

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Confidential

Student,¹)	Case No. 2021-0071
)	
Petitioner,)	Hearing Dates: September 7-8, 2021
)	
)	Conducted by Video Conference
v.)	
)	Date Issued: September 20, 2021
District of Columbia Public Schools,)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X year-old student (“Student”) who attended School A during the 2020-21 school year. On May 28, 2021, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging, *inter alia*, that the District of Columbia Public Schools (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to conduct triennial evaluations or evaluate Student in all areas of suspected disability, failing to provide and implement appropriate Individualized Education Programs (“IEP”), and failing to provide access to Student’s evaluations. On June 8, 2021, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint* (“*Response*”) denying that it had denied Student a FAPE in any way.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

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

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

Petitioner filed the *Complaint* on April 15, 2021 alleging that DCPS denied Student a FAPE by (1) failing to conduct a comprehensive psychological by the summer of 2019, (2) by failing to provide appropriate IEPs in May 2019, April 2020, and May 2021 due to a lack of written expression goals, an insufficient amount of reading and math goals, a lack of goals in adaptive behavior, inattentiveness, and work completion, an insufficient amount of specialized instruction, goals that were not challenging or achievable, goals that were repeated from prior IEPs, goals that were not measurable, inadequate present levels of academic performance and baselines, and the IEPs were not based on sufficient evaluative data, (3) failing to implement Student's IEP by failing to provide the prescribed hours of specialized instruction per week since March 2020, and (4) failing to provide access to Student's prior evaluations.

DCPS filed its *Response* on June 8, 2021 and asserted that (1) during Student's triennial review in September 2018, DCPS used evaluation procedures prescribed by IDEA by reviewing existing data, obtaining information from Petitioner and Student's teachers, and conducting a classroom observation. The IEP Team determined that Student remained eligible for special education services, but did not require further evaluations, as there was no question as to his/her eligibility or classification, (2) Student's 2019 and 2020 IEPs prescribed 27.5 hours per week of specialized instruction, his/her May 2021 IEP prescribed 26.5 hours per week, and all three IEPs were reasonably calculated to enable Student to make appropriate progress considering her/his circumstances, (3) once DCPS school facilities were closed in March 2020, DCPS provided instruction and related services to Student to the greatest extent possible, and (4) DCPS responded to Petitioner's records requests on March 3, 2021, March 4, 2021, April 7, 2021, and April 28, 2021 and provided all of Student's available records.

The parties participated in a resolution meeting on June 10, 2021 that did not result in a settlement. The resolution period ended on June 27, 2021. A prehearing conference was conducted by video conference on June 23, 2021, and the *Prehearing Order* was issued that day.

The due process hearing was conducted on September 7 and 8, 2021 by video conference and was open to the public. Respondent's *Hearing Disclosures*, filed August 30, 2021, contained a witness list of four witnesses and documents R-1 through R-31. Petitioner did not file an objection to any aspect of Respondent's *Disclosures*. During the hearing, DCPS offered Exhibits R1 – R30 into evidence, all of which were admitted.

Petitioner's Disclosure was also submitted on August 30, 2021, containing a list of seven witnesses and documents P1-P61. DCPS filed objections to *Petitioner's Disclosure* on September 2, 2021. DCPS objected to Exhibits P5-P8, P14-20, P24-25, and P58-59. I overruled the objections to P5, P6, P8, P14 -P20, sustained the objection to P7, and deferred ruling on P 24, P25, P58, and

P59.² During the hearing, I sustained the objections to P 24 and P25, and overruled the objections to P58 and P59. Thus, Petitioner’s Exhibits P1 – P6, P8 – P23, and P26 – P59 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, Witness B, and Witness C. Petitioner offered Witness A as an expert in evaluations and IEP programming, and Witness B as an expert in Special Education. There was no objection to expert testimony in these categories and I allowed opinion testimony from each of these witnesses. Respondent presented as witnesses in chronological order Witness D and Witness E. Both witnesses were offered and admitted as experts in Special Education without objection. The parties’ counsel provided oral closing arguments at the conclusion of the testimony. I authorized the parties’ counsel to file the authorities on which they rely by September 9, 2021. On September 9, 2021, Respondent filed a memorandum of points and authorities on the issue of Respondent’s obligation to evaluate students suspected of disabilities.

ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive psychological evaluation by the summer of 2019.
2. Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs in May 2019, April 2020, and May 2021 due to a lack of written expression goals, an insufficient amount of reading and math goals, a lack of goals in adaptive behavior, inattentiveness, and work completion, an insufficient amount of specialized instruction, goals that were not challenging or achievable, goals that were repeated from prior IEPs, goals that were not measurable, inadequate present levels of academic performance and baselines, and the IEPs were not based on sufficient evaluative data.
3. Whether DCPS denied Student a FAPE by failing to implement Student’s IEP by failing to provide the prescribed hours of specialized instruction per week since March 2020.
4. Whether DCPS denied Student a FAPE by failing to provide access to Student’s prior evaluations.

FINDINGS OF FACT

1. Student is X years old and was in grade G at School A during the 2020-2021 school

² Exhibit P7 was a psychological evaluation that was performed after the filing of the *Complaint*. I sustained the objection because the document is not relevant to the issues in dispute, as it does not relate his/her condition at the time the issues in dispute took place.

year.³

2. On July 8, 2014, when Student was in grade H at School B, it completed a Psycho-Educational Evaluation of Student.⁴ Petitioner had expressed concerns about Student's inability to complete many of the classroom activities and homework. Examiner A administered the Primary Test of Nonverbal Intelligence ("PTONI"), an intelligence test that measures nonverbal reasoning. Student's standard score of 71 was in the Low range, indicating that "when the verbal component is removed from an assessment instrument, [Student] is unable to perform at a level consistent with [his/her] same age peers."⁵ The Young Children's Achievement Test ("YCAT") included subtests in General Information, Reading, Mathematics, Writing, and Spoken Language, which are combined to form an Early Achievement Composite ("EAC"). Student's EAC score of 72 was equivalent to a score expected of a child one year and seven months younger than Student. Student's Standard Score on the Writing subtest (70) was the lowest, the equivalent to a score expected of a child one year and nine months younger than Student.⁶ The Comprehensive Test of Phonological Processing ("CTOPP") measures a child's strengths and weaknesses in Phonological Awareness, Phonological Memory, and Rapid Naming ability. Student's scored in the Poor range in Phonological Awareness (76), Very Poor in Phonological Memory (61), and Below Average in Rapid Naming (87). His/her phonological awareness scores indicated that s/he did "not have the necessary basis for reading at an age appropriate level."⁷ The low score in phonological memory "may not impair listening or reading comprehension for simple sentences but is likely to impair both listening and reading comprehension for more complex sentences."⁸ His/her scores on the three subtests "suggest that [s/he] is unable to decode, comprehend, and efficiently read at a level that is similar to [his/her] same age peers."⁹

Examiner A concluded that Student's nonverbal cognitive ability was that of a child two years and two months younger than Student. The scores on the CTOPP indicate that s/he is unable to decode, comprehend, and efficiently read at a level that is similar to her/his same age peers. "[Student] requires support in the areas of academic/cognitive functioning especially in the academic areas of fundamental reading, phonemic awareness and comprehension. [S/he] also requires support in the area of mathematical calculations."¹⁰

3. On September 10, 2014, School B, a local education agency ("LEA"), completed an initial IEP for Student. S/he was classified as a student with a Developmental Delay ("DD").¹¹

³ Petitioner's Exhibit ("P:") 23 at page 1, electronic page 213. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, *i.e.*, P23:1 (213).

⁴ P5:1 (33). Witness A testified that the failure to reference this evaluation in the May 2021 IEP suggests that DCPS did not have access to it. However, the Final Eligibility Determination Report issued by DCPS on September 11, 2018 indicates that the referral for an initial evaluation was made to School C, a DCPS School. (P11:6 (96)). Although the evaluation was on School B letterhead, Examiner A signed the evaluation as a "DCPS Licensed School Psychologist."

⁵ P5:2 (34).

⁶ *Id.* at 6 (36).

⁷ *Id.* at 7 (37).

⁸ *Id.*

⁹ *Id.* at 8 (39).

¹⁰ *Id.*

¹¹ P14:1 (107).

The Areas of Concern were in Mathematics and Reading.¹² The IEP team prescribed ten hours per week of specialized instruction outside general education.¹³

4. On September 11, 2015, School B determined that Student met the criteria for a student with a Specific Learning Disability (“SLD”).¹⁴

5. Student’s last IEP at School B was developed on June 8, 2018, as Student completed grade F. Student was classified with an SLD.¹⁵ The Areas of Concern were Mathematics and Reading. In Reading, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) indicated that Student could count pennies dimes, and pennies and nickels, could solve single digit addition and subtraction, had trouble with place value, and could tell time “to the hour” on an analog clock, but confuses the hour and minute hands. The baselines were: (1) s/he can count pennies and dimes, pennies and nickels, as well as \$5’s and \$1’s, and \$10’s and \$1’s, (2) s/he can solve single digit addition but has trouble with place value, (3) s/he can solve single-digit subtraction, and (4) Student can tell time “to the hour” on an analog clock, but confuses the hour and minute hands. The goals were: (1) Given instructions and coin manipulatives, Student will be able to count an assortment of coins with a sum over \$1 and mixed bills with a sum of at least \$15, (2) Given instruction and manipulatives, Student will solve double digit addition with regrouping with 80% accuracy, (3) Given instruction and manipulatives, Student will solve double digit subtraction with regrouping with 80% accuracy, and (4) Given individualized instruction, Student will tell time to the nearest 5 minutes with 80% accuracy.¹⁶ In Reading, the PLOP revealed that Student could read the pre-primer sight word lists. S/he could read at level E at 26 words per minute with 43% comprehension. The baselines were: (1) Student can read pre-primer sight word lists, (2) S/he can read independently at level E at 26 words per minute at 43% comprehension, and (3) S/he can answer questions about a text read aloud when s/he is able to focus on the story. The goals were: (1) Student will identify grade E to grade C level (two levels and one level below grade F) sight words with 80% accuracy, (2) Given differentiated instruction, Student will increase her/his reading fluency and accuracy to grade level, and (3) Given individualized instruction, Student will ask and answer WH questions using key details in an instructional level text with 80% accuracy.¹⁷ The IEP team prescribed 27.5 hours per week of specialized instruction outside general education¹⁸ and extended year services (“ESY”).¹⁹

6. On September 11, 2018, when Student was in grade A at School C, DCPS issued a Final Eligibility Determination Report.²⁰ His/her classification was SLD. Student was reported to be “not achieving adequately” for his/her age in written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving.²¹ In

¹² *Id.* at 3, 4 (109, 110).

¹³ *Id.* at 7 ((113).

¹⁴ P8: 5 (79).

¹⁵ P20:1 (173).

¹⁶ *Id.* at 3-4 (175-76).

¹⁷ *Id.* at 4-5 (176-77).

¹⁸ *Id.* at 6 (178).

¹⁹ *Id.* at 9 (181).

²⁰ P11:1 (91).

²¹ *Id.* at 3 (93).

Mathematics, School B reported progress on four goals in the 4th quarter of the 2017-18 school year. S/he had been “introduced to adding single digits using mental strategies and a number line at the beginning of the year. [S/he] was able to pick this skill up quickly and showed progress throughout the year.”²²

7. On September 11, 2018, Petitioner signed a DCPS Consent for Initial Evaluation/Reevaluation. She checked the box providing: “I give my consent to have [Student] evaluated to determine if he/she is eligible or continues to be eligible for special education and to determine educational needs.”²³

8. On September 11, 2018, DCPS completed an Analysis of Existing Data, indicating that it had reviewed all existing data relating to Student’s educational history.²⁴ That day DCPS also issued a Prior Written Notice (“PWN”) confirming that Student remained eligible for special education services in math and reading. Student was assigned to a Specific Learning Support (“SLS”) classroom.²⁵

9. In the spring of 2019, Student was administered the Partnership for Assessment of Readiness for College and Careers (“PARCC”) in English Language Arts (“ELA”). S/he scored 677, in the lowest Performance Level, and “did not yet meet expectations for [grade A] learning standards.”²⁶ She was below expectations in Literary Text (Read and analyze fiction, drama, and poetry), Informational Text (Read and analyze nonfiction history, science, and arts), Vocabulary (Use context to determine the meaning of words and phrases), Written Expression (Compose well-developed writing using details from texts), and Knowledge and Use of Language Conventions (“Compose writing using rules of standard English”).²⁷

Student was also administered the PARCC in Mathematics in the spring of 2019. S/he scored 679, in the lowest Performance Level, and “did not yet meet expectations for [grade A] learning standards.”²⁸

10. On May 31, 2019, DCPS completed an IEP Annual Review.²⁹ The Mathematics PLOP reported that Student could tell time to the nearest five minutes, could add and subtract double digit numbers without regrouping, struggles with adding and subtracting with regrouping and with multiplication and division of single digit numbers. S/he has difficulty initiating assignments independently, quickly becomes overwhelmed with new material, and needs breaks throughout the day. Student improved from grade H to grade E (3 grades below current grade) on his/her i-Ready

²² *Id.* at 7 (97).

²³ P45:1 (312).

²⁴ Respondent’s Exhibit (“R:”) 1 at page 1, electronic page 1. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, *i.e.*, R1:1 (1).

²⁵ P46:1 (314). SLS program classrooms serve students in 3rd – 12th grade who are identified as having a specific learning disability or complex learning needs and have not responded to interventions in the general education classroom. <https://dcps.dc.gov/page/academic-programs-and-inclusion>.

²⁶ P32:1 (264).

²⁷ *Id.* at 2 (265).

²⁸ *Id.* at 3 (266).

²⁹ P21:1 (185).

math assessment from September 12, 2018 to January 18, 2019. The baselines were: (1) S/he can solve single digit addition problems, but continues to have difficulty with regrouping double digit numbers, (2) S/he can solve double digit subtraction problems without regrouping, and (3) S/he is able to multiply single digit problems with “5” as the multiplier, but has difficulty with any other number. The goals were: (1) Given individualized instruction and manipulatives, s/he will solve double digit addition with regrouping with 80% accuracy, (2) Given individualized instruction and manipulatives, s/he will solve double digit subtraction with regrouping with 80% accuracy, and (3) Given a multiplication problem with factors up to 10, Student will determine the product using manipulatives and/or multiplication charts.³⁰

In Reading, the PLOP indicated that Student is able to answer “WH” questions when given a graphic organizer and when the story is read to her/him. S/he is able to write information on the graphic organizer with assistance. S/he has improved on the reading inventory and “made slow and steady progress this school year.” S/he often becomes upset and refuses to complete assignments throughout the day “which takes up the majority of instruction time. [S/he] becomes frustrated and non-compliant when 1:1 attention is not given and [s/he] often has challenges when following 1-2 directions.” On a Reading Inventory on August 30, 2018 and 5/29/19, Student scored 62 and 239, respectively. (The latter score reflects a reading level three years below Student’s grade at that time). S/he had “extreme” difficulty with the Gort assessment that measures fluency and accuracy. The baselines were: (1) S/he can read pre-primer sight word lists and some primer sight words, (2) S/he can read independently to level E, but has difficulty with fluency and accuracy, and (3) S/he can answer questions about a text read aloud to her/him, but is unable to independently. The goals were: (1) S/he will identify grade E and grade C (3 and 2 grades below his/her grade) sight words with 80% accuracy, (2) Given differentiated instruction, Student will increase her/his reading fluency and accuracy to grade level, and (3) Given individualized instruction, Student will ask and answer WH questions using key details in an instructional level text with 80% accuracy.³¹

The IEP team prescribed 27.5 hours per week of specialized instruction outside general education and ESY.³²

11. On June 14, 2019, DCPS issued an IEP Progress Report for the 2018-19 school year. Student was reported to be progressing on all of his/her Math and Reading.³³

12. During the 2018-19 school year, Student had 16 unexcused absences.³⁴

13. On April 30, 2020, DCPS completed an IEP Annual Review.³⁵ The Mathematics PLOP reported that Student had made “slight” progress in developing arithmetic fluency, is able to count an assortment coins with a sum over \$1, mixed bills, can tell time to the nearest 5 minutes, and add and subtract single and double digit numbers without regrouping, can identify and count to 100, struggles adding and

³⁰ *Id.* at 3-4 (187-88).

³¹ *Id.* at 4-5 (188-89).

³² *Id.* at 7, 10 (191, 194).

³³ R6:1-4 (22-25).

³⁴ P30:1 (260).

³⁵ P22:1 (199).

subtracting with regrouping and multiplying and dividing single digit numbers, difficulty initiating assignments independently, quickly becomes overwhelmed with new material. Student understands place values to the thousandths, but cannot solve calculation and computation problems at grade level. S/he can complete applied problem solving tasks at grade level. “Real world problems involving add/sub of fractions with uncommon denominators, mult/div of fractions, measurement with unit conversion can be very difficult for [Student] as well as solving word problems involving addition and subtraction of fractions...” The latest reported I-Ready score was the January 2019 score reported on the previous IEP. The baselines were: (1) S/he can solve double digit subtraction without regrouping, and (2) S/he is able to multiply single digit numbers but has difficulty with double digits. The goals were: (1) Given individualized instruction and manipulatives, s/he will solve double digit subtraction with regrouping with 80% accuracy, and (2) Given a multiplication problem with factors up to 10, Student will determine the product using manipulatives and/or multiplication charts.³⁶

In Reading, the PLOP indicated that Student had developed phonological/phonetic awareness at a grade C level (three grades below Student’s), can “partially” read regular short vowel, single syllable words and words that feature common consonant digraphs. His/her reading fluency is in the grade F range (two graded below Student’s), and read independent level text at 71-107 WCPM, can comprehend text at grade level that is read to him/her, has developed sentence composition at grade H level (six grades below Student’s), understands spelling concepts at a grade E level (five grades below Student’s), is able to read pre-primer and primer sight words with assistance, is able to answer “WH” questions when given a graphic organizer and when the story is read to her/him, and is able to write information on the graphic organizer with assistance. As on the previous IEP, s/he often becomes upset and refuses to complete assignments throughout the day “which takes up the majority of instruction time. [S/he] becomes frustrated and non-compliant when 1:1 attention is not given and [s/he] often has challenges when following 1-2 directions.” There was no new testing/assessment data since the previous IEP. The three baselines from the previous IEP were repeated and a fourth was added: s/he struggles with starting writing without incentives; his/her writing is disorganized and lacks structure. The previous first goal was replaced with a more aggressive goal: s/he will identify grade F to grade D (from two grades below to grade level) sight words with 80% accuracy. The second and third goals were repeated, and a fourth goal was added: given independent level and/or orally informational text, a writing prompt with a specified topic, a report organizer with sentence starters, and after a shared writing of the introductory sentence and the first supporting detail, Student will write a second supporting detail and a concluding statement.³⁷

The IEP team prescribed 27.5 hours of specialized instruction outside general education and ESY.³⁸

14. On May 11, 2020, DCPS issued and IEP Progress Report for the 2019-20 school year. In Math, Student had mastered the goal of adding double digit addition with regrouping and was progressing on the other two goals. In Reading, s/he was reported to have progressed on all three

³⁶ *Id.* at 3-4 (201-02).

³⁷ *Id.* at 5-7 (203-05).

³⁸ *Id.* at 8, 11 (206, 209).

goals throughout the year.³⁹

15. On the Progress to College and Career Report Reading Inventory on January 1, 2021, Student's Lexile score placed her/him as a Beginning Reader, in the first percentile of students in grade G.⁴⁰ On the i-Ready Math assessment, Student scored at the grade H level (6 grades below her/his grade at that time) on October 26, 2020 (381) and on February 1, 2021 (383).⁴¹

16. On March 2 and May 18, 2021, Petitioner requested copies of all of Student's education records.⁴² DCPS submitted records on May 14, 2021, indicating that other records were sent on April 7, April 13, and/or April 28, 2021.⁴³

17. At an IEP team meeting on March 9, 2021, Petitioner, who was represented by counsel at the meeting, expressed concerns about (1) Student failing core subjects but passing electives, (2) Student is failing because s/he was placed at School A instead of School D, (3) Petitioner and Student had technical issues "causing both to mentally shut down."⁴⁴

18. On April 28, 2021, DCPS issued an IEP Progress Report for the first three reporting periods of the 2020-21 school year. S/he was reporting to be progressing on all of his/her Math and Reading goals.⁴⁵

19. On May 17, 2021, when Student was in grade G at School A, DCPS completed an IEP Annual Review.⁴⁶ The Mathematics PLOP reported that on an I-Ready assessment on February 1, 2021, his/her score of 383 placed her/him at a grade H level (six grades below her/his grade at that time). The baselines were: (1) S/he can solve addition and subtraction equations but has difficulty with multiplication and division, (2) S/he can identify positive numbers, and (3) Student does well interpreting data, but struggles with converting the data into graph forms. The goals were: (1) Given a one-step equation with whole numbers, Student will solve for the variable using visual or arithmetic strategies, (2) Given a real-world context involving quantities from -10 to 10, and a labeled diagram of the scenario, Student will identify the values on a number line by responding to verbal prompts with 80% accuracy, and (3) Given 5 problems involving constructing graphical displays to describe sets of data values, Student will correctly draw diagrams with 80% accuracy.⁴⁷ In Reading, the PLOP reported that on an Reading Inventory assessment on January 11, 2021, Student earned a score equivalent to a grade H level (six grades below her/his grade at that time). Due to the low score, s/he was administered the Phonics Inventory assessment on January 24, 2021 where s/he scored at the beginning decoding level. The first baseline, that s/he can read pre-primer and some primer sight words, was repeated from the two prior IEPs. The three other baselines from the April 30, 2020 IEP were replaced with the following: (1) S/he can identify main characters in a

³⁹ R10:1-4 (38-41).

⁴⁰ P39:2 (290).

⁴¹ P40:1 (292).

⁴² P50:1 (326), P51:1 (328).

⁴³ P53:1 (333).

⁴⁴ P26:1 (240).

⁴⁵ R18:1-4 (72-75).

⁴⁶ P23:1 (213). Petitioner was represented by counsel at the meeting. P27:1 (243).

⁴⁷ *Id.* at 4-5 (216-17).

text, and (2) S/he is able to recall facts from a text. The goals were: (1) Given a passage with target words or list of words, Student will use a dictionary, glossary, or thesaurus to determine the definition, syllabication, pronunciation, alternate word choice, and/or part of speech of 10 words, (2) Given an independent instructional level literary text, s/he will identify 2 significant plot events and analyze how a character responds to those events, referring to 2 specific examples in the text, and (3) After reading an informational, independent level text, Student will state the central idea of the text, list 3 supporting details, and explain in one sentence how the details support the central idea in a graphic organizer.⁴⁸

The IEP team prescribed 26.5 hours per week of specialized instruction outside general education and ESY.⁴⁹

20. At the May 17, 2021 IEP meeting, Teacher A, Student's English Language Arts ("ELA") and Social Studies general education teacher, reported that when Student gets frustrated, s/he will leave the classroom.

If it's [her/his] turn to answer a question or read a passage, [s/he] will just leave. I'll call [him/her] back and [s/he] will decline the call. The only class I know of when [s/he] is consistently engage is self-advocacy, because that's something to watch. But if it's reading or writing, then [s/he] will just not respond, and I will repeatedly call [her/him] and [s/he] will be non-responsive. Like everyone else said, [s/he's] a good kid, [s/he's] not disrespectful, [s/he] wants to participate, but [s/he] gets frustrated.⁵⁰

Petitioner's counsel suggested that it would be appropriate to add goals for Written Expression. Witness E, Student's special education teacher, did not agree:

The IEP is based on when [s/he] was initially evaluated for IEP services, and we have a Triennial coming up... I don't think – look I can see how [s/he] would benefit from written expression goals, I do – but based on [her/his] responses, and maybe this is wrong with me, but I tend to just have [her/him] respond verbally So we can have written expression goals, but I can't just open up and add it, it has to have the triennial.⁵¹

Staff Member A reported that Student's hours of specialized instruction was reduced to 26.5 hours from 27.5 hours in the previous IEP to reflect the maximum available under the schedule at School A. Student would be in a self-contained class of 10-12 students.⁵²

Petitioner's counsel requested that a comprehensive psychological evaluation be conducted as soon as possible. Witness E noted that the triennial period did not expire until September.⁵³

⁴⁸ *Id.* at 5-6 (217-18).

⁴⁹ *Id.* at 7, 10 (219-222).

⁵⁰ P 27:3 (245).

⁵¹ *Id.* at 5 (247).

⁵² *Id.* at 6 (248).

⁵³ *Id.* at 5 (247).

21. On May 21, 2021, DCPS issued a PWN indicating that it would conduct assessments “as part of [Student’s] triennial because there are other concerns that were not addressed in previous evaluations.”⁵⁴

22. Students final grades for the 2020-21 school year were as follows: Concepts of World Geography & Cultures – B-, Graded Advisory – Pass, Self-Advocacy – A, English – Pass, and Health & Physical Education – A-.⁵⁵ During the 2020-21 school year, Student had 5 unexcused absences,⁵⁶ and was recorded present 142 out of 157 days, 90% of the time.⁵⁷

23. Witness A opined that DCPS should have conducted comprehensive assessments of Student no later than 2019. Had it done so, Student’s classification likely would have changed due to her/his Attention Deficit Hyperactivity Disorder (“ADHD”). She also opined that the May 17, 2021 IEP lacked goals for Written Expression despite known weaknesses in that area since the 2014 evaluation.

24. Witness B opined that the May 31, 2019 IEP was lacking in writing goals, and goals to address off-task and inattentive behavior, or goals to address deficiencies in adaptive skills. He also testified that the IEP was deficient because it was not based on current evaluation data.

25. School D is a non-public special education day school located in Springfield, Virginia. It holds a Certificate of Approval from the District of Columbia Office of the State Superintendent of Education (“OSSE”). All of its teachers are licensed in Virginia. The total school enrollment is 77. The average student to teacher ratio in School D classes is 3:1, not including dedicated aides. School D has admitted Student. If Student were to attend, s/he would be the eighth student in the class. That class is led by a licensed teacher and a teacher’s assistant, and two of the students in the class have dedicated aides.⁵⁸ Witness D, Manager of Specialized Education at School C, opined that Student would not be a good fit at School D, because s/he did not present the behavioral issues typical of students at School D.

26. Witness D testified that DCPS does not routinely conduct assessments during triennial evaluations. It conducts assessments only if there is an anticipated change in the student’s classification, or if the parent specifically requests an assessment. DCPS did not conduct assessments of Student at School C, because its review of Student’s records confirmed that his/her classification would remain SLD.⁵⁹

27. At School C, Student was in a class of five students, a teacher, and a teacher’s assistant. Student did not present behavior concerns. Nor was her/his writing a concern, based on a review of his/her writing samples. The staff did not believe Student exhibited deficits warranting adaptive living skills support. The staff did not observe significant inattentiveness or failure to

⁵⁴ P49:1 (323).

⁵⁵ P38:1-2 (284-85).

⁵⁶ P31:1 (262).

⁵⁷ P38:3 (286).

⁵⁸ Testimony of Witness C.

⁵⁹ Testimony of Witness D.

complete assignments. Witness D opined that Student's inattentiveness was not an area of concern warranting goals in the IEP because s/he was easily redirected.⁶⁰

28. Student enrolled at School A for the 2020-21 school year. The school offered only virtual learning at the beginning of the school year. Student did not begin participating in virtual learning until mid-to-late October. Like his/her peers, s/he was somewhat unfocused, but was easily redirected. S/he was capable of effective self-advocacy. S/he interacted well with his/her peers during virtual learning. Student was offered in-person classes in February 2021, but s/he did not come in-person until May 2021. Student was one of nine students in the classroom.⁶¹

29. Witness E, Student's special education teacher at School A, did not believe Student required writing goals on his/her IEP because his/her deficits in writing could be addressed through his/her reading goals. Witness E did not believe Student required adaptive goals because of his/her ability to self-advocate, to organize his/her materials, to run errands independently, and to build rapport with adults in the building. Student did not need goals for inattentive behavior because s/he was easily redirected. During virtual learning, Student routinely missed 1-2 days of classes. When s/he attended virtually, there were considerable distractions in the home environment including music and younger children in the room with him/her. When Student returned to in-person classes in May, his/her attendance was perfect.⁶²

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: 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:

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: 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.⁶³

⁶⁰ Testimony of Witness D.

⁶¹ Testimony of Witness E.

⁶² Testimony of Witness E.

⁶³ D.C. Code Sect. 38-2571.03(6)(A)(i).

One of the issues in this case involves the alleged failure of DCPS to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden of persuasion on this issue; Petitioner bears the burden as to all other issues presented. The burden of persuasion shall be met by a preponderance of the evidence.⁶⁴

Whether DCPS denied Student a FAPE by failing to conduct a comprehensive psychological evaluation by the summer of 2019.

The regulations require that a child with a disability be reevaluated whenever such is requested by a teacher or parent, or in the event the local education agency (“LEA”) determines that the child’s needs warrant it, and at least once every three years.

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 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.⁶⁵

Evaluation means procedures used in accordance with C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.⁶⁶ The LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining the appropriate content of the child’s IEP.⁶⁷

In the case of a triennial evaluation, the LEA must review all existing data involving the child’s academic and disability history to determine if additional data is necessary data is necessary and to determine (1) whether the child continues to have a disability, (2) if so, whether the child continues to require special education services, (3) the present levels of academic achievement and related developmental needs of the child; and (4) the appropriate content of the child’s IEP:

- (a) Review of existing evaluation data. As part of ...any reevaluation under this part, 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;

⁶⁴ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁶⁵ 34 C.F.R. §300.303.

⁶⁶ 34 C.F.R. §300.15, 34 C.F.R. §300.30.

⁶⁷ 34 C.F.R. §300.304.

- (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...
 - (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...
 - (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.⁶⁸

DCPS' position is that the triennial evaluation regulations do not compel it to conduct assessments that it has conducted of a student in the past. Rather, 34 C.F.R. Section 300.305 requires it to review all existing data relating to a student's educational history to determine (1) whether the child continues to have such a disability, (2) and the educational needs of the child. If it does not require any "additional data" to make these determinations, it need not conduct assessments to complete its evaluation. However, I note that subsection 34 C.F.R. Section 300.305 (a)(1)(i) requires DCPS to review evaluations provided by the parents of the child. Clearly, this reference to evaluations is to actual assessments solicited by parents that may not be in DCPS' possession. Thus, while the regulations define evaluations as a process, they also use it in the commonly accepted manner, as a specific, individual assessments of the student.

The record reveals that DCPS conducted a triennial evaluation in 2018. On September 11, 2018, Petitioner signed a Consent for Initial Evaluation/Reevaluation. During her closing argument, Respondent's counsel argued that Petitioner's consent was needed not to authorize DCPS to conduct an assessment, but to initiate the triennial review to determine Student's continuing eligibility for services. However, this argument is undercut by its issuance that same day of an Analysis of Existing Data indicating that it had already conducted its evaluation of Student, and its issuance of a PWN that day determining that Student remained eligible for services. Witness E referred to this determination at the May 17, 2021 IEP meeting, when she said that Student's triennial period expires in September 2021.

DCPS' argument also ignores the second and equally important goal of a triennial evaluation: to determine the appropriate content of the child's IEP. When it completed its triennial review in September 2018, DCPS relied heavily on the IEP conducted three months previously by school B. There is no indication that Petitioner objected to the June 2018 IEP or thought it was deficient in any way.

⁶⁸ 34 C.F.R. §300.305.

When it issued its Final Eligibility Report on September 11, 2018, School A was already aware that Student was “not achieving adequately” in Written Expression. By the end of the 2018-19 school year, DCPS had proof of Student’s deficits. On the PARCC assessment in the spring of 2019, Student scored in the lowest Performance Level in ELA, which included written expression as well as reading, and in mathematics. The PLOPs on the May 31, 2019 IEP reported that Student was performing at least three grades below his/her current level in Math and Reading. The Reading baseline indicated that Student could read pre-primer level sight words and only some primer level sight words.

By the end of the 2018-19 school year, Student was performing at least three grades below her/his current grade level in Math, Reading, and Written Expression. It is not apparent from the record that DCPS had access to Examiner A’s July 8, 2014 Psychological Evaluation. That evaluation was on School B letterhead, but the Final Eligibility Determination Report issued by DCPS on September 11, 2018 indicates that the 2014 referral for an initial evaluation was made to School C, a DCPS School.⁶⁹ Moreover, Examiner A signed the evaluation as a “DCPS Licensed School Psychologist.” On that evaluation, Student’s lowest subtest on the YCAT was in Written Expression, which was not an Area of Concern on School B’s IEPs or on DCPS’ May 2019 IEP.

By the end of the 2018-19 school year, DCPS either had no assessment data on a student who was performing well below grade level in all core subjects, or the only assessment it had was five years old. In light of Student’s failure to make meaningful progress towards grade level progress in core subjects, and in light of the fact that Student had severe and documented deficiencies in Written Expression from the PARCC, DCPS should have conducted a comprehensive psychological evaluation at the end of the 2018-19 school year to obtain current data to determine the appropriate content of the child’s IEP. Thus, I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to conduct a comprehensive psychological evaluation by the summer of 2019.

Whether DCPS denied Student a FAPE by failing to provide appropriate IEPs in May 2019, April 2020, and May 2021 due to a lack of written expression goals, an insufficient amount of reading and math goals, a lack of goals in adaptive behavior, inattentiveness, and work completion, an insufficient amount of specialized instruction, goals that were not challenging or achievable, goals that were repeated from prior IEPs, goals that were not measurable, inadequate present levels of academic performance and baselines, and the IEPs were not based on sufficient evaluative data.

The Supreme Court’s first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act (“EHA”), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁷⁰ The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”⁷¹ Rather, the Court ruled that “Implicit in the congressional purpose of providing access

⁶⁹ P11:6 (96).

⁷⁰ 458 U.S. 176, 187 (1982).

⁷¹ *Id.* at 189-90, 200

to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...⁷² Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁷³

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁷⁴ The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”⁷⁵ The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] 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... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁷⁶

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁷⁷

Petitioner alleged that the three IEPs at issue are inappropriate because they lack written expression goals, have an insufficient amount of reading and math goals, a lack of goals in adaptive behavior, inattentiveness, and work completion, an insufficient amount of specialized instruction, goals that were not challenging or achievable, goals that were repeated from prior IEPs, goals that

⁷² *Id.* at 200.

⁷³ *Id.* at 203-04.

⁷⁴ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁷⁵ *Id.* at 997.

⁷⁶ *Id.* at 1000-01 (citations omitted).

⁷⁷ 137 S.Ct. at 1000-01.

were not measurable, inadequate present levels of academic performance and baselines, and the IEPs were not based on sufficient evaluative data. In the previous section, I concluded that by the end of the 2018-19 school year, DCPS should have conducted a psychological reevaluation in light of Student's failure to demonstrate objective evidence of progress towards grade level proficiency in core subjects. Thus, Petitioner has made a *prima facie* showing that the April 2020 and May 2021 IEPs were not based on sufficient evaluative data. The record also supports a finding that the May 31, 2019, April 30, 2020, and May 17, 2021 IEPs should have included Written Expression as an Area of Concern, for the reasons discussed above.

However, the remaining allegations regarding the IEPs are unsubstantiated. Petitioner offered no testimony or credible argument that there was an insufficient amount of reading and math goals. Petitioner offered no credible evidence that Student required goals in adaptive behavior. DCPS' Witness E did not believe Student required adaptive goals because of his/her ability to self-advocate, to organize his/her materials, to run errands independently, and to build rapport with adults in the building. Petitioner offered no testimony supporting the need for goals to address inattentiveness. DCPS' Witness D opined that Student's inattentiveness was not an area of concern warranting goals in the IEP because s/he was easily redirected. Witness E attributed Student distractibility primarily to the home environment during virtual learning: interruptions by younger siblings and music playing in Student's study area. Petitioner offered no testimony to support the need for the IEP to address Student's failure to complete work. The only evidence of a problem with work completion is the statement at the May 17, 2021 IEP meeting by Teacher A, Student's ELA and Social Studies teacher. She reported that when Student gets frustrated, s/he will leave the classroom. However, the record does not support that this was a problem in other classes or that it persisted over a significant period of time. The allegation that DCPS prescribed an insufficient amount of specialized instruction is unsupported as Student's IEPs prescribed specialized instruction outside general education throughout each school day. Petitioner offered no testimony to support the contention that Student's goals were both not challenging and not achievable. As set forth in the findings above, it is simply not accurate that goals were repeated from one on IEP to the next. It is also apparent that the goals were measurable. Petitioner was represented by counsel at the March 9, 2021 and May 17, 2021 IEP team meetings. The meeting notes from those meetings, submitted by Petitioner, reveal that neither Petitioner nor her attorney raised questions as to the appropriateness of the IEP goals other than the lack of goals in Written Expression.

I conclude that Petitioner has established a *prima facie* case that the April 2020 and May 2021 IEPs were not based on sufficient evaluative data, and all three IEPs at issue were inappropriate because they should have included Written Expression as an Area of Concern. I further conclude that DCPS has failed to meet its burden of proving that the three IEPs were appropriate.

Whether DCPS denied Student a FAPE by failing to implement Student’s IEP by failing to provide the prescribed hours of specialized instruction per week since March 2020.

The only evidence adduced on this issue was testimony of Witness B, Student’s Educational Advocate, citing Student’s schedule for the 2020-21 school year.⁷⁸ First, that schedule was only for the 2020-21 school year at School A. Thus, Petitioner offered no evidence of a failure of DCPS to implement Student’s IEP at School C during the 2019-20 school year. Second, the schedule was developed to account for the fact that DCPS was providing services to all students through a virtual learning platform at the beginning of the 2020-21 school year. That schedule shows that during the 9:35 -10:55 a.m. period, the SLS class was held every day but Wednesday, when Witness E, Student’s special education teacher was available for “Office Hours.”⁷⁹ During the 11:00 – 12:20 block, SLS Science met twice per week, Self-Advocacy met twice, and one-on-one instruction was available on Wednesday. Lunch was from 12:25 too 1:10. From 1:15 to 2:35, SLS met two days, Health/PE was conducted two days, and “Reteaching a Skill” was provided on Wednesday. The period from 2:40 to 4:00 was a study block that was monitored by Witness E.

When COVID-19 led to school closings in March 2020, the Department of Education (“DOE”) issued guidance to school districts as to the level of services they were required to provide disabled students under IDEA:

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, too the greatest extent possible, each student with a disability can be provided with special education and related services identified in the student’s IEP...⁸⁰

Student did not begin attending virtual sessions until October 2020, and his/her attendance thereafter in virtual learning was inconsistent. DCPS made in-person classes available in February 2021, but Student did not return to in-person classes until May.⁸¹

I conclude that Petitioner has failed to meet her burden of proving that DCPS failed to implement Student’s IEP from March 2020 until the filing of the *Complaint*. Petitioner offered no testimony or argument that the scheduled developed for Student’s SLS class was not consistent with the DOE mandate to provided special education services to the greatest extent possible.

⁷⁸ P29:1 (257).

⁷⁹ Testimony of Witness E.

⁸⁰ *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (DOE March 2020).

⁸¹ Testimony of Witness E.

Whether DCPS denied Student a FAPE by failing to provide access to Student's prior evaluations.

Petitioner offered no testimony on this issue during the hearing, and Petitioner's counsel did not address it in either his opening or closing statements. Therefore, I must conclude that Petitioner has failed to meet her burden of proving that DCPS denied her access to any records.

RELIEF

For relief, Petitioner requested, *inter alia*, (1) an order directing DCPS to convene an IEP Team meeting to develop an appropriate IEP, (2) an order directing DCPS to provide Student an appropriate public or private placement, (3) compensatory education, and (4) attorney's fees.

Petitioner requested an order placing Student at School D in light of the denial of FAPE by DCPS. It is apparent that Student is not making acceptable educational progress. In assessments conducted in January and February this year, Student's scores placed him/her six grades below his/her current grade level in Math and Reading. S/he still only recognizes pre-primer and primer sight words. While I have found a denial of FAPE, my findings are limited to the failure to conduct a comprehensive triennial evaluation after the 2018-19 school year, and the failure to include Written Expression as an Area of Concern on Student's IEPs. Despite receiving full-time specialized instruction in a small class environment since enrolling at School C in 2018, Student's reading, writing, and math proficiency has not improved.

The record reveals that since COVID-19 restrictions were implemented, Student's participation in classroom instruction has been inconsistent. ■ did not begin participating in virtual learning during the 2020-21 school year until mid-to-late October. His/her ELA teacher during the 2020-21 school year reported that during virtual learning, if Student was asked to answer a question or read a passage, s/he would simply leave the room. Witness E testified that Student's participation during virtual learning was inconsistent, and when s/he did participate, the noisy environment at home made difficult for Student to focus. Once Student's IEP is updated with data from a recently conducted psychological evaluation, and Student can receive services in-person without the distractions s/he encountered during the past two school years, a determination can be made if Student can make measurable academic progress in the SLS environment.

Therefore, while I will order DCPS to fund compensatory education services to address the failure to evaluate and failure to provide Written Expression goals, the record does not now support a determination that a private, non-public day school is Student's least restrictive environment.⁸²

⁸² 20 U.S.C. §1412(a)(5)(A).

ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, the testimony presented during the hearing, the closing arguments by the parties' counsel, and Respondent's post-hearing submission, it is hereby

ORDERED, that in the event DCPS has not conducted an IEP review since the completion of a Comprehensive Psychological Re-Evaluation of Student on or about June 17, 2021, DCPS shall convene an IEP meeting within fifteen (15) business days of the issuance of this HOD to review that evaluation, to update date Student's IEP, and to determine an appropriate placement.

IT IS FURTHER ORDERED, that DCPS shall fund 100 hours of compensatory education services, by independent providers selected by Petitioner, in Reading, Written Expression and Mathematics, without limitation as to the date by which services must be completed.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks
Terry Michael Banks
Hearing Officer

Date: September 20, 2021

Copies to: Attorney A, Esquire
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