District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Office of Dispute Resolution
1050 First Street, NE
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

Parent on Behalf Student, [1] v. District of Columbia Public Schools ("DCPS") Local Education Agency ("LEA") Case # 2021-0103 Date Issued: February 11, 2022	HEARING OFFICER'S DETERMINATION Hearing Dates: January 25 & 26, 2022 Counsel for Each Party listed in Appendix A Hearing Officer: Coles B. Ruff, Esq.

[1] Personal 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 maternal grandmother ("Petitioner") in Prince Georges County, Maryland. Student's mother ("Parent") resides in the District of Columbia, and Student attended District of Columbia Public Schools ("DCPS") during school year ("SY") 2019-2020 and SY 2020-2021.

Petitioner filed her initial due process complaint ("DPC") on July 30, 2021, which alleged that DCPS failed to provide Petitioner Student's educational records. After obtaining Student's educational records, Petitioner sought and was granted leave to file an amended DPC. Petitioner filed her amended DPC on October 6, 2021.

In the amended DPC, Petitioner alleged DCPS denied Student a free appropriate public education ("FAPE") during SY 2019-2020 and SY 2020-2021, by inter alia, failing to ensure that an appropriate and timely individualized educational program ("IEP") was developed for Student when Student attended DCPS.

Relief Sought:

Petitioner seeks a finding that DCPS denied Student a FAPE and an order directing DCPS to provide Student compensatory education based on the alleged denials of FAPE.

DCPS' Response to the Complaint:

DCPS filed a timely response to the complaint Petitioner's initial DPC. DCPS denied that there was any failure to provide Student with a FAPE. Between the time of filing the initial and the amended DPC, DCPS had a change of Counsel. DCPS Counsel filed a Motion to Dismiss in response to Petitioner's amended DPC. That Motion was denied. [2]

Resolution and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on November 10, 2021. The parties did not mutually agree to proceed directly to a hearing. The 45-day period began on November 6, 2021,

[2] DCPS asserted that based upon a D.C. Superior Court custody order, Student was not a resident of the District of Columbia during the relevant period. In an order issued on November 19, 2021, the Hearing Officer concluded that Petitioner should be allowed to present evidence and legal authority regarding Student's residency and any that might demonstrate denial(s) of a FAPE and any relief Student might be entitled to as a result.

and ended [and the Hearing Officer's Determination ("HOD") was initially due] on December 20, 2021.

The parities' Counsel were unavailable on the hearing dates offered and requested an extension of the HOD due date to accommodate their unavailability. Petitioner's Counsel filed a motion to continue the hearing and extend the HOD due date from December 20, 2021, to February 2, 2022. At the conclusion of the hearing on January 26, 2022, the parties requested a continuance to file written closing arguments. Petitioner's Counsel filed a corresponding motion that was granted. The HOD is now due February 11, 2022.

The undersigned independent hearing officer ("IHO") conducted a pre-hearing conference ("PHC") on October 27, 2021. The IHO issued a pre-hearing order ("PHO") on November 6, 2021, outlining, inter alia, the issues to be adjudicated.

The issues adjudicated are: [3]

1. Did DCPS deny Student a FAPE by failing to ensure that an appropriate IEP was timely developed for Student by January 29, 2020, when Student attended DCPS?

2. Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP at the start of SY 2019-2020,[4] because the IEPs: (a) were not based on current evaluations, or (b) did not provide Student the appropriate amount of specialized instruction hours outside general education, which Petitioner asserts should have been in all academic subjects,[5] or (c) did not include social-emotional as an area of concern, or (d) did not include speech-language as an area of concern? [6]

3. Did DCPS denied Student a FAPE by failing to implement Student's IEPs[7] by not providing Student specialized instruction and related services with fidelity, based on the absence of service trackers and progress reports?

4. Did DCPS deny Student a FAPE by failing to provide an interim IEP and then convening a full IEP meeting within 30 days when Student transferred from a D.C. Public Charter School to DCPS at the start of SY 2019-2020?

---

[3] In the amended DPC, Petitioner also alleged violation(s) that Student was improperly exited from special education in a period more than two years before the filing of the amended DPC. The Hearing Officer directed Petitioner to file a motion regarding this issue to support Petitioner's claim that the statute of limitations should not apply or that an exception to the statute applies. The Petitioner did not file this Motion by the date anticipated, November 18, 2021, or after that. Petitioner attempted to withdraw this issue without prejudice. Because Petitioner's Counsel did not file a timely motion as directed, the Hearing Officer dismissed the issue with prejudice on the record at the start of the hearing.

[4] The September 1, 2020, IEP and the October 29, 2020, IEP

[5] The September 1, 2020, IEP

[6] The October 29, 2020, IEP

[7] The September 1, 2020, IEP and the October 29, 2020, IEP

DUE PROCESS HEARING:

The due process hearing convened on January 25 & 26, 2022. Due to the COVID-19 emergency and the parties' request, the hearing was conducted and recorded via video teleconference on the Microsoft Teams platform. The parties submitted their written closing arguments on February 3, 2022.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the following as evidence and which are the sources of the findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 45 and DCPS Exhibits 1 through 22) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.[8]

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issues #1, #3, #4. DCPS held the burden of persuasion on issue #2 after Petitioner presented a prima facie case on that issue. Based on the evidence adduced, the Hearing Officer concluded that Petitioner sustained the burden of persuasion on issues #1, #3 and #4. DCPS did not sustain the burden of persuasion on issue #2. Based on the finding of denials of FAPE, the Hearing Officer granted Petitioner compensatory education.

FINDINGS OF FACT: [9]

1. Student resides with Petitioner, Student's maternal grandmother, in Prince Georges County, Maryland, and Student now attends school in Prince Georges County, Maryland. Parent, Student's mother, resides in the District of Columbia. (Petitioner's testimony, Parent's testimony)

2. On April 1, 2021, a District of Columbia ("D.C.") Superior Court judge granted Petitioner and Parent joint legal custody of Student. The Court determined that Parent was a resident of the District of Columbia. Petitioner was granted sole physical custody, and Parent and Student's father were granted visitation rights. Although Student had

[8] 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. Petitioner presented four witnesses: Petitioner, Student's mother, an Educational Advocate employed by the law firm representing Petitioner, and an independent clinical psychologist, both whom testified as expert witnesses. DCPS presented four witnesses: a DCPS Social Worker, a DCPS Psychologist, both whom testified as expert witnesses, and an Administrative Assistant, and a School A Administrator, who also testified as an expert witness.

[9] 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.

resided with Petitioner in Prince Georges County for as long as two years before the Court's order, during SY 2019-2020 and most of SY 2020-2021, Parent, a D.C. resident, had legal and physical custody of Student under an April 6, 2017, D.C. Superior Court order. Consequently, Student was a resident of the District of Columbia during SY 2019-2020 and SY 2020-2021, at least until April 1, 2021. (Petitioner's Exhibit 1)

3. During SY 2019-2020 and SY 2020-2021, Student was enrolled in District of Columbia Public Schools ("DCPS"). During that period, Student attended a DCPS school, School A, and DCPS was Student's local educational agency ("LEA"). (Petitioner's Exhibit 31)

4. During SY 2018-2019, Student attended a public charter school in the District of Columbia ("School B"). School B was its own LEA. On January 29, 2019, School B determined Student eligible for special education with a disability classification of Specific Learning Disability ("SLD") and drafted an IEP. The IEP prescribed goals in math, reading, written expression and 30 minutes per week of specialized instruction outside general education and 120 minutes per day of behavior support services in the general education setting. (Petitioner's Exhibits 27, 36-20)

5. Student had previously been determined eligible for special education by DCPS Early STAGES in 2014 with a Speech or Language Impairment ("SLI"). Student first began receiving special education services in February 2014. DCPS provided Student with annual IEPs from 2014 through 2017. In 2017, DCPS conducted a psychological reevaluation of Student that recommended that Student no longer met the SLD disability criteria. DCPS exited Student from special education on March 17, 2017. (Petitioner's Exhibits 12, 15, 20 through 26, 36-17)

6. Student's overall ability was in the average range, and in 2014 and Student displayed no significant issues academically or behaviorally. In 2017, Student was operating cognitively and academically in the low average range. Student was performing near grade level, but Student's academic performance was hindered by spotty attendance. (Witness 2's testimony, Petitioner's Exhibits 15, 37-1)

7. Parent had been satisfied with Student's educational progress while Student was enrolled in DCPS. However, once Student exited special education, Student's educational performance began to plummet. Parent enrolled Student in School B for SY 2018-2019, where, as stated, Student was found eligible for special education and provided an IEP that expired on January 29, 2020. Student remained at School B for one academic year. (Parent's testimony)

8. Parent enrolled Student at School A at the start of SY 2019-2020. When Parent enrolled Student in School A, she completed all the paperwork and asked to speak with the Special Education Department. The Assistant Director of Special Education was not available, but Parent gave the person she spoke with a copy of the Student's IEP from School B, along with Student's birth certificate and medical records. (Parent's testimony)

9. In November 2019, School A's Assistant Principal bought Student to the attention of School A's Special Education Department because of Student's low academic scores. The Administrator checked the central special education database ("SEDS") to see if Student had an IEP. Although SEDS communication entries noted Student had an IEP, no current IEP document had been uploaded into SEDS. Consequently, she referred Student to the Response to Intervention ("RTI") team. School A developed an intervention plan to provide Student supports and monitor Student's progress. (Witness 5's testimony, Witness 6's testimony, Respondent's Exhibit 7)

10. Although School A was not aware that Student had a current IEP, School A initiated a referral for Student to be provided out school counseling from the D.C. Department of Behavioral Health. The services started at or near the time that remote virtual learning started in April 2020. (Witness 3's testimony)

11. Student's name came back up to the Administrator in April 2020 when the RTI team informed her that Student was at risk of retention. School A's Administrator asked the School A Register had School A requested Student's records from School B. That is when the Administrator confirmed that Student had an IEP. School A convened an emergency meeting with Parent. Parent then provided the school a photocopy of Student's School B IEP. (Witness 6's testimony, Parent's testimony, Respondent's Exhibit 7)

12. Although School A requested Student's education records from School B, School A did not receive them when School A convened the meeting with Parent. School A proposed delaying any formal evaluation until the start of SY 2020-2021 because the school year was almost over, and virtual learning had begun due to the COVID-19 pandemic. School A suggested that Student attend summer school to collect educational data that would inform the evaluations the following school year. However, Student was absent during summer school. During SY 2019-2020, however, School A did not provide Student any specialized instruction or related services. (Witness 6's testimony)

13. DCPS convened an IEP meeting on August 31, 2020, and based on Student's prior eligibility determination, School A put an IEP in place until Student could be formally evaluated. Although the IEP listed an SLD disability classification, otherwise the content of the IEP was data from Student's previous DCPS IEP with the SLD classification. The IEP prescribed math, reading, written expression, and speech-language goals. The services provided were 5 hours per week of specialized instruction outside general education and 120 minutes per month of speech-language pathology. (Witness 6's testimony, Petitioner's Exhibits 28, 36-22, 36-24, 36-25, 36-27)

14. On October 13, 2020, School A issued a prior written notice ("PWN") noting the following: "Student's previous IEP [dated January 29, 2019] was out of timeliness. A finalized IEP has been put in place for [Student] as [Student] completes [Student's] eligibility phase of determination for special education services. This supports meeting IEP timeliness guidelines." (Petitioner's Exhibit 36-24)

15. DCPS conducted a psychological evaluation in October 2020. Overall, Student earned an FSIQ score of 79, suggesting current functioning in the Very Low range. Student performed equally as well as or higher than 8% of equal-aged peers. (Witness 4, Petitioner's Exhibit 16)

16. Student's academic scores were as follows:

	WJ-IV ACH	
	Grade Equivalent	Standard Score
CLUSTER/Test		
BRIEFACHIEVEMENT	3.2	75
BROAD READING	3.4	79
Letter-Word Identification	3.7	79
Passage Comprehension	3.1	73
Sentence Reading Fluency	3.3	78
BROAD MATHEMATICS	3.0	76
Applied Problems	3.0	73
Calculation	3.7	75
Math Facts Fluency	3.3	78

The DCPS Psychologist did not review Student's 2017 evaluation and only reviewed the documents listed in her evaluation. SEDS indicated that Student had been found eligible and had a prior IEP. (Witness 4's testimony Exhibit Petitioner's Exhibit 16, Respondent's Exhibit 7)

17. In the October 2020 evaluation, Student was still performing at or near the same academic level as Student had been in the 2017 evaluation. Student's academic performance either had plateaued, or Student had not been provided appropriate interventions. (Witness 2's testimony)

18. DCPS convened an IEP review meeting in October 20, 2020. Student's mother participated. After reviewing the psychological evaluation, School A determined Student eligible for special education and related services with a disability of SLD. The IEP team updated and revised Student's IEP which is dated October 29, 2020. The team reduced Student's specialized instruction to three hours per week from the five hours per week outside general education in the IEP put in place on September 1, 2020. The team added 120 minutes per month of behavioral support services and removed speech-language pathology. The IEP included a transition plan. (Petitioner's Exhibit 31)

19. DCPS also designed an Individualized Distance Learning Plan ("IDLP") to communicate how the supports and services outlined in Student's IEP would be delivered during remote virtual learning. The IDLP stated the following: "This plan is based on the current IEP and does not take the place of the annual IEP." (Petitioner's Exhibits 29, 30)

20. Student was in an inclusion classroom from Student's start at School A. Behavior support services were added once Student's IEP was in place. Student's participation in instruction and related services was inconsistent. Student's attendance was poor during

remote virtual learning, and Student was rarely in class and rarely available for behavior support services, although the School A Social Worker assigned to Student made repeated attempts to provide Student services. Student had a total of 32 absences during SY 2020-2021. Because Student had not been participating in remote virtual learning, Petitioner contacted School A and stated that she would ensure Student participated in instruction and services. Despite absences, Student's progress reports reflected that Student made progress toward IEP goals. Student's end-of-year report card, however, reflected that Student failed most courses. (Witness 6's testimony, Petitioner's Exhibits 35, 37-18)

21. Student had difficulty doing school work independently. Student was not grasping the work and would act out in class and distract other students. Student was too afraid to ask questions in class. Student was more comfortable asking for help from friends than teachers. During remote virtual learning, Student was sometimes residing with Parent and at other times residing with Petitioner. Student initially was not attending remote virtual learning, then began attending more frequently, but slaked off after changing households. (Petitioner's testimony, Parent's testimony, Witness 2's testimony)

22. School A first asked School B for Student's in May 2020 and finally received all Student's educational records from School B in summer 2021. There were five requests made before School A finally obtained Student's educational records from School B. (Witness 6's testimony)

23. Petitioner presented her Educational Advocate, who testified as an expert witness. The Advocate asserted that Student should have been in a full-time self-contained classroom. She alleged that Student missed a total of 930 hours of services and did not make sufficient academic and behavioral progress as a result. The Advocate proposed the following services as compensatory education for the denials of FAPE that were alleged: 600 hours of tutoring and 100 hours of counseling. The Advocate opined that with the proposed compensatory education, Student should demonstrate a year's worth of academic progress. (Witness 1's testimony, Petitioner's Exhibit 45)

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). Petitioner held the burden of persuasion on issues #1, #3, #4. DCPS held the burden of persuasion on issue #2 after Petitioner presented a prima facie case on that issue.[10] 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: Did DCPS deny Student a FAPE by failing to ensure that an appropriate IEP was timely developed for Student by January 29, 2020, when Student attended DCPS?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to ensure that an appropriate IEP was timely developed for Student by January 29, 2020.

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

---

[10] 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.

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).

The evidence demonstrates that Student was determined eligible in 2019 while attending School B and School B developed an IEP for Student dated January 29, 2019. That IEP expired on January 29, 2020. Pursuant to 34 C.F.R. § 300.324 (b), School A was obligated to review and update Student's IEP by the annual review date of January 20, 2021.

DCPS asserts that it should not be held responsible for updating an IEP that the staff at School A were unaware existed. Parent credibly testified that she provided School A the IEP when she enrolled Student at School A at the start of SY 2019-2020. Although the IEP never made its way to School A's Special Education Department to be reviewed and implemented, DCPS still had an obligation to ensure that Student's IEP was implemented and updated before its expiration.

School A staff checked the SEDS database for an IEP only after Student came to its attention because of academic and behavioral difficulties. Although there was no current IEP in SEDS, the SEDS communication log noted that the Student had a current IEP. DCPS should be held strictly responsible for failure to thoroughly check the database, not to mention to ensure that the IEP that Parent provided School A promptly made its way to the appropriate School A personnel.

Each public agency must ensure that an IEP team reviews a child's IEP periodically, but not less than annually. By DCPS' admission in its October 13, 2020, PWN, Student's previous IEP was out of compliance for timeliness. As a result, Student went without appropriate special education services for the entire 2019-2020 school year. Student suffered academic harm as a result. DCPS' failure in this regard resulted in a denial of FAPE to Student.

Issue 2: Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP at the start of SY 2019-2020 because the IEPs: (a) were not based on current evaluations, or (b) did not provide Student the appropriate amount of specialized instruction hours outside general education, which Petitioner asserts should have been in all academic subjects, or (c) did not include social-emotional as an area of concern, or (d) did not include a speech-language as an area of concern?

Conclusion: DCPS did not sustain the burden of persuasion by a preponderance of the evidence. DCPS did not provide Student an appropriate IEP at the start of SY 2019-2020 because the September 1, 2020, IEP was not based on current evaluations and omitted social-emotional as an area of concern, and did not prescribe behavior support services. The October 29, 2020, IEP was inappropriate because it prescribed an insufficient number of hours of specialized instruction outside the general education setting.

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 *Endrew 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. *Endrew 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 *Endrew F*., supra, 137 S. Ct. 988.

The evidence demonstrates that when School A provided Student an IEP on September 1, 2020, the IEP was put in place to provide Student with some special education services while DCPS conducted an evaluation. The evaluation perhaps could have been conducted sooner. However, the height of the COVID-19 pandemic may have added to delays to evaluations. Nonetheless, some form of assessments could have been conducted that would have informed the Student's services in the September 1, 2020, IEP.

DCPS provided Student services based upon the data available from Student's prior DCPS IEP that prescribed speech language services, even though the School B IEP that Parent provided did not prescribe those services. On the other hand, School A did not include any behavior support

services in that September 1, 2020, IEP even though the School B IEP prescribed a significant amount of behavior support services.

After evaluating Student within a relatively short time after that, School A updated Student's IEP, removed the speech language services, and added behavior support services, but reduced the amount of specialized instruction. Student had previously been exited from speech language services in 2017, so the evidence does not demonstrate that there was any need for those services to be continued in the updated IEP, even without School A having to conduct a speech language evaluation.

There was insufficient evidence that Student required specialized instruction in all academic areas or that the five hours per week of specialized instruction was insufficient to remediate Student's academic deficits. Although Student had made little if any academic progress in the three years since Student was last formally evaluated, the only evidence provided that Student would have needed to be in a self-contained special education setting with specialized instruction in all academic areas was the testimony of Petitioner's Educational Advocate. However, she had neither met, observed, nor evaluated Student and had not spoken to any of Student's teachers or services providers. Consequently, the hearing Officer does not give weight to that portion of her testimony.

However, it seems inappropriate for School A to have reduced Student's specialized instruction from five hours per week in the September 1, 2020, IEP to three hours per week in the October 29, 2020, IEP. The evaluation DCPS conducted demonstrated that Student was operating significantly below grade level, and there was no testimony to justify that apparent reduction.

The IHO concludes that Student's September 1, 2020, IEP was inappropriate because it was not based on current evaluations and did not prescribe behavioral support services. The October 29, 2020, IEP was inappropriate because it reduced Student's specialized instruction. Neither of the IEPs were reasonably calculated to enable Student to make progress appropriate, in light of Student's circumstances.

Issue 3: Did DCPS deny Student a FAPE by failing to implement Student's IEPs by not providing Student specialized instruction and related services with fidelity, based on the absence of service trackers and progress reports?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS failed to implement Student's January 29, 2019, IEP. There was insufficient evidence that Student's September 1, 2020, and October 29, 2020, IEPs were not implemented.

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).

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE. A school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268-69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (*quoting Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts ... have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.' " *Id.* (*quoting Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

The evidence already discussed in the issues above demonstrates that School A failed to implement Student's January 29, 2019, IEP that was in effect when Student enrolled at School A. The evidence demonstrates that Student received no special education services during SY 2019-2020. This absence of services for an entire school year was substantial and significant and constituted a denial of FAPE.

Petitioner's Educational Advocate testified that she reviewed Student's educational records and claimed that School A did not provide Student with all the required services during SY 2020-2021. However, the evidence reflects, both from the testimony of the School A Administrator and the Social Worker, that School A made special education services available to Student consistent with Student's IEPs after they were developed in September and October 2020. The evidence demonstrates that although the services were made available to Student, Student had significant absences during the remote virtual learning. Consequently, despite the Advocate's testimony of her reviewing the Student's related services trackers, there was insufficient evidence that Student's September 2020 and October 2020 IEPs were not implemented.

Issue 4: Did DCPS deny Student a FAPE by failing to provide an interim IEP and then convening a full IEP meeting within 30 days when Student transferred from a D.C. Public Charter School to DCPS at the start of SY 2019-2020?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school

within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either-- (1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

34 CFR § 300.323(e) provides: In this case, Student transferred from PCS to City School in the 2016-2017 school year. Therefore, City School's decision to implement the PCS IEP, rather than initially develop a new IEP, complied with the IDEA's intrastate transferee provision. DCPS cannot be faulted for not revising Student's PCS IEP when Student first enrolled in City School in April 2017.

However, a child's IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities. See, e.g., Pinto v. District of Columbia, 938 F. Supp. 2d 25, 30 (D.D.C. 2013), citing 20 U.S.C. § 1414(d)(4). See, also, 34 CFR § 300. 324(b)(ii).

Pursuant to DCMR Title 5 Chapter E30 § 3019.5 Transfers between LEA Charters, District Charters, and DCPS shall be conducted as follows, whether the change in enrollment is initiated by the parent or results from the procedures established by DCPS for District Charters:

(a) If a child with a disability transfers from one LEA to another, the sending LEA shall provide a copy of the child's records to the receiving LEA, including any IEP for that child, within ten (10) days of receipt of notice of enrollment of the child in the receiving LEA.

(b) The sending LEA and receiving LEA shall cooperate fully in the transfer of all child records.(c) If a child transfers between an LEA Charter, a District Charter, or DCPS, after an evaluation or reevaluation process has begun, but prior to its conclusion, the receiving LEA shall be responsible for completing the evaluation process and fully implementing a resulting IEP in the event one is required. The sending LEA shall cooperate fully to ensure all relevant information follows a child to his or her new school. (d) Pursuant to 34 C.F.R. § 300.323(e), if a child with an IEP in effect transfers between an LEA Charter, a District Charter, or DCPS, the receiving LEA shall be responsible upon enrollment for ensuring that the child receives special education and related services according to the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA.

The evidence already discussed demonstrates that Parent provided School A Student's School B IEP, and there was a failure by School A to ascertain that Student's had a current IEP. These facts, too, support a violation of School A's requirement to either adopt the School B IEP or develop a new IEP within the required timeframe.

As previously stated, the SEDS database indicated Student had an IEP, although the IEP had not been loaded into SEDS by School B. Due diligence would have warranted contacting Parent to inquire whether an IEP existed, as was done after Student was in danger of retention.

Although the School A Administrator testified that the Special Education Department did not receive the IEP when Student was registered and did not see an IEP in the database, the evidence belies that assertion. The parent was more credible in this regard. She demonstrated an easy command of the details of the other documents she provided and was believable. The DCPS witnesses, on the other hand, defined their procedures but did not explain why they did not conduct their research of information that was available through the SEDS database. The database may not have had Student's most recent IEP, but the database indicated Student was a special education student. Consequently, the Hearing Officer determines that DCPS' failure in this regard denied Student a FAPE.

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.

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

Petitioner's educational Advocate offered her opinion that Student should have been in a self-contained program and that the five hours per week of specialized instruction that Student's IEP prescribed was insufficient to meet Student's needs. However, she had never met Student, observed Student in an educational setting, or spoken to Student's teacher or service providers.

The Advocate asserted that Student should have been in a self-contained special education setting. She alleged that Student missed a total of 930 hours of services and that Student did not make sufficient academic and behavioral progress as a result. The Advocate proposed the following services as compensatory education for the denials of FAPE that were alleged: 600

hours of tutoring 100 hours of counseling. The Advocate opined that with the proposed compensatory education Student should demonstrate a year's worth of academic progress.

However, this amount was based upon the Advocate's assertion that Student missed services that Student would otherwise received had Student been in a self-contained educational setting receiving services in all academic subjects. There was insufficient evidence that Student required such a setting and that the five hours of specialized instruction outside of special education that Student's September 1, 2020, IEP prescribed was insufficient.

Having found that the five hours per week of instruction was sufficient and presuming that had School A fulfilled its obligation to implement Student's School B IEP and then updated it and eventually reevaluated Student as it did in October 2020, Student missed approximately one-third of the services the Advocate proposed. The IHO concludes that there is sufficient evidence that the type of services requested is appropriate, but the amount requested is grossly overstated. Consequently, the IHO awards compensatory services in the order below that the evidence supports.

ORDER:[11]

Within ten (10) business days of the date of this order, DCPS shall provide Petitioner authorization for 200 hours of independent tutoring and 35 hours of independent counseling and at the OSSE approved rates.

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 11, 2022

Copies to: Counsel for Petitioners
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR due.process@dc.gov
{hearing.office@dc.gov}
[redacted] and [redacted]

[11] Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.