

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

Parent, by and through Student,)	
)	
Petitioner,)	Michael Lazan, Hearing Officer
)	
v.)	Case No.: 2022-0081
)	
District of Columbia Public Schools,)	
)	
Respondent.)	

District of Columbia Public Schools,)	
)	
Petitioner,)	Michael Lazan, Hearing Officer
)	
v.)	Case No.: 2022-0087
)	
Parent, by and through Student,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a pair of cases involving an X-year-old student (the “Student”)¹ who is currently eligible for services as a student with Multiple Disabilities (Speech-Language Impairment, Other Health Impairment). Pursuant to the Individuals with Disabilities Education Act (“IDEA”), a due process complaint (“Complaint”) was filed by the

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

Student's parent ("Parent") and received by District of Columbia Public Schools ("DCPS") on May 5, 2022. This case was assigned to this Hearing Officer on May 6, 2022. On May 11, 2022, DCPS filed a response. A resolution meeting was held on May 20, 2022, but no agreement was reached. The resolution period expired on June 4, 2022.

A second due process complaint notice was filed by DCPS against Parent on May 11, 2022. This case was assigned to this Hearing Officer on May 12, 2022. There was no resolution period because the claims were brought by the Local Educational Agency ("LEA").

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations ("DCMR"), Title 5-E, Chapter 30.

III. Procedural History

On May 23, 2022, DCPS filed District of Columbia Public Schools' Motion to Consolidate, which sought to consolidate the two cases and extend the Hearing Officer Determination ("HOD") deadline for case number 2022-0087 so that the consolidated cases would have the same timeline. On June 3, 2022, the motion to consolidate was granted without opposition by this Hearing Officer's Order on Motion to Consolidate. On June 17, 2022, the motion to extend the timelines for case number 2022-0087 was granted without opposition through this Hearing Officer's Interim Order on Continuance Motion. As a result of the foregoing, the HOD became due on July 19, 2022.

On June 22, 2022, a prehearing conference was held. Attorney A, Esq., counsel for Parent, appeared. Attorney B, Esq., counsel for DCPS, appeared. On June 27, 2022, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case. On July 13, 2022, the prehearing conference order was revised to reflect Parent's email of June 30, 2022. On July 14, 2022, DCPS moved to extend the HOD deadline to September 14, 2022. This motion was granted by an order of this Hearing Officer issued on August 3, 2022.

The matter proceeded to trial on July 22, 2022, through Microsoft Teams. Attorney A, Esq., counsel for Parent, appeared. Attorney B, Esq., counsel for DCPS, appeared. However, testimony and evidence were not completed on that date, in part because Parent needed to be excused. Over an objection by DCPS, the parties set a hearing date of August 31, 2022, to complete the case. On July 27, 2022, DCPS moved to extend the timelines to September 14, 2022, on consent, to allow for the hearing to proceed. This motion was granted by an order dated August 3, 2022.

A second hearing was scheduled and held on August 31, 2022. However, more time was needed to hear from Parent's rebuttal witness and for closing arguments. As a result, a third hearing date was scheduled and held on September 7, 2022, during which a rebuttal was presented and closing arguments were made. The parties then submitted written citation lists to this Hearing Officer on September 9, 2022.

Pursuant to Parent's request dated August 16, 2022, a Notice to Appear for Witness C was signed by this Hearing Officer on September 1, 2022. DCPS moved to quash this Notice to Appear on August 30, 2022, and Parent opposed the motion on August 31, 2022. This motion was denied on the record at the August 31, 2022, hearing.

During the proceeding, Parent moved into evidence exhibits P-1 through P-32. DCPS objected to exhibits P-1 through P-6, P-11, P-17, P-19, P-20, P-24 through P-27, and P-30 through P-32. These objections were overruled except that exhibit P-32 was not entered into evidence because it is a transcript from the first day of the hearing. Exhibits P-1 through P-31 were admitted. DCPS moved into evidence exhibits R-1 through R-3 and R-6 through R-10. Parent objected to exhibits R-1 through R-3, R-6 through R-8, and R-10. These objections were overruled. Exhibits R-1 through R-3 and R-6 through R-10 were admitted. Parent presented Witness A, a speech-language pathologist and audiologist (expert in speech language pathology and audiology, including evaluations for special education eligibility). Respondent presented Witness B, a speech-language pathologist and an LEA representative (expert in speech language pathology, specifically with respect to evaluating and making recommendations for students with disabilities). On rebuttal, Parent presented Witness C, an LEA representative.

IV. Issues

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

- 1. Did DCPS fail to implement the Student's Individualized Education Program ("IEP") by failing to provide the Student's prescribed speech-language pathology services during the 2021-2022 school year? If so, did DCPS deny the Student a Free Appropriate Public Education ("FAPE")?**
- 2. Did DCPS fail to provide the Student with a sufficiently comprehensive evaluation in speech and language in or about January, 2022, and/or did DCPS fail to respond promptly enough to Parent's request for an Independent Educational Evaluation ("IEE") on March 15, 2022?**

As relief, Parent seeks funding for an independent speech-language pathology evaluation of the Student and any other evaluations that the subject speech-language

pathologist recommends, at market rate. Parent also seeks an IEP meeting during which the evaluations would be discussed, the Student's IEP would be revised, and compensatory education would be determined. Alternatively, Parent seeks an independent evaluation at market rate to determine an appropriate compensatory education award. Additionally, Parent requests that the Student's eligibility be appropriately determined at the IEP team meeting, and that the meeting be scheduled through counsel.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Multiple Disabilities (Speech-Language Impairment, Other Health Impairment). The Student has academic issues in all subjects and behavioral issues that make it difficult for him/her to pay attention and work in class. The Student's speech and language skills were formally assessed through a report on January 8, 2013. The Student's expressive and receptive language skills were considered to be in the average range, but the Student's articulation skills were significantly delayed. P-7. On May 8, 2015, the Student's speech and language skills were again formally assessed. The Student's expressive and receptive language skills were once again found to be in the average range, as were the Student's receptive and expressive vocabulary, fluency, and pragmatic language ("unremarkable and within normal limits for age and gender"). The Student's articulation and phonological development was below the average range with some "observed developmentally acceptable imprecision," resulting in "inconsistent poor to fair" intelligibility of connected speech. Strengths were found in receptive language development, particularly in the Student's ability to absorb information presented orally

and understand the concept of same/different and how it related to categories and word meanings. Weaknesses were demonstrated in formulating grammatically correct sentences and in articulation/phonological delays. Nevertheless, all of the Student's language and vocabulary skills were within normal limits. P-8.

2. A formal speech and language assessment of the Student was conducted on September 9, 2015. A corresponding report was issued by Witness A on September 12, 2015. The report found that the primary problem for the Student was articulation, but also found that his/her language comprehension was deficient, possibly due to an underlying auditory processing disorder, self-regulation issues, executive functioning issues, or attention difficulties. The report also found that the Student's auditory-verbal working memory was consistently poor. Witness A recommended a comprehensive auditory processing assessment to look at the Student's general auditory processing. Witness A also recommended an oral-motor speech assessment of the Student to identify whether this area contributed to his/her speech production problems. Services were recommended as follows: three thirty-minute sessions per week individually and daily thirty-minute sessions in a group. P-9.

3. Another formal speech and language assessment of the Student was conducted in January, 2019, and was the subject of a report by a speech and language pathologist dated January 31, 2019. The independent evaluator conducted the Goldman Fristoe Test of Articulation-3, Expressive One Word Picture Vocabulary Test-4th Edition, Receptive One Word Picture Vocabulary Test-4th Edition, and Clinical Evaluation of Language Fundamentals-5th Edition, and informally assessed the Student's voice, fluency, hearing, vision, and oral motor structure and function. The evaluator also

interviewed the Parent and conducted a CELF Observational Rating Scale. The evaluator found that the Student was cooperative, though with many self-distracting behaviors, and remarked on teacher concerns about the Student's comprehension and social and academic language exchanges with peers and teachers. The Student's speech contained "impulsive" and "blurring" responses. Weaknesses included speech sound approximations during conversational speaking and oral language comprehension (listening comprehension, text comprehension, and following directions). The Student's deficits in language were commensurate with an observed difficulty in reading and written expression in core academic learning areas. Language deficits were observed in receptive language, comprehension of material that was read to the Student, and completion of directions. P-10.

4. DCPS conducted a psychoeducational evaluation of the Student on or about January 10, 2022. The Student tested far below grade level in all academic areas. The Student was at the 2.5 grade level equivalent for passage comprehension and at the 1.7 grade level equivalent for calculation. P-12.

5. Witness B conducted a formal speech and language assessment of the Student on January 24, 2022, and issued a corresponding report on January 25, 2022. A social worker's classroom observation of the Student on November 1, 2021, indicated that s/he taunted peers, put up his/her middle finger, mouthed obscene insults, made disparaging comments to peers about their deceased family members, and tearfully refused to complete assignments despite one-on-one support from a social worker and a teacher. P-14.

6. Witness B conducted a record review, compiled a teacher report, and informally assessed the Student's hearing and behavior, articulation, voice, fluency, and pragmatics. Witness B also administered the Goldman-Fristoe Test of Articulation-Third Edition ("GFTA-3"), Receptive One Word Picture Vocabulary Test-4 ("ROWPVT-4"), Expressive One Word Picture Vocabulary Test-4 ("EOWPVT-4"), and Oral and Written language Scales-Second Edition ("OWLS II"). Witness B also relied on 2020-2021 IEP progress reports when assessing the Student. On the GFTA-3, the Student scored within normal limits. On the ROWPVT-4, which evaluates comprehension of the spoken word in "Standard English" and serves as a measure of the ability to acquire vocabulary, the Student scored 76, in the below average range. The OWLS-II evaluates four language processes on four separate scales: listening comprehension, oral expression, reading comprehension, and written expression. Each of these scales assesses four "linguistic structures": lexical/semantics (vocabulary, including nouns, verbs, prefixes, and suffixes); syntax (grammatical morphemes, including pronouns, prepositions, verb tenses, and noun-verb agreement, and sentence structure, including word order and sentence complexity); pragmatics (functional and social characteristics of language); and supralinguistics (nonliteral language, including double meaning, inference, verbal reasoning, figurative language, and humor). Two scales were administered for this assessment. The Listening Comprehension Scale ("LCS") measured receptive language, where the examiner read a stimulus word aloud and the Student responded by indicating one of four pictures that best depicted the meaning of the word. The Oral Expression Scale ("OES") measured expressive language, requiring the examinee to answer questions, finish sentences, and generate sentences in response to visual and oral

prompts. The Student's scores were below average on the LCS, but in the average range on the OES. P-14-375-380; Testimony of Witness B.

7. In her report and during her testimony, Witness B noted that the Student demonstrated pragmatic language skills, made appropriate eye contact, took turns in conversation, and had no previous concerns in testing. P-14-381; Testimony of Witness B. The Student's teacher testified that the Student understood simple sentences but struggled with complex sentences, stories with multiple themes, and following directions. The teacher reported that the Student was aware of his/her communication difficulties and often got so frustrated that s/he refused to complete assignments or do any work. The teacher reported that the Student could always be understood when the topic was known, and could "sometimes" be understood when the topic was unknown, but that s/he never enjoyed speaking in front of the class, never attended to oral class discussions, and never explained ideas and thoughts clearly in logical order or used compound/complex sentences. The teacher said that, in the area of pragmatics, the Student never made or responded to greetings to or from others, but sometimes began and ended conversations appropriately, observed turn-taking rules in the classroom and in social interactions, maintained eye contact during conversations, and asked for (or responded to requests for) clarification during conversations. P-14 at 377. During the assessment, the Student was cooperative but consistently asked to end testing, though with prompting and promised rewards. The Student told Witness B that s/he did not need support in speech and language and wanted to stop going to speech therapy. The Student admitted that sometimes s/he had trouble paying attention, following spoken directions, understanding curriculum content, writing down thoughts, expanding on an answers, and providing

additional details when writing. The Student scored in the below average range, indicating below average skills in single word receptive vocabulary attainment. Previous test results from 2013, 2015, and 2019 revealed average receptive vocabulary skills. P-14-379. Witness B concluded that the Student's pragmatic language skills were within functional limits upon observation, that s/he consistently made gains in speech articulation and intelligibility skills from 2013 to 2022, and that his/her receptive vocabulary development continued to be within functional limits. Witness B noted that, compared to 2019, the Student had increased overall language and expressive language scores. Witness B did not see a need for an auditory processing evaluation because the Student's attentional issues were likely at least part of the cause for his/her receptive language issues. Witness B underscored that the Student's needs were being met with other supports and that his/her IEP addressed attention and self-regulation. Witness B therefore concluded that the Student's strengths would enable him/her to access the educational setting and support overall academic performance. P-14-381.

8. Witness B emphasized that the Student's core language scores were in the average range. Witness B did not recommend speech and language therapy for the Student, referencing his/her average scores on the OWLS, behavior during testing, and progress on goals from prior IEPs. Witness B found that the Student exhibited strengths in verbal reasoning, adequate functional language skills, and the ability to understand language so that s/he could function in the classroom. Though Witness B noted that the Student had difficulty analyzing text, she said that the Student also received help on that issue in class. Testimony of Witness B.

9. DCPS's Division of Specialized Instruction ("DSI") experienced an interruption in the speech and language staff assigned to the Student's school during the first two reporting periods of the 2021-2022 school year. P-21-508-510.

10. A confidential comprehensive psychological reevaluation of the Student was conducted by DCPS and reviewed in a report dated February 6, 2022. The evaluator selected tests based on the Student's history of issues with articulation and expressive and receptive language. The evaluator administered the Reynolds Intellectual Assessment Scales ("RIAS-2"), Woodcock Johnson Tests of Achievement-IV ("WJ-IV"), Behavior Assessment Scale for Children-Second Edition ("BASC-2"), Brief Rating Inventory Executive Function ("BRIEF-2")-Teacher Form, and the Strengths Difficulties Questionnaire ("SDQ"). The evaluator also used the Student's teacher's administration of the WJ-IV. The evaluator also interviewed the Student, Parent, social worker, and teacher, and conducted a records review. The interview with the social worker revealed that the Student's attendance was excellent, that s/he had a desire for friendships, and that s/he was motivated by positive reports sent home. The Student had shown improvements with class attendance and participation but would still skip classes and find refuge in abandoned parts of the building. The Student was also combative when confronted about negative behavior and work avoidance. The Student conveyed feelings of paranoia about eating in the presence of others, was late to school daily, and reported not sleeping at night out of fear or hearing noises and someone calling his/her name. The Student's inclusion teacher and math teacher indicated to the evaluator that it was difficult to assess the Student's skills because s/he was usually late to class, slow to begin classwork when s/he was there, and often actively avoided work. The Student was said to be difficult to

engage in group work because s/he liked to choose the group and then focus on side conversations instead of completing work. S/he often asked to be excused from the classroom to go to the bathroom or get water, and could be verbally aggressive despite station teaching, small group instruction, one-on-one instruction, and modifications of the type and amount of work. According to the teacher, the Student's difficulty with focus, attention, withdrawal, anxiety, and depression impacted his/her academic performance and behavior. Notable academic deficits were reported in math, reading, reading comprehension, written language, and fluency. Benchmark assessments such as ANET, Reading Inventory, and i-Ready revealed below basic scores in reading and math. On the RIAS-2, the Student had a Composite Intelligence Index ("CIX") of 77, moderately below average. BRIEF and BASC-2 behavior rating scales indicated particular concerns in the areas of anxiety, depression, impulsivity, somatization, learning problems, activities of daily living, atypicality, focus, inattention, social skills, withdrawal, and hyperactivity. The Student also exhibited executive function impairment in areas related to impulse control, working memory capacity to carry out multi-step activities, checking performance to manage present and future task demands, cognitive flexibility, and the ability to begin a task or independently generate ideas. The Student typically had difficulty staying focused in class, resisting extraneous stimuli, and demonstrating goal-oriented organization and focus. P-15.

11. An occupational therapy reassessment of the Student was conducted by a DCPS occupational therapist on February 11, 2022, and discussed in a report dated February 18, 2022. The evaluator determined that the Student had very low visual-motor integration, visual perceptual, and motor coordination skills, though the Student had a

typical sensory profile. Concerns were noted about the Student's auditory and visual processing, behavior, avoidance, and registration of information. The Student scored in the well below average range in the fine motor precision section of the testing, below average in the fine motor integration section, and in the low end of average in the manual dexterity section. The Student was considered to be in need of support in sensory processing/self-regulation related to noise and visual information, attention to task, working in group situations, visual motor skills related to handwriting, fine motor precision and manual dexterity skills, and visual perception. P-16.

12. An IEP meeting was held for the Student on May 5, 2022. In the IEP, teachers and staff described the Student as a more active participant during the initial sessions of virtual instruction compared to in-person instruction. The Student then needed encouragement to participate during virtual instruction and complete assignments. The Student also often required prompting to pay attention and use the chat box feature only at appropriate times (instead of using the feature to socialize during instruction). The Student eventually expressed boredom with the virtual learning experience. The IEP stated that the Student would benefit from continued behavior support services to address his/her distractibility, hyperactivity, inattention, and social-emotional behavior issues. The IEP reported that school staff had observed the Student displaying mood fluctuations where s/he was focused and on-task during one academic period and highly distractible and off-task during another period. The IEP determined that the Student was eligible for services through Multiple Disabilities (Speech-Language Impairment, Other Health Impairment), indicated that s/he had behavioral issues in the classroom but responded to incentives, and said that his/her language impairment presented in the moderate range for

syntax (sentence structure) and comprehension (instruction-based commands, inference-based tasks related to narrative comprehension, and instruction-based texts). The IEP said that the Student presented with a speech/language impairment and indicated that the Student's disability affected his/her ability to consistently and accurately accept directions, read narrative content or stories, read instructional language, or understand academic oral language during instruction. It also indicated difficulties with language comprehension, especially when the Student was overwhelmed with oral input. The IEP further said that the Student's coexisting impairments adversely impacted his/her ability to sustain attention, manage behaviors appropriately, stay engaged, and adequately participate in the learning environment. The IEP said that the Student's communication and language deficits were commensurate with his/her documented difficulty in reading and written expression, and that the Student's skill sets in oral expression presented in tasks that affect written expression and oral language communication. The IEP stated that deficits observed in receptive language suggested a lack of comprehension of orally presented reading selections, limited use of comprehension strategies, and impact on accurate completion of instructional directions. The IEP recommended goals in math, reading, written expression, communication/speech and language, emotional, social and behavioral development, and motor skills/physical development. In regard to speech, the IEP recommended goals on such topics as articulation, "chunking," and recalling details. The IEP also contained an extensive "Other Classroom Aids and Services" section. The team recommended specialized instruction inside general education for six hours per week (two hours each for math, reading, and written expression) and outside general education for nine hours per week (three hours each for math, reading, and written

expression). The IEP also recommended 240 minutes per month of speech and language pathology outside general education, 120 minutes per month of occupational therapy outside general education, 180 minutes per month of behavioral support services outside general education, and thirty minutes per month of occupational therapy inside general education. The IEP recommended speech goals relating to the ability to access academic content/curriculum content, oral language comprehension difficulty, and recall of events, but also indicated that speech articulation minimally impacted the Student's overall speech intelligibility and ability to be understood by others. Difficulty in the area of language comprehension at the time of the IEP review impacted the Student's ability to understand information orally presented during instruction. P-18.

13. Parent sought an independent speech-language evaluation at public expense at a March 15, 2022, meeting between the parties. On May 4, 2022, counsel for DCPS indicated that they would not agree to the IEE and would file a due process complaint. R-7-1.

14. On June 18, 2022, Witness A conducted a speech-language independent educational evaluation of the Student. The formal assessment indicated that DCPS approved a "speech" IEE and that the purpose of the IEE was to assess the Student's speech, language, and communication skills. Witness A reviewed background information, including the psychoeducational evaluation conducted by DCPS, an educational evaluation completed by the Student's teacher, and the formal speech-language assessment by Witness B. Witness A felt that the Student's scores indicated that the Student's receptive vocabulary (written and oral) was significantly below normal, suggesting underlying auditory processing disorders. Witness A also posited that

Witness B had not administered any formal measures to determine the Student's pragmatic language skills, and that Witness B's observation that the Student's pragmatic skills were within normal limits was based on insufficient data. Witness A concluded that the three evaluations established that the Student has significant language problems, especially in receptive language and at the word level, which could affect his/her comprehension and understanding of lessons presented in class and create social communication problems with peers. Witness A criticized the Student's IEP goals as inappropriate, given the Student's lack of an auditory processing evaluation and overreliance on the Student's visual memory, and indicated that the Student had issues with higher-level language processing and inferencing. Witness A also tested the Student. He administered the CASL because, among other things, it assesses higher-level language, processing, and pragmatic language. Witness A found that the Student was below normal on all measures of expressive and receptive word knowledge, that his/her receptive grammar ability was two deviations below the mean, that his/her higher-level language processing revealed low normal or borderline normal results on word reading, and that his/her idiomatic language was 1.5 standard deviations below the mean. Pragmatic language was also considered to be below normal. In summary, Witness A found significant deficits for the Student in all language areas, with the greatest problem in receptive understanding of language presented to him/her. Witness A concluded that the Student's social/pragmatic language communication issues do not appear to relate to behavior. The problem appears to relate more to a lack of understanding of the wording used by the people with whom the Student converses, which in turn relates to language knowledge deficits and problems with higher-level language processing. Witness A

recommended new and appropriate IEP goals for language and language processing, with language therapy at least twice a week. The therapy should focus on receptive language and processing, and the Student should use the new skills to express him/herself linguistically. P-17; Testimony of Witness A.

15. The Student's IEP progress reports for the first two reporting periods of the 2021-2022 school year indicated either that the goal was "not introduced" or that the Student was "progressing" in the academic goal area. In communication/speech and language, no progress was reported for either reporting period because staff shortages interrupted the delivery of services. No progress was made in regard to on-task behaviors or handwriting during the second reporting period. P-21. The Student's report cards during the 2021-2022 school year revealed mainly "D" and "F" grades, with some "C" grades. P-23.

16. During the 2021-2022 school year, the Student was not offered speech-language pathology per his/her IEP mandate. Prior to December 14, 2021, the Student's provider went on maternity leave. P-24-526. A new speech-language pathologist was found on or about February 17, 2022. P-27-558. The provider who started in February, 2022, left in March, 2022, and returned in mid-May, 2022. Testimony of Witness C. The Student was angry and did not want to participate in speech and language therapy when s/he did attend. P-22 at 515.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is

a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #1, the burden of persuasion is on Parent. On Issue #2, which does not involve the appropriateness of the Student’s program, the burden is on DCPS to show that its evaluation of the Student was appropriate.

1. Did DCPS fail to implement the Student’s IEP by failing to provide the Student’s prescribed speech-language pathology services during the 2021-2022 school year? If so, did DCPS deny the Student a FAPE?

“Failure to implement” claims may be brought if an LEA cannot “materially” implement an IEP. A parent “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”

Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district’s school setting provided ten minutes less of specialized instruction per day than was required by the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and

import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013).

The Parent argued that the Student missed speech and language pathology services for almost the entire school year, relying on emails from Witness C and the Student's IEP progress reports for the first two reporting periods of the 2021-2022 school year, all of which suggested that the Student did not receive his/her mandate for speech-language pathology for the 2021-2022 school year. One email from Witness C, dated January 10, 2022, stated that DCPS experienced a staffing gap in finding speech and language therapy providers at the time, and could not staff the Student's school adequately. Witness C's testimony indicated that the Student's speech-language pathologist went on maternity leave prior to December 14, 2021, and that the replacement provider, who started in February, 2022, then left in March, 2022. While this provider eventually returned to the school in mid-May, 2022, Witness C said that services trackers should exist where corresponding services were delivered. There are no service trackers in the record that correspond to speech-language pathology for the 2021-2022 school year, except for the month of February, during which the Student apparently attended one session. It is noted that, at the May 20, 2022, resolution meeting for the Student, DCPS indicated that all service trackers had been provided to the Parent.

DCPS argued that Witness C's testimony was improperly permitted on rebuttal, since DCPS did not address this issue during its presentation. However, Witness B did say that she believed that it was "highly unlikely" that the Student did not receive any speech services during the 2021-2022 school year, and there are emails in the record indicating that the Student did not receive his/her speech services during the 2021-2022

school year. Also, the Student's IEP progress reports indicated that the Student did not receive speech services for at least the first half of the 2021-2022 school year.

Moreover, courts in the District of Columbia have consistently suggested that hearing officers must create a thorough and complete record, even after a party has rested. Indeed, as this Hearing Officer pointed out on the record, a hearing officer was reversed in one case for not allowing evidence in the record after a parent had concluded her case. A.G. v. Dist. of Columbia, 794 F. Supp. 2d 133, 140 (D.D.C. 2011). DCPS also argued that there was no showing of harm to the Student, but a parent does not have to prove harm to prevail on a claim that a school district failed to materially implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013). There is no question that DCPS failed to materially implement the Student's IEP during the 2021-2022 school year with respect to speech-language pathology. DCPS denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with his/her speech-language pathology mandate during the 2021-2022 school year.

2. Did DCPS fail to provide the Student with a sufficiently comprehensive evaluation in speech and language in or about January, 2022, and/or did DCPS fail to respond promptly enough to the Parent's request for an IEE on March 15, 2022?

A re-evaluation of a special education student must occur at least once every three years. 20 U.S.C. Sect. 1414(a)(2)(B); 34 C.F.R. Sect. 300.303(b). It is the responsibility of the LEA to ensure that the child is evaluated in "all areas of suspected disability." 20 U.S.C. Sect. 1414(b)(3)(B). The LEA evaluation must "not use any single measure or assessment as the sole criterion" for determining an appropriate program, but must "use a variety of assessment tools." 20 U.S.C. Sect. 1414(b)(2); 34 C.F.R. Sect. 300.304(b). Federal regulations provide that, subject to certain limitations, a parent has the right to an

IEE at public expense if a parent disagrees with an evaluation obtained by the school district. 34 C.F.R. Sect. 300.502(a), (b). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate, or that the evaluation obtained by a parent does not meet the school district criteria. 34 C.F.R. Sect. 300.502(b)(2)(i)-(ii). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense. 34 C.F.R. Sect. 300.502(b)(3); DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 (D. Vt. Sept. 4, 2007).

1. Timeliness.

DCPS filed its due process complaint challenging the IEE request on May 11, 2022, less than two months after Parent requested an IEE on March 15, 2022. During closing argument, Parent argued that DCPS delayed the filing of its due process complaint and therefore waived the right to challenge Parent's request for an IEE. The applicable regulations do not set a specific time limit for a school district to respond to a request for an IEE. Instead, the regulations state that the school district must act "without unreasonable delay." 34 C.F.R. Sect. 300.502 (b) (2). The weight of authority stands for the proposition that delays can be reasonable if the parties have been communicating with each other about the IEE in the interim. See, e.g., Santa Monica-Malibu Unified Sch. Dist., 62 IDELR 279 (SEA CA 2013) (complaint filed after two-month delay was not unreasonable where the district sent parents prior written notice of its disagreement); J.P. v. Ripon Unified School District, No. 207CV02084MCEDAD, 2009 WL 1034993, at *7

(E.D. Cal. Apr. 15, 2009) (complaint filed after more than a two-month delay was timely, since the parties were communicating regarding the request for the IEE in the interim).

Here, the parties were communicating with each other about the IEE between the date of the IEE request, March 15, 2022, and the date that DCPS filed its due process complaint, May 11, 2022. On May 4, 2022, DCPS acknowledged receipt of the IEE request and stated that it was going to file its own due process complaint challenging the Complaint. DCPS also sent Parent a Prior Written Notice indicating that it intended to challenge the IEE request. Also, Parent did not provide any authority supporting the position that a delay of less than two months is tantamount to the school district waiving its right to challenge an IEE. This may be because, in determining the adequacy of an IEE request, a school district needs time to assess the request and determine if a due process complaint is warranted. Additionally, the school district needs time to prepare and file a due process complaint. There is nothing in the record to suggest that DCPS ignored the IEE request, employed delay tactics, or filed its own due process complaint in “bad faith.” In addition, Parent did not convincingly show that any prejudice resulted as a result of the delay. Cf. Fullmore v. D.C., No. 13-CV-00409 (CRC), 2016 WL 1254208, at *3 (D.D.C. Mar. 29, 2016) (parents must show substantive harm when pointing to school district delay in IEE cases). Accordingly, Parent’s argument that DCPS took too much time before filing its due process complaint is without merit, and an IEE will not be ordered on this basis.

2. Substantive adequacy of the assessments.

A special education evaluation does not have to be perfect to be “appropriate” under the IDEA for purposes of a request for an IEE. As long as the school district uses

qualified evaluators who follow the IDEA's requirements, the request for the IEE can be denied. See, e.g., B.G. by J.A.G. v. Bd. of Educ. of City of Chicago, 901 F.3d 903 (7th Cir. 2018) (psychologist's failure to explain certain scores on one assessment and failure to consider the results of a behavioral rating scale did not invalidate reevaluation); see also E.P. By & Through J.P. v. Howard Cnty. Pub. Sch. Sys., No. CV ELH-15-3725, 2017 WL 3608180, at *28 (D. Md. Aug. 21, 2017), aff'd sub nom. E.P. v. Howard Cnty. Pub. Sch. Sys., 727 F. App'x 55 (4th Cir. 2018)(failure to administer certain subtests when evaluating did not entitle the parents to an IEE at public expense).

Witness B's choices were based on teacher reports, which indicated that the Student had expressive and receptive language difficulties and had had articulation issues in the past. Witness B accordingly administered the GFTA-3, ROWPVT-4, EOWPVT-4, and OWLS II, and informally assessed the Student in areas such as pragmatic language. Parent contended that Witness B only administered certain subtests, but like in E.P., the failure to administer every subtest is not a basis for invalidating an entire evaluation, which in this case included a comprehensive psychological assessment and an occupational therapy assessment. Parent also contended that Witness B's assessment failed to measure the Student's pragmatic language skills, but the informal assessment of Witness B found no major issues with pragmatic language. Instead, as indicated in the psychological assessment that tested the Student's behaviors through the BRIEF and BASC-2, Witness B concluded that the Student's issues with peers involved behavior issues, which makes sense since testing indicated that the Student has anxiety, depression, impulsivity, somatization, learning problems, activities of daily living, atypicality, focus, inattention, social skills, withdrawal, and hyperactivity. It is also

notable that Parent's Complaint mentions nothing about the Student requiring an IEE because the DCPS evaluation did not include testing about pragmatic language.

Parent also argued that Witness B's assessment failed to address the Student's auditory processing issues. However, this Hearing Officer found Witness A's testimony to be unclear on this issue. Witness A advocated for an auditory processing assessment, but he did not clearly explain the nature of the assessment or why it was necessary to understand the Student's speech and language difficulties in the classroom. Moreover, the occupational therapy assessment conducted by DCPS included a Sensory Profile-2 that included an assessment for auditory processing. P-16 at 434. There is no mention of the need for an auditory processing assessment in Parent's Complaint or in any documentation in the record, except for Witness A's own earlier evaluation.

In fact, as DCPS pointed out, it appears that Parent's main objection to Witness B's report was the fact that Witness B ultimately felt that the Student did not need any speech and language therapy. Indeed, Parent mentioned this issue with concern during her closing argument. While this Hearing Officer does not agree with Witness A's conclusion that the Student does not need speech-language pathology services, DCPS is correct that a disagreement with the conclusions of an assessment do not provide the basis for an IEE. L.S. v. Abington Sch. Dist., Civ. A. No. 06-5172, 2007 WL 2851268 (E.D. Pa. Sept. 28, 2007); County Sch. Bd. of Henrico County v. Z.P., 399 F.3d 298, 307 (4th Cir. 2005). Parent did not present a counter argument on this point.

Finally, though not highlighted in Parent's closing argument, Witness A also testified that Witness B's evaluation was inadequate because there was no assessment of the Student's written language or higher language. However, the psychological

evaluation by DCPS did include administration of the RIAS and the WJ-IV, which assessed the Student's cognitive functioning and academic achievement, including his/her reading, math, and writing skills.

In sum, I agree with DCPS that its evaluation involved the use of a variety of technically sound assessment tools, as administered by capable professionals. Accordingly, this Hearing Officer finds that DCPS's evaluation of the Student during the winter of 2022, including the speech-language assessment by Witness B, was appropriate.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). These words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate." In this case, Parent seeks compensatory education for the failure to implement the Student's speech and language pathology services during the 2021-2022 school year. Courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid ex Rel. Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). Compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and "must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." B.D. v. District of Columbia, 817 F.3d 792, 797-798 (D.C. Cir. 2016) (quoting Reid, 401 F.3d at 524).

Parent's request for compensatory education is for 39.5 hours of speech-language pathology, which roughly corresponds to the missed speech-language pathology services over the course of the 2021-2022 school year. Respondent contended that a hearing officer need not order compensatory education where it is not needed, but the record suggests that the Student needs speech and language therapy to address expressive and receptive language issues. There is no evidence that the Student made any progress at all in speech-language pathology during the 2021-2022 school year, and Witness A is well-qualified to determine a compensatory education award for the Student, given his extensive background in speech-language pathology. While hour-for-hour compensatory education awards are not necessarily encouraged in this circuit, the only alternative to the award proposed by Witness A is to order a compensatory education assessment, which would delay the provision of the services. Under the circumstances, the compensatory education award will be ordered as requested.

VII. Order

As a result of the foregoing:

1. DCPS shall pay for 39.5 hours of speech-language pathology for the Student, to be provided by a qualified, licensed provider at a rate that is customary in the community;
2. Parent's claims are otherwise denied.

Dated: September 14, 2022

Michael Lazan
Impartial Hearing Officer

Hearing Officer Determination
Michael Lazan, Hearing Officer
Cases # 2022-0081/2022-0087

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Dated: September 14, 2022

Michael Lazan
Impartial Hearing Officer