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Confidential

Parent on Behalf Student, ¹	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Dates:
v.	January 21, 2021, & February 4, 2021
District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2020-0201	
Date Issued: February 16, 2021	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The due process hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student’s parent (“Petitioner”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is a currently age ____² and is eligible for special education pursuant to IDEA with a disability classification of Specific Learning Disability (“SLD”). Student currently attends a DCPS school (“School A”).

During school year (“SY”) 2019-2020, School A developed an individualized education program (“IEP”) for Student dated October 21, 2020. Petitioner, along with her attorney and educational advocate participated in the IEP meeting.

Petitioner filed her due process complaint against DCPS on November 20, 2020, alleging DCPS denied Student a free appropriate public education (“FAPE”) by failing to provide Student with an appropriate IEP on October 21, 2020, because, inter alia, the IEP reduced Student’s hours of specialized instruction and speech language services (“SLS”), and did not prescribe assistive technology (“AT”), transportation, and extended school year (“ESY”) services. Petitioner also alleges DCPS failed to fully implement Student’s IEP during SY 2020-2021, by not providing all required SLS and behavior support services (“BSS”).

RELIEF SOUGHT:

Petitioner seeks the following as relief:

A finding that Student has been denied a FAPE; DCPS amend Student’s IEP to prescribe 180 minutes of SLS per month; 120 minutes of BSS per month outside the general education setting; an additional 5 hours of specialized instruction outside the general education setting; extended time on college admissions tests, transportation, AT, and the use of fidgets; DCPS gather data during school breaks to address and reconvene before May 2021 to address Student’s need for ESY for summer 2021. Petitioner also seeks compensatory education for denials of FAPE that have occurred and/or a compensatory education evaluation and/or the right to seek compensatory resulting from the timely completion of evaluations.

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

LEA Response to the Complaint:

The LEA filed a response to Petitioner's complaint on December 1, 2020, and an amended response on December 23, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

Student was enrolled at a public charter school in the District of Columbia ("School B") for SY 2019-2020 and had an IEP dated November 1, 2019.

On October 21, 2020, the multidisciplinary team ("MDT") including Petitioner convened to review and revise Student's IEP. The IEP was appropriate when it was developed.

On December 2, 2020, the parties convened a resolution meeting ("RSM") to discuss the issues. The team agreed to make changes to the IEP that resulted in an amended IEP dated December 12, 2020. Student has access to technology and will benefit from embedded features such as spell/grammar check and dictate tools to support written expression concerns. The team proposed to convene a meeting following winter break to discuss Student's need and eligibility for ESY.

On December 12, 2020, DCPS issued a prior written notice ("PWN") reflecting the proposed changes to the IEP and the refusal to increase Student's SLS from 60 minutes per month to 120 minutes per month.

DCPS has not failed to implement Student's IEP by not providing related services. On December 21, 2020, DCPS authorized 60 hours of independent tutoring, 20 hours of independent counseling/behavior support services, and 20 hours of independent speech pathology services, to resolve the allegations in Petitioner's complaint prior to the due process hearing.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on December 2, 2020, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on December 21, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on February 3, 2021.

Respondent's counsel filed a motion to continue and to extend the HOD due date to accommodate the selected hearing dates. The motion was granted and the HOD is now due February 16, 2021.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on December 21, 2020, and issued a pre-hearing order on December 28, 2020, outlining, inter alia, the issues to be adjudicated.

Issues Adjudicated:

1. Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on October 21, 2020.³
2. Whether DCPS failed to fully implement Student's IEP by failing to provide the full extent of SLS and BSS during SY 2020-2021.⁴

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on January 21, 2021, and February 4, 2021.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 49 and Respondent's Exhibits 1 through 21) that were admitted into the record and are listed in Appendix A.⁵ Witnesses' identifying information is in Appendix B.⁶ Some of the findings of fact were stipulated to by the parties and are so noted.

³ Petitioner alleges that Student's IEP was not appropriate in that it 1) improperly reduced instructional services and removed instruction outside the general education setting; 2) improperly reduced related speech services; 3) improperly changed BSS from outside the general education setting to inside the general education setting; 4) failed to include recommended AT; 5) failed to include the use of fidgets; 6) failed to note the need for extended time on college admissions testing in Student's transition plan; 7) failed to include transportation and 8) failed to include ESY without appropriate consideration.

⁴ Petitioner alleges that DCPS failed to fully implement the IEP by failing to provide Student with the full extent of SLS required by Student's IEP. Petitioner alleges Student has only received two forty-five (45) minute sessions since the beginning SY 2020-2021 in August which is more than half of the services that Student should have received. Thereafter, Student's SLS were reduced to only 60 minutes per month. Petitioner alleges Student has also been denied the full amount of BSS and Student's sessions have been 10 minutes instead of the 30 minutes prescribed by Student's IEP.

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner presented four witnesses: (1) An Independent Speech Language Pathologist, who testified as an expert witness, (2) Petitioner's Educational Advocate who testified as an expert witness and who is an employee by the law firm representing Petitioner, (3) Petitioner, and (4) Student. DCPS presented two witnesses, both of whom testified as expert witnesses: (1) The DCPS Speech Language Pathologist who provides Student services, and (2) School A's Director of Specialized Instruction. The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law.

SUMMARY OF DECISION:

In this case, Petitioner held the burden of production on both issues adjudicated and the burden of persuasion on issue #2. The burden of persuasion fell to Respondent once Petitioner established a prima facie case on issue #1. The Hearing Officer concluded that Respondent did not sustain the burden of persuasion on issue #1 and Petitioner did not sustain the burden of persuasion on issue #2. As relief to Petitioner for the denial of FAPE found, the Hearing Officer directed DCPS to restore Student's original SLS and to conduct evaluations, review those evaluations, and review and revise Student's IEP as appropriate focusing on SLS and specialized instruction.

FINDINGS OF FACT:⁷

1. Student resides with Petitioner in the District of Columbia and DCPS is Student's LEA. Student is eligible for special education and related services pursuant to IDEA with a disability classification of SLD. Student currently attends School A where Student began attending at that start of SY 2020-2021. (Stipulation)
2. From the start of SY 2020-2021 to date, because of the COVID-19 emergency, DCPS has used a distance learning platform for all students, including Student. (Stipulation)
3. During SY 2019-2020, Student was enrolled at a public charter school in the District of Columbia, School B, and had an IEP developed at School B dated November 1, 2019. (Stipulation)
4. Student's last triennial evaluation was conducted at School B which included a comprehensive psychological evaluation conducted in September 2018. The evaluator assessed Student's cognitive, academic, social-emotional and behavioral functioning. Student's intellectual ability was assessed as being in the Low Average range with language skills being one of Student's strongest areas of functioning. Student's academic functioning indicated areas of both strength and weaknesses with most scores falling within the Average to Below Average range. Student's Basic Reading Score was Below Average, but Student's Reading Comprehension and Oral Reading Fluency was Average. Student's Written Expression Scores and Math scores were Average. The evaluator concluded with diagnostic impressions that Student had an SLD with an impairment in reading, and a rule out of an Unspecified Anxiety Disorder due to Student's shyness and reluctance to engage with peers. (Petitioner's Exhibit 11)
5. An evaluation was conducted in December 2018 that diagnosed Student with Attention-Deficit/Hyperactivity Disorder ("ADHD") (Petitioner's Exhibit 12)

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number it denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

6. A speech and language evaluation of Student was conducted by Kennedy Krieger Institute (“KKI”) on June 3, 2019. The evaluator administered the Clinical Evaluation of Language Fundamentals - 5th Edition (“CELF-5”) and the Goldman-Fistoe Test of Articulation – 3rd Edition (“GFTA-3”). The results revealed that overall, Student had below average receptive and expressive language skills with respect to Student’s chronological age. Student’s pragmatic social language skills were assessed informally and were judged to be within normal limits for Student’s chronological age. The evaluation revealed a mixed receptive-expressive language disorder and ankyloglossia, a structural abnormality that restricts tongue mobility; however, the effect on Student’s speech as result was undetermined. The evaluator noted that Student’s language difficulties might be more apparent and impactful to Student’s functioning where time pressure, distractions and unstructured language demands are likely to be present in academic or social settings. The evaluator recommended that Student would benefit from 45 minutes of speech language services weekly. (Petitioner’s Exhibit 13)
7. School B developed an IEP for Student dated November 1, 2019, that prescribed the following services: 15 hours per week of specialized instruction inside general education, 5 hours per week of specialized instruction outside general education, 180 minutes per month of SLS outside general education, and 120 minutes per month of BSS outside general education. The IEP prescribed ESY and transportation services. The IEP did not provide for AT. The classroom aids and services and classroom and testing accommodations sections of the IEP did not mention the use of any technology other than buffering headphones. Student’s transition plan mentioned Student’s plan to attend college or career readiness programs after graduation. (Petitioner’s Exhibit 7)
8. The IEP had the following SLS goals: (Petitioner’ Exhibit 7)

Annual Goal 1: Given tasks and activities, [Student] will follow 3-step directions containing linguistic concepts to facilitate participation and task completion with 80% accuracy as measured by informal assessment and clinical data.

Baseline: [Student] can follow 1-2 step directions containing linguistic concepts to facilitate participation and task completion with 80% accuracy. The information is from testing data on report from [KKI] dated 6/2019.

Annual Goal 2: Given pictures and words, [Student] will formulate grammatically and syntactically correct sentences of 8-10 words with 80% accuracy as measured by informal assessment and clinical data.

Baseline: [Student] can formulate grammatically and syntactically correct sentences of 6-8 words with 80% accuracy. The information is from testing data on report from [KKI] dated 6/2019.

Annual Goal 3: Given instructional, grade level texts, and/or personal experiences/events, [Student] will retell/generate implicit details, inferences, conclusions, predictions, and sequential events to demonstrate comprehension of the story and story themes with 80% accuracy as measured by informal assessment and clinical data.

Baseline: Given support and scaffolding, [Student] can retell/recall/generate implicit details, inferences, conclusions, predications, and sequential events to demonstrate comprehension of the story and story themes with 80% accuracy. The information is from testing data on report from [KKI] dated 6/2019.

Annual Goal 4: Given instructional, grade level texts, and/or personal experiences/events, [Student] will answer inferential and implicit wh-questions demonstrate comprehension of the story and story themes with 80% accuracy as measured by informal assessment and clinical data.

Baseline: [Student] can answer explicit wh-questions demonstrate comprehension of the story and story themes with 80% accuracy. The information is from testing data on report from [KKI] dated 6/2019. Date of Achievement 10/31/20.

9. During SY 2019-2020 Student made progress on all SLS IEP goals in each of the four reporting periods, but did not fully achieve the goals during that school year. The goals were to be achieved in SY 2020-2021: by October 31, 2020. (Respondent's Exhibit 15)
10. On July 29, 2020, KKI conducted a neuropsychological evaluation of Student through a telehealth session. The evaluation was initiated at Petitioner's request with concerns that Student's functioning might be consistent with autism spectrum disorder due to Student being socially withdrawn. The evaluator conducted an interview of Student and Petitioner, reviewed Student's medical and academic records, administered parent ratings, and administered standardized measures to Student by video. These included selected subtests from the Wechsler Intelligence Scale for Children Fifth Edition ("WISC-V"), Kaufman Test of Educational Achievement-Third Edition ("KTEA-3") and Beck Youth Inventories –Second Edition ("BYI-II"). (Petitioner's Exhibit 14)
11. On the WISC-V, Student's abstract verbal reasoning fell within the low average range (Similarities scaled score = 7, 16th percentile); Student's knowledge and expression of social norms was average (Comprehension scaled score = 9, 37th percentile). Student's inductive reasoning skills were similarly age appropriate (Matrix Reasoning scaled score = 9, 37th percentile). In contrast, Student's single word reading skills were low average (KTEA-3 Letter & Word Recognition standard score = 80, 9th percentile). The evaluator concluded Student exhibited low average single word reading and would continue to need supports documented in Student's IEP. (Petitioner's Exhibit 14)
12. The evaluator concluded that Student's performance on standardized subtests was considered an accurate representation of Student's skills at the time. However, given the non-standardized administration format (i.e. remote video administration), the evaluator stated that extraneous facts could have contributed to Student's performance, including unclear audio, even if briefly, distraction not easily noticeable through video and the stress/anxiety related to the novelty of the situation. (Petitioner's Exhibit 14)
13. The rating scale from the parent report was notable for concerns regarding Student's attention, executive functioning and social skills. Per Student's self-report and that of Student's parent, Student was exhibiting several symptoms of social anxiety. Student's self-report was notable for lower-than-expected self-esteem and some compulsive

behaviors. “Consistent with Student’s focus on right vs. wrong as illustrated by [Student’s] description of the voice [Student’s hears or Student’s conscience. The description of the voice that [Student’s] hears or [Student’s] conscience...appears to reflect [Student’s] internal struggles regarding appropriate conduct/behaviors.” (Petitioner’s Exhibit 14)

14. The evaluator made several recommendations: “Given [Student’s low average single word reading skills, extended time on standardized tests is highly recommended. [Student and Student’s] parents are encouraged to apply for extended time for the SAT and/or ACT. The application should be made through the College Board.” The evaluator noted the website link for that application. (Petitioner’s Exhibit 14)
15. The evaluation also stated the following: “The use of technological supports is recommended to help [Student] access and comprehend grade-appropriate reading material. These include text-to speech software (e.g. Natural Reader) and listening to books on tape. Similarly, [Student] should be allowed to use spellcheck and type [Student’s] written assignments.” (Petitioner’s Exhibit 14)
16. The evaluation also stated the following: “When completing tests, due to [Student’s] tendency to feel anxious about [Student’s] performance, [Student] will benefit from being provided with only one section at a time. If necessary, [Student] can be allowed a brief break after completing each section and before moving on to the next section of the test. Additionally, [Student] will benefit from being tested in a distraction-free environment. It will be important for [Student] to have frequent check-ins with [Student’s] guidance counselor given [Student’s] tendency to worry about [Student’s] grades.” (Petitioner’s Exhibit 14)
17. Student entered School A with the School B November 1, 2019, IEP, and School A provided services to Student pursuant to that IEP. During the first months of SY 2020-2021 Student was provided BSS for a total of eight 30 minutes sessions in September and October 2020. Student’s IEP provides that the BSS are to provided outside the general education setting. However, most of the behavior support in September 2020 and October 2020 was provided in the general education setting. There were some individual sessions provided and some individual check-in sessions that the provider had with Student after she observed Student in the general classroom setting. During the November 2020, Student participated at least two small group sessions outside the general education setting for 45 minutes each. However, most of the months prior to the filing of the due process complaint, although the BSS services were provided, they were not all provided consistent with the IEP in the proper setting. (Respondent’s Exhibit 10)
18. During the first months of SY 2020-2021, Student was provided SLS through video conference. Student was provided two 45 minutes session in September 2020, three 45-minute sessions in October 2020, and three 30 minutes sessions in November 2020. Generally, Student was always willing to participate in sessions and seemed receptive to the strategies the School A Speech Language Pathologist (“SLP”) would try to implement. Student’s 2020-2021 SLS progress notes reflect that relative to IEP SLS goals, Student continued to make progress, but did not fully master the goals. Some, but

not all, of Student's SLS goals were addressed during the sessions in September and October 2020. The services trackers reflect Student's progress relative to the goals:

09/14/2020 Direct Service: 45 minutes

[Student] received S&L therapy via Teams at 1:55 PM. Session addressed forming grammatically correct sentences. [Student] formed sentences while answering questions related to [Student's] English class work in 1/3 times independently and 4/6 times given a reminder to reread [Student's] work.

09/28/2020 Direct Service: 45 minutes

[Student] received S&L therapy via Teams at 1:30 to 2:15. Session addressed forming grammatically correct sentences.

[Student] formed sentences while creating a rough draft of [Student's] play "Quarantine". In 4/8 sentences [Student] made errors relating to tense and omission. [Student] was reminded to re-read [Student's] sentences and [redacted] was able to correct them on [Student's] [redacted] own in 4/4 opportunities. [Student] also spoke with complete sentences in 4/4 opportunities independently.

10/05/2020 Direct Service: 45 minutes

[Student] received S&L therapy via teams from 10:30 to 11:00 am. Session addressed [Student's] goal of forming grammatically correct sentences. While working on [Student's] play for [redacted] English class, [Student] had 2 errors in 5 sentences. Errors were made due to omission of words and incorrect use of a phrase. [Student] was able to correct 1/2 after reading over [Student's] writing.

10/19/2020 Direct Service: 45 minutes

[Student] received speech-language therapy via teams at 2:00 PM. Session addressed [Student's] goal of making inferences and answering questions pertaining to information presented. [Student] answered a variety, including inference and prediction questions while watching an animated short film. [Student] provided logical inferences and predictions in 3/3 opportunities and answered a variety of wh questions related to the story with 80% accuracy.

10/26/2020 Direct Service: 30 minutes

[Student] received speech therapy. Session addressed [Student's] goal of forming sentences by answering questions. While watching an animated short film, [Student] answered questions intermittently with complete sentences in 2/4 opportunities independently and 4/4 when the sentence was read out loud to [Student]. (Witness 3's testimony, Respondent's Exhibit 11)

19. On October 21, 2020, School A convened an MDT meeting including Petitioner and her representatives to review and revise Student's IEP. During the meeting the team reviewed the KKI neuropsychological evaluation. The DCPS psychologist reviewed the KKI evaluation for the team, after which the team transitioned to the IEP meeting. Petitioner's representatives requested that AT: text to speech and the ability to type assignments be added to Student's IEP, along with extended time for testing. They also requested individual therapy and advance notice for testing. (Respondent's Exhibit 2)
20. Student's English teacher reported that Student engages well in the class and had a "B+" average. Student's math teachers shared Student's progress in math and both indicated

that Student participates and engages in class well. The math teachers stated that they both provide Student small group instruction at times during class. Student had an “A” in Geometry and Algebra II. Student’s Measures of Academic Progress (“MAP”) assessment indicated Student was on grade level. The social worker reviewed her observation of Student and described how services are being rendered. The Student’s case manager and service providers reviewed their respective IEP goals. Petitioner’s attorney asked the that reading goals state “At student’s instructional level....” I t was agreed that that change would be made. There were no other concerns raised about the IEP goals. (Respondent’s Exhibit 2)

21. During the October 21, 2020, IEP meeting, Petitioner provided DCPS the KKI June 3, 2019, speech language evaluation, so DCPS had not yet reviewed that evaluation. The School A’s SLP shared with the team how Student was presenting in sessions and what Student’s previous therapists had indicated on Student’s School B IEP. The School A SLP reviewed two of Student’s prior assessments from 2018, 2019, Student’s School B services trackers and notes from Student’s School B IEP meeting and learned that Student’s language skills were judged to be within normal limits. The School A SLP modified Student’s SLS goals and removed the ones Student was preforming well in, kept the goal of formulating sentences, and added another goal. (Witness 3’s testimony, Respondent’s Exhibit 4)
22. The School A SLP created two SLS goals and cited Student’s present levels of performance and how Student’s disability affects Student educationally.⁸ Student’s two new SLS IEP goals are: (Respondent’s Exhibit 4)

Annual Goal 1:

When presented with information (i.e., videos, texts, discussions) [Student] will formulate grammatically and syntactically correct sentences with 80% accuracy as measured by informal assessment and clinical data. Achievement date 10/20/21

Baseline: [Student] can formulate grammatically and syntactically correct sentences of 6-8 words with 80% accuracy. The information is from testing data

⁸ Present Levels of Performance (“PLOP”) : [Student] currently attends [School A] for the 2020-2021 school year. Since the start of the school year therapy has been provided virtually. [Student] presents with relative strengths in articulation, voice, fluency and social skills. [Student] has presented with mild difficulty in forming grammatically correct sentences. Presently [Student] is able to form sentences with ~40% accuracy independently and 80% accuracy given a reminder to re-read [the] sentences. [Student] is at or near mastery of [Student’s] IEP goals related to [Student’s] communication skills.

Description of how the student’s disability affects the student’s access to the general education curriculum: [Student] exhibits mild difficulty in receptive and expressive language skills and may benefit from support with forming sentences to express [self], understanding main idea. [Student] benefits from reminders to use strategies to improve [Student’s] communications skills.

Description of how the student’s disability affects the student’s progress in the general education curriculum: [Student] exhibits mild difficulty in receptive and expressive language skills and may benefit from support with forming sentences to express [self], understanding main idea. [Student] benefits from reminders to use strategies to improve [Student’s] communications skills.

on report from [KKI] dated 6/2019. From therapy sessions, [Student] can form complete sentences in 40% of opportunities independently and at least 80% given a reminder to re-read [redacted] sentences. Orally [Student's] sentences are formulated with higher accuracy than [Student's] written forms.

Annual Goal 2:

[Student] will demonstrate understanding of information (i.e., text, video, discussion) by orally sharing at least (1-2) major themes in the text, using at least (2-4) complete sentences and including at least (1) supporting observation per theme in 80% of opportunities.

Baseline: [Student's] previous assessment reports difficulties in this area. [Student] received a score of 6 on the CELF-5.

23. The School A SLP reduced Student's SLS services from 180 minutes per month to 60 minutes per month because none of Student's teachers had indicated they have difficulty understanding Student's speech. The School A SLP noted that although Student may have difficulty producing some sounds, in conversational speech this has not been a factor and Student has been able to compensate and articulate functionally. The only area the School A SLP is concerned with is [Student's] ability to formulate grammatically correct sentences. She believes that 60 minutes per month of SLS is appropriate to address this area of concern and that this and other areas of concern noted in Student's evaluation can be addressed by professionals other than through direct services from an SLP. The School A SLP did not talk to Student's previous services provider or the evaluator who conducted Student's last evaluation. She has never performed an evaluation of Student herself. Because Student was asking for the extra support and to be sensitive to Student, the School A SLP was willing to compromise and offered to increase SLS services from 60 minutes per month to 90 minutes per month. (Witness 3's testimony)
24. At the October 21, 2020, IEP meeting, the School A team members proposed the hours of specialized instruction and related service hours. There were disagreements between the School A team and Petitioner and her representatives about the reduction in hours for SLS. Also, Petitioner wanted additional hours of instruction outside general education for English. School A team members proposed that Student receive a total of 15 hours of specialized instruction in and out of the general education setting. Because services were being provided through distance learning, the School A team did not add transportation to the IEP, but stated that once in-person school resumed, they would revisit transportation to determine if Student meets the criteria. They also determined to revisit ESY later in the school year. (Respondent's Exhibit 2)
25. The School A team, in reducing Student's services, stated that they could come back to the IEP meeting and increase the services if that level of instruction proved to not be enough. With regard to the request for AT in the IEP, the School A special education coordinator stated that Student's school issued computer had text-to-speech, spell-check and dictation capabilities embedded in the computer. She informed Student that she would assist Student in learning how to access these features on the computer and would inform the technical staff and Student's teachers to also assist Student in their use. (Petitioner's Exhibit 9)

26. Student attended the IEP meeting and shared Student's opposition to the reduction in SLS because of a lisp and continued difficulties in the use of nouns and verbs. Student believes that the amount of SLS support Student had at School B was what Student needs. Student did not want specialized instruction reduced because of continued difficulty processing and understanding what Student's is learning and without the instruction Student's work would not be to the best standards. Student also wanted assess to fidgets because they help Student stay focused. (Student's testimony, Witness 2's testimony)

27. Student's transcript reflects that Student has following, grade point average, class rank, credits toward graduation, and grades in the following subjects: (Respondent's Exhibit 7)

Cumulative GPA. 3.44

Program of Study DCPS IV 24-CU

Rank: 18 out of 133 as of 11/16/2020 Total Credits 16.00

SY 2018-2019

Course:	Grade	Credit
E03 English I (School B)	A	1.00
E03 English I (School B)	A	1.00
HC5 World History & Geography I: (School B)	B-	1.00
L73 Chinese I (School B)	B	1.00
M09 Pre-Algebra Development (School B)	B+	1.00
S41 Physics I (School B)	B	1.00
TSC Computer Science 1 (School B)	B+	1.00
TSE Hip Hop Dance (School B)	P	0.50
E04 English Language Art II (School B)	A	1.00
E04 English Language Art II (School B)	A	1.00
HC6 World History & Geography II: (School B)	A-	1.00
L74 Chinese II (School B)	B+	1.00
M21 Algebraic Geometry (School B)	B	1.00
M21 Algebraic Geometry (School B)	B	1.00
M66 AP Computer Science (School B)	B	1.00
S21 Biology	B	1.00

(School B)

P26 Health Education	A	0.50
E05 English III		
M31 Geometry		
M41 Algebra II & Trigonometry		
PE1		

Grades for first quarter of SY 2020-2021. (Respondent's Exhibit 8)

English III.	B
Geometry	A
Algebra II &	
Trigonometry	A
Health Education	A
Fitness & Lifetime Sports.	N/A

28. The IEP that resulted from the October 21, 2020, MDT meeting prescribed 15 hours per week of specialized instruction inside general education, 120 minutes per month of BSS inside general education, and 60 minutes per month of SLS outside general education. The IEP did not prescribe transportation, ESY or AT. However, the School A IEP stated: "[Student] doesn't require assistive technology devices and services to access the general education curriculum. [Student] does have access to technology that has tools that can be used to assist [Student] with spelling and written expression." The revised IEP did not include the recommendations for extended time on college admissions tests like the SAT or ACT. (Petitioner's Exhibit 8)
29. Petitioner's educational advocate who participated in the meeting noted that the only academic data provided at the October 21, 2020, meeting by the School A team was the updated MAPP scores for math, as the beginning of year reading inventory had not been administered and there was no I-Ready data. She noted that Student has not taken either SAT or ACT and the fact that statements about accommodations for the SAT or ACT were not mentioned in the IEP has not harmed Student. With regard to ESY, she acknowledged that the School A team said they wanted to collect the data and consider ESY in January 2021. School A never disagreed with providing Student ESY and there was still time to make a determination. (Witness 2's testimony, Petitioner's Exhibit 9)
30. On October 30, 2020, School A issued a PWN that stated the following: "On October 21, 2020, the IEP team met to conduct the annual IEP meeting for [Student]. The Team proposed that [Student] receive specialized instruction in the following areas: Reading, Written Expression and Mathematics. [The] [t]eam proposed that [Student] will receive the following related services: Emotional Social and Behavior Development and Speech and Language. Explanation of reasons for proposal or refusal of action. The Team reviewed the data and concluded that [Student] has demonstrated progress in all areas of concerns. Although, [Student] has demonstrated progress in identified area the team determined [Student] still requires 15 hours a week of specialized instruction in Reading, Written Expression and Mathematics. The team determined that [Student] would receive 120 minutes a month of Behavior Support Services. [Student] continues to make progress in Speech and Language and is close to mastering [Student's] speech and

language goals therefore [Student] will receive 60 mins a month of speech and language services. (Respondent's Exhibit 6)

31. On December 2, 2020, the parties convened an resolution meeting ("RSM") to discuss the issues raised in Petitioner's due process complaint. The team agreed to make changes to Student's IEP. The School A team determined that based upon the Student's current progress that 10 hours of specialized instructional support inside the general education setting and 5 hours of pull-out service is an adequate amount of time to meet Student's special education needs. The RSM notes state: "Student has demonstrated growth in the areas of concern indicated on Student's IEP. Student's recent MAP score is a 246, and the national average for Student's grade in Algebra II is a 231. This puts [Student] above the national average at the 63rd percentile, meaning that Student performed better than 63% of [redacted] peers who took the MAP math assessment. [Student] is out performing 63% of [redacted] peers on a standardized test." (Witness 4's testimony, Respondent's Exhibit 3)
32. The School A team did not agree to increase the hours of SLS, and kept these services at 60 minutes per month. The School A SLP indicated that [Student] is near mastery to majority of [redacted] speech goals as stated in [Student's] previous IEP and progress report. The RSM notes state: "The [SLP] ascertained that [Student] has shown growth in the area of speech and language and a reduction in hours is appropriate." (Witness 3's testimony, Respondent's Exhibit 3)
33. The December 7, 2020, amended IEP that resulted from the RSM prescribes 5 hours per week of specialized instruction outside general education, 10 hours per week of specialized instruction inside general education, 120 minutes per month of BSS outside general education, and 60 minutes per month of SLS outside general education. The School A team included AT support in the consideration section of the IEP. The team proposed to convene a meeting following the winter break to review data and determine whether Student requires ESY services. (Respondent's Exhibits 1, 4)
34. The SLS goals remained the same as the October 21, 2020, IEP. The Classroom Aids and Services section added the following: "[Student] will be able to use a laptop/computer and the accessibility tools embedded to assist with grammar, spelling etc. to include dictating tools. [Student] will be allowed to type all written assignments. [Student], if needed, will have access to headphone to cancel out noise or be allowed to test in a quiet place with no distractions when in the school building." The Classroom Accommodations of the IEP state: "Student benefits from the use of headphones to access the read-aloud feature on computer-based tests when applicable. Noise Buffer or Headphones Preferential seating." (Respondent's Exhibit 4)
35. Under Assistive Technology the IEP states: "[Student] has access to technology and will benefit from embedded features such as spell/grammar check, dictate tools to support written expression concerns. [Student] will be provided the opportunity to use text to speech features that are embedded on device as well as other text to speech tools as needed to support reading." (Respondent's Exhibit 4)

36. On December 10, 2020, DCPS issued a PWN reflecting the proposed changes to the IEP and the refusal to increase Student's SLS from 60 minutes per month. It noted the change in the setting of 5 hours of specialized instruction to outside the general education to provide for a total of 15 hours per week of specialized instruction (5 hours/week provided outside general education and 10 hours/week provided inside general education) and to change the setting for BSS to provide for 120 minutes per month of BSS outside general education, and to include AT support in the consideration section of the IEP. The PWN also noted that the team proposed to convene a meeting following the winter break to review data and determine whether Student requires ESY services. (Respondent's Exhibit 3)
37. On December 21, 2020, DCPS authorized Petitioner to obtain 60 hours of independent tutoring, 20 hours of independent counseling/behavior support services, and 20 hours of independent speech pathology services. (Petitioner's Exhibit 38)
38. Petitioner's educational advocate believed that the compensatory education that DCPS offered after RSM was reasonable. (Witness 2's testimony)
39. Since the RSM, additional changes were made to Student's IEP to add additional hours and School A put in requests for audio books, added to the supplementary aids section language about the SAT and fidgets, added ESY, transportation, and an increase in SLS. (Witness 4's testimony)
40. Petitioner's expert SLP who testified at the hearing opined that 45 minutes per week of SLS services that was in Student's School B IEP was reasonable given the concerns noted in the KKI evaluation that affect Student the classroom. She stated that the School B IEP SLS goals dealing with three-step directions and formulating sentences were reasonable given the evaluation results. In her opinion, although Student had been progressing on all the SLS goals while at School B, given the few sessions and lack of focus on all the goals at School A, the reduction in services came too soon. However, in providing her opinion, she had not talked to Student's teachers and had not spoken with past or present providers or anyone on the IEP team at School A. She also acknowledged that sometimes a student can be discharged from SLS services even if the student is still showing speech and language difficulties, and that the IEP team is in the best position to determine the services for a student. (Witness 1'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 held the burden of production on both issues adjudicated and the burden of persuasion on issue #2. The burden of persuasion fell to Respondent once Petitioner established a prima facie case on issue #1.⁹ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue 1: Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on October 21, 2020.

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

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "child with a disability" is defined by statute as a child with intellectual disabilities, physical impairments, or serious emotional disturbance "who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A). The District is required to enact policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including ... children with disabilities attending

⁹ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

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

private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Id.* § 1412(a)(3)(A).

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

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

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

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

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected

progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323 at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Petitioner alleges that Student's October 21, 2020, IEP was not appropriate in that it 1) improperly reduced instructional services and removed instruction outside the general education setting; 2) improperly reduced related speech services; 3) improperly changed BSS services from outside the general education setting to inside the general education setting; 4) failed to include recommended AT; 5) failed to include the use of fidgets; 6) failed to note the need for extended time on college admissions testing in Student's transition plan; 7) failed to include transportation, and 8) failed to include ESY without appropriate consideration.

The evidence demonstrates that at the October 21, 2020, IEP meeting at least three of Student's teachers attended and shared that Student was participating in class, accessing the curriculum and had above average grades at that point in Student's math classes and English class. The math assessment data, the MAP scores, were provided and demonstrated that Student was operating on grade level. Student's related service providers shared their impressions of Student's progress, including impressions they gained from talking to Student's teachers.

The School A team members reduced Student's specialized instruction hours from 20 hours per week to 15 per week and removed the 5 hours that were outside the general education setting. Petitioner, through her representatives, objected to that reduction. Although there was sufficient evidence that Student was making above average grades, there was no academic data shared at the meeting other than Student's math performance. There was no data shared with regard to Student's performance in English and Language Arts ("ELA"), an area that Petitioner specifically requested that Student be provided support.

Although DCPS' witnesses testified credibly that Student was performing on grade level and progressing well academically, Student credibly testified about Student's continued academic difficulties and need for support. In addition to reducing the overall number of hours of specialized instruction, the School A team reduced the specialized instruction that was to be delivered outside the general education setting. At a time when instruction was limited to the use of distance learning technology, the team removed what appears to be a vital component of Student's specialized instruction.

The Hearing Officer gives greater weight to Student's testimony of Student's need for the level of specialized instruction and the setting in which that instruction was to be delivered than that of the DCPS witnesses who testified, particularly since the reduction in services were implemented

without the benefit of specific academic data beyond math. In addition, the reduction occurred when there was no in-person instruction being provided. Consequently, the Hearing Officer concludes that School A's unilateral reduction of Student's specialized instruction in the October 21, 2020, IEP without more supporting academic data was denial of a FAPE to Student and the IEP was as result not reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

The evidence demonstrates that since the filing of Petitioner's due process complaint and the RSM, DCPS has amended Student's IEP with Petitioner's agreement to increase Student's specialized instruction. However, as of the due process hearing, the evidence did not reflect that specialized instruction had been reinstated to the level that Petitioner sought in the hearing: the reinstatement of the 20 hours per week, including 5 hours outside general education. DCPS has provided Petitioner compensatory education and there was testimony from DCPS' witness that there have been additional changes to Student's IEP since the RSM. In light of that, rather than direct DCPS to reinstate the 20 hours per week of specialized instruction, the Hearing Officer has, in the order below, directed DCPS to conduct an academic achievement assessment to assist in a determination of the level of specialized instruction and the setting that will meet Student's needs.

Petitioner also alleges that DCPS improperly reduced Student's SLS. The evidence demonstrates that the School A SLP worked with Student on only three of the four SLS goals that were in the School B IEP. There is no evidence that the goal of following three step directions was addressed. Although the SLP testified that Student was progressing on all the SLS and close to mastery, there was no data presented to support that Student's proficiency with regard to all the goals had been measured since Student began attending School A. The School A SLP reduced the Student's SLS goals from four to two which focused on sentence structure.

Although the School A SLP testified that Student's areas of concerns that were being addressed by the SLS goals could also be addressed by professionals other than a SLP, presumably teachers, the team also reduced Student specialized instruction, which would have provided the extra support in these language areas covered by the SLS goals. At bottom, Student was being provided fewer services without sufficient data to demonstrate that Student's existing SLS needs could be met under the October 21, 2020, IEP. The Hearing Officer concludes that the reduction of Student's SLS from 180 minutes per month to 60 minutes per month was denial of a FAPE to Student and the IEP was as result not reasonably calculated to enable Student to make progress appropriate in light of the Student's circumstances.

Petitioner also alleges that DCPS improperly changed BSS from outside the general education setting to inside the general education setting. Although the evidence demonstrates that Student's BSS services were so changed, there was indication during the hearing that the change in setting of BSS was inadvertent. The parties readily agreed to make the change in the IEP for BSS to be outside general education as reflected in the December 7, 2020, amended IEP. In addition, the BSS provided to Student in November 2020 was outside the general education setting. The evidence also demonstrates that the services provided in the first months were provided both inside and outside general education. However, there was no evidence of any detriment to Student from the services having been delivered both inside and outside of general education, or the fact that the

October 21, 2020 IEP, prescribed BSS inside the general education setting. Consequently, the Hearing Officer concludes that there was no denial of a FAPE to Student in this regard.

Petitioner also alleges that DCPS improperly failed to include recommended AT in Student's IEP and improperly failed to note the need for extended time on college admissions testing in Student's transition plan. The evidence demonstrates that the July 2020 neuropsychological recommended: "The use of technological supports is recommended to help [Student] access and comprehend grade-appropriate reading material. These include text-to speech software (e.g. Natural Reader) and listening to books on tape. Similarly, [Student] should be allowed to use spellcheck and type [Student's] written assignments." At the October 21, 2020, meeting Petitioner's representatives requested that AT: text to speech and the ability to type assignments be added to Student's IEP.

Although the October 21, 2020, IEP stated that Student was not in need of AT, the IEP clearly stated that Student had access to technology that had tools that could be used to assist with spelling and written expression. The IEP specifically stated: "[Student] doesn't require assistive technology devices and services to access the general education curriculum. [Student] does have access to technology that has tools that can be used to assist [Student] with spelling and written expression."

Although this language included in the IEP does not specifically state that Student needs AT, it notes that Student has access to technology to assist in the areas of concern that the evaluator noted and for which Petitioner's representative made the request. There was no evidence that Student was harmed by the IEP failing to more specifically define the type of technology that would be provided. In addition, additional language has been added to the IEP with Petitioner's agreement to specifically include the additional technology Petitioner sought. Consequently, the Hearing Officer concludes that there was no denial of a FAPE to Student in this regard.

The July 2020 neuropsychological also recommended: "[Student and Student's] parents are encouraged to apply for extended time for the SAT and/or ACT. The application should be made through the College Board." The evaluator noted the website link for that application. The evaluator clearly recommended action for Student and Student's parents to take, not recommendations that should be added to Student's IEP. There was no documentation that Petitioner made the request for this addition at the October 21, 2020 IEP meeting. Although the IEP did not include the recommendations for extended time on college admissions tests like the SAT or ACT, there is no evidence that Student has yet taken either of the examinations. Therefore, there has been no harm to Student. Consequently, the Hearing Officer concludes that there was no denial of a FAPE to Student in this regard.

Petitioner also alleges that DCPS improperly failed to include the use of fidgets. Student testified that the use of fidgets would assist Student in focusing. There is no evidence that Student did not have the use of fidgets or was in any way harmed by the October 21, 2020, IEP not specifically noting their use. Student has been at home engaging in distance learning where the use of fidgets would apparently be available to Student. In addition, additional language has been added to the IEP with Petitioner's agreement to specifically include their use. There is no evidence of harm to Student. Consequently, the Hearing Officer concludes that there was no denial of a FAPE to Student in this regard.

Petitioner also alleges that DCPS improperly failed to include transportation and ESY in the October 21, 2020, IEP. Although Student's School B IEP included transportation and ESY, as previously stated, Student has been at home engaging in distance learning and thus, has had no need for transportation services. The evidence demonstrates that the School A team specifically noted that it would review Student's need for ESY in January 2021, and would consider transportation services when in-person instruction resumed. Because there was no demonstrated harm to Student in the October 20, 2021, IEP not prescribing transportation or ESY, the Hearing Officer concludes that there was no denial of a FAPE to Student in either regard.

Issue 2: Whether the DCPS failed to fully implement Student's IEP by failing to provide the full extent of SLS and BSS during SY 2020-2021.

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

In reviewing a failure-to-implement claim, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

Petitioner alleges that DCPS failed to fully implement Student's IEP by failing to provide Student with the full extent of SLS required by Student's IEP and because Student's BSS sessions have been 10 minutes rather than 30 minutes per week as prescribed. Petitioner alleged that Student had only received two forty-five (45) minute sessions since the beginning SY 2020-2021, and thereafter, Student's SLS were reduced to only 60 minutes per month.

The evidence demonstrates that Student was provided BSS for a total of eight 30 minutes sessions in September and October 2020. Student's IEP provides that the BSS are to be provided outside the general education setting. Although most of the behavior support from September 2020 and October 2020 was provided in the general education setting, there were some individual sessions provided and some individual check-in sessions after the provider observed Student in the general classroom setting. During November 2020, Student participated in at least two small group sessions outside the general education setting for 45 minutes each. There was insufficient evidence presented that Student's BSS were not provided. The Hearing Officer takes administrative/judicial notice of DCPS' policy that allows for any services that might have been missed to be made up by the service providers later in school year.

With regard to SLS, the evidence demonstrates that Student was provided two 45 minutes session in September 2020, three 45-minute sessions in October 2020, and three 30 minutes sessions in November 2020. The School A SLP credibly testified that generally Student was always willing to participate in sessions and seemed receptive to the strategies that she tried to implement. There was insufficient evidence presented that services were not delivered consistent with the IEP. Despite the claims by Petitioner and Student that the total amount of related services were not delivered, the documentary evidence, as well as the credible testimony of at least one of the service providers demonstrates otherwise.

In addition, DCPS has now provided Petitioner with authorization to obtain independent related services. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue and there was no denial of a FAPE to Student in this regard.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

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.

DCPS authorized Petitioner to obtain independent services that Petitioner's educational advocate considered reasonable for any services that Student's missed as a result of the denials of a FAPE. Petitioner made no additional request for compensatory education beyond what DCPS had already authorized. The Hearing Officer concludes that the independent services that DCPS has authorized Petitioner to obtain with public funding is sufficient compensatory education for the denials of FAPE found herein.

ORDER: ¹⁰

1. DCPS shall, within ten (10) business days of the date of this order, amend Student's IEP to increase speech language services ("SLS") to 180 minutes per month.
2. DCPS shall, within thirty (30) business days of the date of this order, conduct a speech language evaluation and an academic achievement assessment of Student or, at its discretion, grant Petitioner authorization to obtain them independently at the OSSE prescribed rates.
3. DCPS shall, within fifteen (15) business days of the completion or receipt of the evaluation/assessment mentioned above, convene an MDT/IEP meeting to review the evaluation/assessment and review and revise Student's IEP as appropriate and specifically determine the amount of SLS and the amount and setting of specialized instruction that will be provided Student.
4. Petitioner claims of failure to implement Student's IEP are dismissed with prejudice.
5. All other relief requested by Petitioner 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 concerning the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: February 16, 2021

Copies to: Counsel for Petitioners
 Counsel for LEA
 OSSE-SPED {due.process@dc.gov}
 ODR {hearing.office@dc.gov}
 contact.resolution@dc.gov

¹⁰ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.