

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 10/5/21; 10/7/21; 10/14/21;
v.)	10/22/21
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools,)	Case No. 2021-0101
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently ineligible for special education services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 26, 2021. The Complaint was filed by the Student’s parent (“Petitioner”). On July 28, 2021, Respondent filed a response. The resolution period expired on August 25, 2021.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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

III. Procedural History

A prehearing conference was held on August 18, 2021. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on August 23, 2021, summarizing the rules to be applied in the hearing and identifying the issues in the case. The prehearing conference order was amended on September 2, 2021, per the suggestions of Petitioner without objection. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding.

The parties agreed to appear at hearings on October 5, 2021, and October 7, 2021, based on witness and counsel availability. Testimony and evidence were not completed on October 7, 2021. As a result, the parties agreed to finish testimony on October 14, 2021. On October 7, 2021, Respondent moved, on consent, to extend the timelines to allow for the case to be tried on the October 14, 2021, hearing date. Petitioner consented to this motion and an order was issued on October 8, 2021, extending the timelines for the Hearing Officer Determination (“HOD”) to October 29, 2021. The matter did not conclude on October 14, 2021. As a result, the parties agreed to complete testimony and evidence on October 22, 2021, and extend the HOD due date to November 5, 2021. On October 14, 2021, Respondent moved on consent to extend the timelines for the case to be tried on the final hearing date. The motion was granted and the HOD due date was extended to November 5, 2021.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-52 without objection. Respondent moved into evidence exhibits R-1 through R-12, R-14

through R-23, and R-25 through R-31 without objection. Petitioner presented as witnesses, in the following order: Witness A, a psychologist (expert in psychology with regard to evaluating students with special needs); Witness B, an occupational therapist (expert in occupational therapy); Witness C, an educational advocate (expert in special education programming and Individualized Education Program (“IEP”) development); herself; Witness D, the head of “education and family partnerships” at a private organization (expert in special education); and Witness E, a social worker (expert in social work). Respondent presented as witnesses: Witness F, an occupational therapist (expert in occupational therapy); Witness G, a special education teacher (expert in special education, including in regard to appropriate evaluation, determination, and eligibility); Witness H, a social worker (expert in social work); Witness I, a school counselor (expert in education); Witness J, a DCPS designee (expert in determining evaluation procedures and availability); and Witness K, a school psychologist (expert in school psychology).

After the conclusion of Respondent’s presentation, the parties presented oral closing arguments.

IV. Issues

As identified in the revised Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did DCPS deny the Student a Free Appropriate Public Education (“FAPE”) by failing to identify the Student as eligible for special education services under the classification of Other Health Impairment (“OHI”)?

Petitioner contended that an independent psychological evaluation of the Student, provided to DCPS and reviewed at a meeting on or about January 23, 2020, diagnosed the Student with severe Attention Deficit Hyperactivity Disorder (“ADHD”) and

recommended that the Student receive an IEP under the OHI classification. Petitioner also contended that the Student should have been identified as a result of his/her ongoing academic struggles, particularly in math and writing, and classroom behavioral struggles.

2. Did DCPS deny the Student a FAPE by failing to conduct a comprehensive initial evaluation of the Student?

Petitioner contended that the Student was denied a FAPE as a result of DCPS's failure to conduct a comprehensive initial evaluation of the Student, by failing to conduct an occupational therapy assessment to address the Student's sensory processing and executive functioning skills, and by failing to assess the Student in the area of written expression and/or conduct a functional behavioral assessment ("FBA") of the Student.

As relief, Petitioner seeks a finding that the Student has been denied a FAPE based on the above; that the Student should be determined eligible for special education services under the classification OHI; that DCPS shall immediately convene the IEP team to develop an IEP for the Student; that DCPS shall conduct or fund an occupational therapy evaluation of the Student that addresses sensory processing issues, as well as executive functioning and organizational issues; that DCPS shall conduct or fund testing to address the Student's skills in the area of written expression and also conduct or fund an FBA; that DCPS shall timely reconvene the IEP team to review the results of the above-referenced evaluations, revise the Student's IEP, and develop a Behavioral Intervention Plan ("BIP"); that the Student should be entitled to compensatory education for denials of FAPE that have occurred; that DCPS shall fund a compensatory education evaluation; that the Student's right to request additional compensatory education upon completion of additional evaluations shall be reserved; that all meetings shall be scheduled through Petitioner's counsel; and that other relief should be considered at this

Hearing Officer's discretion. This Hearing Officer has no jurisdiction over Petitioner's request for attorneys' fees.

V. Findings of Fact

1. The Student is an X-year-old who is not currently eligible for services.

The Student is an auditory learner who is cognitively in the average range. Testimony of Witness A. The Student functions in the average to above-average range in reading but is a year to a year-and-a-half behind in mathematics. In writing, the Student has issues with spelling. Testimony of Witness A. The Student is said to be a "pretty good" writer but needs additional help to follow directions. Testimony of Witness C.

2. The Student has been diagnosed with ADHD and needs supports in areas such as organization, focus, concentration, self-control, participating, communicating, listening, completing work, and getting along with peers. Testimony of Witness C; Testimony of Witness J; Testimony of Witness E; P-37-1. The Student has anxiety about participating and responds to positive reinforcers and sensory tools such as fidgets. Testimony of Witness E. The Student's ADHD is "severe in degree." Testimony of Witness A. The Student's behavior problems in school are related to ADHD. These behaviors, including being off task, are what psychologists tend to see in ADHD students. Testimony of Witness H.

3. For a child with ADHD, the impairment is usually managed through medicine. However, it can also be managed through sensory interventions. An occupational therapist could work with the Student's central nervous system to help him/her self-regulate through an "optimal level of arousal," "bombarding the system with sensory input" to develop a more regular and even response during learning. Teachers

could also adapt the classroom environment for the Student, providing discreet visual supports and scaffolding instruction. Testimony of Witness C.

4. The Student attended School A during the 2017-2018 school year. The Student received outside counseling during this time because s/he was having issues following directions, following rules, respecting others, listening when others spoke, and practicing self-control. P-25-1; Testimony of Petitioner. i-Ready testing indicated that the Student was below grade level in mathematics. P-9; Testimony of Witness C. The Student's i-Ready scores in math increased from 382 at the start of the 2017-2018 school year to 422 at the end of the school year. P-9-1. However, the score of 422 is still below grade level.

5. According to i-Ready testing on August 30, 2018, the Student was performing at the 50th percentile nationally in mathematics, with a score of 429. P-10-1. Still, it was recommended that the Student receive interventions in mathematics relating to quantitative reasoning and representation. P-10-1. Petitioner received regular reports about the Student's behavior during the 2018-2019 school year. The Student would get into arguments with peers, be off-task, and have issues turning in assignments. Testimony of Petitioner. Additionally, teachers had problems with the Student and felt that his/her behavior was the main reason s/he struggled to learn new skills. The Student's teacher said that the Student might have ADHD and should be seen by a physician. P-40-1.

6. The Student continued at School A for the 2018-2019 school year. The Student's report card of November 2, 2018, showed grades of "2" across academic subjects. The report card indicated that the Student read above grade level and was a

good writer, but often showed a lack of maturity and received a failing grade on a math assessment. P-26-1. The Student's report card of January 21, 2019, also showed grades of "2" across academic areas, with the Student requiring frequent prompts to work with others, follow rules, practice self-control, and use time wisely. The report card indicated that the Student continued to struggle with subtraction and rarely completed his/her homework, but made significant gains in reading inventory assessment. P-27. The Student's April 11, 2019, report card likewise showed grades of "2" across academic areas and indicated that the Student needed frequent prompts for effort. This report card also indicated that the Student struggled with fractions but was strong in other areas; that when s/he wrote independently, his/her responses lacked organization; and that s/he occasionally copied. P-28. The Student's June 12, 2019, report card again showed grades of "2" in academics and indicated that frequent prompts were necessary for effort. P-29-1. This report card underscored that the Student had increased his/her level on the Reading Inventory test and gained fifty-three points on the i-Ready mathematics measure during the year. The goal for the year had been a twenty-seven-point gain. P-29.

7. The Student continued at School A for the 2019-2020 school year. On a beginning-of-year writing diagnostic, the Student scored a "1" (out of 4) on the writing rubric. The Student participated in class discussions with some prompting from the teacher and needed many reminders to follow directions and stay on task. The Student's teacher reported that the Student required "a lot of teacher support in solving problems with the peers." P-46-4-5. The Student behaved better in smaller or 1:1 settings, where it was quiet. In contrast, the classroom was noisy, which tended to make the Student sing and hum. P-38-27. The Student's private therapist, Witness E, worked with the Student

at the school on self-regulation, problem solving, and related issues. The Student's teacher, Teacher A, provided the Student with interventions, including giving him/her breaks when s/he got frustrated, allowing him/her to sit independently to focus on work when s/he got distracted, and tracking his/her behavior with a behavior tracker and reflection sheet. The behavior tracker/reflection sheet outlined strategies to address the Student's attention and distraction issues, including with language from the educational programs "Zones of Regulation" and "Big Deal/Little Deal." P-46-2-3.

8. The Student was assessed through an independent psychoeducational evaluation on November 4, 2019, and November 11, 2019. The assessment indicated that the Student could read, write, and use grammar appropriately and that s/he disliked mathematics. The Student was fidgety throughout the testing process, frequently humming, using self-talk, or singing, and at times was unable to answer questions. The evaluator assessed the Student through a clinical interview, a cognitive measure, the Wide Range Achievement Test ("WRAT-4"), and the Behavior Assessment System for Children ("BASC-3" Self-Report, Teacher Report, and Parent Version). The Student's cognitive ability was judged to be average. On the WRAT-4, the Student scored in the average to above-average range in word reading, sentence comprehension, spelling, math computation, and reading composite. According to the BASC-3 Teacher Report, the Student was "clinically significant" in "externalizing problems" (i.e., disruptive behaviors that deviated from norms), hyperactivity, and aggression, and "at-risk" in adaptability, social skills, leadership, and functional communication. On the BASC-3 Self-Report, the Student indicated that s/he had issues with self-control, attention, hyperactivity, interpersonal relations, and social stress. On the BASC-3 Parent Version, Petitioner

reported that the Student did not have issues with writing, reading, or grammar. The evaluator felt that the Student would need 1:1 specialized attention and an IEP. The evaluator indicated that the Student needed a reduction in the number of tasks imposed on him/her throughout the day. The evaluator also recommended special accommodations for the Student at school, including a smaller classroom setting and a “scaffolding approach” to help the Student remember new information. P-4; Testimony of Witness A.

9. On January 6, 2020, the Student was referred for an evaluation to review his/her social-emotional issues and attention problems. R-1. The Student’s i-Ready testing from January 15, 2020, placed the Student one grade below level in mathematics. P-11-1; Testimony of Witness C. A parent-teacher conference was held on January 15, 2020, during which it was indicated that the Student had issues with maintaining self-control, completing classwork, participating appropriately, having a positive attitude, and speaking at appropriate times. P-37-1. An “analysis of existing data” (“AED”) meeting was held for the Student on January 23, 2020. At the meeting were Petitioner, Witness E, Teacher A, a special education teacher, Witness K, Witness G, Occupational Therapist A, Witness J, and the principal of School A. Teacher A reported progress, though the Student required “a lot of adult support to stay on task,” and indicated that she was using a visual chart for the Student. Teacher A said that the Student frequently spoke out of turn or talked loudly, though s/he was caring and helpful. Teacher A also said that the Student had a hard time starting assignments, got frustrated easily when s/he was running out of time or challenged by material, and would distract others with loud humming or singing noises. P-6-6-7. Teacher A discussed her use of a “behavior/reflection” tracker to try to identify whether an issue was a “big deal or little deal” to the Student and

determine what strategies the Student could use to cope with the issue. Occupational Therapist A said that the Student was a “moderate tactile seeker” and might benefit from a “subtle, effective hand fidget.” R-11 at 31. Occupational Therapist A also said that the Student was still learning how to use “tools” to help stay focused, including a sensory ruler kept under the Student’s desk, out of sight, to assist the Student in regulating his/her distractibility. R-14-44-45. No occupational therapy assessment was deemed necessary. Testimony of Witness J.

10. The Student was then evaluated by Witness K, who reviewed Witness A’s evaluation and conducted interviews. Witness K also administered the Woodcock-Johnson Test of Achievement-4th Edition (“WJ-IV”) and conducted an observation. The Student was observed in his/her classroom for thirty minutes, with Teacher A in the room. The Student attempted to work independently at a table with three students. S/he worked diligently for about ten minutes but then had a dispute with a tablemate. The Student placed his/her pencil on the desk, crumpled up his/her paper, and threw it in a nearby garbage receptacle, without asking the teacher for assistance. Teacher A inquired as to the problem, but instead of responding, the Student returned to his/her desk and put his/her head down on it. Several minutes later, Teacher A approached the Student by bending down to his/her desk and talking to him/her, and the Student eventually began to work again. R-14-44-45.

11. During testing with Witness J, the Student was attentive and diligent and did not require any prompting or re-direction. On the WJ-IV, the Student received a standard score of 84 in “calculation,” in the low-average range. The Student was also in the low-average range in “applied problems,” with a standard score of 88, and in spelling.

Witness J concluded that the Student's behaviors were consistent with a child who has ADHD. However, the evaluator concluded that the Student was performing at grade level compared to his/her same-age peers in mathematics, sentence reading, and writing fluency, as well as in mathematical word problem-solving. The evaluator concluded that the Student's difficulty self-regulating did not appear to impact his/her ability to access the general education curriculum. The evaluator contended that, while the Student had some difficulties with inattention and distractibility, the classroom observations demonstrated that when the Student received adult support, cueing, and proximity to the teacher, "it appears" that his/her performance and ability to complete classroom assignments improved. The evaluator recommended reducing visual distractions, modifying worksheets to reduce non-essential visual stimuli, providing only one task or assignment at a time, breaking work up into three different parts, opening only one section of the work at a time, assigning preferential seating, using contrasting colors to increase visual focus, and varying lessons to increase focus.

12. A social work evaluation of the Student was conducted by Witness H, based on an interview with Petitioner on February 10, 2020, during which Petitioner said that the Student had developmentally appropriate personal functioning skills to manage hygiene, but had a major challenge in his/her organizational skills. Witness H also observed the Student and felt that, during the observation, the Student had a "great deal" of difficulty staying focused and preferred to socialize and play with his/her pencil sharpener. The Student was on task 63% of the time during the observation. P-6. The Student also received counseling from Witness H starting in or about February, 2020. During counseling, the Student made some progress in areas such as recognizing facial

and body cues, and s/he actively participated in the sessions, but s/he would not always focus. P-31-1; P-38-23. Witness H provided the Student with emotional-behavioral support in the classroom through the response-to-intervention process, which lasted for four weeks prior to the onset of the COVID-19 pandemic. The Student made good progress with emotional vocabulary, coping skills, and understanding body language. P-8-3.

13. At an eligibility meeting for the Student on March 27, 2020, which coincided with the start of the pandemic, Witness H reviewed the Student's social history report and Witness K reviewed the outside independent evaluation and her own report. There were no comments, questions, or concerns in response to this report review. The team did not closely consider the Student's performance during prior school years and perceived that the Student was functioning on grade level based on standardized testing and teacher reports. Testimony of Witness J; Testimony of Witness K. The team indicated that the Student appeared to have ADHD but that the impairment did not adversely affect his/her educational performance at the time. Petitioner agreed with this determination. Witness J and Witness K then described the next steps for a "Section 504" referral. P-7-1; Testimony of Witness J; Testimony of Witness K.

14. In or about March, 2020, the COVID-19 pandemic forced educational services to be provided through videoconferencing. At about this time, the Student received extra writing help. A teacher met with the Student for thirty minutes, though not every day of the school week. Testimony of Witness K.

15. Virtual instruction was a significant challenge for the Student. S/he had to handle emotions about being home and isolating, so s/he and Witness H talked about

coping skills, virtual learning, advocating, role playing, and problem solving. Testimony of Witness H.

16. DCPS issued a Prior Written Notice (“PWN”) on March 27, 2020. The PWN underscored that the Student was performing at grade level and stated that the Student’s adaptive skills issues and self-regulation issues did not appear to impact his/her ability to access the general education curriculum consistent with his/her same-age peers. The PWN indicated that with proper supports and additional strategies, the Student was able to respond to the interventions in place and improve in the areas that then hindered him/her from making more progress based on his/her intellectual functioning. R-17.

17. By April 6, 2020, the Student indicated to Witness H that s/he was overwhelmed by online learning. P-38-17. In July, 2020, the Student finished the school year with no marks in writing or world languages, and a “P” (pass) in other subjects, together with a reference that the Student required frequent prompting for following directions and rules. P-32-1.

18. The Student was assessed through different measures during the 2019-2020 school year. On an Affirm Interim 1 Assessment in mathematics conducted on October 18, 2019, the Student scored 31%, compared with the class average of 66% and school district average of 55%. On an Affirm Interim 2 Assessment in mathematics conducted on December 17, 2019, the Student scored 27%, compared with the class average of 49% and school district average of 54%. P-46-2. The Student’s i-Ready scores rose to 482 over the year, a fifty-three-point gain from June, 2019. P-46-2. The Student’s i-Ready mathematics scores for the 2019-2020 school year still indicated that

the Student continued to be below grade level in most domains, including algebra and algebraic thinking, measurement and data, and overall score. P-11.

19. The Student continued at School A for the 2020-2021 school year, with classes held largely through virtual instruction. DCPS decided to delay implementation of the Student's Section 504 plan until virtual instruction had ended, which Petitioner agreed with. Testimony of Witness J. The Student's November 2, 2020, i-Ready test indicated that the Student had regressed to a score of 419 overall, at the 7th percentile. This score suggested that the Student was approximately three grade levels behind in mathematics. P-14. The Student received additional work from his/her teacher in math during this school year because the Student scored so low on the i-Ready diagnostic. P-33-1. By January 15, 2021, the Student's i-Ready score had improved to 459, at the 24th percentile, which is still below grade level. P-15.

20. The Student's report cards for the 2020-2021 school year, from November 18, 2020, February 8, 2021, and May 7, 2021, all indicated grades of "2" in academics. Problems were noted in completing homework and following rules. It was also noted that the Student had improved in math and was now one grade level below the standard. The Student's reading was on grade level, though it had dropped from Lexile level 1152 to Lexile level 993. P-34.

21. A Section 504 meeting was held for the Student on May 28, 2021, during which the Student was deemed to be eligible for services. The Student's teacher, Teacher A, indicated that the Student had made great progress as reflected by mid-year i-Ready data. Petitioner indicated that the Student was doing better in mathematics. The team discussed the Student's difficulty with concentration and agree that the Student's ADHD

caused concentration problems that impacted him/her in the classroom. Petitioner contended that the Student needed an IEP, but Witness K said that the Student was able to refocus and re-engage with support, and Witness I said that the Student's ability to learn has not been affected by ADHD. The team also discussed the Student's "moderate" issues with producing work within time constraints. A Section 504 plan was therefore established, which provided the Student with graphic organizers (math, reading, writing), a visual schedule, "brain breaks," "Planner/checklist for assignments," a "PBIS" reward system, modified work to reduce non-essential visual stimuli, extended time, chunking assignments, and checks for understanding. Petitioner sought a classroom with a small student-to-teacher ratio, but Witness I did not agree. Petitioner said that she thought that the Student was distracted by peers, but Witness K noted that when a triggering student and the Student were separated, the issues greatly improved, and that a small student-to-teacher ratio was not needed. P-8.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement" provided that "the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency." D.C. Code Sect. 38-

2571.03(6)(A)(i). Accordingly, for both Issue #1 and Issue #2, which relate to the Student's eligibility and the appropriateness of an evaluation, the burden of persuasion is on Petitioners.

1. Did DCPS deny the Student a FAPE by failing to identify the Student as eligible for special education services under the classification of OHI?

Petitioner contended that the Student should have been deemed eligible as a Student with OHI because of his/her severe ADHD and requested that s/he receive an IEP under the OHI classification. Petitioner also contended that the Student should have been identified because of the Student's ongoing academic struggles, particularly in math and writing, and classroom behavioral struggles.

The term "child with a disability" is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR Sects. 300.304 through 300.311 "as a child . . . having one or more defined disabilities," "and who, by reason thereof, needs special education and related services." 34 CFR Sect. 300.8(a), (b). "Other health impairment" is an appropriate classification if a child has limited strength, vitality, or alertness with respect to the educational environment which adversely affect the child's educational performance. This classification requires identification of chronic or acute health problems such as asthma, Attention Deficit Disorder or ADHD, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, or sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1.

The parties agree that the Student has been diagnosed with ADHD, with is listed in the statute as a basis for "Other Health Impairment." The question before this Hearing Officer is whether the Student's "other health impairment" has had an adverse impact on the Student's educational performance, thereby necessitating specialized instruction.

Though some of Respondent's witnesses, such as Witness I, indicated that the Student's ADHD did not have an adverse impact on the Student's school performance, the Student's classroom actions and behaviors included, among other things, having organizational issues, losing focus, losing concentration, losing self-control, having difficulty participating, having difficulty communicating, having difficulty listening, having difficulty completing work, and having issues with peers. As stated by Witness H, a DCPS witness, these behaviors are typical of students who have ADHD. Witness H, in accord with all of Petitioner's witnesses, said that "it is obvious" that the Student's difficulties with behavior in school are a function of the Student's ADHD. In fact, the Student's teacher during the 2018-2019 school year, who was not called as a witness, reacted to the Student's behavioral issues by specifically asking Petitioner to speak to a doctor to see if the Student had ADHD. Consistent with this evidence are statements in the record from Teacher A, who said that the Student required a lot of adult attention to stay on task, frequently spoke out of turn or talked loudly, had a hard time starting assignments, and got frustrated easily when s/he was running out of time or challenged by material. Teacher A also said that the Student distracted others in class with loud humming or singing noises. None of the Student's other teachers were called as witnesses to rebut Petitioner's contention that the Student's classroom behaviors were a function of the Student's ADHD. Indeed, the Student's ADHD-related behavior was so prevalent that it flared up during an observation conducted by Witness K, who watched the Student suddenly throw his/her work in the garbage during the brief thirty-minute session.

Respondent's main argument was that ADHD's impact on the Student was not severe enough to require "specially designed instruction," contending that the Student was functioning on grade level and doing reasonably well in school. However, the Student was not functioning at or above grade level across the board. The Student has been below grade level in mathematics in most i-Ready measures over the last several school years. Eight months after the eligibility meeting, the Student scored more than three grade levels below where s/he should have been on the i-Ready mathematics measure. The Student has also received "2" grades in all academic subjects consistently over the course of the past several school years, which indicate that the Student is approaching grade level, but not on grade level.

Further, the legal definition of "specially designed instruction" does not mean that the Student necessarily needs to be placed in self-contained special education classes. In McLean v. District of Columbia, 264 F. Supp. 3d 180 (D.D.C. 2017), the hearing officer relied on an expert who said that the student was meeting expectations grade-wise and was "normal achievement-wise." The court reversed the hearing officer, paying close attention to the testimony of the petitioner's expert who suggested that the student could benefit from special education strategies such as teaching the student to calm down and meditate. Id. at 185.

Additionally, in Letter to Chambers, 59 IDELR 170 (May 9, 2012), a Massachusetts school district contended that certain extra services like counseling, social skills training, and modified teaching methodologies are best teaching practices that are part of the district's regular education program. OSEP stated that "the fact that some of those services may also be considered 'best teaching practices' or 'part of the district's

regular education program’ does not preclude those services from meeting the definition of ‘special education’ or ‘related services’” and being included in the child’s IEP. OSEP pointed out that “specially designed instruction” means “the adaptation of content, methodology, or delivery of instruction, as appropriate to meet the unique needs of a child with a disability in order to ensure access to the general curriculum, so that the child can meet the educational standards that apply to each child within the jurisdiction of the District.” 34 C.F.R. Sect. 300.39(a)(1); 5-E DCMR Sect. 3001(1). OSEP continued by stating that “OSEP recognizes that classrooms across the country are changing as the field of special education responds to innovative practices and increasingly flexible methods of teaching. While the needs of many learners can be met using such methods, they do not replace the need of a child with a disability for unique, individualized instruction that responds to his or her disability and enables the child to meet the educational standards within the jurisdiction of the public agency that apply to all children.”

To this Hearing Officer, the kinds of interventions mentioned in Letter to Chambers were being implemented at School A during the 2019-2020 school year. Prior to the eligibility meeting, the Student was receiving “a lot of adult support to stay on task.” The Student’s teacher indicated that she was using a visual chart for the Student. Teacher A also used a “behavior/reflection” tracker, which focuses on identifying whether an issue is a “big deal or little deal” to the Student and what strategies s/he can use to cope with them. Starting in February, 2020, the Student met with a social worker weekly to address behavioral issues. Starting in March, 2020, the Student received extra writing help regularly during the school day.

Moreover, in the Section 504 plan that was to immediately follow the eligibility meeting, the Student was offered interventions that were clearly adaptations to the content, methodology, or delivery of instruction, including modifying work to reduce non-essential visual stimuli and chunking assignments. Respondent did not explain how these kinds of interventions could possibly be characterized as anything but adaptations to and/or modifications of curriculum.

The record also suggests that the eligibility team did not sufficiently consider whether the Student could benefit from interventions such as a small classroom setting to address his/her ADHD issues. A note in the record from Witness H to DCPS states that the Student gets distracted, stops listening, and starts singing and humming in a large, noisy classroom. P-38-27. Witness K and Witness H both made it clear that the Student has done well in individual sessions, and the Student apparently benefitted from small group or individual math instruction during the 2020-2021 school year.

Finally, this Hearing Officer felt that Witness B was convincing in her argument that the Student may need special education in the form of sensory-related services to address his/her ADHD-related issues. Witness B argued that the Student could benefit from a sensory diet, whether through an occupational therapy provider or interventions provided by a teacher in the classroom. Witness B testified to the effect that an occupational therapist could work with the Student's central nervous system to help him/her self-regulate through an "optimal level of arousal," "bombarding the system with sensory input" to develop a more regular and even response during learning. Classroom teachers can also adapt the environment for the Student, providing discreet visual supports and scaffolding the instruction. In response, Witness F took the position that an

assessment was not needed, but agreed that the Student's issues with initiating work and self-regulation could have a sensory basis. Occupational Therapist A also said that the Student is a "moderate tactile seeker."

As a result of the foregoing, this Hearing Officer finds that Respondent failed to determine the Student to be eligible for services as a child with a disability in its determination on March 23, 2020, and therefore denied the Student a FAPE.

2. Did DCPS deny the student a FAPE by failing to conduct a comprehensive initial evaluation of the student?

Petitioner contended that the Student was denied a FAPE as a result of DCPS's failure to conduct a comprehensive initial evaluation of the Student, by failing to conduct an occupational therapy assessment to address the Student's sensory processing and executive functioning skills, and by failing to assess the Student in the area of written expression and/or conduct an FBA of the Student.

To obtain relevant functional, developmental, and academic information about a child, a public agency must conduct a comprehensive evaluation, using a variety of assessment tools and strategies. Information obtained through the evaluation can assist in determining whether the child is a child with a disability, as well as determining the content of an eligible child's IEP to enable the child to be involved in, and make progress in, the general education curriculum. 34 C.F.R. Sect. 300.304(b)(1). The public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 C.F.R. Sect. 300.304(c)(4). Nevertheless, "There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas

related to the child's suspected disability, as it determines appropriate." Letter to Unnerstall, 68 IDELR 22 (OSEP Apr. 25, 2016).

Witness A testified that the Student was diagnosed with severe ADHD and that students with ADHD often benefit from sensory-based services. Witness B opined that such services could work to help the Student self-regulate through "bombarding the system with sensory input" to develop a more regular and even response during learning. These witnesses were credible and there is no rebuttal in the record from DCPS. In fact, Occupational Therapist A wrote that the Student had moderate sensory issues. Under the circumstances, occupational therapy must be considered an "area of concern," and DCPS should have completed an occupational therapy assessment to comprehensively explore the Student's needs in this area. Witness A suggested that Occupational Therapist A reviewed the Student's occupational therapy needs, but there is no mention of occupational therapy or sensory issues in the AED report, and Occupational Therapist A did not review the Student's sensory needs except to state, at the January 23, 2020, AED meeting, that the Student is a moderate tactile seeker and may benefit from a subtle, effective hand fidget that does not distract him/her or other students. The meeting notes do not explain why Occupational Therapist A came to this conclusion, and Witness F did not amplify this analysis during testimony. Witness F argued that the initial referral did not refer to occupational therapy. However, a local education agency is not allowed to narrowly frame an evaluation before it occurs and then limit the scope of the evaluation to the questions that were originally posed. If, during the evaluation process, it becomes apparent that a particular assessment is needed to ascertain whether the child has a

disability and whether the child has special educational needs, then the public agency must conduct the necessary assessments. Letter to Unnerstall.

Less persuasive were Petitioner's requests for a fuller writing assessment and an FBA. While the Student's psychological testing did not include a full battery of writing measures, the Student's spelling was tested by Witness A, and the record contains useful reports from teachers describing the Student's writing performance. These reports suggested that the Student can write, but that the Student's writing is impaired by his/her ADHD. For instance, in the Student's AED report, Teacher A said that the Student is "a very good writer" as long as s/he understands the directions and is able to sit, focus, and write. Indeed, Teacher A also explained the interventions she had tried, including breaks, allowing the Student to sit independently, and tracking his/her behavior with a behavior tracker and reflection sheet. Petitioner did not clearly explain why an additional subtest in writing would be necessary to program the Student in view of Teacher A's clear and focused analysis.

Additionally, this Hearing Officer was not convinced that an FBA was necessary during the Student's initial evaluation. Some courts hold that a school district cannot deny a student a FAPE by failing to conduct an FBA during an initial evaluation. E.L. Haynes P.C.S. v. Frost, 115 LRP 58575 (D.D.C. September 12, 2015). Other courts focus on a school district's duty to "consider the use of positive behavioral supports and other strategies" if a student's behavior impedes that student's learning. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). Overall, caselaw suggests that an FBA should be employed by a school district when it needs new ideas on how to manage a particular student's behavior. Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C.

2008) (in ruling the district failed to provide an FBA/BIP for a student, the court stated, “the quality of a student’s education is inextricably linked to the student’s behavior”).

While the record does not suggest that DCPS even considered an FBA, this Hearing Officer does not believe an FBA was necessary to adjust the Student’s educational program to address his/her behavioral issues. The record indicates that the Student needs an IEP, which should provide the Student with additional services that have not yet been tried, including smaller class sizes, help from a special educator, and sensory-related services. These services, especially regarding smaller class size and sensory services, could well address the Student’s behavioral issues. An occupational therapy assessment could provide additional approaches to address the Student’s behavioral concerns. Moreover, Petitioner did not request an FBA from DCPS at the time, and Petitioner did not clearly explain what specific information an FBA could reveal to properly individualize an educational program for the Student. It is already known, from teacher reports and psychological reports, that the Student engages in a myriad of inappropriate behaviors in a large general education classroom with a single teacher.

In sum, this Hearing Officer agrees that DCPS denied the Student a FAPE by failing to comprehensively assess the Student for sensory issues.

RELIEF

As relief, Petitioner seeks compensatory education or a compensatory education assessment, a determination that the Student should be determined eligible for special education services under the classification OHI, that DCPS shall immediately convene the IEP team to develop an IEP for the Student, that DCPS shall conduct or fund an

occupational therapy evaluation of the Student that addresses sensory processing issues as well as executive functioning and organizational issues, that DCPS shall conduct or fund testing to address the Student's skills in the area of written expression, that DCPS shall also conduct or fund an FBA and BIP, and related relief.

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

Hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The award 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “qualitative, fact-intensive” inquiry used to craft an award “tailored to the unique needs of the disabled student”). A Petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Through the plan of Witness A, Petitioner seeks compensatory education in the form of specialized instruction and “executive functioning coaching.” Insofar as the

request for specialized instruction is concerned, Witness A stated that he went through the evaluations in the record and estimated that the Student would catch up if s/he were to receive ninety hours of specialized instruction. This Hearing Officer finds that this approach is reasonable in view of the eighteen or so months during which the Student did not have access to specialized instruction. Insofar as the request for executive functioning coaching, this Hearing Officer finds that this term was not adequately defined in the proceeding. The record does not establish any way to determine what the credentials of an executive functioning coach might properly be, or what an executive functioning coach might do to help the Student's executive functioning. This Hearing Officer is therefore not convinced that executive functioning coaching would be of use to the Student. Accordingly, the request for executive functioning coaching will be denied.

Finally, consistent with the earlier sections of this HOD, this Hearing Officer will order that the Student be deemed eligible for services as a student with ADHD, that DCPS arrange for an occupational therapy assessment (public or private) to be completed within thirty days, and that an IEP meeting should occur within fifteen days of completion of the occupational therapy assessment to craft an IEP for the Student. Petitioner's other requests, including the request for an FBA, BIP, and an additional writing assessment, are hereby denied.

VII. Order

As a result of the foregoing:

1. The Student is eligible for services as a student with Other Health Impairment;

2. Respondent shall pay for ninety hours of academic tutoring for the Student, to be provided by a certified special education teacher at a reasonable and customary rate in the community;
3. Respondent shall arrange for an occupational therapy assessment of the Student, to be completed within thirty days;
4. Within fifteen days of the completion of the occupational therapy assessment report, DCPS shall convene an IEP meeting and write an IEP for the Student;
5. Petitioner's requests for relief are otherwise denied.

Dated: November 5, 2021

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Dated: November 5, 2021

Michael Lazan
Impartial Hearing Officer