

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
February 13, 2021

<i>Student</i> , ¹)	Case No.: 2020-0204
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 2/13/21
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (using Microsoft Teams):
("DCPS"),)	2/2/21 & 2/4/21
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of needed evaluations, appropriate Individualized Education Programs (“IEPs”), and failure to fully implement existing IEPs. DCPS responded that the evaluation of Student was sufficient, and that Student’s IEPs were appropriate and fully implemented.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 11/30/20, the case was assigned to the undersigned on 12/1/20. Respondent filed a response on 12/10/20, and did not challenge jurisdiction. A resolution meeting was held on 12/9/20, which did not resolve the dispute or shorten the 30-day resolution period, which ended on 12/30/20. A final decision

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

Hearing Officer Determination

Case No. 2020-0204

in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 2/13/21.

The prehearing conference was held on 1/11/21 and the Prehearing Order was issued that same day addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 2/2/21 and 2/4/21 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated throughout the hearing.

Petitioner’s Disclosures, submitted on 1/26/21, contained documents P1 through P28, which were all admitted into evidence without objection. Respondent’s Disclosures, also submitted on 1/26/21, contained documents R1 through R44; R43 and R44 were withdrawn by Respondent at the due process hearing and the remaining documents were admitted into evidence without objection.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychologist* (qualified without objection as an expert in Clinical Psychology and IEP Programming)
2. *Educational Advocate* (qualified without objection as an expert in Special Education and IEP Programming, and IEP Implementation)
3. *Father*
4. *Mother*

Respondent’s counsel presented 1 witness in Respondent’s case (*see* Appendix A): *Special Education Coordinator at Public School* (qualified over objection as an expert in Special Education Evaluation and Programming)

Petitioner’s counsel recalled Mother as the sole rebuttal witness.

At the end of Petitioner’s case-in-chief, Respondent made an oral motion for a default judgment on Issue 1 and Issue 2(b), which the undersigned took under advisement and hereby denies based on testimony and documentary evidence and other reasons set forth below.

² Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages separated by commas). By contrast, Respondent’s documents are consecutively Bates numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted.

Hearing Officer Determination

Case No. 2020-0204

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate and/or timely conduct (a) a psychological evaluation based on information available by October 2019 and Parent’s request at the start of 2019/20,³ and/or (b) a functional behavioral assessment (“FBA”) followed by a behavioral intervention plan (“BIP”) to address attendance and off task behaviors in 2019/20. (*Petitioner has the burden of persuasion on this issue.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to create an appropriate IEP on 10/7/19⁴ and/or 3/16/20 that was (a) tailored to the particular needs of Student, (b) based on updated and current evaluations, and/or (c) allowed Student to make appropriate progress, as service hours were reduced instead of increased. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to fully implement Student’s 10/2018 and 10/2019 IEPs during 2018/19 and 2019/20 when Student missed (a) 225 out of 600 minutes of speech-language services in 2018/19 and 285 out of 600 minutes of speech-language services in 2019/20, and/or (b) specialized instruction when the attendance and/or behavior issues were not addressed. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. DCPS shall fund the following independent educational evaluations (“IEEs”): (a) psychological, and (b) FBA.⁵
2. DCPS shall provide compensatory education for any denials of FAPE, with reservation of additional compensatory education based on the evaluations requested in the previous paragraph.⁶

³ All dates in the format “2019/20” refer to school years.

⁴ The date of the IEP was erroneously stated as 10/17/19 in the Prehearing Order based on the complaint.

⁵ At the beginning of the due process hearing, Petitioner withdrew without prejudice her request for an independent speech-language evaluation.

⁶ So far as Petitioner’s request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student’s assessments and a determination of eligibility for additional special education and related services.

With regard to any request for compensatory education to be awarded in the HOD, Petitioner’s counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had

Hearing Officer Determination

Case No. 2020-0204

3. DCPS shall guarantee timely payment to independent providers of evaluations and compensatory education.
4. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁷ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁸ Student is *Age*, *Gender* and was in *Grade* at Public School in 2019/20.⁹ Student impressed the evaluator for the 10/10/18 comprehensive psychological evaluation as "friendly, polite and humorous"; others noted that Student was "pleasant," "sweet," and "enjoys helping others."¹⁰

2. IEPs. Student's 2/8/17 IEP provided for 10 hours/week of specialized instruction outside general education and 1 hour/week of specialized instruction inside general education, along with 1 hour/month of speech-language services outside general education.¹¹ That IEP was amended on 6/23/17 with no change in services, and continued the disability classification of Specific Learning Disability ("SLD").¹² The 10/10/18 comprehensive psychological evaluation found that Student met the criteria for Other Health Impairment ("OHI") (due to Attention Deficit Hyperactivity Disorder ("ADHD")) and SLD; Student was found eligible for Multiple Disabilities ("MD") on 10/26/18.¹³

3. Student's 10/24/18 IEP, with the new MD classification, provided 15 hours/week of specialized instruction outside general education (divided into 8 hours for reading, 5 for math, and 2 for written expression), and 1 hour/month of speech-language services outside

Student not suffered the alleged denial of FAPE. Respondent was invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁷ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁸ Mother.

⁹ *Id.*

¹⁰ P6-4,6; P4-4.

¹¹ R42p165,173.

¹² R41p150.158.

¹³ P6-20,21; Psychologist; R42p165; P15-1.

Hearing Officer Determination

Case No. 2020-0204

general education.¹⁴ The services page stated that Student would receive small group and 1:1 instruction in the special education classroom in reading, writing, and mathematics.¹⁵

4. Student's 10/7/19 IEP – the first IEP at issue in this case – provided only 10 hours/week of specialized instruction outside general education (divided into 5 hours each for reading and math), and 1 hour/month of speech-language services outside general education.¹⁶ The services page continued to state that Student would receive small group and 1:1 instruction in the special education classroom in writing, as well as reading and mathematics.¹⁷ Student's 3/16/20 IEP – the other IEP at issue in this case – provided the very same services as the 10/7/19 IEP, including the promise of instruction in writing.¹⁸

5. Student's IEP was amended by *Public Charter School* on 10/22/20 to change service hours and review accommodations for Student; specialized instruction was increased to 19 hours/week outside general education, while speech-language services continued at 1 hour/month.¹⁹

6. Cognitive Abilities. The 10/10/18 comprehensive psychological evaluation included a Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), but did not yield a Full Scale IQ (“FSIQ”) due to Student's differing range of abilities.²⁰ Student had cognitive strength in visual-spatial problem-solving (Average); underdeveloped working memory (Low Average); and significant deficits in solving novel problems, processing speed, and verbal comprehension (Very Low range).²¹

7. Academic Achievement. Student struggled in all achievement areas.²² Academic testing with the Woodcock-Johnson IV (“WJ-IV”) as part of the comprehensive psychological evaluation indicated that Student's overall achievement was within the Extremely Low range (standard score (“SS”) of 59, 1st percentile compared to others the same age).²³ Student was well below grade level in all areas compared to peers, with age-equivalent deficits of 3 to 4 years in most areas, and only 2 of 26 clusters/tests in which Student's deficit was less than 3 years.²⁴ Student was performing significantly lower than expected based on cognitive skills as shown in the WISC-V.²⁵ Psychologist, testifying as Parent's expert, concluded that Student “really needs help” based on low academic scores.²⁶

¹⁴ P10-1,9.

¹⁵ P10-9.

¹⁶ P11-1,10.

¹⁷ P11-10.

¹⁸ P12-1,10.

¹⁹ P13-1,10.

²⁰ P6-8; Psychologist.

²¹ P6-8,22.

²² P10-3.

²³ P6-10.

²⁴ P5-1; Educational Advocate.

²⁵ P6-10; P6-17 (Student underperforming).

²⁶ Psychologist; P6-11.

Hearing Officer Determination

Case No. 2020-0204

Student struggled to complete work independently; Student's learning was "effortful" and gains slow.²⁷ Student indicated that reading, math and writing were "hard" because Student "can't keep up" and "gets confused."²⁸ Student noted that Student is easily distracted by noises and has trouble focusing in class.²⁹

8. Math. DCPS relied on informal math assessments to determine that Student was 3 years below grade level on 8/23/18; the 9/4/18 WJ-IV assessment showed comparable deficits.³⁰ Student's iReady in August 2019 indicated that Student was 4 years below grade level in math.³¹ Math short cycle assessments ("SCAs") were administered every other week and showed an average of 33% early in 2019/20.³² IEP Progress Reports for second quarter ("2Q") 2019/20 noted a 2-point iReady increase from Beginning of Year ("BOY") to Middle of Year ("MOY") was "minimal" progress, although DCPS viewed it very positively at the hearing.³³ An iReady assessment at Public Charter School showed that Student was 5 years below grade level in math on 10/18/20, at the 5th percentile compared to others in the same grade.³⁴

9. Reading. The 9/4/18 WJ-IV assessment showed Student was about 3.5 years below grade level; an informal classroom-based assessment of reading found that Student was 3 years below grade level on 8/23/18.³⁵ In August 2019, the Scholastic Reading Inventory ("SRI") found that Student had regressed to Beginning Reader, a Pre-K reading level.³⁶ Student was to be administered the ANET assessment on 10/10/19.³⁷ In 2019/20, Student's SRI score "improved by 10%" from BOY to MOY.³⁸ Student was years below grade level in reading on 10/18/20 at Public Charter School, with a Reading Inventory assessment score of 122, which was Below Basic and at the 1st percentile compared to others in the same grade.³⁹

10. Written Expression. The 9/4/18 WJ-IV assessment showed Student was 3 years below grade level in written expression.⁴⁰ A 10/15/15 written expression screen found that Student was able to write very basic sentences of 3 words.⁴¹ Student's reading and writing skills were commensurate; Student's IEP PLOP for written expression relied on reading

²⁷ P6-4.

²⁸ P6-5.

²⁹ *Id.*

³⁰ P10-3 (IEP present levels of performance ("PLOPs")).

³¹ P11-4.

³² *Id.*

³³ P22-63; Special Education Coordinator.

³⁴ P20-1.

³⁵ P10-4 (IEP PLOP); P4-1,2 (Analysis of Existing Data ("AED") dated 8/31/18).

³⁶ P11-5 (10/7/19 IEP PLOP); Psychologist.

³⁷ P11-5; Special Education Coordinator.

³⁸ R25p96.

³⁹ P20-1,4.

⁴⁰ P10-6.

⁴¹ *Id.*

Hearing Officer Determination

Case No. 2020-0204

data.⁴² Student's writing on 10/3/19 can be seen on the Student Participant Written Input Form, where Student was asked for 3 jobs of interest and responded, "FireFight, Truck, Police office."⁴³

11. Specialized Instruction. The 10/10/18 comprehensive psychological evaluation recommended that Student receive specialized instruction to address the impact of ADHD as well as SLD in the school setting.⁴⁴ Student needed more services and support for 2019/20, but specialized instruction was reduced.⁴⁵ Special Education Coordinator asserted that there was no decrease in specialized instruction services, which undermined his credibility with the undersigned.⁴⁶ Special Education Coordinator testified that the change in specialized instruction was offset by Student receiving additional reading supports through a Reading Lab in a general education class of regular size with about 20 students.⁴⁷ Parents had sought more specialized instruction for Student in both the 10/7/19 IEP and the 3/16/20 IEP.⁴⁸

12. Behavior. Off-task behavior affected Student's progress in the general education curriculum; Student required small group instruction, among other things, in order to progress.⁴⁹ Student would "act out" in school when Student couldn't keep up.⁵⁰ A classroom observation for the 10/10/18 comprehensive psychological evaluation indicated that Student was on-task 60% of class time; another for the 10/1/18 speech-language reevaluation noted attention to task less than 50% of the time, with off-task behaviors of making (and throwing) paper airplanes, throwing a pencil, and a verbal outburst concerning other student behaviors.⁵¹ Student's behavior was significantly ("10 times") worse in 2019/20 than 2018/19.⁵²

13. The Behavior Assessment System for Children, Third Edition ("BASC-3") administered as part of the 10/10/18 comprehensive psychological evaluation included significant concerns by all raters across several externalizing, internalizing and adaptive functioning areas; this suggests that Student demonstrates social, emotion, and behavioral difficulties that are impacting Student across settings and interfering with learning.⁵³ At-Risk and Clinically Significant scores were reported in the areas of conduct problems and aggression.⁵⁴ The special education teacher and Student rated Clinically Significant scores in the areas of anxiety, depression, and somatic concerns; both of Student's teachers

⁴² P10-6; P11-6.

⁴³ P16-1 (verbatim).

⁴⁴ P6-22.

⁴⁵ P11-10; Educational Advocate; Father.

⁴⁶ Special Education Coordinator; Administrative Notice.

⁴⁷ Special Education Coordinator.

⁴⁸ Father.

⁴⁹ P10-3 (10/24/18 IEP); P11-4 (10/7/19 IEP).

⁵⁰ Father.

⁵¹ P6-5; P7-2,3.

⁵² Father.

⁵³ P6-13.

⁵⁴ P6-14.

Hearing Officer Determination

Case No. 2020-0204

reported Clinically Significant school problems.⁵⁵ Teachers had concerns regarding Student's attention and emotional needs; the 10/10/18 comprehensive psychological evaluation concluded that Student's academic difficulties may have been starting to impact social/emotional functioning, so counseling or interventions were likely warranted at that time.⁵⁶

14. Attendance. Parents expressed concerns about Student's attendance and academic progress.⁵⁷ Student often was within the school building, but could not be found.⁵⁸ Student missed some classes for a month or two and Parents were never contacted.⁵⁹ Student would do well in one class if getting help, but not in another class without help.⁶⁰ Student often cut Reading Lab, a general education class.⁶¹ Special Education Coordinator suggested an attendance contract and Parents agreed to try it.⁶² Student was to begin using a conduct sheet to track attendance daily; Parents agreed.⁶³ Parents felt it took too long to get a plan to deal with attendance.⁶⁴ The plan for attendance worked out and Student began attending classes in January 2020.⁶⁵

15. Evaluations. Student's primary care physician prepared a short letter dated 10/3/19 stating that it was "imperative" that Student's IEP services continue and that Student receive a full psychoeducational evaluation in 2019/20 to better understand and address Student's challenges.⁶⁶ Father took the letter to Public School to give to Special Education Coordinator to try to get the best care possible for Student.⁶⁷ Special Education Coordinator testified that he had read the letter, noting that the physician was not an educational expert and may not have known about the prior evaluation.⁶⁸ Mother testified that Public School had told Parents to submit a doctor's note to obtain an evaluation which they sought for Student.⁶⁹

16. Psychologist testified that Student was refusing to do work, as indicated in IEP Progress Reports, so an FBA was needed to determine why, followed by an BIP.⁷⁰ DCPS

⁵⁵ P6-14,15.

⁵⁶ P6-4,22; Psychologist (counseling recommended).

⁵⁷ Father; Mother; P25-6 (3/16/20 Prior Written Notice).

⁵⁸ Father.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Special Education Coordinator.

⁶² *Id.*

⁶³ P25-6.

⁶⁴ Mother.

⁶⁵ *Id.*

⁶⁶ P9-1.

⁶⁷ Father.

⁶⁸ Special Education Coordinator.

⁶⁹ Mother.

⁷⁰ Psychologist; R11p56 (Student refused to complete assignments in math class or with special education teacher, 2Q 2018/19).

Hearing Officer Determination

Case No. 2020-0204

asserted that an FBA was not needed because Student was not constantly fighting or causing disruption; Student's off-task and attendance problems only affected Student.⁷¹ Student was purposefully skipping Reading Lab.⁷²

17. Public Charter School increased Student's specialized instruction in 2020/21 without needing or conducting a formal evaluation.⁷³ Public Charter School has not conducted an FBA or prepared a BIP.⁷⁴ Petitioner's counsel didn't disagree with how Public Charter School has handled Student's situation.⁷⁵ Educational Advocate "wholeheartedly" agreed that Student's LRE was correct on the Public Charter School IEP, with 19 hours/week of specialized instruction outside general education.⁷⁶ Student is doing better in school now with distance learning at Public Charter School; school is keeping Student engaged.⁷⁷

18. Parents were highly involved in Student's education, seeking the best for Student, with Mother participating in meetings for Student while hospitalized for a difficult pregnancy.⁷⁸ Parents sought evaluations, more services and counseling for Student, but believed Public School was not taking sufficient action to help Student.⁷⁹ Parents felt that Public School was "nonchalant" about Student's education, dismissively asserting that it was doing everything Student needed.⁸⁰ Parents hired a tutor for Student to make up for the lack of services at Public School, paying \$100/week out of pocket for 2 sessions/week for 4-5 months.⁸¹

19. Speech-Language Services. Based on Service Trackers, DCPS failed to provide or offer the following speech-language services as required by Student's 10/24/18 IEP: 30 minutes in November 2018, 60 minutes in March 2019, 60 minutes in April 2019, 15 minutes in May 2019, and 15 minutes in August 2019 (when only one-fourth of a month was due); on the other hand, 30 extra minutes were provided in June 2019 (when only one-half of the month was due), and 30 extra minutes in September 2019; the net result was a failure by DCPS to provide 120 minutes pursuant to the 10/24/18 IEP which required 60 minutes/month from 10/24/18 to 10/6/19.⁸² A total of 555 minutes were due Student pursuant to the 10/24/18 IEP, with 15 minutes required for the last week in October 2018, 30 minutes for half of June 2019, 15 minutes in August 2019, 15 minutes in October 2019,

⁷¹ Special Education Coordinator.

⁷² *Id.*

⁷³ P25-8; Educational Advocate.

⁷⁴ Educational Advocate.

⁷⁵ P14-4 (RSM).

⁷⁶ Educational Advocate.

⁷⁷ Father.

⁷⁸ P6-2; Mother.

⁷⁹ Father.

⁸⁰ *Id.*

⁸¹ Father; Mother.

⁸² P23-2,3,4,5,6,7,8,9,10,11,12,13.

Hearing Officer Determination

Case No. 2020-0204

and 60 minutes for each of the other 8 months in between; according to IEP Progress Reports, 2018/19 ended on 6/14/19 and 2019/20 began on 8/26/19.⁸³

20. DCPS provide or offered all speech-language services required by Student's 10/7/19 IEP, which ended on 3/15/20, as 60 minutes not offered due to the unavailability of the speech-language pathologist in November 2019 (according to Service Tracker notes) was offset by an extra 45 minutes in December 2019 and 30 minutes in the first half of March 2020.⁸⁴

21. Compensatory Education. Educational Advocate's compensatory education proposal is based on Student's failure to progress, which should have been addressed through increased specialized instruction and an FBA followed by a BIP.⁸⁵ The compensatory education goal is to bridge the gaps and help Student catch up where Student is behind due to the denial of FAPE.⁸⁶ Educational Advocate testified persuasively that but for the denial of FAPE, Student could have made advancements in reading and math.⁸⁷ Educational Advocate proposed that 325 hours of tutoring would be necessary to put Student in the place Student would have been, calculating 8.75 hours of specialized instruction per week over 40 weeks, as adjusted for other factors and exercising expert judgment.⁸⁸ Mother felt that Student would be willing to do an extra hour or two of tutoring per week.⁸⁹

22. The compensatory education proposal also included 100 hours of counseling to meet socio-emotional needs and help Student succeed in the classroom, with an hour/week over 2 years.⁹⁰ The proposal further included 20 hours of speech-language services to make up missed services which included allegations at the end of 2019/20 that were outside the claim in the due process complaint.⁹¹

⁸³ P23-2,3,4,5,6,7,8,9,10,11,12,13; P22-53,58.

⁸⁴ P23-13,14,15,16,17,18. In the alternative, if Student absences or unavailability were required to be made up, Student would have lacked 45 minutes in October 2019 (based on three-fourths of the month), 60 minutes in November 2019, and 60 minutes in January 2020, as offset by an extra 45 minutes in December 2019 and 30 minutes in the first half of March 2020; there were a total of 315 minutes of speech-language services required by the 10/7/19 IEP, of which 90 minutes – or 29% of speech-language services required – were missed.

⁸⁵ Educational Advocate; P28.

⁸⁶ Educational Advocate.

⁸⁷ *Id.*

⁸⁸ P28-5.

⁸⁹ Mother.

⁹⁰ P28-5; Educational Advocate.

⁹¹ P28-3; Educational Advocate.

Hearing Officer Determination

Case No. 2020-0204

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Andrew F.*, 137 S. Ct. at 1001.

In addition, the LEA must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with

Hearing Officer Determination

Case No. 2020-0204

disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only 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 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate and/or timely conduct (a) a psychological evaluation based on information available by October 2019 and Parent's request at the start of 2019/20, and/or (b) an FBA followed by a BIP to address attendance and off task behaviors in 2019/20. (Petitioner has the burden of persuasion on this issue.)*

Petitioner succeeded in part on this first issue by showing the need for an FBA and BIP in 2019/20, but failed to prove more than a procedural violation on the question of repeating the psychological evaluation that had been conducted a year earlier.

The importance of assessing children in all areas of suspected disability was emphasized in *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 518 (D.C. Cir. 2018), *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) ("in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable [the student] to receive educational benefits" (citation omitted)); 34 C.F.R. § 300.304(c)(4).

The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as

Hearing Officer Determination

Case No. 2020-0204

appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a); *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016). The specific evaluations which Petitioner claims should have been provided are considered in turn.

(a) Psychological Evaluation. A detailed comprehensive psychological evaluation had been completed on 10/10/18, but Parents requested reevaluation just a year later at the beginning of 2019/20, as they were entitled to do. DCPS disputed whether Parents had requested reevaluation, but there is no doubt about the 10/3/19 letter from Student's physician seeking reevaluation in 2019/20, which Parents took to Public School with the understanding that a doctor's note was the necessary process for Student to obtain an evaluation. Special Education Coordinator acknowledged reviewing that written request, so the undersigned finds the request clear.

At that point, in accordance with 34 C.F.R. § 300.305(a), the MDT for Student should have conducted an AED, as the team had previously done on 8/31/18. Failure to do so is a procedural violation of the IDEA, *Z.B.*, 888 F.3d at 524, but not a denial of FAPE unless there were substantive effects such as preventing the IEP team from developing the program needed by the child. Here, due weight is given to the 10/10/18 comprehensive psychological evaluation which made recommendations that had not been implemented, as Psychologist noted in her testimony. But Petitioner did not demonstrate the need for an updated psychological evaluation of Student and the undersigned is not persuaded of the need to reevaluate Student by repeating assessments prior to implementing the 10/10/18 comprehensive psychological recommendations. As noted below, it is clear that Student needed more support based on the 2018 evaluation. In addition, there are informal assessments that can be and were used to determine Student's needs, including short cycle assessments administered every other week at Public School, along with ANET and other assessments, which were a regular part of Public School's process for determining the progress and needs of students.

This approach is confirmed by the fact that Parents, along with their advocates and experts, have not stated dissatisfaction with Public Charter School in 2020/21, but value the additional services provided there without the need for additional formal assessments. Thus, this Hearing Officer concludes that DCPS committed a procedural violation by not taking Parents' reevaluation request seriously, but no substantive violation or denial of FAPE resulted.

(b) Functional Behavioral Assessment. Turning to the FBA, the IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i); *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 146 (D.D.C. 2018). *See Z.B.*, 888 F.3d at 524 (failing to conduct an FBA is a procedural violation that could have substantive effects).

Student was not a child with typical behavior problems, but both the 10/24/18 IEP and the 10/7/19 IEP noted that Student's off-task behaviors affected Student's progress in

Hearing Officer Determination

Case No. 2020-0204

the general education curriculum. The 10/10/18 comprehensive psychological evaluation noted that Student had social, emotion, and behavioral difficulties that impacted Student and interfering with learning. Student also refused work and had attendance challenges; Public School was unreasonably slow in responding with an attendance plan. In this posture, the undersigned is persuaded that an FBA would have been appropriate in 2019/20 followed by a BIP to determine in detail how Student's behavioral difficulties could have been addressed. The undersigned concludes that the failure was a substantive violation due to impeding Student's right to a FAPE and causing a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(i),(iii).

If Student had remained at Public School where the FBA was needed, the undersigned would have no hesitation in ordering an FBA to be conducted now. However, since Student is now at Public Charter School the situation has shifted, for Student is reportedly doing well currently and apparently there has been no request or need for an FBA to be conducted there. Parents and their advocates are reportedly satisfied with Public Charter School and the lack of these formal evaluations in 2020/21.

However, that does not mean there is no remedy for the lack of an FBA/BIP in 2019/20. Indeed, the 10/10/18 comprehensive psychological evaluation concluded that Student's serious academic difficulties were starting to impact Student's social/emotional functioning to the extent that counseling or interventions were likely warranted. Accordingly, Psychologist recommended counseling at the due process hearing, which this Hearing Officer concludes is appropriate for Student as compensatory education to remedy this denial of FAPE, as discussed further below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to create an appropriate IEP on 10/7/19 and/or 3/16/20 that was (a) tailored to the particular needs of Student, (b) based on updated and current evaluations, and/or (c) allowed Student to make appropriate progress, as service hours were reduced instead of increased. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case through expert testimony and documents on this issue, shifting the burden of persuasion to DCPS, which failed to meet its burden of persuasion on the appropriateness of the IEPs with reduced specialized instruction hours.

The applicable legal standard for analyzing the appropriateness of the 10/7/19 and 3/16/20 IEPs at issue here was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. As the D.C. Court of Appeals emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA," requiring more than "merely some" educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be "reasonably calculated to produce meaningful educational benefit"). The measure and adequacy of the IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by considering the specific concerns raised by

Hearing Officer Determination

Case No. 2020-0204

Petitioner, which are considered in turn.⁹² See 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Not Tailored to Student's Particular Needs. Every IEP is to be based on the needs of the Student, for as noted above, “[t]he IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 137 S. Ct. at 994, *quoting Rowley*, 458 U.S. at 181. Here, Student needed more services than were provided in the 10/7/19 and 3/16/20 IEPs to address the serious deficits in Student’s academic skills.

(b) Not Based on Updated and Current Evaluations. This assertion has been resolved in Issue 1, which concluded that there was a procedural violation, but no denial of FAPE in not adequately considering Parent’s request for a psychological reevaluation. As discussed above, there was sufficient clarity from the 10/10/18 comprehensive psychological evaluation and other informal assessments to provide more services than DCPS included in the 10/7/19 and 3/16/20 IEPs at issue here.

(c) Student Could Not Make Appropriate Progress. Ultimately, the issue comes down to whether Student could make appropriate progress in the circumstances with the IEPs offered to Student on 10/7/19 and 3/16/20, in which DCPS had reduced, rather than increased, Student’s specialized instruction despite worsening academic deficits. Parents sought more specialized instruction for Student in both the 10/7/19 IEP and the 3/16/20 IEP, and the undersigned is persuaded that they were correct, as the IEPs were not calculated to enable Student to make sufficient progress in the circumstances.

Student’s overall achievement level at the time of the prior 10/24/18 IEP was within the Extremely Low range – at the 1st percentile compared to others the same age – and well below grade level in all areas. Student was performing significantly lower than expected based on Student’s cognitive skills. Based on this, the 10/24/18 IEP provided 15 hours/week of specialized instruction. By the next year Student’s deficit had increased from 3 to 4 years below grade level in math, and significantly regressed in reading to a Beginning Reader or Pre-K level. Student similarly struggled in written expression. But instead of providing more resources in the 10/7/19 IEP, DCPS reduced specialized instruction from 15 to 10 hours/week. The undersigned was unpersuaded by Special Education Coordinator’s assertion that there actually was no reduction in the level of specialized instruction because Student was provided additional reading supports in a Reading Lab. As Special Education Coordinator acknowledged, Reading Lab was a regular size general education class, which cannot substitute for specialized instruction hours.

The lower level of only 10 hours/week was maintained in the 3/16/20 IEP, even though Student continued to struggle. DCPS tried to dress up Student’s deficits and assert that Student was on the right track, claiming that in 2019/20 Student’s SRI score “improved

⁹² A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. Issue 1, above, addresses procedural violations.

Hearing Officer Determination

Case No. 2020-0204

by 10%,” even though Student’s starting point was so low that a 10% improvement had little meaning. Indeed, in 2020/21 at Public Charter School, Student’s Reading Inventory was only 122, a Below Basic level at the 1st percentile compared to others in Student’s grade. In math at Public Charter School in 2020/21, Student’s deficit had increased to 5 years below grade level.

Psychologist concluded at the due process hearing that Student “really needs help” based on low academic scores. The undersigned agrees. As the court recently noted in *S.M. v. Dist. of Columbia*, CV 19-2096 (RC), 2020 WL 7230266, at *5 (D.D.C. 12/8/20), review of an IEP turns on whether it is reasonable, not whether it is ideal, quoting *Endrew F.*, 137 S. Ct. at 999. This Hearing Officer concludes that the 10/7/19 and 3/16/20 IEPs were not reasonable when developed and denied Student a FAPE, which contributes significantly to the award of compensatory education set forth below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to fully implement Student’s 10/2018 and 10/2019 IEPs during 2018/19 and 2019/20 when Student missed (a) 225 out of 600 minutes of speech-language services in 2018/19 and 285 out of 600 minutes of speech-language services in 2019/20, and/or (b) specialized instruction when the attendance and/or behavior issues were not addressed. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the lack of full implementation of speech-language services required by the 10/24/18 IEP, but not the 10/7/19 IEP; she did not meet her burden on the lack of specialized instruction implementation based on attendance or behavior issues.

With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student’s IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

(a) Speech-Language Services. Petitioner asserted that Respondent failed to provide over one-third of Student’s speech-language services in 2018/19 and nearly one-half in 2019/20. In fact, careful analysis of the claim and applicable legal principles shows that only 22% of the required speech-language services were not provided pursuant to the 10/24/18 IEP, amounting to a total of 2 hours. As for implementation of the 10/7/19 IEP, all minutes of speech-language services were provided or offered to Student, but even if Student’s absences were attributed to DCPS only 90 minutes were not provided.

Hearing Officer Determination

Case No. 2020-0204

As an initial matter, it must be noted that Petitioner's failure-to-implement claim is limited to the 10/24/18 IEP and the 10/7/19 IEP (which ended with the 3/16/20 IEP, which is not in issue here), both of which required 1 hour/month of speech-language services. Calculations based on close review of the Service Trackers for speech-language services reveal that DCPS failed to provide 120 minutes required by the 10/24/18 IEP, during which time a total of 555 minutes were due Student, based on careful proration of the months at the beginning and end of the school year and of the IEPs, which amounts to a failure to provide 22% of the required speech-language services.

Based on relevant caselaw, the failure to provide 22% of services is a material deviation from Student's IEP and a denial of FAPE. *See Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *cf. Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This modest denial of FAPE for the lack of 2 hours of speech-language services is addressed in the award of compensatory education below.

Whether there was full implementation of the 10/7/19 IEP turns on whether Student's absences are attributed to DCPS based on Petitioner's arguments in the due process hearing that DCPS failed to address Student's attendance issues, as discussed above. Here, the undersigned is clear that Student was not regularly failing to participate in the speech-language services, but was willing to receive services in December, February and March (with extra services in December and March), even though absent in October, November and January.

The undersigned thus concludes that the standard principles should apply under which student absences are not the responsibility of the LEA. In *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court held that related services sessions missed due to "snow days, holidays, [student's] absence from school, and the like" were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14-01119, 2015 WL 5175885, at *8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if the student "would not have been present to receive any" of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP 4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability due to school functions to be made up).⁹³

(b) Specialized Instruction. Petitioner argued that Student did not receive adequate attention during distance learning, which began in mid-March 2020 and thus falls outside the claim for implementation of the 10/7/19 IEP which ended with Student's new IEP on 3/16/20. Petitioner also argued in her complaint that DCPS failed to implement the specialized instruction in the IEPs because Student did not make progress. But lack of a desired outcome does not demonstrate that DCPS did not provide the required inputs by

⁹³ At the end of the day there were only 90 minutes at issue, which amounted to 29% of the 315 total speech-language service minutes that were required pursuant to the 10/7/19 IEP. This would be a denial of FAPE based on the decisions noted above, if DCPS was responsible for Student's absences, which the undersigned concludes it was not.

Hearing Officer Determination

Case No. 2020-0204

providing Student's specialized instruction. *See, e.g., Holman v. Dist. of Columbia*, 153 F. Supp. 3d 386, 389-90 (D.D.C. 2016) (while a FAPE is required, there is no guarantee of "any particular outcome or any particular level of academic success").

Remedies

Having analyzed and resolved the issues in this case, what remains is to consider appropriate remedies that will compensate for the denials of FAPE. Since Student is no longer in a DCPS school, and Student's current school is not at issue, there is no need to modify Student's IEP and an FBA is not ordered as discussed above.

Compensatory education is awarded to make up for the denials of FAPE found above. In determining the amount of compensatory education for the denials of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, a significant amount of academic tutoring is required to make up for the failure to provide the specialized instruction needed by Student, with the goal of restoring Student to the position in which Student would be but for the denials of FAPE. In addition to tutoring, the restoration of Student to the proper position may also be aided by counseling, which is ordered below. Educational Advocate testified that the compensatory education hours sought in his compensatory education proposal would put Student in the position Student would have been but for the denials of FAPE in this case. However, Educational Advocate's proposal must be adjusted significantly as it is based on nearly full-time specialized instruction, and a proposal of 325 hours of tutoring, while Mother felt that Student would be able to handle only an hour or two per week (in addition to school). Thus, based on the experience and judgment of the undersigned, the Order below awards 200 hours of academic tutoring, along with 40 hours of counseling to make up for the failure to conduct an FBA and develop a BIP, and 4 hours of speech-language services based on the services missed and understanding that gaining full benefits from working with a new provider may require some extra time.

These determinations by the undersigned have been carefully considered and specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 24 months to avoid administrative burdens on Respondent, although the undersigned encourages Parents to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

Hearing Officer Determination

Case No. 2020-0204

ORDER

Petitioner has prevailed in part in this case, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denials of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter(s) of authorization for (a) 200 hours of academic tutoring, (b) 40 hours of counseling, and (c) 4 hours of speech-language services, all from independent providers chosen by Petitioner; all hours are to be used within 24 months and any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat
Keith L. Seat, Esq.
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).

Copies to:

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