

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 29, 2017

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: November 28, 2017
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2017-0232
)	
DISTRICT OF COLUMBIA)	Hearing Dates: November 13-14, 2017
PUBLIC SCHOOLS and)	
)	Office of Dispute Resolution, Room 2006
D.C. OFFICE OF THE STATE)	Washington, D.C.
SUPERINTENDENT OF)	
EDUCATION,)	
)	
Respondents.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 25, 2017, named District of Columbia Public Schools (DCPS) and the D.C. Office of the State Superintendent of Education (OSSE) as respondents. The undersigned hearing officer was appointed on August 28, 2017. On

¹ Personal identification information is provided in Appendix A.

August 31, 2017, OSSE, by counsel, filed a motion to dismiss for Petitioner's failure to serve the agency with the due process complaint. On September 5, 2017, OSSE withdrew its motion. Petitioner (GUARDIAN) and respondents met for a resolution session on September 19, 2017, which did not result in an agreement. On September 26, 2017, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The final decision in this case was originally due by November 8, 2017. Petitioner was not available on the hearing officer's first available dates to convene the due process hearing, October 11 and 13, 2017. The next dates available to the hearing officer and counsel to schedule a 2-day due process hearing were November 13 and 14, 2017. In order to hold the hearing on those dates and to allow time to prepare my written decision, I ordered an extension of the final decision due date from November 8, 2017 to November 28, 2017.

The due process hearing was convened before this Impartial Hearing Officer on November 13 and 14, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Respondent OSSE was represented by OSSE's Counsel.

Counsel for the respective parties made opening statements and closing arguments. Guardian testified and called as additional witnesses SPECIAL EDUCATION TEACHER 1, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses SPEECH-LANGUAGE PATHOLOGIST and

SPECIAL EDUCATION TEACHER 2. OSSE called OSSE COMMUNICATIONS SPECIALIST as its only witness. Petitioner's Exhibits P-1 through P-60 were admitted into evidence without objection, except for Exhibit P-40 to which DCPS' objection was sustained. DCPS' Exhibits R-1 through R-35 were admitted into evidence without objection. OSSE's Exhibits OSSE-1 through OSSE-5 were admitted into evidence without objection, except for Exhibit OSSE-3 admitted over Petitioner's objection. At my request, after the hearing, Petitioner and OSSE submitted clarifications of their analyses of OSSE's school transportation logs for Student. There was no request to file post-hearing briefs.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the September 26, 2017

Prehearing Order:

- Whether DCPS failed to comprehensively evaluate or reevaluate Student in October 2015 by failing to conduct a Comprehensive Psychological evaluation, an Adaptive assessment, a Vocational evaluation, and Assistive Technology assessment, an Occupational Therapy evaluation, a Physical Therapy evaluation and/or an Audiological evaluation;
- Whether DCPS failed to provide Student with appropriate Individualized Educational Programs (IEPs) on or about October 5, 2015, October 5, 2016 or April 25, 2017 in that 1) these IEPs were not based on comprehensive evaluations; 2) many of the academic goals were insufficient and unattainable and lacked appropriate baseline data; 3) the IEPs lacked goals in the area of Written Expression; 4) the 2016 and 2017 IEPs reduced instructional hours and related service hours without justification and 5) the 2017 IEP fails to include ESY;
- Whether DCPS failed to afford the parent access to all of Student's education

records upon receipt of the parent's written request;

- Whether in the 2015-2016 school year, DCPS failed to fully implement Student's IEP and/or provide Student with the Least Restrictive Environment (LRE) or exposure to nondisabled peers by physically segregating Student's class within City School 1 and by restricting Student's access to non-disabled peers;
- Whether DCPS and/or OSSE denied Student a FAPE by failing to ensure that transportation was provided in a timely fashion throughout the 2016-2017 school year.

For relief, Petitioner requests that the hearing officer order DCPS to immediately increase Student's hours of specialized instruction back to not less than 25 hours per week, outside the general education setting, and provide 120 minutes per month of speech and language services; order DCPS or OSSE to provide timely and consistent school transportation; and order DCPS to conduct or fund the following assessments for Student: a Comprehensive Psychological evaluation, an Adaptive assessment, an Assistive Technology assessment, an Occupational Therapy evaluation and a Vocational assessment. (In closing argument, Petitioner's Counsel withdrew the request for an Audiological evaluation.) In addition, Petitioner seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

DCPS' Counsel represented in his opening statement that prior to the due process hearing, DCPS had agreed to reevaluate Student with psychological, speech and language and vocational assessments.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this hearing officer's Findings of Fact are as follows:

1. Student resides with Guardian in the District of Columbia. Guardian is

Student's grandmother and Student has resided with her since birth. Testimony of Guardian.

2. Student was born with Down Syndrome. Student is eligible for special education and related services as a student with an Intellectual Disability. Testimony of Guardian, Exhibit R-25.

3. Student has been in special education for as long as the Guardian can remember. Testimony of Guardian. Student's prior IEPs included Occupational Therapy (OT) related services. Student was exited out of OT services in October 2013, when it was determined that Student had achieved maximum potential in the areas of fine motor, visual motor, and visual perception skills. Exhibit R-1.

4. Student has attended CITY SCHOOL 2, a DCPS public school, since the 2016-2017 school year. Previously Student attended CITY SCHOOL 1. At City School 2, Student is placed in the Independence & Learning Support (ILS) Program classroom. Testimony of Guardian, Testimony of Special Education Teacher 2.

5. Student's most recent triennial eligibility reevaluation was completed on October 8, 2015 when Student attended City School 1. Student was determined to have a Severe Intellectual Disability. The multidisciplinary team's (MDT) disability determination was based on Student's performance at school, teacher observations, the Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH) administered in September 2015, an October 2015 speech and language reevaluation and a parent interview. Exhibit R-7. In 2015 (and at present) there was no psychological evaluation of Student or recent assessment of Student's cognitive abilities on file. Exhibit P-9, Representation of Counsel.

6. Student's scores on the WJ-IV ACH, administered in September 2015, were all Extremely Low, pre-kindergarten level. Exhibit P-9.

7. Student's October 8, 2015 IEP at City School 1 identified Mathematics, Reading, Adaptive/Daily Living Skills and Communication/Speech and Language as areas of concern. The IEP provided for full time, 25 hours per week, Specialized Instruction, outside general education, and 120 minutes per month of Speech-Language Pathology services. Exhibit P-3.

8. At City School 1, Student was placed in a self-contained special education classroom of 10 students. At City School 1, Student had very little interaction with nondisabled peers. The students in Student's classroom sat together at a separate table in the school cafeteria. The students were not allowed access to the school gym or exercise room. Testimony of Special Education Teacher 1. Student was able to learn at City School 1 because Student had excellent teachers. Testimony of Guardian.

9. Student transferred to City School 2 at the beginning of the 2016-2017 school year. Student's IEP was reviewed at City School 2 on October 6, 2016. Student's Specialized Instruction Services were reduced to 20 hours per week, which allowed Student to participate for one hour per day in Specials classes with nondisabled peers. Testimony of Special Education Teacher 2. Student's Speech-Language Pathology services were reduced in the IEP from 120 minutes per month to 90 minutes per month. Exhibit P-2.

10. Student has been in Special Education Teacher 2's class at City School 2 for the last two school years. There are 8 students in Student's class, taught by Special Education Teacher 2 and an instructional aide. At City School 2, the special education

teachers rotate among the special education classrooms. Special Education Teacher 2 teaches Math and Science. Other teachers teach English/History and Life Skills.

Testimony of Special Education Teacher 2.

11. Students in Student's ILS class attend one "Specials" class per day – music, art or physical education – with nondisabled peers. An instructional aide accompanies the special education students to the Specials classes. Student is doing as well as other students in the Specials classes. Student is behaving and doing the work, and there has been no negative feedback. Testimony of Special Education Teacher 2.

12. On April 25, 2017, City School 2 convened an IEP team meeting to review Student's IEP. The meeting was held prior to the annual review date in order to get Student on a springtime IEP annual review schedule. Student's special education and related services were left unchanged from the October 6, 2016 IEP. At the IEP meeting, Special Education Teacher 2 offered Extended School Year (ESY) services for Student. Guardian declined ESY services because the family travels during those weeks.

Testimony of Special Education Teacher 2, Testimony of Guardian, Exhibit P-1.

13. Student's speech is limited, but Student is able to communicate what Student wants. Student is able to read short words, but not fluently. In a class period, Student needs redirection 4-5 times. Special Education Teacher 2 keeps instructions simple for Student and repeats them as needed. Testimony of Special Education Teacher 2.

14. Student's IEP provides that Student requires school transportation services. OSSE provides school transportation for eligible DCPS special education students. In the 2016-2017 school year, the OSSE driver was often late picking Student

up in the morning, requiring the Guardian to find another way to get Student to school. School transportation has been worse in the current school year. Testimony of Guardian.

15. In the 181 school days of the 2016-2017 school year, Student was picked up late almost 35% of the time, but still arrived on time for school over 83% of the time. Due to the late arrivals, Student missed some 22 hours of school time over the year, including some 10 hours of instruction time (when Student arrived after the 9:00 class start time).² Testimony of OSSE Communications Specialist, Testimony of Special Education Teacher 2, Exhibit OSSE-2.

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 DCPS, the District 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

² From the data in OSSE Exhibit 2, I calculated the total number of minutes, after the 9:00 a.m. start time for the first class, missed by Student due to late bus service. Student was scheduled to arrive at school by 8:45 a.m. for breakfast. Instruction time started at 9:00 a.m. Testimony of Special Education Teacher 2.

before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A. Triennial Reevaluation

Did DCPS fail to comprehensively evaluate or reevaluate Student in October 2015 by failing to conduct a Comprehensive Psychological evaluation, an Adaptive assessment, a Vocational evaluation, an Assistive Technology assessment, an Occupational Therapy evaluation, a Physical Therapy evaluation and/or an Audiological evaluation?

Guardian first alleges that DCPS violated its reevaluation obligations under the IDEA by not ensuring that Student was comprehensively reevaluated for special education eligibility and educational needs in the October 2015 triennial reevaluation. DCPS responds that the October 2015 triennial reevaluation was comprehensive, in that the assessment included teachers' input, in addition to a Woodcock-Johnson academic achievement assessment, a speech and language evaluation and data from the Brigance Comprehensive Inventory of Basic Skills II (CBIS II). The parent has the burden of persuasion on this issue.

The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In *James v. District of Columbia*, 194 F. Supp. 3d 131 (D.D.C. 2016), U.S. District Judge Amit Mehta pronounced concerning reevaluations,

The IDEA . . . sets out detailed requirements for a reevaluation. 20 U.S.C. § 1414(b), (c). As pertinent here, a reevaluation requires the local education agency to review not only existing information about the child, *id.* § 1414(c), but also to conduct additional testing to determine the child's abilities and needs Among other testing requirements, the local education agency must "use technically sound instruments that may assess the relative contribution of cognitive and behavior factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C). In other words, a

reevaluation requires a new round of tests and analysis to evaluate the child. . . .

The failure to conduct a new comprehensive psychological evaluation of [the student] means that [the student's] IEP might not be sufficiently tailored to [the student's] special and evolving needs. This potentially compromises the effectiveness of the IDEA's protections as they pertain to [the student].

James, 194 F.Supp.3rd at 143-144.

Petitioner's expert, Educational Advocate 1, opined that the October 2015 reevaluation was not comprehensive because it lacked an assessment of Student's cognitive skills, adaptive functioning and social-emotional functioning. I agree. For reasons not explained at the due process hearing, when Student was reevaluated in October 2015, there was no psychological evaluation of Student on file and DCPS did not conduct a new psychological evaluation. Consequently, the IEP team did not have formal cognitive data for Student, an assessment of Student's adaptive skills or an updated behavior assessment.

The October 2015 multidisciplinary team (MDT) determined that Student had a Severe Intellectual Disability. DCPS' criteria for a Severe Intellectual Disability include a deficit in adaptive behavior and impaired intellectual functioning based upon a tested IQ of 25 to 40. DCPS' failure to conduct a comprehensive psychological evaluation of Student meant that there were no norm-based criteria for determining that Student had a Severe Intellectual Disability and that the IEP team lacked appropriate adaptive and behavioral data to tailor Student's IEP to the student's "special and evolving needs." *See James, supra*.

Petitioner also contends that the October 2015 triennial evaluations was inadequate for lack of a Vocational evaluation, an Assistive Technology (AT) assessment,

an Occupational Therapy (OT) evaluation, a Physical Therapy (PT) evaluation and an Audiological evaluation. I find that the parent did not meet her burden of persuasion that the 2015 reevaluation was inadequate for want of these additional assessments. Decisions regarding the areas to be assessed are determined by the suspected needs of the child. See Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006).

For Student's vocational needs, a Brigance Transition Inventory was conducted on September 15, 2015 (Exhibit P-3). Regarding the need for an AT assessment, Petitioner's witness, Special Education Teacher 1, testified that in the 2014-2015 and 2015-2016 school years, Student did not have severe deficits in speech and she opined that Student did not need an assistive technology communication device because Student was able to speak. Speech-Language Pathologist, who currently provides services to Student, testified that Student is intelligible and that voice and fluency are not areas of concern. With regard to OT, Student was exited from IEP OT services in October 2013 when it was determined that Student had achieved maximum potential in the areas of fine motor, visual motor, and visual perception skills. Petitioner adduced no evidence of a change in Student's OT needs which would have warranted a reassessment. As to the need for a PT assessment, Special Education Teacher 1 testified that when she taught Student, she did not believe that Student needed adaptive physical education. Special Education Teacher 2 testified that Student currently has no mobility issues at school. In the October 2015 Speech and Language Reevaluation, it was reported that Student passed an audiological screening in September 2009. At the due process hearing, Petitioner withdrew her request for an audiological assessment of

Student.

In sum, I find that the October 2015 triennial reevaluation of Student was not sufficiently comprehensive because it did not include a comprehensive psychological evaluation and an assessment of Student's adaptive behavior. Based on the testimony of Special Education Teacher 1 and Special Education Teacher 2, which I found credible, and the hearing exhibits, I conclude that Petitioner has not met her burden of persuasion that Student had suspected needs in the areas of vocational services, AT, OT, PT or audiology that required additional assessments as part of the October 2015 triennial reevaluation.

DCPS' failure to ensure that Student was comprehensively reevaluated with appropriate psychological and adaptive functioning evaluations was a procedural violation of the IDEA. *See, e.g. G.G. ex rel. Gersten v. District of Columbia., supra*, 924 F. Supp. 2d at 280 (District's failure to adequately evaluate student was a procedural error that effectively prevented development of an IEP reasonably calculated to provide student with a meaningful educational benefit.) Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

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

34 CFR § 300.513(a)(2). In this case, I conclude that Petitioner has met her burden of persuasion that DCPS' failure to ensure that Student's October 2015 triennial evaluation included a comprehensive psychological evaluation and adaptive assessment

significantly impeded the parent's opportunity to participate in the decision-making process regarding Student's IEP and educational placement needs. Student was therefore denied a FAPE.

B. Interaction with Nondisabled Peers at City School 1

In the 2015-2016 school year, did DCPS fail to fully implement Student's IEP and/or provide Student with the Least Restrictive Environment (LRE) or exposure to nondisabled peers by physically segregating Student's class within City School 1 and by restricting Student's access to non-disabled peers?

In the 2015-2016 school year at City School 1, in order to provide more classroom space, Student's self-contained classroom was moved downstairs from the main office floor to the ground floor. Special Education Teacher 1 testified credibly that this move limited the special education students' contact with their nondisabled peers. In addition, students in the special education class were not allowed access to the school gym or exercise room. At lunch, these students sat together and were not allowed to eat at tables with their nondisabled peers. Petitioner contends these "segregation" practices violated the IDEA's least restrictive environment (LRE) requirement and the requirements of Student's IEP. Petitioner has the burden of persuasion on this issue.

The IDEA requires that students with disabilities be placed in the least restrictive environment so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). Every IEP must include an explanation of the extent, if any, to which the student will not participate with nondisabled students in extracurricular and other nonacademic activities such as lunch and recess. *See* 34 CFR § 300.320(a). Nothing in Student's October 8, 2015 IEP suggests that at City School 1, Student should not have participated with nondisabled

peers at lunch, gym or other nonacademic activities. Student's current teacher, Special Education Teacher 2, opined that Student benefits from the modeling and socialization aspects of interaction with nondisabled peers. I conclude that limiting Student's interaction with nondisabled peers at City School 1 at lunch, gym and other nonacademic activities violated the IDEA's LRE mandate.

Even though I find that separating Student from nondisabled peers for these nonacademic activities at City School 1 violated the IDEA's LRE requirement, there was no showing that Student was harmed. Guardian testified that Student was able to learn anyway because Student had an excellent special education teacher. Since transferring to City School 2 at the beginning of the 2016-2017 school year, Student has apparently been able to interact with nondisabled peers. Notably, for one class period every day, Student attends "Specials" classes with typically developing students. I conclude that in this proceeding there is no relief which can be granted for City School 1's failure in the 2015-2016 school year to place Student with nondisabled peers to the maximum extent appropriate.

C. Appropriateness of IEPs

Did DCPS fail to provide Student with appropriate IEPs on or about October 5, 2015; October 5, 2016 or April 25, 2017 in that 1) these IEPs were not based on comprehensive evaluations; 2) many of the academic goals were insufficient and unattainable and lacked appropriate baseline data; 3) the IEPs lacked goals in the area of Written Expression; 4) the 2016 and 2017 IEPs reduced instructional hours and related service hours without justification and 5) the 2017 IEP fails to include ESY?

Petitioner asserts that IEPs developed for Student in October 2015 at City School 1 and in October 2016 and April 2017 at City School 2 were inadequate for Student. DCPS responds that the IEPs were appropriate at the time they were developed. In

Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

DCPS holds the burden of persuasion on the appropriateness of these IEPs.

Having concluded that Student's October 2015 triennial reevaluation was not a full and comprehensive evaluation because there were no current or past psychological evaluations, no cognitive data and no adaptive functioning data to inform Student's

MDT/IEP teams, it follows that none of DCPS' IEPs developed for Student subsequent to the October 2015 triennial was individually tailored to meet Student's "special and evolving needs." *See James, supra.*

With regard to the specific shortcomings of the three IEPs, Petitioner contends first that the IEP annual goals were not appropriate for Student. The IDEA requires that IEPs include, among other things: . . . 'a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum . . . [and] meet each of the child's other education needs that result from the child's disability' . . . [and] 'a description of how the child's progress toward meeting the[se] annual goals . . . will be measured.'" *N.S. ex rel. Stein v. District of Columbia*, 709 F. Supp. 2d 57, 60 (D.D.C. 2010), citing 20 U.S.C. § 1414(d)(1)(A)(i).

Petitioner's expert, Educational Advocate 2, faulted all three IEPs for the omission of Written Expression goals for Student. DCPS argued that the Reading goals in Student's IEPs included a goal to "identify, read, write and spell at least 2 words correctly every week" which addressed writing. However, Special Education Teacher 1, who taught Student at City School 1, testified that Student would be capable of writing simple sentences and that Student should have had an IEP goal to write words and simple sentences. I find that DCPS has not shown that the three IEPs at issue were appropriately ambitious for Student without Written Expression annual goals. *See Andrew F., supra.*

Educational Advocate 2 also opined that the annual goals and baselines in these

IEPs were inappropriate because many were carried over from prior IEPs and specifically that the academic goals in the October 2015 IEP were repeated from the 2014 IEP. However, the 2014 IEP was not offered into evidence, except for the signature page (Exhibit P-4), and I am not able to assess this claim. Special Education Teacher 2 opined that the goals were appropriate when the IEPs were developed based on Student's deficits, but she conceded that some of the IEP baselines had not been updated when the IEPs were reviewed. Inasmuch as Student requires updated evaluations and Student's IEP must be reviewed and revised based on the additional information, I will order DCPS to ensure that the present levels of performance and annual goals in Student's IEP are also revised, as appropriate.

Petitioner further alleges that the City School 2 IEP team inappropriately reduced Student's Specialized Instruction from 25 to 20 hours per week in the October 6, 2016 IEP. This change was made in order for Student to attend Specials classes, for one hour per day, with nondisabled peers. Petitioner's expert, Educational Advocate 2, opined that Student is not able to get anything from being in a classroom with nondisabled peers. However, the IDEA requires that students with disabilities be educated with their nondisabled peers to maximum extent appropriate. *See, e.g., DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989) ("Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act.") Both Special Education Teacher 1 and Special Education Teacher 2 opined credibly that Student benefits from the opportunity to interact with nondisabled peers at school. Special Education Teacher 2

testified that Student is doing well in Specials classes with nondisabled peers. I find that DCPS has met its burden of persuasion that this change was appropriate for Student.

Educational Advocate 2 also opined that Student was harmed by the decision of Student's October 6, 2016 IEP team to reduce Student's Speech-Language Pathology related services from 120 minutes to 90 minutes per month. Speech-Language Pathologist explained that she recommended this reduction because Student was already doing very well on the ability to label new objects and terms (Communication/ Speech and Language Annual Goal 3). Speech-Language Pathologist opined that the Speech-Language Pathology services in the October 6, 2016 and the April 25, 2017 IEPs were appropriate for Student. Speech-Language Pathologist is Student's Speech and Language services provider. Petitioner did call a Speech-Language expert. I find Speech-Language Pathologist's opinion as to Student's Speech and Language needs more credible than Educational Advocate 2's contrary opinion.

I conclude that DCPS has met its burden of persuasion that the decisions of Student's October 6, 2016 IEP team, confirmed by the April 15, 2017 IEP team, to reduce Student's Specialized Instruction time from 25 to 20 hours per week and to reduce Speech-Language Pathology from 120 minutes to 90 minutes per month were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Andrew F., supra.*

Lastly, Petitioner alleged in her complaint that the April 25, 2017 IEP inappropriately eliminated Student's Extended School Year (ESY) services. However, Special Education Teacher 2 explained that ESY services were offered at the IEP meeting. However, the Guardian declined ESY services because the family travels out of

the District during the summer. In her testimony, Guardian did not recall discussing ESY services at the IEP meeting, but confirmed that she takes Student on extended RV road trips during the DCPS summer break. I find that in light of the conflict with the family's summer travel schedule, City School 2 did not deny Student a FAPE by not providing for ESY in April 25, 2017 IEP.

D. School Transportation

Did DCPS and/or OSSE deny Student a FAPE by failing to ensure that transportation was provided in a timely fashion throughout the 2016-2017 school year?

Student's IEPs provide that Student requires special education transportation services. OSSE's Division of Student Transportation is responsible for transporting eligible District special needs students to school each day. In the 2016-2017 school year, Student was scheduled to arrive at City School 1 by 8:45 a.m. for breakfast. First period started at 9:00 a.m. Throughout the school year, OSSE was frequently late picking Student up for school. Due to the late pick-ups, on some 17 days over the school year, Student arrived at school after 9:00 a.m., arriving too late for school breakfast and missing more than 10 hours of instruction time for the school year. Petitioner contends that this was a failure to implement Student's IEP transportation services requirement. OSSE maintains that the harm was *de minimis*.

In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the court analyzed when a failure to fully implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party "must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) To meet this standard, a moving party need not prove that the student suffered "educational harm"

because “the Court has no way of knowing how much more progress” a student might have made in the absence of a failure to implement. *Wilson v. Dist. of Columbia*, 770 F.Supp.2d 270, 275, 276 n. 2 (D.D.C.2011) (emphasis original). 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.” *Wilson*, 770 F.Supp.2d at 275. For example, in *Sumter County School District 17 v. Heffernan*, the court held that a 33% gap of 60 minutes per day between the required and provided hours of applied behavioral analysis therapy was substantial. 642 F.3d 478, 486 (4th Cir.2011). On the other hand, in *Savoy v. District of Columbia*, the court held that a 3% gap of 10 minutes per day between the required and provided hours of specialized instruction was not substantial. 844 F.Supp.2d 23, 34–35 (D.D.C.2012).

Beckwith, supra, 208 F. Supp. 3d at 49.

While missing 10 hours of instruction time over a 180-day school year due to unreliable school transportation may, on first impression, appear to be *de minimis* harm, OSSE concedes that Student was picked up late over 35 percent of the time. On numerous days, the bus was over 30 minutes late. Guardian explained that the unreliable transportation services created a real hardship because it upset Student’s daily routine for going to school and, not knowing when – or if – the late bus would arrive, Guardian often had to arrange alternative school transportation. I find that in these circumstances, Petitioner has demonstrated that OSSE’s failure over the 2016-2017 school year to provide on-time school transportation services on a regular basis was a failure to implement a significant provision of Student’s IEPs and constituted a denial of FAPE.

E. Education Records

Did DCPS fail to afford the parent access to all of Student’s education records upon receipt of the parent’s written request?

On June 27, 2017, Petitioner’s Counsel wrote the principal at City School 2 to request copies of specified education records pertaining to Student in DCPS’ possession.

The records requested included attendance records, progress reports and report cards, standardized test scores, class schedules, IEPs, evaluations and assessments, related services provider logs, letters of understanding and disciplinary records. *See Exhibit P-34.*

The IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. *See 34 CFR § 300.501(a); Friendship Edison Public Charter School Collegiate Campus v. Murphy 2006 WL 2711524, 4 (D.D.C.2006).* DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. *See 34 CFR § 300.613(a).* At the due process hearing, Petitioner did not identify what, if any, education records for Student, maintained by DCPS, were not made available to Petitioner's Counsel to inspect and review. Petitioner did not meet her burden of persuasion on this issue.

Remedy

For relief in this case, Petitioner requested that the hearing officer order DCPS to restore Student's Specialized Instruction and Speech-Language Pathology services to the levels in Student's October 8, 2015 IEP. In this decision, I determined that DCPS met its burden of persuasion that the Special Education and Speech-Language Pathology related services provided in Student's October 6, 2016 and April 25, 2017 IEPs were reasonably calculated to enable Student to make progress in light of Student's circumstances. Therefore, I decline to order an increase in Specialized Instruction or Speech-Language Pathology services. Petitioner also requested that I order DCPS or

OSSE to provide timely and consistent school transportation to Student. OSSE is responsible for providing Student's school transportation and I will order OSSE to use reasonable diligence to ensure that the service is provided on a reliable and timely basis.

Petitioner also requested that I order DCPS to conduct or fund assessments of Student, including a comprehensive psychological evaluation, an adaptive assessment, an AT assessment, an OT evaluation, a PT assessment and a Vocational assessment. I have found in this decision that Petitioner had not met her burden of persuasion that Student requires an AT, PT or an OT assessment. Prior to the due process hearing, DCPS agreed to reevaluate Student with a comprehensive psychological evaluation, and Speech and Language evaluation and a Vocational assessment. The evidence also established that Student needs an adaptive functioning assessment. As explained below, I find that an Independent Education Evaluation (IEE) assessment is warranted to determine what, if any, harm to Student resulted from DCPS' failure to complete a full comprehensive psychological as part of the October 2015 triennial evaluation. Student's psychological reevaluation and adaptive functioning assessment should be part of this IEE assessment.

Petitioner requests a compensatory education award to compensate Student for the denials of FAPE in this case. "If a hearing officer concludes that the school district denied a student a FAPE, he has 'broad discretion to fashion an appropriate remedy,' which may include compensatory education. *See B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). The compensatory education inquiry requires 'figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.' *Id.* at 799." *Butler v. District of Columbia*, Case No.

16-cv-01033 (D.D.C. Aug. 14, 2017).

The principle denial of FAPE in this case was the failure of DCPS to conduct a full, comprehensive evaluation of Student as part of the October 2015 triennial reevaluation. Since the triennial, Student's IEP teams have not had formal data on Student's cognitive skills, adaptive functioning or social-emotional functioning to equip the teams to develop appropriate IEPs "to set out a plan for pursuing [Student's] academic and functional advancement." *See Andrew F., supra*. On the current record, "the [hearing officer] has no way of knowing how much more progress" Student might have made had there been a full, comprehensive evaluation. *See Wilson, supra*.

In *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), in the context of compensatory education awards, the D.C. Circuit encouraged hearing officers to order further assessments if needed to discern a student's needs. ("Assessments sufficient to discern B.D.'s needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them, including, if appropriate on the updated record, assessment at a residential treatment facility." *Id.* at 800.) In the present case, I conclude that the appropriate course at this juncture is to order DCPS to obtain an independent educational evaluation (IEE) assessment of Student to include a full, comprehensive psychological evaluation with an adaptive functioning assessment. The IEE assessor shall further be charged with addressing (1) what if any changes to Student's IEP services and educational placement would have been appropriate if Student's IEPs, after October 2015, had been based upon a full comprehensive psychological evaluation and if the IEPs had included Written Expression goals – and

what position a student would now be in with those IEP provisions and (2) what is needed now to get Student to that position. *See Butler, supra.*

In addition, Student is entitled to an award of compensatory education for missed school time due to OSSE's failure to ensure that Student's school transportation was provided on a timely basis. In *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C.Cir.2005), the District of Columbia Court of Appeals rejected "mechanical hour-counting," and emphasized that a compensatory education award must be designed to meet the student's unique needs. *Reid*, 401 F.3d at 524. However an award created with the aid of a formula is not *per se* invalid, so long as the evidence provides a "sufficient basis for an individually-tailored assessment." *See Stanton ex rel. K.T. v. District of Columbia*, 680 F.Supp.2d 201, 206 -207 (D.D.C.2010).

Due to the late school bus pick-ups, Student missed over 10 hours of instruction in the 2016-2017 school year. In addition, Student was often not delivered to school in time for school breakfast. In her testimony, Educational Advocate 2 recommended that Student receive some 1.5 hours of private tutoring for each hour of missed instruction time due to late transportation services.³ A parent is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012). I find that this proposal is reasonable and I will order OSSE to fund 15 hours of compensatory education tutoring as compensation to Student for the agency's failure to ensure timely school transportation for Student in the 2016-2017 school year.

³ I decline to adopt the rest of this witness' compensatory education recommendations which do not correspond to the denials of FAPE which I have found in this decision.

It appears from the *B.D.* decision that the D.C. Circuit anticipated that the hearing officer or court would keep the evidentiary record open until further compensatory education assessments are completed. However, because my Hearing Officer Determination is due by November 28, 2017, it is not permissible to defer my final decision in this case until after the IEE psychological/compensatory education evaluation is completed. *See* 34 CFR § 300.515(a). If, after Student’s IEP team has reviewed the ordered assessments and updated Student’s IEP, Petitioner and DCPS are unable to agree on a compensatory education award “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,” *see Reid, supra*, Petitioner may request compensatory education relief through a new due process hearing request.

ORDER

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

ORDERED:

1. Student must be comprehensively reevaluated to determine Student’s educational and related developmental needs. Subject to obtaining the Guardian’s consent, DCPS shall, within 21 calendar days of the date of this decision, engage a qualified independent psychologist, who is not an employee of DCPS, to conduct a comprehensive psychological evaluation of Student, with assessment of Student’s adaptive functioning, in accordance with this decision. Unless the parties reach a voluntary agreement on compensatory education for Student, the independent psychologist shall also assess Student’s compensatory education needs resulting from DCPS’ failure to conduct a full, comprehensive, reevaluation in fall 2015 and DCPS’ failure to provide Student appropriate IEPs from October 2015 through the present (including with goals for Written Expression), based upon a comprehensive reevaluation. DCPS shall not be precluded from engaging separate independent professionals to conduct the psychological evaluation and the compensatory education assessment if warranted;
2. Upon receipt of the assessments completed by the independent

evaluator(s) and the other assessments which DCPS has agreed to conduct, DCPS shall ensure that Student's IEP team is promptly convened to review Student's IEP and to revise the IEP as appropriate, including to update Student's Present Levels of Performance and IEP annual goals;

3. If DCPS and Petitioner remain unable to agree upon an appropriate compensatory education award informed by the recommendations of the independent evaluator(s), Petitioner may request another due process hearing to seek a compensatory education award;
4. As compensatory education for the agency's failure to provide on-time special education transportation services to Student during the 2016-2017 school year, OSSE shall provide funding authorization for the Guardian to obtain 15 hours of individual academic tutoring for Student;
5. For so long as Student remains eligible for special education school transportation, OSSE shall exercise reasonable diligence to ensure that Student is picked up on time and timely delivered to school and
6. All other relief requested by the Petitioner herein is denied.

Date: November 28, 2017

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
OSSE - SPED
DCPS Resolution Team