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Office of the State Superintendent of Education
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Confidential

Parent on Behalf of Student, ¹ Petitioner, v. District of Columbia Public Schools (Local Education Agency “LEA”) & OSSE Respondent. Case # 2023-0215 Date Issued: February 17, 2024	HEARING OFFICER’S DETERMINATION Hearing Date: February 7, 2024 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student's parent in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”). Student is a child with a disability pursuant to IDEA with a disability classification of autism spectrum disorder (“ASD”) or autism. Student’s currently attends a DCPS school (“School A”) where Student began attending at the start of school year (“SY”) 2022-2023.

On October 30, 2023, Student’s mother (“Petitioner”) filed the current due process complaint (“DPC”) against DCPS (“Respondent”) alleging that DCPS denied Student a free appropriate public education (“FAPE”) for, inter alia, allegedly failing to place Student on diploma track, failing to provide Student bus transportation, and failing to implement Student’s individualized educational program (“IEP”) by not providing Student all speech-language services prescribed by the IEP.

Petitioner’s DPC also alleged that the District of Columbia Office of the State Superintendent of Education (“OSSE”), which is the state education agency (“SEA”), denied Student a FAPE regarding Petitioner’s bus transportation claim because OSSE’s transportation division provides bus transportation to DCPS’s special education students.

Relief Sought:

Petitioner seeks the following relief: that DCPS be ordered to reimburse Petitioner her costs of transporting Student to and from school for approximately one month; DCPS amend Student’s IEP to prescribe diploma track and provide Student compensatory education in the form of 110 hours of independent tutoring and 20 hours of independent speech-language services.

OSSE’s Response to the Complaint:

OSSE filed a response to the complaint on November 9, 2023. In its response, OSSE stated, inter alia, the following: OSSE admits that it did not provide transportation to Student from August 29, 2022, through September 20, 2022, because it had not received a correct transportation request form from Student’s LEA. The remainder of the DPC does not pertain to OSSE and no response from OSSE is required.

DCPS’s Response to the Complaint:

DCPS filed a response to the complaint on November 9, 2023. In its response, DCPS stated, inter alia, the following:

Student currently attends the high functioning autism program and began attending this program beginning August 2023. Prior to this, Student was placed in the communication and education

support (“CES”) program. During SY 2022-2023, Student attended a specific learning support (“SLS”) classroom for a trial period to determine whether Student’s IEP programming could be amended to include a diploma track compared to a certificate track.

DCPS conducted an IEP meeting with Petitioner, Petitioner’s attorney, and additional advocates on February 2, 2022. The team reviewed assessments, speech, occupational therapy (“OT”), audiological, behavioral support, accommodations/aids and transportation. The updated IEP, placing Student on a certificate track, was reviewed by the family and finalized at the end of the meeting. A prior written notice (“PWN”) was sent to Petitioner on February 3, 2022, confirming the finalization of the IEP. To develop Student’s IEP programming, the team reviewed beginning of year data, classroom observations and family input. This IEP was appropriate in light of Student’s circumstances and Petitioner was present and in agreement with the proposed IEP.

The IEP team met on October 6, 2022, and included Petitioner and additional advocates on behalf of Petitioner. Based on Petitioner’s request the team agreed to Student transitioning to the SLS program on a trial period to see if Student could access grade level content in the program and obtain credits toward a high school diploma, as opposed to a certificate. The team reviewed Student’s benchmark data so the team could make a data-informed decision. The IEP team met again on December 20, 2022, to discuss Student’s academic progress and data collections since the beginning of Student’s trial period in the SLS program. The team proposed a hybrid model for Student’s classes based on the data collected.

The IEP team met on March 24, 2023, and July 5, 2023, to discuss programming for Student. After reviewing the end of year data, the School A team proposed to transfer Student to the diploma track beginning SY 2023-2024. All members present at the meeting, including Petitioner and Petitioner’s advocates, agreed with the proposal.

Regarding speech-language services, Student was unavailable and/or absent for 57% of attempted services. Despite Student not receiving the full amount of speech services, however, Student made progress towards communication goals per Student’s IEP progress reports and service trackers.

Petitioner previously filed an office of civil rights (“OCR”) complaint regarding missed services for speech. The IEP team met on July 5, 2023 to address this complaint regarding missed services. The team determined that Student was eligible for 15 hours of behavior support services (“BSS”), however, all other academic and related services for OT, speech-language, and audiology were fulfilled and made up during SY 2022-2023 as noted in PWN sent to Petitioner on July 6, 2023.

Petitioner alleges that DCPS denied Student a FAPE due to transportation issues during the beginning of the 2022-23 SY. Petitioner has already been provided relief and been reimbursed per this OCR complaint.

OSSE’s Motion for Summary Judgment:

On December 19, 2023, OSSE filed a Motion for Summary Judgment Dismissal as to the claims against OSSE, along with a declaration from a management analyst in OSSE’s division of

transportation (“DOT”) and other documents in support of its motion including OSSE DOT’s special education transportation policy.

No opposition to OSSE’s motion was filed by Petitioner or Respondent DCPS. After consideration of OSSE’s motion and the documents presented with the motion, the undersigned impartial hearing officer (“IHO” or “Hearing Officer”) concluded that no genuine issue as to the material fact existed as to whether OSSE denied Student a FAPE by failing to provide transportation services.

Because there was no denial by DCPS of OSSE’s claim that DCPS as the LEA had not provided OSSE a request for Student to be transported to School A, on January 11, 2024, the IHO granted OSSE’s Motion for Summary Judgment and issued an order dismissing OSSE as a Respondent.²

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on November 29, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on October 30, 2023. The 45-day period began on November 29, 2023, and ended [and the hearing officer’s determination (“HOD”) was originally due as to OSSE on December 13, 2023, and as to DCPS on January 13, 2024. OSSE filed a motion to align the timelines and extend the HOD due date for the SEA for 30 calendar days. With the selected hearing dates, the parties filed a motion to continue the hearing and extend the HOD to January 26, 2024. The hearing date was later moved to February 7, 2024, after OSSE was dismissed from the case. The HOD due date was extended by motion to February 17, 2024.

The IHO conducted a pre-hearing conference on October 30, 2023, and issued a pre-hearing order on December 5, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to place Student on the diploma track on Student’s February 2022 IEP?
2. Did DCPS deny Student a FAPE by inappropriately placing Student in a SLS classroom for a trial period from about October 2022 until about December 2022.
3. Did DCPS deny Student a FAPE by failing to place Student on the diploma track on Student’s March 2023 IEP.

² OSSE counsel later requested that the case against OSSE be dismissed with prejudice. The IHO considers the order granting OSSE’s motion as dismissal of the claims against OSSE with prejudice.

³ The Hearing Officer restated the remaining issues and the parties agreed that these were the issues to be adjudicated. At the outset of the hearing, Petitioner withdrew two of the eight issues that were in the pre-hearing order:

- Did DCPS deny Student a FAPE by failing to place Student on the diploma track after the July 2023 IEP meeting—where DCPS verbally decided to place Student on the diploma track but has failed to amend or update the IEP to reflect that change.
- Did DCPS deny Student a FAPE by failing to provide Student with an iPad as required by Student’s IEP from December 2022 until about March 2023.

4. Did DCPS deny Student a FAPE by failing to implement specialized instruction from August 29, 2022 until October 2022.
5. Did DCPS deny Student a FAPE by failing to provide Student with speech-language pathology during SY 2022-2023.
6. Did DCPS deny Student a FAPE by failing to transport Student to and from school as required by Student's IEP from the beginning of SY 2022-2023 until the end of September 2022.

DUE PROCESS HEARING:

The Due Process Hearing was convened on February 7, 2024. The hearing was conducted via video teleconference.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 49 and Respondent's Exhibits 1 through 37) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

SUMMARY OF DECISION:

DCPS held the burden of persuasion on issues #1, #2, and #3 after Petitioner presented a prima facie case on those issues. Petitioner held the burden of persuasion on the issues #4, #5, and #6. Based on the evidence adduced, the IHO concluded that Respondent sustained the burden of persuasion on issues #1, #2, and #3. Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #4, #5, and #6.

FINDINGS OF FACT:⁶

1. Student is age ____ and resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student is in ____ grade for SY 2023-2024 and eligible for specialized instruction and related services under the ASD or autism disability classification. Student currently attends School A, a DCPS school, where Student has been enrolled since the start of SY 2022-2023. (Parent's testimony, Respondent's Exhibit 23)

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

⁵ Petitioner presented two witnesses: (1) Student's parent, Petitioner, and (2) an educational consultant who testified as an expert witness. Respondent presented two witnesses: (1) School A Director of Specialized Instruction who testified as an expert, and (2) a DCPS Resolution Specialist. 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.

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

2. Prior to attending School A, Student attended another DCPS school (“School B”). At School B, Student began _____ grade at the start of SY 2021-2022. While Student was attending School B, a comprehensive psychological reevaluation was conducted of Student in August and November 2021, with an evaluation report dated November 18, 2021. The psychologist who conducted the evaluation assessed Student’s cognitive, academic, and social-emotional functioning, reviewed Student’s educational records, interviewed Student’s parent and teacher and conducted a classroom observation of Student. (Respondent’s Exhibit 4)
3. Student had the following cognitive scores: ⁷

Index	Composite Score	Percentile Rank	95% Confidence Interval	Qualitative Description
Verbal Comprehension (VCI)	89	23	82-98	Low Average
Visual Spatial (VSI)	64	1	59-75	Extremely Low
Fluid Reasoning (FRI)	94	34	87-102	Average
Working Memory (WMI)	79	8	73-88	Very Low
Processing Speed (PSI)	72	3	66-84	Very Low
Full Scale (FSIQ)	79	8	74-85	Very Low

(Respondent’s Exhibit 4)

4. Student had the following academic scores: ⁸

Composite	Standard Score	Grade Equivalence	Qualitative Description
Reading			
Word Reading	103	9.1	Average
Reading Comprehension	96	8.0	Average
Written Expression			
Spelling	76	4.0	Very Low
Sentence Composition	68	1.9	Extremely Low
*Sentence Building	72	1.9	Very Low
*Sentence Combining	68	1.9	Extremely Low
Essay Composition	57	<3.0	Extremely Low
Mathematics			
Math Problem Solving	73	3.2	Very Low
Numerical Operations	74	2.8	Very Low

(Respondent’s Exhibit 4)

5. The psychologist concluded based on her evaluation that academically, Student presented

⁷ Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V)

⁸ Wechsler Individual Achievement Test, Fourth Edition (WIAT-IV)

with symptoms consistent with a specific learning disability, with impairment in the area of written expression. She surmised that clinically, Student's symptoms appeared to be consistent with a diagnosis of generalized anxiety disorder given parent, teacher and Student endorsement of "attention problems, somatic complaints, and vulnerability to become acutely upset, anxious, disorganized, inattentive and impulsive with impaired capacities for self-control." She noted Student's diagnosis of ASD by history. (Respondent's Exhibit 4)

6. In her recommendations, the psychologist noted among other things the following:

"[Student's] FSIQ score fell in the Very Low range, which means that [Student's] overall level of cognitive ability is greater than 8% of individuals [Student's] age. Individuals with this level of ability may experience significant difficulty in various areas of functioning."

"[Student's] overall performance on the VSI [visual spatial index of the WISC-V] was extremely low compared to other individuals [Student's] age. Individuals with low visual spatial skills may have difficulty understanding information that is presented nonverbally."

"[Student's] overall performance on the WMI [working memory index of the WISC-V] was very low compared to other individuals [Student's] age. With working memory skills lower than many individuals [Student's] age, [Student] may have difficulty concentrating and attending to information that is presented to [Student]. This may impact [Student's] school performance. Relatively weak working memory skills can lead to reading comprehension problems as text becomes more complex in future grades."

"[Student's] overall performance on the PSI [processing speed index of the WISC-V] was very low compared to other individuals [Student's] age. Individuals with relatively low processing speed may work more slowly than same-age peers, which can make it difficult for them to keep up with classroom activities. Consequently, the individual may feel frustrated or confused when material is presented quickly."

(Respondent's Exhibit 4)

7. DCPS sent a location of services ("LOS") letter dated December 29, 2021, addressed to Petitioner at her previous address notifying her that for SY 2022-2023, Student would be assigned to the CES program at the DCPS school ("School C") that was the boundary school for Petitioner's previous address. However, Petitioner never received the December 21, 2021, LOS letter prior to the start of SY 2022-2023. (Petitioner's testimony)
8. On February 2, 2022, School B conducted an annual review of Student's IEP. Petitioner participated in the meeting. The team developed an IEP for Student that prescribed 20 hours per week of specialized instruction outside general education, 120 minutes of OT per month outside general education, 240 minutes of speech-language pathology per month outside general education, and 90 minutes of behavioral support services per month in general education. The IEP's post-secondary transition plan included a post-secondary education goal of Student attending college

upon graduation from high school and Student identifying three colleges that offer Student's chosen major and identifying their location and tuition. The graduation planning section of the IEP had the box checked indicating Student was to obtain a high school certificate prior to age 22 rather than a high school diploma. The IEP also prescribed transportation services. During SY 2021-2023 Student was provided transportation services from home to school pursuant to Student's IEP. (Respondent's Exhibit 6)

9. On April 5, 2022, School B held an IEP meeting to discuss compensatory services for Student. Petitioner participated in the meeting along with her attorney at the time. The team reviewed Student's iReady scores which reflected that Student was reading on grade level. The team discussed Petitioner's requested compensatory services. On May 5, 2022, DCPS provided Petitioner authorization to obtain 20 hours of independent tutoring and 10 hours of independent speech-language services. (Respondent's Exhibits 8, 11, 12)
10. At School B, Student was in the CES program. Student's special education teacher informed Petitioner that she was going to recommend Student for diploma track at Student's School B graduation. Student's end of year report card for SY 2021-2022 reflected above average grades in all subjects and noted that Student's scholastic reading inventory scores reflected that Student was reading at the next grade level. The report card noted that Student had 49 total absences for the year with all but 8 excused. (Petitioner's Exhibit 21)
11. During SY 2021-2022 at School A, Student's English Language Arts & Literacy ("ELA") and math scores on standardized testing for Student's grade indicated Student did not meet grade level expectations and scored at the 3rd percentile of all students who took the test at School A, and the 12th percentile of all students in DCPS. (Respondent's Exhibits 9, 10)
12. School B is a feeder school for School A, so upon graduation from School B, School B students' data is transferred to School A. Prior to the start of SY 2022-2023, Petitioner received a class schedule for Student for School A. As a result, and not aware of the December 2022 LOS letter notifying her of Student's assignment to the CES program at School C, Petitioner enrolled Student at School A and provided the residency documentation that was required. (Parent's testimony, Witness 3's testimony, Petitioner's Exhibit 8)
13. Student began attending School A at the start of SY 2022-2023. Despite having sent Petitioner a School A class schedule for Student, School A was not expecting Student to attend and for the first few days Student along with other students whose records were not immediately available, Student did not attend classes, but remained in the common areas of the school with school staff working to sort out where they were supposed to attend. Within a few days, Student was placed in the classroom with a special education teacher. School A's director of specialized instruction determined that Student was assigned to the CES classroom at School C and informed Petitioner of the same, provided her a copy of the December 2021 LOS letter and a second LOS letter for School C dated September 7, 2022. (Petitioner's testimony, Witness 3's testimony, Petitioner's Exhibits 5, 6)
14. Petitioner did not accept Student's assignment at School C because it was not Student's boundary school and because she considered School C's neighborhood to be unsafe for Student. As a result, Petitioner complained to and sought assistance from DCPS central office administrators and others for Student to remain at School A. Student was not provided bus transportation services to School A during the first few weeks of SY 2022-2023, but eventually bus transportation started for Student by October 1, 2022. During that period, Petitioner provided Student transportation

to and from school personally or with ride sharing services.⁹ (Petitioner’s testimony, Witness 3’s testimony, Petitioner’s Exhibits 38)

15. On October 6, 2022, School A conducted a 30-day review of Student’s progress. At that meeting Petitioner requested that Student participate in School A’s SLS program to see if Student’s was able to access grade level content to successfully obtain high school credits toward a high school diploma. The team agreed that Student would transition to the SLS program on a trial basis. (Petitioner’s Exhibit 9)
16. On December 20, 2022, School A convened a placement meeting. The purpose of the meeting was to discuss Student’s academic progress since beginning the SLS program trial period. Based on the discussion and the academic and behavioral data presented, the team proposed a “hybrid model” for Student’s classes. Based on the data presented for both the English and math classes, it was evident that Student had significant difficulties accessing grade level content and often shut down, displaying stemming behaviors, sleeping to cope with mental fatigue and inability to complete tasks. The School A team agreed that Student needed to build typing skills and willingness to write with added details. (Petitioner’s Exhibit 10)
17. The School A team noted that Student was demonstrating some levels of success in the woodwork and study skills development elective classes. As a result, the School A team proposed a “hybrid model” for Student to take all core content classes (math, English, biology, and history) within the CES classroom and remain in the SLS elective classes to allow Student an opportunity to access grade level content while strengthening Student’s independent skills, developing skills in math reasoning and concepts and reading comprehension and fluency. The team noted that Student would remain in a structured environment to support behavioral needs through applied behavior analysis (“ABA”) services and supports, such as fading and prompting, essential for Student’s improvement in completing tasks independently. (Witness 2’s testimony, Petitioner’s Exhibit 10)
18. During the meeting Student’s parent expressed that communication from the SLS teachers to her was lacking. She felt that because Student was in a trial period the teachers were not communicating sufficiently and giving Student the best opportunity to succeed. At the end of the meeting, Petitioner requested Student remain within the SLS program with additional support services in math and science classes. However, School A placed Student from the CES classroom for core academics and began its “hybrid model”. (Parent’s testimony, Respondent’s Exhibit 10)
19. School A prepared a plan to make up for speech-language services that Student missed in September, October, and December 2022. In total Student’s missed 240 minutes of services during those months that were to be made up by the end of SY 2022-2023. (Petitioner’s Exhibit 16)
20. School A convened an annual IEP review meeting on March 17, 2023. Petitioner participated in the meeting. The team developed an IEP that prescribed 18 hours per week of specialized instruction with 3 hours per week in general education and 15 hours per week outside general education and related services of 90 minutes per month of OT and 120 minutes per month of

⁹ The ride sharing services receipts disclosed by Petitioner totaled \$180.23.

speech-language pathology, both outside general education, and 90 minutes per month of behavior support services inside general education. The IEP still noted Student's post-secondary goal of attending college after high school and H.S. certificate prior to age 22. (Respondent's Exhibit 14)

21. Student's end of year report card for SY 2022-2023, reflected that Student took the following courses and earned the following grades:

Reading Workshop I: B
Industrial Woodworking: B
English C1: A-
Concepts of World Hist & Geo I: A
Foundational Math C1: A
Concepts of Biology CE: A
Learning Lab-Self Advocacy I: A
Study Skills Development I: C
Health Education: C+

22. Student's transcript reflects that Student earned 7.5 elective credits of the 3.5 elective credits Student needs for a high school diploma and .5 credits for physical education and health that Student's needs for a high school diploma. (Petitioner's Exhibit 24)

23. During SY 2022-2023 Student had a total of 44 total absences, of which 21 days were unexcused. (Respondent's Exhibit 17)

24. Petitioner filed a complaint with the U.S. Department of Education Office for Civil Rights ("OCR") that resulted in a resolution agreement signed by the DCPS Chancellor, dated May 11, 2023. The OCR resolution agreement covered two action items: (1) compensatory services and (2) transportation reimbursement, and included reporting requirements and provisions for enforcement of the resolution agreement by OCR. Regarding compensatory services the agreement provided the following provision:

"By July 1, 2023, after providing proper written notice to the Student's parent/guardian, the District will convene a group of persons knowledgeable about the Student, making all reasonable efforts to include the parent/guardian, to discuss the provision of compensatory and/or remedial services to the Student for the time period the Student did not receive appropriate the related services required by [Student's] Individualized Education Program (IEP) during the first 30 days of the 2022-2023 school year, from approximately August 29, 2022 to October 10, 2022. The group will develop a plan for providing timely compensatory and/or remedial services with a completion date not to extend beyond December 31, 2023. The District will provide the Student's parent/guardian with written notice of the outcome of the meeting, including an explanation for decisions made, a description of and schedule for providing compensatory and/or remedial services to the Student, and notice of the procedural safeguards, including the right to challenge the group's determination through an impartial due process hearing."

25. Regarding transportation reimbursement, the OCR resolution agreement provided the following provision:

“By September 1, 2023, the District will reimburse the Complainant \$130.50 to cover the out-of-pocket costs the Complainant incurred during the first month of the 2022-2203 school year due to the District’s failure to provide the transportation services required by the Student’s IEP (calculated based on GSA mileage rate during relevant time period for round trip distance from home to school).”

26. Petitioner received the transportation reimbursement from DCPS mandated by the OCR resolution agreement. Petitioner did not request additional transportation compensatory prior to filing the current due process complaint. (Parent’s testimony, Witness 3’s testimony Respondent’s Exhibits 15, 27)
27. On June 2023, Petitioner provided School A a form which designated an educational consultant as her designee to observe Student’s special education program at School A. (Respondent’s Exhibit 16)
28. On July 5, 2023, School A convened a meeting to address the OCR complaint. Petitioner participated along with her educational consultant. Student’s speech-language provider reviewed her provision of services and stated that Student’s was not owed any speech-language services. DCPS issued a PWN summarizing the results of the meeting: The PWN stated the following: “Based on the data reviewed and the team’s discussion, it was determined that Student was owed 900 minutes (15 hours) of behavior support services (BSS). All other academic and related services for OT, speech, and audiology have been fulfilled and made up during the 2022-23 academic year, as evidenced by each service provider. The team concluded that the behavior support services are owed due to the lack of documentation and service trackers to confirm the rendered services. The [School A] team did not have any evidence of the school social worker’s service for the entire 2022-23 school year.” DCPS provided Petitioner authorization to obtain 15 hours of independent counseling. (Witness 1’s testimony, Witness 3’s testimony, Respondent’s Exhibits 18, 19)
29. School A was to provide Student’s a total of 1920 minutes of speech language services during SY 2022-2023. Of the total number of minutes of speech-language services that Student was due, DCPS attempted to provide 1635 minutes, or 85% of the services. The instances where the service provider attempted to deliver the services and Student was not available due to absences was 930 minutes or 48% of the time. (Witness 3’s testimony, Respondent’s Exhibit 25, Petitioner’s Exhibit 7)
30. At the July 5, 2023, meeting the team also revisited the March 24, 2023, discussion regarding Student’s programming. After reviewing Student’s performance data, the team agreed that Student would be transferred to the diploma track and would be assigned to the “high functioning autism” program at School A beginning in August 2023. The participants noted that Student might have to attend summer school to recover two or three classes from the ____ -grade diploma programming to support Student’s graduating goal of June 2026. The PWN stated that the decision was based on the data and team discussion for Student’s reading and math from the reading inventory benchmark and recent Woodcock Johnson IV math subtests. (Witness 1’s testimony, Respondent’s Exhibit 20)
31. On August 8, 2023, School A amended Student’s IEP, but the IEP continued to note that Student’s

was on the certificate track. On November 7, 2023, School A amended Student's IEP to note that Student was on diploma track. (Respondent's Exhibits 22, 23, 23a)

32. Since the start of SY 2023-2024, Student has been in School A's "high functioning autism" program, which is currently combined with its SLS program because of the total number of students remains below 15. In the first advisory of SY 2023-2024, Student earned passing grades in all classes. Student is taking both _____ grade classes and some _____ grade classes for which Student would have earned diploma credits had Student taken those classes during SY 2022-2023. (Witness 2's testimony, Petitioner's Exhibit 33)

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 proceeded and held the burden of production. Once Petitioner presented a prima facie case on issues #1, #2, and #3, Respondent held the burden of persuasion on those issues. 10 Petitioner held the burden of persuasion on the remaining issues.

¹⁰ DC Code § 38-2571.03 (6) provides:

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

(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.

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

Failure to Place Student on Diploma Track:

ISSUE 1: Did DCPS deny Student a FAPE by failing to place Student on the diploma track on Student’s February 2022 IEP?

ISSUE 2: Did DCPS deny Student a FAPE by inappropriately placing Student in a SLS classroom for a trial period from about October 2022 until about December 2022.

ISSUE 3: Did DCPS deny Student a FAPE by failing to place Student on the diploma track on Student’s March 2023 IEP.

Conclusion: Respondent sustained the burden of persuasion by a preponderance that Student’s February 2022 and March 2023 IEPs were reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances at the time the IEPs were developed. In addition, there was no denial of FAPE to Student by DCPS placing Student in the SLS classroom on a trial basis during SY 2022-2023.

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

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

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

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 Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to

grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *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, 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.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

In developing an IEP, the Supreme Court has explained that IDEA's mandate to place a disabled student in their least restrictive environment must be balanced with the requirement that an IEP be “reasonably calculated to enable a child to make progress appropriate in light of [their] circumstances.” *Endrew F.*, 137 S. Ct. at 999, 1101.

Petitioner asserts that Student's IEP should have prescribed that Student was on diploma track from the time Student's IEP was developed in February 2022, while Student was attending School B. Petitioner based that assertion principally on Student's iReady scores that reflect that Student was reading at or slightly above grade level while Student was attending School B and only one grade level behind in math when the February 2022 IEP was developed.

Despite Student's iReady reading scores, the evidence reflects that on the standardized academic achievement testing conducted early in SY 2021-2022, although Student's reading scores were average, Student's scores in written expression and math were extremely low. The psychologist who conducted that evaluation noted that Student's cognitive functioning in several areas reflected significant deficits and Student's overall cognitive functioning was in the Very Low range. In addition, during SY 2021-2022 at School B, Student's ELA and math scores on the standardized testing for Student's grade indicated Student did not meet grade level expectations and scored at the 3rd percentile of all students who took the test at School B, and the 12th percentile of all students in DCPS.

Petitioner presented an educational expert who reviewed Student's reading scores during Student's time at School B which reflected that Student was operating on grade level in reading and one grade level below in math. Based upon that data, the consultant opined that Student's February 2022 IEP was inappropriate because it did not prescribe that Student be on diploma track. There was also testimony by Petitioner that diploma track was not discussed during the February 2022 meeting and that Student's special education teacher at the end of the year stated that she would recommend Student for diploma track.

Although the IHO considered the consultant's testimony to be thoughtful, his testimony was insufficient for the IHO to conclude that the IEP was inappropriate when it was developed simply based on Student's reading scores. As noted above, the psychological data from the independent reevaluation completed just

months prior to the meeting indicated several challenging areas for Student both cognitively and academically.

In addition, Petitioner's consultant had never observed Student in a classroom setting. This testimony was insufficient to rebut the deference that should be granted to the educators who worked with Student at School B. The February 2022 IEP was developed for the remainder of SY 2022-2023, which included four months in which Student remained at School B in the CES classroom. There was no testimony to support a conclusion that at School B Student should not have been and did not benefit from being in the CES classroom. At that point when the IEP was developed Student could not earn credits toward a high school diploma at School B.

Although the February 2022 IEP was also to cover some of the following school year, soon after Student arrived at School A, a team conducted a 30-day review meeting. At that meeting, the team agreed to place Student in the SLS program for a trial period where Student could have received diploma credits. Student remained in the classroom for the remainder of the first semester. At a meeting in December 2022, School A convened a team meeting to review Student's performance in the SLS classroom. The teacher noted that Student was not able to maintain the requisite focus and began engaging in stemming behaviors and was not able to access the grade level curriculum.

As result, School A team determined that Student would return to the CES classroom for core academics classes and still would be able to earn credits in elective classes in what the team called a hybrid program. The evidence demonstrates that the team made efforts to collect data and determine what programming was appropriate to meet Student's needs and modified Student's programming accordingly. By the time the team met again in March 2023, the School A team still did not believe Student's had yet gained the skill sets to move to the SLS program. Although Student was not placed fully on diploma tract to earn all the required _____ grade credits, Student earned some credits in _____ grade. There was no evidence that Student suffered any harm from the trial period in the SLS program or that such a trial period was inappropriate, particularly considering Petitioner's request that Student be on diploma track.

The evidence demonstrates that in July 2023, the School A team met and again reviewed Student's educational data, including recent academic standardized testing, and concluded that Student would be fully on diploma track as of the start of SY 2023-2024. The evidence demonstrates that since the start of SY 2023-2024 Student has been in School A SLS program which is also considered the high functioning autism program.

Petitioner asserts that School A did not have a high functioning autism class during SY 2022-2023. However, there was credible testimony from the School A director of specialized instruction that School A had such a program, however, because of low student numbers, the program was and remains combined with the SLS program.

Based on the evidence, the IHO concludes that Respondent sustained the burden of persuasion by a preponderance that Student's February 2022 and March 2023 IEPs were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances at the time the IEPs were developed. In addition, there was no denial of FAPE to Student by DCPS placing Student in the SLS classroom on a trial basis during SY 2022-2023.

Failure to Implement:

ISSUE 4: Did DCPS deny Student a FAPE by failing to implement specialized instruction in school from August 29, 2022 until October 2022.

ISSUE 5: Did DCPS deny Student a FAPE by failing to provide Student with speech-language pathology

during SY 2022-23.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS failed to materially implement Student's IEP during SY 2022-2023 regarding specialized instruction or speech-language pathology.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at 274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

Petitioner asserts that School A failed to provide Student specialized instruction during the first weeks of SY 2022-2023. The evidence demonstrates that when Student initially arrived at School A, Student did so with a general education schedule. Petitioner within the first week of school spoke with School A's director of specialized instruction who researched and determined that Student was supposed to be attending the CES program at School C. Petitioner refused Student's placement and maintained Student at School A until DCPS central office ultimately assigned Student to School A and issued Petitioner an LOS letter to that effect.

Petitioner asserts that during the time prior to Student being assigned to School A, Student went without specialized instruction. However, the evidence belies this assertion. Petitioner testified that Student was in a classroom and not being provided any work. She named the teacher in that classroom and, based upon the credible testimony of School A's director of specialized instruction, the teacher Petitioner named was the CES teacher with whom Student was ultimately assigned after the LOS letter for School A was issued to Petitioner. Petitioner's testimony was insufficient for the IHO to conclude that Student missed any significant amount of specialized instruction during the first weeks of SY 2022-2023 and there was no material failure to implement Student's IEP in this regard.

Regarding speech-language pathology, Petitioner presented an expert witness who testified as to the missed services. He simply stated that Student missed approximately 20 hours of speech language services. That witness did not account for Student's absences from school that were the reason for many of the missed services. The evidence reflects that in December 2022, School A proposed a plan to make up missed speech-language services from the first half of the year.

In addition, Petitioner filed a OCR claim for the missed services that resulted in a resolution agreement signed by the DCPS Chancellor, dated May 11, 2023. Pursuant to the resolution agreement DCPS convened a meeting at which the speech-language provider reviewed all the services provided and concluded that no further make up services were warranted. DCPS prepared a chart that reelected the missed services which demonstrated that nearly 50% of the total number of services that were to be delivered were missed due to Student's absences.

The evidence reflects that during SY 2022-2023, Student had a total of 44 total absences, of which 21 days were unexcused. Petitioner's counsel asserted that DCPS still must deliver related services despite Student's absence, but produced no DCPS policy document that mandates that when a student is absent from school, the related services must be made up even when a student's absences are excused.

School A was to provide Student a total of 1920 minutes of speech language services during SY 2022-2023. Of the total number of minutes of speech-language services that Student was due, DCPS attempted to provide 1635 minutes, or 85% of the services. Based on this data the IHO concludes that the amount of speech-language services that Student missed not due to Student's absences was immaterial when measured against the total amount of services that Student was due to receive.

Failure to Transport:

ISSUE 6: Did DCPS deny Student a FAPE by failing to transport Student to and from school as required by Student's IEP from the beginning of SY 2022-2023 until the end of September 2022.

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

An LEA must provide services to address all of a student's identified special education and related services needs. The federal regulations indicate that a FAPE includes the provision of related services defined as "transportation and such developmental, corrective and other supportive services" as are required to assist a child with a disability to benefit from special education 34 C.F.R §300.34(a), (b) (16).

In the District of Columbia, the applicable regulations also specifically indicate that transportation is a related service that must be made available by the LEA. It should be pointed out that a local federal court has held that the LEA in the District of Columbia continues to have legal responsibility to provide transportation to its students. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D. C. 2011).

The evidence clearly demonstrates that the provision of transportation services is a related service prescribed by Student's IEP. The failure to provide consistent and timely transportation services is an alleged failure to implement the IEP.

As stated above, for a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at 274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

The OCR resolution agreement covered both compensatory services and transportation reimbursement and included reporting requirements and provisions for enforcement of the resolution agreement by OCR.

Regarding transportation reimbursement, the OCR resolution agreement provided the following provision:
“By September 1, 2023, the District will reimburse the Complainant \$130.50 to cover the out-of-pocket costs the Complainant incurred during the first month of the 2022-2203 school year due to the District’s failure to provide the transportation services required by the Student’s IEP (calculated based on GSA mileage rate during relevant time period for round trip distance from home to school).”

The evidence demonstrates that Petitioner received the transportation reimbursement from DCPS mandated by the OCR resolution agreement. Petitioner did not request additional transportation compensatory prior to filing the current due process complaint.

Petitioner asserts that DCPS failed to transport Student to school for 20 school days and she either drove Student to school or used a ride service. She is seeking \$718 above the amount that Petitioner received pursuant to the OCR resolution agreement. However, Petitioner submitted ride sharing receipts that only totaled approximately \$180. Despite Petitioner’s testimony that she is due additional compensation, the receipts for that additional amount were missing. If Petitioner is due more compensation, the IHO suggests that she provide that documentation to DCPS along with a request for additional amount. However, the difference of approximately \$50 that is reflected in the disclosed documents, given that Petitioner had and perhaps still does have the opportunity to request and receive the additional compensation, does not rise to the level of denial of FAPE.

ORDER:

Petitioner’s due process complaint is hereby dismissed with prejudice and all 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 with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: February 17, 2024

Copies to: Counsel for Petitioner
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