

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 28, 2023

PARENT, on behalf of STUDENT, ¹)	Date Issued: December 28, 2023
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2023-0194
)	
DISTRICT OF COLUMBIA)	Online Videoconference Hearing
PUBLIC SCHOOLS,)	
)	Hearing Dates:
Respondent.)	November 16, 2023
)	December 11, 2023
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner parent under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the parent seeks compensatory education and other relief against Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied her child a free appropriate public education (FAPE) by failing to offer Student appropriate Individualized Education Programs (IEPs) beginning in October 2021, failing to conduct sufficiently comprehensive special education evaluations and failing to fully implement the child’s IEPs.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on October 3, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on October 4, 2023. The parties met for a Resolution Session Meeting on October 18, 2023 and did not resolve the issues in dispute. On October 18, 2023, I convened a videoconference prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was initially scheduled for November 16 and 20, 2023. Due to counsel's illness, the second hearing day was continued until December 11, 2023. On December 11, 2023, I granted Petitioner's unopposed request to extend the final decision due date to December 29, 2023.

With the parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on November 16 and December 11, 2023. The parent appeared online for the hearing and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by ASSISTANT PRINCIPAL and DCPS' COUNSEL. Petitioner's Counsel and DCPS' Counsel made opening statements. Mother testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called as witnesses SPEECH-LANGUAGE THERAPIST (SLP), SCHOOL SOCIAL WORKER, CES TEACHER and Assistant Principal.

Petitioner's Exhibits P-1 through P-32, Pages 1 and 2 of P-33, P-34 through P-41, P-46, P-51, P-59, P-65 and P-67 through P-83 were admitted into evidence, including Exhibits P-51 and P-65 admitted over DCPS' objections. I sustained DCPS' objections to Exhibits P-47 and P-84. Petitioner withdrew her remaining proposed exhibits. DCPS' Exhibits R-1 through R-46 were all admitted into evidence without objection. Following completion of the presentation of evidence on December 11, 2023, Petitioner's Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as set out in the October 18, 2023 Prehearing Order are:

- a. Did DCPS deny the child a FAPE by failing to comprehensively evaluate him/her in the following areas of suspected disability: Assistive Technology, & Functional Vision Learning Media Assessment (FVLMA)/Learning needs related to Functional vision (including an eye medical report);
- b. Did DCPS deny the child a FAPE by providing inappropriate IEPs and corresponding educational placements on October 5, 2021, November 2, 2022, December 12, 2022 (if there was an IEP developed this date) and May 15, 2023 (Amended IEP), because the IEPs failed to provide a 1:1 aide/dedicated aide; failed to provide for placement in a more restrictive placement/more appropriate placement amongst DCPS's self-contained settings, the CES program; failed to consider the entire continuum of alternative placements including whether the

student's needs could be met within the self-contained programs DCPS had available, given that he/she did not benefit from time with non-disabled peers, and his/her programming was not adequate to address the severity of his/her disability and needs; failed to provide for Extended School Year services (all but May 15, 2023 IEP); failed to timely and adequately update the IEP following the completion of the triennial evaluations to incorporate the findings of those evaluations into the child's programming; DCPS failed to call a meeting to revise the IEP based on the findings/results of the evaluations and when it did amend the IEP in May of 2023, DCPS did not incorporate (and still has not) incorporated the findings/results of the 2022 triennial evaluation into the IEP.

c. Did DCPS deny the child a FAPE by failing to implement his/her IEPs developed November 4, 2020, October 5, 2021, November 2, 2022, December 12, 2022 (if there was an amended IEP developed this date) and May 15, 2023 (Amended IEP), as the student had inconsistent (and sometimes no) related services, and also during COVID-19 period, no access to any of his/her instruction at all, because of which the child lost an entire school year of instruction and related services;

d. Did DCPS deny the child a FAPE by failing to discuss and determine, with the parent and IEP team, whether he/she was entitled to compensatory education for COVID-19 related educational/learning loss and what the appropriate compensatory education would be, and or failing to provide compensatory education for missed services related to the lack of service providers for various related services (PT, OT, and Speech), even after DCPS indicated the student was owed compensatory education for those missed services;

e. Did DCPS deny the child a FAPE by failing to effectuate its January 3, 2023 LOS letter that purported to place the student in a CES program (at PROPOSED SCHOOL) after admitting that the ELS program was unable to meet the child's needs;

f. Did DCPS deny the child a FAPE by failing to convene an IEP meeting and/or amend the IEP without a meeting in July of 2023 to add the dedicated aide/1:1 aide, even after the whole IEP team agreed it was necessary for the provision of FAPE, even in the context of a move to the CES program.

For relief, Petitioner requests that the hearing officer:

Order DCPS to conduct both an Assistive Technology Evaluation and a

Functional Vision Learning Media Assessments (FVLMA) (including an eye medical report) within 45 days of a decision in this matter; order DCPS to hold an IEP/MDT meeting within 30 days of each of the completed evaluations above to review the evaluation(s) and make revisions to the IEP consistent with any findings and recommendations from that/those evaluation(s); order DCPS to hold a meeting to amend the student's IEP within 30 days of a decision in this matter to (1) include a 1:1 aide/dedicated aide for 100 percent of the time he/she is in school; and (2) to incorporate the 2022 Speech, Psychological, and FBA evaluations into the IEP and revise the present levels, goals, baselines, services and potentially service hours, placement along the continuum, LRE description and considerations, other classroom aids and services, and accommodations to be consistent with the findings and recommendations of those reports; and order DCPS to fund the compensatory education plan to be presented to the hearing officer and/or that the hearing officer fashion his own compensatory education award after conducting a fact-specific inquiry to address the denials of FAPE alleged herein; and order any other relief that the Hearing Officer finds just and equitable.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case on November 16 and December 11, 2023, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides with the parent in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education as a child having Multiple Disabilities, based on coexisting Autism and Other Health Impairment (OHI) disabilities. Apparently the coexisting OHI disability is Cerebral Palsy. Exhibits R-15, P-26.

3. In a November 1, 2022 Psychological Evaluation Report, DCPS

PSYCHOLOGIST reported, *inter alia*, that Student was born at 24 weeks gestation, weighing 1 pound, 6 ounces; Student was diagnosed with bilateral Grade IV intraventricular hemorrhage (IVH), persistent hydrocephalus, and right hemiparetic cerebral palsy, and hydrocephalus with VP shunt; that Student has a right corneal injury that occurred at age of about 3 months. In February 2022, Student received a developmental pediatric evaluation. Based on that assessment, it was determined that Student met medical/clinical criteria for diagnoses of Autism Spectrum Disorder and Intellectual Disability-severe. Student had notable developmental delay across all domains and results indicated that Student was operating at a developmental level of a 12 to 15 month-old. Student also demonstrated social communication deficits, repetitive behaviors, perseverative interests, “self-stimming” and sensory seeking behaviors that align with a diagnosis of Autism. For the psychological evaluation, Student’s classroom teacher completed the Gilliam Autism Rating Scale, Third Edition (GARS-3) rating scales. The teacher’s responses produced an Autism Index of 114 which is in the very likely range for ASD and indicated Level 3 severity, requiring very substantial support for the child. On The Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), Student scored a total of 6.5 out of 45 points in level 1 (0-18 months). The DCPS Psychologist concluded that Student met IDEA eligibility criteria for special education services as a student with Autism Spectrum Disorder, in addition to meeting criteria for Other Health Impairment. DCPS Psychologist recommended that Student

would benefit from as much 1:1 support and attention as possible. Exhibit P-26.

4. In 2019, Student was determined eligible for Early Intervention Services as a child with a Developmental Delay. Exhibit P-1. Student began receiving Speech-Language services and Occupational Therapy (OT) through the District of Columbia's Early Intervention Program (DC EIP) in August 2019. Student began attending DCPS schools in fall 2019. Exhibit P-3.

5. In November 2019, Student began attending CITY SCHOOL 2, a DCPS public school. Testimony of Mother. Student had an IEP developed on November 14, 2019. That IEP was not introduced into evidence, but, based on service tracker logs, the IEP apparently provided for Specialized Instruction Services and Speech and Language, OT and Physical Therapy (PT) related services. *See* Exhibits P-4, P-5 and P-6.

6. DCPS schools closed to in-person learning in March 2020 due to the COVID-19 pandemic. Hearing Officer Notice.

7. On or about September 19, 2020, Mother signed consent for an Individualized Distance Learning Plan (IDL) for Student. The IDL provided for Student to receive, via internet, virtual services for Cognitive or Adaptive Functioning, 1.5 hours per day; Speech Therapy, 60 minutes per week; PT, 240 minutes per month and OT, 120 minutes per month. Exhibit P-9.

8. The City School 2 IEP team developed a revised IEP for Student on November 4, 2020. Mother did not attend this IEP meeting. It was noted that Student

had not been able to log on to virtual classes during the 2020-2021 school year and the IEP team relied on assessments from prior school years. For special education and related services, the November 4, 2020 IEP team provided for Student to receive 25 hours per week of Specialized Instruction Services, 4 hours per month of Speech and Language, 120 minutes per month of OT and 240 minutes per month of PT. All services would be provided outside the general education setting. The IEP team decided that Student did not require a dedicated aide or Extended School Year (ESY) services. The team recommended that Student receive an assistive technology (AT) consultation with the statement that Student's eye medical report would be essential to determining what, if any, AT device would be beneficial. Exhibit P-15.

9. Although DCPS made a laptop computer and an internet hotspot available for Student to access distance learning from home during the COVID school closure period, that was unworkable because due to his/her severe disability, Student does not sit down and does not focus. Testimony of Educational Advocate. From March 2020 through the end of the 2020-2021 school year, Student received no special education and related services. Testimony of Mother.

10. Student returned to City School 2 for in-person instruction in the fall of 2021. Student was placed in the GRADE X self-contained classroom. This was an Early Learning Support (ELS) classroom. Testimony of Educational Advocate. Student's IEP was reviewed by the City School 2 IEP team on October 5, 2021. The October 5, 2021

IEP provided for Student to receive 25 hours per week of Specialized Instruction Services, 2 hours per month of Speech-Language Pathology, 120 minutes per month of OT and 240 minutes per month of PT. In addition, the IEP provided for 1 hour per month of Speech and Language consultation services. The October 5, 2021 IEP team decided that Student did not require a dedicated aide or Extended School Year (ESY) services. The team again recommended on the IEP that Student receive an AT consultation with the caveat that Student's eye medical report would be essential to determining what, if any, AT device would be beneficial. Exhibit P-20.

11. By letter of January 12, 2022, DCPS notified Mother that the Early Learning Support (ELS) program at City School 3 had been identified as the school year 2022-2023 [sic] location of special education services for Student. Exhibit R-36. On or about February 28, 2022, Student enrolled at City School 3. Exhibit R-38.

12. On April 1, 2022, City School 3 determined that Student had presented steady learning progress although mastery has not been made, and for that reason, ESY services were not recommended. Exhibit R-38.

13. Following an Analysis of Existing Data (AED) meeting on September 15, 2022, City School 3 obtained Mother's consent to conduct triennial psychological and speech and language reevaluations of Student. Exhibits R-5, R-6.

14. In September 2022, SLP conducted a speech and language reevaluation of Student. She found that Student did not produce verbalizations and could only make

non-speech sounds. Other measures, including voice, fluency, and speech, could not be formally assessed due to Student's limited verbal output. SLP concluded that Student's expressive and receptive language were severely impaired. Exhibit P-25.

15. Student currently uses only one eye, which has not been a hindrance in school. Testimony of CES Teacher. In the 2022-2023 school year, there were concerns with Student's vision because it was not clear whether Student could see adequately. Mother told the IEP team that Student could see. Testimony of Assistant Principal. In her September 23, 2022 Speech and Language Re-Evaluation Report, SLP reported that Student's hearing and vision were attempted to be screened at City School 2, however due to Student's difficulty with participating in the screening, the test could not be conducted. Exhibit P-25. Student is seen by an ophthalmologist at Children's National Hospital. Testimony of Mother. The hearing evidence does not indicate that Mother ever provided a report from Student's ophthalmologist to DCPS.

16. At an eligibility meeting in November 2, 2022, the City School 3 MDT team determined that Student was a child with Multiple Disabilities (MD), which impacted Student's participation in the general education curriculum in the following areas: Communication/Speech and Language; Emotional, Social, and Behavioral Development; Adaptive-Daily Living Skills; Health/Physical; Cognitive; and Motor Skills/Physical Development. Exhibits R-12, R-13.

17. City School 3 convened an IEP annual review meeting on November 2,

2022. Mother did not attend. In its Consideration of Special Factors, the IEP team reported, *inter alia*, that Student's needs with attention, staying in the seat/area and ability to demonstrate expressive and receptive language skills affected his/her ability to learn and to access the general education curriculum; that Student required 1:1 support in order to stay in his/her area and attend to instruction across academic, social, activities of daily living, motor skills, and communication domains; and that data was being taken on a time-block schedule for staying in area and eloping from the room. The IEP also reported that Student's receptive and expressive language skills were considered severely impaired which impacted his/her ability to communicate his/her needs in the classroom and interact with peers; that Student is non-verbal and will mostly use vocalizations to communicate. For the Assistive Technology consideration, the IEP team reported that the prior year IEP team had recommended that Student receive an AT consultation, but did not put in a request. In the 2022-2023 school year, the IEP team was teaching Student how to use a low-tech picture communication system for both expressive and receptive language skills and that Student was using some verbal gesture/light physical prompting to exchange or choose PCS/pictures. For cognitive present levels of performance, the IEP team reported that Student's score on the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was at Birth to 18-month age range equivalence. For Special Education and Related Services, the IEP team decided that Student would receive 26 hours per week of specialized instruction, 2

hours per month of Speech and Language, 120 minutes per month of OT and 120 minutes per month of PT. In addition, the IEP provided 30 minutes per month of speech consultation services and 60 minutes per month of behavioral support consultation service. The November 2, 2022 IEP team decided that Student did not require a dedicated aide or ESY services. Exhibit R-14.

18. On December 21, 2022, City School 3 convened an MDT meeting to review Student's IEP and to discuss changing Student's placement to a DCPS Communication and Education Support (CES) program. Student's classroom teacher and Assistant Principal discussed with the parent concerns about Student's being in the ELS placement, that the student profile for was more appropriate for the child and the fact that Student's lack of communication was hindering the progress he/she would make. They explained the CES classroom set up and asked Mother if she would be interested in Student's transferring to a CES program during the 2022-2023 school year, so that he/she could be properly serviced based on his/her needs. Mother agreed with the CES placement and stated her interest in knowing which school with a CES program Student would attend and seeing the CES classroom before enrolling. Exhibit R-16. On January 3, 2023, City School 3 issued a Change-in-Placement prior written notice (PWN) to change Student's placement to a CES program, because Student's current ELS placement was not appropriate based on Student's communication needs. Exhibit R-17.

19. A few days after the January 3, 2023 PWN, City School 3 staff arranged for

Mother to visit the CES program at PROPOSED SCHOOL. Mother visited Proposed School and observed that the CES program was in a modular classroom, outside the school building, and that there was no bathroom for the classroom. Mother told City School 3 staff that she did not like the CES classroom at Proposed School. City School 3 staff told Mother that if she did not take the offer of Proposed School, Student would have to stay at City School 3. Mother agreed and Student remained in the ELS classroom at City School 3 for the rest of the school year. Testimony of Mother.

Testimony of Assistant Principal.

20. On January 11, 2023, DCPS issued a PWN notifying the parent that Student did not qualify for COVID 19 compensatory education services. Exhibit R-18. City School 3's reason for this decision was that DCPS had provided a laptop computer and internet hotspot for Student's use during the COVID school closings, but Student's virtual attendance was "zero" and he/she did not try to log on to distance services.

Testimony of Assistant Principal.

21. On January 30, 2023, Social Worker completed a Functional Behavioral Assessment (FBA) intended to identify the function of Student's sometimes disruptive and unsafe behaviors at school. Social Worker collected data and made observations beginning in the fall of 2022. She reported that during these observations, Student engaged in tantrum-like behaviors 60% of the time and elopement behaviors 70% of the time. Student demonstrated appropriate behaviors, with 1:1 adult support, 20% of the

time. Student had a history of tantrums and elopement from his/her designated area when seeking adult attention and/or when unable to communicate or gain the item or activity he/she desires or needs. Social Worker reported that Student presented with moderate to significant symptoms of Autism Spectrum Disorder (ASD) in the areas of communication, socialization, and sensory and cognitive skills in the school setting, in the community and in the home. The function of Student's behaviors were found to be directly related to a manifestation of his/her ASD symptoms and impairment of his/her receptive and expressive language skills, impacting his/her ability to communicate needs and desires in the classroom, as well as build relationships with peers and engage in academic tasks. Social Worker reported that Student's needs with maintaining attention, staying in his/her designated area, engaging in safe behaviors, and ability to demonstrate expressive and receptive language skills affected his/her ability to learn and access the general education curriculum where he/she requires 1:1 adult support in order to stay in his/her area, keep him/herself and others safe, and attend to instruction across academic, social, activities of daily living, motor skills, and communication domains. Exhibit R-19.

22. On February 10, 2023, City School 3 developed a Behavior Intervention Plan (BIP) intended to address Student's tantrum behaviors and elopement from assigned areas. The BIP states that Student was experiencing frequent tantrums (including dropping his/her body on the ground, banging his/her head on the ground

kicking, hitting, slapping, thrashing his/her body, etc., at least 3-5 times every hour and experienced consistent elopement from his/her assigned designated areas that was occurring once every 15 minutes. Exhibit P-32.

23. City School 3 amended Student's IEP on April 12, 2023 to make changes to transportation services – to add hand-to-hand support for getting on and off the bus. Exhibits R-20, P-33.

24. City School 3 amended Student's IEP on May 15, 2023 to add ESY services and an ESY goal and to obtain an AT consult for an AT device. Exhibit R-22.

25. On or about June 13, 2023, Assistant Principal submitted a More Restrictive Environment (MRE) referral to the DC Office of the State Superintendent of Education (OSSE) for Student. In the referral document, City School 3 reported that Student walks with a non-typical gait and needs physical assistance (hand-holding) in order to walk down steps safely; Student requires hand over hand assistance to hold an adapted writing utensil (*e.g.*, big crayon, writing utensil with pencil grip, marker); Student may drool throughout the day and requires an adult to wipe his/her mouth throughout the day; Student is a runner and will run out of the classroom, playground area, school building, off the bus into traffic, etc.; He/she requires hand-holding to stay safe and not run into dangerous situations when walking around the school or community environment; Student also climbs on classroom furniture (tables and chairs) and needs close proximity to an adult to get down safely; Student began the school year

wearing a helmet since he/she would bang his/her head when his/her wants were not met. Student was able to transition out of the helmet at school during the fall of the 2022-2023 school year with intensive adult support; Student occasionally bangs his/her head on the floor if his/her most preferred wants are not delivered, and he/she needs 1:1 adult correspondence to give direction to “stop,” or provide sensory input (hug, squeezes, discussion) to calm him/her down; Student was calming down much quicker and not banging his/her head as much as at the beginning of the school year. Student requires intense tiered instruction, a structured therapeutic environment, and one to one correspondence for all activities including instruction; Student requires Applied Behavior Analysis (ABA) instruction and drills with use of prompt hierarchy and repetition to acquire skills; Student has received some ABA instruction from the speech pathologist for choosing a requested non-preferred (academic/school based) PCS/picture; Student requires materials to be placed on a vertical plane or slant board to attend to materials; Student requires 1:1 adult correspondence to stay in his/her seat, attend to tasks, and participate by looking and touching lesson materials, using close proximity from an adult with sensory input and use of prompt hierarchy; Student requires hand-over-hand guidance to sort items, write pre-writing strokes, touch to count with assisted counting, and activities that require a response (academic or activity of daily living); Student has made gains with transitioning between activities and locations, however the one transition area, that he/she has needs with, is transitioning

away when his/her favorite activities are ended; Student is getting hand-holding as a part of his/her safety plan or a staff escort for times when he/she is exhibiting tantrum behavior in order to transition safely and stop tantrum behaviors. Student needs hand-holding even when in line, if transitioning out of the classroom, once in line (holding a rope with handles for each student); Student has had a habit of running out of the classroom and down the hall to run around the school atrium multiple times running back and forth from staff; At these times, he/she needs to be stopped by an adult in the hallway and escorted back to class; Student is usually crying and attempting to drop to the floor and wiggle out of an escort when he/she is brought back to class after running out of the classroom; Student's IEP provides for hand-over-hand assistance for boarding and exiting the school bus; Student has needs with communication and currently uses PCS to increase his/her verbal communication; Student is nonverbal, although he/she makes noises, gestures, and some verbal approximations (although not consistently) to communicate wants and needs; Student is able to use a touch screen AT device, and has been trialed on a device for choosing preferred items. Currently an AT consult/referral is being entered to the DCPS' AT team since Student has demonstrated ability to use PCS and a touchscreen device. Student can hold his/her urine for about 1 and a half to 2 hours; Student is not able to communicate when he/she needs to use the bathroom; Student has not been toilet trained to have a bowel movement in the toilet with consistency; Student is not able to drink from an open cup/straw or at the water

fountain; Student needs 1:1 correspondence from an adult with use of prompt hierarchy (most to least) to initially use and continue to use a spoon; Student prefers to eat by hand. Exhibit P-35.

26. For Student's IEP ending November 1, 2023, the City School 3 Progress Report for Reporting Period 4 of the 2022-2023 school year reported that for Adaptive - Daily Living Skills, Student had Mastered 6 IEP goals and was Progressing on 1 goal. For Communication-Speech and Language, Student was reported to be Progressing on 3 goals. For Motor Skills-Physical Development, Student was reported to have Mastered 1 goal and to be Progressing on 6 goals. For Emotional, Social and Behavioral Development, Student was reported to be Progressing on 3 goals. Exhibit P-37.

27. On July 18, 2023, OSSE issued a "not warranted" recommendation that a Change in Placement (CIP) of Student to a more restrictive environment than the ELS program at City School 3 was not warranted, and that Training and Technical Assistance (TTA) be provided to City School 3 on the "Utilization of appropriate supplementary aids and services (*i.e.* one-on-one aide, behavior specialist) that assist students in accessing the general education curriculum and allow for instruction in the least restrictive environment". Exhibit P-46.

28. City School 3 made a request to DCPS for a dedicated aide for Student on July 25, 2023. DCPS responded that dedicated aide requests were not accepted over the summer due to DCPS' need to observe the child in the classroom and that the request

should be resubmitted after the summer break. Exhibit P-65.

29. On August 3, 2023, City School 3 provided a PWN to Mother giving notice that Student's overall programming was appropriate for him/her, based on his/her present level of performance, recent triennial assessment results, and identified needs, services, accommodations and other supports that Student requires to receive FAPE. City School 3 notified the parent that at that time, Student required a CES placement, which would result in a different school placement; that Student's IEP could not be fulfilled at City School 3 in the ELS classroom and that DCPS had identified CITY SCHOOL 4 as the new school placement for Student. Exhibit R-27.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP 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. *See* D.C. Code § 38-2571.03(6).

ANALYSIS

Student, who was born at 24 weeks gestation, is a child with severe disabilities – notably Cerebral Palsy and Autism Spectrum Disorder (ASD). Student has been enrolled in DCPS schools since the fall of 2019. In a February 2022 psychological reevaluation report, when Student was EVALUATION AGE, the DCPS psychologist reported that Student’s recent developmental pediatric evaluation indicated that he/she was operating at a developmental level of 12 to 15 month-old. On the VB-MAPP assessment, Student scored a total of 6.5 out of 45 points in level 1 (0-18 months equivalence). On the Gilliam Autism Rating Scale (GARS-3) rating scales, the classroom teacher’s responses indicated Level 3 severity ASD, requiring very substantial support for the child. The DCPS Psychologist recommended that Student would benefit from as much 1:1 support and attention as possible.

In this due process proceeding, the parent alleges that DCPS has denied the child a free appropriate public education (FAPE) by not conducting Assistive Technology (AT) and vision assessments; not offering appropriate IEPs and educational placements since October 2021; not fully implementing Student’s IEPs and not providing compensatory

education to the child for special education services missed during the COVID-19 school closings. DCPS maintains that it appropriately evaluated Student, offered him/her appropriate IEPs and educational placements and substantially implemented the child's IEPs. DCPS disputes that Student is entitled to compensatory education for services missed during the COVID-19 pandemic. For the reasons discussed below, I find that DCPS has not fully met its obligation to provide Student a FAPE and that the child is entitled to compensatory education relief.

– Did DCPS deny Student a FAPE by failing to comprehensively evaluate him/her in the following areas of suspected disability: AT and Functional Vision Learning Media Assessment (FVLMA)/Learning needs related to Functional vision (including an eye medical report)?

The parent alleges that DCPS has denied Student a FAPE by failing to comprehensively evaluate the child with an AT assessment and a Functional Vision Learning Media Assessment (FVLMA). For the reasons explained below, I agree that DCPS violated IDEA procedures by not timely conducting an AT assessment and a medical vision assessment of the child and that these procedural omissions must be deemed a denial of FAPE.

The IDEA requires that in conducting special education evaluations, the local education agency (LEA) must ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs and that child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and

emotional status, general intelligence, academic performance, communicative status, and motor abilities. The agency must gather adequate functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. § 300.304(b)(1-3), (c)(4, 6).

Decisions regarding the areas to be assessed are determined by the suspected needs of the child. U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). The decisions of the student's educators as to what areas to assess are entitled to some deference. *See R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 937 (9th Cir.2007) (Fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render more deferential approach appropriate.) *Cf. T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.)

With regard to Student's need for an AT assessment, as early as November 4, 2020, the IEP team at City School 2 recommended that Student receive an AT consultation with the statement that Student's eye medical report would be essential to determining what, if any, AT device would be beneficial. This recommendation was repeated in City School 2's November 4, 2021 IEP. However, City School 2 never made a request to DCPS for an AT consultation. Subsequently, the November 2, 2022 City

School 3 IEP team did not recommend an AT consultation. However, deciding what areas needed to be assessed should be based on what was known about the child's needs at the time of the evaluation, not on later developments. *Cf. L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1004 (9th Cir. 2017) (Appropriateness of a student's eligibility should be assessed in terms of its appropriateness at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight.) Deferring to the decisions of Student's IEP teams at City School 2, I find that Petitioner has met her burden of persuasion that DCPS was obliged to obtain an AT consult for Student following the November 2, 2021 IEP review.

With regard to the child's need for a vision assessment, the IDEA requires that an LEA ensure that the child is assessed in all areas related to the suspected disability, including, vision, if appropriate. This is not limited to vision screening by a school nurse. District of Columbia regulations provide that if the IEP team determines that a medical evaluation is necessary to determine the educational needs of the child, the LEA shall arrange for such services, which shall be free of charge to the parent. *See* 5A DCMR § 3006.8 (2022).

The hearing evidence establishes that as early as November 4, 2020, Student's IEP team at City School 2 reported that an eye medical report would be essential to determining what AT device would be beneficial for Student. In the fall 2022 triennial reevaluation, the City School 2 IEP team reported concerns about Student's vision, but

City School 2 staff were not able to conduct a vision screening because, due to his/her disability, Student was not able to participate in the screening. Because the vision screening could not be done at the time of the November 2021 IEP review meeting or as part of the 2022 triennial reevaluation, I conclude that a medical eye examination was a necessary aspect of a comprehensive evaluation to determine Student's educational needs. It was, therefore, incumbent upon DCPS either to obtain an ophthalmologist's report on Student from Mother² or the child's ophthalmologist or, subject to obtaining the parent's consent, to arrange its own medical eye examination of the child. I conclude that by not obtaining a medical eye examination of Student, DCPS failed to meet the evaluation requirements of § 3006 of the DCMR.

A failure to evaluate a child in a timely manner is a procedural violation of the IDEA. *See, e.g., Idea Pub. Charter Sch. v. District of Columbia*, 374 F. Supp. 2d 158, 167 (D.D.C. 2005). Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). *See, also, Brown v. District of Columbia*, 179 F. Supp. 3d 15,

² Student had apparently been examined in fall 2022 by an ophthalmologist at National Medical Center, but Mother did not provide the physician's report to DCPS.

(D.D.C. 2016). In this case, City School 2's failure to obtain an AT consult for Student delayed a decision on what, if any, AT device would be beneficial for Student. I find that this omission significantly impeded Mother's opportunity to participate in the decision-making process and may have caused a deprivation of educational benefit. Likewise, the IEP team's not knowing to what extent Student's vision impairment affected his/her educational needs impeded Student's right to a FAPE and may have caused a deprivation of educational benefit. I conclude that DCPS' not providing an AT consult for Student and its failure to ensure that Student received a medical vision examination must be deemed a denial of FAPE.

– Did DCPS deny the child a FAPE by providing inappropriate IEPs and corresponding educational placements on October 5, 2021, November 2, 2022, December 12, 2022 (if there was an IEP developed this date) and May 15, 2023 (Amended IEP), because the IEPs failed to provide a 1:1 aide/dedicated aide; failed to provide for placement in a more restrictive placement/more appropriate placement amongst DCPS' self-contained settings, the CES program; failed to consider the entire continuum of alternative placements including whether the student's needs could be met within the self-contained programs DCPS had available, given that he/she did not benefit from time with non-disabled peers, and his/her programming was not adequate to address the severity of his/her disability and needs; failed to provide for Extended School Year services (all but May 15, 2023 IEP); and failed to timely and adequately update the IEP following the completion of the triennial evaluations to incorporate the findings of those evaluations into the child's programming.

Petitioner contends that DCPS' IEPs for Student, beginning October 5, 2021, were inappropriate for Student because the IEP teams did not place Student in a CES program until the 2023-2024 school year, did not provide for a dedicated aide, did not

offer ESY services until summer 2023 and did not incorporate data from the November 2022 triennial reevaluation into subsequent IEPs. I find from the hearing evidence, including the testimony of the parent's expert, that Petitioner established a *prima facie* case that the IEPs at issue were inadequate. Therefore, DCPS holds the burden of persuasion on the appropriateness of its IEPs and educational placements for Student. DCPS has not met that burden.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

Middleton at 128. In this case, Petitioner has not alleged that DCPS did not comply with IDEA procedures to develop the IEPs. I turn, therefore, to the substantive prong of the *Rowley* inquiry – Did DCPS offer Student appropriate IEPs and educational placements for the school years at issue?

In *E.W. v. District of Columbia*, No. 21-CV-1598 (FYP/GMH), 2022 WL 2070869 (D.D.C. May 11, 2022), *report and recommendation adopted*, No. 21-CV-1598 (FYP), 2022 WL 2070858 (D.D.C. June 1, 2022), U.S. Magistrate Judge G. Michael Harvey set

forth the legal standard for evaluating IEPs.

The IDEA guarantees children with disabilities the right to a FAPE, which is defined as “special education and related services” provided at public expense that “conform[] with the [student’s] individual education program,” also known as an IEP. 20 U.S.C. §§ 1400(d)(1)(A); 1401(9); 1412(a)(1). Thus, the primary vehicle for ensuring that students identified as disabled receive a FAPE is the creation and implementation of an IEP setting forth the services to be provided to meet that student’s needs. 20 U.S.C. § 1414(d)(1)(A)–(2)(A); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (describing the IEP as the “*modus operandi*” of the IDEA). The plan is developed by the student’s IEP team, which includes the student’s parents, teachers, and other educational specialists. 20 U.S.C. § 1414(d)(1)(B). An IEP contains assessments of the student’s needs, strategies to meet those needs, and goals used to measure the effectiveness of the plan. 20 U.S.C. § 1414(d)(1)(A). The IEP team must develop an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ----, ----, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). The IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* 20 U.S.C. § 1412(a)(5)(A).

E.W., 2022 WL 2070869, at *3. “[A]n IEP’s adequacy thus ‘turns on the unique circumstances of the child for whom it was created,’ and a reviewing court should defer to school authorities when they ‘offer a cogent and responsive explanation’ showing that an IEP ‘is reasonably calculated to enable the child to make progress appropriate in light of [his/her] circumstances.’ *Andrew F.*, 137 S. Ct. at 1001-02.” *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, at *7 (D.D.C. Mar. 8, 2022).

Inappropriateness of ELS Program

Prior to the 2022-2023 school year, DCPS placed Student in Early Learning Support (ELS) classrooms, first at City School 2 and, after February 28, 2022, at City School 3. The ELS program is designed to serve children with Developmental Delays. Students in the ELS program are exposed to all areas of the core content for academics, including ELA, mathematics, science and social studies with instruction aligned to Common Core standards. Unlike DCPS' CES program, which primarily serves students who have ASD, the ELS program does not operate on Applied Behavior Analysis (ABA) principles.

The IDEA requires that an IEP be “*specially designed*’ to meet a child’s *‘unique needs.’* “ *Andrew F.*, 137 S. Ct. at 999 (*quoting* 20 U.S.C. § 1401(29), (14)) (emphasis in original). *A.D. v. Creative Minds Int’l Pub. Charter Sch.*, No. 18CV2430CRC DAR, 2020 WL 6373329, at *4 (D.D.C. Sept. 28, 2020). Petitioner’s expert, Educational Advocate, opined in her testimony, that due to Student’s lack of progress at school, communication challenges and behavior issues, the ELS program setting did not meet Student’s needs. DCPS’ expert, Assistant Principal, agreed that for the 2022-2023 school year, due to Student’s behaviors, the CES program was more appropriate for the child than the ELS program. I agree. The ELS program’s focus on academic core content was not specially designed to meet the unique needs of Student, a child who was wholly nonverbal and functioning at a 12-18 month age equivalence. DCPS has not offered a cogent and

responsive explanation for its IEP teams' decisions to place Student in ELS program classroom settings in the October 12, 2021 or November 2, 2022 IEPs.

On January 3, 2023, City School 3 issued a Change-in-Placement prior written notice (PWN) to change Student's placement to a CES program, recognizing that Student's then-current ELS placement was not appropriate based on Student's communication needs. City School 3 staff arranged for Mother to visit Proposed School, which offered a CES classroom. Mother told City School 3 staff that she did not like the CES classroom at Proposed School because it was in a modular unit outside the school building and that there was no bathroom. DCPS did not offer Student a different CES setting or change the Student's IEP educational placement from the City School 3 ELS setting until August 3, 2023, when the IEP team identified the City School 4 CES program as Student's new school placement.³ I conclude that DCPS has not met its burden of persuasion that its educational placements of Student in the ELS programs at City School 2 and City School 3 from October 5, 2021 through the end of the 2022-2023 school year were appropriate.

Extended School Year

The parent alleges that the failure of Student's City School 2 IEP team to find that Student required Extended School Year (ESY) services for summer 2022 was a denial of

³ Whether the CES program at City School 4 is appropriate for Student is not an issue in this case and I make no determination as to the appropriateness of that educational placement.

FAPE. In determining whether ESY services are necessary for the provision of FAPE, the IEP team must consider and document each of the following:

- (a) The impact of a break in service on previously attained or emerging critical skills;
- (b) The likelihood and degree of regression related to previously attained or emerging critical skills; and
- (c) The time required for recoupment of previously attained or emerging critical skills.

5A DCMR § 3015.2 (2022). “ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008), adopting standard from *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537–38 (4th Cir.2002)). See, also *Johnson v. District of Columbia*, 873 F. Supp. 2d 382, 386 (D.D.C. 2012) (“[A]ll students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of ‘meaningful progress.’”)

The City School 2 IEP team determined on April 1, 2022 that it did not have concerns about the impact of a break in service on any of Student’s critical skills.

Exhibit R-38. Petitioner’s expert, Educational Advocate, opined that Student required ESY services, but she did not point to any evidence that Student had gains during the

school year which would be jeopardized over the summer months. I find that DCPS has established that the IEP team's decision not to offer ESY services to Student for summer 2022 was not inappropriate. (On May 15, 2023, City School 2 amended Student's IEP to provide for ESY services for summer 2023.)

Dedicated Aide for 2023-2024 School Year

Petitioner also claims that DCPS denied Student a FAPE by not amending Student's IEP in July 2023 to provide a dedicated aide for the child for the 2023-2024 school year. City School 3 made a request to DCPS for a dedicated aide for Student on July 25, 2023. DCPS responded that dedicated aide requests were not accepted over the summer due to DCPS' need to observe the child in the classroom. Student was moved to the CES program at City School 4 at the start of the 2023-2024 school year. CES Teacher testified that she submitted a request to DCPS for a dedicated aide for Student. This was on or about October 25, 2023. *See Exhibit P-65.* Considering the need for the CES teaching team to get to know Student and assess his/her need for a 1:1 aide, I find it that this was not an undue delay in requesting a dedicated aide. *Cf. Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). (Absent statutory guidance, "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.*)

In light of my conclusion that DCPS' educational placements of Student in the ELS program classrooms in the October 12, 2021 and November 2, 2022 IEPs were not

appropriate, it is not necessary to reach Petitioner’s additional claims that these IEPs were inadequate because they failed to provide for a dedicated aide and failed to incorporate the November 2022 triennial reevaluation findings. *See Adams v. District of Columbia*, 285 F. Supp. 3d 381 (D.D.C. 2018) (“[W]hen an HOD finds an IDEA violation, ‘[w]hether the Hearing Officer based such a finding on one, or two, or three alleged violations is irrelevant—the result would be the same.’” *Id.* at 391, quoting *Green v. District of Columbia*, 2006 WL 1193866, at 9 (D.D.C. May 2, 2006)).

Compensatory Education for COVID-19 Learning Loss

- Did DCPS deny the child a FAPE by failing to discuss and determine, with the parent and IEP team, whether he/she was entitled to compensatory education for COVID-19 related educational/learning loss and what the appropriate compensatory education would be?

Petitioner alleges that DCPS denied Student a FAPE by not determining whether the child was entitled to compensatory education for educational/learning loss from March 2020 through the end of the 2020-2021 school year due to pandemic-related school closings. In fact, DCPS issued a PWN on January 11, 2023 notifying the parent that Student did not qualify for compensatory services for services missed during the COVID-19 pandemic. At the due process hearing, Assistant Principal explained in her testimony that Student was determined not entitled to compensatory education because DCPS had provided a laptop computer and an internet hotspot for Student to access the agency’s online Distance Learning during the COVID school closings, but Student never

logged on to Distance Learning services. DCPS' justification does not hold water.

In a Q & A guidance issued September 30, 2021, the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) addressed compensatory education for children who did not receive IEP services due to pandemic-related school closures:

Question D-7: Must States ensure that compensatory services are available for all IDEA eligible children who need them because they did not receive appropriate services under Part B of IDEA due to pandemic-related closures and other service disruptions?

Answer: Generally, yes. States must ensure FAPE is available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. 34 C.F.R. § 300.101. The Department's longstanding position has been that IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child's needs based on any failure or inability to provide appropriate services due to circumstances such as teacher strikes, natural disasters, and pandemics. The Department believes that IEP Teams are already empowered under IDEA to make individualized determinations regarding the special education and related services that a child needs. The consideration of compensatory services is just one subset of the IEP Team's responsibility to address the child's needs and would arise, for example, due to the impact of the pandemic. A determination of compensatory services by the child's IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA's failure or inability to provide appropriate services.

If challenged, such determinations may receive deference from a court if arrived at consistent with IDEA requirements and based on the expertise of, and the exercise of judgment by, school authorities.

U.S. Dept. of Education, *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the*

Individuals with Disabilities Education Act (OSEP QA 21-06, September 30, 2021). *Cf. White v. District of Columbia*, No. 20-CV-3821 (APM), 2022 WL 971330, at *6 (D.D.C. Mar. 31, 2022) (The IDEA contains no exception that would allow suspending special education services because a global pandemic forced schools online.)

DCPS' expectation that Student should have been able to log on to Distance Learning services, without the in-person assistance of a trained adult, was not reasonable. This is a child whom a DCPS psychologist reported in February 2022 to be operating at a developmental level of a 12 to 15 month-old and who, according to City School 3, required one to one correspondence for all activities. *See Exhibit P-35.* As Educational Advocate explained in her testimony, Student was not capable of communicating with the online instructors and could not even be expected to sit still or maintain attention. I conclude that a determination of compensatory services by Student's IEP team was warranted to address the child's needs arising from DCPS' inability to provide appropriate services to Student during the pandemic. DCPS erred in determining that Student was not entitled to compensatory education for special education and related services missed due to the COVID-19 school closures.

Implementation of Related Services

- Did DCPS deny the child a FAPE by failing to implement his/her IEPs developed November 4, 2020, October 5, 2021, November 2, 2022, December 12, 2022 (if there was an amended IEP developed this date) and May 15, 2023 (Amended IEP), as the student had inconsistent (and sometimes no) related services?

– Did DCPS improperly fail to provide compensatory education for missed IEP related services for PT, OT, and Speech, even after DCPS indicated the student was owed compensatory education for those missed services?

Petitioner alleges that DCPS failed to fully implement the child’s IEP related services beginning November 2020. Student’s November 4, 2020 IEP provided for Student to receive 4 hours per month of Speech-Language Pathology, 120 minutes per month of Occupational Therapy (OT) and 240 minutes per month of Physical Therapy (PT). The child’s Speech and Language services were reduced to 2 hours per month in the October 5, 2021 IEP. The November 2, 2022 IEP provided for Student to receive 2 hours per month of Speech and Language, 120 minutes per month of OT and 120 minutes per month of PT. Petitioner claims that Student is owed compensatory education services because DCPS did not fully implement the child’s IEP related services.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child’s IEP may constitute a denial of FAPE.

A school district “must ensure that . . . special education and related services are made available to the child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). A material failure to implement a student’s IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th

Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144. The parent holds the burden of persuasion on her failure to implement claims.

In the preceding section of this decision, I determined that DCPS owes Student compensatory education for special education and related services missed during the COVID-19 school closures, from March 2020 through the end of the 2020-2021 school year. Petitioner also seeks compensatory education for alleged missed related services. The parent offered little probative evidence of what related services DCPS allegedly failed to provide Student. In a November 1, 2022 City School 3 Data Summary Report, it was reported that during Term 4 of the 2021-2022 school year, Student did not receive Speech and Language services due to “an interruption in the Speech Language Pathologist assigned to” City School 3. *See* Exhibit R-11. This interruption equates to some 10 hours of missed Speech and Language services. Given the severity of Student’s communication deficits, I find that this was a failure to implement a significant provision of the child’s October 5, 2021 IEP. Assistant Principal also testified that the child’s OT provider was absent for September and October 2022, but that affected children were given make-up services. I conclude that Petitioner established that DCPS

denied Student a FAPE by its failure to implement some 10 hours of SLP services in the 2021-2022 school year and that Student is entitled to compensatory education for this service that was withheld.

Relief Requested

In this decision, I have determined that DCPS denied Student a FAPE by not providing an appropriate educational placements responsive to student’s individual needs before the child was placed in the CES classroom at City School 5 in the 2023-2024 school year; by not timely conducting AT and medical vision assessments; by not compensating Student for services missed during the COVID-19 pandemic and by not fully implementing Student’s Speech and Language services in the 2021-2022 school year. The primary relief sought by the parent is a compensatory education award for Student.

In the Court’s recent decision in *J.T. v. District of Columbia*, No. CV 21-3002 (RBW), 2023 WL 8369938, (D.D.C. Dec. 4, 2023), U.S. District Judge Reggie B. Walton explained the compensatory education remedy:

When a [hearing officer] finds that a school district has denied a student a FAPE under the IDEA, “it has ‘broad discretion to fashion an appropriate remedy,’ which can go beyond prospectively providing a FAPE, and can include compensatory education.” *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016) (quoting *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). In assessing whether an equitable remedy should be provided, however, “[courts] must consider all relevant factors.” *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (quoting *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993)). This

includes considering “the parties’ conduct” in fashioning an equitable remedy. [*Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)]. For instance, a court may consider “the school system reasonably ‘requir[ing] some time to respond to a complex problem,’ “ or if “[a] parent[’s] refusal to accept special education delays the child’s receipt of appropriate services[.]” *Id.*

Typically, “[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.” *Id.* at 523 (internal quotation marks omitted) (*quoting G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003)). However, “[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Id.* at 524 (*quoting Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994)). Nevertheless, “the inquiry must be fact-specific and . . . 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.” *Id.* Moreover, “[e]ven if entitlement to an award is shown through a denial of a free and appropriate public education, it may be conceivable that no compensatory education is required for the denial of a FAPE either because it would not help or because the student has flourished in his current placement.” *Phillips ex rel. T.P. v. District of Columbia*, 932 F. Supp. 2d 42, 50 (D.D.C. 2013) (Walton, J.) (*quoting Cousins v. District of Columbia*, 880 F. Supp. 2d 142, 145 n.3 (D.D.C. 2012)). Indeed, “the weight of authority in this Circuit . . . recognizes that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established.” *Id.* at 52 n.4; *see Reid*, 401 F.3d at 524; *see also B.D.*, 817 F.3d at 798 (“An appropriate compensatory education award must rely on individualized assessments, and the equitable and flexible nature of the remedy will produce different results in different cases depending on the child’s needs.” (internal quotation marks omitted)).

J.T., 2023 WL 8369938, at *13–14. “[T]he plaintiff has the burden of proposing a

well-articulated [compensatory education] plan that reflects the student's current education abilities and needs and is supported by the record." *Smith v. District of Columbia*, No. 22-CV-2755-TSC-ZMF, 2023 WL 6291637, at *4 (D.D.C. July 31, 2023), *report and recommendation adopted sub nom. Mabel Smith, Guardian of the minor child K.C., v. District of Columbia*, No. 22-CV-2755 (TSC/ZMF), 2023 WL 8519987 (D.D.C. Dec. 8, 2023), quoting *Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010) (cleaned up).

In the present case, due to the severity of Student's disability and DCPS' failure, prior to the 2023-2024 school year, to ensure that Student had an appropriate educational placement, the child's needs are great. In her compensatory education plan, Petitioner's compensatory education expert, Educational Advocate, opined that if Student had received FAPE, there would have been progress for the child in communicating, OT and motor skills, PT skills and in academics.

Educational Advocate, recommended two, alternative, compensatory education remedies. Her first proposal was for direct compensatory services for Student outside of school, including 3,100 hours of Applied Behavior Analysis (ABA) special education services as well as replacement SLP, OT and PT related services. However, as Educational Advocate acknowledged in her plan, with Student's disabilities, it might be difficult for the child to receive benefit from, or even to tolerate so many hours of additional compensatory services, on top of the regular school week. It is also

concerning to the hearing officer that Student has never been evaluated by a Board Certified Behavior Analyst (BCBA) to determine whether this child would benefit from the direct services of a BCBA.

Alternatively, Educational Advocate recommended that Student be placed for 2 years in an appropriate non-public school that would be able to provide the recommended intensive ABA interventions during the school day, while also moving the child forward academically and in all service areas. Specifically, Educational Advocate recommended that Student be placed at NONPUBLIC SCHOOL, a day school in suburban Virginia which serves children on the autism spectrum. However, as of the hearing date, an application for Student had not been made to Nonpublic School or any other private school.

Although it is rarely ordered, if a hearing officer finds a violation or various violations of the IDEA, he may award compensatory education—which could include compensatory placement in a private school. *See, e.g., Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1286 (11th Cir.2008) (“We do not read the Act as requiring compensatory awards of prospective education to be inferior to awards of reimbursement. . . . Although it ordinarily has a structural preference for special education in public schools, the Act does not foreclose a compensatory award of placement in a private school.”); *Ferren C. v. School Dist. of Philadelphia*, 595 F.Supp.2d 566, 577 (E.D.Pa.2009), *aff’d*, 612 F.3d 712 (3d Cir.2010) (“Courts have often

awarded compensatory education in the form of tuition reimbursement or an injunction requiring school districts to pay for private school tuition or other services.”). *Cf. District of Columbia v. Masucci*, 13 F. Supp. 3d 33 (D.D.C. 2014) (Where hearing officer directed DCPS to place child for one year at a private school, “no evidence that the hearing officer undertook such a careful analysis of the harm to [child] caused by the missed services. Nor did he discuss how the services awarded—a one-year placement at a private school that primarily serves autistic children—would address the deficits caused by the school system’s past failures.” *Id.* at 40.)

I find that this is one of those unusual cases where a compensatory award of placement in a private school, which focuses on ABA services, is appropriate. Here, it is undisputed that over the two years preceding the filing of the due process complaint in this case, Student had not made appropriate progress in the DCPS SLS classrooms. Student’s current teacher testified that Student is making progress this school year in the CES classroom, but at a very basic level. For example, CES Teacher explained that Student has not gotten to “turn-taking” with toys yet, because the child has to first learn what a toy is. However, assuming, without deciding, that the current CES program is an appropriate educational placement for Student, the child is still entitled to compensation for the prior FAPE denials. *See, e.g., Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 525 (D.C. Cir. 2005) (Court should have required DCPS to offer proof that the new placement compensated for prior FAPE denials in addition to

providing some benefit going forward.)

In its June 13, 2023 More Restrictive Environment referral to OSSE, City School 3 wrote that Student requires, *inter alia*, intense tiered instruction, a structured therapeutic environment, one to one correspondence for all activities including instruction and that Student requires ABA instruction and drills with use of prompt hierarchy and repetition to acquire skills. Both Petitioner's expert, Educational Advocate, and DCPS' expert, Assistant Principal, testified that Student needs ABA instruction services, although Assistant Principal did not know whether Student needed full-time ABA services. (While the DCPS CES program follows ABA principles, DCPS does not provide BCBA instructors.)

Petitioner's expert, Educational Advocate, opined in her testimony that two school years of placement at an ABA focused school would put Student where he/she would have been if the child had received an appropriate education through the DCPS. That is, placement at an ABA focused private school would address the deficits caused by DCPS' past failures. Educational Advocate has extensive experience with ABA programs and I found her opinion credible. However, because Student has never attended an ABA focused special school, the efficacy of such instruction for this child will need to be assessed after a reasonable period. Therefore I will order DCPS to place Student in a special school only through the 2024-2025 school year. With this limitation, I conclude that Petitioner has met her burden of proposing a well-articulated

compensatory education plan that reflects Student's current education abilities and needs and is supported by the record. *See Smith, supra.*

As other and further relief, Petitioner seeks, *inter alia*, an order for DCPS to conduct an Assistive Technology Evaluation and a Functional Vision Learning Media Assessments (FVLMA). In this decision, I have determined that DCPS denied Student a FAPE by not conducting an AT consultation and by not obtaining a medical vision assessment. City School 4 has already requested an AT consultation for Student and it is not necessary for this hearing officer to order that assessment. I will order DCPS to obtain a medical vision assessment of Student, either from the child's ophthalmologist or from another qualified vision specialist.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall, within 10 school days of the date of this decision, initiate the application process for Student to an appropriate ABA focused nonpublic day school, or schools, serving children with ASD and Student's other disabilities and shall ensure that Student is placed at such a school, at public expense, as soon as Student's admission is secured. DCPS shall fund Student's placement at such a nonpublic school, with transportation, through the remainder of the 2023-2024 school year and for the 2024-2025 school year. At the appropriate time in the 2024-2025 school year, DCPS shall ensure that Student's DCPS IEP team, including the parent and her representatives, reviews Student's progress and needs and determines whether Student will require an ongoing special school placement to receive a FAPE;

2. Within 15 business days of the date of this decision, subject to obtaining the parent's prior consent, DCPS shall obtain a medical vision report from Student's private ophthalmologist or arrange for Student's vision to be assessed by a qualified vision specialist at no charge to the parent. Upon receipt of Student's medical vision report, DCPS shall ensure that the report is promptly reviewed by Student's IEP team and that Student's IEP is revised, as appropriate and
3. All other relief requested by the Petitioner herein is denied.

Date: December 28, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution