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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 # 2020-0183</p> <p>Date Issued: December 30, 2020</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: December 14, 2020, December 15, 2020,</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information. The HOD issuance date, December 30, 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 and related services pursuant to IDEA with a disability classification of Multiple Disabilities (“MD”) including Specific Learning Disability (“SLD”) and Other Health Impairment (“OHI”). Student currently attends a DCPS school (“School A”). Student’s educational placement has been a self-contained special education program at School A since school year (“SY”) 2016-2017. School A developed Student’s most recent individualized education program (“IEP”) on February 28, 2020.

Starting in March 2020 and for the remainder of SY 2019-2020, because of the Covid emergency, DCPS used a distance learning platform for all students including Student. From the start of SY 2020-2021 to date, DCPS has continued distance learning for its students, including Student.

Petitioner filed her due process complaint against DCPS on October 16, 2020, alleging DCPS denied Student a free appropriate public education (“FAPE”) by failing provide Student with an appropriate IEP, and/or through DCPS’ distance learning program that has been delivered to Student during SY 2020-2021 as a result of Covid-19 restrictions.

Relief Sought:

Petitioner seeks as relief that DCPS be ordered to place and fund Student at a nonpublic special education day school for the remainder of SY 2020-2021.

LEA Response to the Complaint:

The LEA filed a response to the complaint on October 26, 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:

Student is enrolled and virtually attending School A for SY 2020-2021. Student also attended School A during SY 2018-2019 and SY 2019-2020. DCPS asserts the Student’s current IEP, dated February 28, 2020, prescribes 20 hours per week of specialized instruction outside general

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

education, 60 minutes per month of occupational therapy outside general education, 30 minutes per month of behavioral support service consultation, classroom and statewide assessment accommodations, and a post-secondary transition plan. Student's current IEP and placement are reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas County School Dt. RE-1*, 2017 WL 1066260 (U.S. Mar. 22, 2017).

DCPS asserts as of March 16, 2020, due to the Covid-19 pandemic, all instruction for DCPS students has been and remains virtual. Issues regarding the number of hours of specialized instruction and/or placement are no longer an issue in the virtual environment. The United States Department of Education Guidance informs that an LEA can create distance learning plans for special education students but are not required to do so. <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>.

An individualized distance learning plan ("IDLP") was developed for the Student by which Student receives specialized instruction and related services virtually. In addition, DCPS has established Student Support Centers as a volunteer service to provide students with additional academic support during distance learning. Student has only taken advantage of this additional support on one occasion. DCPS asserts the Student has made and continues to make academic progress as measured by Student's academic performance. There are several community-based reasons as to why Student's formal assessment scores have varied. DCPS denies a failure to provide an appropriate educational program and placement for SY 2020-2021 and there no issue of a denial of a FAPE during distance learning under the IDEA. Therefore, Petitioner's request for relief is unwarranted and the complaint should be dismissed with prejudice.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on October 23, 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 November 16, 2020, and ends [and the Hearing Officer's Determination ("HOD") is due] on December 30, 2020.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on November 23, 2020, and issued a pre-hearing order ("PHO") on November 24, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:

1. Whether DCPS denied Student a FAPE by failing to propose an appropriate educational program and placement for SY 2020-2021.
2. Whether DCPS denied Student a FAPE during SY 2020-2021 through its distance learning program.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on December 14, 2020, and December 15, 2020. The parties presented oral closing arguments on December 15, 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 29 and Respondent's Exhibits pages 1 through 126) that were admitted into the record and are listed in Appendix A.³ Witnesses' identifying information is in Appendix B.⁴

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 fell 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 did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #2. Having found a denial of FAPE to Student, the Hearing Officer directs DCPS to amend Student's IEP to prescribe a program and placement totally removed from general education and to make referrals for Student to, and to place Student at, a non-public special education day school for the remainder of SY 2020-2021.

³ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁴ Petitioner presented two witnesses: (1) Student's Mentor, and (2) an Educational Consultant who testified as an expert witness. DCPS presented one witness: a DCPS Psychologist who testified as an expert witness. 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:⁵

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 an MD disability classification, including SLD and OHI. Student currently attends School A. Student's educational placement has been a self-contained special education program at School A since school year SY 2015-2016. School A developed Student's most recent IEP on February 28, 2020. (Petitioner's Exhibits 6, 16)
2. In September 2011, a comprehensive psychological re-evaluation was conducted of Student that included administering the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV"). Student's Full-Scale IQ was found to be in the Borderline Range of functioning with a score of 75. The evaluator diagnosed Student with Expressive Language Disorder, Developmental Coordination Disorder, and learning disorders in Reading, Written Expression, and Math. (Petitioner's Exhibit 2)
3. There had been some decline in Student's cognitive scores since Student's previous evaluation in 2007 and the evaluator noted that, "research has indicated that cognitive abilities can decline without appropriate support for developmental and growth," suggesting that Student's educational program may have not been appropriate. (Petitioner's Exhibit 2)
4. In March 2017, DCPS completed speech/language and occupational therapy ("OT") evaluations as part of its triennial evaluations. A speech language therapist found that Student's expressive and receptive language fell in the Average and Borderline range, respectively, and therefore did not negatively impact Student's academic progress. An OT evaluator found that Student presented with very low visual-motor integration skills and low performance in motor coordination. However, the OT evaluator found that Student's primary challenge was the ability to sustain attending skills to participate and remain on task with classroom routines. The evaluator noted that Student was motivated by good grades and was putting forth Student's best effort within Student's academic setting. (Petitioner's Exhibits 4, 5)
5. On April 13, 2017, School A updated Student's IEP. The IEP noted that Student had made improvements in math and reading but was still functioning significantly below grade level. The IEP continued to provide twenty hours per week of specialized instruction in School A's self-contained classroom and 120 minutes of OT per month. (Petitioner's Exhibit 6)

⁵ 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.

6. In November 2017, Student's IEP progress report indicated that five of the fourteen IEP goals had not yet been introduced and Student was progressing on the remaining goals. (Petitioner's Exhibit 10)
7. In March 2019, School A again updated Student's IEP. The IEP noted that Student had made little or no progress in math and reading from Student's grade level functioning in the March 2017 IEP. Student's math and reading scores on the standardized testing that School A administered demonstrated Student had made little, if any, progress in math and reading. Despite the lack of progress, the School A team continued to the same program for Student: 20 hours per week of instruction in School A's self-contained program. (Petitioner's Exhibits 11-3, 11-5, 12-1, 12-4, 12-5, 12-10).
8. An IEP progress report from November 2019 indicated that six of Student's twelve IEP goals had not yet been introduced and Student was "progressing" on the remaining six. (Petitioner's Exhibit 13)
9. In February 2020, Student engaged in self-harm cutting behaviors and was hospitalized. Because of Student's self-harm and apparent poor academic progress, Petitioner invited Student's mentor to join her at Student's IEP meeting on February 28, 2020. Although Student's recent report cards reflect As and Bs, Student's written work often contains misspelled words and transposed letters. In response to a question by the mentor to the team as to what grade level Student was operating, the team stated Student was reading at the 3rd to 5th grade level and operating in math at the 5th grade level, which is significantly below Student's current grade. Despite Student having made little if any academic progress since being in the School A self-contained program, the IEP team made no changes to Student's level of services and programming. (Witness 1's testimony, Petitioner's Exhibits 14, 16)
10. On March 2, 2020, DCPS completed a psychological evaluation as part of Student's triennial assessments. The evaluator did not assess Student's cognitive functioning. DCPS administered the Woodcock Johnson Test of Achievement- Fourth Edition ("WJ-IV"). Student received a standard score of 50 on the Broad Reading Skills Cluster, which placed Student in the <0.1 percentile or the Extremely Low Range. Student also scored in the Extremely Low Range on the Broad Mathematics Cluster. Student performed slightly better on the Broad Written Language Cluster with a standard score of 80, placing Student in the Below Average Range. (Petitioner's Exhibit 17)
11. Student demonstrated significant regression in reading, dropping almost four standard deviations in some areas. Student made modest improvements on some writing subtests, but still remained almost three grade levels below peers. Also, as part of the psychological evaluation, Student's mother and special education teacher at School A completed the Connors-3 rating scales to assess Student's attention and behavioral functioning. Elevated scores were noted in the areas of inattention, learning problems, defiance/aggression, and peer relations. The DCPS psychologist determined that Student continued to meet the criteria as a student with Multiple Disabilities (SLD and OHI). (Petitioner's Exhibit 17)

12. 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)
13. 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)
14. Starting in March 2020 and for the remainder of SY 2019-2020, because of the Covid emergency, DCPS used a distance learning platform for all students including Student. From the start of SY 2020-2021 to date, DCPS has continued distance learning for its students, including Student. (Hearing Officer Takes Administrative Notice)
15. On March 20, 2020, Petitioner mother, through counsel, wrote to School A expressing her concern about Student's lack of educational progress over the last several years and requested that the school convene an IEP meeting as soon as possible to discuss Student's programming and placement. She requested that DCPS authorize an Independent Educational Evaluation ("IEE"), in order to obtain updated information as to Student's current levels of functioning in all areas including Psychological, Educational, Speech and Language and Occupational Therapy. (Petitioner's Exhibit 20)
16. On May 13, 2020, School A convened a meeting with Petitioner and her attorney at which Petitioner and her attorney expressed concern about Student's lack of academic progress and again requested DCPS' authorization for an IEE. (Respondent's Exhibit pages 118, 119)
17. On June 17, 2020, Petitioner filed a due process complaint alleging DCPS' failure to provide Student with an appropriate program and placement for SY 2019-2020 and SY 2020-2021. Shortly after the filing, DCPS approved the IEE request, and Petitioner withdrew her complaint. (Petitioner's Exhibit 21)
18. 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)
19. The independent psychological evaluation ("IEE") was completed on August 6, 2020. The evaluator found that Student's overall intellectual functioning was consistent with previous 2011 testing, although some individual subtest scores were lower. The evaluator attributed the lower scores to different test demands (WISC-IV vs. WAIS-IV),

a failure to make progress in executive functioning skills, as well as an effect whereby individuals with learning disabilities may see a decrease in scores due to a lack of exposure to advanced content. (Petitioner's Exhibits 22, 23-1, 23-13)

20. The evaluator reconfirmed Student's diagnoses of ADHD, Developmental Coordination Disorder, and Specific Learning Disabilities in reading, math, and written expression. Additionally, she diagnosed Student with an Unspecified Depressive Disorder due to Student's difficulty with emotional regulation, history of self-harm, and elevated concerns related to interpersonal relationships and separation from loved ones. (Petitioner's Exhibit 23-14)
21. The independent evaluator recommended that Student continue to be found eligible for services as a student with MD (OHI and SLD). She also recommended that due to Student's learning, fine motor, attention, and social/emotional needs, Student requires placement in a small classroom setting with a high level of structure and low student to teacher ratio. The evaluator stated, "this more restrictive placement will provide [Student] with the interventions, differentiation of instruction, and greater opportunity for individualized support that [Student] needs in order to benefit from instruction and access the curriculum." On August 20, 2020, a DCPS psychologist completed a review of the IEE. (Petitioner's Exhibits 23-15, 24)
22. On September 11, 2020, DCPS convened a meeting to review the IEE and reconvened the meeting on October 13, 2020. The team reviewed the report and expressed no disagreements with the IEE findings. Petitioner and her representatives again raised concerns about Student's lack of academic progress. The School A staff stated that Student had been making progress, both academically and socially. When pressed for data to support their findings, the school staff were only able to point to the fact Student was consistently taking ■■■ medications. Petitioner and her representatives expressed their beliefs that Student was not making appropriate progress in school and that Student required a more intensive placement. The team continued to disagree. (Witness 2's testimony, Witness 3's testimony, Respondent's Exhibit page 116)
23. 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, Respondent's Exhibit page 8)
24. At the start of the Covid school closure, School A provided Student pages of the handouts for Student to complete at home. Student's mentor assisted Student in completing some of this work. For a single class the handout was as many as 60 pages of material. With the mentors help, Student was only able to complete 4 of the 60 pages within an hour. Student could not complete the work simply by reading the directions. Student did not know how to do the ratios and percentages. The work appeared to the mentor to be grade level work for Student but the work was in no way modified to account for

Student's academic deficits. The mentor has done no work with Student during distance learning in SY 2020-2021. (Witness 1's testimony,)

25. Student initially went into School A for the distance learning a few days a week at the start of SY 2020-2021, but Student informed the mentor there was no teacher to assist Student there. Student stopped going to School A for the distance learning and continued exclusively from home. (Witness 1's testimony,)
26. Students with IEPs have an individual distance learning plan to make sure they stay engaged and make the same level of progress. School A staff have observed Student during distance learning classes and observed that Student is consistently engaged and involved. (Witness 3's testimony, Respondent's Exhibit pages 8, 27)
27. Student's mentor assisted Petitioner is looking at three separate special education day schools that Student might possibly attend. Petitioner has submitted applications on behalf of Student to these three schools. Although it appears that Student is a good candidate for all three schools, Student has not yet been accepted to any of the three and at least one school has noted that Student's admission was conditioned upon DCPS placing Student at the school. (Witness 1's testimony)
28. Petitioner engaged the services of an educational consultant who testified as an expert witness and who reviewed Student's evaluations and educational records. He also participated the meetings for Student at School A in September and October 2020. The consultant has met Student through video conferencing only, and has not observed Student during distance learning. The consultant completed a needs analysis of Student's academic strengths and weaknesses. In reviewing Student's March 2020 WJ scores in broad reading, broad math and broad written language, the consultant concluded Student has regressed in reading, and made slight progress in math and written language, but Student's current IEP indicates Student is reading approximately 8 grade levels below Student's current grade. The consultant expressed an opinion that Student requires a more restrictive setting and more intensive programming than Student is currently receiving at School A. (Witness 2's testimony, Petitioner's Exhibit 16)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). Petitioner proceeded first on the day of the hearing and carried the burden of production on both issues adjudicated and the burden of persuasion on issue #2. The burden of persuasion fell to Respondent once Petitioner established a prima facie case on issue #1. ⁶ 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 propose an appropriate educational program and placement for SY 2020-2021.

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

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).

⁶ 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.

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, and the weight of the evidence in this case supports a finding that, Student’s current IEP developed on February 28, 2020, that is in effect for SY 2020-2021, as well as Student’ current program in the self-contained classroom at School A, where Student has been placed for the last few years, has resulted in Student making minimal academic progress and amounts to a denial of a FAPE to Student.

The evidence demonstrates that Student has remained virtually at the same functional academic level in reading and math for the past few years, while DCPS has continued, despite Student’s dismal academic performance and lack of progress, to prescribe the same level of service in Student’s IEP and place Student in the same self-contained special education program. Despite the fact that Student appears to make passing grades, the standardized testing that School A has administered to assess Student’s academic performance reveals that Student has made little, if any, academic progress.

The Hearing Officer finds Petitioner’s witnesses’ testimony convincing and compelling, in light of the academic data that is reflected in Student’s IEP over the past few years, that Student is clearly in need of a more restrictive and intense program to address Student’s lack of academic progress. The Hearing Officer did not find DCPS’ witness’s testimony that Student is making appropriate academic progress believable in the face of clear academic data to the contrary.

As the Court points out in *Andrew*: “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 evidence of this case clearly demonstrates that Student has not, in the current IEP and self-contained program at School A, been provided an appropriately ambitious program that has allowed Student to meet challenging objectives. Consequently, the Hearing Officer concludes that Student’s current IEP and the program at School A in which that IEP is to be implemented has resulted in a denial of a FAPE to Student. a FAPE for Student requires a more restrictive program totally removed from general education in a non-public special education day school. The Hearing Officer in the order below directs DCPS to amend Student’s IEP and place Student in such a program.

Issue 2: Whether DCPS denied Student a FAPE during SY 2020-2021 through its distance learning program.

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

Petitioner's claim in issue #2, that Student has been denied a FAPE as a result of the distance learning School A has provided Student, most closely aligns with an alleged failure to implement claim.

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).

The Hearing Officer, having already concluded that Student was denied a FAPE based on Student's current IEP and prescribed placement in School A's self-contained program, does not conclude that Petitioner has substantiated an additional denial of FAPE because of distance learning provided to Student during SY 2020-2021.

The evidence demonstrates that School A has developed an individual distance learning program for Student that aims at providing Student special education and related services in Student's IEP within reasonable confines of the Covid restrictions and any limitations associated with distance learning.

Although Petitioner's witness testified that the work Student was provided during the initial stages of distance learning during the latter part SY 2019-2020 was difficult for Student to complete even with her help, that witness was not familiar with Student's distance learning during SY 2020-2021, save that Student attended distance learning in person at School A for a short time. On the other hand, the DCPS witness stated that she has observed Student during distance learning classes and student is fully engaged.

Although the specifics of Student's current distance learning schedule was not addressed by the evidence, the evidence demonstrates that DCPS and School A offered Student a reasonable variation of special education programming through the distance learning program that was a good faith effort to provide the specialized instruction and related services that Student's was due to receive during a time when in-person learning is perhaps life threatening.

Given the extreme nature of the novel conditions that the Covid emergency has thrust upon students, parents, teachers, and schools, in the Hearing Officer opinion School A made has good faith efforts to provide Student special education and related services, and Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that Student was denied a FAPE because of the distance learning School A and DCPS has provided Student during SY 2020-2021.

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.

Petitioner has requested as relief that DCPS place and fund Student in one of the non-public schools to which Petitioner has applied. However, none of these schools has yet accepted Student and there was insufficient evidence presented from which the Hearing Officer could conclude that any of the schools mentioned are appropriate for Student and meet the legal standards that the Hearing Officer is to consider in making a placement determination. Consequently, in the order below, the Hearing Officer directs DCPS to take prompt action to amend Student's IEP and determine an appropriate school placement for Student.

ORDER: ⁷

DCPS shall, within 15 business days of the date of this order, amend Student's IEP to prescribe a program and placement totally removed from general education and to make referrals for Student to, and place Student at, a non-pubic special education day school, for the remainder of SY 2020-2021.

All other relief requested by Petitioner is denied.

⁷ 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.

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 30, 2020

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