

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

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OSSE  
Office of Dispute Resolution  
October 04, 2019

PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: October 4, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0164

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Dates: August 13, 2019  
September 11 and 20, 2019

Respondent.

Office of Dispute Resolution, Room 423  
Washington, D.C.

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DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Petitioner,

v.

Case No: 2019-0186 (Consolidated Case)

PETITIONER,  
on behalf of STUDENT,

Respondent,

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the consolidated Administrative Due Process Complaint Notices filed, respectively, by the parent (FATHER or PARENT) and by

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<sup>1</sup> Personal identification information is provided in Appendix A.

District of Columbia Public Schools (DCPS), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In his due process complaint (Case No. 2019-0164), filed on June 26, 2019, Father alleged the District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to conduct comprehensive special education evaluations, failing to develop appropriate Individualized Education Program (IEPs), failing to implement Student’s IEPs and failing to afford the Parent’s representatives access to Student’s education records. In Case No. 2019-0186, filed on July 25, 2019, DCPS seeks a determination that its May 2019 Psychological Evaluation and Occupational Therapy (OT) assessments of Student were appropriate. Case No. 2019-0186 was originally assigned to Impartial Hearing Officer Coles Ruff.

On July 18, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On July 17, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

On August 2, 2019, Father, by counsel, filed a motion to consolidate Case No. 2019-0186 with Case No. 2019-0164 on the grounds that the same evidence would be presented in both cases and consolidation would further judicial efficiency. DCPS filed a response in opposition to the motion. With the concurrence of Hearing

Officer Ruff, by order of August 8, 2019, I granted the Parent's motion to consolidate, before me, Case No. 2019-0186 with Case No. 2019-0164.

On August 2, 2019, Father, by counsel, filed a motion to dismiss DCPS' complaint in Case No. 2019-0186 for failure to state a claim upon which relief could be granted. In my August 8, 2019 order, I denied this motion.

The due process hearing in the consolidated cases was originally scheduled for August 13-14, 2019. On August 13, 2019, the first day of the due process hearing, Parent's attorney informed the hearing officer that she had just obtained a psychological evaluation report on the child, completed in summer 2018 by a local education agency (LEA) in Pennsylvania, which the parent considered to be an appropriate evaluation. In her opening statement, Father's counsel withdrew Father's request for DCPS funding for an Independent Educational Evaluation (IEE) psychological reevaluation of Student. The Pennsylvania evaluation report had only been provided to DCPS in Father's 5-day prehearing disclosures and had not yet been formally reviewed by DCPS or considered by Student's DCPS IEP team. At the August 13, 2019 hearing, DCPS' counsel made an, on the record, oral motion for a continuance of the hearing date to allow DCPS to complete a review of the Pennsylvania evaluation and for Student's IEP team to meet and revise Student's IEP as appropriate. I granted DCPS' motion over the parent's objection and adjourned the hearing. By order issued August 20, 2019, I granted DCPS' continuance motion to extend the final decision due date in both cases to September 27,

2019. On September 27, 2019, I granted DCPS' unopposed continuance motion to further extend the final decision due date to October 4, 2019.

Student's DCPS IEP team met on September 5, 2019, reviewed the 2018 psychological evaluation completed by the Pennsylvania LEA and revised Student's DCPS IEP. The parent continues to dispute that the DCPS IEP, as revised on September 5, 2019, is appropriate.

The due process hearing was reconvened before the undersigned impartial hearing officer on September 11 and September 20, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Father appeared in person and was represented by PARENT'S COUNSEL. Respondent DCPS was represented by SPECIALIZED INSTRUCTION MANAGER and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Father testified at the hearing and called as additional witnesses INDEPENDENT OCCUPATIONAL THERAPIST, INDEPENDENT SPEECH-LANGUAGE PATHOLOGIST, EDUCATIONAL ADVOCATE 1 and EDUCATIONAL ADVOCATE 2. DCPS called as witnesses SCHOOL PSYCHOLOGIST 2, DCPS OCCUPATIONAL THERAPIST, DCPS SPEECH-LANGUAGE PATHOLOGIST, SCHOOL SOCIAL WORKER and Specialized Instruction Manager. Parent's Exhibits P-6, P-7, P-12 through P-75, P-77 through P-90, P-99 through P-134 and P-136 were admitted into evidence including Exhibit P-131 admitted over DCPS'

objection. DCPS' objection to Exhibit P-3 was sustained. Parent withdrew Exhibits P-1, P-2, P-4, P-5, P-8 through P-11, P-76, P-91 through P-98 and P-135. DCPS' Exhibits R-1 through R-25 were all admitted into evidence, including Exhibit R-21 admitted over Parent's objection. Due to time constraints, in lieu of making oral closing arguments, the parties were directed to file post-hearing written memoranda. Both parties timely filed written closings.

### **JURISDICTION**

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

### **ISSUES AND RELIEF SOUGHT**

The issues for determination in these Case No. 2019-0164, as certified in the July 18, 2019 Prehearing Order, are:

- a. Whether DCPS denied the student a FAPE for its failure to timely and comprehensively evaluate and/or reevaluate the student via a Comprehensive Psychological Evaluation, Occupational Therapy Evaluation, Speech and Language Evaluation, and Functional Behavior Assessment (with a corresponding and appropriate Behavior Intervention Plan created);
- b. Whether DCPS denied the student a FAPE for the failure to develop appropriate IEPs from January 2018 up to the present date and determine the appropriate location of services for the student;
- c. Whether DCPS denied the student a FAPE for its failure to implement the student's IEP Specialized Instruction, Speech and Language and Behavioral Support Services during the 2016-2017, 2017-2018 and 2018-2019 school years;
- d. Whether DCPS denied the student a FAPE for its failure to provide Student's education records to the parent's representatives and thereby preventing the

parent from meaningfully participating in the student's education.

For relief, Father originally requested that the hearing officer order DCPS as follows:

1. DCPS shall fund an independent provider to conduct an OT evaluation, a Comprehensive Psychological Evaluation, a Speech and Language Evaluation, and a Functional Behavior Assessment;
2. DCPS shall place and fund the student in a full-time therapeutic special education day school as determined by Parent and independent evaluators;
3. DCPS shall revise the student's IEP to provide: Extended School Year (ESY) services to the student, 240 minutes per month of direct Behavioral Support Services (BSS) outside of the general education setting, 60 minutes per month of consult BSS, 120 minutes of direct OT services, full time (27.5 hours per week) specialized instruction, a dedicated aide, one to one instruction, appropriate classroom and statewide accommodations, appropriate classroom aids and services, transportation as necessary for the new location of services and/or ESY services, and updated and appropriate goals in written expression, reading, mathematics, behavior support services, speech and language pathology, and OT as determined by Parent, the independent evaluators, and the school;
4. DCPS shall hold a location of services meeting immediately upon completion of the above-referenced evaluations, and prior to the start of the 2019-2020 school year, with Parent and OSSE to determine the appropriate location of services for the student;
5. DCPS shall provide Father with any and all outstanding education records for Student;
6. DCPS shall provide the student with Compensatory Education in the form of Tutoring, Occupational Therapy, Speech and Language Pathology, and Behavior Support Services and/or shall pay for a Compensatory Education Evaluation of the student.

In Case No. 2019-0186, DCPS requested a finding that its May 13, 2019 OT assessment of Student was appropriate and that Student is not entitled to a publicly funded independent evaluation. (DCPS had also sought a finding that its May 17, 2019

comprehensive psychological evaluation of Student was appropriate. That relief is now moot inasmuch as the Parent submits that the August 2018 Evaluation Report on Student conducted by the Pennsylvania LEA was appropriate and he no longer seeks DCPS funding for an IEE psychological reevaluation.)

### **FINDINGS OF FACT**

After considering all of the evidence received at the September 11 and 20, 2019 due process hearing in this case, as well as the argument and legal memoranda of counsel, my findings of fact are as follows:

1. Student, an AGE child, is a legal resident of the District of Columbia. Student resides with Father. Testimony of Father.
2. Student is eligible for special education under the IDEA disability classification Intellectual Disability (also known as Mental Retardation). Exhibit R-24.
3. In early 2017, a Speech and Language evaluation of Student was conducted at City School 1. The evaluator reported that Student presented with severe deficits in the areas of articulation, phonology, expressive vocabulary, receptive vocabulary, expressive language, and receptive language and mild deficits in pragmatic language. Exhibit R-12.
4. On February 24, 2017, a DCPS Clinical School Social Worker completed a Social Work Assessment of Student. She reported that the combination of impaired reading skills and comprehension, math skills, speech and language concerns, and

attention issues were significantly impacting Student's ability to learn. She recommended, *inter alia*, that Student may learn best in a smaller class environment with varied academic interventions in areas of difficulty, such as reading and mathematics; that Student may benefit from having assignments broken into smaller sections, repetitive instructions, preferential seating, and frequent check-in with the classroom teacher. Exhibit R-13.

5. On March 9, 2017, SCHOOL PSYCHOLOGIST 1 completed a COMPREHENSIVE PSYCHOLOGICAL EVALUATION of Student. Student's cognitive functioning was assessed using the Comprehensive Test of Nonverbal Intelligence-Second Edition (CTONI-2). Student's performance fell within the Very Low range (63 Pictorial Scale, 63 Geometric Scale and 60 Full Scale). The Adaptive Behavior Assessment System-Third Edition (ABAS-3) was completed by Father and a teacher. Student's adaptive behavior at school, as reflected in scores from the General Adaptive Composite (GAC) and the three adaptive domains, fell within the Low to Extremely Low range (Conceptual SS=63, Social SS=73, Practical SS=67 and GAC=65). Student's adaptive behavior at home reflected scores within the Low Average to Average range (Conceptual SS=89, Social SS=88, Practical SS=100 and GAC=93). School Psychologist 1 determined that Student met the criteria for an Intellectual Disability (ID) disability. Exhibit R-3. On March 10, 2017, the special education eligibility team at CITY SCHOOL 1 determined that Student was eligible for special education and related services under



the ID classification. Exhibit R-14.

6. Student's initial March 23, 2017 IEP identified Mathematics, Reading, Written Expression and Communication/Speech and Language as areas of concern. This IEP provided for Student to receive 10 hours per week of Specialized Instruction outside general education and 2 hours per month of Speech-Language Pathology (SLP) services. Initially, Student was served at City School 1. Exhibit R-18. At the end of the school year, Student was reported to be "Progressing" on most academic and Speech and Language annual IEP goals. Exhibit P-27.

7. On October 2, 2017, a City School 1 social worker conducted a Functional Behavior Assessment Level 1 Interview of Student's teacher. The teacher described the behavior of concerns for Student as lacking appropriate interpersonal skills, especially with peers; being developmentally immature, snatching things, play hitting and infringing on others' personal space of which Student seemed unaware. On the FBA form question, "if it was worth a million dollars, what would you do to help him/her succeed in learning [appropriate behavior], the teacher responded, "if I had the money, I would also hire a dedicated aide and provide intense individualized teaching." Exhibit R-16. On October 2, 2017, a Behavior Intervention Plan (BIP) was developed for Student. Exhibit R-15.

8. On November 7, 2017, DCPS send a notice to Father that the Early Learning Support program at CITY SCHOOL 2 had been identified as Student's location

of service. Exhibit R-17.

9. Student transferred to City School 2 on January 22, 2018. The annual review of Student's IEP was done of March 16, 2018 at City School 2. The March 16, 2018 IEP provided for Student to receive 26.5 hours per week of Specialized Instruction outside of general education, 2 hours per month of Speech-Language Pathology and 30 minutes per week of Behavioral Support Services. Exhibit P-22.

10. In the spring of 2018, Father took Student to Pennsylvania and on April 23, 2018, enrolled Student in the local school division (GJSD). On April 27, 2018, Father signed a GJSD consent form for an initial special education evaluation of Student. The GJSD Evaluation Report was completed on August 23, 2018. At GJSD, Student was placed in a Supplemental Life Skills Support classroom, where a para-educator sat with Student at all times. Student received Supplemental Life Skills Support in the areas of reading, mathematics and writing. Student was included in regular education for homeroom activities, breakfast and lunch, Specials classes, recess, assemblies and field trips. Exhibit R-20.

11. In the GJSD Evaluation Report, it was reported that Student was administered the Kaufman Brief Intelligence Test - Second Edition (KBIT-2) to measure both verbal and nonverbal intelligence. Student obtained an IQ composite score of 52, which fell at the 0.1 percentile and within the Lower Extreme range. On the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to assess Student's academic

skills, Student's scores fell in the Very Low range on the Basic Reading Composite and Numerical Operations subtest in Mathematics. Student was reported to need to improve adaptive skills and expressive and receptive language skills. Student was reported not to have demonstrated any behavioral concerns since moving to GJSD. The GJSD evaluator reported that Student has a special education disability – ID (primary) and Speech or Language Impairment (secondary). The evaluator recommended that Student continue to receive services in a GJSD Life Skills Support program as Student's least restrictive environment (LRE) and that Student continue to receive Speech and Language services as a related service. Student was also determined eligible for ESY services because of regression in skills following breaks in instruction. Exhibit R-20.

12. GJSD developed an IEP for Student on May 24, 2018. The IEP stated that Student did not need Assistive Technology (AT) devices or services and that Student did not exhibit behaviors that impeded learning. The GJSD IEP provided Annual Goals for Speech-Language, Reading, Mathematics and Writing. The IEP provided for 30 minutes of Speech and Language group services, 1 time per 6 day cycle; for school transportation; and for Extended School Year (ESY) services. For Student's educational placement, the GJSD IEP provided for Student to receive all "functional academics and life skills education" within the Life Skills Support classroom. Under the GJSD IEP, Student would be placed with nondisabled peers for 28% of the school days, for outside of functional academic times. Exhibit P-8.

13. Student did not attend the GJSD ESY program. Exhibit R-20.

14. GJSD sent an Unlawful Absence letter to Parent on September 25, 2018.

Exhibit R-20.

15. Father did not formally disenroll Student from DCPS before moving Student to Pennsylvania in April 2018. Testimony of Father. DCPS had not known that Father had moved Student to the GJSD school in Pennsylvania. Testimony of Specialized Instruction Manager. Apparently Parent's Counsel was likewise not originally informed about the Pennsylvania period of Student's education, because in the due process complaint in Case No. 2019-0164, one misguided claim is that DCPS failed to provide Student specialized instruction or Speech and Language services from March 2018 through August 20, 2018. This period coincided with the time Student was enrolled in the GJSD school and not attending a DCPS school. *See Administrative Due Process Complaint Notice, Case No. 2019-0164, June 26, 2019.*

16. Father moved Student back to the District of Columbia for the 2018-2019 school year. Testimony of Father. On September 7, 2018, DCPS sent the "Parent/Guardian" of Student a location of service letter stating that City School 3 had been identified as Student's location of service for the 2018-2019 school year. Exhibit P-126. Father testified that for 6 school days in the 2018-2019 school year, Student attended City School 1 and then transferred to City School 3, where Student was allowed to go to class right away. Specialized Instruction Manager testified that Student started at City

School 3 toward the end of October 2018. I found Father's testimony more credible, because there is documentation that Student took The Reading Inventory test at City School 3 on September 26, 2018, Exhibit P-47, and because Student's IEP was amended at City School 3 on October 4, 2018. Exhibit P-21. Based on the preponderance of the evidence, I find that Student started at City School 3 after the first few days at the start of the 2018-2019 school year.

17. At City School 3, Student was placed in the Specific Learning Support (SLS) classroom. This is a full-time special education program. Testimony of Specialized Instruction Manager. As of March 2019, the program had a 6 to 2 student-teacher ration, with 6 students, the teacher and a paraprofessional. Exhibit P-77. DCPS' ILS program and SLS program both serve, *inter alia*, DCPS students who have been identified with a cognitive impairment. Hearing Officer Notice.

18. Student's IEP team convened on March 14, 2019 at City School 3 to review Student's draft annual IEP revision. Father and an attorney and two educational advocates from LAW FIRM attended. Father's representatives requested revision of Student's IEP goals and a change in Student's placement from the SLS program to an Independence and Learning Support (ILS) program. They also requested that Extended School Year (ESY) be added to Student's IEP and that Student receive a comprehensive psychological reevaluation and an OT reevaluation. Exhibit P-77. The March 14, 2019 IEP provided for Student to receive 26.5 hours per week of Specialized Instruction

outside of general education, 120 minutes per month of Speech-Language Pathology and 120 minutes per month of Behavioral Support Services. ESY was not added to Student's IEP and Student's placement was not changed from the SLS program at City School 3.

Exhibit R-5.

19. On April 3, 2019, City School 3 convened an Analysis of Existing Data (AED) meeting for Student. A Law Firm attorney and Educational Advocate 1 attended the meeting. At the meeting, Law Firm requested that DCPS conduct OT and psychological evaluations of Student and that an updated Behavior Intervention Plan be developed. DCPS agreed to conduct an OT evaluation and to review existing data for psychological review. The attorney also requested a dedicated instructional aide for Student, placement in a therapeutic day school, 240 minutes per month of Behavioral Support Services and appropriate IEP goals. These IEP changes were not made at that time. Exhibits P-76, P-80.

20. On May 14, 2019, School Psychologist 2 conducted a triennial Psychological Revaluation of Student. She administered the Woodcock-Johnson IV Tests of Achievement, (WJ IV ACH), had Father and the teacher complete behavior rating scales – the Behavior Assessment for Children – Third Edition (BASC-3), conducted a classroom observation, interviewed Father, Student and a teacher and reviewed Student's cumulative records. School Psychologist 2 did not administer cognitive testing because Student's cognitive skills were not part of the referral question

and there was no question about Student's ID disability classification. Testimony of School Psychologist 2. Student's scores on the WJ IV ACH were all in the Very Low range, with relatively higher scores in Written Language and Written Expression. Psychologist 2 reported, *inter alia*, that Student continued to have difficulty in the area of reading. Student struggled to produce letters or words without a model from which to copy directly. Student's progress was inconsistent for reading and math. By teacher report, Student was easily distracted and could be disruptive (walk around the class and call out) to avoid instruction or a non-preferred activity. School Psychologist 2 concluded that Student met criteria for the ID disability classification, as a student who demonstrated significantly sub-average general intellectual functioning as measured by the CTONI-2 score of 60 Full Scale, Very Low range adaptive functioning at school, as measured by the ABAS-3, and the impact of these weaknesses on Student's academic performance and behavior. Exhibit R-3.

21. In May 2019, a DCPS occupational therapist conducted an OT evaluation of Student. In her May 13, 2019 report, the assessor reported that Student demonstrated adequate neuromuscular skills (*i.e.*, range of motion, muscle endurance, muscle strength and postural control) required to navigate the classroom and school environment to access general education curriculum; that Student's overall visual perceptual performance results were below average and that Student was above average in the area of visual discrimination. The assessor concluded that Student's deficits in

visual motor and visual perceptual skills impacted Student's ability to access and progress in the academic curriculum. Exhibit R-4.

22. From October 2018 to March 2019, Student did not have academic growth at City School 3. School staff updated Student's BIP, consulted with the Speech-Language Pathologist and provide visual reminders to Student. From March 2019 to the end of the school year, Student started making a little progress. Student would use visual charts and was able to get on to the computer independently. Testimony of Specialized Instruction Manager.

23. By email of July 18, 2019 to DCPS' Counsel, Parent's Counsel wrote that in earlier emails, sent June 13, June 17 and June 18, 2019, Law Firm had asked for IEE psychological, OT, Speech and Language and FBA evaluations of Student. DCPS' Counsel responded the same day that DCPS did not agree to those IEE requests and was challenging them in the due process proceeding. Exhibit P-114.

24. On August 29, 2019, School Psychologist 2 supplemented her May 17, 2019 psychological evaluation of Student with data received from Student's 2018 Pennsylvania LEA, GJSD. Exhibit R-21.

25. On September 5, 2019, Student's IEP team at City School 3 convened to review and revise Student's IEP upon receipt Student's records from GJSD, including the August 23, 2018 GJSD Evaluation Report on Student. The IEP team updated Student's Present Levels of Performance and Annual Goals. The September 5, 2019 IEP



provided for 26.5 hours per week of Specialized Instruction in the SLS classroom, 240 minutes per month of Speech-Language Pathology, 120 minutes per month of Behavioral Support Services, 120 minutes per month of OT, and OT and Behavioral Support Consultation Services. ESY services were also added to Student's IEP. Exhibit R-24.

### **CONCLUSIONS OF LAW**

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

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing 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, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Parent shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

#### **Analysis**

A.1 Case No. 2019-0164 (brought by Parent)

Did DCPS deny Student a FAPE for its failure to timely and comprehensively evaluate and/or reevaluate Student via a Comprehensive Psychological Evaluation, an Occupational Therapy Evaluation, Speech and Language Evaluation, and Functional Behavior Assessment (with a corresponding and appropriate Behavior Intervention Plan created);

A.2 Case No. 2019-0186 (brought by DCPS)

Was DCPS' May 17, 2019 psychological evaluation and May 13, 2019 OT assessment of Student appropriate?

For his failure to evaluate claim, Parent alleges that Student has been denied a FAPE due to DCPS' failure to comprehensively evaluate Student during initial eligibility evaluations in 2017; failure to timely conduct FBAs of Student when Student transferred to City School 2 in January 2018 and to City School 3 in fall 2018; and failure to reevaluate Student at the time of Student's transfer to City School 2 and when Student's IEP services were increased in March 2018 or upon the request of Parent in spring 2019. DCPS responds that it has always timely and comprehensively evaluated Student. DCPS also asserts as an affirmative defense that all of Parent's claims concerning denials of FAPE, which occurred more than two years before the parent's complaint was filed, are barred by the IDEA statute of limitations.<sup>2</sup>

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<sup>2</sup> *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

2017 Initial Eligibility Evaluation

Parent alleges that DCPS' initial special education eligibility evaluation of Student was not sufficiently comprehensive. This claim implicates the IDEA statute of limitations. Pursuant to 20 U.S.C. § 1415(f)(3)(C), a parent can "request an impartial due process hearing within two years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927, at \*9 (D.D.C. Aug. 1, 2019). DCPS' initial evaluation of Student was completed on March 10, 2017, more than two years before the parent's complaint was filed in this matter. However, because DCPS has not established when the parent knew or should have known that the initial evaluation was allegedly inadequate, I do not find that this claim is time-barred. *See Seed Co. Ltd. v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016) (Burden of proof rests with the defendants because the statute of limitations is an affirmative defense.)

U.S. Department of Education regulations require that, as part of an initial special education evaluation and as part of any reevaluation, a local education agency (LEA) must administer such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. *See* 34 CFR § 300.305(a), (c). The LEA must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence,

communicative status and motor abilities. 34 CFR § 300.304(c)(4). Decisions regarding the areas to be assessed are determined by the suspected needs of the child. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46643 (August 14, 2006). IDEA evaluations depend upon the exercise of professional judgment by the child's educators, which is entitled to a reasonable degree of deference. *Perrin on behalf of J.P. v. Warrior Run Sch. Dist.*, No. 4:13-CV-2946, 2015 WL 6746306 (M.D.Pa. Sept. 16, 2015), *report and recommendation adopted sub nom. Perrin v. The Warrior Run Sch. Dist.*, No. 13-CV-02946, 2015 WL 6746227 (M.D. Pa. Nov. 4, 2015), citing *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir.2005).

Student's initial special education eligibility evaluation in early 2017 was related to a suspected Intellectual Disability (ID) disability. DCPS administered social work and speech and language assessments and a comprehensive psychological evaluation. The psychological evaluation included the Comprehensive Test of Nonverbal Intelligence - Second Edition (CTONI-2), subtests from the Woodcock-Johnson Tests of Achievement (WJ-IV ACH) and Adaptive Behavior Assessment System - Third Edition (ABAS-3) rating scales. Based on these assessments and other information, the School 2 special education eligibility team determined that Student was eligible for special education and related services under the ID classification.

DCPS' expert, School Psychologist 2, who evaluated Student in 2019, opined that

the 2017 eligibility evaluation was comprehensive in that it covered all core areas and included a classroom observation, parent and teacher input as well as cognitive, academic and adaptive components. Petitioner's expert, Educational Advocate 2, did not have any doubt about the initial evaluation finding that Student had an Intellectual Disability but she opined that school staff knew that Student had experienced trauma just before the 2017 evaluation and should have explored the impact of the trauma on Student. She also opined that adaptive behavior assessments would have been warranted and that Student's attention functioning was not sufficiently addressed.

I found School Psychologist 2's opinions about the initial evaluation more credible than those of Educational Advocate 2. Unlike School Psychologist 2, Father's expert never evaluated Student or even met the child in person. Educational Advocate 2 appears to have ignored that School Psychologist 1 did, in fact, obtain adaptive behavior rating scale responses from Parent and a teacher. Moreover, Educational Advocate 2's opinion that School Psychologist 1 should also have assessed Student for the impact of recent trauma or a possible attention deficit seems an overreach, considering Student's age at the time of the evaluation and Student's Very Low range cognitive scores, which confirmed Student's suspected ID disability. *See D.K. v. Abington School Dist.*, 696 F.3d 233, 249 (3<sup>rd</sup> Cir.2012) ("[W]hile an evaluation should be tailored to the specific problems a potentially disabled student is having, it need not be designed to identify and diagnose every possible disability.") I find that this is a case where the judgment of DCPS' evaluators as to

what was needed for Student's initial eligibility evaluation is entitled to reasonable deference.

Parent's expert, Independent OT, opined that an OT evaluation should have been part of the 2017 initial eligibility evaluation of Student because of "red flags" in the psychological evaluation, such as Student's below grade level academics, Student's rarely writing and Student's processing challenges. However, Parent's experts from Law Firm endorsed the subsequent 2018 GJSD evaluation, which affirmed that Student did not need OT related services because Student was able to sit, stand, walk, run, navigate steps, grasp writing implements and open doors and containers independently. I find that Parent has not shown that DCPS' initial evaluation was inadequate for want of an OT assessment and I conclude that Parent did not meet his burden of persuasion that DCPS' initial eligibility evaluation of Student was not sufficiently comprehensive.

#### Functional Behavior Assessment

Functional Behavior Assessment or "FBA" refers to a systematic set of strategies that are used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. *See Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017). The IDEA requires that, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34

CFR § 300.324(a)(2)(i). *See, also*, Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

City School 1 conducted an FBA of Student in October 2017 to address Student's lack of appropriate interpersonal skills, especially with peers. Student's classroom teacher hypothesized that the purpose of these behaviors was to get attention, although that attention was usually negative. Following the October 2017 FBA, City School 1 developed a Behavior Intervention Plan (BIP) on October 2, 2017, which was updated on February 28, 2018 at City School 2 and again on March 14, 2019 at City School 3.

The Parent alleges in his complaint that DCPS should have conducted FBA reevaluations upon Student's transfers to City School 2 in January 2018 and to City School 3 in fall 2018, when Student's IEP services were increased in March 2018 and when requested by the parent to conduct a reevaluation in spring 2019. However, the August 23, 2018 GJSD Evaluation Report, which Parent's experts endorsed, stated that Student had not demonstrated behavioral concerns at GJSD and "No behavioral needs [were] warranted at this time." DCPS' expert, Specialized Instruction Manager, who has a background in school social work, opined that the October 2017 FBA was appropriate

and neither of Parent's experts, Educational Advocate 1 or Educational Advocate 2, opined that or provided an explanation for why Student's 2017 FBA needed to be updated on the dates asserted.

Educational Advocate 2 opined that Student currently needs an updated FBA because Student has "important behaviors," *e.g.*, Student wets self, cries and has "attacked others" in the past. The IDEA regulations provide that a parent may request a reevaluation, so long as it does not occur more than once a year. 34 CFR § 303(b). Although I conclude that Parent has not met his burden of persuasion that DCPS denied Student a FAPE by not heretofore updating the FBA, Student has changed schools three times and been moved to a more restrictive SLS classroom setting since the October 2017 FBA was done. I find persuasive Educational Advocate 2's opinion that an FBA reassessment is warranted at this time and will order DCPS to conduct it. When the FBA is completed, Student's Behavior Intervention Plan must be updated based on the new data.

#### Special Education Reevaluations of Student

The IDEA requires that a special education reevaluation must occur at least once every three years, unless the parent and the public agency agree otherwise. *See* 34 CFR § 300.303. In between the triennial reevaluations, the District may also be required to reevaluate a child with a disability if the District determines that the educational or related services needs of the child warrant a reevaluation, or if the child's parent or



teacher requests a reevaluation. *See* 34 CFR § 300.303(a).

Student's initial eligibility evaluation was completed in March 2017. In the normal course, Student's triennial reevaluation would be due by March 2020. Parent contends that Student should have been reevaluated upon Student's January 2018 transfer to City School or when Student's IEP was revised in March 2018 to place Student in a full time special education classroom. There was no evidence that the parent or a teacher had requested that Student be reevaluated in the 2017-2018 school year or that DCPS had determined that Student's needs warranted a reevaluation. *See* 34 CFR § 300.303. Nor did Parent's experts explain why Student needed to be reevaluated in 2018, only one year after the initial evaluation was completed. I conclude that Parent has not met his burden of persuasion that DCPS was required to reevaluate Student in the 2017-2018 school year.

#### IEE Requests in June 2019

At Student's AED review meeting on April 3, 2019, Parent's representatives from Law Firm requested that DCPS conduct OT and psychological evaluations of Student. DCPS conducted the requested OT evaluation and psychological reevaluation in May 2019. In emails to DCPS on June 13 and June 18, 2019, Law Firm requested IEE funding for a Comprehensive Neuropsychological and/or Psychological Evaluation, an OT Evaluation, a Speech and Language Evaluation and a Functional Behavior Assessment. DCPS, by counsel, refused Parent's IEE requests.

In Case No. 2019-0164, Parent originally sought an order for DCPS to fund the requested IEE assessments. On July 25, 2019, DCPS filed its complaint in Case No. 2019-0186, requesting a finding by the hearing officer that its May 13, 2019 OT assessment and May 17, 2019 psychological evaluation of Student were appropriate. I ordered consolidation of Case No. 2019-1086 with Case No. 2019-0164. A few days before the initial hearing date in this case, Law Firm discovered that Student had been evaluated by GJSD in the spring of 2018. Parent considered the Pennsylvania LEA evaluation report to be appropriate and withdrew his request for funding for an IEE psychological evaluation of Student. Parent continues to request DCPS funding for IEE OT, and Speech and Language, and FBA assessments of Student.

#### OT/Sensory Processing Evaluation

Because DCPS filed a due process complaint to show that its OT evaluation is appropriate, I conclude that the District must shoulder the burden of persuasion as to the appropriateness of its OT evaluation of Student. *See* 34 CFR § 300.502(b)(2)(i). DCPS' OT evaluation of Student was completed on May 13, 2019. For this evaluation, DCPS OT conducted a record review and an interview with the parent and Student's teacher; made a clinical observation and assessment and a handwriting analysis; and administered to Student the Test of Visual Perceptual Skills - 4<sup>th</sup> Edition (TVPS-4) and the Beery VMI Developmental Test of Visual-Motor Integration 6th Edition (Beery VMI-6). DCPS OT concluded that the results she obtained were a true representation of

Student's level of function in the classroom/school setting.

Parent's expert, Independent OT, opined in her hearing testimony that the DCPS OT evaluation was not comprehensive because it did not assess Student's motor skills or sensory processing skills. However, DCPS OT explained in her testimony that she observed Student in the classroom and was able to assess motor skills, such as use of a pencil and scissors as well as Student's visual discrimination challenges. But DCPS OT agreed that Student's September 5, 2019 IEP included a sensory processing goal and acknowledged that she had not assessed Student's sensory processing skills. I conclude, therefore, that DCPS must fund an IEE assessment of Student's sensory processing skills.

#### Speech and Language Evaluation

DCPS conducted its Speech and Language evaluation of Student in February 2017 and there was no evidence at the hearing that Parent ever informed DCPS that he disagreed with that evaluation. Parent's expert, Independent Speech Language Pathologist, who testified at the hearing that she had reviewed the 2017 evaluation, also did not testify to disagreeing with it. Where the parent has not notified the District that he disagrees with an evaluation obtained by the public agency, he does not have the right to an IEE at public expense. *See* 34 CFR § 300.502(b). I conclude that because the parent did not timely notify DCPS of any disagreement with the February 2017 Speech and Language evaluation of Student, the District is not required to fund an IEE Speech

and Language evaluation.

Functional Behavioral Assessment

Parent likewise did not notify DCPS of any disagreement with DCPS' October 2017 FBA of Student and I conclude that DCPS is not required to fund an IEE FBA.

However, as explained above, I find that DCPS must conduct an FBA reassessment of Student and will include that relief in my order.

- C. Did DCPS deny Student a FAPE by failing to develop appropriate IEPs from 2018 up to the present date and determine the appropriate location of services for the 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, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP. As explained by the D.C. Circuit in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018),

The Supreme Court . . . in *Endrew F.* . . . , raised the bar on what counts as an adequate education under the IDEA. *Endrew F.* held that the Act requires education “reasonably calculated to enable a child to make progress in light of the child’s circumstances”—a standard that the Court described as “markedly more demanding than the ‘merely more than *de minimis*’” standard the Tenth Circuit had applied. . . . In requiring more than merely some “educational benefits,” *id.* at 77 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ), the Court in *Endrew F.* stressed that “every child should have the chance to meet challenging objectives,” and that a student’s “educational program must be appropriately ambitious in light of his circumstances.” 137 S.Ct. at 1000. *Z. B.*, 888 F.3d at 517. Substantively, the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” *Endrew F.*, 137 S.Ct. at 1001, even as it stops short of requiring public schools to provide the best possible education for the

individual child, *Rowley*, 458 U.S. at 200, 102 S.Ct. 3034, or an education “equal” to that of non-disabled peers, *Endrew F.*, 137 S.Ct. at 1001; *Rowley*, 458 U.S. at 198-99, 102 S.Ct. 3034.

...

Applying the IDEA as interpreted in *Endrew F.*, we must ask whether, in developing the [contested IEP], the [education agency] adequately evaluated [the student’s] particular needs and offered her an IEP tailored to what it knew or reasonably should have known of her disabilities at the time. *See Endrew F.*, 137 S.Ct. at 999. *Z. B.*, 888 F.3d at 524. . . . The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP it offered was reasonably calculated to enable the specific student’s progress. *See Endrew F.*, 137 S.Ct. at 999. . . . [T]hat standard calls for evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight. . . . At the same time, . . . evidence that post-dates the creation of an IEP is relevant to the inquiry to whatever extent it sheds light on whether the IEP was objectively reasonable at the time it was promulgated.

*Z. B.*, 888 F.3d at 519, 524 (some internal quotations and citations omitted.)

#### March 16, 2018 and March 14, 2019 IEPs

On January 22, 2018, Student transferred from City School 1 to City School 2. Since that time, Student’s DCPS IEP teams have reviewed and revised Student’s IEPs on March 16, 2018, March 15, 2019 and September 5, 2019. In the March 16, 2018 IEP, the City School 2 IEP team provided for Student to receive 26.5 hours per week of Specialized Instruction outside of general education, 2 hours per month of Speech-Language Pathology and 30 minutes per week of Behavioral Support Services. Student was placed in the City School 2 Early Learning Support (ELS) special education classroom.

In April 2018, Father moved Student to the GJSD in Pennsylvania.<sup>3</sup> After Student returned from Pennsylvania in August 2018, Father enrolled Student in City School 3, which apparently continued the March 16, 2018 DCPS IEP program. (At the time, DCPS had no knowledge of Student's sojourn in the Pennsylvania school district or of Student's GJSD IEP.)

Student's DCPS IEP was next reviewed and revised at City School 3 on or about March 15, 2019. The March 15, 2019 IEP provided for Student to continue to receive 26.5 hours per week of Specialized Instruction outside of general education, 120 minutes per month of Speech-Language Pathology and 120 minutes per month of Behavioral Support Services.

Petitioner's expert, Independent Speech-Language Pathologist opined that the Speech and Language Services in the March 2018 and March 2019 DCPS IEPs were inadequate because Student required 240 minutes (4 hours) per month of Speech-Language Pathology – twice the 120 minutes per month provided in the IEPs. At the September 5, 2019 IEP team meeting, DCPS Speech-Language Pathologist agreed to Parent's Counsel's request for 240 minutes per month of Speech and Language services,

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<sup>3</sup> There was considerable testimony about Student's progress under the GJSD IEP. However, Student's GJSD IEP was completed on May 24, 2018 and Student was only enrolled in the Pennsylvania school from April 23, 2018 until the end of the 2018-2019 school year. Student did not attend the GJSD ESY program, although it was included in the IEP. I find that Student was enrolled in the Pennsylvania school district for too brief a time to reasonably draw any conclusions about the effectiveness of the GJSD IEP or educational placement.

because she had just met Student. Because Independent Speech-Language Pathologist's testimony was not specifically rebutted by DCPS, I conclude that DCPS has not met its burden of persuasion that the provisions for 2 hours per month of Speech and Language services in the March 16, 2018 and March 15, 2019 IEPs were appropriate.

Except for the Speech and Language services provisions, Petitioner offered no probative evidence that the March 16, 2018 IEP or the March 15, 2019 IEP were not appropriate for Student. DCPS' expert, Director of Special Education, opined that both IEPs were appropriate and testified that the parent agreed with the IEPs when they were developed. She also opined that Student was making a little growth after the March 15, 2019 IEP was developed. Petitioner's expert in IEP programming and placement, Educational Advocate 1, did not specifically opine on the appropriateness of the content of either IEP. Based on this limited evidence, I conclude that DCPS has met its burden of persuasion that, except for the provision of only 120 minutes per month of Speech and Language Services, DCPS' March 16, 2018 and March 15, 2019 IEPs were reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances.

#### September 5, 2019 IEP

The due process hearing in this case was originally set to start on August 13, 2019. When the parties convened for the due process hearing, Parent's Counsel informed the hearing officer for the first time that Student had been evaluated by the

GJSD over the summer of 2018 and that the parent considered the GJSD August 23, 2018 Evaluation Report to be an appropriate, comprehensive evaluation of Student. Because Parent's Counsel first provided this evaluation report to DCPS with Parent's prehearing disclosures 5 business days before the start of the hearing, on the motion of DCPS, I continued the hearing date to allow time for DCPS to review the GJSD Evaluation Report and to convene Student's IEP team to update and revise Student's IEP, as appropriate.

On September 5, 2019, Student's IEP team met at City School 3 to review and revise Student's IEP following receipt of Student's education records from GJSD, including the August 23, 2018 GJSD Evaluation Report. School Psychologist 2 went over the GJSD Evaluation Report with the team. The IEP team then revised Student's IEP, including Student's Present Levels of Performance (PLOPs) and Annual Goals. The September 5, 2019 revised IEP provided for Student to receive 26.5 hours per week of Specialized Instruction outside of general education, 240 minutes per month of Speech-Language Pathology, 120 minutes per month of Behavioral Support Services, 120 minutes per month of OT and an additional 60 minutes per month of OT and Behavioral Support Consultation Services. ESY services and special education transportation were also added to the IEP.

Educational Advocate 2 opined that biggest concern with the September 5, 2019 IEP is that Student's Present Levels of Performance and Baselines were not updated



with data from the GJSD Evaluation Report. I agree. At the request of DCPS' Counsel, I had continued the hearing in this case to allow time for the City School 3 IEP team to update Student's IEP with the information from the GJSD Evaluation Report. However, the September 5, 2019 revised IEP omits or misstates data from the GJSD evaluation of Student. For example, the September 5, 2019 IEP omits Student's scores on the Kaufman Brief Intelligence Test - Second Edition (KBIT-2) (IQ Composite Score of 52), and ignores the GJSD determination that Student has a Speech or Language Impairment (SLI) secondary disability as well as the recommendation that Student receive services in a "Life Skills Support program." For the IEP academic areas of concern, the September 5, 2019 School 3 IEP misidentifies test results from the May 17, 2019 WJ IV ACH administered by School Psychologist 2, as being derived from the 2018 GJSD evaluation report.<sup>4</sup>

The Supreme Court instructs that "[u]nderstanding the particulars of a child's current skills and needs is critical to developing an 'individualized' educational plan: 'An

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<sup>4</sup> For example, the September 5, 2019 IEP recites in the Area of Concern for Mathematics,

According to data from Greater Johnstown School District, on May 5, 2019, [Student] was reevaluated and the following information was notated from the psychological triennial assessment. The Broad Mathematics cluster provides an overview of [Student's] math skills, and it measures computational skills, math facts and problem solving. [Student] performed within the Very Low range (SS=<40). On the Math Facts Fluency test, [Student] performed within the Very Low range (SS=<40). On the Applied Problems test, [Student] was required to analyze and solve math problems. [Student] performed within the Very Low range (SS=<40). Overall, [Student] performed within the Very Low range (SS=<40).

These test results came from School Psychologist 2's May 17, 2019 Psychological Triennial Reevaluation of Student, Exhibit P-12, not from the GJSD evaluation. Similar errors were made for the Present Levels of Performance for the Reading and Written Expression areas of concern.

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.' *Endrew F.*, 137 S.Ct. at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) )." *Z. B.*, *supra*, 888 F.3d at 522 (D.C. Cir. 2018). Because the data in the September 5, 2019 IEP on Student's disability and present levels of performance are inaccurate or incomplete, the IEP does not comply with the Supreme Court's mandate in *Endrew F.* that the IEP be individualized based on Student's current skills and needs. *See Z. B.*, 888 F.3d at 522. To be clear, I do not hold that Student's IEP team must adopt the placement and services decisions made by the GJSD IEP team. But the City School 3 IEP team must consider these data in making its programming decisions for Student.

Parent's experts, Educational Advocate 1 and Educational Advocate 2, also opined that the educational placement in the September 5, 2019 IEP, the Specific Learning Support (SLS) Classroom at City School 3, was not suitable because they believe that Student should be placed in an Independence and Learning Support (ILS) program classroom rather than in an SLS program classroom. "The benchmark under IDEA for determining the appropriateness of a student's educational placement, and thus whether the student was provided a FAPE, is that DCPS must place the student in a setting that is capable of fulfilling the student's IEP." *Wade v. District of Columbia*, 322 F. Supp. 3d 123, 132 (D.D.C. 2018) (internal quotation and citation omitted.)

Both the ILS program and the SLS program are for DCPS students who have been

identified with a cognitive impairment. Special Education Director opined credibly that the SLS classroom at City School 3 is geared to Student's disability and appropriate based on Student's academics and behavior. School Psychologist 2 opined credibly that the SLS classroom works for Student and Student is able to get the attention Student needs in this setting. She added that at City School 3, Student is also to see behavior from typically developing peers during nonacademic times which shows Student how to do things appropriately. These DCPS experts have observed Student in the SLS classroom setting. Even assuming that an ILS classroom may be a better fit for Student, I conclude that DCPS has met its burden of persuasion that the SLS classroom at City School 3 is capable of fulfilling Student's IEP requirement for full-time specialized instruction, outside of general education. *See Endrew F., supra*, 137 S.Ct. at 1001 (IDEA stops short of requiring public schools to provide the best possible education for the individual child.)

In sum, with regard to the appropriateness of Student's DCPS IEPs since 2018, I find that DCPS failed to establish that the provision of only 120 minutes per month of Speech and Language services in the March 2018 and March 2019 IEPs was reasonably calculated to enable Student "to make progress appropriate in light of the child's circumstances." *See Endrew F.*, 137 S.Ct. at 1001. This was a denial of FAPE. I also find that the September 5, 2019 IEP must be revised to correct the incomplete and erroneous data for the academic Baselines and PLOPs and to update Student's annual goals and

services as appropriate. I find that DCPS has met its burden of persuasion that the educational placement in the SLS classroom at City School 3 is suitable for Student.

- D. Did DCPS deny Student a FAPE by failing to implement Student's IEP Specialized Instruction, Speech and Language and Behavioral Support Services during the 2016-2017, 2017-2018 and 2018-2019 school years?

In his due process complaint, Parent alleges that DCPS failed to provide most of Student's IEP Specialized Instruction, Speech and Language and Behavioral Support Services since March 2017. Parent's claims of failure to implement Student's IEP more than 2 years before the June 26, 2019 complaint filing date are barred by the IDEA statute of limitations. *See* 34 CFR § 300.511(e).

Parent's remaining timely failure to implement claims appear to be based on Law Firm's allegedly not receiving documentation from DCPS, rather than on whether the services were actually provided to Student. *See, e.g.,* Administrative Due Process Complaint Notice, June 26, 2019, page 19 ("The following school year, there are no records that indicate the student received any specialized instruction hours from August 2017 through the IEP's expiration in March 2018."); *Id.*, page 20 ("Based upon the records provided to Parent, the student has not received any specialized instruction since January 18, 2019, only received 180 minutes of SLP services, and has not received any BSS since January 2019.")

Parent must bear the burden of persuasion as to these failure to implement claims, which, on their face, are not credible. For example, beginning in January 2018,

Student was placed in an Early Learning Support (ELS) program classroom at City School 2. For the 2018-2019 school year, Student was placed in the SLS program classroom at City School 3. The claim in Petitioner's complaint that Student's Specialized Instruction *and* Related Services were not implemented at City School 2 and City School 3, when it is uncontested that at all times concerned, Student was placed in self-contained ELS or SLS classrooms is not supportable.

In her testimony, Parent's Expert Educational Advocate made a more limited failure to implement claim, namely that after Student returned from Pennsylvania and enrolled in City School 3 early in the 2018-2019 school year, Student's Specialized Instruction and Related Services were not implemented until October 2018. However, Father testified that when Student transferred to City School 3 at the beginning of the 2018-2019 school year, Student was allowed to go to the SLS classroom right away. School Social Worker testified that Student was always in a self-contained classroom at City School 3 and that she ensured that Student received all IEP Behavioral Support Services during the school year. Specialized Instruction Manager testified that in the 2018-2019 school year, Student received the correct amount of Related Services specified in Student's IEP.

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). On this evidence, I find that Parent has not met his burden of persuasion that DCPS failed to implement substantial or significant provisions of Student’s IEPs during the two years preceding the filing of Parent’s due process complaint.

- E. Did DCPS deny Student a FAPE by failing to provide Student’s education records to Parent’s representatives and thereby preventing Parent from meaningfully participating in Student’s education?

Lastly, Parent alleges that DCPS denied Student a FAPE by failing to provide Student’s education records to Law Firm. The IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. *See* 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. *See* 34 CFR § 300.613(a).

In February and March 2019, Law Firm made written requests to the school principals at City School 1, City School 2 and City School 3 to provide copies of Student’s entire academic file. By emails sent March 2019, Specialized Instruction Manager informed the law firm that she had provided the education records for Student, to which

she had access. Specialized Instruction Manager provided additional records in an email dated July 2019. In their testimonies, neither Educational Advocate 1 nor Educational Advocate 2 described any of Student's education records which they claimed had been withheld from the parent by DCPS. Nor did Father identify any such records in his testimony. I conclude that Parent has not met his burden of persuasion that his representatives were not provided the requested education records relating to Student, which had been collected, maintained, or used by DCPS.

#### Remedy

In this decision, I have determined that DCPS denied Student a FAPE by providing for 120 minutes – not 240 minutes per month – of Speech and Language services in Student's March 16, 2018 and March 14, 2019 IEPs and by completing the Academic Present Levels of Performance sections of the September 5, 2019 IEP with incomplete and erroneous data.

Parent's expert, Educational Advocate 2, offered a compensatory education proposal for Student, which recommended, *inter alia*, 40 hours of speech compensatory education due to Student's not receiving 240 minutes per month of Speech-Language Pathology services since Student's initial IEP was adopted. "An award of compensatory education aims to put a student . . . in the position he 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.) I find Educational Advocate 2's recommendation for Speech-Language compensatory services to be reasonably calculated to provide the educational benefits that Student should have received, had Student's prior DCPS IEPs provided for 240 minutes per month of Speech-Language Pathology services.

I will also order DCPS to reconvene Student's City School 3 IEP team to review and incorporate into Student's IEP the relevant data from the GJSD Evaluation Report, to correct Student's academic present levels of performance and to update and revise Student's IEP annual goals and services, as appropriate.

Lastly, I will order DCPS to conduct an FBA reassessment of Student and to fund an IEE assessment of Student's sensory processing skills to supplement DCPS' May 13, 2019 OT evaluation of Student.

### **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 in this case, not later than 15 school days from the date of this decision, DCPS shall provide Parent funding authorization to obtain for Student 40 hours of individual speech-language pathology services;
2. Within 15 school days of the date of this decision, DCPS shall convene Student's IEP team at City School 3, including the parent and his representatives, to review and revise Student's September 5, 2019 IEP in



accordance with this decision and with 34 CFR § 300.320, *et seq.*

3. Within 15 school days of the date of this decision, DCPS shall issue funding authorization to the parent to obtain an Independent Educational Evaluation assessment of Student's sensory processing functioning;
4. Within 20 school days, DCPS shall conduct a Functional Behavior Assessment (FBA) reassessment of Student. Upon completion of the FBA, Student's Behavior Intervention Plan shall be updated based on the new data;
5. DCPS' request in Case No. 2019-0186 for a finding that its May 13, 2019 OT assessment of Student was appropriate is denied. DCPS' request for a finding that its May 17, 2019 comprehensive psychological evaluation of Student was appropriate is denied as moot and
6. All other relief requested by the Parent and DCPS herein is denied.

Date: October 4, 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).

Case No. 2019-0164  
Case No. 2019-0186  
Hearing Officer Determination  
October 4, 2019

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