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Confidential

<p>Parent on Behalf of Student, Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”),</p> <p>Respondent.</p> <p>Case # 2020-0114</p> <p>Date Issued: September 14, 2020</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: September 2, 2020, September 3, 2020,</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, September 14, 2020, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this proceeding (“Student”) resides in the District of Columbia with Student’s parent (“Petitioner”). Student has been determined eligible for special education and related services pursuant to the IDEA with a disability classification of Multiple Disabilities (“MD”) including Intellectual Disability (“ID”) and Other Health Impairment (“OHI”). District of Columbia Public Schools (“DCPS”) is Student’s local education agency (“LEA”). Student attends a separate special education school (“School A”).

On June 9, 2020, Petitioner filed her due process complaint asserting DCPS denied Student a free appropriate public education (“FAPE”) by allegedly failing to comprehensively evaluate Student for a triennial review in 2019, by not conducting the following evaluations: a comprehensive psychological, occupational therapy (“OT”) and speech-language. Because of DCPS’s alleged failure to appropriately evaluate, Petitioner alleged that Student’s individualized education program (“IEP”) is inappropriate. Petitioner also asserts that DCPS failed to develop a functional behavior assessment (“FBA”) and implement a behavior intervention plan (“BIP”) or a safety plan for Student, and failed to fully implement Student’s IEP.

Petitioner seeks the following as relief: that DCPS be ordered to: (1) fund independent educational evaluations (“IEE”)s: to include a neuropsychological with adaptive functioning testing, OT evaluation, speech-language, FBA with a corresponding BIP; (2) conduct or fund an assistive technology (“AT”) assessment and a transition assessment; (3) update Student’s IEP to include goals based on any findings and recommendations from the evaluations requested and add a dedicated aide, applied behavior analysis (“ABA”) therapy, and an appropriate amount of behavioral support services, (4) place and fund Student in an appropriate non-public setting, and (5) provide Student compensatory education for any denials of FAPE and guarantee timely payment to providers for IEEs conducted and any compensatory education awarded. Petitioner also requests to reserve the right to request additional compensatory education on behalf of Student after completion of the requested evaluations.

LEA Response to the Complaint:

DCPS filed a response to the complaint on June 19, 2020. DCPS denies that there has been any failure to provide Student with a FAPE, and stated, inter alia, the following in its response:

Student was enrolled and attended School A for school year (“SY”) 2019-2020 and SY 2018-2019. Student’s current IEP is dated May 22, 2020, and prescribes 30.75 hours per week of specialized instruction outside general education, 180 minutes per month of speech-language pathology

("SLP") outside general education, 120 minutes per month of OT outside general education, 120 minutes per month of behavioral support services ("BSS") outside general education, low-tech assistive technology, classroom and statewide assessment accommodations, transportation, extended school year ("ESY"), and a post-secondary transition plan. The current IEP as well as the IEPs dated October 15, 2019, and November 7, 2018, are/were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. The IEP progress reports indicate the Student is progressing toward achievement of IEP goals.

Student has an FBA dated March 13, 2020, a BIP dated May 22, 2020, and safety plans dated March 12, 2019, October 15, 2019 and May 22, 2020. All are appropriate for Student. Each of Student's IEPs were implemented during SY 2018-2019 and SY 2019-2020 at School A.

On April 27, 2020, DCPS provided Petitioner letters authorizing and funding IEEs for the following: neuropsychological evaluation, speech-language evaluation, OT evaluation, FBA and BIP. DCPS obtained written consent from Petitioner on May 22, 2020, to conduct an AT assessment.

Resolution Meeting, Pre-Hearing Conference, and Continuances:

The parties held a resolution meeting on June 23, 2020. The complaint was not resolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on July 9, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on August 23, 2020.

The parties were not available for the hearing dates offered. Based upon the hearing dates chosen by the parties, DCPS filed an unopposed motion of continuance/extension of the HOD due date which was granted. The HOD is now due on September 14, 2020.

A pre-hearing conference ("PHC") in this matter was held on July 13, 2020. The undersigned hearing officer ("Hearing Officer") issued a pre-hearing order ("PHO") on July 16, 2020, setting the hearing dates and outlining, inter alia, the issues to be adjudicated.

ISSUES:

The Hearing Officer determined, and the parties agreed and affirmed at the start of the hearing, that the following were the only issues to be adjudicated:

1. Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by not conducting the following evaluations at Student's triennial evaluation in September 2018: (a) comprehensive psychological, (b) OT, (c) speech-language.
2. Whether DCPS denied Student a FAPE by failing to conduct, create, and implement an appropriate FBA, appropriate and corresponding BIP and/or an appropriate safety plan, from the time student started attending School A until the present time (limited to the two-year statute of limitation period).

3. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP dated November 7, 2018, and/or October 15, 2019, and/or May 22, 2020, because the IEP(s): (a) was not created from updated and current evaluations (the evaluations noted in issue #1 above), and/or (b) have not allowed Student to make appropriate progress in the educational setting.
4. Whether DCPS denied Student a FAPE for the failing to implement Student's IEP by not conducting all services prescribed by the IEP (limited to the two-year statute of limitation period).

DUE PROCESS HEARING:

The Due Process Hearing was convened on September 2, 2020, and September 3, 2020. Due to the COVID-19 emergency, the hearing was conducted via video-teleconference.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 115, and DCPS Exhibits 1 through 44 identified as "Respondent's Exhibits") that were admitted into the record and are listed in Appendix 2. The witnesses testifying on behalf of each party are listed in Appendix B.²

SUMMARY OF DECISION:

Petitioner had the burden of persuasion on issues #1, #2, and #4 and sustained the burden of persuasion on all these issues. Petitioner established a prima facie case on issue #3 before the burden of persuasion fell to Respondent on issue #3. Respondent did not sustain the burden of persuasion on that issue. The Hearing Officer directed that DCPS, consistent with the authorization it has already provided Petitioner, fund IEEs and update Student's IEP. The Hearing Officer also directed DCPS to place and fund Student in a non-public special education separate school, and provided Petitioner the right to seek compensatory education.

FINDINGS OF FACT:³

1. Student resides in the District of Columbia with Petitioner and has been determined eligible for special education and related services pursuant to the IDEA with an MD disability classification including ID and OHI. DCPS is Student's LEA. Student attends School A, a special education separate school. (Petitioner's testimony, Petitioner's Exhibits 14)

² Petitioner presented the following five witnesses. In addition to Petitioner, the witnesses were: (1) a Speech Language Pathologist, (2) a Clinical Psychologist, (3) an independent Special Educator, and (4) a DCPS Special Education Teacher. These four witness all testified as expert witnesses. DCPS presented no witnesses.

³ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

2. In July 2010, DCPS conducted a comprehensive speech-language evaluation of Student in which the evaluator administered formal assessments, including the Goldman Fristoe 2 Test of Articulation (“GFTA-2”) and the Comprehensive Receptive and Expressive Vocabulary Test-2nd Edition (CREVT-2). Student’s results on these assessments were from “below range” to “poor range” of functioning and were not commensurate with Student’s age and linguistic environment. The evaluator concluded that Student’s qualified for SLP services. (Petitioner’s Exhibit 11)
3. In July 2010, DCPS also conducted a comprehensive psychological evaluation of Student in which the evaluator administered formal assessments, including among others, the Wechsler Intelligence Scale for Children-Fourth Edition, Test of Nonverbal Intelligence 3, Vineland-II Adaptive Behavior Scales Parent Rating Form, and the Connors Teacher and Parent Rating Scales. Student’s general cognitive ability was in the Extremely Low range with a FSIQ of 53. Student’s personal and social sufficiency skills were low and consistent with intellectual deficiency. (Petitioner’s Exhibit 10)
4. In September 2010, DCPS conducted an OT evaluation of Student in which the evaluator conducted formal assessments including the Bruininks-Oseretsky Test of Motor Proficiency-2. However, Student was not able to comply with the conditions of that standardized assessment. The evaluator also administered the Sensory Profile School Companion (“SPSC”) which was successfully administered. The evaluator also conducted an interview with Student’s teacher and a classroom observation of Student. The evaluator concluded Student had strengths in endurance, navigating the educational environment, and managing most garments, except for fasteners. The evaluator also concluded Student had the following weaknesses: presenting with global sensory processing difficulties, range of motion in arms and legs above normal limits, and difficulty maintaining eye contact with slow moving stimulus. (Petitioner’s Exhibit 9)
5. In February 2013, DCPS conducted another OT evaluation of Student, in which the evaluator conducted formal assessments including the Bruininks-Oseretsky Test of Motor Proficiency- 2nd Edition (“BOT-2”), the Motor Free Visual Perception Test – 3rd Edition (“MVPT-3”), and a Sensory Processing Measure. Student had difficulty understanding instructions of the MVPT-3 and this assessment was discontinued. Although Student had difficulty following directions for the BOT-2, the evaluator was able to administer the assessment. According to Student’s performance on the BOT-2, the evaluator noted Student’s strengths in manual dexterity, upper limb and bilateral coordination and balance. Student had difficulty with sensory processing and needed support in visual perceptual processing. (Petitioner’s Exhibit 8)
6. In March 2013, Student’s classroom teacher conducted a Woodcock Johnson (“WJ-3”) Update of Test of Achievement. Student’s scores were significantly below grade and age level. (Petitioner’s Exhibit 7)

7. In September 2017, DCPS conducted a TIPS Transition Planning Guide - Student and Family Interview to determine Student's future goals for independent living. (Petitioner's Exhibit 6)
8. In September 2018 DCPS conducted a psychological triennial reevaluation review. The DCPS school psychologist conducted a classroom observation and summarized Student's academic concerns, speech-language and vocabulary performance, social emotional and behavioral development, motor skills and physical development. The psychologist also summarized Student's previous evaluations and response to intervention. The WJ-3 results reported in the review were from July 2010. Based upon the review, the psychologist concluded Student continued to meet the criteria for the MD disability classification for ID and OHI. The psychologist did not conduct or attempt to conduct any standardized assessments of Student. (Petitioner's Exhibit 5)
9. On September 18, 2018, School A convened an multidisciplinary team ("MDT") meeting to review the analysis of existing data and decide if additional assessments were necessary to determine Student's continued eligibility for special education and related services. School A attempted to reach Petitioner to participate in the meeting, but could not reach her. The team noted that Student's last psychological evaluation was conducted in 2010 and last educational evaluation was in 2013. The team agreed that testing should not be done because of Student's recent seizure, but assessments would be conducted once Student returned to school to determine if Student's skills were affected by the seizure. Student's teacher and service providers reported on Student's progress and the team concluded it had sufficient data to determine that Student remained eligible. (Respondent's Exhibit 5)
10. On October 12, 2018, DCPS issued a prior written notice ("PWN") that stated that it would delay evaluations for Student for one year due to Student's recent seizure. (Respondent's Exhibit 10)
11. On November 7, 2018, DCPS developed an IEP for Student that prescribed 31 hours per week of specialized instruction outside general education, 180 minutes per month of SLP outside general education, 120 minutes per month of OT outside general education, 60 minutes per month of BSS outside general education. The IEP included one math goal with three objectives, one reading goal with three objectives, one communication/speech-language goal with two objectives, two emotional/social and behavioral development goals with objectives, and two motor skills/physical development goals with objectives. The IEP stated that no assistive technology was required by Student. (Petitioner's Exhibit 17)
12. On February 5, 2019, School A engaged the services of Catholic Charities Children & Adolescent Mobile Psychiatric Service ("CHAMPS") when student absconded from the school building. Thereafter, Student was provided and signed a "Contract for Safety" promising not to "run out the door" and to talk to staff when Student felt the urge to escape from the classroom or school building. (Respondent's Exhibit 14)

13. On March 12, 2019, School A developed a safety plan for use by School A staff to address Student's behavioral difficulties including aggressiveness with peers and staff, self-harming behavior, absconding from the classroom and attempting to leave the school building. Petitioner participated in the meeting when the safety plan was developed. The safety plan was updated on May 22, 2019. (Respondent's Exhibits 16, 17)
14. Student's next IEP, developed on October 15, 2019, prescribed 31 hours per week of specialized instruction outside general education, 180 minutes per month of SLP outside general education, 120 minutes per month of OT outside general education, 60 minutes per month of BSS outside general education. The IEP included one math goal with three objectives, one reading goal with three objectives, one communication/speech-language goal with two objectives, two emotional/social and behavioral development goals with objectives, and two motor skills/physical development goals with objectives. The IEP also provided for low-tech assistive technology such as visual supports. The IEP meeting notes indicated that the Student had access to a tablet, smart board and computer. (Petitioner's Exhibit 16, Respondent's Exhibit 25)
15. Student's IEP progress reports during SY 2018-2029 reflect that Student either mastered or was making progress relative to IEP goals. (Petitioner's Exhibits 27, 28, 29)
16. Although Student's IEP prescribed ESY services for summer 2019, Student did not attend ESY, and DCPS issued a PWN notice that Student did not attend ESY. (Respondent's Exhibits 22, 23)
17. On several occasions during SY 2019-2020, Student engaged in repeated unsafe and risky behaviors, including using profanity with staff, that School A cited in behavior incident reports. (Respondent's Exhibits 27, 28, 29)
18. Student's IEP progress reports during SY 2019-2020 reflect that Student was making progress relative to IEP goals. (Petitioner's Exhibits 23, 24, 25)
19. On April 27, 2020, School A convened an MDT meeting that Petitioner and her attorney attended. Petitioner requested DCPS provide Petitioner authorization for independent evaluations and that DCPS conduct an assistive technology evaluation for Student. Petitioner and her counsel shared concerns about Student's IEP and requested changes, including revision of existing IEP goals as well as additional goals. Petitioner also requested that Student be provided a dedicated aide. The team discussed Student's safety plan and development of a BIP and need to collect data regarding Student's behaviors. The team agreed to meet for an IEP meeting on May 22, 2020. (Respondent's Exhibit 31)
20. On April 27, 2020, DCPS provided Petitioner authorization to obtain IEEs, including neuropsychological, SLP, OT, FBA with BIP and on June 30, 2020, provided authorization for Petitioner to obtain an assistive technology evaluation. (Respondent's Exhibits 3, 4)
21. School A developed a BIP for Student dated May 13, 2020, that identifies the following problematic behaviors: absconding (leaving assigned areas without permission, attempting

to leave school building); non-compliance (failure to follow instructions, directives from staff); self-injurious behaviors (any behavior student engages in to cause harm to self). However, the evidence does not reflect that DCPS conducted an FBA prior to developing the BIP. (Respondent's Exhibit 35)

22. Student's current IEP is dated May 22, 2020, and prescribes 30.75 hours per week of specialized instruction outside general education, 180 minutes per month of SLP outside general education, 120 minutes per month of OT outside general education, 120 minutes per month of BSS outside general education, low-tech assistive technology, classroom and statewide assessment accommodations, transportation, ESY, and a post-secondary transition plan. The IEP includes the following goals: (1) the same one math goal of using currency that was in Student's previous IEP, with three objectives, two of which are new, (2) two reading goals, one of which was same as the previous IEP with the same three objectives, (3) two updated communication/speech-language goals with objectives, two emotional/social and behavioral development goals with objectives, and (4) three motor skills/physical development goals with objectives. The IEP states that Petitioner and her attorney requested an AT assessment focused on Student's communication. (Petitioner's Exhibit 14, Respondent's Exhibit 33)
23. Petitioner's educational advocate participated in Student's most recent IEP meeting and testified as an expert witness. She opined that Student's IEP is deficient for reasons that include among others, no written expression goals and the reduction of behavior supports services from a prior IEP despite Student's continued behavior difficulties. (Witness 3's testimony)
24. According to service trackers since June of 2018 through April 2020, Student has missed 670 minutes of OT (11.17 hours), 685 minutes of BSS (11.42 hours), and 1450 minutes of SLP (24.17 hours). (Petitioner's Exhibits 35 through 64, and 114)
25. Petitioner acknowledges that Student's attendance at School A has not always been good. There are times Student does not want to attend school because of Student's fear of other students. Sometimes School A staff called Petitioner to pick Student up from school early because of Student's behavior. Student's behavior included running out of the school building and engaging in behavior that was dangerous to Student and others. On occasion Petitioner would sit with Student in the classroom to help control Student's behavior so Student could remain in school. Student would sometimes receive calls two or three times per week. Some weeks Student would have no behavior problems at all. Student seemed unsettled about things happening in the classroom and displayed a need for attention. Often School A staff would not effectively address and mitigate Student's behaviors. Petitioner has participated in the development of the safety plan for Student. (Petitioner's testimony, Witness 4's testimony)
26. Student did not attend ESY because Student participated in summer work program instead. Student enjoyed the program and did well in it. Student was assigned a dedicated aide while in summer employment to help keep Student safe and to model behaviors. Petitioner believes Student needs more one to one assistance to control behavior and to cope.

Petitioner does not believe School A effectively addresses Student's needs and she is hopeful of Student attending a different school. Student would benefit from a school that offers functional skills instruction and work readiness programming, a certified behavior specialist and more staff in a classroom to monitor and support students. (Petitioner's testimony, Witness 4's testimony)

27. Petitioner presented an expert witness in speech language pathology who credibly testified that because Student's last full comprehensive speech language evaluation was completed in 2010, an updated comprehensive evaluation should have been conducted at least during Student's last triennial review in 2018. In addition she testified that Student would have benefited from an AT evaluation. She also testified that Student's IEPs since 2018 lacked goals regarding articulation and pragmatic language which were areas of concern mentioned in the 2010 evaluation. Although Student's service providers might be aware of Student's current functioning to inform the goals, ideally Student's IEP goals should have been and need to be updated based on current evaluations when they are completed. (Witness 1's testimony)
28. Petitioner presented an expert witness in neuropsychology who credibly testified that Student's history of seizure disorder may affect Student's cognitive functioning. As a result, best practices dictate conducting current neuropsychological testing to determine Student's current cognitive functioning. Because such an evaluation was not conducted, a full understanding of Student's current functioning was likely unavailable to Student's IEP team to inform Student's special education services. (Witness 2's testimony)
29. On June 23, 2020, DCPS convened a resolution meeting in which Petitioner requested, among other things, that Student's school placement be changed to a non-public special education school. Petitioner and DCPS have explored, but not yet secured, a non-public placement for Student. (Respondent's Exhibit 36, Petitioner's Exhibits 96, 97, 98)
30. Petitioner's educational advocate developed an compensatory education proposal, but acknowledged that the harm Student might have incurred as result of any alleged denials of FAPE cannot be pinpointed without the evaluations being done first. The advocate opined that but for the denials of FAPE, Student would have mastered adding and subtracting numbers with regrouping, knowing the value of money, answering wh-questions, identifying sounds of alphabets blends and digraphs (which impacts Student's ability to sound out unfamiliar words). The advocate proposed that Student be provided tutoring as compensatory education. The proposal also included the recommendation and request for ABA therapy; however, the advocate acknowledged she is not certified in the technique and her knowledge of ABA therapy is limited. Although the proposal does not document Student's attendance, the advocate took Student's attendance into account in arriving at the missed and requested services. (Witness 3's testimony, Petitioner's Exhibit 114)

CONCLUSIONS OF LAW:

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (“FAPE”).

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS’] procedural violations affected the student’s substantive rights.” *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner had the burden of persuasion on issues #1, #2, and #4. Petitioner established a prima facie case on issue #3 before the burden of persuasion fell to Respondent on issues #3. 4 The burden of persuasion shall be met by a

⁴ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) 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. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate Student by not conducting the following evaluations at Student's triennial evaluation in September 2018: (a) comprehensive psychological, (b) OT, (c) speech-language.

Conclusion: Petitioner sustained the burden of persuasion by preponderance of the evidence that DCPS denied Student a FAPE by failing to comprehensively evaluate Student by not conducting the following evaluations: (a) comprehensive psychological, (b) OT, (c) speech-language at Student's triennial evaluation in September 2018.

34 C.F.R. § 300.303 provides:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section--

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. *20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).*

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

The evidence presented in this case demonstrates that at the time of Student's triennial evaluation in September 2018, DCPS did not conduct comprehensive formal assessments of Student with standardized testing to assess Student's cognitive functioning, social/emotional functioning, and did not conduct or attempt to conduct other assessments that were previously performed when Student's last formal comprehensive psychological evaluation was conducted in 2010. Petitioner presented unrefuted testimony from an expert witness that supports a finding that DCPS should have conducted a comprehensive psychological evaluation and the psychological review that was conducted was insufficient to effectively assess Student's current functioning. The evidence supports a finding that Student was harmed by DCPS failing to conduct this evaluation.

Likewise, the evidence demonstrated that DCPS failed to conduct a comprehensive OT and speech-language evaluation at the time of Student's triennial review in 2018. There was unrefuted expert testimony that DCPS's failure to comprehensively evaluate Student in these areas resulted in harm to Student and amounted to a denial of a FAPE to Student.

There was evidence that in September 2018, Student had recently suffered a seizure and was not attending school at the time. DCPS team members, without Petitioner present at the meeting, made the decision that additional assessments beyond the psychological review and the analysis of existing data were not warranted to determine that Student remained eligible for special education and related services. In addition, the team determined that because of Student's recent seizure, evaluations would be delayed until Student returned to school. Later, DCPS issued a PWN stating that because of the seizure, DCPS would evaluate Student a year later. However, there was no evidence presented that DCPS evaluated Student when Student returned to school at any point after September 2018.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to conduct, create, and implement an appropriate FBA, appropriate and corresponding BIP and/or an appropriate safety plan, from the time student started attending School A until the present time (limited to the two-year statute of limitation period).

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that Student was denied a FAPE by DCPS failing to conduct an FBA and corresponding BIP and an effective safety plan.

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions do not apply to this case. Nonetheless, in the instant case, DCPS conducted developed a BIP to address Student's behaviors, but did not apparently conduct an FBA.

Functional Behavior Assessment or "FBA" refers to a systematic set of strategies 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) 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).

While an FBA is the "primary way" for an LEA to "consider the use of positive behavioral interventions and supports," it is not the only way. *Simms v. Dist. of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *14 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018)

Petitioner asserts DCPS denied Student a FAPE by not conducting a comprehensive FBA and for not creating and implementing an appropriate a corresponding BIP, and/or an appropriate safety plan.

School A developed a BIP for Student dated May 13, 2020, that identifies the following problematic behaviors: absconding (leaving assigned areas without permission, attempting to leave school building); non-compliance (failure to follow instructions, directives from staff); self-injurious behaviors (any behavior student engages in to cause harm to himself). However, the evidence does not reflect that DCPS conducted an FBA prior to developing the BIP and the BIP was developed after Student stopped attending school due to the COVID emergency.

The evidence demonstrates that on March 12, 2019, School A developed a safety plan for use by School A staff to address Student's behavioral difficulties including aggressiveness with peers and staff, self-harming behavior, absconding from the classroom and attempting to leave the school building. Petitioner participated in the meeting when the safety plan was developed and the safety plan was updated on May 22, 2019. However, the evidence also demonstrates that on several occasions during SY 2019-2020, Student engaged in repeated unsafe and risky behaviors, including using profanity with staff, which School A cited in behavior incident reports.

Petitioner credibly testified that School A staff called Petitioner to pick Student up from school early because of Student's behavior that included running out of the school building and engaging in behavior that was dangerous to Student and others. On occasion, Petitioner would sit with Student in the classroom to help control Student's behavior so Student could remain in school.

Although School A developed the safety plan and Petitioner participated in its development, Student's behavioral incidents persisted. One of Student's former special education teachers at School A credibly testified that often School A staff would not effectively address and mitigate Student's behaviors, albeit this testimony was not about Student's most recent school year.

Although DCPS created a BIP, the BIP was developed too late to affect Student's behaviors during SY 2019-2020. Based upon this unrefuted testimony by Petitioner and Student's former teacher, the Hearing Officer concludes that although DCPS created a safety plan for Student, that plan did not effectively curb Student's disruptive behavior. As a result, Student suffered harm that amounted to a denial of a FAPE.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP dated November 7, 2018, and/or October 15, 2019, and/or May 22, 2020, because the IEP(s): (a) was not created from updated and current evaluations (the evaluations noted in issue #1 above), and/or (b) have not allowed the Student to make appropriate progress in the education setting.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student's IEPs were reasonably calculated to enable a Student to make progress appropriate in light of the Student's circumstances because the IEPs were not based upon current and comprehensive evaluations.

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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 offered was reasonably calculated to enable the specific student's progress. . . . "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

The evidence presented in this case demonstrates according to Student's IEP progress reports, Student either made progress or mastered Student's IEP goals during SY 2018-2019 and made

progress relative to IEP goals during SY 2019-2020. Consequently, the Hearing Officer cannot conclude that Student did not make progress in Student's educational setting.

However, as has been previously discussed, at the time of Student's triennial evaluation in September 2018, DCPS did not conduct comprehensive formal assessments of Student with standardized testing to assess Student's cognitive functioning, social/emotional functioning, and did not conduct or attempt to conduct other assessments that were previously performed when Student's last formal comprehensive psychological evaluation was conducted in 2010. DCPS also failed to conduct a comprehensive OT and speech-language evaluation at the time of Student's triennial review in 2018.

Petitioner presented unrefuted testimony from an expert witness that supports a finding that DCPS should have conducted a comprehensive psychological evaluation and the psychological review that was conducted was insufficient to effectively assess Student's current functioning. There was unrefuted expert testimony of DCPS's failure to comprehensively evaluate the areas of OT and speech-language and the harm to Student therefrom. Without evidence that Student's IEP team had current data to inform Student's current functioning, the Hearing Officer cannot conclude that Student's IEPs during SY 2018-2019 and SY 2019-2020 were reasonably calculated to enable a Student to make progress appropriate in light of the Student's circumstances. Thus, Student was denied a FAPE.

ISSUE 4. Whether DCPS denied Student a FAPE for the failing to implement Student's IEP by not conducting all services prescribed by the IEP (limited to the two-year statute of limitation period).

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS failed to fully implement Student's IEPs during SY 2018-2019 and SY 2019-2020 by not providing Student all the related services that Student's IEPs prescribed.

According to 5E DCMR 3002.1(f) the LEA must provide services to address all of a student's identified special education and related services needs. This provision is consistent with the federal regulations, which indicate that a FAPE includes the provision of related services defined as "transportation and such developmental, corrective and other supportive services" as are required to assist a child with a disability to benefit from special education 34 C.F.R §300.34(a), (b) (16).

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at 274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the

child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

Although there was evidence that some of Student's missed services were due to Student's absences, according to service trackers since June of 2018 through April 2020, and the unrefuted testimony presented on Petitioner's behalf, the evidence sufficiently demonstrated that Student missed the following services: 670 minutes of OT (11.17 hours), 685 minutes of BSS (11.42 hours), and 1450 minutes of SLP (24.17 hours).

Consequently, the Hearing Officer concludes that the missed related services that Student incurred amounted to a material deviation from the services prescribed in Student's IEPs and resulted in a denial of a FAPE to Student.

Although Petitioner's advocate theorized that Student had missed thousands of hours of appropriate individualized special instruction and requested 300 hours of tutoring, there was no documentary evidence that was brought to the Hearing Officer's attention, and insufficient evidence presented otherwise, of missed specialized instruction.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate 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." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Although there was sufficient evidence presented that Student made some progress relative to IEP goals while attending School A, Student has continued to have significant behavioral difficulties. Petitioner has requested that Student be placed in another educational setting other than School A and DCPS has made efforts to do so. Therefore, the Hearing Officer directs that DCPS place and fund Student at an appropriate non-public special education separate school where Student's IEP can be effectively and appropriately implemented.

Although Petitioner has requested that a dedicated aide be added to Student's IEP, the Hearing Officer does not find sufficient evidence that Student requires a dedicated aide in light of Student's

pending change of schools. It is more appropriate for a team to review that issue once Student has begun attending a different school.

As previously stated, although Petitioner's advocate theorized that Student had missed thousands of hours of appropriate individualized special instruction and requested 300 hours of tutoring, there was no documentary evidence of any missed specialized instruction.

The advocate's proposal also included the recommendation and request for ABA therapy, but she acknowledged that she is not certified in the technique and her knowledge of ABA therapy is limited. No witness was certified in or had experience delivering ABA therapy. Therefore, the Hearing Officer did not find a sufficient basis to conclude that ABA therapy is a reasonable form of compensatory services for Student.

Although Petitioner's educational advocate developed an compensatory education and requested compensatory services, the advocate acknowledged that the harm Student might have incurred as result of any alleged denials of FAPE could not be pinpointed without the evaluations being done first. The Hearing Officer agrees. Consequently, in the order below the Hearing Officer directs that compensatory education for the denials of FAPE found in this HOD be determined following the completion and review by a team of the evaluations DCPS has authorized Petitioner to obtain.

ORDER: ⁵

1. DCPS shall, within twenty (20) business days of the date of this order, place and fund Student at an appropriate non-public special education separate school where Student's IEP can be effectively and appropriately implemented.
2. DCPS shall, within thirty (30) calendar days of its receipt of the final of the IEEs that DCPS has authorized Petitioner to obtain, convene an IEP meeting to review the evaluations and to update Student's IEP as appropriate and address compensatory education.
3. Petitioner shall have the right to pursue, in due process hearing if need be, a compensatory education award based the denials of FAPE determined in this HOD.
4. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

⁵ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer

Date: September 14, 2020

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