

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

OSSE  
Office of Dispute Resolution  
December 10, 2023

**Confidential**

Parents on Behalf of Student, <sup>1</sup>  Petitioners,  v.  District of Columbia Public Schools (Local Education Agency “LEA”)  Respondent.  Case # 2023-0176  Date Issued: December 10, 2023	<b>HEARING OFFICER’S DETERMINATION</b>  Hearing Date: November 8, 2023 November 9, 2023 November 20, 2023 November 30, 2023  Counsel for Each Party listed in Appendix A  <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing (“Student”) resides with Student's parents (“Petitioners”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities (“MD”), including autism spectrum disorder (“ASD”) and other health impairment (“OHI”) due to Attention Deficit Hyperactivity Disorder (“ADHD”).

Petitioner filed a due process complaint (“DPC”) on September 8, 2023, alleging that DCPS denied Student a free appropriate public education (“FAPE”) because, inter alia, DCPS failed to have an individualized educational program (“IEP”) in place for Student prior to the start of school year (“SY”) 2023-2024.

### **Relief Sought:**

At the time that the DPC was filed, Petitioner was seeking as relief a finding that DCPS has denied Student a free appropriate public education (“FAPE”) and an order directing DCPS to convene a meeting to develop an appropriate IEP within seven calendar days of the HOD and an award compensatory education.<sup>2</sup>

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

DCPS filed a response to the complaint on September 19, 2023. In its response, DCPS stated, inter alia, the following:

DCPS sought reevaluation and eligibility consideration for Student in June 2022. DCPS had proposed to convene a meeting in June 2022 for this purpose. Parent responded to DCPS the same day that she would not seek a FAPE from DCPS for SY 2022-2023.

Student began attending School D for the current school year after having not attended a DCPS school the prior school year. DCPS offered comparable services for an interim provision of support to Student while simultaneously proposing an evaluation procedure that included a comprehensive evaluation of Student’s academic performance.

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<sup>2</sup> By the time the due process hearing began, DCPS had developed an IEP for Student, and Petitioner was only seeking compensatory education.

Student's parent had sought a meeting with School D. DCPS informed the parent that Student's residency needed to be completed as well as enrollment. As of August 2, 2023, the parent had submitted an incomplete enrollment packet. It would appear from Student's record that this was finally remedied in the last few weeks prior to the DPC, and Student had been attending school.

DCPS has not violated IDEA, and there has not been a denial of FAPE. Respondent respectfully requests that Petitioners' request for relief be denied.

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

The parties participated in a resolution meeting on September 21, 2023. They did not mutually agree to shorten the 30-day resolution period. The due process complaint ("DPC") was filed on September 8, 2023. The 45-day period began on October 8, 2023, and ended [and the Hearing Officer's Determination ("HOD") was originally due on November 22, 2023. The hearing did not conclude within the time originally scheduled. The undersigned impartial hearing officer ("IHO" or "Hearing Officer") granted the requested continuance, and the HOD is now due on December 10, 2023.

The IHO conducted a pre-hearing conference on September 27, 2023, and issued a pre-hearing order ("PHO") on October 5, 2023, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>3</sup>

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to develop a current IEP between June 8, 2023, when Petitioner first enrolled Student in DCPS, and August 1, 2023, when DCPS removed Student from special education?
2. Did DCPS deny Student a FAPE by failing to have an IEP in place for Student at the start of SY 2023-2024?
3. Did DCPS deny Student a FAPE by failing to have an IEP in place for Student within 90 days of Student's enrollment in DCPS?
4. Did DCPS deny Student a FAPE by dismissing Student from special education on August 1, 2023?

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<sup>3</sup> The Hearing Officer restated the issue at the hearing, and the parties agreed that this was the issue to be adjudicated.

## **DUE PROCESS HEARING:**

The Due Process Hearing (“DPH”) was convened on November 8, 2023, November 9, 2023, November 20, 2023, and November 30, 2023. The hearing was conducted via video teleconference. The parties presented written closing arguments after the DPH concluded.

## **DCPS’s Motion to Dismiss:**

On November 9, 2023, after the DPH had begun, DCPS counsel filed a motion to dismiss Petitioners’ DPC with prejudice, asserting that all relief that Petitioner was seeking had been granted. DCPS noted in its motion that DCPS had developed the IEP for Student that Petitioners sought. DCPS also asserted that after Petitioners revealed in their disclosures the amount and type of compensatory education they sought, information that DCPS claimed Petitioners had not before shared, DCPS then granted Petitioners written authorization for the requested compensatory services. DCPS asserted that granting the relief sought by Petitioners made the case moot.

On November 15, 2023, Petitioners' counsel filed an opposition to DCPS's motion. Petitioners stated they were not accepting the belated authorization and there remained an undecided issue as to whether DCPS had denied Student a FAPE.

When the DPH resumed on November 20, 2023, the IHO considered DCPS's motion. Because DCPS sought dismissal with prejudice without stipulating that Student had been denied a FAPE, the IHO denied DCPS's motion on the record, irrespective of DCPS's authorization of the requested compensatory education. The IHO then proceeded with the DPH.

## **RELEVANT EVIDENCE CONSIDERED:**

This IHO considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 40 and Respondent’s Exhibits 1 through 60) that were admitted into the record and are listed in Appendix 2.<sup>4</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>5</sup>

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

<sup>5</sup> Petitioner presented one witness: (1) Student's parent ("Petitioner"). Respondent presented five witnesses, four of whom were designated as expert witnesses: (1) Student's School Special Education Teacher (2) the Program Manager for DCPS Central IEP Team, (3) School A’s Assistant Principal, (4) School A LEA Representative (5) DCPS Resolution Specialist. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the conclusions of law.

## **SUMMARY OF DECISION:**

Petitioner held the burden of persuasion on all issues adjudicated. Based on the evidence adduced, the IHO concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #2 but not as to issues #1, #3, and #4. The IHO awarded Petitioners the compensatory education sought.

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

1. Student resides with Student's parents, Petitioners, in the District of Columbia, and DCPS is Student's LEA. Student was last determined eligible for special education and related services pursuant to IDEA in August 2020 when Student was attending a DCPS school (School A). Student's disability classification is multiple disabilities ("MD"), including autism spectrum disorder ("ASD") and other health impairment ("OHI"). (Mother's testimony, Respondent's Exhibit 15)
2. During school year ("SY") 2021-2022, Student had an IEP dated September 1, 2021, that included goals in the areas of math, written expression, and emotional/social/behavior development and prescribed 2 hours per week of specialized instruction in written expression in general education and 4 hours per week of specialized instruction per week in math in general education. The IEP also prescribed 60 minutes of behavior support services ("BSS") per month in general education and 60 minutes per month of BSS outside general education. The IEP also included classroom aids and services and medical and classroom accommodations such as repetition of directions, preferential seating, use of headphones, extended time for assignments, and frequent breaks. (Respondent's Exhibit 15)
3. Petitioners withdrew Student from School A and from DCPS in October 2021 and enrolled Student in a private school ("School B") for the remainder of SY 2021-2022 and for SY 2022-2023. School B did not provide Student special education and related services pursuant to an IEP. School B provided Student instruction and accommodations pursuant to an individual learning plan that considered Student's diagnoses and learning differences. (Mother's testimony, Respondent's Exhibits 24, 59)
4. In June 2022, DCPS's centralized IEP support unit ("CIEP"), which is responsible for students enrolled in private schools, reached out to Petitioners to determine if they intended to seek a FAPE for a Student from DCPS for SY 2022-2023. Student's mother ("Petitioner") informed DCPS that they did not intend to enroll Student in DCPS for SY 2022-2023. DCPS issued a prior written notice ("PWN") dated June 15, 2022, that stated

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

the following: "DCPS attempted to schedule [Student's] annual IEP meeting in order to provide the student with a FAPE. Parent informed DCPS she does not intend for student to attend DCPS 22/23 SY." (Respondent's Exhibits 21, 38)

5. Near the end of SY 2022-2023, Petitioner decided to reenroll Student in DCPS due to Student's increased emotional difficulties and Student's desire to return to a public school. On June 8, 2023, Petitioner attempted to enroll Student in Student's neighborhood DCPS school ("School C") before the end of SY 2022-2023, and submitted enrollment documents to School C. Petitioner hoped to start the IEP process at School C at the end of SY 2022-2023 so that an IEP would be in place for Student at the start of SY 2023-2024. (Mother's testimony, Petitioners' Exhibit 5)
6. Petitioner also applied to the DCPS lottery for Student to attend a newly formed DCPS school ("School D") slated to open at the start of SY 2023-2024. Petitioner also submitted enrollment documentation to School D on June 8, 2023. In response to a July 20, 2023, email from School D requesting Student's transcript, Petitioner emailed School D on July 30, 2023, a copy of Student's recent report card. In the email, Petitioner requested a meeting to discuss Student's need for an IEP. (Petitioners' Exhibit 7)
7. On July 30, 2023, School D's assistant principal ("AP") responded Petitioner's email noting the requirement for a transcript or proof from Student's prior school of the credits Student had obtained. The AP also asked Petitioner to provide School D a copy of Student's IEP. On July 30, 2023, Petitioner responded that she would attempt to obtain a transcript or letter from Student's prior school and a send a draft of Student's last DCPS IEP. She informed the AP that a final version of the IEP could be obtained from DCPS. (Petitioners' Exhibit 7)
8. On August 1, 2023, the DCPS's CEIP sent Petitioner an email and a copy of a PWN that stated the following: "As of 8/1/23, (Student) had been withdrawn from our system, please feel free to contact our office if you would like to reinstate services the future." The CEIP was unaware that Petitioner had enrolled Student in School D and had been communicating with School D about Student's need for an IEP. The CEIP was belatedly responding to the prior year's notice from Petitioners that Student would not be attending a DCPS school, but would be attending School B for SY 2022-2023. (Witness 2's testimony, Petitioners' Exhibit 9)
9. Petitioner understood the CEIP email to mean that Student was being exited from special education despite her correspondence with School D about Student's need for an IEP for SY 2023-2024. Petitioner immediately responded to CEIP's email informing that Student was enrolled in School D and still needed an IEP. Petitioner also stated in her email that she intended to file a DPC to challenge Student's removal from special education without notice or consent. The CEIP team immediately responded, thanking the Petitioner for that information, and stating that it would keep the Student's file open. Petitioner responded by informing that she had requested a meeting with School D. (Mother's testimony, Petitioners' Exhibit 9)

10. On August 4, 2023, CEIP emailed Petitioner informing her the next steps for obtaining an IEP for Student would be for her to enroll Student and provide residency documentation to Student's local school. Petitioner immediately emailed back that Student had been enrolled in School D since June 2023 and that a residency verification was completed. Petitioner stated concern that obtaining an IEP for Student was taking so long. (Petitioners' Exhibit 9)
11. On August 10, 2023, Petitioner emailed CEIP noting that she had requested a meeting to discuss Student's IEP for months and expressed urgency that school would start in two weeks. On August 11, 2023, CEIP responded to Petitioner's email stating they would check on the progress. On August 14, 2023, CEIP emailed Petitioner informing her that because School D was a DCPS school, which the CEIP was not aware of initially, Petitioner would need to engage with the DCPS public school IEP team instead and initiate contact with the appropriate team. (Petitioners' Exhibit 9)
12. On August 11, 2023, Petitioner sent an email to DCPS and copied the School D AP, requesting the next steps to ensure that Student had an IEP in place on the first day of school. She requested a meeting before her travel out of town. She noted that Student did not handle change well and that if certain accommodations were not in place for Student the first day of school, Student would be set up for failure. The AP responded promptly and offered to meet with Petitioner in the next few days. Petitioner responded insisting that an IEP meeting be held so that Student had an IEP in place on the first day of school. (Petitioners' Exhibit 9)
13. On August 12, 2023, Petitioner received an email from a DCPS school psychologist explaining that because School D was just opening at the start of SY 2023-2024, no IEP team had been assembled during summer 2023, and no team would be in place until school started. Petitioner responded with an email expressing, among other things, her frustration that no IEP meeting had yet been held despite her enrolling Student in June 2023, her communication with School D in July 2023 and with DCPS CIEP requesting an IEP meeting. She asserted that DCPS's failure to put an IEP team in place at School D prior to the start of SY 2023-2024 did not relieve it of its responsibility to have an IEP in place for Student on the first day of school. (Petitioners' Exhibit 8)
14. On August 14, 2023, CIEP sent an email to Petitioner asking whether she had reached out to the School D principal and AP and encouraging her to do so for further assistance. Petitioner and the School D AP had a telephone conversation on August 14, 2023, followed by an email exchange in which Petitioner, among other things, reiterated her alarm that no IEP meeting had been held and that Student would not have an IEP in place on the first day of school, which she believed would be detrimental to Student and to the School D staff. (Petitioner's Exhibits 10, 13-1)
15. The AP attempted to assure Petitioner that School D would provide Student services comparable to those in Student's prior DCPS IEP starting on the first day of school, and School D would conduct a 30-day review process in which School D would update Student's IEP. He also stated that School D would complete Student's triennial reevaluation

within 45 days. The AP provided Petitioner a copy of a modified class schedule for Student and stated that Student's teachers would be provided the proper context to support Student during a 30-day review period. (Witness 3's testimony, Petitioners' Exhibits 10, 13-1)

16. On August 15, 2023, School D's AP emailed Petitioner in anticipation of their meeting the following day. The AP stated that School D was prohibited from initiating the IEP process and conducting a formal IEP meeting the next day because Student had been "formally withdrawn from the special education process." The AP stated that instead of having an IEP meeting the next day, they would review the list of continuing services from Student's previous DCPS IEP that Student would be provided, and a new IEP would be developed after obtaining new data. The AP noted that they would schedule an analysis of existing data ("AED") meeting to discuss consent for upcoming evaluations, eligibility, and the IEP process. (Petitioners' Exhibit 13-1, 13-2)
17. After the AP informed Petitioner that an IEP meeting would not be convened before the start of school Petitioner and School D staff had a series of email exchanges the week before the first day of school for SY 2023-2024. On August 22, 2023, the AP emailed Petitioner proposing to hold a conference call with Petitioner and key members of the School D team, including the psychologist, social worker, and LEA representative for special education. He stated the following: "Although we are not prepared to review a new IEP at that time, I want to ensure you can speak with some of these critical team members in advance of Monday's first day and to assist with background information as we prepare a new IEP within the required 30 days from Monday, 8/28, and re-eligibility (triennial) process. If you share your availability for Thursday, I can work to arrange this call." (Petitioner's Exhibit 13-17)
18. On August 23, 2023, Petitioner emailed the School D AP requesting additional information in light of her being informed that Student would not have an IEP in effect on the first day of school. (Petitioners' Exhibit 13-9)
19. On Friday, August 25, 2023, the School D LEA representative emailed Petitioner proposing to hold an IEP meeting for Student on August 30, 2023. An IEP meeting was eventually scheduled for September 5, 2023. (Mother's testimony, Petitioner's Exhibit 13-7)
20. Student began attending School D on the first day of School for SY 2023-2024 on August 28, 2023, without a formal IEP in effect. On August 29, 2023, Petitioner emailed School D relating, among other things, an incident in which, despite School D's assurance that Student would be provided accommodations, including breaks from the classroom, one of Student's teachers did not allow Student to leave the classroom which resulted in Student revealing to the entire class Student's disability status to gain permission to leave the classroom. Student became significantly distressed as a result. Although School D assured Petitioner that Student would be provided accommodations and comparable services until an IEP was developed, Petitioner doubted those accommodations and services were being consistently provided based upon information that Student shared with Petitioner. (Mother's testimony)



21. Student was enrolled in an intensive outpatient therapy program during the summer 2023 and was still attending that program when Student started attending School D. As a result, Student mother arranged with School D for Student to leave school in the early afternoon to attend that program. School D, therefore, arranged for the Student's core academic classes to be provided in the morning. The Student attended the outpatient program for approximately one month after school started. (Mother's testimony, Witness 4's testimony)
22. Petitioner was present for the September 5, 2023, IEP meeting. However, DCPS postponed the meeting until September 11, 2023. On September 11, 2023, School A developed an IEP for Student. Petitioner participated in the IEP meeting. (Mother's testimony, Respondent's Exhibit 32)
23. DCPS provided Petitioner with a finalized IEP on October 11, 2023. DCPS could not provide a finalized IEP until that date due to technical difficulties and delays associated with the migration to a new OSSE special education database. (Witness 3's testimony)

### **CONCLUSIONS OF LAW:**

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

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

34 C.F.R. § 300.17 provides: A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner will proceed on the first on the day of the hearing and has the burden of production. Once Petitioner presents a prima facie case, Respondent has the burden of persuasion on the issue to be adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. <sup>7</sup> The burden of persuasion shall be

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

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

met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Did DCPS deny Student a FAPE by failing to develop a current IEP between June 8, 2023, when Petitioner first enrolled Student in DCPS, and August 1, 2023, when DCPS removed Student from special education?

**Conclusion:** Petitioner failed to sustain the burden of persuasion by a preponderance of the evidence on this issue.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[ ] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

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

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

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

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

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

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

Petitioners assert that DCPS removed Student from special education as of August 1, 2023. The facts do not support this contention. During SY 2021-2022, Student attended School A, a DCPS school, with an IEP dated September 1, 2022. Petitioners withdrew Student from School A and DCPS in October 2021, and enrolled Student in a private school, School B, for the remainder of SY 2021-2022 and for SY 2022-2023. While Student attended School B, DCPS remained Student's LEA.

In June 2022, DCPS's CIEP, responsible for private school students, reached out to Petitioners to determine if they intended to seek a FAPE for Student from DCPS for SY 2022-2023. Petitioner informed DCPS that they did not intend to enroll Student in DCPS for SY 2022-2023. DCPS issued a prior PWN and noted that response.

Near the end of SY 2022-2023, Petitioner decided to reenroll Student in DCPS and did so on June 8, 2023. Petitioner hoped to start the IEP process at the end of SY 2022-2023 so that an IEP would be in place for Student at the start of SY 2023-2024. After Student's acceptance to School D, for SY 2023-2024, Petitioner requested a meeting with School D's AP to discuss Student's need for an IEP. It appears that by chance, the next day, the DCPS CIEP emailed Petitioner with a PWN stating that the Student had been withdrawn from their system.

Although it was not unreasonable for Petitioner to have thought that Student was being exited from special education, Petitioner immediately responded to CIEP's email clarifying that Student was enrolled in DCPS at School D and needed an IEP. CIEP responded that they would keep Student's record open. Based upon this communication and the credible testimony by DCPS Witness 2 that the Student had not been exited from special education, the IHO concludes that DCPS maintained Student's eligibility for special education services.

Although the evidence demonstrates a failure by DCPS to effectively track Student's enrollment in its internal database and failure to effectively communicate and coordinate between DCPS central office and School D, the evidence does not support a conclusion that Student was removed from special education as of August 1, 2023. As a result, the IHO concludes that Petitioner did not sustain the burden of persuasion on this issue.

**ISSUE 2:** Did DCPS deny Student a FAPE by failing to have an IEP in place for Student at the start of SY 2023-2024?

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to have an IEP in place at the start of SY 2023-2024.

34 CFR § 300.323 states: When IEPs must be in effect. (a) General. At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

5A DCMR 3020.1 provides that an LEA shall ensure an IEP in effect for each enrolled child who has been determined eligible for special education and related services throughout the calendar year, including the summer months.

The starting point in this analysis is that “the IEP is the vehicle through which school districts typically fulfill their statutory obligation to provide a free appropriate public education and that officials must have an IEP in place for each student with a disability “[a]t the beginning of each school year. U.S.C. § 1414(d)(2)(A)); 34 C.F.R. 300.322(a), 300.323(a). *See also Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 95 (D.D.C. 2014) (“there is no requirement that the child be currently enrolled in a public school in order to trigger the LEA’s obligation to develop an IEP for that child”); *Dist. of Columbia v. Oliver*, 2014 WL 686860, at 6 (D.D.C. 2014).

As stated, the evidence demonstrates that near the end of SY 2022-2023, Petitioner decided to reenroll Student in DCPS and did so on June 8, 2023. Petitioner hoped to start the IEP process at the end of SY 2022-2023 so that an IEP would be in place for Student at the start of SY 2023-

2024. After Student's acceptance to School D for SY 2023-2024, Petitioner requested a meeting to School D's AP to discuss Student's need for an IEP. Petitioner made repeated attempts in impassioned communication with School D in July and August 2023 to ensure that on day one of SY 2023-2024 Student would have an IEP in place and was provided needed special education services. The evidence demonstrates that School D did not have a team in place to develop an IEP for Student prior the start of SY 2023-2024.

Although School D was newly formed and its staff was still being assembled, the responsibility to ensure that Student had an IEP in effect on the first day of school, did not simply rest with School D. It was a responsibility of the LEA, DCPS. Despite Student having attended School B, a private school, for the prior two school years and returning to a DCPS school at the end of SY 2022-2023, DCPS remained Student's LEA, and its responsibility to offer Student a FAPE continued uninterrupted. Had DCPS effectively maintained its internal communication and coordination, the CIEP team would have been aware that Student was enrolled in a DCPS school and needed an updated IEP.

Although School D may not have had a team available to put an IEP in effect during the summer months, the CIEP team should have been able to do so. When CIEP became aware that Student was enrolled in a DCPS school after having withdrawn Student from its system and then reopening Student's file, the CIEP put the onus on Petitioner to seek an IEP from School D, which was unprepared to provide Student an IEP by the first day of school. Although School D's AP and other team members attempted to ensure that Student was provided services comparable to Student's expired DCPS IEP and to provide Student accommodations that Student had at School B, their efforts fell short of what IDEA requires: that an IEP be in place at the start of the school year.<sup>8</sup>

There was credible testimony from DCPS's witnesses about the instruction and accommodations that School D staff provided Student from the first day of School until the IEP was developed on September 11, 2023. However, there was equally credible testimony from Student's mother, substantiated by documents in the record, that on day one of school Student was not provided an accommodation that was promised and expected, and this had a detrimental effect on Student. Based upon the evidence presented, the IHO concludes the evidence presented by DCPS did not sufficiently overcome the prima facie case that Petitioner presented of harm to Student. DCPS's failure to have an IEP in effect for Student on the first day of school for SY 2023-2024 was a denial of a FAPE to Student.

**ISSUE 3:** Did DCPS deny Student a FAPE by failing to have an IEP in place for Student within 90 days of Student's enrollment in DCPS?

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

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<sup>8</sup> The IHO notes that 5A DCMR 3020.11 states the following: "Upon receipt of an expired IEP, the LEA shall presume that the child remains a child with a disability and provide FAPE in the form of comparable services consistent with Section 3020.5 unless it has record or documentation of a formal exit from special education..." However, the IHO interprets this provision to apply to a student who transfers into the LEA, not a student who is already in the LEA.

Petitioners assert that DCPS failed to have an IEP in place for the Student within 90 days of the Student being enrolled in DCPS. The evidence demonstrates that Student's mother, Petitioner, enrolled Student in DCPS on June 8, 2023.

Petitioners' counsel provided as authority for this 90-day requirement a December 17, 2014, OSSE policy document regarding special education students who transfer to District of Columbia LEAs. That policy states that if an LEA receives an expired IEP for a student transferring into the LEA, and there is no record that the student has been formally exited from special education, the LEA should presume that the student remains eligible for special education and is entitled to services.

This policy also states that when a student transfers into the LEA with an existing services plan, the LEA is to complete the evaluation and eligibility process within 60 days of enrollment and finalize a new IEP within 90 days of enrollment. However, it is unclear that the nearly 10-year-old policy document remains in effect, as there was no on-the-record discussion of the policy for vetting purposes by the parties. The policy is not currently available on the OSSE website.

The evidence demonstrates that DCPS developed an IEP for Student on June 11, 2023. Although that IEP was not finalized until October 11, 2023, there was credible testimony from the DCPS witnesses that Petitioner participated in the development of the IEP, requested that the IEP be immediately implemented, and evidence that School D promptly began implementing the IEP following that meeting. There was credible testimony that the delay in finalizing the IEP was because of technical glitches in the new database system administered by OSSE, and the official finalization of the IEP through that system had no effect on whether the IEP was valid and being implemented.

Assuming the OSSE policy document that Petitioners' counsel cited is OSSE's current policy, the delay in developing and implementing the IEP as of September 11, 2023, was merely a matter of a few days beyond 90 day. There was insufficient evidence that this short delay had any significant impact on the delivery of services to Student such that it would rise to the level of a denial of FAPE. Consequently, the IHO concludes that Petitioners did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

**ISSUE 4:** Did DCPS deny Student a FAPE by dismissing Student from special education on August 1, 2023?

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

As noted in issue # 1 above, although it was not unreasonable for Petitioner to have thought that Student was exited from special education, Petitioner immediately responded to CIEP's email clarifying that Student was enrolled in DCPS at School D and needed an IEP. CIEP responded that they would keep Student's record open.

Based upon this communication and the credible testimony by DCPS Witness 2, that Student had not been exited from special education, the IHO concludes that DCPS maintained Student's eligibility for special education services. The evidence does not support a conclusion that Student

was removed from special education as of August 1, 2023. As result, the IHO concludes that Petitioner did not sustain the burden of persuasion on this issue.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioner testified that Student would benefit from the services and that they would reasonably put Student in the position Student would have been but for the denial of FAPE. As noted above, after the hearing began, DCPS granted Petitioners authorization to obtain the amount and type of compensatory education that Petitioners requested. The IHO infers, therefore, that Respondent also thought the requested compensatory education was reasonable. The IHO concludes that there was sufficient evidence to provide Student compensatory services that Petitioners requested.

**ORDER:**

1. DCPS shall, within ten (10) business days of the issuance of this order, if it has not already done so, provide Petitioners authorization to obtain the following as compensatory education: 120 hours of independent tutoring and 50 hours of independent counseling at the OSSE prescribed rates by providers of Petitioners' choice. <sup>9</sup>

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<sup>9</sup> The IHO notes that DCPS provided Petitioners authorization for compensatory services after the hearing began. In her closing arguments, Petitioners' counsel asserted that DCPS later rescinded that authorization. The IHO has not verified this assertion. In any case, Petitioner shall be provided compensatory education either pursuant to this order or DCPS's authorization, but not both.

2. All other relief requested by Petitioners is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: December 10, 2023**

Copies to:      Counsel for Petitioner  
                      Counsel for LEA  
                      OSSE-SPED {[due.process@dc.gov](mailto:due.process@dc.gov)}  
                      ODR {[hearing.office@dc.gov](mailto:hearing.office@dc.gov)}  
                      [contact.resolution@dc.gov](mailto:contact.resolution@dc.gov)