

OSSE
Office of Dispute Resolution
May 25, 2023

Date Issued: May 25, 2023

Hearing Officer: Peter B. Vaden

Case No: 2023-0007

Online Videoconference Hearing

Date of Hearing: May 9, 2023

¹ Personal identification information is provided in Appendix A.

February 1, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On February 7, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was scheduled for May 9 and 10, 2023. On February 24, 2022, I granted Petitioner's unopposed motion to extend the final decision due date in this case from April 5, 2023 to May 26, 2023.

With consent of the parent, the due process hearing was held online and recorded, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on May 9, 2023. Mother appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. Mother testified at the hearing and called EDUCATIONAL ADVOCATE as her only additional witness. DCPS called RESOLUTION SPECIALIST as its only witness. Petitioner's Exhibits P-1 through P-27 were admitted into evidence, including Exhibits P-10, P-11, P-13, P-14, P-22 through P-24 and P-26 admitted over DCPS' objections. DCPS' Exhibits R-1, R-3, R-4, R-12, R-14, R-15, R-17, R-19, R-21 through R-23, R-30, R-31, R-41, R-46 and R-49 were admitted into evidence, including Exhibit R-23 admitted over Petitioner's objection. At the conclusion of the taking of the evidence, counsel for both parties made oral closing arguments. There was no request to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the February 7, 2023 Prehearing Order, are:

- a. Whether DCPS denied Student a FAPE by failing to implement the May 28, 2021 IEP when it did not provide 270 minutes of occupational therapy consultative services to which the Student was entitled; by failing to implement the March 4, 2022 IEP when it did not provide the student with 180 minutes of occupational therapy consultative services that he/she should have received under that IEP and/or by failing to implement the March 4, 2022 IEP when it did not timely introduce the Student's IEP reading and written expression goals;
- b. Whether DCPS denied Student a FAPE by failing to implement the May 28, 2021 and the March 4, 2022 IEPs when it did not provide a special education teacher for the Student's grade beginning in February 2022 through the end of the 2021-2022 school year;
- c. Whether DCPS denied Student a FAPE by failing develop an appropriate revised IEP for Student on March 4, 2022, when Student was reported to be at a Pre-Kindergarten level in several academic areas and DCPS failed to appropriately address these deficiencies by increasing his/her hours of specialized instruction and by not finding Student eligible for Extended School Year (ESY) services.

For relief, Petitioner requests that the hearing officer order DCPS to add additional specialized instruction and extended school year services to the student's IEP within 30 days and to provide Student compensatory education with related transportation expenses for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

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

Testimony of Mother.

2. Student is eligible for special education services under the IDEA disability classification Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). Exhibit R-47.

3. In July 2019 and June 2021, the parent brought prior due process complaints on behalf of Student, which went to hearing and resulted in hearing officer determinations. Exhibits R-21 and R-22. In the 2021 case, Case No. 2021-0175, the parent alleged that DCPS had denied Student a FAPE by not providing for Behavioral Support Services in Student's May 6, 2020 and March 30, 2021 IEPs. In his September 27, 2021 Hearing Officer Determination, Impartial Hearing Officer Terry Banks found that Petitioner failed to make a *prima facie* showing of a denial of FAPE. Exhibit R-21.

4. Student is currently enrolled in CITY SCHOOL in GRADE. Student has attended City School since Pre-Kindergarten. Testimony of Mother.

5. In December 2019, Student was referred for an independent comprehensive psychological evaluation. The resulting February 26, 2020 evaluation report was reviewed by a DCPS school psychologist. In her March 20, 2020 review report, SCHOOL PSYCHOLOGIST reported, *inter alia*, that Student's cognitive abilities

were found to be in the Borderline range of functioning (FSIQ = 76), (GAI = 78).

Student's low performance on the Cognitive Proficiency Index suggested that he/she struggled with efficiently processing cognitive information in service of learning. On the Woodcock-Johnson Tests of Achievement (WJ IV ACH), Student's scores in all academic areas reflected Kindergarten achievement level or below, commensurate with Student's low cognitive functioning. Student earned a Broad Reading cluster Standard score of 66 (1st percentile, AE 5-1), which was in the Very Low Range and placed him/her at the below Kindergarten grade reading level. Exhibit P-19.

6. At an April 8, 2020 eligibility meeting, Student was determined to be eligible for special education as a child with an Other Health Impairment (OHI-ADHD). Exhibit R-20.

7. Student's May 6, 2020 initial IEP identified mathematics, reading, written expression and motor skills/physical development as areas of concern. The IEP provided for Student to receive 10 hours per week of Specialized Instruction Services outside the general education setting and 60 minutes per month of Occupational Therapy (OT) consultative services. The IEP team determined that Student did not require ESY services. The IEP team reported that Student's Broad Reading cluster WJ-IV ACH score, in the 1st percentile, was in the Very Low range and placed Student at the below Kindergarten reading level. Exhibit P-6.

8. Student's IEP team convened for the annual IEP review on March 30, 2021. The IEP team reported that in school year 2020-2021, Student was learning in

the virtual setting due to the COVID 19 pandemic. The team reported that for reading, Student was below grade level in phonics & decoding, phonemic awareness and sight word recognition; that Student could recognize sight words at a Kindergarten level and achieved a composite score of 332 (middle Kindergarten) on the DIBELS middle of the year assessment. The March 30, 2021 IEP identified the same areas of concern as the prior year IEP and provided the same Specialized Instruction Services. The IEP team determined that Student required Extended School Year (ESY) services. Exhibit P-7.

9. Information gathered over the 2020-2021 academic year, including parent and teacher interviews, virtual observations and a Strengths and Difficulties Questionnaire suggested a need for behavior support for Student focused on helping him/her with concentration and focus in class. At the time, Student had not returned to in-person classes and was attending school virtually. On May 28, 2021, the IEP team amended Student's IEP to add Emotional, Social and Behavioral Development as an area of concern and added 60 minutes per month of Behavioral Support Services (BSS) as well as 30 minutes per month of BSS Consultation Services to Student's IEP. Exhibit P-9.

10. Student's IEP team convened for the annual IEP review on March 4, 2022. The team reported that on the Academic Fluency Cluster, a combination of Reading Fluency, Math Fluency, and Writing Fluency, a measure that provides an overall index of academic fluency or speed with which the student can read, perform simple math problems and perform simple writing tasks, Student demonstrated a weakness in

Academic Fluency, earning a cluster Standard Score of 75, which was in the Low Range and ranked at the beginning Kindergarten grade level. Student was reported to have a Reading Fluency level in the 1st grade, but was unable to read independently and, in the classroom, was not able to independently answer comprehension questions. The March 4, 2022 IEP team increased Student's related services to 120 minutes per month for Behavior Support Services and 90 minutes per month of direct OT services. Specialized Instruction Services were not changed from the 10 hours per week, outside general education, in the prior IEPs. Exhibit P-12.

11. The March 4, 2022 IEP team determined that Student did not meet criteria for Extended School Year (ESY) services because there was no indication or data to support that any of Student's critical skills would be jeopardized by a break in service or likelihood of significant regression of any critical skills. Exhibit R-12.

12. On May 2, 2022, City School's interim principal notified children's parents by letter that due to the limited availability of specialized staff, children in Student's grade at City School has been without a consistent special education teacher since February, 2022. Exhibit P-24. Student's IEP goals in Mathematics, Reading and Written Expression were not introduced during the last three reporting periods of the 2021-2022 school year, November 8, 2021 through the end of the school year. Exhibits P-10, P-11, P-13, P-14, Testimony of Mother.

13. On Reading Inventory tests administered in September 2021 and January 2022, Student tested at Lexile score BR for Beginning Reader. These scores were in the

1st percentile. Exhibit P-21.

14. Student's overall score on the i-Ready mathematics diagnostic administered in January 2022 was Grade K - 3rd percentile. Exhibit P-20.

15. In an informal assessment given by Educational Advocate in April 2023, Student was reading at the Kindergarten level and struggled to read words of more than 1 syllable. Testimony of Educational Advocate.

16. In March 2023, School Psychologist conducted a triennial psychological reevaluation of Student. School Psychologist observed Student in his/her general education ELA class. There were approximately 17 students and 1 general education teacher. Student was seated next to the teacher for small group instruction. Student was working independently and was able to ask for assistance when he/she needed it. Student was only slightly distracted when the teacher reminded students of behavioral expectations and was able to return to his/her independent task without assistance. Student did not present with any behavioral difficulties and was able to remain focused for the duration of the observation. Exhibit P-27.

17. School Psychologist reported in her April 11, 2023 report, *inter alia*, that Student's academic functioning was equivalent to that of a Kindergarten to 2nd grade student; that Student's ability to identify letters and read grade-appropriate words, read symbols, words, sentences, and passages appropriate to grade level was in the Low to Very Low range of functioning; that Student's overall score on The Kaufman Test of Educational Achievement, 3rd Edition, (KTEA-3) indicated Low functioning and that

Reading & ELA tasks above Kindergarten grade would be difficult for Student.

Student's ability to write single letters and spell words, write words and sentences and his/her ability to solve math problems that relate to real life situations, use number concepts, arithmetic, time, money and measurement required only slightly less support. Student's overall academic functioning hovered around the Kindergarten level. Exhibit P-27.

18. On February 14, 2023, after the parent initiated the due process proceeding in this case, Student's IEP team convened to update Student's IEP. The IEP team increased Student's Specialized Instruction Services from 10 hours to 12.5 hours per week, outside general education. For related services, the IEP team provided for Student to receive 30 minutes per month of Behavioral Support Services and 90 minutes per month of direct OT services. Exhibit P-15. The IEP was amended on March 9, 2023 to remove ESY services. Exhibit P-16. Mother was told by the special education coordinator that ESY services had been provided in the February 14, 2023 IEP by error. Testimony of Mother.

19. Student's IEP team met on May 2, 2023. Student's Specialized Instruction Services hours were left unchanged from the February 4, 2023 IEP at 12.5 hours per week outside of general education. Testimony of Educational Advocate. Mother was told Student no longer needed OT services. Testimony of Mother.

20. Student's City School IEPs, beginning in May 2020, provided for Student to receive 60 minutes per month of OT Consultation Services. The OT provider

consulted with Student's teacher and the school LEA Representative on OT strategies for Student. In the March 4, 2022 IEP, Student's IEP team changed OT services from the Consultation model to 90 minutes per month of direct OT services. During the period of IEP Consultation OT services, DCPS failed to provide 150 minutes of IEP Consultation OT services. Testimony of Resolution Specialist.

CONCLUSIONS OF LAW

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

Burden of Proof

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

ANALYSIS

Failure to Implement

a. Whether DCPS denied Student a FAPE by failing to implement the May 28, 2021 Amended IEP when it did not provide 270 minutes of occupational therapy consultative services to which the Student was entitled; by failing to implement the March 4, 2022 IEP when it did not provide the student with 180 minutes of occupational therapy consultative services that he/she should have received under that IEP and/or by failing to implement the March 4, 2022 IEP when it did not timely introduce the Student's IEP reading and written expression goals;

b. Whether DCPS denied Student a FAPE by failing to implement the May 28, 2021 and the March 4, 2022 IEPs when it did not provide a special education teacher for the Student's grade beginning in February 2022 through the end of the 2021-2022 school year.

The first two issues raised by the parent concern DCPS' alleged failure to provide Student's IEP Specialized Instruction Services from February 2022 through the end of the 2021-2022 school year and alleged failure to fully implement Student's IEP provisions for OT consultation services. The parent has the burden of persuasion on these failure to implement claims. DCPS argued that any IEP services not provided to Student were *de minimis*. For the reasons explained below, I agree with DCPS that the evidence did not establish that Student was harmed by the District's failure to fully provide OT Consultation services. However, I find that DCPS' failure to implement Student's Specialized Instruction Services for part of the 2021-2022 school year denied Student a FAPE.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement

substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.'" *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

Student's May 28, 2021 Amended IEP and March 4, 2022 IEP provided for Student to receive 10 hours per week of Specialized Instruction Services, outside of general education, for his/her academic areas of concern. At the due process hearing, the parent established that from February 2022 through the end of the school year, a period of some 19 school weeks, due to limited availability of special education teachers, City School did not provide consistent special education services to children in Student's grade. In fact, Student's IEP progress reports indicate that his/her IEP goals in Mathematics, Reading and Written Expression were not introduced from November 8, 2021 through the end of the school year. It is notable that at the time, Student was generally performing two years below grade level in Reading and Written Expression and had demonstrated needs in Mathematics as well. I find that DCPS' failure to

provide Student's IEP prescribed specialized instruction services for some 19 weeks was a material failure to implement Student's IEPs.

Student's May 28, 2021 Amended IEP provided for 60 minutes per month of OT Consultation services. The DCPS OT provider used the consultation time to consult with Student's teacher and the school LEA Representative on OT strategies for Student. In the March 4, 2022 IEP, OT services were changed from consultation to direct services for Student. At the hearing, DCPS acknowledged that in the 2021-2022 school year, City School did not provide 150 minutes of the total 360 minutes of OT Consultation services specified in Student's IEP. While this gap is notable on a percentage basis, I find that the Parent did not establish that the Occupational Therapist's missing some 2½ hours of consultation services over the school year constituted a failure to implement substantial or significant provisions of the IEP.

I conclude that the parent established that DCPS' failure to fully implement Student's Specialized Instruction Services in the 2021-2022 school year deprived Student of a FAPE. The parent did not meet her burden with regard to missed OT Consultation services.

IEP Appropriateness

Whether DCPS denied Student a FAPE by failing develop an appropriate revised IEP for Student on March 4, 2022, when Student was reported to be at a Pre-Kindergarten level in several academic areas and DCPS failed to appropriately address these deficiencies by increasing his/her hours of specialized instruction and by not finding Student eligible for ESY services.

City School's initial May 6, 2020 IEP and its March 30, 2021 annual IEP provided

for Student to receive 10 hours per week of Specialized Instruction Services outside the general education setting. For the March 4, 2022 IEP, the City School IEP team continued Student's Specialized Instruction Services unchanged from the prior IEPs. The March 4, 2022 IEP team also determined that Student did not require Extended School Year (ESY) services. The parent contends that the failure of the March 4, 2022 IEP team to increase Student's Specialized Instruction Services and the omission of ESY services denied Student a FAPE. I find that the parent made a *prima facie* showing that the unchanged hours of special education services and the omission of ESY services made the March 4, 2022 IEP not appropriate for Student. Therefore the burden of persuasion as to the appropriateness of the March 4, 2022 IEP falls on DCPS.

As U.S. District Judge Colleen Kollar-Kotelly explained in *E.W.-G. v. District of Columbia*, No. CV 20-2806 (CKK), 2023 WL 2598680 (D.D.C. Mar. 22, 2023) ,

To comply with the substantive components of the IDEA, an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017). The adequacy of an IEP necessarily turns on a fact-intensive assessment of a child's “unique needs,” as “a focus on the particular child is at the core of the IDEA.” *Id.* at 400. . . . Accordingly, the hearing officer must expressly evaluate whether the specific IEP under consideration is “reasonably calculated” to achieve that goal. *Id.* at 399-400. . . . Ultimately, “[t]he key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP it offered was reasonably calculated to enable the specific student's progress.” *Z.B. v. District of Columbia*, 888 F.3d 515, 524 (D.C. Cir. 2018) . . . In order to be “reasonably calculated,” the IEP must “provid[e] personalized instruction with sufficient support service to permit the child to benefit educationally from that instruction.” *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005).

E.W.-G. at *5. School authorities must be able to offer a “cogent and responsive explanation” for their decisions that shows the IEP was reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. *See Endrew F.* at 404.

When Student was evaluated by an independent psychologist in winter 2020, Student’s cognitive abilities were found to be in the Borderline range of functioning. Student’s academic achievement scores in all areas reflected Kindergarten achievement level or below, commensurate with Student’s low cognitive functioning. Student’s Broad Reading cluster score was in the Very Low Range and placed him/her at the below Kindergarten grade reading level. City School’s initial May 6, 2020 IEP provided Student 10 hours per week of special education services. At the March 30, 2021 annual IEP review, although Student was still at the Kindergarten level academically, the IEP team did not increase Student’s special education services. The appropriateness of those IEP team decisions is not before this Hearing Officer.

When the City School IEP team met to review Student’s IEP on March 4, 2022, the IEP team reported that Student continued to demonstrate a weakness in Academic Fluency, which was in the Low Range and still ranked at the beginning Kindergarten grade level. Although Student had made minimal academic progress since the initial IEP was developed May 2020, the March 4, 2022 IEP team decided to continue Student’s Specialized Instruction Services unchanged, at 10 hours per week, outside general education. Petitioner’s expert, Educational Advocate, opined in her hearing

testimony that by the date of the March 4, 2022 IEP review, Student's special education services should have been increased to especially focus on improving reading skills.

This opinion was not countered by DCPS' expert witness. When a DCPS school psychologist reevaluated the child in spring 2023, Student's overall academic functioning still hovered around the Kindergarten level.

I find that DCPS has not offered "cogent and responsive explanation" for the decision of the March 4, 2022 IEP team to maintain Student's Specialized Instruction Services at 10 hours per week even though Student had achieved slight academic progress between May 2020 when his/her initial IEP was developed and the March 4, 2022 annual IEP meeting. *See D.C. Int'l Charter Sch. v. Lemus*, No. 21-CV-0223 (RCL), 2023 WL 2645985, at *2 (D.D.C. Mar. 27, 2023) ("While a court reviewing an IEP's adequacy must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal, a school fails its obligations under the IDEA when the student is unable to achieve progress." *Id.* (quotations and internal citations omitted.)) I conclude that DCPS has not met its burden of persuasion that the City School IEP team's decision to provide for only 10 hours per week of Specialized Instruction Services in Student's March 4, 2022 IEP was appropriate.

Petitioner contends that the March 4, 2022 IEP was also inappropriate because it did not provide for ESY services for Student. Petitioner's expert, Educational Consultant, opined that the IEP should have provided for ESY services because that would have enabled Student to make progress with his/her reading skills. The expert

misunderstands the criteria for ESY. As the Court explained in *Shipley v. District of Columbia*, No. CV 18-2550 (CRC/RMM), 2020 WL 13669941 (D.D.C. Mar. 6, 2020), report and recommendation adopted in part, No. 18CV2550CRCRMM, 2020 WL 13669870 (D.D.C. Mar. 24, 2020), ESY is not a remedial “catch-up” program for students who are behind grade level. ESY is limited to students at risk of significant regression, or loss of ability. *Id.* at *17. *See, also, S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56 (D.D.C. 2008) (“ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *Id.* at 68-69, adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)).

The City School IEP team determined in March 2022 that there was no indication that Student’s critical skills would be jeopardized by a break in service or a likelihood of significant regression of any critical skills. This determination was not rebutted by Petitioner at the due process hearing. I conclude that DCPS has met its burden of persuasion that the City School IEP team’s decision not to include ESY services in the March 4, 2022 IEP was appropriate.

In summary, I find that DCPS denied Student a FAPE by providing for only 10 hours per week of Specialized Instruction in the March 4, 2022 IEP. The IEP team’s decision that Student did not require ESY services was not a denial of FAPE.

Remedy

In this decision, I have determined that Student was denied a FAPE by City School's failure to fully implement Student's Specialized Instruction Services in the 2021-2022 school year and by the decision of the March 4, 2022 IEP team to provide Student only 10 hours per week of Specialized Instruction Services. For relief, the parent requested in her due process complaint that the hearing officer order DCPS to increase specialized instruction services on Student's IEP and award Student compensatory education. In her hearing testimony, Petitioner's expert, Educational Advocate, recommended that Student be awarded 150 hours of tutoring as compensatory education and that DCPS be ordered to place Student in a full-time, self-contained, program for children who need intensive specialized instruction.

With regard to compensatory education, when a hearing officer finds a denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education 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, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Educational Advocate's recommendation of 150 hours of academic tutoring was proposed as compensatory education for both DCPS' failure to fully implement Student's special education services in the 2021-2022 school year and its failure to

provide an appropriate IEP on March 4, 2022. While DCPS disputed that Student had been denied a FAPE, the District did not directly rebut this compensatory education recommendation. I find that Petitioner has established that Student should be awarded 150 hours of academic tutoring as compensatory education for the denials of FAPE in this case.

With regard to Educational Advocate's opinion on Student's educational placement, the D.C. Circuit emphasized in *Z. B.*, *supra*, "to 'the maximum extent appropriate,' public schools provide students with disabilities an education in the 'least restrictive environment' possible." *Z.B.*, 888 F.3d at 528, citing 20 U.S.C. § 1412(a)(5)(A). The evidence before this hearing officer does not suffice to adopt the expert's recommendation that Student's least restrictive environment is a full-time self-contained classroom.

For her spring 2023 psychological reevaluation of Student, School Psychologist conducted a classroom observation of student in the City School general education classroom. School Psychologist reported that Student was working independently and was able to ask for assistance; that Student was only slightly distracted when the teacher reminded students of behavioral expectations and was able to return to his/her independent task without assistance; that Student did not present with any behavioral difficulties and he/she was able to remain focused for the duration of the observation.

Unlike School Psychologist, Educational Advocate did not observe Student in the classroom and appears to have only "met" Student virtually. In light of School

Psychologist's report that with support from the classroom teacher, Student was able to work independently in the general education setting, I conclude that there is not enough data to support Educational Advocate's position that Student's least restrictive environment is a full-time self-contained classroom.

After Petitioner filed her request for a due process hearing in December 2022, on February 14, 2023, Student's IEP team increased Student's Specialized Instruction Services from 10 hours to 12.5 hours per week, outside general education. Student's IEP team met again on May 2, 2023 to review the psychological reevaluation. At the May 2023 meeting, Student's specialized instruction hours were left unchanged at 12.5 hours per week.²

DCPS' recent psychological evaluation shows that after three years of special education services, Student's overall academic functioning still hovered around the Kindergarten level. At this point in time, more data is needed to determine an appropriate educational placement for Student. Pursuant to 33 C.F.R. § 300.502(d), I will order DCPS, to fund an independent psycho-educational reevaluation of Student. The independent evaluator shall be tasked with reevaluating Student with appropriate instruments and making recommendations for Student's programming and educational placement, for consideration by Student's IEP team, for the 2023-2024 school year.

² While the appropriateness of the May 2, 2023 IEP is not before this hearing officer, based on the evidence at the due process hearing, it is not evident that 12.4 hours per week of Specialized Instruction Services will suffice to meet Student's present individualized needs.

DCPS shall have responsibility for selecting the independent evaluator after consultation with the parent and her representatives.

ORDER

1. As compensatory education for the denials of FAPE found in this decision, the hearing officer orders DCPS to promptly issue funding authorization to the parent to obtain 150 hours of one-on-one academic tutoring for Student by a qualified special educator. DCPS shall fund transportation expenses for the tutoring session in accordance with the Office of the State Superintendent of Education (OSSE) regulations and guidelines;
2. Subject to the parent's providing written consent, within 20 business days of the date of this decision, DCPS shall engage a qualified independent psychologist to conduct a psychoeducational reevaluation of Student with the charge to make recommendations for Student's ongoing educational programming and placement for consideration by Student's IEP team. At the discretion of the independent evaluator, the evaluator may rely upon previously conducted tests to assess Student's intellectual, educational and emotional functioning or may administer new assessments. DCPS shall ensure that the evaluation is timely completed to allow Student's IEP team to review the evaluation and revise Student's IEP as appropriate in time for the start of the 2023-2024 school year. DCPS shall consult with the parent and her representatives on the selection of an appropriate evaluator and
3. All other relief requested by the Petitioner herein is denied.

SO ORDERED.

Date: May 25, 2023

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

NOTICE OF RIGHT TO APPEAL

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

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