

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 30, 2019

PETITIONER,
on behalf of STUDENT,¹

Date Issued: November 30, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0237

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates:

November 19, 2019 (Room 423)

November 20, 2019 (Telephone)

Respondent.

Office of Dispute Resolution
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER), 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.”). In her due process complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to conduct a comprehensive initial special education evaluation and by failing to develop an appropriate initial Individualized Education Program (IEP) for Student.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on September 17, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on September 19, 2019. On October 1, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute. On October 17, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision in this case is due by December 2, 2019.

The due process hearing was convened before the undersigned impartial hearing officer on November 19, 2019 at the Office of Dispute Resolution in Washington, D.C. Oral closing arguments were made, by telephone, on November 20, 2019. The hearing, which was closed to the public, was recorded on an electronic audio recording device. MOTHER and FATHER appeared in person for the hearing and were represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. A French language interpreter was provided for Mother. Over DCPS' objection, I allowed the parents to leave the hearing after concluding their case-in-chief. Respondent DCPS was represented by LEA REPRESENTATIVE and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother and Father both testified at the hearing and called EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2 as additional witnesses. DCPS called as witnesses SCHOOL PSYCHOLOGIST, SPECIAL EDUCATION TEACHER and LEA Representative. Petitioner's Exhibits P-1 through P-36 and DCPS' Exhibits R-1 through R-23 were all admitted into evidence without objection. The evidentiary phase of the

hearing was completed on November 19, 2019. At the request of counsel, I reconvened the hearing on the record, by telephone, on November 20, 2019 to receive oral closing arguments.

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 issues for determination in this case, as certified in the October 30, 2019 Amended Prehearing Order, are:

- a. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive initial evaluation of the Student in fall 2018, which included an assessment for Autism Spectrum Disorder and Assistive Technology needs;
- b. Whether DCPS has denied Student a FAPE by failing to provide an appropriate Individualized Education Program (IEP) since December 2018, in that the initial IEP only provides for 10 hours per week of Specialized Instruction in the general education setting; 4 hours per month of Speech and Language services outside the general education setting; and 120 minutes per month of Occupational Therapy outside the general education setting² and the IEP's location and placement is incompatible with the recommendations of the comprehensive psychological evaluation that Student should be placed in an academic environment that is fully able to accommodate Student's level of need.

For relief, Petitioner requests that the hearing officer order that DCPS conduct or fund evaluations of Student for Autism Spectrum Disorder (ASD) and Assistive

² Petitioner's Counsel confirmed in the prehearing conference that Petitioner does not claim that DCPS' Speech and Language or OT evaluations of Student were not appropriate/comprehensive or that Student's initial IEP Speech and Language and OT services were inappropriate.

Technology (AT) needs, to include assessments of the Student's executive functioning, motor functioning, sensory processing skills, distractibility, and focus issues; that DCPS create an IEP that appropriately matches the level of services to Student's level of need; and that DCPS place the Student in appropriate setting that can support the Student's unique needs. The Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the November 19-20, 2019 due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, is a resident of the District of Columbia.

Testimony of Mother.

2. Student is enrolled in GRADE at CITY SCHOOL. Student first started attending school, at City School, at the beginning of the 2018-2019 school year.

Testimony of Mother.

3. Student was initially determined eligible for special education on December 11, 2018 at a City School eligibility team meeting under the IDEA disability classification, Developmental Delay. **Exhibit P-8.**

4. Student had been referred by City School for an initial eligibility evaluation, after receipt of the parent's written consent on October 5, 2018. **Exhibit R-7.**

5. School Psychologist conducted a "Comprehensive Psychological

Evaluation” of Student in November 2018. Student was initially referred for the psychological evaluation, through the Ages and Stages Questionnaire (ASQ), due to concerns about delays in Student’s cognitive, communication, and adaptive functioning, all of which were reported to severely impact Student’s ability to access the general education curriculum. Specifically, Student had difficulty expressing self in words and often made odd noises when interacting with others. According to Student’s 2018-2019 classroom teacher, Student was unable to function independently in the classroom setting. Student could not express needs and wants intelligibly, did not engage in the lessons, and needed assistance taking care of toileting needs. In addition, Student presented as well below average in auditory comprehension and cognition and Student did not show an age appropriate ability to hold a writing utensil or engage in any level of independent thinking. It was reported that Student had to be monitored in class because Student put inedible objects in Student’s mouth and tried to eat them. School Psychologist’s evaluation plan was to determine if Student met IDEA criteria as a student who was Developmentally Delayed in cognition, adaptive skills, and communication. Exhibit R-15.

6. School Psychologist reported that she was unable to administer a standardized cognitive assessment of Student, because Student had been uncooperative during the school-based hearing screening and adequate hearing acuity could not be established for either ear. However, from her observation of Student’s head turning in the direction of sounds in the classroom, School Psychologist concluded that Student

had some capacity to recognize audible sounds. Exhibit R-15.

7. School Psychologist administered the Developmental Assessment of Young Children - 2nd Edition (DAYC-2) instrument to assess Student in the cognitive, adaptive and communication domains. She conducted a telephone interview with the classroom teacher and observed Student in the classroom on November 2, 2019. School Psychologist made multiple attempts to reach Mother for an interview, however she did not receive a response and was not able to interview Mother. School Psychologist also reviewed Student's education records, including an Analysis of Existing Data (AED) and the vision and hearing screening report. School Psychologist was informed by the classroom teacher that Student did not have language skills, often engaged in odd noises such as "ehh" or "ahh" throughout the day; that Student did not interact with peers and often acted as if they were not there; that during morning meeting, Student just sat and stared blankly; that Student was not toilet-trained and not able to verbally express toileting needs; that Student presented as a child who was extremely delayed and not oriented to person, time or place or environment on a consistent basis; that Student rarely engaged in eye contact and frequently rolled around on the floor and breached the personal boundaries of classmates (although not thought to be intentional); that Student often danced to music in Student's head and walked around the classroom while instruction was taking place. Exhibit R-15.

8. On the DAYC-2 assessment, Student's functioning on the Cognitive domain fell in the Very Poor range (.1 percentile), on the Adaptive domain fell in the

Very Poor range (1st percentile) and in the Communication domain also fell in the Very Poor range (1st percentile). In the Cognitive, Adaptive and Communication domains Student's skills fell at least 2 years behind what was expected for Student's chronological age and development. School Psychologist recommended that the Developmental Delay disability classification be considered for special education eligibility. Exhibit R-15.

9. School Psychologist also recommended, *inter alia*, that the parents consider visiting a developmental pediatrician for Student, both to gain further insight and to rule out further medical concerns. Exhibit R-15.

10. School Psychologist did not do a social-emotional assessment of Student because at the time of the referral, Student was reported to be compliant and trying to do what was directed at school, and was not reported to have behavior issues. School Psychologist did not consider an Autism Spectrum Disorder (ASD) diagnosis because due to the inability to assess Student's hearing and because other factors and not been ruled out, such as lack of opportunity, exposure to toxics and possible neglect, she felt it would be premature and negligent to move in the ASD direction. School Psychologist did not consider an Intellectual Disability (ID) diagnosis for Student because Student was too young for an ID diagnosis. Testimony of School Psychologist.

11. A DCPS occupational therapist conducted an Occupational Therapy (OT) evaluation of Student on November 1, 2018. She interviewed the classroom teacher but was not successful in attempt to reach either parent. She conducted a clinical observation and assessment. The occupational therapist reported that Student

exhibited multiple deficits in the occupational domain and would have difficulty accessing the general education curriculum and would require consistent direct adult supports to facilitate participation in communicating needs and with visual motor and fine and gross motor tasks. Exhibit P-26.

12. A DCPS Speech-Language Pathologist conducted an initial Speech and Language Evaluation of Student on October 24, 2018. This assessor made several attempts to reach Student's parents to obtain background information, but was not successful in reaching them. According to the November 19, 2018 evaluation report, in the classroom observation, Student demonstrated the ability to imitate utterances as well as produce vocalizations/sounds and rote utterances. Student was also observed to exhibit self-stimulatory behaviors such as: producing sounds that are accompanied by arm movements; Jumping up and down and producing vocalizations while doing so. Student did not initiate interactions with peers or instructors. Student was observed to mouth and/or chew on non-food items (crayon) during the observation session. Student was reported and observed to wander around the classroom and to need the classroom paraprofessional to be close, to make sure that Student was doing what was asked and expected. She perceived that Student did not consistently understand and comprehend what was said and was not able to express self to communicate wants, needs and thoughts. Throughout the assessment, Student participated in self-preferred play and was not observed to respond to Student's name. In order to follow directions, Student required repetition or a physical prompt or hand over hand assistance to

engage; however, this was not consistent. Student presented with limited eye contact and did not respond to questions asked. Exhibit P-24 (Exhibit P-24 was missing pages from the October 24, 2018 report).

13. The City School eligibility team met on December 11, 2018. Mother attended the meeting. The team found that Student met all criteria for the DD disability. To reach that decision, the team affirmed that Student did not have autism or other impairments which were contrary to a finding of DD. Exhibit R-8.

14. Student's initial IEP was developed on December 11, 2018. The IEP identified Adaptive/Daily Living Skills; Cognitive; Communication/Speech and Language; Emotional, Social and Behavioral Development; and Motor Skills/Physical Development as areas of concern. The initial IEP provided for Student to receive 10 hours per week of Specialized Instruction in the general education setting, 4 hours per month of Speech-Language Pathology and 120 minutes per month of OT. Exhibit P-8. (The "yes" box on the IEP was checked to indicate that Student required the support of a dedicated aide, but this box was checked by mistake. Testimony of Special Education Teacher.) Mother signed her consent to the initial provision of IEP special education and related services. Exhibit R-11.

15. By the end of the 2018-2019 school year, Student had exhibited some progress on the December 11, 2018 IEP goals. On the end of the school year IEP Progress Report, 6 goals were reported as "Progressing" and 9 goals were reported as "No Progress." Exhibit R-14. At the end of the 2018-2019 school year, Special

Education Teacher had concerns about Student's educational placement in the general education setting at City School and wanted to see whether to make a request to DCPS' Central Office for a Least Restrictive Environment (LRE) reconsideration, that is, whether Student should be moved to a more restrictive educational setting. Testimony of Special Education Teacher.

16. Student's 2018-2019 general education classroom at City School had approximately 18 students, staffed by a regular education teacher and a para-professional. Special Education Teacher provided "push-in" services. Student was the only child with a disability in that class. Testimony of Special Education Teacher.

17. Later in the 2018-2019 school year, Special Education Teacher was told by the parents that they had placed Student in a separate public charter school for the 2019-2020 school year. For a time, Student's special education records were not accessible at City School on the DCPS Special Education Data System (SEDS), indicating that Student's enrollment had changed from DCPS to a public charter school. However, the parents re-enrolled Student at City School for the start of the 2019-2020 school year. Testimony of Special Education Teacher.

18. On August 23, 2019, at the request of LAW FIRM a meeting was convened at City School to discuss Student's educational placement. The parents, Petitioner's Counsel and Educational Advocate 2 participated. Petitioner's Counsel stated that they had come to request that Student be placed in a program for children with ASD at another DCPS school because Student's brother had a placement there. LEA

Representative responded that they would move forward with the parents' request, but that they did not have control over "where Student lands." The parents' representatives also requested an AT evaluation. When asked about the outside neurological evaluation of Student by a developmental pediatrician as recommended by School Psychologist, the parents' representatives were not able to address whether an appointment had been scheduled. Exhibit R-17.

19. After the August 23, 2019 meeting, LEA Representative made an LRE referral for Student to DCPS' Central Office. On or about October 10, 2019, a DCPS specialist made an observation of Student at City School. Reportedly, the Central Office recommendation was not to move Student to a more restrictive placement at this time. Student's IEP team was scheduled to meet on November 18, 2019 to review Student's IEP. The meeting was postponed at the parent's request. Testimony of LEA Representative.

20. DCPS' AT specialist has conducted two observations of Student and had asked to conduct a third observation which was pending as of the date of the due process hearing. Testimony of LEA Representative.

21. Student has now been screened by DCPS professionals for ASD. The resulting report was provided to City School about November 5, 2019 and had not yet been presented to the parents' representatives. (The report was not offered into evidence.) Testimony of LEA Representative.

22. In the prehearing conference on October 17, 2019, DCPS Counsel

confirmed that DCPS has agreed to conduct an AT assessment of Student and to assess Student for Autism Spectrum Disorder (ASD) with ASD rating scales. Petitioner's Counsel represented that Mother was privately obtaining a neuropsychological assessment of Student and did not wish DCPS to conduct an ASD assessment. By email of October 17, 2019, Petitioner's Counsel wrote that the parent did not object to DCPS' conducting an ASD screening for Student, so long as there were no conditions and the instruments used for the ASD testing were fully disclosed, in order not to interfere with the neuropsychological assessment the parents had scheduled through Student's medical provider. See Revised Prehearing Order. The parents missed the appointment for the neuropsychological assessment which they had scheduled, and they are unable to obtain another appointment for Student until June 2020. Testimony of Father.

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, not applicable to this case, 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

- A. Did DCPS deny Student a FAPE by failing to conduct a comprehensive initial evaluation of Student in fall 2018, which included an assessment for Autism Spectrum Disorder and Assistive Technology needs?

Student, who started school in August 2018, was initially evaluated for special education eligibility in October and November 2018. The initial evaluation included formal psychological, speech and language and OT assessments. On December 11, 2018, Student was determined eligible for special education as a child with a Developmental Delay (DD). The Petitioner contends that the initial psychological evaluation was not sufficiently comprehensive because the evaluator did not assess Student specifically for Autism Spectrum Disorder (ASD) and there was not an Assistive Technology (AT) assessment. DCPS responds that its psychological evaluation of Student met all of the requirements of the IDEA. Petitioner must bear the burden of persuasion on this claim.

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the

educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, communicative status and motor abilities. 34 CFR § 300.304(c)(4). 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). IDEA evaluations depend upon the exercise of professional judgment by the child's educators, which is entitled to a reasonable degree of deference. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), *report and recommendation adopted sub nom. Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), citing *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005).

Petitioner's expert, Educational Advocate 1, is an employee of Law Firm with a deep background in working with children on the Autism Spectrum. She testified that at the time of the November 2018 psychological evaluation, Student exhibited characteristics associated with ASD, including sensory concerns, not staying within personal boundaries, language challenges, inability to function independently in the classroom and difficulty looking at books and pictures. Educational Advocate 1 opined that School Psychologist should have assessed Student specifically for a possible ASD disability.

If Student did have autism, then the DCPS eligibility guidelines would have precluded finding Student eligible for special education under the Developmental Delay classification. School Psychologist did not refute Educational Advocate 1's opinion that Student exhibited characteristics of ASD, but she explained that she did not consider ASD for Student, because at the time of her evaluation in November 2018, she had been unable to reach the parents to obtain their input and hence, could not rule out other causes for Student's condition, such lack of opportunities, exposures to toxics, neglect etc. Also School Psychologist thought that in the fall of 2018, it was premature to move in the ASD direction because attempts to screen Student for hearing issues had been fruitless and it was not known whether Student had hearing deficits which would have barred a finding that Student had autism.

A school psychologist's choice of assessment instruments is due deference from the hearing officer. However, the IDEA still requires that the child be assessed in *all* areas of suspected disabilities. In this case, I find that in fall 2018, ASD was an area of suspected disability for Student. It was therefore incumbent upon DCPS to evaluate Student for autism, even if due to the parents' not providing input and the difficulty screening Student's hearing, it was not practicable to complete an autism assessment as part of Student's original psychological evaluation. I conclude that DCPS' initial eligibility evaluation of Student, without an ASD assessment, was not fully comprehensive.

Educational Advocate also opined that the November 18, 2018 psychological

evaluation was not complete without a formal social-emotional assessment. However, School Psychologist explained that at the time of the psychological evaluation referral, Student did not have behavior issues at school. This was supported by the testimony of Special Education Teacher that, in the classroom, Student was a sweet and happy child who loved school. I conclude that Petitioners did not show that Student needed to be evaluated for social and emotional status as part of the initial psychological evaluation.

Petitioner also did not establish that Student required an Assistive Technology (AT) evaluation as part of the initial psychological evaluation. An IEP team must consider whether a student needs assistive technology devices and services to address the student's unique needs resulting from the student's disability or to assist the student to benefit from special education or as a supplementary aid or service. *See* 34 CFR § 300.105, 300.324(a)(2). School Psychologist had recommended in her November 18, 2018 report that, because of Student's very poor communication level, a visual schedule and other AT may be appropriate and that as such an AT consult was warranted. The IEP team addressed this by providing for Classroom Aids and Services in the December 11, 2018 IEP, including, *inter alia*, pairing new vocabulary words and concepts with visual representations or visual boards, as well as visual cues. When requested by the parents in summer 2018 to conduct an AT evaluation of Student DCPS agreed to do the assessment, which was in progress at the time of the due process hearing.

An LEA's failure to appropriately assess a student for suspected disabilities is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.,*

2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). 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, Student was determined eligible for special education when evaluated in November 2018, even though Student was not assessed for a possible ASD disability. Student was provided an initial IEP with 10 hours of push-in Specialized Instruction, in addition to OT and Speech and Language related services. School Psychologist explained in her testimony that a child’s delays associated with ASD are very similar to Developmental Delays and therefore educational programming would also be very similar, whether the child was classified as having autism or a developmental disability. Moreover, DCPS agreed to evaluate Student specifically for ASD when requested by the parents in the summer of 2019. Educational Advocate 2, who testified as an expert on IEP programming, was unable to opine on what different position Student would now be in, if Student had been assessed for an ASD disability as part of DCPS’ initial evaluation. I find, on these facts, that Petitioner did not meet her burden of persuasion that DCPS’ failure to evaluate Student specifically for an ASD

disability, as part of the November 2018 initial eligibility evaluation, resulted in a denial of FAPE to Student.

- B. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP since December 2018, in that the initial IEP only provided for 10 hours per week of Specialized Instruction in the general education setting; 4 hours per month of Speech and Language outside the general education setting; and 120 minutes per month of Occupational Therapy outside the general education setting and the IEP's location and placement were incompatible with the recommendations of the comprehensive psychological that Student should be placed in an academic environment that is fully able to accommodate Student's level of need?

The Petitioner alleges that DCPS' initial IEP for Student, specifically the provision for 10 hours of Specialized Instruction in the general education setting, was not adequate for Student. (In the prehearing conference, Petitioner's Counsel clarified that Petitioner does not allege that the December 11, 2018 IEP Speech and Language and OT services were not appropriate for Student.) In her testimony, Petitioner's expert, Educational Advocate 2, stated that the IEP was also deficient because it included Emotional, Social and Behavioral Development annual goals, but no Behavioral Support Service.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 197 L.Ed.2d 335 (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 under the IDEA:

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 “*specially 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.) . . . 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.

See also Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018) (“[The *Endrew F.*] standard calls for evaluating an IEP as of ‘the time each IEP was created’ rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated.” *Z. B.* at 517.)

Special Education Teacher drafted the Adaptive/Daily Living, Cognitive and Emotional, Social and Behavioral Development goals that were adopted by the 11, 2018 IEP team for Student. She also provided Student’s Specialized Instruction Services through the end of the 2018-2019 school year. Special Education Teacher explained that 10 hours of push-in Specialized Instruction was specified in the IEP, because this was Student’s first year in school and the team felt that for Student’s age, and this being Student’s initial IEP, 10 hours of support in the general education setting was the right

start. She opined that the initial IEP was calculated for Student to make appropriate progress, and that Student did in fact in fact make incremental progress over the rest of the school year.

Special Education Teacher also testified that by the end of the school year, she felt that Student was not making enough progress, especially in the area of communications and she opined that a smaller self-contained setting for Student would now be more appropriate.

Educational Advocate 2 opined that Student's needs were not met by the December 11, 2018 IEP because, overall, Student did not make adequate progress. She opined that Student should have a full-time special education placement, especially if Student is further evaluated and determined to be on the autism spectrum. I found Special Education Teacher's characterization of Student's progress better informed than the assertion by Educational Advocate 2 that overall, Student was not making progress. Special Education Teacher worked with Student through the second half of the 2018-2019 school year and her knowledge of and concern for Student's needs was very apparent. I found her to be a wholly credible witness. In any event, the appropriateness of an IEP is assessed as of the time it was created, not with the benefit of hindsight. *See Z. B., supra*, 888 F.3d at 524.

Educational Advocate 2 also opined that the initial IEP should have included Behavioral Support Services for Student, because the IEP had Emotional, Social and Behavioral Development goals. Special Education Teacher explained that she drafted

these goals for Student to promote Student's social interaction with peers, but that Student did not exhibit behaviors out of the ordinary which would have warranted behavioral support from a social worker at school. I find that DCPS established that Student did not need Behavioral Support Services to benefit from special education. *See* 34 CFR § 300.34(a) (Related services included in IEP as required to assist a child with a disability to benefit from special education.)

Educational Advocate 2 opined that the IEP team should have considered Assistive Technology for Student because Student's language deficits severely impacted Student's ability to access the curriculum. As note above, however, the December 11, 2018 IEP does include assistive technology including, *inter alia*, visual representations or visual boards to enhance communication as classroom aids and services. Special Education Teacher testified that Student is also provided pencil grips, a magnetic board for writing, and a small pencil for developing motor skills. She opined credibly that these "lo-tech" aids were appropriate for Student in light of the hands-on curriculum at Student's grade.

In sum, I conclude that DCPS has met its burden of persuasion that at the time Student's December 11, 2018 IEP was developed, this initial IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ORDER

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

ORDERED:

All relief requested by the Petitioner herein is denied. This is without prejudice to the right of the parents to file a new due process complaint, if warranted, should they not agree with such revisions to Student's IEP and educational placement which may be forthcoming, following the completion of DCPS' additional evaluations and assessments of Student, now in progress.

Date: November 30, 2019

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
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