

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

PARENT,
on behalf of STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: November 18, 2019

Hearing Officer: Peter B. Vaden

Case No: 2018-0208

Hearing Dates: December 19, 2018
January 8, 2019
October 31, 2019
November 8, 2019

Office of Dispute Resolution,
Rooms 112, 423
Washington, D.C.

HEARING OFFICER DETERMINATION - FINAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

This is the final decision in this case, originally brought by the Petitioner (MOTHER) on August 15, 2018. Following two days of hearings on December 19, 2018 and January 8, 2019, this hearing officer issued an Interim Decision on January 17, 2019 (the Interim Decision). In the Interim Decision, I found that neither party had offered into evidence assessments sufficient to discern Student's disability and educational needs. I further found that to ensure a valid comprehensive special

¹ Personal identification information is provided in Appendix A.

education evaluation, Student needed to be evaluated by professionals trained to assess children with hearing loss. I ordered, *pendente lite*, that DCPS fund an independent comprehensive psychological reevaluation and a speech-language reevaluation of Student both to fill in the gaps in the evidentiary record and to inform Student's IEP team as to the scope of Student's IDEA disability and what are Student's educational needs. The independent psychological report was completed on April 3, 2019. The speech-language reevaluation was completed on April 19, 2019 by [REDACTED] University. The evaluations were reviewed at a meeting on May 30, 2019. An IEP team meeting for Student was convened on September 30, 2019 to review the independent psychological report but revisions to Student's IEP were not finalized.

To allow sufficient time for the additional assessments ordered in the Interim Decision to be completed and reviewed by Student's IEP team, and due to repeated scheduling conflicts that have since arisen, on the unopposed motions of the parties, I have extended the final decision due date multiple times. My final decision is now due by November 21, 2019.

The due process hearing in this case resumed on October 31, 2019 and was completed on November 8, 2019 at the Office of Dispute Resolution in Washington, D.C. The proceedings, which were closed to the public, were recorded on an electronic audio recording device. At the resumed hearing, Mother appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL 2.

After brief opening statements by counsel, Petitioner called INDEPENDENT PSYCHOLOGIST 2 as an additional witness and re-called Mother and EDUCATIONAL ADVOCATE to testify. DCPS re-called as witnesses, DCPS AUDIOLOGIST, SCHOOL PSYCHOLOGIST, DCPS S-LP, and SCHOOL SOCIAL WORKER and called LEA REPRESENTATIVE 2 as an additional witness. Petitioner's supplemental Exhibits P-41 through P-44 and P-46 through P-49 were admitted into evidence, including Exhibits P-44 and P-49 admitted over DCPS' objections. I sustained DCPS' objection to Exhibit P-45. DCPS' supplemental Exhibits R-27 through R-36 were all admitted into evidence, including Exhibit R-33 admitted over Petitioner's objection. I also admitted into evidence over Petitioner's objection, as IHO Exhibit 1, a November 26, 2013 comprehensive psychological reevaluation of Student completed by a DCPS school psychologist. Petitioner's Counsel and DCPS Counsel 2 made closing arguments. There was no request to file post-hearing written 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 issues for determination, as certified in the August 30, 2018 Prehearing Order, and stated in the Interim Decision, are:

A. Whether DCPS denied Student a FAPE by failing to evaluate Student upon parent's request beginning in January 2018, by failing to conduct: (1) a comprehensive psychological evaluation; (2) a Functional Behavior Assessment;

(3) a speech and language evaluation; (4) an audiological evaluation; and an (5) assistive technology assessment;

B. Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student in each area of suspected disability, during the 2016-2017 school year and the 2017-2018 school year, by the failure to complete a comprehensive psychological evaluation, a functional behavior assessment, a speech and language evaluation, a audiological evaluation and an assistive technology evaluation, and/or convene a meeting with the parent to review the same and update Student's IEP as necessary;

C. Whether DCPS has denied Student a FAPE by failing to conduct a triennial reevaluation which was due as early as February 2015;

D. Whether DCPS denied Student a FAPE by failing to provide all of the Speech and Language services specified on Student's IEPs in the 2016-2017 and 2017-2018 school years;

E. Whether DCPS failed to provide Student with appropriate Individualized Educational Programs (IEPs) on or about December 14, 2016 and December 7, 2017 in that these IEPs were not based on updated and comprehensive evaluations; the disability classifications were not appropriate; the present levels and academic goals and baselines were not based on updated and comprehensive evaluations; the IEPs lacked goals in the area of social-emotional functioning; and the 2016 IEP reduced related service hours for speech and language services without justification and

F. Whether DCPS has failed to afford the parent and her representatives access to Student's complete education records despite numerous written requests.

For relief, the parent requested that DCPS be ordered to:

Conduct or fund the following assessments for Student: a Comprehensive Psychological evaluation; Assistive Technology; Speech and Language Evaluation and Functional Behavior Assessment;

Afford the parent's representatives timely and full access to Student's education records maintained by DCPS;

Convene an IEP team meeting to develop an appropriate IEP for Student consistent with the claims made in the due process complaint, upon completion

of the evaluations and the receipt of Student's education records by the parent's representatives;

Provide compensatory education for the denials of FAPE alleged in the due process complaint and/or provide compensatory education upon completion of the requested evaluations.

The parent also requested that the issues of manifestation determination review or Functional Behavior Assessment for disciplinary reasons, be reserved until receipt of all of the records.

FINDINGS OF FACT FROM THE INTERIM DECISION

I adopt the following findings of fact from my Interim Decision:

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

Testimony of Mother.

2. Student is currently enrolled in GRADE (now GRADE B) at CITY SCHOOL 2, where Student has attended since the 2017-2018 school year. **Testimony of Mother.**

3. Student was evaluated by DCPS' Early Stages in February 2010. The assessor reported that cognitive testing revealed extremely weak information processing abilities. Student's ability to name common objects, when given a pictorial cue and when given only abstract verbal information, also fell in the Lower Extreme range. It was reported that Student had ear surgery in December 2009 and that Student's teacher had noted some improvement in Student's speech. The assessor recommended that speech and language intervention services were clearly warranted. **Exhibit P-4.** Student was determined eligible for special education under the Developmentally Delayed

classification. Exhibit P-5.

4. In a December 2012 DCPS Speech and Language Reevaluation Report, Student's DCPS Speech-Language Therapist reported that Student presented with normal limits fluency and vocal quality. Student's overall language scoring fell significantly below the average range and was characterized by significantly impaired receptive and expressive language skills. Specifically, Student's speech was compromised by numerous production deficits that impaired the ability to communicate with peers and adults. While Student was intelligible at the one word and short sentence levels, Student's connected speech was compromised. The evaluator recommended, *inter alia*, that Student would benefit from access to technology, such as computer software and on-line activities, designed to increase reading comprehension, build grammar skills and understanding of the spoken word. Exhibit P-5.

5. A DCPS psychologist conducted a comprehensive psychological reevaluation of Student in 2013. Testimony of School Psychologist. Although the reevaluation report is available in the DCPS Special Education Data System (SEDS), Testimony of Social Worker, it was not offered into evidence by either party at the original hearing. (I have now received and admitted this psychological reevaluation report as IHO Exhibit 1.)

6. Student's special education eligibility was affirmed on January 14, 2014. At that time, Student's IDEA disability classification was identified as Specific Learning Disability (SLD). Exhibit P-8.

7. Student's City School 1 September 25, 2015 IEP identified Mathematics, Reading, Written Expression, and Communication/Speech and Language as areas of concern. The September 25, 2015 IEP provided for Student to receive 10 hours per week of Specialized Instruction, including 5 hours outside general education and 240 minutes per month of Speech-Language Pathology. Exhibit P-8. Under the prior, October 21, 2014, annual IEP, Student had received 10 hours per week of Specialized Instruction, all outside general education. The switch was purportedly made in order to offer Student access to the general education curriculum. Exhibit P-9.

8. At City School 1's annual review of Student's IEP on December 14, 2016, Student's IEP was revised to reduce Speech-Language Pathology services from 240 minutes to 180 minutes per month. Most of Student's academic and Speech and Language annual goals from the September 5, 2015 IEP were carried over, unchanged, to the December 14, 2016 IEP. One Speech and Language goal was removed. The Speech and Language Baselines were also not updated from the December 2012 evaluation. Exhibit P-10.

9. After Student enrolled at City School 2 for the 2017-2018 school year, that school's IEP team reviewed Student's IEP on December 7, 2017. Student's annual goals and baselines were carried over, essentially unchanged, from the December 14, 2016 City School 1 IEP. The December 7, 2017 IEP continued Student's Specialized Instruction and Related Services, without change, from the December 14, 2016 IEP. Exhibit P-11.

10. On March 1, 2018, a multidisciplinary team (MDT) meeting for Student was convened at City School 2. Mother attended the meeting. Mother stated that when Student was evaluated at HOSPITAL when Student was very little, Student's hearing was gone in the right ear and declining in the other ear. Hospital offered to do surgery, but Student only wanted a hearing aid. FORMER LEA REPRESENTATIVE obtained consent from Mother to reevaluate Student. Exhibit P-12.

11. School Psychologist conducted a comprehensive psychological reevaluation of Student in fall 2018. School Psychologist was not successful in getting Mother to complete the adaptive functioning checklist. As of the second day of the due process hearing, the comprehensive psychological evaluation was complete except for the adaptive functioning part. Testimony of School Psychologist. The report was not offered into evidence.

12. Student's family was homeless and lived in a shelter facility for about 4 months in the fall of 2017. During that time, Student had behavior issues and lashed out. In the 2018-2019 school year, Student's behavior had improved. Student was also making better grades. Testimony of Mother. Student's behavior at school was not a problem in the 2018-2019 school year. At the request of Petitioner's Counsel, Social Worker conducted a Functional Behavioral Assessment (FBA) of Student in October 2018. Testimony of Social Worker.

13. DCPS S-LP has provided Speech-Language Pathology services to Student since the 2017-2018 school year. During the 2017-2018 school year, she failed to

provide 180 minutes of services, due to the provider's unavailability. Testimony of DCPS S-LP.

14. Audiologist conducted an audiology assessment of Student in June 2018. She found that Student had moderate to moderately severe permanent hearing loss on the right side and that Student's hearing is a little better on the left side. She recommended that Student be evaluated by an Ear, Nose and Throat (ENT) medical doctor to confirm that Student is only experiencing hearing loss and does not have another underlying condition. Testimony of Audiologist. Mother was working with Hospital to obtain hearing aids for Student. As of the January 8, 2019 hearing date, Student had not yet been provided hearing aids. Testimony of Mother.

ADDITIONAL FINDINGS OF FACT

After considering all of the supplemental evidence received at the resumed hearing in this case on October 31, 2019 and November 8, 2019, as well as the argument of counsel, my additional findings of fact are as follows:

15. As of the December 7, 2017 IEP annual review meeting, Student's most recent speech and language evaluation had been conducted in December 2012. Exhibit P-11.

16. A DCPS school psychologist conducted a Comprehensive Psychological Reevaluation of Student in November 2013. For cognitive functioning, on the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), Student obtained an overall composite score of 73, in the Borderline range. The evaluator concluded, *inter alia*, that

Student may present with difficulty in Mathematics and Reading and may benefit from interventions from teachers who can provide proximity and frequent small grouping. She added that Student was likely to present with articulation and phonemic awareness concerns which could prompt Student to appear as quiet in the classroom and not ask for help when needed. She recommended that Student appeared to meet criteria as a Student with a Specific Learning Disability. Exhibit IHO-1.

17. DCPS conducted a Functional Behavior Assessment II of Student in the fall of 2018 and completed the FBA report on October 15, 2018. Exhibit P-38.

18. Students grades at City School 2 for the 2017-2018 school year were as follows; Math - D, English - F, Science - C-, Geography - F, Language Arts - C-, Math Support - D, Advisory - A-, Music - C, Reading Workshop - B-, and Health and Phys Ed - C. For the school year, Student had 25 days of unexcused absences and 33 tardies. Exhibit P-15.

19. As ordered in my Interim Decision in this case, DCPS referred Student to Independent Psychologist 2 for a comprehensive psychological evaluation to identify Student's pschoeducational strengths and weaknesses, to support the determination of appropriate classroom accommodations and for academic planning purposes. Exhibit R-35. Independent Psychologist 2 holds a doctorate in Speech-Language Pathology and is the Program Director of Speech and Hearing Services for a public charter school in the District of Columbia. Exhibit P-47.

20. Independent Psychologist 2 reported that Student's overall intellectual

functioning, as measured by the Nonverbal Index score on the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), placed significantly below peers in the Extremely Low range. Student's fluid reasoning, visual spatial, and working memory skills all placed well below peers. Student's processing speed skills were an area of relative strength and placed in the Low Average range. Student's verbally-based reasoning skills placed well below same-aged peers. Student's fluid reasoning, visual spatial, working memory, and verbal comprehension skills were significantly lower than those skills obtained during the 2013 DCPS psychological reevaluation. Student's academic skills were commensurate with Student's intellectual functioning, placing Student in the Extremely Low range, with the exception of a Low Average performance on a task of automaticity with basic math addition facts. Student was able to sustain attention and willingly completed testing for lengthy testing intervals. Self- and teacher-reports indicated a degree of concern with inattention in the classroom. Adaptively, Student's teacher rated Student's adaptive functioning to be well below peers, with a relative strength with functioning in social situations. Mother's rating scale responses indicated generally age-appropriate adaptive functioning, with a relative weakness with everyday communication skills. Behaviorally, when engaged in the classroom, Student did not present with behavior concerns, although Student has instances when not engaged and could be disruptive and noncompliant. Independent Psychologist 2 reported that from a diagnostic/classification perspective, using the DSM-5 criteria, Student's overall level of intellectual and adaptive functioning appeared to be consistent

with a diagnosis of Intellectual Disability, however, in consideration of Student's hearing loss and limited auditory access to the everyday environment, this diagnosis could not yet be fully supported. Exhibit R-35.

21. In her report, Independent Psychologist 2 made a number of recommendations for services and accommodations for school. These included consideration of the diagnosis of hearing loss when considering the appropriate special education classification for Student, modified instruction, a small student to teacher ratio, scaffolding, repetition and guided practice in order to support success in the classroom. Academic goals that focus on functional and/or vocational skills were also recommended. She recommended extended time on standardized assessments, the use of a reader for instructions, a computer for the written composition section and calculator for the mathematics section. Independent Psychologist 2 also recommended that a teacher for the deaf consult with Student's classroom teachers on a regular basis to support academic programming and to implement a plan to support Student's hearing in the classroom; that Student work with an audiologist to support an understanding of the impact that hearing loss has on Student's academic functioning; that teachers should be aware of Student's need to access their face when providing instructions; to check for understanding of verbal instructions without singling out Student; closed captioning for all videos; to provide copies of classroom notes so that Student can focus on watching the speaker rather than taking notes; to seat Student close to the teacher for visual access to their face; to reduce background noise,

particularly during academic instruction; small group instruction for linguistically heavy subjects and support for Student's self-advocacy skills for when Student does not understand or hear instruction. Exhibit R-35.

22. On March 29, 2019, staff at the [REDACTED] Hearing and Speech Center conducted a Speech-Language Diagnostic Evaluation of Student. They reported that Student presents with mild to moderate mixed hearing loss for the left ear and a severe to profound hearing loss for the right ear. Their report concluded that Student presents with moderate to severe deficits in expressive and receptive language skills, articulation errors and reduced intelligibility. In addition, Student's ability to receive spoken English, when presented in the Auditory only and Auditory + Visual modes is strong. However, Student's Visual only receptive skills in an open set were weaker. These assessors recommended, *inter alia*, that Student use hearing aids during all times, particularly during academic classes, that there be a focus on developing communication strategies at school to aid effective communication and continued speech-language pathology services. Exhibit P-42.

23. After the independent speech and language and psychological evaluation reports were received, there a meeting to review them, on or about May 30, 2019. Mother and Petitioner's Counsel participated by telephone. Testimony of School Psychologist.

24. On June 19, 2019, DCPS forwarded an IEP amendment form to Petitioner's Counsel to add hearing services to Student's IEP and to change the Present

Levels of Performance for the hearing concern. Exhibit R-27. Petitioner's Counsel wrote DCPS' Counsel 2 by email that the parent was not signing the amendment because there were additional requests at the May 2019 meeting which DCPS had not agreed to or had not stated on the amendment form. Id. Mother did later sign the amendment form and it was returned to DCPS on September 3, 2019. Stipulation of Counsel.

25. For the 2019-2020 school year Student is in Grade B at City School 2. Attendance continues to be a major concern. This year, Student started school one week late. Testimony of DCPS S-LP.

26. DCPS convened an IEP team meeting for Student on September 30, 2019. Mother participated by telephone. Testimony of Mother. DCPS had made several attempts to schedule the meeting earlier in the school year, but Mother had not been responsive. Testimony of LEA Representative 2.

27. DCPS' proposed September 30, 2019 IEP identified Student's disability as Specific Learning Disability (SLD). The IEP identified Mathematics, Reading, Written Expression, Hearing and Communication/Speech and Language as areas of concern. The proposed IEP provided that Student would receive 5 hours per week of Specialized Instruction outside general education, 5 hours per week of Specialized Instruction in general education and 180 minutes per month of Speech-Language Pathology. As a consultative service, the proposed IEP provided for 15 minutes per month of Audiology. Exhibit R-33. The evidence does not establish that the proposed September 30, 2019 IEP has been finalized.

28. As of the November 8, 2019 hearing date, Student still does not have hearing aids. Testimony of DCPS S-LP. Mother continues to work on obtaining replacement hearing aids for Student from Hospital. Testimony of Mother. Once Mother gets Student fitted with the correct hearing aids at Hospital, DCPS is able to obtain a duplicate set of hearing aids for Student to use as a back-up set at school. Representation of DCPS' Counsel 2.

29. Student is resistant to wearing hearing aids. Student told School Psychologist that Student was not going to wear them. Student is also more defiant at school this fall. Testimony of School Psychologist.

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 for this decision 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).

EVALUATIONS

Analysis

- i. Whether DCPS denied Student a FAPE by failing to evaluate Student upon parent's request beginning in January 2018, by failing to conduct: (1) a comprehensive psychological evaluation; (2) a Functional Behavior Assessment; (3) a speech and language evaluation; (4) an audiological evaluation; and an (5) assistive technology assessment;
- ii. Whether DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student in each area of suspected disability, during the 2016-2017 school year and the 2017-2018 school year, by the failure to complete a comprehensive psychological evaluation, a functional behavior assessment, a speech and language evaluation, a audiological evaluation and an assistive technology evaluation, and/or convene a meeting with the parent to review the same and update Student's IEP as necessary;
- iii. Whether DCPS has denied Student a FAPE by failing to conduct a triennial reevaluation which was due as early as February 2015.

The parent's first contention is that from February 2015 to when the due process complaint was filed on August 15, 2019, DCPS failed to timely and comprehensive reevaluate Student to determine that Student continued to have a qualifying disability and the nature and extent of the special education and related services that Student needed. *See* 34 CFR § 300.15. The parent has the burden of persuasion on this claim.

The IDEA requires local education agencies to reevaluate students with disabilities at least once every three years unless the parent and the local education

agency deem such reevaluation unnecessary. *See* 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2). *Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014). DCPS conducted a Comprehensive Psychological Reevaluation of Student in November 2013 and Student's continued eligibility for special education was confirmed on January 14, 2014. Student's special education eligibility was confirmed again on December 14, 2016, but it does not appear that any formal reevaluations were conducted. As of the December 7, 2017 IEP annual review meeting, Student's most recent speech and language evaluation had been completed in December 2012. DCPS conducted an Audiologic (Hearing) Evaluation of Student on June 5, 2018. School Psychologist conducted a psychological reevaluation of Student in fall 2018. I find from the preponderance of the evidence that DCPS did not conduct a comprehensive special education reevaluation of Student between January 2014 and June 2018.

An LEA's failure to appropriately reassess 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).

Student's IEP special education and related services have been carried over, unchanged, since the December 2016 IEP. Student's last triennial reevaluation was due to be completed by January 2017. When Student was reevaluated by Independent Psychologist 2 in April 2019, Student's fluid reasoning, visual spatial, working memory, and verbal comprehension skills were significantly lower than when Student had been evaluated in 2013. Student's intellectual functioning and academic skills tested in the Extremely Low range. Independent Psychologist 2 reported that Student's overall level of intellectual and adaptive functioning in 2019 appeared to be consistent with a diagnosis of Intellectual Disability, although because of Student's hearing loss and limited auditory access (without hearing aids), she withheld making this diagnosis. I find that DCPS' failure to comprehensively reevaluate Student by January 2017 impeded Student's right to a FAPE and also impeded Mother's opportunity to participate in the IEP decision making process. I conclude that this procedural violation was a denial of FAPE.

INDIVIDUAL EDUCATION PROGRAMS

iv. Whether DCPS failed to provide Student with appropriate IEPs on or about December 14, 2016 and December 7, 2017 in that these IEPs were not based on updated and comprehensive evaluations; the disability classifications were not appropriate; the present levels and academic goals and baselines were not based on updated and comprehensive evaluations; the IEPs lacked goals in the area of social-emotional functioning; and the 2016 IEP reduced related service hours for speech and language services without justification.

Petitioner alleges that Student's December 14, 2016 IEP at City School 1 and December 7, 2017 IEP at City School 2 were inappropriate for want of updated and comprehensive reevaluations, lack of goals for social, emotional and behavioral functioning and the decision of the City School 1 IEP team to reduce speech and language services from 240 minutes per month to 180 minutes per month. The parent made a *prima facie* case that these IEPs were not appropriate. Therefore, DCPS must shoulder the burden of persuasion that the respective IEPs were appropriate for Student.

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 "*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.) . . . 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, 517 (D.C. Cir. 2018) (In *Endrew F.*, Supreme Court held that the IDEA requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard markedly more demanding than requiring merely some educational benefits.)

December 14, 2016 IEP

The December 14, 2016 IEP was developed more than two years before the complaint in this case was filed, outside of the IDEA’s two-year statute of limitations period. *See* 34 CFR § 300.511(e). However the IDEA’S statute of limitations is an affirmative defense rather than a jurisdictional prerequisite. *See M.G. v. New York City Dep’t of Educ.*, 15 F. Supp. 3d 296, 304 (S.D.N.Y. 2014). DCPS did not raise the statute of limitations in its pleadings. Therefore, I consider this defense waived. *See id.*

At the time the December 14, 2016 IEP was developed and the IEP goals and baselines were considered, Student’s evaluations were current and there was no evidence that the parent or school staff had requested additional assessments. With regard to the IEP disability classification, Student was classified as having a specific learning disability (SLD). In her 2019 evaluation, Independent Psychologist 2 posited that Student might have an Intellectual Disability (ID), but she cautioned that Student’s hearing loss and limited auditory access may have affected Student’s cognitive ability scores. In any event, it is unnecessary for me to decide whether Student’s IEP disability

classification should have been ID rather than SLD. That is because the IDEA does not require that a child's disability classification be identified in the IEP, so long as the child's special education and related services needs are met. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006) (Child's identified needs, not the child's disability category, determine the services that must be provided to her); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.)

As to Student's need for Social, Emotional and Behavioral Development goals in the IEP, School Social Worker testified that except for a period at the beginning of the 2017-2018 school year when the family was dealing with lack of housing, Student's behavior at school was not a problem. She reported that Student's behavior improved in December 2017 when stable housing was secured. Student's teacher indicated to the social worker that Student's behavior in the classroom was not a concern or problem. School Social Worker's testimony was credible and generally supported by Mother's account of when the family was homeless. I find that DCPS met its burden of persuasion that there was not a need for behavior support goals or services on Student's IEP.

Beginning with the December 14, 2016 IEP, Student's IEP Speech and Language services were reduced from 240 to 180 minutes per month. This change was made when Student was attending City School 1 and the IEP team's reason for the 2016 reduction in speech-language services was not provided at the due process hearing. However, Speech-Language Pathologist opined that at present, 240 minutes per month

of speech-language service would not be appropriate because Student needs to be in the classroom more with typically developing peers to order to generalize speech-language skills and to address Student's low academic scores.

Independent Psychologist 2, who is also a speech-language pathologist, opined that based on the April 2019 [REDACTED] University evaluation, 240 minutes per month of speech-language services would be preferable because, with 180 minutes per month, it would be difficult for Student to retain information between speech-language sessions. However, Independent Psychologist 2 did not conduct a speech-language evaluation of Student. I found both of these experts very credible, but I was more persuaded by the opinion of Speech-Language Pathologist because she has provided speech-language services to Student since the 2017-2018 school year and presumably is better informed as to Student's speech-language capabilities and needs than is Independent Psychologist 2.

The *Endrew F.* standard calls for evaluating whether the IEP was objectively reasonable at the time it was promulgated. *See Z. B., supra* at 517. I find that DCPS has shown by a preponderance of the evidence that when the December 14, 2016 IEP was completed at City School 1, the IEP was reasonably calculated to enable Student to make appropriate progress.

December 7, 2017 IEP

In this decision, I have concluded that DCPS denied Student a FAPE by not conducting formal special education reassessments of Student between January 2014

and June 2018. Student was due to be comprehensively reevaluated by January 2017. *See* 34 CFR § 300.303(b)(2). The U.S. Supreme Court instructs that “[u]nderstanding the particulars of a child’s current skills and needs is critical to developing an individualized educational plan.” *Endrew F.*, 137 S.Ct. at 999. At the hearing in this case, the District’s burden was 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.

The December 7, 2017 IEP team lacked comprehensive data on Student’s then-current skills and needs. Notwithstanding, the City School 2 IEP team carried over Student’s annual goals and baselines, essentially unchanged, from the December 14, 2016 City School 1 IEP and continued unchanged the IEP Specialized Instruction and Related Services. I conclude that DCPS has not adequately explained the reasons for the December 7, 2017 IEP team’s decisions or met its burden of persuasion that this IEP was reasonably calculated to enable Student to make appropriate progress.

With regard to Petitioner’s remaining claims about the alleged inappropriateness of the December 7, 2017 IEP – the SLD disability classification, the lack of goals in the area of social-emotional functioning, and the provision of 180 minutes per month of speech and language services – I find that, as with the December 14, 2016 IEP, DCPS has met its burden of persuasion that these alleged shortcomings did not make the December 7, 2017 IEP inappropriate.

FAILURE TO IMPLEMENT

v. Whether DCPS denied Student a FAPE by failing to provide all of the Speech and Language services specified on Student's IEPs in the 2016-2017 and 2017-2018 school years.

Student's September 25, 2015 IEP provided for Student to receive 240 minutes per month of Speech-Language Pathology Services. These speech-language services were reduced to 180 minutes per month in the December 14, 2016 IEP. Petitioner alleges that DCPS failed to fully implement the IEP provisions for speech-language services during the 2016-2017 and 2017-2018 school years. Petitioner has the burden of persuasion on this claim.

Petitioner's expert, Educational Advocate, testified that, beginning with the December 14, 2016 IEP through October 2018, Student should have received 3,600 minutes total of Speech-Language Pathology services. From her review of the DCPS service trackers, she concluded that Student had only received 2,195 minutes of speech services during this period. From my review of the service trackers, Exhibit P-17, it appears that from January to June 2017, at City School 1, Student was provided some 645 minutes of Speech-Language Pathology services. Under the IEP, Student should have received some 900 hours of speech-language services during this period. However most of the missed services were due to Student's unavailability. It appears that some 90 minutes of missed services were due to the provider's not fully implementing the IEP. For the 2017-2018 school year at City School 2, S-LP testified that she provided most of Student's speech services per Student's IEP, except when Student was absent or

unavailable. She testified that she only missed providing a total of 180 minutes for the school year. I found S-LP's testimony credible.

In sum, from my review of the service trackers and based on S-LP's testimony, I find from the preponderance of the evidence that the speech-language pathologists at City School 1 and City School 2, without justification, did not provide Student some 270 minutes of IEP Speech-Language Pathology services from January 2016 to the end of the 2017-2018 school year, a period of approximately 15 school months. This was out of some 2,700 minutes of Speech-Language Pathology services due under Student's IEPs.

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. Here, I conclude that DCPS' not providing Student some 270 minutes (4.5 hours) of speech language services over 15 months of school, especially in light of Student's significant deficits in expressive and receptive communication skills, was a substantial gap which must be deemed a denial of FAPE.

EDUCATION RECORDS

vi. Whether DCPS has failed to afford the parent and her representatives access to Student's complete education records despite numerous written requests.

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). In her due process complaint, Petitioner alleged that she requested copies of Student's records and cumulative file on January 19, 2018 and records were received in early February 2018. However, she alleged in the complaint that not all records were received. Petitioner has the burden of persuasion on this claim. At the due process hearing, Petitioner did not offer evidence as to which, if any, of Student's DCPS education records she was not allowed to inspect or review. I find that Petitioner did not establish that DCPS failed to afford her access to Student's education records.

Remedy

For relief in this case, Petitioner originally requested that the hearing officer

order DCPS to conduct or fund updated assessments for Student including a Comprehensive Psychological reevaluation, an Assistive Technology (AT) assessment, a Speech and Language reevaluation and a Functional Behavior Assessment. Each of these assessments has since been completed except the AT assessment. It was recommended in the April 2019 [REDACTED] University Speech-Language evaluation report that Student have use of multi modal support, written language in conjunction with an FM audio system. I will order DCPS to obtain an AT Assessment of Student, after Student is provided replacement hearing aids, to evaluate whether this system or other speech-language or audiology classroom technology would be appropriate for Student.

Petitioner also requested that DCPS be ordered to afford her representatives full access to Student's education records. The evidence does not establish that DCPS has not provided the parent's representatives access to Student's records and I do not find that this order is warranted.

Petitioner requested that I order DCPS to convene an IEP meeting to revise Student's IEP, as appropriate based on the updated evaluations. DCPS convened an IEP team meeting on September 30, 2019, but the revised IEP was apparently not finalized. I will order DCPS to ensure that Student's IEP team, including the parent and her representatives, reconvenes to continue review of the reevaluations and other current data and to complete the revision of Student's IEP as appropriate. If possible, Independent Psychologist 2 should participate in this meeting to provide her input as to

Student's needs.

Lastly, Petitioner has requested an award of compensatory education for Student for the denials of FAPE in this case. "An award of compensatory education aims to put a student . . . in the position ■ would be in absent the FAPE denial, and it accordingly 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. *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019) (internal quotations and citations omitted.)

In this decision, I have found that DCPS did not meet its burden of persuasion that City School 2's December 7, 2017 IEP was appropriate for Student and that DCPS also denied Student a FAPE by not ensuring that Student was comprehensively reevaluated between January 2017 and June, 2018 and by not fully implementing Student's IEP Speech-Language Pathology services from January 2017 until the end of the 2017-2018 school year. Quantifying the harm from these denials of FAPE, especially from the failure to comprehensively reevaluate Student and to appropriately revise Student's IEP, is necessarily an exercise in some conjecture.

Law Firm employee, Educational Advocate, offered a compensatory education proposal for Student, which recommended, *inter alia*, 660 hours of academic tutoring, 60 hours of counseling/behavior support services and 82 hours of speech and language services. In this decision, I have found that DCPS met its burden of persuasion that the IEP teams' decisions to provide Student 180 minutes per month of Speech-Language

Pathology services was appropriate. I also have found that DCPS did not deny Student a FAPE by not offering Behavior Support Services.

Educational Advocate's proposal of 660 hours of academic tutoring is predicated on Student's having been denied a FAPE since the December 14, 2016 IEP was developed, a period of approximately 28 school months. I have found that DCPS met its burden of persuasion that the December 14, 2016 IEP – but not the December 7, 2017 IEP – was reasonably calculated to enable Student to make appropriate progress. I conclude, therefore, that the period of harm from the denial of FAPE in this case runs from the completion of the December 7, 2017 IEP through the present, approximately 18 school months, and I will award Student 425 hours of academic tutoring as compensatory education for DCPS' failure to ensure that Student was provided appropriate IEPs based on timely comprehensive evaluations. I will also order DCPS to provide Student 5 hours of compensatory speech and language services.

ORDER

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

1. As compensatory education for the denials of FAPE determined in this decision, within 10 school days of the date of this decision, DCPS shall issue funding authorization for the Parent to obtain 425 hours of individual academic tutoring and 5 hours of Speech-Language Pathology services for Student;
2. Within 20 school days of the date of this decision, DCPS shall conduct or provide funding for an assistive technology assessment of Student to be completed by a Speech-Language or Audiology professional experienced in

working with hearing impaired adolescents;

3. DCPS shall reconvene Student's IEP team within 21 school days of the date of this decision, and shall make a diligent effort to secure the attendance of Mother and Mother's representatives. DCPS shall request Independent Psychologist 2 to participate in the meeting and shall pay her customary hourly fee. The IEP team shall consider all of the current assessments and reevaluations of Student, as well as all other relevant data and shall revise Student's IEP and Educational Placement as appropriate and
4. All other relief requested by the parties herein is denied.

Date: November 18, 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
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