's proposal of 100 hours of services is appropriate in light of the Student's significant behavioral and emotional concerns. This Hearing

Officer also agrees that an award of parent training is appropriate in this case. This Hearing Officer will therefore award Petitioner with ten hours of parent training, to be provided by a licensed professional.

Petitioner also seeks independent evaluations of the Student in speech, occupational therapy, school avoidance, anxiety, mental health, and psychiatric services, as well as an independent FBA and BIP. However, Petitioner did not clearly explain why these evaluations need to be done independently, and Petitioner did not mention this remedial issue during the prehearing conference, which is why the prehearing conference order does not contain these requests. Still, to ensure that the Student is properly evaluated, this Hearing Officer will order DCPS to conduct a full evaluation of the Student, including an occupational therapy evaluation, a speech and language evaluation, and an evaluation of the Student's psychiatric state by a mental health professional, upon consent by the parent. A revised IEP and BIP should follow the evaluations.

Lastly, Petitioner indicated at various points during the hearing that the Student requires a non-public school placement. However, this request was not mentioned at the prehearing conference, and the Student has never been in a public school placement that has self-contained special education classes in all academic subjects. Accordingly, this Hearing Officer declines to order that the Student be assigned to a non-public school.

## **VII. Order**

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay for 750 hours of one-to-one academic tutoring for the Student, to be provided by a certified special education teacher, at a rate that is usual and customary in the community;

2. Respondent shall pay for 100 hours of behavioral support services for the Student, to be provided by a licensed professional, at a reasonable and customary rate in the community;

3. Respondent shall pay for ten hours of parent training for Petitioner, to be provided by a licensed professional, at a reasonable and customary rate in the community;

4. DCPS shall evaluate the Student as follows: 1) an occupational therapy evaluation; 2) a speech and language evaluation; and 3) an evaluation by a mental health professional;

5. After completing the evaluation of the Student, DCPS shall create a new IEP and BIP for the Student within thirty calendar days;

6. All other requests for relief, and all claims pursuant to the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973, are hereby denied.

Dated: May 22, 2023

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Petitioner's Representative: Attorney A, Esq.  
Petitioner's Representative: Attorney B, Esq.  
Respondent's Representative: Attorney C, Esq.  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS

### **VIII. Notice of Appeal Rights**

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

Dated: May 22, 2023

Michael Lazan  
Impartial Hearing Officer