

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
1050 First Street, NE
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

<p>Parent on Behalf Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2020-0172</p> <p>Date Issued: December 23, 2020</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: December 7, 2020, December 8, 2020, December 11, 2020</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	--

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, December 23, 2020, 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 parent (“Petitioner”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is a currently age ___² and has been found eligible for special education pursuant to IDEA with a disability classification of Specific Learning Disability (“SLD”). Student currently attends a DCPS school (“School A”). During school year (“SY”) 2019-2020, School A developed an individualized education program (“IEP”) for Student dated April 14, 2020. Petitioner, along with her attorney and educational advocate participated in the IEP meeting. During the meeting Petitioner, through her attorney, requested changes to Student’s IEP including increased hours of specialized instruction, additional IEP goals, behavior support services (“BSS”) and extended school year (“ESY”). The team did not grant to the requested changes in the IEP.

At the time of the IEP meeting, and for the remainder of SY 2019-2020, because of the Covid emergency, DCPS used a distance learning platform for all students including Student. Student initially did not have an electronic device to access distance learning, but as of the day of the April IEP meeting, DCPS provided Student a device. Student did not attend ESY during summer 2020. Prior to the start of SY 2020-2021 Petitioner, through her representative, requested a meeting with School A staff to discuss her concerns about Student’s difficulties during distance learning.

From the start of SY 2020-2021 to date, DCPS has continued distance learning for its students, including Student. The length of the school week, hours of instruction and teaching methodologies have been altered from the normal in-person school day. School A has developed an Individual Distance Learning Plan (“IDL”) for Student. However, according to DCPS representations, the IDL is not intended to supplant Student’s IEP or serve as the method by which the IEP is implemented.

From the start of SY 2020-2021 to date, Student has had sporadic participation in the distance learning, for both general education and special education instruction. School A convened a meeting in September 2020 which Petitioner attended along with her representatives. Petitioner reiterated her requests for changes to Student’s IEP. However, School A did not agree to any changes in Student’s IEP.

² Student’s age and grade are listed in Appendix B.

Petitioner filed her due process complaint against DCPS on September 28, 2020, alleging DCPS denied Student a free appropriate public education (“FAPE”) by failing provide Student with an appropriate IEP on April 14, 2020, and/or failed to revise that IEP as appropriate to enable Student to access Student’s education through the virtual platform currently in place as a result of Covid-19 restrictions, by not to fully implementing Student’s IEP, and by failing to provide the full extent of specialized instruction during periods of distance learning.

In November 2020, School A convened an IEP meeting for Student and Student’s IEP was reviewed and revised. However, the November 2020 IEP is not the subject of this due process hearing.

Relief Sought:

Petitioner seeks as relief a finding that Student has been denied a FAPE and that DCPS be ordered to amend Student’s IEP to provide 120 minutes of BSS per month, goals to address Student’s attention, executive functioning, increase specialized instruction by 5 additional hours per week outside general education to address Student’s deficits in writing, and 5 hours of specialized instruction in mathematics outside general education instead of inside general education during periods of virtual instruction. Petitioner asserts that this instruction could be reduced to 10 hours of “push in” instruction inside general education for math and writing when in-person instruction resumes.

LEA Response to the Complaint:

The LEA filed a response to the complaint on October 9, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

On April 14, 2020, the multidisciplinary team (“MDT”) including parent convened to review and revise Student’s IEP. The IEP requires 60 minutes per day of specialized instruction in mathematics inside general education and 60 minutes per day of specialized instruction in reading outside general education. 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 to provide additional response to the District’s 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 the education of DCPS students. The adjusted calendar provides for a shift in DCPS’ Spring Break to Tuesday, March 17 through Monday, March 23, 2020 and distance learning from March 24 through Tuesday March 31, 2020. On April 17, 2020 the Mayor of the District of Columbia announced 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.

The United States of the Department of Education Guidance informs that a Local Education Agency can create distance learning plans for special education students but are not required to do so. Pursuant to this guidance, DCPS developed an individualized distance learning addendum, created by the special education teachers in collaboration with parents to help apply each student's IEP during virtual learning.

Student has received specialized instruction as outlined in Student's individual distance learning plan ("IDL"), through the virtual platform, to the extent practicable under the current health emergency which prevents schools from providing in person instruction. DCPS has not failed to implement Student's IEP. Student is making appropriate academic progress. Respondent requests that the Hearing Officer deny Petitioner's request for relief.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on October 14, 2020, 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 October 4, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on December 12, 2020.

Respondent's counsel filed a motion to continue and to extend the HOD due date to accommodate the selected hearing dates. The motion was granted and the HOD is now due December 23, 2020.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on October 27, 2020, and issued a pre-hearing order ("PHO") on November 3, 2020, and a revised PHO November 19, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on or about April 14, 2020, and/or failed to revise that IEP as appropriate to enable Student to access Student's education through the virtual platform currently in place as a result of Covid-19 restrictions.³

³ Petitioner contends that Student's IEP developed on or about April 14, 2020, was not appropriate in that it failed to provide Student with sufficient specialized instruction and/or a separate goal section to address Student's deficits in written expression and to provide Student with any supports to address Student's deficits in attention and executive functioning. Petitioner also asserts DCPS failed to appropriately consider Student's need for ESY services for the 2020 summer. Petitioner contends that despite the difficulties Student was having with accessing the distance learning, DCPS has refused to make any changes to Student's program to enable Student to access the curriculum through the video platform in place as a result of Covid-19 Restrictions.

2. Whether the DCPS failed to fully implement Student's IEP by failing to provide the full extent of specialized instruction during periods of Distance Learning. ⁴

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on December 7, 2020, and December 8, 2020. The parties presented oral closing arguments on December 11, 2020.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 59 and Respondent's Exhibits 1 through 22) that were admitted into the record and are listed in Appendix A.⁵ Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

Petitioner held the burden of production on both issues adjudicated and the burden of persuasion on issue #2. The burden of persuasion will fall to Respondent on issue #1 once Petitioner established a prima facie case on issue # 1.

The Hearing Officer concludes, based on the evidence adduced, that Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #2. Having found a denial of FAPE to Student, the Hearing Officer granted Petitioner's authorization to for an independent educational evaluation ("IEE") to determine the appropriate amount of compensatory education that Student is due for the missed specialized instruction.

⁴ Petitioner asserts that DCPS failed to fully implement Student's IEP during periods of distance learning by failing to provide Student with the full extent of specialized instruction required by Student's IEP. Petitioner asserts that Student is not receiving specialized instruction within the general classroom setting and is only receiving a fraction of the specialized instruction outside the general education setting that the IEP requires.

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner presented four witnesses: (1) Petitioner's Educational Advocate who testified as an expert witness and who is an employed by the law firm representing Petitioner, (2) Petitioner's other Educational Advocate who testified as an expert witness in Psychology, and who is an employed by the law firm representing Petitioner, (3) Student's Godmother who assisted Student at times during distance learning, and (4) Petitioner. DCPS presented three witnesses all of whom testified as expert witnesses: (1) a DCPS Psychologist, (2) Student's School A Special Education Teacher, (3) Student's School A General Education Teacher. 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.

FINDINGS OF FACT:⁷

1. Student resides with Petitioner in the District of Columbia and DCPS is Student's LEA. Student has been found eligible for special education and related services pursuant to IDEA with a disability classification of SLD. Student currently attends School A and addended School A during SY 2018-2019. (Petitioner's Exhibit 14-1)
2. On March 15, 2019, DCPS conducted a psychological reevaluation as part of a triennial re-evaluation review. The evaluator assessed Student's cognitive and academic functioning, conducted a classroom observation and interviews with Student, and Student's parent and teacher. Student's cognitive functioning was in the Average range with a full-scale IQ of 107. Student's academic performance was well below grade level in Broad Reading and Broad Written Language. Student was preforming on grade level in math. The evaluator noted that Student was struggling with skills such as writing concrete sentences. With regard to Student's behavior, the evaluator noted that Student can become mean, but did not act out; instead Student would tell other students to do so. Student was well behaved at home. The evaluator did not conduct any behavior assessments, but observed Student's behaviors in the classroom, during which Student was focused and engaged. But on some educational exercises Student was unsure of what to do and appeared to lack confidence. (Petitioner's Exhibits 4, 17)
3. During SY 2018-2019 Student had a disability classification of Developmental Delay and an IEP developed on June 4, 2019. That IEP prescribed the following services: 45 minutes per day of specialized instruction in math in general education and 45 minutes per day of specialized instruction in reading outside general education. The IEP had goals in math and reading. (Petitioner's Exhibit 4)
4. Student's IEP progress report stated that Student was progressing on IEP math and reading goals in the first and second reporting periods of SY 2019-2020, including the reading goal that addressed writing through completing sentences when given a sentence stem. (Petitioner's Exhibits 25, 26)
5. Student's SY 2019-2020 report card reflects that Student was "Below Basic" in reading and writing and language and "Basic" in math for the first term and progressed to "Basic" in reading and writing and language in the second term. Student rarely displayed appropriate work habits and social skills during the first term, but improved in these areas during the second term. (Petitioner's Exhibit 27)
6. Student's Middle of Year ("MOY") reading assessment during SY 2019-2020, demonstrated improvement from the Beginning of Year ("BOY") assessment and was at

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. The second number following the exhibit number 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.

or above the goal level or “Benchmark” for all of the nine areas of reading assessed, except Reading Fluency and Reading Comprehension. Student’s Decoding was above benchmark and Student’s Word Reading and Reading Accuracy were at benchmark. There was no End of Year (“EOY”) assessment because of the Covid school closure. (Petitioner’s Exhibit 28)

7. On March 11, 2020, the Mayor of the District of Columbia declared a state of emergency and public health emergency to provide additional response to the District’s 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. (Hearing Officer takes Administrative Notice)
8. 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 the education of DCPS students. The adjusted calendar provided for a shift in DCPS’ spring break to March 17 through March 23, 2020, and distance learning from March 24 through March 31, 2020. On April 17, 2020, the Mayor of the District of Columbia announced DCPS students would continue distance learning until the end of the school year on May 29, 2020. (Hearing Officer takes Administrative Notice)
9. School A updated Student’s IEP on April 14, 2020. Petitioner, along with her attorney and educational advocate participated in the IEP meeting. During the meeting Petitioner requested changes to Student’s IEP including that Student’s writing goals be separated from the reading goals, that Student have instruction and goals in written expression, increased specialized instruction, BSS and ESY. The IEP team did not grant all Petitioner’s requested changes. Student’s specialized instruction was increased to 60 minutes per day in math inside general education and 60 minutes per day in reading outside general education. However, the School A team members did not agree to give student separate goals and specialized instruction in written expression, or to prescribe BSS or ESY. (Petitioner’s Exhibits 6, 8)
10. The Present Levels of Performance (“PLOP”) or math in Student’s April 14, 2020, IEP cited Student January 14, 2020, i-Ready Math assessment. Student’s PLOP for math in the IEP stated that Student was operating one grade level behind in number operations, but two grade levels below in algebraic thinking and measurement and data. Student’s PLOP in reading stated that Student was above average in all areas assessed except oral reading fluency and reading comprehension. Of Student’s 4 reading goals, one goal addressed sentence writing. (Petitioner’s Exhibit 6)
11. The special education teacher did not agree that Student’s writing goals needed to be separated from reading goals because the skills in her opinion could be better addressed together. Student did not need math instruction outside general education because Student was able to engage in math instruction in small group instruction within general education with general education peers. (Witness 4’s testimony)

12. At the time of the April 14, 2020, IEP meeting, and for the remainder of SY 2019-2020, DCPS moved to a distance learning platform for all students including Student. Student initially did not have an electronic device to access distance learning but as of the April 14, 2020, IEP meeting DCPS provided Student a device. Student did not attend ESY during summer 2020. (Petitioner's Exhibit 8)
13. Although Student was provided a laptop computer on April 14, 2020, from then to the end of SY 2019-2020 Student did not attend distance learning at all. Student's special education teacher called Petitioner and sent emails in attempts to get Student to join the live lessons of distance learning to no avail. (Witness 4's testimony)
14. On July 27, 2020, Petitioner's educational advocate sent a letter of dissent to School A stating that Petitioner disagreed with the team decisions at the April 14, 2020, IEP meeting that Student did not need ESY services, and noted that Petitioner wanted Student to have written expression goals separate from reading goals, more specialized instruction with "push-in services for writing, and adult support for distance learning. The letter also requested a meeting with School A staff to discuss Petitioner's concerns about Student's difficulties accessing Student's education through distance learning. (Petitioner's Exhibit 38)
15. On July 30, 2020, the Mayor of the District of Columbia announced that DCPS would be all virtual for the first term (August 31, 2020 – November 6, 2020) of SY 2020-2021. (Hearing Officer takes Administrative Notice)
16. The United States of the Department of Education Guidance informs that a Local Education Agency can create distance learning plans for special education students but are not required to do so. Pursuant to this guidance, DCPS developed individualized distance learning addendums, created by the special education teachers in collaboration with parents to help apply each student's IEP during virtual learning. (Hearing Officer takes Administrative Notice)
17. Student's SY 2020-2021 BOY reading assessment demonstrated that Student remained at benchmark in most areas except Letter Sounds and Decoding and remained below benchmark in Reading Comprehension. Student remained at benchmark in Word Reading and Reading Accuracy and was also at benchmark for Reading Fluency. (Petitioner's Exhibit 29)
18. School A convened a meeting with Petitioner and her representative on September 22, 2020. During that meeting School A did not agree to discuss making any changes to Student's IEP. Petitioner's educational advocate noted in a dissent letter following the meeting that Student was struggling with distance learning, having difficulty sustaining attention, needed modified assignments and increased specialized instruction outside general education and one-to-one assistance from a social worker to ensure Student stays engaged. The letter also noted that there were additional evaluations discussed and DCPS agreed to conduct. (Petitioner's Exhibit 48)

19. On September 23, 2020, School A had a meeting with Petitioner without representation, in which the school staff reviewed with Petitioner Student's IDLP. Student has received specialized instruction as outlined in Student's IDLP through the virtual platform, to the extent practicable under the current health emergency which prevents schools from providing in person instruction. (Witness 4's testimony, Witness 5's testimony, Petitioner's Exhibit 46)
20. From the start of 2020-2021 to date, DCPS has continued distance learning for its students, including Student. The length of the school week, hours of instruction and teaching methodologies and been altered from the normal in-person school day. From the start of SY 2020-2021 to date, Student has had sporadic participation in the distance learning both general education and special education instruction. (Witness 4 testimony, Witness 5's testimony)
21. Student is with Student's godmother on the weekends and sometimes during weekdays during school hours. She assists Student during the distance learning and she has noticed that Student gets distracted quickly and cannot keep up with the class and needs more time to complete assignments. Student does not like to show Student's face on the camera and shuts down when Student doesn't understand the work. Student writes slowly and that is what takes most of Student's time. Student is usually able to do the work, but if the work is being timed, Student is going to be way behind. Student's has most difficulty with whole group instruction. Student's godmother has reached out to Student's teacher multiple times regarding Student's difficulties with distance learning. When Student is with the special education teacher with no other students, Student does not mind having the camera on. Student does seem to be proficient in the individual learning platforms. (Witness 2's testimony)
22. During distance learning Petitioner has been speaking with Student's teachers often. At the start of distance learning, Student ■ did not have an electronic device. When Student shuts down, Student may turn off the computer, get up and walk away, sometimes for the rest of the school day. If Student doesn't understand the material Student will shut down. A lot of time Petitioner logged Student into the distance learning platform but Student did not participate. Student would turn the computer off and the teacher would call Petitioner to ask that she help Student. (Petitioner's testimony)
23. At the beginning of distance learning School A was using educational packets which needed to be picked up from School A. Petitioner picked up the packets and worked with Student on completing them, but there was so many, and Student found them to be difficult to complete. Student could only complete a limited amount without directions from an adult. Petitioner believes Student needs one to one support and struggles with writing and needs counseling and a tutor. Petitioner cannot sit with Student throughout the school day during distance learning. (Petitioner's testimony)
24. School A offered Petitioner an seat in a classroom at School A where Student would have adult supervision during distance learning. Because Petitioner did not have sufficient information about the safety protocols of the classroom, she did not agree for Student to

attend. From what Petitioner was told by School A, in that classroom, there would be up to ten students and someone to assist Student, but the instruction would still be online. (Petitioner's testimony)

25. Prior to the Covid-19, Student's special education teacher was gearing up to have Student test out of some areas of special education instruction because of Student's academic progress during SY 2019-2020. When Student tested at the beginning of SY 2020-2021, Student did not regress and was performing generally at the level Student was operating in April 2020. Student's special education teacher disagreed that ESY was needed because of Student's performance. (Witness 4's testimony)
26. Prior to March 2020, Student was in school, on time, very inquisitive, asked questions, and would help other students when Student understood the material. Student's attention and organization skills were rarely a problem during in-person instruction. Student usually came to class prepared knowing what was expected. (Witness 4's testimony)
27. During distance learning, the special education teacher provided Student one hour per day in reading and math because Student was making adequate gains and any more time Student would be taken away from peers. The special education teacher wanted Student to be exposed to grade level material, particularly during the distance learning. (Witness 4's testimony)
28. Student's general education teacher meets weekly with Student's special education teacher and participated in Student's IEP meetings. She has 16 students total in her classroom. In her classroom she using whole group and small group instruction to hone into students' deficits. She is familiar with Student's IEP goals and provides modified instruction to address Student's deficits. During distance learning she makes the instruction interactive and as exciting as possible. More of the substance is presented in the morning, from 8:45 a.m. to 12:30.p.m. During distance learning, the longest a student will sit working individually is usually is 7 minutes. Parents' involvement varies from student to student. The majority of the students are familiar with the technology and can engage with the video learning. Usually a parent is called to assist when there is a technical issue. (Witness 5's testimony)
29. In November 2020, School A convened an IEP meeting for Student and Student's IEP was reviewed and revised. However, the November 2020 IEP is not the subject of this due process hearing. (Petitioner's Exhibit 12, 13, 14)

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). In this case, Petitioner held the burden of persuasion on issue #2 and Respondent held the burden of persuasion on issue #1 after Petitioner presented a prima facie case. 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).

Issue 1: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on or about April 14, 2020, and/or failed to revise that IEP as appropriate to enable Student to access Student's education through the virtual platform currently in place as a result of Covid-19 restrictions.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

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.

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "child with a disability" is defined by statute as a child with intellectual disabilities, physical impairments, or serious emotional disturbance "who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A). The District is required to enact policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including ... children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* § 1412(a)(3)(A).

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 contends that Student’s IEP developed on or about April 14, 2020, was not appropriate in that it failed to provide Student with sufficient specialized instruction and/or a separate goal section to address Student’s deficits in written expression, and failed to provide Student with any supports to address Student’s deficits in attention and with executive functioning. Petitioner asserts DCPS failed to appropriately consider Student’s need for ESY services for summer 2020. Petitioner also asserts that despite the difficulties Student was having with accessing distance learning, DCPS has refused to make any changes to Student’s program to enable Student to access the curriculum through the video platform in place as a result of Covid-19 Restrictions.

The facts in this case demonstrate that when Student’s April 14, 2020, IEP was developed, DCPS has recently moved to distance learning. Prior to the distance learning, as Student’s special education teacher credibly testified, Student did not have any behavior difficulties that would have warranted Student needing BSS; Student was generally focused and engaged in instruction.

In addition, the special education teacher credibly testified that there was a reasonable basis for Student’s writing skill development to be included in Student’s reading goals and that no additional instruction was warranted in the area of writing. Although Petitioner presented witnesses who testified otherwise, those witnesses who are educational advocates had not observed Student in the classroom or otherwise conferred with Student’s teachers other than in an IEP meeting.

In addition, although Student’s academic assessments indicate Student has some deficits in writing, the Student’s IEP progress reports indicate that Student was making progress in the writing elements of the reading goals. The Hearing Officer finds Petitioner’s witnesses testimony unconvincing. These witnesses lacked direct classroom interaction with Student and their opinions did not supplant the teaching approach and methodologies employed by Student’s teachers to address Student’s writing needs.

In addition, the Student's teachers' testimony and well as Student's performance in most of the areas of math, provide convincing proof that Student's math instruction was sufficient and was appropriately addressed within the general education setting.

Petitioner asserts that Student's demonstrated difficulty with distance learning should have warranted School A amending Student's IEP prior to the initiation of Petitioner's due process complaint to add additional services to address Student's frustration with, and lack of participation in, distance learning. The evidence demonstrates that School A offered an in-school classroom where Student could participate in distance learning. Although it is unclear from the record exactly when that offer was made, Petitioner was understandably cautious about sending Student to School A given the current Covid emergency. Nonetheless, the evidence demonstrates that DCPS and School A offered Student a reasonable variation of special education and general education programming through the distance learning program that was a good faith effort to provide a significant amount of the specialized instruction that Student was due to receive through Student's IEP.

Given the extreme nature of the novel conditions that the Covid emergency has thrust upon students, parents, teachers, and schools, in the Hearing Officer's opinion, School A made good faith and repeated efforts to provide Student special education and general education services.

There was an insufficient basis prior to the filing of Petitioner's due process complaint for School A to have amended Student's IEP to address Student's lack of consistent participation in distance learning. Hopefully, however, the November 2020 meeting that the parties participated in resulted in a strategies that will significantly increase Student's school participation. At bottom, Respondent sustained the burden of proof that that Student's April 14, 2020, IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and there was no denial of FAPE to Student in DCPS not amending Student's IEP to account for distance learning.

Issue 2: Whether the DCPS failed to fully implement Student's IEP by failing to provide the full extent of [REDACTED] specialized instruction during periods of Distance Learning.

Conclusion: Petitioner sustained the burden of persuasion by a 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).

Petitioner asserts that DCPS failed to fully implement Student's IEP during periods of distance learning by failing to provide Student with the full extent of specialized instruction required by Student's IEP. Petitioner asserts that Student is not receiving specialized instruction within the general classroom setting and is only receiving a fraction of the specialized instruction outside the general education setting that the IEP requires.

The evidence in this case demonstrates that Student is due to receive 60 minutes per day of specialized instruction in the general education setting and one hour per day in the general education setting. Although Student's general education teacher noted that she confers with Student's special education teacher weekly, there was no indication that the special education teacher is actually delivering specialized instruction to Student in the general education setting during distance learning, or that the special education teacher has increased Student's specialized instruction outside general education to account for the additional 60 minutes of specialized instruction that Student has apparently been missing since the start of SY 2020-2021 under distance learning.

Student's special education teacher testified that she only makes 60 minutes per day of specialized instruction in reading and math available to Student per day. This amounts to half the specialized instruction that Student is due to receive. The Hearing Officer concludes that a Student's missing half of the IEP services, even in a challenging distance learning environment, is significant and far from de minimus. Thus, the Hearing Officer concludes that Petitioner sustained the burden of persuasion on this issue and that Student was thus denied a FAPE.

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.

In the current hearing, Petitioner presented a request for compensatory education that included requests for denials of FAPE that were not proved. In addition, the testimony offered about

compensatory education was unconvincing as it related to missed services. Consequently, the evidence presented as compensatory education in this case is difficult to discern. The Hearing Office concludes there is insufficient evidence from which to make a compensatory education award. As a result, the Hearing Officer grants Petitioner authorization to obtain an independent educational evaluation for the purpose of determining compensatory education for the denial of FAPE determined herein.

ORDER:⁹

1. Petitioner claims as to the inappropriateness of Student’s IEP and/or the DCPS’ alleged failure to amend Student’s IEP for distance learning are dismissed with prejudice.
2. DCPS shall, within ten (10) business days, of the date of this order grant Petitioner authorization to obtain an independent educational evaluation (“IEE”) at the OSSE prescribed rate for the purpose of determining compensatory education for the denial of FAPE determined in this HOD.
3. Petitioner is authorized to pursue compensatory education pursuant to this HOD in a subsequent due process complaint, if need be, after presenting the IEE referenced above to DCPS for a determination of appropriate compensatory education.
4. 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: December 23, 2020

Copies to: Counsel for Petitioners
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
contact.resolution@dc.gov

⁹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.