

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

OSSE
Office of Dispute Resolution
October 18, 2023

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 9/26/23; 10/2/23
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0099
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently ineligible for 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 May 25, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On June 6, 2023, Respondent filed a response. A resolution meeting was held on June 6, 2023, without an agreement being reached. The resolution period expired on June 24, 2023.

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.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

On June 29, 2023, a prehearing conference was held. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. On July 3, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On July 28, 2023, Respondent moved to extend the timelines for the filing of the Hearing Officer Determination (“HOD”). The motion was granted by order dated August 7, 2023. The HOD is currently due on October 18, 2023.

The matter proceeded to trial on September 26, 2023, and October 2, 2023. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented oral closing statements on October 2, 2023. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-46 without objection. Respondent moved into evidence exhibits R-1 through R-33 without objection. Petitioner presented as witnesses, in the following order: Petitioner; Witness A, an educational advocate (expert in special education eligibility and Individualized Education Program (“IEP”) programming, placement, process, and procedure); Witness B, a clinical and forensic psychologist (expert in psychology); and Witness C, the Student’s general education teacher during the 2022-2023 school year. Respondent presented as witnesses, in the following order: Witness D, an occupational therapist (expert in occupational therapy); Witness E, a social worker (expert in social work); and Witness F, a special education teacher (expert in special education).

IV. Issues

As identified in the Prehearing Order and in the Complaint, the issue to be determined in this case is as follows:

1. Did Respondent erroneously determine that the Student was ineligible for special education services during the eligibility meeting on May 11, 2023? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that the Student should have been determined to be eligible for services as a student with Autism and/or a student with Other Health Impairment, and that a revised IEP should have then been developed. During closing argument, Petitioner did not mention the argument relating to Other Health Impairment. As relief, Petitioner seeks an order determining that the Student is eligible for special education services, requiring DCPS to review and revise the Student’s January 2023 IEP, and award the student compensatory education services.

V. Findings of Fact

1. The Student is an X-year-old who is currently ineligible for services. The Student has been diagnosed with autism and Attention Deficit Hyperactivity Disorder (“ADHD”). The Student has difficulties in social situations. The Student reacts to misunderstandings and then may run and hide. Testimony of Petitioner. The Student responds to redirection. Testimony of Witness C. The Student has significant sensory issues. Testimony of Witness D. The Student speaks and reads slowly. Testimony of Witness F. The Student has issues following directions and needs verbal instructions broken down into smaller chunks. The Student often relies on others to complete tasks, has issues with organization, can insist on items in a particular order or color, can be

sensitive to loud sounds, can be withdrawn and moody, and can have memory issues.

Testimony of Petitioner.

2. The Student had an IEP in or about 2019. After attending School A during the 2021-2022 school year, the Student attended School B during the 2022-2023 school year. The Student's teacher, Witness C, observed that the Student's focus was a challenge. The Student frequently put his/her head in his/her hands, did not pay attention, and moved his/her body around. The Student was easily overwhelmed by noise and would shout, crumple up work, get angry, not talk, hide, and need "corner time." Witness C felt that the Student became overwhelmed when s/he could not communicate his/her thoughts effectively, and that the Student did not interpret social cues from others appropriately. P-19-21.

3. In November 2022, Witness E from DCPS conducted a Functional Behavior Assessment ("FBA") of the Student, based on an interview with Witness C. The Student's behavior was considered to be to a function of his/her need for attention, his/her reaction to a difficult situation, or when s/he felt excluded or unheard. The behaviors were "somewhat abnormal" and "more intense than kids the same age." The FBA indicated that the Student's behaviors could last more than thirty minutes; that the Student could get upset, go to sleep, wake up, and still be upset; that the Student could shut down when s/he was told no; and that the Student could get frustrated by small things. The Student's behavioral episodes were considered to last between ten and fifteen minutes. The FBA suggested providing the Student with regular non-verbal attention, praise for making positive choices, a reward of extra time, and allowing him/her to express his/her feelings. R-1; Testimony of Witness E.

4. Witness D conducted an occupational therapy evaluation of the Student in November 2022 and December 2022. The corresponding report, dated December 8, 2022, stated that the Student did well with fine motor tasks but exhibited minor challenges with motor planning, manual dexterity, and upper-limb coordination. The Student had difficulty catching and bouncing a tennis ball, had significant sensory issues, missed instructions, and became upset. Witness D reported that the Student found the loud noises of peers in the cafeteria and the classroom upsetting and very distracting. The report recommended preferential seating, noise-cancelling headphones, repeating instructions, and written instructions, among other interventions. P-14.

5. A speech evaluation of the Student was conducted in October and November 2022, with a corresponding report issued on December 2, 2022. The report did not recommend direct services, though (based on formal and informal testing and clinical observation) the Student presented with borderline receptive language issues. The evaluator found that the Student presented with adequate receptive-expressive language, vocabulary, and pragmatic skills necessary to access the general education curriculum without a speech-language pathologist. However, the report made recommendations such as allowing additional wait-time for oral responses, having the Student repeat or paraphrase directions before completing tasks, and presenting information in small, sequential segments. P-13.

6. Witness E wrote a Behavior Intervention Plan (“BIP”) for the Student on January 4, 2023, which recommended preferential seating near the teacher, ongoing verbal support, redirection, praise from the teacher, non-verbal redirection and prompts, and scaffolding directions (breaking down each step, giving only one direction at a time,

and using visual cues for what was wanted), with praise each time the Student followed directions appropriately. The plan also recommended modeling, providing “firm and friendly choices” for work, ignoring unwanted behavior, giving the Student space to calm down, checking in on him/her periodically, pairing him/her with a peer, engaging him/her as a helper, watching for triggers, suggesting breaks at the right time, giving rewards tied to the Student’s positive behavior and use of coping skills, sending positive notes home, providing verbal redirection, and communicating with the Student’s parent when incidents occurred. The plan indicated that, when the Student got frustrated or was told “no,” s/he pouted, shut down, and made noises (maybe for attention) but did not “use [his/her] words.” The plan noted that the Student sometimes hid under his/her desk, shouted, or refused to leave the classroom when it was time for transitions. P-15.

7. An IEP meeting was held for the Student on January 4, 2023. The resulting IEP provided the Student with five hours per week of specialized instruction inside general education (2.5 hours in mathematics and 2.5 hours in reading), sixty minutes per month of behavioral support services inside general education, sixty minutes per month of behavioral support services outside general education, and sixty minutes per month of occupational therapy. The IEP noted the Student’s weaknesses with respect to planning and task completion, paying attention, remaining focused, engaging in whole-group instruction, managing his/her emotions, disengaging, and refusing to do his/her work. The IEP provided for a “check out” time at the end of each school day to discuss the Student’s positive moments and challenges, and indicated that s/he might benefit from keeping a diary and opportunities for small-group support for learning activities. The IEP also indicated that the Student should be asked to repeat directions to the teacher

and that s/he should be monitored for signs of being overwhelmed, such as standing still, looking off, or slowly walking away. The IEP contained “Area of Concern” sections and goals in four areas: mathematics, reading, adaptive skills, and emotional, social and behavioral development. A social skills goal was added to this IEP by Witness E. P-6.

8. The IEP reported that the Student was on grade level in math, except for one area, and on grade level in reading, except for comprehension, but that the Student’s adaptive and daily living issues significantly interfered with his/her access to learning activities in the general education curriculum without specialized instruction and supports. The IEP also stated that the Student’s poor coping skills (in response to inattention from the teacher) and difficulty with self-advocacy (sharing his/her thoughts, feelings, and needs with adults and peers) caused him/her to be emotionally dysregulated in the classroom setting, leading to disengagement from whole-class activities and difficulty accessing the general education curriculum. The IEP said that when the Student needed additional support in the classroom setting, it could disrupt the learning of other students. The IEP also said that the Student’s teacher provided a number of interventions for him/her in the classroom, including preferential seating, peer pairing, providing choices, and encouraging him/her to use the “calm down corner.”

9. After the January 2023 IEP was written, the Student made progress, largely in small-group settings. Testimony of Witness C. The Student also began to employ more independent strategies, some inside the classroom. Witness F pulled the Student out of class for math and Orton-Gillingham-based reading instruction, and also provide push-in services to coach and support the Student and modify his/her work. Testimony of Witness F. In speech, the Student’s spoken requests improved and s/he

understood better. The Student also played age-appropriate games, could follow instructions, and improved his/her level of participation. Testimony of Witness D. The Student benefitted from behavioral support services, practiced calming and coping skills, and progressed toward his/her emotional, social and behavioral development goals. Testimony of Witness E. Witness C “had to put [the Student] into two interventions” and “see [him/her] twice a day every day for reading,” explaining that service hours were not being met. The Student ended up on grade level in reading at least in part because of Witness C’s interventions.

10. During the 2022-2023 school year, while in a large class, the Student struggled to retain information. Witness C tried to work with the Student individually. Testimony of Witness C. The Student would respond to loud noises, get angry, and ask for headphones, and had to have all his/her flashcards rearranged in a specific way. After a behavioral incident, the Student took six to eight minutes to get back on track and s/he would miss class time. Witness C said “it almost felt” like the Student was out of control, with his/her eyes blinking unusually. It would take “six or seven” tries to get the Student into a work station. Witness C noted that the Student had difficulty making eye contact, was not really hearing what Witness C said while teaching, missed a lot of social cues, and always thought that someone was upset at him/her. Witness C felt that these behavior incidents affected the Student academically, pointing out that s/he struggled to retain any information. P-40; Testimony of Witness C.

11. A comprehensive psychological evaluation of the Student was conducted in March 2023, with a corresponding report dated May 4, 2023. The evaluator concluded that the Student was performing within the average range cognitively, with relative

weakness in processing speed and working memory abilities, which is consistent with the profile of a student with ADHD. The Student's academic skills ranged from slightly below average to the average range, and the evaluator said that his/her academic functioning indicated a relative weakness in applied math skills and oral expression, but that s/he had age-appropriate performance in reading, math, and writing. The evaluator noted the Student's difficulty in following directions, and stated that neurological factors appeared to play a role in his/her inability to initiate responses quickly. The evaluator found that the Student's adaptive functioning scores fell in the moderately low range. The evaluator also found the Student to have executive dysfunction, per parent and teacher input from the Brown Executive Function/Assessment ("Brown EF/A") scales. Based on parent and teacher inputs, the Student's behaviors were "atypical" in all seven sub-measures on the Brown EF/A, consistent with attentional concerns and executive dysfunction. P-17-11.

12. The evaluator interviewed the Student's teacher, Witness C, who reported that the Student often misunderstood situations, had focus issues, got confused about what s/he should have been doing, and was constantly saying, "You are mad at me." Witness C also said that the Student could shut down, scream, hide, cry, "check out," and, as a result, miss part of the school day. The evaluator observed the Student in his/her art class on March 6, 2023, for fifteen minutes. There were seventeen students and one teacher present at the time of the observation. The Student displayed more off-task behaviors and received more redirection from the teacher than any other student. In another observation, during independent reading, the Student exhibited more off-task behavior than on-task behavior. The Student was out of his/her seat frequently and

discussed matters unrelated to the task at hand. Witness C prompted the Student repeatedly, but s/he still struggled to follow directives and stay focused. The evaluator said that, compared to his/her peers, the Student displayed far more off-task behaviors and received more redirection from the teacher than any other student. P-17.

13. The evaluator also assessed the Student's behavior pursuant to the BASC-3 scales. The Student did not demonstrate any major externalizing behaviors, such as hyperactivity, conduct problems, or aggression. The scales did suggest that the Student internalized problems, with clinically significant concerns for depression and anxiety. There were also consistent concerns regarding the Student being tense, getting stressed easily, worrying about tasks and things, and being nervous. In the area of depression, the Student complained about not being liked, cried easily, and got easily upset. P-17.

14. The evaluator also found "clinically significant" concerns with atypicality as observed at school. P-17-10. On the Pervasive Developmental Disorder Behavior Inventory, a questionnaire originally designed to assess responsiveness to intervention in children with autism spectrum disorder ("ASD"), the Student's score was "typical of children with ASD" and fell at the lower end of the spectrum. On the Gilliam Autism Rating Scale-Third Edition ("GARS-3"), which was completed by the Student's special education teacher, Witness F, there was a probable diagnosis of ASD. The evaluator said that the Student's "emotional responses seem to be an area of significant concern." P-17-14. However, the evaluator determined that the Student should not qualify for services as a student with Autism because the Student demonstrated no major stereotyped, restricted, or repetitive behaviors, and was not disruptive during instruction. The evaluator also determined that the Student should not qualify for services as a student with Other Health

Impairment because the Student's academic performance on KTEA-3 testing indicated that s/he was performing at the level of a typical child his/her age, i-Ready test results revealed that the Student had made progress since the beginning of the year, and "work samples indicate that [s/he] has the skills to do the work." P-17.

15. The Student's report card for the third reporting period of the 2022-2023 school year included "3" grades in English language arts in all but one area, "2" grades in all math areas, and "3" and "4" grades in other areas. R-23. An IEP progress report was issued for the Student on April 12, 2023. For the third reporting period, the Student made progress on two of three math goals, with one math goal just introduced. In reading, the Student mastered one goal and made progress on two goals. Progress was also noted on adaptive/living skills goals and emotional, social and behavioral development goals.

Witness E wrote in the progress report that the Student was excited to have additional support in class, but was easily dysregulated when things did not go the way s/he wanted or when s/he did not get the response s/he wanted from the teacher. Witness E wrote that when the Student was dysregulated in class, it was difficult for him/her to identify his/her feelings, use a skill to communicate those feelings effectively, and self-advocate for his/her needs. Witness E also wrote that the Student sometimes fixated on an idea or a feeling and required more support and redirection to reengage in academic tasks. R-9.

16. In January 2023, on DIBELS reading testing, the Student scored 382, "below benchmark." In April 2023, according to i-Ready assessments, the Student was functioning on grade level in math, phonics, high-frequency words, and literature comprehension, but s/he continued to function one level below grade in phonological awareness, vocabulary, and informational text comprehension. P-17-15.

17. By May 2023, the Student's behavior worsened. Behavioral incidents occurred often, sometimes with the Student staying under a desk for an extended period. An IEP meeting was scheduled for the Student on May 11, 2023. Prior to this meeting, DCPS met to discuss the Student. Some staff felt that the Student did not need an IEP, given his/her recent reports, grades, and scores, but Witness C felt that s/he did need an IEP, and during this staff meeting, which the Student's parents did not attend, the team agreed to provide him/her with specialized instruction in math. Testimony of Witness C.

18. At the May 11, 2023, IEP meeting, DCPS emphasized the Student's comprehensive psychological evaluation and discussed his/her communication skills and i-Ready scores in math and reading. The evaluator said that the Student was not eligible for services as a student with a Specific Learning Disability, or as a student with Autism, or as a student with Other Health Impairment. DCPS recommended a Section 504 plan for the Student. Petitioner disagreed and filed a dissent letter through Witness A's statement on May 15, 2023. Testimony of Witness A; P-35.

19. An Evaluation Summary Report dated May 18, 2023, provided an update on the Student's progress in math. The report stated that the Student could recognize numerals 0 to 10 and count backward from 10 to 0, but would likely benefit from instruction to develop skills related to counting to 100 and counting up or back to add or subtract. The Student's scores in math concepts and application were deemed to be below average. The report indicated that the Student understood phonemic concepts like rhyming but needed continued practice to build confidence and actively engage in phonemic tasks and practicing high-frequency words. The report said that the Student needed support to consistently recognize letters and letter sounds, that s/he had gaps in

grade-level word knowledge, and that s/he would benefit from support in comprehending grade-level texts. The report recommended providing the Student with rich, engaging, oral-language activities that target vocabulary, comprehension, and phonological awareness. The report also recommended instruction and practice in high-frequency words, vocabulary, and encoding one-syllable words with final consonant blends and common consonant digraphs. The report said that the Student needed to develop comprehension skills and required support to remain on topic, for which specialized instruction and Elkonin boxes were provided. P-11.

20. After the May 2023 IEP meeting, Witness C dissented. She felt that the Student needed specialized instruction to address his/her behavioral issues. On May 19, 2023, Witness C wrote a letter stating that the Student's behaviors aligned with characteristics of ASD, including making inconsistent and incomplete eye contact, misinterpreting information and social cues, and consistently engaging in outlier behavior such as walking in circles around the classroom at least once per day. Witness C stated that it took at least three "redirections" to get the Student back to the assigned task, and she reported that, when redirected, the Student felt that s/he was in trouble, would run and hide, and would say for the entire day that s/he was mad at the teacher. Witness C stressed that all these situations impacted the Student academically because s/he got distracted and was unable to focus on completing work. Witness C requested that the Student be reevaluated for a diagnosis of autism, which would lead to special education services to meet his/her needs. P-40.

21. The Student currently receives services at School B pursuant to his/her stay-put IEP. The Student has made progress on his/her emotional goals, but has not

mastered any of these goals. The school is currently assessing whether or not the Student still requires a BIP. Testimony of Witness E.

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, on Issue #1, the burden of persuasion is on Petitioner.

1. Did Respondent erroneously determine that the Student was ineligible for special education services during the eligibility meeting on May 11, 2023? If so, did Respondent deny the Student a FAPE?

Petitioner contended that the Student should have been determined to be eligible for services as a student with Autism and/or a student with Other Health Impairment, and that a revised IEP should have then been developed. During closing argument, Petitioner abandoned the claim that the Student should have been deemed to be eligible as a student with Other Health Impairment.

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP. 20 U.S.C. Sects.

1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court’s decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005). In this connection, the question is whether the IEP was appropriately designed at the time of creation so as to convey a meaningful benefit. S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (warning against “Monday morning quarterbacking,” i.e., reviewing IEPs based on prospective evidence).

In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 999-1000. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001-1002. The Endrew F. decision reaffirmed Rowley, in particular the statement that if a child is fully integrated into a regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard. However, a footnote to the opinion warns that this “guidance should not be interpreted as an inflexible rule” and is not a holding that every child advancing from one grade to the next “is automatically receiving an appropriate education.” Id. at 1001 n.2 (citation omitted).

A child with a disability means a child having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.308(a)(1). Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child’s educational performance. Other characteristics often associated with autism include engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

There is no dispute in this matter that the Student has been diagnosed with Autism Spectrum Disorder. As pointed out by DCPS, for a student to be eligible for services as a student with Autism, the IEP team must issue a determination that the autism had an “adverse effect on the child’s educational performance.” The “adverse effect” must then create a need for special education, which is defined as “specially designed instruction in the classroom, in the home, in hospitals and institutions, and in other settings.” 34 C.F.R. Sect. 300.39(a)(1). “Specially designed instruction” means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability, and to ensure access of the child to the general curriculum, so that the child can meet the

educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. Sect. 300.39(b)(3).

Petitioner's argument was based in part on the testimony of the Student's teacher, Witness C, who is a DCPS employee. Witness C was the Student's general education teacher during the 2022-2023 school year at School B, and she asked that the Student remain eligible for special education as a student with Autism. Witness C indicated that the Student had significant behavioral concerns during the 2022-2023 school year. The Student responded to loud noises, got angry, asked for headphones, and had to have all of his/her flashcards rearranged in a specific way. After a behavioral incident, the Student would take six to eight minutes to get back on track and, as a result, miss class time. Witness C said "it almost felt" like the Student was out of control, with his/her eyes blinking unusually, and that everything got worse as the year went on.

While Witness C did indicate that the Student was functioning at or about grade level in reading at the end of the school year, she indicated that the Student's success was only due to the special interventions that Witness C initiated to modify and adapt the Student's instruction in light of the Student's significant behavior problems in class. Witness C indicated that she "had to put [him/her] into two interventions" and "see [him/her] twice a day every day for reading." Witness C also mentioned the need for chunking and a variety of behavior-related interventions in the classroom, so that the Student could understand the material. Witness C said that, in a large class, the Student struggled to retain information.

Witness C's dissent letter, sent to DCPS on May 19, 2023, expanded on these points. In this letter, Witness C wrote that the Student displayed behaviors aligned with

characteristics of ASD, including: making inconsistent and incomplete eye contact, misinterpreting information and social cues, and consistently engaging in outlier behavior such as walking in circles around the classroom at least once per day. Witness C stated that it took the Student at least three redirections to get him/her back to the assigned task. Then, when redirected, the Student felt that s/he was in trouble and would run and hide. Witness C contended that all these situations impacted the Student academically because these incidents distracted him/her from work. The incidents also made it difficult for the Student to properly follow one-step directions or communicate with grade-level peers and properly socialize.

Witness C's testimony and dissent letter were consistent with her earlier interview with the DCPS psychologist who evaluated the Student. Witness C reported to the evaluator that the Student often misunderstood situations, had focus issues, got confused about what s/he should be doing, and was constantly saying, "You are mad at me." Witness C said that the Student shuts down, screams, hides, cries, "checks out," and, as a result, misses part of the school day.

Witness C's testimony was also consistent with the observations of the evaluator, who observed the Student twice. In both observations, the Student displayed more off-task behaviors and received more redirection from the teacher than any other student in the class. In the second observation, Witness C prompted the Student five times, but the Student still struggled to follow directives and staying focused. The evaluator also assessed the Student's behavior pursuant to the BASC-3 forms, which suggested that s/he internalized problems and had clinically significant concerns in depression and anxiety. There were also consistent concerns regarding the Student being tense, getting stressed

easily, worrying about tasks and things, and being nervous. In the area of depression, the Student complained about not being liked, cried easily, and got easily upset.

DCPS argued that only Witness C noticed the Student's behavioral issues, but Witness D also said that the Student often had a hard time last year and sometimes hid under desks. Witness D also said that the Student's issues with organization and planning impacted him/her in the classroom in regard to completing work during the 2022-2023 school year.

DCPS contended that Witness C was biased because of a personal relationship with the Student's parents, but the record indicates that Witness C was a credible, thoughtful witness who had no "axe to grind" and was testifying on principle, not because of personal advantage. No proof of friendship was established between Witness C and Petitioner or Petitioner's spouse, and no relationship was established to give Witness C a reason to commit perjury before this Hearing Officer.

DCPS also argued that the Student's circumstances had changed since the January 2023 IEP, which had "Area of Concern" sections in four areas: math, reading, adaptive/physical, and emotional, social, and behavioral development. The Student had made some improvements in reading, according to an i-Ready assessment, since the Student was then on grade level and passing his/her classes. Moreover, recent psychological tests put the Student in the average range academically. However, by the third reporting period of the 2022-2023 school year, which preceded the May 2023 IEP meeting, the Student had not mastered any of the IEP goals, except for one reading goal. Moreover, as Petitioner pointed out, the Student's third reporting period report card included "2" grades in all math areas, and Witness C testified that the Student's behavior

had become worse in May 2023. It took Witness C “six or seven” tries to get the Student into a work station. Witness C noted that the Student had difficulty making eye contact, did not really hear what Witness C said while teaching, missed a lot of social cues, and always thought that someone was upset at him/her. This Hearing Officer finds that the Student’s circumstances between January and May 2023 did not change so drastically that the Student’s IEP services should have been entirely eliminated.

DCPS also argued that the Student has been doing well the 2023-2024 school year. Even assuming that this Hearing Officer could consider such recent developments, given caselaw like Shank, this evidence is more proof that the Student should not be declassified. The Student has been receiving IEP services during the current school year through stay-put. The Student has made progress because the current program gives him/her extra access to teachers and small-group instruction. Tellingly, just prior to the determination that the Student was ineligible, Witness E wrote in a progress report that the Student was actually “excited” to have additional support in class.

Indeed, Witness E’s testimony supported Petitioner’s claim that the Student needs extra help in the classroom. Witness E noted that the Student sometimes fixated on an idea or a feeling and required more support and redirection to reengage in his/her academic tasks. It is noted that Witness E testified that she is still in the process of assessing whether a BIP should continue to exist for the Student. In the District of Columbia, the BIP is supposed to be part of an IEP. 5-A DCMR Sect. 5-3007.3.

DCPS also argued that Witness F, the Student’s special education teacher, was more credible than Witness C, the Student’s general education teacher, even though Witness C’s testimony was consistent with her prior statements. However, Witness F’s

testimony and analysis relied too much on DCPS's psychological evaluation from May 2022, whose author was not called as a witness, even though the psychological evaluation was the main basis for DCPS's positions in this case. This Hearing Officer finds this evaluation to be flawed. The evaluation concluded that the Student should not qualify for services as a student with Autism because the Student demonstrated no major stereotyped, restricted, or repetitive behaviors and was not disruptive during instruction. In fact, Witness C's and Witness E's testimony, together with documentation in the record, demonstrates that the Student did engage in disruptive repetitive behaviors, such as circling around the classroom again and again, and hiding under desks.

DCPS also suggested that the Student only requires "general education" interventions and does not need "specially designed instruction" from a special education teacher. However, "specially designed instruction" is a broadly written term which means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum." 34 C.F.R. Sect. 300.39. The May 18, 2023, Evaluation Report Summary suggested that the Student has been receiving such services and should continue to receive them because they have been working. The report says that *specialized instruction* has been provided to the Student in regard to his/her needs to develop comprehension skills and remain on topic. The report recommended providing the Student with rich, engaging, oral-language activities that target vocabulary, comprehension, and phonological awareness. The report also recommended instruction and practice in high-frequency words, vocabulary, and encoding one-syllable words with

final consonant blends and common consonant digraphs. The report also said that the Student's scores in math concepts and application were below average. Respondent did not clearly explain why these interventions should be considered "general education" interventions. L.J. v. Pittsburg Unified School District, 850 F.3d 996 (9th Cir. 2017) (a child had diagnoses of bipolar disorder, oppositional defiant disorder, and ADHD and displayed suicidal behavior; the district maintained that the child did not need special education because he was performing average or above-average academically; the court reversed, noting that though the services were furnished in the general education classroom, they were effectively special education, so the district could not maintain that the child had no need for special education and could succeed academically).

DCPS also pointed to the Student's academic testing and scores on the KTEA-3, which were mostly at grade level at the time the IEP was created. However, this was not entirely the case. The Student did not produce grade-level performance in math during the third reporting period, and some the Student's scores on the KTEA-3 subtests were below grade level. Moreover, the Student's i-Ready testing in April 2023 showed that s/he continued to be one level below grade in phonological awareness, vocabulary, and informational text comprehension, and DIBELS reading testing in January 2023 also showed that the Student was below his/her benchmark.

Moreover, even if students function at grade level, they may be eligible for services. In A.A. v. District of Columbia, Civil Action No. 16-248 (RBW), 2017 WL 11589194, (D.D.C. Apr. 20, 2017), a child who was diagnosed with ADHD, Post-Traumatic Stress Disorder, and a social engagement disorder, nevertheless had good grades. The court reversed the hearing officer and found that while the student had

average or above-average academic performance, the student's behavioral issues demonstrated to the court that the student was not able to consistently remain in a grade-level-appropriate classroom because of anxiety and mood disorders. 2017 WL 11589194, at *8.

In A.W. v. Board of Education of the Wallkill Central School District, No. 1:14-CV-1583, 2016 WL 4742297, (N.D.N.Y. Sept. 12, 2016), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016), a state review officer ruled that a child was not eligible under the IDEA, stressing that the child consistently received good grades, even when anxiety and depression surged. The court reversed, saying that students with good grades in general education may still be disabled for purposes of IDEA. The court noted that the district had significant information about the functional impairments of the child and the child's difficulties in preparation, focus, and attention, but did not consider the effects of those disabilities on academics. Similarly, in Yankton School District v. Schramm, 93 F.3d 1369 (8th Cir. 1996), a child had an orthopedic impairment, but the school district said it did not adversely affect educational performance and did not cause the child to need special education because she had already satisfied her physical education requirement. The court noted that the child continued to have slowness and fatigue when writing and lacked dexterity in her right hand, and decided that she was still in need of transition services that IDEA provides, even if some of the services and accommodations she needed were also required under Section 504. See also Memorandum to State Directors of Special Educ., 65 IDELR 181 (OSEP 2015) (noting that high cognition does not bar eligibility and districts may not use cut-off scores as sole basis for determining eligibility of students with high cognition who may qualify).

In sum, “specially designed instruction” is defined broadly in the applicable law and regulations to encompass a wide variety of instruction, whether in the home or elsewhere. All that is required by the statute is that the instructor adapt “the content, methodology, or delivery of instruction: 1) to address the unique needs of the child that result from the child’s disability; and 2) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” As underscored by Witness C’s statements, this Hearing Officer finds that the Student’s autism causes an adverse effect on his/her educational performance, which requiring DCPS to adapt their delivery of instruction to him/her. As a result of the foregoing, this Hearing Officer finds that DCPS erred when it determined that the Student was ineligible for services in its May 11, 2023, IEP meeting.

RELIEF

As relief, Petitioner seeks twenty-five hours of tutoring and twenty hours of mentoring for the Student. 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).

Given that stay-put relief has been in effect during this school year, the impact of the Student’s deprivation in this case is limited. Still, the record suggests that the Student was not provided services during at least part of May and June 2023. As a result, this Hearing Officer agrees with Petitioner that twenty-five hours of tutoring is a reasonable award. This Hearing Officer will also require the school district to review all relevant evaluations and documentation on the Student, conduct all necessary evaluations, conduct a full IEP meeting for the Student, determine the Student to be eligible for services as a student with Autism, and issue an IEP for the Student.

Finally, this Hearing Officer does not find that DCPS denied the Student any mentoring services. As a result, this Hearing Officer declines to issue an order directing the Student to receive mentoring services as compensatory education.

VII. Order

As a result of the foregoing:

1. DCPS shall fund twenty-five hours of special education tutoring for the Student, to be provided by a licensed special education teacher selected by Petitioner at a regular and customary rate in the community;

2. DCPS shall review all relevant evaluations and documentation on the Student, conduct all necessary evaluations, conduct a full IEP meeting for the Student, determine the Student to be eligible for services as a student with Autism, and issue an IEP for the Student;

3. All other requests for relief are denied.

Dated: October 18, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.

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 Sect. 1415(i).

Dated: October 18, 2023

Michael Lazan
Impartial Hearing Officer