

OSSE  
Office of Dispute Resolution  
April 24, 2022

Parent on Behalf of Student, <sup>1</sup>	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates:
v.	March 22, 2022 March 23, 2022 March 24, 2022 March 25, 2022
School A, a Public Charter School located in a District of Columbia (Local Education Agency "LEA")	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2021-0165	<u>Hearing Officer:</u>
Date Issued: April 24, 2022	<u>Coles B. Ruff, Esq.</u>

<sup>1</sup> Personally identifiable information is in the attached Appendices A& B.

## **JURISDICTION:**

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

## **BACKGROUND AND PROCEDURAL HISTORY:**

The Student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner") in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA.

During school year (“SY”) 2018-2019, SY 2019-2020 and SY 2020-2021, Student attended a public charter school located in the District of Columbia (“School A”) and School A was Student’s local education agency ("LEA"). Student no longer attends School A. District of Columbia Public Schools ("DCPS") is Student's current LEA.

On October 12, 2021, Petitioner filed her due process complaint (“DPC”) and asserts that School A (“Respondent”) , denied Student a free appropriate public education (“FAPE”) during SY 2019-2020 and SY 2020-2021 by, inter alia, failing to provide Student an appropriate individualized educational program (“IEP”) and failing to implement Student’s IEP.

## **Relief Sought:**

Petitioners seek the following reliefs that Respondent provide sufficient compensatory education services.

## **LEA Response to the Complaint:**

Respondent, School A, filed a timely response to Petitioner’s DPC on October 22, 2021. School A denies that there has been any failure to provide Student with a FAPE and requests that the Petitioner’s request for relief be denied.

## **Resolution Meeting and Pre-Hearing Conference:**

The parties participated in a resolution meeting on October 27, 2021, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on November 13, 2021, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on December 26, 2021. The parties were not available for the hearing dates offered and filed a consent motion to continue and to extend the HOD due date to accommodate the selected hearing dates. Petitioner filed a subsequent motion to continue the hearing and to extend the HOD due date that was granted. The HOD due date to April 24, 2022.

The undersigned independent hearing officer (“IHO”) conducted a pre-hearing conference on November 24, 2021, and issued a pre-hearing order (“PHO”) on December 6, 2021, and a updated PHO on March 15, 2022, outlining, inter alia, the issues to be adjudicated.

## **ISSUES: <sup>2</sup>**

The issues adjudicated are:

1. Did Respondent deny Student a FAPE by failing to develop appropriate IEPs during school year SY 2019-2020 and SY 2020-2021?
2. Did Respondent deny Student a FAPE by failing to materially implement Student's IEP during SY 2019-2020 and SY 2020-2021?
3. Did Respondent deny Student a FAPE by during SY 2019-2020 and SY 2020-2021 by denying Petitioner an opportunity to meaningfully participate ? <sup>3</sup>

## **DUE PROCESS HEARING:**

The Due Process Hearing was convened on March 22, 2022, March 23, 2022, March 24, 2022, and March 25, 2022. Due to the COVID-19 emergency and at the parties' request, the hearing was conducted via video teleconference on the Microsoft Teams platform. The parties submitted written closing arguments on April 16, 2022.

## **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 80 and LEA Exhibits 1 through 26 also identified as or Respondent's Exhibits) that were admitted into the record and are listed in Appendix 2.<sup>4</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>5</sup>

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<sup>2</sup> The IHO restated the issues at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated.

<sup>3</sup> Petitioner alleged in her DPC that during SY 2019-2020 and SY 2020-2021, Respondent denied Petitioner the right to meaningfully participate in Student's education and failed to offer or provide Petitioner information and training to help her understand Student's rights to special education and related services. Petitioner alleges that she was not informed that (a) Student had a right to receive new evaluations after Student failed to meet IEP goals during SY 2019-2020 and SY 2020-2021 to address significant academic concerns, or (b) the right to request independent educational evaluations if she disagreed with evaluations of Student already completed by Respondent, or (c) or the right to request a functional behavior assessment and behavioral intervention plan to address Student's significant anxiety related behavioral concerns, and (d) she was not informed that Student's IEPs were defectively impeding her ability to advocate for Student.

<sup>4</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

<sup>5</sup> Petitioner presented seven witnesses: (1) Student (2) Student's Mother (Petitioner) and the following individuals who were designated as expert witnesses: (3) Independent Speech Language Pathologist, (4) an Independent Psychologist, (5) a Board-Certified Behavior Analyst, (6) an Independent Special Education Consultant, (7) and second Independent Special Education Consultant. Respondent presented six witnesses, all of whom were designated as expert witnesses: (1) School A Special Education Coordinator, (2) School A Principal (3) School A Speech Language Pathologist, (4) School A Psychologist, (5) Student's School A Special Education Teacher, and (6) School A Director of Clinical Services. The IHO 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.

## **SUMMARY OF DECISION:**

Petitioner held the burden of production on all issues adjudicated and the burden of persuasion on all issues except issue #1. Petitioner did not sustain the burden of persuasion on issues #2, and #3. Respondent did not sustain the burden of persuasion on issue #1 once Petitioner established a prima facie case on that issue. The IHO granted Petitioner compensatory education services as result of the denial of FAPE found.

## **FINDINGS OF FACT:<sup>6</sup>**

1. Student resides with Petitioner in the District of Columbia. During school year SY 2020-2021, SY 2019-2020 and SY 2018-2019, Student attended School A, a public charter school located in the District of Columbia and School A was Student's LEA. Student no longer attends School A and DCPS is Student's current LEA. Student has been determined eligible for special education and related services pursuant to IDEA. (Petitioner's testimony, Respondent's Exhibit 26)
2. On May 14, 2019, School A conducted a psychological of Student that included academic testing using the WIAT-III. The evaluator noted the following: Student received the following Standard Scores: Mathematics 65, Reading 75, and Written Language 80. When [Student's] academic skills were measured, [Student] demonstrated significant difficulty with completing math calculations both accurately and with speed. While [Student] was able to read familiar words out loud, [Student] demonstrated difficulty utilizing [Student's] phonics skills to read aloud more complex words and when [Student] was asked comprehension questions regarding what was read. In the area of writing, Student's spelling skills and ability to combine appropriate sentences were well developed and similar to same aged peers. However, when [Student] was asked to generate [Student's] own sentences or to write an essay with a coherent thought pattern and utilize appropriate grammar, punctuation, and capitalizations, [Student] demonstrated significant difficulty. Overall, [Student] was able to perform basic academic tasks; however, once [Student] was asked to build upon those tasks or to implement critical thinking and reasoning skills, [Student] was not able to do so at an age-appropriate level. ( Respondent's Exhibits 58, 67)
3. The psychological evaluation also assessed Student's social-emotional functioning. The evaluation noted the following: [Student], [Student's] mother, and teacher completed several rating scales to measure overall behavioral functioning, depressive symptoms, and anxiety related behaviors. All three raters indicated that [Student] demonstrates significant difficulty with social relationships and exhibits elevated levels of withdrawal when compared to same aged peers. All three raters also indicated that [Student] displays varying levels of depression across environments, as identified as isolation, withdrawal,

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<sup>6</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

psychosomatic symptoms and functional communication delays. [Student's] teacher also indicated that [Student] presents with significant learning problems as measured on the BASC-3. Of particular note, [Student] also shared on a depression measure (BDI-2) that [Student] has thought about killing [self]. When questioned further, [Student] indicated that [Student] did not have an active plan to commit suicide and was able to identify [Student's] grandmother and godmother as individuals [to] reach out to if [Student] had suicidal thoughts. Lastly, in the area of anxiety, [Student] and [Student's] mother completed the MASC-2 form and their ratings indicated that [Student] exhibits elevated levels of anxiety, as demonstrated through tense and restless feelings and both general anxiety and anxiety provoked by social situations. These results indicate that [Student] is experiencing significant internalizing concerns that may present as irritability or avoidance in the academic environment; however, these behaviors are likely coping mechanisms that [Student] has adopted to mask true feelings. (Respondent's Exhibit 67)

4. School A developed Student's initial IEP on May 20, 2019. Petitioner participated in the development of the IEP. The IEP determined that Student's disability classification was Emotional Disability ("ED") based on the fact that Student's primary concerns focused on social-emotional issues related to Student's suicidal ideations. The IEP included goals in math, reading, writing expression, cognitive and prescribed the following services: 30 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support outside general education. The IEP also included classroom and testing accommodations including "Read Aloud" for literacy assessments, use of calculation device, small group setting, extended time and frequent breaks. (Witness 11's testimony, Petitioner's Exhibits 56, 57)
5. The May 20, 2019, IEP contained the following goals:

**Math:**

Annual Goal 1:

By the end of the IEP year, the student will solve multi digit arithmetic problems in numeric and word problem-based instances with 80% accuracy.

Annual Goal 2:

By the end of the year the, the student will know that numbers that are not rational are called irrational and understand informally that every number has a decimal expansion; for rational numbers show that the decimal expansion repeats eventually, and convert a decimal expansion which repeats eventually into a rational number with 80% accuracy in 3 out of 4 instances.

Annual Goal 3:

By the end of the IEP year, the student will understand that positive and negative numbers are used together to describe quantities having opposite directions or values (e.g., temperature above/below zero, elevation above/below sea level, credits/debits, positive/negative electric charge); use positive and negative numbers to represent quantities in real-world contexts, explaining the meaning of in each situation with 70% accuracy in 3 out of 4 instances.

**Reading:**

Annual Goal 1:

By the end of the IEP year, the student will read 125 words per minute with no more than 4 errors in a five-minute sample.

Annual Goal 2:

By the end of the IEP year, the student will derive central idea using textual evidence with 70% accuracy in 3 out of 4 instances.

**Written Expression:**

Annual Goal 1:

By the end of the IEP year, the student will compose essays containing 5 paragraphs using appropriate English language conventions with 70% accuracy in 4 out of 5 instances.

**Cognitive:**

Annual Goal 1:

By the end of the IEP year, the student will learn techniques for the promotion of self-awareness and emotional intelligence by “reading” own emotions and distinguish healthy from unhealthy feelings

Annual Goal 2:

By the end of the IEP year, the student will learn techniques of prevention of future episodes of emotional distress and development of personal growth by helping clients change core beliefs that are often at the heart of their suffering with 70% accuracy. (Petitioner’s Exhibits 56

6. The IEP noted the following under the cognitive concern: [Student] was administered the WISC-V and received the following Standard Scores: Verbal Comprehension 73, Visual Spatial 81, Fluid Reasoning 82, Working Memory 74, Processing Speed 66, and Full-Scale IQ 69. [Student’s] measured cognitive skills indicated that [Student] will have general limitations and difficulties in the academic environment, when presented with grade level tasks. These results indicated that [Student] verbal reasoning skills are less developed than visual spatial and fluid reasoning skills. [Student] Processing speed skills are also likely impacted by [Student’s] depressed mood, which would substantially impact efficiency in solving problems and completing academic assignments. In addition, [Student’s] working memory skills are an area of relative weakness and [Student] will likely benefit from small chunks of information and repetition to assist in completing presented tasks. (Petitioner’s Exhibits 56, 67)
7. On May 20, 2019, Petitioner received and signed acknowledging her receipt of the IDEA Procedural Safeguards Notice of Rights for Parents of Students with Disabilities. (Respondent’s Exhibit 62)
8. During SY 2019-2020, the first full school year that Student had an IEP, Student earned passing grades:

Year/Term	Grd Lvl	Course number	Course	Earned Credit	P1	P2	P3	P4	Q1	Q2	Q3	Q4	S1	S3	Y1
19-20 YR		ADV	Adv sory	0.00	P	P	P	.	P	P	P	—	.	.	.
19-20 YR		885	Eng-Lang Arts	0.00	B	B	B	.	B	B	F	P	.	.	C
19-20 YR		850	Math	0.00	B	F	D	.	B	F	D	P	.	.	D

19-20 S2		50550S1	Math Lab	0.50	.	.	A+	.	.	.	B	F	.	.	B
19-20 S1		847	Read 180	0.00	A	B	.	.	A	A	.	.	.	.	A
19-20 S1		870	Science 8	0.00	B	F	.	.	D	C	.	.	.	.	D
19-20 S2		831	SS - History of the United States II	0.00	.	.	B	.	.	.	B	P	.	.	B

Respondent's Exhibits 5, 8)

9. On April 15, 2020, School A conducted an annual IEP review and updated Student's IEP. Petitioner participated in the meeting by telephone. The IEP team continued the ED disability classification. The IEP included goals in math, reading, writing expression, cognitive. The IEP maintained the same goals as Student's previous IEP. The IEP prescribed the following services: 30 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support outside general education. The IEP also included classroom and testing accommodations including "Read Aloud" for literacy assessments, use of calculation device, small group setting, extended time and frequent breaks. (Respondent's Exhibit 47)
10. During the remainder of SY 2019-2020 and during the SY 2020-2021, because of the Covid-19 Pandemic, and resulting school closure for in-person learning, School A implemented distance learning using the Zoom Platform. Student's schedule for distance learning during SY 2020-2021 included Self-Paced Learning on Zoom for one hour in each subject on Mondays, and Thursday from 9:00 a.m. to 1:30 p.m. with a lunch break from 1:30 p.m. to 2:00 p.m., with extended classroom hours from 2:00 p.m. to 4:00 p.m. The schedule on Tuesday and Friday was similar, except it included live instruction. On Wednesdays, Student was to engage in virtually tutoring during the mornings and self-paced assignments in the afternoon. (Respondent's Exhibit 11)
11. During SY 2020-2021, the first semester of the second school year that Student had an IEP, Student earned failing grades in two classes, Algebra 1 and Literacy Genres, and passing grades in three classes:

Year/Term	Grd Lvl	Course number	Course	Earned Credit	P1	P2	P3	P4	Q1	Q2	Q3	Q4	S1	S3	Y1
20-21 S1	9	50440S1	Algebra I	0.00	.	.	.	.	F	F	.	.	F	.	.
20-21 S1	9	7003S1	Biology	1.00	.	.	.	.	C	C	.	.	C	.	.
20-21 YR	9	L990SX	College & Career Prep	0.00	.	.	.	.	A	C+	.	.	.	.	.
20-21 S1	9	40110S2	Literacy Genres	0.00	.	.	.	.	D-	F	.	.	F	.	.
20-21 S1	9	40220S1	Reading Lab	0.50	.	.	.	.	B-	D	.	.	C	.	.
20-21 S1	9	AD3104S	Theater	0.50	.	.	.	.	C	B-	.	.	C+	.	.

(Respondent's Exhibit 5)

12. During the first reporting period of SY 2020-2021, Student made no progress on academic goals IEP goals, principally due to Student's non-participation in distance learning. The IEP progress reports noted the following: "Due to the COVID-19 school closure, this goal was not able to be addressed due to [Student's] lack of participation in

distance learning. Several attempts in different ways were made to communicate with [Parent]. We will continue to attempt to engage your child in distance learning. We understand that this is a difficult and unusual time for parents and want to partner with you. Please contact me at so we can determine a plan to ensure [Student] engages in distance learning and receives support through the special education department until the time we return to school.” Student made some progress on cognitive IEP goals. (Respondent’s Exhibit 10)

13. On February 20, 2021, Petitioner requested that School A conduct the following evaluations of Student: Psychological, Educational; Adaptive Behavior; Occupational therapy with a focus on sensory; Speech-language services; and Behavior. School A convened a meeting with Petitioner to review Student’s progress and discuss the evaluations that would be conducted. (Respondent’s Exhibits 13, 16)
14. On March 9, 2021, Petitioner received and signed acknowledging her receipt of the IDEA Procedural Safeguards Notice of Rights for Parents of Students with Disabilities. (Respondent’s Exhibit 19)
15. School A conducted a speech-language evaluation. Student’s standard scores was below the expected range relative to other individuals of the same age group. Overall, the results of formal testing indicate deficits in receptive and expressive language skills. (Respondent’s Exhibit 25, Witness 9’s testimony)
16. On April 6, 2021, School A conducted an adaptive assessment. The evaluator determined that adaptively, Student’s abilities fell within the Moderately Low range in the home setting and ranges from Adequate to Low in the school setting. The evaluator noted the following: “Within the home environment, Student’s parent reported in her assessment that Student is more expressive than ■■■ is in the school environment. When examining teacher responses, Student tends to shut down and/or avoid the work Student does not comprehend/lacks confidence in saying [Student] does not understand. [Student’s] adaptive scores are about as expected, given the reported IQ score of 69 from the 2019 psychological evaluation. Based on Student’s current assessments, reported history, session/classroom observations, and teacher’s reports, [Student] demonstrates symptoms consistent with the Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5) diagnosis of Intellectual Disability. – This is a recommended change from the Comprehensive Psychological Evaluation, (May 2019), based on new data that includes adaptive results.” (Respondent’s Exhibit 24)
17. On April 9, 2021, School A developed an IEP for Student. The IEP included updated present levels of performance based on the recent evaluations. The team updated Student’s academic goals in math, reading and written expression based on the recently evaluations. The team also updated the cognitive goals in the IEP. The IEP continued to prescribed 30 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support outside general education. The IEP also included classroom and testing accommodations including “Read Aloud” for literacy assessments, use of calculation device, small group setting, extended time and frequent breaks. The IEP included a transition plan. (Respondent’s Exhibit 26)



18. On April 26, 2021, School A amended Student's IEP to include speech-language as a related services of 4 hours per month outside general education. (Respondent's Exhibit 29)
19. On April 26, 2021, School A completed an disability worksheet in which the team determined that Student qualified for the ID disability classification and that Students disability would be changed from ED to ID and issued a prior written notice ("PWN") to that effect. (Respondent's Exhibits 31, 33)
20. School A also agreed that Student would be provided a dedicated aide for eight hours per day. (Respondent's Exhibit 32)
21. School A also agreed to conduct a functional behavioral assessment ("FBA") and develop a behavior intervention plan ("BIP"). (Respondent's Exhibits 20, 34 )
22. Student's School A attendance record reflects that Student attended school the vast majority of days during distance learning in SY 2020-2021:

8/31-9/4					9/7-9/11					9/14-9/18					9/21-9/25					9/28-10/2					10/5-10/9					10/12-10/16					10/19-10/23																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																		
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(Respondent's Exhibit 1)

23. However, Student's class attendance report indicates that Student missed significant individual classes during distance learning:

Course	Q1	Q2	Q3	Q4	Absences		Tardies	
					20-21	20-21	20-21	20-21
Read no Lab [REDACTED] a Rm: 234	B-82	D66			23	23	0	0
Explore A/E [REDACTED] 205			D+68	[ ]	11	11	0	0
Algebra I [REDACTED]	F30	F34			7	7	0	0

Algebra I [REDACTED] Rm: 215			F 4	[ ]	1	1	0	0
Literary [REDACTED] Rm: 213	D- 62	F 3			38	38	0	0
Literary Genres [REDACTED] Rm: 213			F 13	[ ]	18	18	0	0
Lunch Lunch, Lunch Cafe Rm:			[ ]	[ ]	0	0	0	0
[REDACTED] [REDACTED]	A 95	C+ 79	B- 83	[ ]	16	16	0	0
Theater [REDACTED] Rm: 208	C 76	B- 81			22	22	0	0
Physical Education [REDACTED] Rm: [REDACTED]			F 50	[ ]	12	12	0	0
[REDACTED] [REDACTED] Rm:	C 65	C 74			18	18	0	0
World History [REDACTED] Rm:			B+ 90	[ ]	4	4	0	0

(Petitioner's Exhibit 31)

## 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). Petitioners held the burden of persuasion on issues #2, and #3. The burden of persuasion fell to Respondent on issues #1 once Petitioner has established a prima facie case on that issue.<sup>7</sup> The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Did Respondent denied Student a FAPE by failing to develop appropriate IEPs during SY 2019-2020 and SY 2020-2021?

**Conclusion:** Respondent did not sustain the burden of persuasion by a preponderance of the evidence that Student's April 15, 2020, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. Respondent sustained the burden of persuasion by a preponderance of the evidence with regard to Student's April 2021 IEP.

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

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for

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<sup>7</sup> DC Code § 38-2571.03 (6) provides:

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

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

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

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

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

The evidence demonstrates that School a developed an initial IEP for Student on May 20, 2019. As the case law noted above states, an IEP appropriateness is to be judged at the time it was developed. Student’s IEP that was in effect for most of SY 2019-2020, is beyond the two-year statute of limitations in which the IEP can be challenged. Petitioner’s counsel specifically stated and that outset of the case during the PHC that Petitioner was not asserting any claim beyond the two -year statute of limitations and was not asserting any exception thereto. Consequently, the IHO concludes that despite the evidence Petitioner presented regarding Student’s disability classification, the IEP goals and services that were prescribed in the May 20, 2019, IEP, there no legitimate basis for the May 20, 2019, IEP to now be challenged.

On the other hand, as to the subsequent IEP that School A developed for Student on April 15, 2020, the evidence demonstrates that this IEP was lacking in a number of ways. The evidence demonstrates that although Student earned passing grades during SY 2019-2020, Student apparently made little if any progress on the IEP goals. The goals in the April 15, 2020, IEP remained unchanged from Student’s initial IEP. Although Respondent’s witnesses testified that this IEP was appropriate, Student’s failure to make progress relative to IEP goals evidenced by

the IEP goals remaining unchanged, and Student's dismissal academic performance during most of the time this IEP was in effect, belies these witnesses' testimony and sufficiently demonstrates that the April 15, 2020, IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and resulted in denial of a FAPE to Student.

Based on Petitioner's request, School A conducted evaluations in March 2021 that resulted in significant changes in Student's IEP, including a change in the Student's disability classification, changes in Student's IEP goals and the addition of speech-language services. Petitioner asserts that Student should have been provided these additional services long before the requested evaluations were conducted. However, there was no evidence that the evaluations were requested prior to March 2021, and there was insufficient evidence that prior to Petitioner's request, the evaluations were warranted. Although based upon Student's Full-Scale IQ, there may have been a basis for conducting an adaptive assessment, there is no indication that an adaptive assessment alone would have resulted in any significant changes in Student's IEP or programming.

Although Petitioner asserts that the IEP that School A developed in April 2021, was also inappropriate, the evidence demonstrates that the with the update of present levels of performance, IEP goals and the addition of speech language services, the IEP developed and then amended in April 2021, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances from that point forward. The evidence of Student's academic performance after the April 2021 IEP was developed did not support a finding that the IEP as developed was inappropriate. The testimony of Petitioner's witnesses was not credible in this regard, as they never personally observed or worked with Student did not review any educational records or progress reports from Student's current LEA that would speak to the effectiveness or ineffectiveness of the April 2021 IEP. Consequently, the IHO concludes there was no prima facie case presented that the amended IEP School A developed for Student in April 2021, was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

**ISSUE 2:** Whether Respondent denied Student a FAPE by failing to materially implement Petitioners IEP during SY 2019-2020 and SY 2020-2021.

**Conclusion:** Petitioner did not sustain the burden of persuasion by the preponderance of the evidence on this issue.

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.

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.



The evidence demonstrates that soon after the announcements of a national and local emergency due to the COVID-19 pandemic, School A, like most other schools, began to deliver instruction and services on a virtual platform. School A implemented distance learning using the Zoom Platform. Student's schedule for distance learning during SY 2020-2021 included Self-Paced Learning on Zoom for one hour in each subject on Mondays, and Thursday from 9:00 a.m. to 1:30 p.m. with a lunch break from 1:30 p.m. to 2:00 p.m., with extended classroom hours from 2:00 p.m. to 4:00 p.m. The schedule on Tuesday and Friday was similar, except it included live instruction. On Wednesdays, Student was to engage in virtually tutoring during the mornings and self-paced assignments in the afternoon.

The evidence demonstrates that following the implementation of distance learning, Student's academic performance plummeted principally due to Student not consistently participating in the distance learning that was made available. The evidence demonstrates that School A made repeated efforts including continually reaching out to Petitioner in an effort to ensure Student participated in distance learning. Student's IEP progress notes demonstrate for instance that Student's teacher conveyed to Petitioner School A's continued attempt to engage Student in distance learning and desire to partner with Petitioner to help ensure Student's participation. During distance learning, Student had overall good daily attendance, but did not remain in the online learning during the full day and for all courses despite the instruction and services being made available to Student. The evidence demonstrates that there was an adult in Student's home during the school day when Student should have been consistently logged onto distance learning.

The U.S. Department of Education has explained that if a local education agency (LEA) continued to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. LEAs were required to "ensure that, to the greatest extent possible, each student with a disability [could] be provided the special education and related services identified in the student's IEP developed under IDEA . . . ." See U.S. Department of Education (DOE), *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, p. 2 (March 2020)

Albeit, School A did not make services available to Student to the same extent that they would have been available to Student had Student engaged in-person learning, the evidence demonstrates that during the school week from 9:00 a.m. to 4:00 p.m. daily, four days per week, School A made instruction and services available to Student. In addition, one day per week, School A made tutoring available to Student during the school day. Based upon the evidence presented, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence of a material failure to implement substantial or significant provisions of Student's IEP during the Covid-19 in-school closure and resulting distance learning. Therefore, the IHO concludes there was not denial of a FAPE to Student in this regard.

**ISSUE 3:** Did Respondent deny Student a FAPE by during SY 2019-2020 and SY 2020-2021 by denying Petitioner an opportunity to meaningfully participate?

**Conclusion:** Petitioner did not sustain the burden of persuasion by the preponderance of the evidence on this issue.

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and 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." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (*quoting A.J. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allow parents to seek a review of IEP decisions they disagree with. *See Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (*quoting Gill v. Columbia* 93 Sch. Dist., 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...<sup>8</sup>

Petitioner alleges that she was not informed that (a) Student had a right to receive new evaluations after Student failed to meet IEP goals during SY 2019-2020 and SY 2020-2021 to address significant academic concerns, or (b) the right to request independent educational evaluations if she disagreed with evaluations of Student already completed by Respondent, or (c) or the right to request a functional behavior assessment and behavioral intervention plan to address Student's significant anxiety related behavioral concerns, and (d) she was not informed that Student's IEPs were defectively impeding her ability to advocate for Student.

The evidence demonstrates that in March 2019, and again in March 2021, School A provided Petitioner, and Petitioner signed for and acknowledged receiving, the IDEA procedural safeguards that informed Petitioner in complete detail of her rights regarding her child's education pursuant to IDEA and the obligations of the LEA. In addition, the evidence

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<sup>8</sup> *Woodson, et al., v. District of Columbia*, 119 LRP 28316



demonstrations with regard to the actions that School A took regarding Student's special education, School A routinely issued PWNs to Petitioner. The IHO takes judicial notice that procedural safeguards clearly delineate parents' rights and the LEA obligations pursuant to IDEA.

Based upon the evidence that School A provided Petitioner the procedural safeguards, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence, relative to this issue. There was insufficient evidence that School A engaged in any procedural inadequacies that impeded Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits.

### **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 IHO has concluded that School A denied Student a FAPE in failing to provide Student an appropriate IEP on April 15, 2020, and has directed in the order below that School A 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.

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.)

Petitioner presented two expert witnesses to attest to the compensatory education for Student. The witnesses varied greatly in the amount and type of services that they recommended to remedy the alleged denials of FAPE. Both proposed to remedy alleged denials of FAPE that included a school year that preceded the statute of limitations period. In addition, they proposed to remedy denials of FAPE that the IHO did conclude had been proved. However, both witness proposed that Student be provided independent academic tutoring in math, reading, and written expression. Based upon their testimony, the IHO concludes that Student would benefit from independent academic tutoring and the IHO has reduced the amount of tutoring awarded to coincide for the denial of FAPE that was determined herein.

**ORDER:** <sup>9</sup>

1. Within fifteen (15) business days of the date of this order, School A shall provide Petitioner written authorization to obtain an 150 hours of independent academic tutoring at the OSSE prescribed rate.
2. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

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

/S/ *Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: April 24, 2022**

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<sup>9</sup>Respondent'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.