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OSSE
Office of Dispute Resolution
April 07, 2022

Confidential

<p>Parent on Behalf Student,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Case # 2021-0157</p> <p>Date Issued: April 5, 2022</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: March 7, 15, & 28, 2022</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, April 5, 2022, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's mother ("Petitioner") in the District of Columbia. District of Columbia Public Schools ("DCPS") is Student's local educational agency ("LEA"). Student is a child with a disability pursuant to the IDEA with a disability classification of Multiple Disabilities ("MD"), including Intellectual Disability ("ID") and an Autism Spectrum Disorder ("ASD").

Student is enrolled in an ungraded certificate-track program at a DCPS school ("School A"). Student enrolled at School A in 2016. Prior to 2016, Student was in a program for students with Autism at another DCPS school ("School B").

Petitioner filed her initial due process complaint ("DPC") on September 30, 2021, and an amended DPC on December 7, 2021.² In the amended DPC, Petitioner alleged DCPS denied Student a free appropriate public education ("FAPE") during school year ("SY") 2019-2020 and SY 2020-2021 by failing to conduct triennial reevaluations or any evaluations while Student attended School A, other than a functional behavioral assessment ("FBA"), by essentially putting the same individualized educational program ("IEP") in place for Student year after year, and by failing to implement Student's IEP during the COVID-19 pandemic.

Relief Sought:

Petitioner seeks a finding that DCPS denied Student a FAPE and that DCPS be ordered to provide the Student with compensatory education for denials of FAPE and order that DCPS fund Student's placement at a nonpublic special education school.

DCPS' Response to the Complaint:

The LEA filed a timely response to the initial complaint on October 21, 2021. The LEA denied that there has been any failure to provide Student with a FAPE. In its response, DCPS stated, inter alia, the following:

On February 10, 2020, the MDT convened to review and revise Student's IEP. The IEP required 28.25 hours per week of specialized instruction, 4 hours per month of speech-language

² Petitioner's attorney represented that the issues had remained the same, with some added facts for some of the stated issues. Counsel also stated that the only change to the relief is that Petitioner is now seeking a nonpublic placement.

pathology, 2 hours per month of occupational therapy, and 1 hour per month of physical therapy outside general education and a dedicated aide. The IEP was appropriate when it was developed.

On March 11, 2020, the Mayor of the District of Columbia declared a state of emergency and public health emergency in response to the coronavirus COVID-19. On March 13, 2020, the President of the United States of America declared a National Emergency in response to the national outbreak of the coronavirus disease COVID-19.

On March 13, 2020, the DCPS Chancellor issued a memo adjusting the 2019-2020 school calendar to address community health risks and ensure the continuity of education of DCPS students. The adjusted calendar provided for a shift in DCPS' spring break to Tuesday, March 17 through Monday, March 23, 2020, and distance learning from March 24, 2020, through March 31, 2020. On April 17, 2020, the Mayor of the District of Columbia announced that DCPS students would continue distance learning until the end of the school year on May 29, 2020.

On July 30, 2020, the Mayor announced that DCPS would be all virtual for the first term (August 31, 2020 - November 6, 2020) of SY 2020-2021. School A also shifted to virtual instruction in March 2020 because of the pandemic and implemented Student's IEP to the extent possible in the virtual setting.

On November 3, 2020, a multidisciplinary team ("MDT") convened a meeting to review Student's existing data and determine if additional assessments were necessary to prepare for Student's triennial reevaluation.

On February 4, 2021, the MDT, including Petitioner, convened to review Student's psychological, speech-language, and assistance technology assessments. The team determined Student continued to be eligible for special education and related services. The MDT convened on May 7, 2021, to review and revise Student's IEP. The IEP required 28.5 hours per week of specialized instruction, 1 hour per week of speech-language pathology, and 30 minutes per week of occupational therapy outside general education. The IEP was appropriate when it was developed.

On February 10, 2021, the MDT convened to review and revise Student's IEP. The team agreed to maintain the level of special education services in Student's IEP. The team developed a seizure safety plan and seizure action plan. The IEP was appropriate when it was developed. School A is an appropriate service location and can implement Student's IEP.

Resolution and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on October 15, 2021, and did not agree to proceed directly to a hearing. The 45-day period began on October 30, 2021, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on December 15, 2021.

Petitioner filed an amended DPC on December 7, 2021. The parties did not agree to proceed directly to a hearing on the amended DPC. Hearing dates were set for January 13 & 18, 2022. DCPS requested to reschedule the hearing because School A's calendar changed due to the

COVID health emergency, resulting in unavailability of School A staff. The parties convened the hearing on March 7, 2022, March 10, 2022, and March 28, 2022. The HOD is now due April 5, 2022.

The undersigned independent hearing officer ("IHO") conducted a pre-hearing conference ("PHC") and issued a pre-hearing order ("PHO") on February 20, 2022, outlining, among other things, the issues to be adjudicated.

The issues adjudicated are:

1. Whether DCPS denied the Student a FAPE by failing to conduct a triennial reevaluation, or conduct a comprehensive psychological evaluation when Student required one, or failed to timely evaluate the Student in all relevant areas from September 2019? ³
2. Whether DCPS failed to develop and/or provide Student with an appropriate or IEP or Placement and/or Location of Service from September 2019? ⁴
3. Whether DCPS failed to implement Student's IEP during the SY 2020-2021 during the COVID-19 pandemic? ⁵

DUE PROCESS HEARING:

The due process hearing convened on March 7, 15, & 28, 2022. Due to the COVID-19 emergency and the parties' request, the hearing was conducted and recorded via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the following as evidence and which are the sources of the findings of fact: (1) the testimony of the witnesses and (2) the documents submitted in the parties' disclosures

³ Petitioner alleges that DCPS elected not to reevaluate Student and neglected to perform any new assessments until Petitioner requested them. Petitioner alleges that it was apparent to DCPS that Student needed evaluations in all areas, including educational, speech and language, and augmentative and alternative communication ("AAC") testing.

⁴ Petitioner asserts that DCPS failed to provide the Student with an appropriate IEP or placement from the start of the SY 2019-2020 through December 2021. Petitioner asserts that DCPS knew or should have known that Student had inappropriate IEPs in that the present levels of performance ("PLOPs") and goals were the same year after year from when Student first enrolled at School A were not based on current, recent, or accurate data. Petitioner also asserts that Student needed direct support from the Applied Behavior Analysis ("ABA") therapist; and an AAC device that would meet Student's changing needs.

⁵ Petitioner alleges DCPS failed to implement Student's IEP during SY 2020-2021 fully. Petitioner alleges that the virtual instruction made available by School A was limited, and Student's needs are such that Student was not able to attend or benefit from the virtual instruction. Petitioner alleges that Student's dedicated aide did not work with Student during this period.

(Petitioner's Exhibits 1 through 91 and DCPS Exhibits 1 through 39) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issues #1 and #3. DCPS held the burden of persuasion on issue #2 after Petitioner presented a prima facie case on that issue. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. DCPS sustained the burden of persuasion by a preponderance of the evidence on issue #2. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue # 3. Based on the finding of denial of FAPE, the IHO granted Petitioner an independent educational evaluation ("IEE") to determine appropriate compensatory education.

FINDINGS OF FACT:⁷

1. Student resides with Petitioner in the District of Columbia. Student is eligible as a child with a disability pursuant to the IDEA with an MD disability classification that includes ID and ASD. DCPS is Student's LEA. Student is enrolled in an ungraded certificate-track program at School A, a DCPS school. (Petitioner's testimony, Petitioner's Exhibit 24)
2. Student enrolled at School A during SY 2015-2016. Before that, the Student attended School B, another DCPS school. At School B, Student was in a self-contained special education program for students with Autism. DCPS conducted a triennial reevaluation in March 2015 while Student was attending School B. The DCPS School psychologist recommended, among other things, that Student be in a full-time program designed for children with ASD that provided structure and applied behavior analysis support. (Petitioner's Exhibit 7)
3. In SY 2015-2016, Student began attending the full-time self-contained program for ASD students at School A. School A developed an IEP for Student on October 7, 2016, and updated Student's IEP annually thereafter. (Petitioner's Exhibits 18, 19, 20, 21)

⁶ The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law. Petitioner presented four witnesses: (1) Petitioner, (2) an independent Speech Language Pathologist, (3) an independent Applied Behavior Analyst, and (4) an Educational Advocate employed by the law firm representing Petitioner, all except Petitioner testified as expert witnesses. DCPS presented four witnesses: (1) a DCPS Speech Language Pathologist, (2) a DCPS Applied Behavior Analyst, (3) School A's Assistant Principal, all of whom testified as expert witnesses, and (4) a DCPS Resolution Specialist.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number, it denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

4. School A conducted an occupational therapy ("OT") evaluation in January 2018. In February 2018, School A conducted a triennial reevaluation that included review of existing data, observations, and teacher input. No additional formal assessments were conducted. Based on the data available, School A determined Student continued to be eligible for special education and related services with a disability classification of ASD. In March 2019, School A conducted a vocational assessment of Student that indicated Student was continuing to work on basic life skills, including self-grooming and toileting. (Petitioner's Exhibits 9, 15, Respondent's Exhibits 28, 31, 32)
5. On May 28, 2019, School A developed an IEP that prescribed 28.5 hours of specialized instruction weekly and 1 hour of speech-language pathology ("SLP") per week, and 30 minutes of OT per week, all outside general education. The IEP noted that Student could not communicate wants and needs independently and required assistive technology ("AT") for communication, learning, and studying. The IEP noted that Student had an AT ACC device, "GoTalk 32 cell," with limited vocabulary, that the teacher and staff used to model requests for Student. The IEP included goals in the following areas: Math, Reading, Adaptive/Daily Living Skills, Communication/Speech & Language, Emotional/Social/Behavioral Development, and Motor Skills and Physical Development. The IEP also prescribed a dedicated aide. The IEP noted that Student engaged in severe maladaptive behaviors such as elopement, throwing items in the classroom, jumping on furniture, and pushing other students. The IEP noted that Student had a one-to-one aide to address these behaviors and reinforce appropriate behaviors. (Petitioner's Exhibit 21)
6. Students' IEP progress reports indicated that Student made progress relative to IEP goals during SY 2019-2020. (Respondent's Exhibit 9)
7. School A conducted an annual review of Student's IEP on May 7, 2020. This IEP noted the same behavior concerns as the previous IEP. The IEP noted that Student required the aid of a static display mid-tech noise output AT device for communication. The IEP had similar present levels of performance and baselines as Student's previous IEP, but included updated goals in most, if not all, areas of concern. (Petitioner's Exhibit 22)
8. Due to the COVID-19 pandemic, School A closed beginning on March 13, 2020, and began providing distance learning to students. In July 2020, DCPS issued a prior written notice ("PWN") describing changes in IEP implementation due to COVID-19. The PWN noted that services and supports were designed to ensure access to the special education distance learning program and implementation of the IEP to the greatest extent possible while students were unable to attend school. The PWN noted that when school resumed, the team would reassess to determine Student's continued educational needs. (Respondent's Exhibit 7)
9. The PWN also noted that School A would provide the following supports and services to Student during School A's closure as a result of the COVID-19 pandemic: Weekly video lessons provided to the parent - one-on-one calls with parent - Related services will be delivered multi-modally through one-on-one parent calls and emails, provision of goal targeted newsletters and online resources, and video conferencing for direct instruction,

consultation, or parent coaching. The PWN also noted that delivery modes are employed and adapted by each clinician in response to Student's present levels of performance and in collaboration with the multidisciplinary team. The PWN also noted that School A provided distance learning with online lesson plans and video instruction with video instruction led by teachers and therapists, and paraprofessionals were encouraged to participate in video lessons. (Respondent's Exhibit 7)

10. The PWN stated the following relative to Student's related services:

SLP: Student is an appropriate candidate for consult with the parent via telephone/email. All of Student's goals can be targeted through consultation with Student's parent. The program will include two weekly consultations with the parent via phone/email.

OT: Teletherapy will be provided through a combination of various modalities, which include: provision of weekly activities via phone, email, or video chat; check-in with family to discuss assigned activities and recommendations; parent training; and sharing of goal-related resources such as online books, activities, audio lessons or apps weekly. Direct teletherapy sessions may not be as beneficial, as Student has limited verbal comprehension and has difficulty attending. Student requires hands-on multi-sensory prompting for guidance to engage in the task at hand. (Respondent's Exhibit 7)

11. Starting in March 2020 and continuing through SY 2020-2021, SLP services were provided principally as consultative services to Student's parent and/or home health care provider. (Respondent's Exhibits 12, 13)

12. Starting in March 2020 and continuing through SY 2020-2021, OT services were provided principally by e-mail, and attached to the e-mail was a weekly OT newsletter that included various activities and tips to advance Student's OT goals. Within the body of the e-mail were more detailed tips and suggestions on how to further engage Student with more particular tasks such as typing, handwriting, and meal preparation. (Respondent's Exhibit 15)

13. Starting in March 2020 and continuing through SY 2020-2021, behavior support services were provided principally by the provider sending email correspondence updates to Petitioner. (Petitioner's Exhibit 66)

14. On November 3, 2020, School A convened an MDT meeting where Petitioner and her attorney participated. Petitioner's attorney expressed concerns that Student had not had any meetings with Student's dedicated aide and requested an Applied Behavior Analysis ("ABA") evaluation and Augmentative and alternative communication ("AAC") evaluation along with a speech-language evaluation. (Respondent's Exhibit 5)

15. During the November 3, 2020, meeting, the MDT reviewed Student's OT needs. Based on classroom observations, Student was able to sit during activities for small increments

of time, scan grocery items and place them in the bag during grocery shopping activities, but required maximum assistance for cleaning up and moderate to maximum assistance for toileting. The team noted that Student was to receive 30 minutes per week of direct services for occupational therapy services. (Respondent's Exhibit 5)

16. The team agreed to complete a speech and AAC evaluation, academic evaluation, and behavior observations. In addition, the psychologist was to follow up on completing a psychological evaluation, including looking into an independent evaluation. (Respondent's Exhibit 5)
17. In January 2021, School A conducted an educational and a speech-language - AAC evaluation. The evaluation noted that Student presents with severe deficits in receptive and expressive language and pragmatic language. Student's relative strengths included following familiar routine directions, requesting "more" given gestural, verbal, and physical prompting to a communication device or visual of the icon symbol, demonstrating awareness of others, and using nonverbal communication to gain access to preferred items and actions. Student's relative weaknesses included using a functional communication system to consistently and independently request, comment, refuse, and direct the actions of others, the ability to follow simple 1-step directions, and limited receptive vocabulary of items/objects in the environment. (Petitioner's Exhibits 11, 12)
18. The evaluation recommended that Student continue to receive speech and language services in small groups, in the classroom, and individual sessions and continue to work on the areas of weakness described in the evaluation. The areas of weakness included initiating use of a functional communication system to gain access to desired items in the environment and using a communication system for a variety of functions including requesting, commenting, refusing, and directing the actions of others. (Petitioner's Exhibits 11, 12)
19. In January 2002, an independent comprehensive psychological evaluation was conducted. The evaluator noted Student's numerous absences due to technical issues at the beginning of the school year when the distance learning program rolled out. It was noted that these issues had since been resolved. The evaluator also noted that Student's IEP reflected Student's skill progression before school closures (February/March 2020) was negatively affected by Student's irregular attendance and difficulty with virtual therapy sessions. (Petitioner's Exhibit 13)
20. In terms of reading, the evaluator noted that Student could turn pages of a book independently and touch textures in a book when prompted. The evaluator also noted that Student enjoyed listening to adapted stories read aloud and that Student demonstrated emotional investment in the stories by laughing and crying. (Petitioner's Exhibit 13)
21. On February 4, 2021, School A convened an MDT meeting to review the evaluations. The AAC evaluator noted that although Student used an 8-cell ACC device and understood the device's purpose, Student wasn't sure which buttons to press on the device and had difficulty pressing the buttons hard enough for the device to speak. The AT

specialist noted that she would continue exploring AAC devices that might be more appropriate for Student. (Respondent's Exhibit 4)

22. The team discussed targeting Student's adaptive skills, including dressing, toileting, and washing hands. The team discussed hygiene and accessing food and agreed that Student's teacher and School A's Board-Certified Behavior Analyst ("BCBA") would reach out to Petitioner to update Student's daily living goals. (Respondent's Exhibit 4)
23. The psychologist reviewed the psychological evaluation noting that it was more important to understand what Student can do rather than how Student performs on standardized measures. The student could not complete any of the items according to the standardized procedures but could respond with increased support. Student's overall cognitive functioning was low. Student had difficulty with more abstract matching and showed the ability to sort items by specific categories. In terms of behavior functioning, the parent filled out a form. Student had no internalizing or externalizing behavior problems but did show some aggression when upset which may be due to limited communication. The evaluator noted that Student appears disconnected from Student's surroundings and shows some self-help skills but presents with limited cognitive skills. (Respondent's Exhibit 4)
24. The psychologist concluded that the ASD classification remained appropriate, and expressed that she did not believe that Student would benefit from a pure ABA approach in educational programming but needed a more dynamic approach, including finding out what motivates Student. The team discussed adding ABA services to Student's IEP because School A's BCBA worked with the School A service providers. (Respondent's Exhibit 4)
25. At the February 4, 2021, meeting, the team discussed adding ABA services to Student's IEP and agreed to add consult services to the IEP at 60 minutes per month, direct behavior support, and additional services in the supplemental services and aids section of the IEP. Behavior services are currently embedded into School A's programming, and the behavior team provides Student support as needed. School A's BCBA trained School A staff before the COVID-19 school closure and provided Student supports when Student returned to in-person instruction. (Respondent's Exhibit 4)
26. On February 19, 2021, School A made the following amendments to Student's IEP: Change to Present Levels of Performance and Annual Goals (in a single area of concern): Edit the present levels of performance, needs, impact on Student, annual goals, baseline, anticipated date of achievement, or evaluation procedures and schedule for an existing area of concern; Change to Related Services; Edit other aids and services; Change to Consultation Services: Add a new consultation service (including service, setting, time/frequency); Change to Assistive Technology: Add new assistive technology (category and/or device) (Petitioner's Exhibit 23)
27. After the meeting, School A made the following changes to Student's IEP to suit Student's individual needs: (1) adding an appropriate AAC device, (2) adding AAC-

integrated SLP sessions, (3) adding 1:1 behavior support with School A's BCBA, (4) new Present Levels of Performance, Annual Goals, and Baselines in each area of concern.

28. Student's current IEP prescribes all instruction and related services outside general education. The IEP prescribes the related services of OT, SLP, and direct ABA services from School A's BCBA or staff with qualifications related to Autism. (Petitioner's Exhibit 24)
29. Student is nonverbal but makes loud vocalizations and requires an AAC device and a dedicated aide to help Student participate in the school setting, keep safe, and attend to daily needs. Student also has a home aide to assist Student in these same areas at home. Student is described as a non-verbal communicator who uses a total communication approach, and Student's IEP notes that Student has access to assistive technology (Petitioner's testimony, Petitioner's Exhibit 13-2)
30. During the COVID-19 distance learning, Petitioner did not have computer access until October 2020, and Student received no related services until after the winter break of SY 2020-2021. Petitioner did not tell School A that she did not want to continue the related services to Student. Student did not do well during that period. Student was running around and was not focused. Student's dedicated aide was not available. Student did have a home health care aide present during the school day from 7:00 a.m. to 5:00 p.m. during virtual learning. Petitioner wants Student to have a better structure and does not see the progress Petitioner had hoped for. She believes Student is regressing doing some of the same things Student was doing before Student began attending School A. Petitioner would like a school placement for Student other than School A, with fewer children in the classroom and more teachers. (Petitioner's testimony)
31. Since the pandemic started in March 2020, much of Student's school attendance was virtual. Unfortunately, the school took months to provide Petitioner with the technology Student needed. When the school did provide that technology, Student's disability impeded Student from participating in virtual learning in any form, although the family and home aid dutifully put Student in front of the computer for "school."
32. During the limited time that Student received virtual instruction, which was approximately an hour per day, Student did not have a dedicated aide from school to assist. Student learned virtually and should have received approximately 28.5 hours of specialized instruction per week but instead received approximately 5 hours per week and could not access curriculum in the virtual setting.
33. Petitioner's educational advocate prepared a compensatory education plan that proposed the following services to compensate for the alleged failure to timely evaluate, inappropriate IEP, and failure to implement the IEP: 300 hours of independent 1:1 academic tutoring for specialized instruction, 200 hours of independent 1:1 SLP services, 10 hours of independent 1:1 OT services, 2,200 hours of independent 1:1 ABA therapy by a BCBA, 12 hours of parent/home aide support and training in ABA therapy. (Witness 3's testimony, Petitioners Exhibit 87)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). Petitioner held the burden of persuasion on issues #1 and #3. DCPS held the burden of persuasion on issue #2 after Petitioner presented a prima facie case on that issue.⁸ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

⁸ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

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

Issue 1: Whether DCPS denied the Student a FAPE by failing to conduct a triennial reevaluation, or conduct a comprehensive psychological evaluation when Student required one, or failed to timely evaluate the Student in all relevant areas from September 2019?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct a triennial reevaluation or conduct a comprehensive psychological evaluation or failed to timely evaluate the Student in all relevant areas.

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

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

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

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

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

services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

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

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

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner asserts that School A elected not to reevaluate Student and neglected to perform any new assessments until Petitioner requested them. Petitioner alleges that it was apparent that Student needed evaluations in all areas, including education, speech and language, and AAC testing.

The evidence demonstrates that School A conducted a triennial reevaluation of Student in February 2018. Although School A did not conduct a psychological evaluation at that time, there was no evidence presented that supports a finding that such an assessment was warranted or requested. Likewise, although the evidence demonstrates that Student had communication deficits and might benefit from different AT to support communication, there was insufficient evidence that a request for any evaluation relative to Student's communication function was ever made.

Petitioner's witnesses were no more persuasive on this issue than Respondent's witnesses, who were also experts and credibly testified that School A staff reviewed ongoing data relative to Student's functioning in all areas of concern, and there was no basis for assessments beyond what School A had conducted. Once Petitioner requested evaluations, the School promptly completed the evaluations, reviewed them, and adjusted Student's programming based on the evaluations. School A's action in convening a meeting to review Student's functioning and consider evaluations and then promptly evaluating Student demonstrated good faith compliance with the requirement of the Act. Consequently, the IHO concludes that there was insufficient evidence to support a finding that DCPS denied Student a FAPE by failing to evaluate.

Issue 2: Whether DCPS failed to develop and/or provide Student with an appropriate IEP or Placement and/or Location of Service from September 2019?

Conclusion: DCPS sustained the burden of persuasion by a preponderance of the evidence that Student's IEP, Placement, and Location of Service were appropriate.

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

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

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

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, what the IEP offered was reasonably calculated to enable the specific student's progress...." "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Pursuant to 34 C.F.R. § 300.324 (b) (1), Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are

being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS “must place the student in a setting that is capable of fulfilling the student’s IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Petitioner asserts that DCPS failed to provide the Student with an appropriate IEP or placement from the start of the SY 2019-2020 through December 2021. Petitioner asserts that DCPS knew or should have known that Student had inappropriate IEPs in that the present levels of performance (“PLOPs”) and goals were basically the same year after year from when Student first enrolled at School A and were not based on current, recent, or accurate data. Petitioner also asserts that Student needed direct support from the Applied Behavior Analysis (“ABA”) therapist; and an AAC device that would meet Student’s changing needs.

The evidence demonstrates that School A developed an IEP for Student in March 2019. That was the IEP in effect in September 2019 when Petitioner alleges Student's IEP was inappropriate. Petitioner presented no witnesses who participated in the development of that IEP, and there is no evidence that any member of the team who developed that IEP, including Petitioner, disagreed with the contents of the IEP. The evidence suggests that the IEP was appropriate when it was developed, which is the point from which the IEP is to be judged. Student's subsequent IEP, drafted in May 2020, included some of the same PLOP and baselines contained in Student's previous IEP. However, the IEP included updated goals in all areas of concern.

The evidence also demonstrates that School A had conducted a triennial evaluation in 2018 before developing the March 2019 IEP. As noted in the discussion of Issue #1 above, regarding evaluations, there was no evidence that any specific evaluation was warranted before the development of the March 2019 IEP or the May 2020 IEP.

Petitioner's assertion that Student’s IEP should have included ABA therapy or a specific AAC device is also without merit. Although School A has now included them in Student's IEP at Petitioner's request, these concerns speak to the methodology used in programming.

As the Court points out in *R.B vs. the District of Columbia* 75 IDELR 102 (September 30, 2019) “Plaintiffs' additional concerns go to the methodology of special education instruction at [Public School] but the methodology to be employed in the future execution of an IEP is not a question for courts to decide. As the Supreme Court stated in *Rowley*, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. "The primary responsibility for formulating the education to be accorded ... and for choosing the educational method most suitable to the child's needs, was left by [IDEA] to state and local

education agencies in cooperation with the parents or guardian of the child." *Id.* "Therefore, once a court determines that the requirements of the Act have been met, questions of methodologies are for resolution by the States." *Id.* at 208."

The evidence presented by Petitioner did not sufficiently demonstrate when countered by the evidence presented by Respondent that Student needed a specific methodology of ABA therapy. Nor was there sufficient evidence that the IEP was lacking because it did not prescribe any specific behavior program.

Petitioner asserts that Student's Placement and Location of Service at School A are also inappropriate. However, the evidence demonstrates that School A provides the type of placement recommended for Student when Student was evaluated at and departed from School B. School A is a separate special education school with a program specifically designed for students with ASD. Although there appears to have been difficulties in School A providing services during the COVID-19 pandemic, the IHO takes judicial notice that most, if not all, schools had difficulties with implementation during the pandemic.

The School A witnesses credibly testified that the services are now being provided consistent with Student's IEP, and School A is meeting Student's needs. The testimony of these expert witnesses was more credible because it was based on their extensive work with Student. Although Petitioner may desire a different school location for Student, she presented no alternative school for the IHO to consider and has apparently not taken any action to pursue a change in location through OSSE, a route that may be available to her should she want to pursue a change in the future.

Consequently, for the foregoing reasons, the IHO concludes regarding the numerous specific concerns that Petitioner asserted as to why Student's IEP, Placement, or Location of Services is inappropriate, the evidence presented by Respondent overcame the evidence presented by Petitioner.

Issue 3: Whether DCPS failed to implement Student's IEP during the SY 2020-2021 during the COVID-19 pandemic?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that School A failed to implement Student's IEP during SY 2020-2021 fully and that failure resulted in denial of a FAPE.

In reviewing a failure-to-implement claim, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated

to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE. A school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268-69 (D.D.C. 2013). To meet its burden, the moving party "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, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts ... 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.'" *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

The IDEA does not set a specific time period for implementation of an IEP but requires that special education and related services must be made available "[a]s soon as possible following development of the IEP." 34 C.F.R. § 300.323(c)(2). As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007),

Plaintiffs' right to a free appropriate public education requires that their IEPs be implemented as soon as possible. "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP. *D.D.*, *supra* at 513-14.

Petitioner alleged DCPS failed to fully implement Student's IEP during SY 2020-2021 school year. Petitioner alleges that the virtual instruction made available by School A was limited, and Student's needs are such that Student was not able to attend or benefit from the virtual instruction. Petitioner also asserted that School A declined to provide or fund the in-person support Petitioner requested for Student during this time. Petitioner alleges that Student's dedicated aide did not work with Student during this time period.

As U.S. Magistrate Judge G. Michael Harvey pronounced in *Brown v. District of Columbia*, Civil Action No. 1:17-cv-00348 (RDM/GMH), 2019 WL 3423208 (D.D.C. July 8, 2019), stated" where implementation of an IEP becomes impracticable or impossible, the District may not leave a student with a disability without services.

Generally, in situations in which implementation of a student's IEP has become impracticable or impossible, the remedy is not to leave the student without services. For example, in *John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202*, 502 F.3d 708 (7th Cir. 2007), the court addressed a situation in which it was unclear whether a student's prior IEP could be implemented as written because he had progressed from middle school to high school. *Id.* at 711-12. In remanding the case to the court below, the Seventh Circuit instructed that, if the court found that implementation of the prior IEP was impracticable or impossible in the high school setting, it could approve an alternative "as close as possible to the approach used in the middle school but nevertheless compatible with the goals of the IEP and the institutional demands of the high school setting." *Id.* at 716. That is, when "rigid adherence" to an IEP is impossible, the school district has an obligation to "provide educational services that approximate the student's ... IEP as closely as possible." *Id.* at 714-15. Brown, n.18.

Petitioner alleges DCPS failed to implement Student's IEP during SY 2020-2021 fully. Petitioner alleges that the virtual instruction made available by School A was limited, and Student's needs are such that Student was not able to attend or benefit from the virtual instruction. Petitioner alleges that Student's dedicated aide did not work with Student during this time period.

The evidence demonstrates that soon after the announcements of a national and local emergency due to the COVID-19 pandemic, School A, like all other schools, began to deliver instruction and services on a virtual platform. School A issued Petitioner a PWN outlining how instruction and services would be provided. In this PWN, School A informed Petitioner that Student's instruction would be provided virtually, albeit with reduced hours. The PWN stated that instead of related service providers meeting with Student directly as Student's IEP prescribed, the related services would be consultative and ultimately consisted of weekly emails and newsletters to Petitioner. Petitioner credibly testified that during the period of virtual instruction, Student also did not have the benefit of the dedicated aide that the IEP prescribed.

The evidence demonstrates that due to that reduction in services, Student's disruptive behaviors increased, and Student's skill levels regressed in several areas. There was insufficient evidence presented to explain the change in related services and why Student was not provided the services of a dedicated aide during virtual instruction. There was no reason presented as to why these services were not also provided to Student virtually during the time that in-person learning was not being provided. The absence of the direct related services prescribed in Student's May 2020 IEP and the services of Student's dedicated aide during the time that virtual learning took place for SY 2020-2021 was significant and resulted in denial of a FAPE to Student.

Remedy:

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

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

The Petitioner seeks an award of compensatory education for Student. When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education 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, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Student was not provided related services, and the services of a dedicated aide during SY 2020-2021 that likely would have resulted in Student making far greater progress during this period, despite the limitations imposed as a result of the COVID-19 pandemic.

Petitioner's advocate asserted that Student should be provided 300 hours of independent, 200 hours of independent SLP services, 10 hours of independent OT services, 2,200 hours of independent ABA therapy, and 12 hours of parent/home aide support and training in ABA therapy. However, this amount was based upon the advocate's assertion that Student was denied FAPE in ways that the IHO has concluded Student was not. The IHO concludes that the number of compensatory services requested is grossly overstated.

Consequently, the IHO awards Petitioner an IEE to determine appropriate compensatory education for the denials of FAPE determined herein and the ability to seek appropriate compensatory services based on that evaluation from DCPS directly, or if need be, by filing for another due process hearing seeking that compensatory education award.

ORDER:⁹

1. Within ten (10) business days of the date of this order, DCPS shall provide Petitioner authorization for an IEE at the OSSE prescribed rate to determine appropriate compensatory education for the denial of FAPE determined herein.¹⁰

⁹Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.

¹⁰ The denial of FAPE is the absence of the direct related services that were prescribed in Student's May 2020 IEP and the services of Student's dedicated aide during the time that virtual learning was taking place during SY 2020-2021

2. Petitioner is authorized to seek appropriate compensatory services based on the IEE from DCPS directly, or if need be, by filing for another due process hearing seeking the compensatory education award for the denial of FAPE determined herein.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: April 5, 2022

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