

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

Student,¹)	Case No. 2021-0075
)	
Petitioner,)	Hearing Dates: September 7-8, 2021
)	
v.)	Conducted by Video Conference
)	
District of Columbia Public Schools,)	Date Issued: September 27, 2021
)	
Respondent.)	Terry Michael Banks,
)	Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X-year-old student (“Student”) School A. On June 1, 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 provide Student behavioral support services (“BSS”). On June 11, 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 June 1, 2021 alleging that DCPS denied Student a FAPE by failing to prescribe BSS in Student's Individualized Education Programs ("IEPs") on May 6, 2020 and March 30, 2021. On June 11, 2021, DCPS filed its *Response* in which it refuted allegations in the *Complaint* denying that it had denied Student a FAPE as follows: (1) On May 25, 2021, Student's IEP was amended to provide 60 minutes/month of BSS outside general education and 30 minutes per month of behavioral consultation services, and (2) Student's prior IEPs were appropriate as DCPS provided all necessary services based upon the information available at the time they were developed.

The parties participated in a resolution meeting on June 25, 2021 that did not result in a settlement. The resolution period ended on July 1, 2021. A prehearing conference was conducted by video conference on July 8, 2021, and the *Prehearing Order* was issued that day.

The due process hearing was conducted on September 14, 2021 by video conference and was closed to the public. Respondent's *Hearing Disclosures*, filed September 7, 2021, contained a witness list of eight witnesses and documents R-1 through R-40. Petitioner did not file an objection to any aspect of Respondent's *Disclosures*. During the hearing, DCPS offered Exhibits R5, R20 – R22, R24 – R26, R29, and R 40 into evidence, all of which were admitted.

Petitioner's Disclosure was also submitted on September 7, 2021, containing a list of four witnesses and documents P1-P25. DCPS filed no objections to *Petitioner's Disclosure*. Thus, Petitioner's Exhibits P1 – P25 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A and Petitioner. Witness B, and Witness C. Petitioner offered Witness A as an expert in Special Education without objection. Respondent presented as witnesses in chronological order Witness B, Witness C, and Witness D. Witness C was offered as an expert in School Social Work, and Witness D was offered as an expert in Special Education, both without objection. The parties' counsel provided oral closing arguments at the conclusion of the testimony.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows: Whether DCPS denied Student a FAPE by failing to prescribe BSS in Student's Individualized Education Programs ("IEP") on May 6, 2020 and March 30, 2021.

FINDINGS OF FACT

1. Student is X years old and was in grade C at School A during the 2020-2021 school year.²

2. On February 26, 2020, when Student was in grade E, Examiner A completed a Comprehensive Psychological Evaluation of Student.³ Student first enrolled at School A for Grade P. No behavior concerns were noted, but Student was reported to be easily agitated when s/he was not allowed to have his/her way. There were no reports of negative interaction with his/her peers.⁴ On the Beery-Buktenica Test (“Beery”), which measures deficits in visual perception, fine motor skills, and hand-eye coordination, Student scored in the Low Range (77). “These findings suggest weak visual perceptual performance and significantly deficient motor control which affects [his/her] visual-motor integration.”⁵ On the Wechsler Preschool and Primary Scale of Intelligence (“WPPSI-IV”), Student’s Full-Scale IQ was 76, in the Borderline range. S/he was Borderline in Verbal Comprehension (77) and Visual Spatial (75), Low Average in Working Memory (82) and Processing Speed (83), and Average in Fluid Reasoning (94).⁶ On the Woodcock-Johnson Tests of Achievement (“WJ-IV”), Student scored in the Extremely Low range in Written Expression (56), the Very Low range in Reading (69), Broad Reading (66), Written Language (66), Broad Written Language (65), and Academic Applications (63). S/he scored in the Low range in Basic Reading Skills (71), Academic Fluency (75), Brief Achievement (76), and Broad Achievement (76), in the Low Average range in Academic Skills (81) and Broad Mathematics (87), in the Average range in Mathematics (90) and Math Calculation Skills (90). S/he was determined to be performing about one-half year below grade level in math, and one to at least two grades below in reading and writing.⁷

Petitioner was interviewed for the Conners Comprehensive Behavior Rating Scales (“Conner”). Her responses yielded Very Elevated scores for Student for Hyperactive-Impulsivity and Physical Symptoms, and Elevated scores in Academic Difficulties. On the DSM-IV-TR Symptom scales, there were significant elevations in ADHD Predominantly Inattentive Type and Obsessive-Compulsive Behaviors.

During the individual testing session, [Student] showed significant difficulties with sustaining attention, especially while working on timed tasks involving a motor component, unless verbal prompting was provided. In the school setting, it is reported that [s/he] has poor ability to sustain attention, poor task completion, as well as difficulties initiating problem solving or activity, sustaining working memory, planning, and organizing problem solving approaches. Also, high levels of depressive symptomology were noted such as anxiety and low self-concept. Many children who are depressed are not aware that depression is the basis for the changes in their emotions, and their ability to interact with others, and school

² Petitioner’s Exhibit (“P:”) 9 at page 1, electronic page 98. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, *i.e.*, P9:1 (98).

³ P6:1 (32).

⁴ *Id.* at 3 (34).

⁵ *Id.* at 6 (37).

⁶ *Id.* at 7 (38).

⁷ *Id.* at 11 (42).

performance. These changes can have serious, life-altering consequences that increase the risk for future depressive episodes, especially if the depression is not recognized or treated. Children who are depressed are at increased risk for an array of emotional problems. These problems may include but not limited to difficulty with schoolwork and relationships with parents and peers, decreased interest and involvement in daily activities and responsibilities. The elevated score on the Social Problems and Social Separation Problems indices is of major concern at this time for [Student].⁸

Student's homeroom teacher, Witness D, completed a form on the Behavior Assessment System for Children ("BASC-3"). Her responses rated Student as normal in Externalizing Problems such as Hyperactivity (40), Aggression (43), and Conduct Problems (41). Witness D reported that Student displays relatively few depressive behaviors or anxiety-based behaviors compared to her/his same aged peers. Witness D also rated Student as normal in Adaptive Skills, including Leadership (58), Study Skills (49), and Functional Communication (49).

Based on the above scores, [Student] demonstrates a typical level of creativity, ability to work under pressure, and/or an ability to bring others together to complete a work assignment. Moreover, [Student's] teacher reports that [Student] generally exhibits adequate organizational and study skills, and [s/he] completes most homework in a timely fashion. Finally, [Student] generally exhibits adequate expressive and receptive communication skills and is usually able to seek out and find information when needed.⁹

Examiner A's significant findings, conclusions, and recommendations include the following:

The Conners profile completed by [Petitioner] suggests significant concerns relative to [Student's] academic performance, which include reading, writing, and math. Based on the results of academic testing, [Student's] reading abilities appear to be [her/his] weakest area of academic skills. However, [his/her] reading scores were commensurate with [his/her] cognitive functioning, and does not meet criteria for a specific learning disability at this time. It is likely that ■ attentional difficulties may be impeding on academic functioning. Nonetheless, [s/he] would benefit from academic support to address [his/her] academic deficits.

Diagnostically, [Student] presents with symptoms consistent with a diagnosis of ADHD. However, the results of the self-report measures from the parent and teacher were discrepant... During the present evaluation, despite [her/his] willingness to complete the assessment, [Student] exhibited significant difficulties with sustaining attention to task and was distractible during both cognitive and educational evaluations.

⁸ *Id.* at 14-15 (45-46).

⁹ *Id.* at 16 (47).

[Student's] attention deficits may impact [her/his] learning and retention of new information, generalization of concepts, understanding complex information, using logical thinking to plan ideas and solve problems, particularly those which involve multiple steps or complex information, and using judgment and abstract thought and overall acquisition of skills across all academic tasks...¹⁰

Attention/Executive Functioning:

[Student] will continue to benefit from a highly structured routine-based environment. [S/he] would continue to require modifications in an effort to reduce distractibility and off task behaviors and to also increase teachers' opportunities to immediately redirect [his/her] attention to task, especially in subjects which [s/he] finds less interesting. The following should be considered: preferential seating (away from distractions); removal of distracting stimuli (objects of interest, pencil when not working directly on a writing task, etc.); frequent breaks, including movement breaks especially on tasks requiring sustained attention; varying instructional pace and medium to include more active and "hands-on activities;" immediate reward and verbal praise for on-task behavior: immediate cueing and monitoring to ensure that [s/he] remains on task, attends to relevant information, and uses appropriate strategies on specific tasks.

Difficulties with sustaining attention will lead to slow output especially when the more demanding task of writing is involved. [S/he] may benefit from extra time on specific assignments.¹¹

3. On May 6, 2020, when Student was in grade E at School A, DCPS convened an Initial IEP meeting. Student was found eligible for special education services as a child with Other Health Impaired due to Attention Deficit Hyperactivity Disorder ("ADHD").¹² Under Consideration of Special Factors, it was reported that Student's behavior impedes his/her learning or that of other children. Student requires constant redirection, support with focusing, as well as the starting and continuing of activities.¹³ The Areas of Concern were Mathematics,¹⁴ Reading,¹⁵ Written Expression,¹⁶ and Motor Skills/Physical Development.¹⁷ The Present Levels of Academic Achievement and Functional Performance ("PLOP") in Math reported the test results from Examiner A's evaluation. It also reported that i-Ready assessment in the middle of the school year showed Student to be performing one grade below grade level.¹⁸ The Reading PLOP reported the test results from Examiner A's evaluation and that Student can identify letters, distinguish between upper and lower case letters, identify letter sounds, write a complete sentence, read words with long vowel

¹⁰ *Id.* at 18 (49).

¹¹ *Id.* at 19-20 (50-51).

¹² P7:1 (56).

¹³ *Id.* at 2 (57).

¹⁴ *Id.* at 3-6 (58-61).

¹⁵ *Id.* at 7-10 (62-65).

¹⁶ *Id.* at 10-13 (65-68).

¹⁷ *Id.* at 13-16 (68-71).

¹⁸ *Id.* at 3-4 (58-59).

sounds, and fluently read sight words.¹⁹ The Written Expression PLOP reported the test results from Examiner A’s evaluation and the information from the Reading PLOP.²⁰ The IEP team prescribed ten hours per week of specialized education outside general education and one hour per week of occupational therapy consultation services. Under Other Classroom Aids and Services, the team prescribed close proximity to the teacher, assessments in a small group setting with extended time and “read aloud.”²¹

4. The list of participants on the May 6, 2020 IEP does not indicate their presence, but Petitioner offered Meeting Notes taken by Petitioner’s Educational Advocate A and indicating the presence of Petitioner’s Attorney A.²² Witness D reported that Student did not have “any special behavioral needs at this time. There are deficits in focus; we will address that within the IEO.” Educational Advocate A suggested the need for BSS in light of Examiner A’s findings and recommendations. Witness D replied that that would not be possible because “it wasn’t on the AED [Analysis of Educational Data].” Petitioner stated that she was unaware that Student’s behavior impedes his/her learning or that of other children. Witness D clarified that this was referencing “[his/her] ability to focus – not an inappropriate behavior toward [her/his] peers.”²³

5. On March 30, 2021, when Student was in grade C at School A, DCPS convened an IEP Annual Review meeting. Petitioner was again represented at the meeting by Attorney A and Educational Advocate A.²⁴ Under Consideration of Special Factors, it was reported that “there are no behavior concerns at school.”²⁵ The Areas of Concern were unchanged from the previous IEP.” The Math PLOP reported that Student is performing below grade level in calculation and computation, number sense and concepts, and fluency.²⁶ The Reading PLOP reported that Student is performing below grade level; ■ could recognize sight words at a level two grades below ■ current grade.²⁷ The Written Expression PLOP reported the test results from Examiner A’s evaluation.²⁸ The IEP team did not change the level of services or Classroom Aids and Services from the previous IEP.²⁹ Attorney A urged the addition of BSS to the IEP: “We think the psych is sufficient information to provide services.” Teacher B appeared to reject the proposal because “This is only an annual IEP review” and “To address behavior, we’d have to have service providers be a part of that discussion.”³⁰ Later in the meeting, Petitioner’s representatives reiterated their desire for BSS, and Witness D promised to discuss the matter with related service providers and “get back to you.”³¹

6. The IEP team reconvened on May 25, 2021. Petitioner was represented by Attorney

¹⁹ *Id.* at 7 (62).

²⁰ *Id.* at 10-11 (65-66).

²¹ *Id.* at 17 (72).

²² P21:1 (172).

²³ *Id.* at 5-6 (176-77).

²⁴ P8:1 (77).

²⁵ *Id.* at 2 (78).

²⁶ *Id.* at 3 (79).

²⁷ *Id.* at 7 (83).

²⁸ *Id.* at 9 (85).

²⁹ *Id.* at 14 (90).

³⁰ P22:1-2 (180-81).

³¹ *Id.* at 6 (185).

A and Witness A. Petitioner expressed concerns about Student's inattentiveness. Witness C reported that SDQs were conducted and the teachers rated Student "average over all domains." Witness C reported that Witness B, Student's general education teacher during the 2019-20 school year, reported that Student "helps [his/her] peers and that [s/he] stays focused and on task and overall, had a positive mood." Witness C also reported that:

[Student] has not been in school for 3 weeks and we have noticed some distractions that [s/he] had at home. In the virtual setting, [s/he] would take [his/her] eyes off the camera and since [his/her] transition to in-person learning, [s/he] struggles to engage with peers and is easily frustrated... In [redacted] independent evaluation, [his/her] inattention was a concern. We are seeing this in the school environment... We can offer [redacted] some BSS direct and consult – we are prepared to do that.³²

7. Three days later, on May 28, 2021, DCPS issued an Amended IEP to add Emotional, Social and Behavioral Development ("Behavior") as an Area of Concern.³³ The Consideration of Special Factors reported that in virtual learning, Student's participation was inconsistent and was easily distracted in the home environment. Upon his/her return to in-person classes, there were "minimal behavior concerns," but s/he continued to show distractibility.³⁴ The new Behavior PLOP reported that following the development of Student's initial IEP, a request was made for the IEP team to consider whether Student would benefit from BSS. After reviewing Examiner B's review of Examiner A's evaluation, the team determined that BSS was not indicated, but would revisit this issue and review Student's performance after his/her return to in-person classes. Information gathered during the 2020-21 academic year suggested a need for BSS "focused on helping [Student] with [her/his] concentration and focus in class." Teacher A, Student's special education teacher, who had only taught Student through virtual learning, reported that Student appeared to be "distracted from either people or things at home... When unmuted there is often noise or other people talking around [him/her] or to [him/her]." The Strengths and Difficulties Questionnaire ("SDQ") was completed by Petitioner, Teacher A, Teacher B, Student's general education teacher during the 2020-21 school year and Witness B, Student's general education teacher during the 2019-20 school year. The scores of all three teachers rated Student's behavior in the areas of stress, emotional distress, behavioral difficulties, hyperactivity and concentration difficulties, difficulties getting along with other children, and helpful behavior to be Average. However, Petitioner's scores rated Student Very High in overall stress, High in emotional distress, High in behavioral difficulties, Slightly Raised in hyperactivity and concentration difficulties, Very High in getting along with other children, Average in helpful behavior, and Very High in impact of any difficulties on the child's life. Witness B reported that Student was an independent worker, always wanted to help [redacted] peers, and showed motivation and effort in completing assignments. Student remained in [redacted] seat, was focused and on task, and required no more redirection than [redacted] peers. Student had an outgoing affect with her/his classmates. Teacher A reported that Student's virtual learning attendance during the 2020-21 school year was inconsistent, and was frequently late. During February, Student missed much of the month due to technology issues. When Student logged in to class, Teacher A noted that Student was distracted by others talking and a television playing.

³² P23:1-2 (188-89).

³³ P9:1 (98).

³⁴ *Id.* at 2 (99).

When Student is engaged, s/he is compliant and on-task. Teacher B reported that Student is a friendly and polite student, and reported the same distractions in the home as Teacher A. The PLOP reported 43 tardies and five unexcused absences during the 2019-20 school year and 5 unexcused absences during the 2020-21 school year. The baseline was: Student is easily distracted by stimuli in his/her home and school environment, and has some difficulty staying focused on the task at hand. The single goal was “In 4 out of 5 presented opportunities, with taught self-regulation skills, [Student] will be able to improve focus and remain on assigned task for at least 8 minutes with no more than 2 prompts.”³⁵ The IEP added one hour per week of BSS outside of general education and 30 minutes per month of behavioral consultation services to Student’s services.³⁶

8. On June 24, 2021, DCPS issued an IEP Progress Report for the 2020-21 school year. S/he was reported to be progressing all Math, Reading, and Written Expression goals.³⁷ The Behavior goal was reported to have been just introduced.³⁸

9. On July 8, 2021, DCPS issued Student’s report card for the 2020-21 school year. His/her grades were Below Basic in Reading, Writing & Language, and Math, and Basic in Speaking & Listening, Social Studies, Music, Art, Health & Physical Education, and World Languages. In the eleven graded behavioral categories, s/he complied Independently in two, with Limited Prompting in five, with Frequent Prompting in following directions, using time wisely, and making an effort, and Rarely in completing classwork on time.³⁹

10. On September 19, 2018, Student was “Approaching Grade [H]” in Overall Math on the i-Ready assessment.⁴⁰ On May 21, 2019, s/he scored at the mid-grade H level.⁴¹ On September 18, 2020, s/he scored at the grade H level.⁴² On January 6, 2021, s/he scored at the grade E level, one grade higher than grade H, and one grade below Student’s grade at that time.⁴³ On May 18, 2021, Student scored at the grade H level.⁴⁴

11. On January 25, 2021, Student was administered the mCLASS Home Connect middle of the year assessment of literacy skills. His/her DIBELS Composite Score was 332, equating to “Needs Most Support.” S/he was “Well Below Benchmark” in Phonics, Accurate and Fluent Reading, and Reading Comprehension.⁴⁵

³⁵ *Id.* at 11-15 (108-112).

³⁶ *Id.* at 18 (115).

³⁷ P11:1-7 (132-38).

³⁸ *Id.* at 7 (138).

³⁹ P17:2 (157).

⁴⁰ P12:1 (142).

⁴¹ *Id.* at 3 (144).

⁴² P13:1 (147).

⁴³ P14:1 (149).

⁴⁴ P15:1 (152).

⁴⁵ P16:1 (154).

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.⁴⁶

The only issue in this case is the alleged failure to provide appropriate IEPs. Under District of Columbia law, DCPS bears the burden as to this issue. The burden of persuasion shall be met by a preponderance of the evidence.⁴⁷

Whether DCPS denied Student a FAPE by failing to prescribe BSS in Student's IEP on May 6, 2020 and March 30, 2021.

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*.⁴⁸ 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.'"⁴⁹ Rather, the Court ruled that "Implicit in the congressional purpose of providing access 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...⁵⁰ 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

⁴⁶ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁴⁷ *Schaffer v. Weast*, 546 U.S. 49 (2005).

⁴⁸ 458 U.S. 176, 187 (1982).

⁴⁹ *Id.* at 189-90, 200

⁵⁰ *Id.* at 200.

advance from grade to grade.”⁵¹

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.⁵² 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*.”⁵³ 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.⁵⁴

In *Andrew*, 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.”⁵⁵

By any objective measure, Petitioner has made minimal academic progress since the development of the May 6, 2020 IEP. In Math, s/he scored at the grade H level on the i-Ready assessment in May 2019 and in May 2021. In Reading, his/her DIBELS score was “Well Below Benchmark” in Phonics, Accurate and Fluent Reading, and Reading Comprehension on January 25, 2021. Although his/her Progress Reports reflected progress on all Math, Reading, and Written Expression goals on June 24, 2021, his/her report card for the year revealed that s/he was Below Basic in the core subjects of Math, Reading, and Written Expression.

Petitioner’s theory of the case is that Student is not making progress because DCPS did not prescribe BSS in the May 6, 2020 and March 30, 2021 IEPs despite the findings in Examiner A’s February 2020 evaluation that Student’s inattentiveness “*may* be impeding on academic functioning.” The glaring flaw in this theory is that Examiner A did not recommend that Student receive BSS to address his/her problem focusing. Rather, Examiner A recommended that Student

⁵¹ *Id.* at 203-04.

⁵² *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁵³ *Id.* at 997.

⁵⁴ *Id.* at 1000-01 (citations omitted).

⁵⁵ 137 S.Ct. at 1000-01.

“would benefit from academic support to address [his/her] academic deficits,” along with classroom accommodations.

While Examiner A diagnosed Student with ADHD, he noted that Student’s presentation was different in the home environment than in class. In fact, Petitioner conceded at the May 2020 IEP meeting that she was unaware that Student’s inattentiveness was a significant problem *after* ■ educational advocate suggested the need for BSS, because Examiner A’s evaluation “recommended things to be therapeutically addressed.” In fact, Examiner A made no such recommendation. Witness B, Student’s general education teacher at the time the May 2020 IEP was developed, “reported that Student was an independent worker, always wanted to help ■ peers, and showed motivation and effort in completing assignments. Student remained in ■ seat, was focused and on task, and required no more redirection than ■ peers.” Thus, while the IEP reflected that Student required “support with focusing,” there was no support from School A staff for prescribing BSS, and neither Educational Advocate A nor Petitioner was insistent that BSS be included in the IEP at that time.

All three teachers who completed SDQ forms for Student rated his/her hyperactivity and concentration difficulties to be Average. Nevertheless, a year later, DCPS reversed its position, largely due to distractions Student experienced in the home environment with the initiation of virtual learning due to COVID-19 restrictions in April 2020. Teacher A, Student’s special education teacher during the 2020-21 school year, reported that Student was distracted from television noise and interruptions in his/her home study environment: “When unmuted there is often noise or other people talking around [him/her] or to [him/her].” Teacher A also reported that Student’s virtual learning attendance was inconsistent, s/he was frequently late, and Student missed much of February 2021 due to technology issues. Teacher B, Student’s general education teacher reported the same distractions in the home as Teacher A.

In his closing argument, Petitioner’s counsel noted that DCPS amended the March 2021 IEP in May 2021 to provide BSS, based on the same data that was available to DCPS when it developed the May 2020 IEP. He expressed no disapproval with the level of services prescribed, one hour per week of BSS outside of general education and 30 minutes per month of behavioral consultation services, or with the single Behavior goal. However, there is no evidence in the record to support the contention that four hours per month of counseling on inattentiveness would have any meaningful effect on Student’s academic performance. Examiner A recommended academic support and classroom accommodations, not BSS or therapeutic services of any kind.

BSS is commonly prescribed for children to address disruptive behavioral problems that interfere with the child’s learning and with the learning of others in the classroom. Student presents no such problems; all of his/her teachers describe him/her as polite, eager to help others, and easily redirected. While Student has made no meaningful progress since being found eligible, there is no evidence in the exhibits or testimony presented by Petitioner that BSS services would have altered this outcome. Nor is it intuitive that a child whose cognitive scores are Borderline and whose achievement scores range from Extremely Low to Low in Reading and Written Expression would make three-fourth of a year growth in each of these areas simply with the addition of BSS services, as was opined without empirical foundation by Witness A.

Petitioner's claim is based solely on the failure of DCPS to prescribe BSS services on the two IEPs. It is not based on the amount of specialized instruction, the restrictiveness of the academic environment, the efficacy of the goals (although Petitioner's counsel referenced this issue in his closing), or a failure to implement the IEP with fidelity. Petitioner was represented by an Attorney A and Educational Advocate A at both meetings, and does not object to any other provision of the IEPs. As Petitioner has failed to adduce any evidence that BSS was necessary or likely to produce meaningful academic improvement, I conclude that Petitioner has failed to make a *prima facie* showing of a denial of FAPE.

RELIEF

For relief, Petitioner requested, *inter alia*, (1) compensatory education, and (2) attorney's fees.

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, and the closing arguments by the parties' counsel, it is hereby

ORDERED, that the *Complaint* is **DISMISSED** with prejudice.

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
Hearing Officer

Date: September 27, 2021

Copies to: Attorney A, Esquire
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