

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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**Confidential**

<b>Parent on behalf of Student,<sup>1</sup></b>	)	<b>Case No. 2021-0146</b>
	)	
<b>Petitioner.</b>	)	<b>Hearing Date: December 8, 2021</b>
	)	
<b>v.</b>	)	<b>Conducted by Video Conference</b>
	)	
	)	<b>Date Issued: December 20, 2021</b>
<b>District of Columbia Public Schools,</b>	)	
	)	<b>Terry Michael Banks</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of an X-year-old student (“Student”) attending School A. Petitioner filed a Due Process Complaint Notice (“*Complaint*”) on September 17, 2021, alleging that District of Columbia Public Schools (“DCPS”) denied Student at free appropriate public education (“FAPE”) by failing to provide an appropriate Individualized Education Program (“IEP”) and placement. On September 27 2021, DCPS filed *District of Columbia Public School’s Response to Petitioner’s Administrative Due Process Complaint* (“*Response*”), denying that it had denied Student a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

**PROCEDURAL HISTORY**

Petitioner is the mother of an X year-old student who is currently enrolled at School A. On July

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<sup>1</sup> Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

1, 2021, Petitioner filed the *Complaint* alleging that DCPS denied the student a FAPE by failing to provide Student an appropriate IEP on September 17, 2019. Specifically, Petitioner alleged that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction. The *Complaint* further alleged that DCPS failed to provide Student an appropriate IEP and placement on April 23, 2020, alleging that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction, and failed to address Student's lack of academic progress.

DCPS filed its *Response* on September 27, 2021 in which it refuted allegations in the *Complaint* as follows: (1) at the time they were developed, the subject IEPs were reasonably calculated to enable Student to make academic progress, and (2) Petitioner never objected to either IEP prior to filing the *Complaint*.

The parties participated in a resolution meeting on September 28, 2021 that did not result in a settlement. A prehearing conference was conducted by video conference on October 26, 2021, and the *Amended Prehearing Order* was issued on November 4, 2021, correcting typographical errors in the *Prehearing Order* issued earlier that day.

The due process hearing was conducted on December 8, 2021 by video conference. The hearing was closed to the public. Petitioner filed Disclosures on December 1, 2021 containing a witness list of three witnesses and documents P1-P32. DCPS filed no objections to Petitioner's disclosures, and Petitioner's Exhibits P1-P32 were admitted into evidence. DCPS also filed Disclosures on December 1, 2021 containing a witness list of one witness and documents R-1 through R-26. Petitioner filed no objections to DCPS' disclosures, and Respondent's exhibits R1-R26 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Witness A and Petitioner. Witness A was admitted as an expert in Special Education without objection. Respondent presented one witness, Witness B, who was also admitted as an expert in Special Education without objection. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

## ISSUES

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

1. Whether DCPS provided Student an appropriate IEP and placement on September 17, 2019. Specifically, Petitioner alleges that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction.
2. Whether DCPS provided Student an appropriate IEP and placement on April 23, 2020. Specifically, Petitioner alleges that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction, and failed to address Student's lack of academic progress.

## FINDINGS OF FACT

1. Student is X years-old and attended School A during the 2019-20 and 2020-21 school years.<sup>2</sup>

2. On September 21, 2018, when Student was in grade L at School B, School B conducted an IEP Annual Review meeting. Student was classified as a student with a Specific Learning Disability (“SLD”).<sup>3</sup> The Consideration of Special Factors reported that Student did not present behavioral issues, had no communications needs, and did not require the use of assistive technology (“A/T”).<sup>4</sup> In Mathematics, the Present Levels of Academic Achievement and Functional Performance (“PLOP”) reported that three NWEA MAP Math assessments during the 2017-18 school year yielded scores in the 6<sup>th</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> percentiles, and in a fall 2018 assessment, s/he scored in the 6<sup>th</sup> percentile. On the Achievement Network assessment, Student scored 7%, 31%, 28%, and 34% on four assessments during 2017-18, compared to school averages of 32%, 37%, 31%, and 38%. On the KTEA-3 in November 2017, Student was in the Below Average Range for understanding math concepts, solving word problems, demonstrating number sense, and calculation. His/her age equivalent score in Math Concepts & Applications was more than five years below her/his age at the time, and s/he scored five years below his/her current age in Math Computation. “[S/he] was able to solve addition with regrouping, multiplication, and basic division. [S/he] did not correctly solve any of the subtraction facts when they required regrouping. [Student] was unable to demonstrate knowledge of many multiplication facts nor was [s/he] able to subtract fractions on tasks of the KTEA-3.” The goals were: (1) Given word problems involving real-life scenarios with ratios and unit rates, [Student] would be able to use strategies such as proportions, double number lines, tape diagrams, and ratio tables to solve the problems, (2) Given a set of expressions, [Student] would generate equivalent expressions by combining like terms and using the distributive property, and (3) Given various problems involving operations with fractions, as well as a set of fraction models and strips, [Student] would be able to add, subtract, multiply and divide fractions and mixed numbers using models and/or the standard algorithms.<sup>5</sup>

In Reading, the PLOP reported that Student’s score on a fall 2018 NWEA MAP assessment placed him/her in the 32<sup>nd</sup> percentile. On the spring 2018 ANET, s/he scored 42%, compared to the school average of 45%. This was a 10% improvement from his/her score in the fall. “[S/he] was able to cite textual evidence, determine the meaning of words and identify textual elements at least 100% of the time. [S/he] is able to read and spell some high frequency and Dolch sight words up. [Student] often displays good comprehension skills and understanding about given text or readings. [S/he] struggles with decoding and recalling details.” The goals were: (1) Given various readings, [Student] would quote accurately from a text when answering text related questions, explaining what the text says explicitly and when drawing inferences from the text, and (2) Given various texts, [Student] would compare and contrast the overall structure of events, ideas, concepts, or information in two or more texts.<sup>6</sup> In Written Expression, the PLOP reported that s/he was progressing on written expression skills, was able to copy information from a guide, book, or board, but had to be reminded to use correct spacing, formation, and letter size. S/he can write simple sentences, but words are often misspelled. His/her independent writing is “emergent.” The goals were: (1) Given various texts, [Student] would

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<sup>2</sup> Petitioner’s Exhibits (“P:”) 9, page 1 at Bates page 100, and P111, page 1 at Bates page 134. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P9:1 (100), P11:1 (134).

<sup>3</sup> P6:1 (53).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3-5 (55-57).

<sup>6</sup> *Id.* 6-7 (58-59).

determine and distinguish the main idea from the theme of a story, drama, or poem from details in the text, and would be able to write various opinion pieces using evidence to cite his/her claim, and (2) Given various topics, [Student] would write about each on paper or a google doc as they relate to the topic.<sup>7</sup>

The IEP team prescribed 15.6 hours per week of specialized instruction outside general education. Other Classroom Aids and Services specified that Student was to receive instruction in a small group setting, with one to one instruction and a reduced workload.<sup>8</sup>

3. On October 19, 2018, School B issued an amended IEP, editing post-secondary and annual transition goals.<sup>9</sup>

4. On April 4, 2019, School B issued an amended IEP to “Remove existing accommodation.”<sup>10</sup> Since “Other Classroom Aids and Services” was unchanged, the removed accommodation was a change in 7.8 hours of specialized instruction from outside to inside general education.<sup>11</sup>

5. On June 6, 2019, School B issued an IEP Progress Report for Student for the first three reporting periods of the 2018-19 school year. In math, only the first of his/her two goals had been introduced by the third reporting period, and s/he was reported to have made no progress on that goal. In Reading, Student was reported to have mastered the quoting goal the during the first two periods, but made no progress in the third. Her/his teacher comments revealed that s/he “rarely completes independent tasks without constant prompting, redirection and assisted initiation from [his/her] teacher.” S/he had mastered the second goal by the end of the first period, but regressed in the second period, and made no progress in the third. In Written Expression, Student was reported to be progressing on both goals throughout the year with 40% and 60% accuracy respectively.<sup>12</sup>

6. On September 17, 2019, when student was in grade K at School A, DCPS completed an IEP Annual Review meeting.<sup>13</sup> In Mathematics, the PLOP indicated that Student scored 197 for MAP and 190 for science.<sup>14</sup> S/he could identify numbers up to the ten-thousands, read and identify the value of numbers up to four digits, add and subtract multi-digit numbers, identify coins and dollar bills, state the value of each and make combinations using coins up to \$1.00, read and identify basic fractions and identify numerators and denominators, state “some multiplication facts” and skip count certain numbers, and identify and design patterns using numbers and shapes. The baselines indicated that Student could multiply three-digit numbers by one digit, and could solve short division problems with no remainders. The goals were: (1) S/he would be able to identify relevant information within word problems and use the information to solve word problems with 80% accuracy, and (2) Given a set of one and two-step equations in one variable, [Student] would be able to solve equations using inverse operations.<sup>15</sup> In Reading, the PLOP indicated that Student could read and spell some high frequency and Dolch sight words up to a grade F level (six grades below her/his grade level at that time). The baselines were: (1) [Student] was able to answer questions and recall information related to texts s/he

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<sup>7</sup> *Id.* at 7-8 (59-60).

<sup>8</sup> *Id.* at 9 (61).

<sup>9</sup> P7:1, 13-15 (66, 78-80).

<sup>10</sup> P8:1 (83).

<sup>11</sup> *Id.* at 9 (91).

<sup>12</sup> P13:1-8 (175-83).

<sup>13</sup> P9:1 (100).

<sup>14</sup> Witness A testified that these scores equate to grade E performance, eight grades below Student’s. *See also*, P25:4 (299).

<sup>15</sup> P9: 3 (102).

has read or heard, and (2) With cueing, Student was able to compare and contrast firsthand and secondhand accounts of the same event with which ■ is familiar. The goals were: (1) the first goal from the previous IEP, regarding quoting accurate from a text, was repeated, and (2) after reading an independent level text, [Student] would be able to answer inferential questions or wh questions in verbal or written form, and identify the central idea of a text when answering either inferential or wh questions.<sup>16</sup> In Written Expression, the PLOP from the previous IEP was unchanged. The two previous goals were replaced with one: s/he would be able to write a five paragraph response to a text-related prompt that includes a topic sentence, conclusion, and at least two pieces of text-based evidence.<sup>17</sup> The IEP team prescribed 7.5 hours per week of specialized instruction outside general education and three hours per month of speech-language pathology (“SLP”) outside general education.<sup>18</sup> The meeting notes reveal no objection by Petitioner to the reduction in services prescribed by DCPS, but at the beginning of the meeting she is reported to have said that Student “needs all the support [s/he] can get.”<sup>19</sup>

7. On September 29, 2019, Student’s score on a reading inventory assessment placed his/her performance at a grade E level, eight grades below his/her grade at that time.<sup>20</sup>

8. On April 23, 2020, DCPS issued Student’s Annual IEP.<sup>21</sup> Petitioner did not attend the meeting after having requested a postponement of an earlier scheduled meeting and having agreed to the new date, April 20, 2020. The meeting notes report that Student was missing school days due to neighborhood threats. “Parent wants to keep [her/him] home for safety reasons.”<sup>22</sup> The Mathematics and Reading PLOPs and goals were unchanged from the previous IEP.<sup>23</sup> In Written Expression, the PLOP was unchanged from the previous IEP. The five-paragraph goal from the previous IEP was replaced with: given an informational writing prompt, [Student] would compose a four-paragraph formal, objective essay to examine a topic with an introductory paragraph stating a central thesis and including information necessary to understand the topic, with body paragraphs supporting the central thesis. The baseline conceded that “Student is unable to complete this task at this time.”<sup>24</sup> The IEP retained Student’s 7.5 hours of specialized instruction, but it terminated his/her SLP services.<sup>25</sup> The notes indicate that while the team proposed 7.5 hours per week of specialized instruction for the new IEP, the

Team proposed to increase hours for next school year. For the remaining of the term [Student] would continue to receive modification and accommodations in all [her/his] classes... Team discussed speech language services to be removed based on last speech evaluation and IEP. [SLP A] will connect with parent and follow up with an email.<sup>26</sup>

9. On April 30, 2020, DCPS issued an IEP Progress Report for the first three reporting periods of the 2019-20 school year. In Math, Reading, and Written Expression, Student was reported to have made progress on all of his/her goals for the first two reporting periods, but made no progress

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<sup>16</sup> *Id.* at 4-5 (103-4).

<sup>17</sup> *Id.* at 5-6 (104-5).

<sup>18</sup> *Id.* at 7 (106).

<sup>19</sup> P27:1 (304).

<sup>20</sup> P25:4 (299).

<sup>21</sup> P10:1 (117).

<sup>22</sup> P28:1-2 (306-7).

<sup>23</sup> *Id.* at 3-5 (119-21).

<sup>24</sup> *Id.* at 5-6 (121-22).

<sup>25</sup> *Id.* at 7 (123).

<sup>26</sup> P28:2 (307).

in the third period due to excessive absences.<sup>27</sup> On May 29, 2020, DCPS issued an IEP Progress Report for the fourth reporting period of the 2019-20 school year. Student made no progress on his/her two Math goals, but was progressing on his/her two Reading goals and his/her Written Expression goal.<sup>28</sup>

10. Student's final grades for the 2019-20 school year were as follows: P's in English I, Extended English I, Pre-Algebra Development, Algebra I, and Biology, a D in General Music, and F's in World History & Geography, Health Education, Fitness & Lifetime Sports I and Fitness & Lifetime Sports II.<sup>29</sup> During the 2019-20 school year, through March 13, 2020, Student had 62 unexcused absences.<sup>30</sup>

11. On February 8, 2021, DCPS issued an IEP Progress Report for the first two reporting periods of the 2020-21 school year. In Math and Reading, s/he made no progress on either goal. His/her special education teacher reported that s/he needed to study more and had excessive absences. In Written Expression, Student was reported to have made progress in both periods. However, the teacher comments were the same as those from the Reading and Math sections from his/her special education teacher.<sup>31</sup>

12. On March 29, 2021, DCPS completed an IEP Annual Review meeting. The IEP team prescribed 16 hours per week of specialized instruction outside general education.<sup>32</sup>

13. Student's final grades for the 2020-21 school year were as follows: Incompletes in Sports Management, Journalism, Spanish, Geometry, and Health Education, and P in World History & Geography I. There were no final grades recorded in Chemistry, Army ROTC, World History & Geography II, and English, in which s/he had received failing grades at the end of term two.<sup>33</sup>

14. Witness A, Student's educational advocate, opined that the September 17, 2019 IEP was inappropriate because DCPS cut Student's specialized instruction services in half, having been at School A but one month, despite no evidence that s/he had made any academic progress. Witness A testified that the math assessment cited in the Math PLOP reflected grade E performance, eight grade levels below Student's. Witness A also cited Student's Progress Report showing s/he was not making progress. Witness A also opined that the April 23, 2020 IEP was not appropriate because there was no evidence to support the reduction in services in September 2019, prior to the beginning of Student's attendance problems in December 2019. Witness opined that with appropriate support, Student would be expected to make one year of academic growth each school year, and proposed that Student receive 400 hours of tutoring as compensatory education services.<sup>34</sup>

15. Petitioner conceded that Student was not consistent in participating attending class at School A, either in-person or virtually due to neighborhood threats, deaths in the family, his/her embarrassment at being so far behind his/her classmates, and her/his perception that the staff at School A did not care about her/him.

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<sup>27</sup> P14:5-7 (208-10).

<sup>28</sup> P14:1-3 (204-6).

<sup>29</sup> P26:1 (301).

<sup>30</sup> Respondent's Exhibits ("R:") 25, page 3 at Bates page 164. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., R25:3 (164).

<sup>31</sup> P15:1-4 (221-24).

<sup>32</sup> P11:9 (142).

<sup>33</sup> P25:1-3 (296-98). His/her grades after the second term were F's in Sports Management, Journalism, Geometry, and Health Education, and D's in Spanish and World History I. *Id.*

<sup>34</sup> P31:6 (323).

16. Witness B, School A's Special Education Coordinator and Student's math teacher for the 2019-20 school year, testified that the IEP team did not have Student's records from School B when it developed his/her IEP in September 2019. Witness B testified that School A got access to Student's School B records in October 2019. The School A staff decided not to amend Student's IEP, but to monitor his/her performance. Witness B testified that the September 2019 IEP was appropriate because it was consistent with the information School A had at the time (2016-17 school year records from School B) and they wanted to monitor his/her progress at that level of services. The team was somewhat influenced by Student, who was embarrassed to being pulled out of class to receive specialized instruction. Witness B described Student as a class leader who wanted to remain in general education. Witness B also testified that Student was receiving additional special education intervention classes in Math and English Language Arts ("ELA") for 12 hours per week, which was not reflected on his/her IEP. Student elected not to attend weekly one-on-one virtual office hours with her/his special education teacher or optional Saturday School. Witness B testified that the April 2020 IEP was appropriate; Student was "doing well" in math and reading, and any failing grades were due to non-attendance. However, she conceded that during one term in the 2019-20 school year, when Student earned 2 F's and 4 D's, Student's poor performance was not attributable to his/her absences.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's legal research, the Conclusions of Law are as follows:

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

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.<sup>35</sup>

The issues in this case involve the alleged failure to provide appropriate IEPs and placements. Under District of Columbia law, DCPS bears the burden as to these issues. Petitioner bears the burden as to all other issues.<sup>36</sup>

**Whether DCPS provided Student an appropriate IEP and placement on September 17, 2019. Specifically, Petitioner alleges that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction.**

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central*

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<sup>35</sup> D.C. Code § 38-2571.03(6)(A)(i).

<sup>36</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005).

*School District v. Rowley*.<sup>37</sup> The Court noted that the EHA did not require that states “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”<sup>38</sup> Rather, the Court ruled that “Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child...”<sup>39</sup> Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>40</sup>

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.<sup>41</sup> The Tenth Circuit had denied relief, interpreting *Rowley* “to mean that a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely... more than *de minimis*.”<sup>42</sup> The Court rejected the Tenth Circuit’s interpretation of the state’s obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] 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... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.<sup>43</sup>

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student’s performance from year to year:

When all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly... awaiting the time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>44</sup>

Thus, to meet her burden of establishing a *prima facie* case of a violation of IDEA, Petitioner must introduce some evidence that the IEP was not reasonably calculated to enable Student to make

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<sup>37</sup> 458 U.S. 176, 187 (1982).

<sup>38</sup> *Id.* at 189-90, 200

<sup>39</sup> *Id.* at 200.

<sup>40</sup> *Id.* at 203-04.

<sup>41</sup> *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

<sup>42</sup> *Id.* at 997.

<sup>43</sup> *Id.* at 1000-01 (citations omitted).

<sup>44</sup> 137 S.Ct. at 1000-01.



progress. Petitioner offered into evidence the September 17, 2019 IEP in which the PLOPs revealed that based on her/his latest math assessment, Student was performing at a grade E level, eight grades below Student's grade at the time. In Reading, the IEP team reported that Student's ability to read sight words was six grades below her/his current level. In Written Expression, the PLOP was unchanged from the previous IEP. Despite these significant areas of weakness, the IEP developed by DCPS cut Student's specialized instruction by more than half, from 15.6 hours per week to 7.5 hours per week. Since cutting services was not likely to accelerate Student's growth, Petitioner established a *prima facie* case of a violation.

DCPS' position was four-fold. First, it argued that Student was new to School A in September 2019 and Student's current records from School B were not available when the IEP team met on September 17<sup>th</sup>. Witness B testified that the latest IEP Student that "showed up in SEDS" was from 2016, in which Student was prescribed 7.5 hours per week. Neither party offered the 2016 IEP into evidence. Second, although School A got access to Student's School B records by mid-October, according to Witness B, the staff decided not to amend the IEP to increase Student's hours, electing to monitor his/her performance before making a change. Witness B also testified that Student was receiving 12 hours per week of individualized services in math and ELA that was not reflected on the IEP. Third, Witness B asserted that in her expert opinion, Student was doing well. In response to my question as to the evidence of improved performance, Witness B reported that in the first term of the 2019-20 school year, Student earned C's in Science and Music, "was doing well" in English and math, and that Student's transcript confirms his/her improvement. Fourth, Witness B testified, and DCPS introduced attendance records to prove that Student had 62 unexcused absences during the 2019-20 school year.

Taking DCPS' arguments in order, first, the fact that Student was new to School A does not excuse DCPS from accessing his/her prior records in order to develop an appropriate IEP. The explanation was that DCPS used the latest IEP in SEDS, which was from 2016, three years before the IEP meeting. At the very least, DCPS should have called School B to confirm the level of Student's services during the previous school year. Second, DCPS had Student's complete School B records by mid-October 2019 and still did not elect to amend Student's IEP. However, School A added math (Pre-Algebra Development) and ELA (Extended English) courses to Student's schedule that were intervention courses taught by a special education teacher that amounted to 12 hours per week of specialized instruction. Third, the record does not confirm that Student was "doing well." During the 2019-20 school year, the only letter grades Student received were one D and three F's. There is no report card in the record documenting the C's to which Witness B testified as evidence of Student's "doing well" in Music and Science. Student received final grades of D in Music and P in Biology. During this same school year, standardized testing revealed her/his performance level in Math and Reading to be eight grades below his/her current level. Fourth, DCPS' contention that Student's 62 absences had a significant inhibiting effect on his/her academic growth is clearly legitimate.

I conclude that DCPS failed to provide Student an appropriate IEP when it reduced his/her specialized instruction from 15.6 hours per week to 7.5 hours per week. It had an obligation to do more than simply to adopt data from a three-year-old IEP for a student who was performing eight grades below grade level. However, the record supports a finding that this violation did not result in a denial of FAPE. Although the IEP it developed prescribed a reduction in services, School A actually increased the level of instruction Student received from special educators when it added the math and ELA intervention courses to Student's schedule. This amounted to 12 hours per week in addition to the 7.5 hours s/he was receiving under the IEP. Moreover, Student was absent for one-third of the school year, which would make it difficult for even the highest functioning students to keep up, much less improve.

Therefore, while I conclude that the September 27, 2019 IEP was inappropriate, I also conclude that DCPS did not deny Student a FAPE, because it provided him/her special education services that were not memorialized on the IEP, the level of which exceeded the amount s/he had received at School B.

As for the allegation of an inappropriate placement, Petitioner offered no evidence and Petitioner's counsel made no argument in her opening or closing statement regarding the appropriateness of School A as a placement. Therefore, I conclude that Petitioner has failed to make a *prima facie* showing that DCPS failed to provide an appropriate placement for the 2019-20 school year.

**Whether DCPS provided Student an appropriate IEP and placement on April 23, 2020. Specifically, Petitioner alleges that the IEP was inappropriate because it failed to provide a sufficient amount of specialized instruction, and failed to address Student's lack of academic progress.**

In the previous section, I found that the September 2019 IEP was inappropriate because it reflected a reduction in services. I also found that DCPS did not deny Student a FAPE because School A provided more special education services than Student had received prior to enrolling in School A, and his/her failure to make him/herself available for one-third of the school year precluded meaningful academic progress. However, DCPS' April 23, 2020 IEP was developed under a different set of circumstances. First, by April 2020, School A was well aware that Student not only had received 15.6 hours per week of specialized services at School B, s/he was receiving 19.5 hours at School A, including the two intervention courses. Nevertheless, the IEP team again prescribed 7.5 hours per week. This would have amounted to a significant reduction in services for the 2020-21 school year, which the April 2020 IEP would govern for virtually all of the following school year. With this IEP, there was no assurance that Student would again have the 12 hours per week of intervention courses that s/he had during the 2019-20 school year. There is no persuasive evidence in the record that Student had made any objective, measurable academic progress since enrolling at School A. In fact, there is no evidence that his/her performance level in Math and Reading had advanced beyond the grade E level, nine grades below her current level. Therefore, I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to provide an IEP for the 2020-21 school year that was reasonably calculated to allow Student to make progress appropriate in light of the his/her circumstances.

As for the allegation of an inappropriate placement, Petitioner offered no evidence and Petitioner's counsel made no argument in her opening or closing statement regarding the appropriateness of School A as a placement. Therefore, I conclude that Petitioner has failed to make a *prima facie* showing that DCPS failed to provide an appropriate placement for the 2020-21 school year.

**RELIEF**

For relief, Petitioner requests an order requiring DCPS to fund compensatory education services and to pay attorney's fees. To perfect a claim for compensatory education services, Petitioner has the burden of establishing entitlement to any requested relief, including the type and amount of compensatory education services that would compensate the student for the services that were allegedly denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, 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.<sup>45</sup>

Thus, Petitioner must show (1) what educational harm Student suffered as a result of the alleged denial of FAPE, (2) what type and amount of compensatory services Student requires to put him/her in the position s/he would be had there been no denial of FAPE, and (3) the assessments or educational, psychological, or scientific studies that support the type and amount of services requested.

Petitioner offered no credible evidence of the type and amount of compensatory services Student requires to put her/him in the position s/he would be had there been no denial of FAPE. Witness A prepared a Compensatory Education Plan requesting 400 hours of tutoring services for 1040 hours of missed specialized instruction over two years to compensate Student for the 10 hours per week of additional instruction Petitioner believes Student needed. In support of the proposal, Witness A testified that the plan would put Student in the position s/he would have been but for the denial of FAPE. However, the entire plan is based on Witness D's assertion that Student would be expected to make a year of growth in academic progress with adequate support. This assertion appears to be inherently suspect. First, no evaluations were offered into evidence, so Student's cognitive ability was apparently not factored into Witness A's analysis. Second, all SLD students are different, with different learning patterns, different learning rates, different backgrounds, different deficits, and varied cognitive skills. Thus, I cannot accept Witness A's mere assertion that Student would be expected to achieve a year of academic growth each school year with appropriate supports. In fact, based on standardized testing scores, Student has rarely made a year of academic growth since becoming eligible for services. Therefore, I will order DCPS to fund 50 hours of compensatory education along with an independent evaluation to determine the appropriate type and amount of appropriate compensatory education Student requires consistent with the mandate set forth in *Reid*.

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<sup>45</sup> *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). See also, *B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

## ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, the exhibits from the parties' disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

**ORDERED**, that DCPS shall fund 50 hours of compensatory education tutoring services in Math, Reading, and Written Expression for Student with no restrictions as to the time of day or deadlines for the completion of such services.

**IT IS FURTHER ORDERED**, that DCPS shall fund an independent evaluation to determine the appropriate type and amount of specialized instruction Student requires to make one year of grade level improvement in Math, Reading, and Written Expression. The evaluation shall address the effect of Student's history of absenteeism on his/her ability to make annual academic progress.

**IT IS FURTHER ORDERED**, that within fifteen (15) business days of receipt of the independent evaluation, DCPS shall schedule an IEP team meeting through Petitioner's counsel to consider the need for additional compensatory education services for Student for the denial of FAPE from the beginning of the 2020-21 school year up to March 29, 2021.

## APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: December 20, 2021

Copies to: Attorney A, Esquire  
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