

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
1050 First Street, N.E., Washington, DC 20002  
(202) 698-3819 www.osse.dc.gov

---

<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 1/22/24; 1/24/24;</b>
<b>v.</b>	)	<b>1/25/24; 1/31/24</b>
	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No. 2023-0228</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

---

**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 14, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On November 27, 2023, Respondent filed a response. A resolution meeting was held on December 6, 2023, without an agreement being reached. The resolution period expired on December 14, 2023.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R.

---

<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

### **III. Procedural History**

On January 12, 2024, a prehearing conference was held. Attorney A, Esq., and Attorney B., Esq., counsel for Petitioner, appeared. Attorney C, Esq., counsel for Respondent, appeared. On January 16, 2024, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The matter proceeded to trial on January 22, 2024, January 24, 2024, January 25, 2024, and January 31, 2024. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After completion of testimony and evidence, the parties presented oral closing statements on January 31, 2024. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-77 without objection. Respondent moved into evidence exhibits R-1, R-3 through R-9, R-12, R-13, R-17, R-19, R-20, R-22 through R-24, R-26, R-28 through R-31, R-41, and R-43 without objection.

Petitioner presented as witnesses, in the following order: Witness A, a professional educator (expert in special education, reading, math, writing, and behavior); Witness B, a board-certified behavior analyst (expert in special education, particularly in the development and implementation of Individualized Educational Plans (“IEPs”) and associated recommendations for evaluations, academics, behavior and vocational services, and planning); herself; and the Student. DCPS presented as witnesses: Witness C, a trauma prevention manager at DCPS (expert in special education, in particular with respect to social and emotional support and evaluations); Witness D, a psychologist at School A (expert in school psychology, specifically with respect to evaluating students

with disabilities); and Witness E, director of special education at School A (expert in special education).

#### **IV. Issues**

As identified in the Prehearing Order and in the Complaint, the issues to be determined in this case are as follows:

**1. Did Respondent provide the Student with inappropriate IEPs for the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a Free Appropriate Public Education (“FAPE”)?**

Petitioner contended that the Student’s IEPs lacked appropriate content, namely: 1) goals; 2) present levels of performance; 3) specialized instruction based on peer-reviewed research; 4) behavior support services; 5) other related services; 6) a Behavior Intervention Plan (“BIP”); 7) a transition plan; 8) accommodations; 9) extended school year services; and 10) recommendations to address issues with course credits.

**2. Did Respondent fail to implement the Student’s IEPs during the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that Respondent failed to provide specially designed instruction, related services, supplementary aides, services, modifications, and accommodations during the 2021-22, 2022-23, and 2023-24 school years, and that Respondent failed to provide certified teachers and related service personnel to implement the Student’s IEPs during the 2021-22, 2022-23, and 2023-24 years.

**3. Did Respondent fail to evaluate the Student during the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that DCPS failed to evaluate the Student in the areas of school avoidance, school refusal, trauma, anxiety, and related mental health issues; that

DCPS did not conduct psychological, educational, adaptive, behavioral, speech-language, or occupational therapy evaluations of the Student; and that DCPS did not perform a functional behavioral assessment (“FBA”) of the Student.

**4. Did Respondent fail to provide Petitioner with educational records during the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

All claims relating to revision of the IEP were withdrawn at the prehearing conference. All Section 504 claims were dismissed at the prehearing conference because this Hearing Officer does not have jurisdiction over these claims. Claims in Issue #3 relating to speech and occupational therapy evaluations were withdrawn on the record. Claims in Issue #4 were withdrawn by notice of withdrawal dated January 19, 2024. As relief, Petitioner originally sought compensatory education, evaluations, a placement at a postsecondary school, counseling, transition services, and records.

**V. Findings of Fact**

1. The Student is an X-year-old who is currently receiving special education services under the category of Multiple Disability (Emotional Disturbance and Other Health Impairment). The Student has been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), Bipolar Disorder, Anxiety, and Depression. The Student has also been significantly impacted by his/her parent’s serious health struggles. Testimony of Witness B. The Student has suffered from homelessness and domestic violence, leading to trauma. DCPS staff at School A, the Student’s school, are aware of the Student’s history with trauma. Testimony of Witness E.

2. The Student has failed Grade X no less than four times, twice outside the District of Columbia and twice in the District of Columbia. P-13. The Student has

approximately 8.5 credits toward school graduation. The Student wants to be able to be gainfully employed and does not feel safe at School A, which triggers his/her anxiety.

Testimony of Petitioner; Testimony of Student.

3. The Student is unable to read and decode most grade-level words and struggles with reading comprehension. Testimony of Witness E. The Student also lacks the confidence to work independently and requires constant teacher support through prompting, clarifying directions, modeling, and one-on-one assistance. P-21. The Student also has poor handwriting, needs language repeated multiple times for him/her to understand it, and has issues with basic cleanliness. Testimony of Petitioner.

4. The Student went to School C, outside the District of Columbia, for portions of the 2017-2018 school year. The Student was enrolled at DCPS's School B for the start of the 2018-2019 school year. The Student earned no credits and had failing grades for all courses except physical education/health class. P-4-1-2.

5. The Student enrolled at School A on January 29, 2019, due to concerns with his/her lack of attendance and credits earned at School B. School A is an "alternative" school with year-round classes, and students at the school generally do not fail, even if they are absent for thirty days. Testimony of E.

6. The Student immediately started having attendance issues at School B during the 2019-2020 school year. This was largely because the Student wanted to avoid going to school, as s/he did not understand much of the work at his/her previous school, School A. Testimony of Petitioner. Trauma and depression also kept the Student from going to School B. Testimony of Witness D.

7. A psychological evaluation of the Student was conducted in 2019. The corresponding report, dated May 6, 2019, indicated that, on the Woodcock Johnson Test of Achievement-IV (“WJ-IV”), the Student scored in the “low” range in all reading tests and subtests, and in the “very low” to “low average” range in all math tests and subtests. The evaluator noted that the Student had challenges with sustaining his/her attention, as well as starting assignments and remaining on task, and that the Student’s poor attendance history was likely impacting his/her academic performance. P-4.

8. On Reading Inventory testing from January 30, 2020, the Student scored in the “below basic” range. P-56-1. In September 2020, the Student’s math and reading levels were in the third-grade to fifth-grade range, and it was difficult for the Student to access grade-level math without significant supports. P-18.

9. In 2020, Petitioner filed a due process complaint against DCPS with respect to the Student. In the resulting settlement agreement on or about August 25, 2020, DCPS agreed to increase the Student’s specialized instruction mandate to twenty hours per week and to increase the Student’s mandate of behavioral support services to 120 minutes per month. P-21-17.

10. The Student was given an independent neuropsychological evaluation in 2020. The corresponding report, dated October 19, 2020, indicated that the Student’s IQ on the Wechsler Adult Intelligence Scale-IV (“WAIS-IV”) was 73, in the “low” range (at the 4th percentile). On the Behavior Assessment Scale for Children-III (“BASC-III”), the Student’s scores on externalizing problems, internalizing problems, and the Behavior Symptoms Index were extremely high. On the Wide Range Achievement Test-V (“WRAT-V”), the Student scored far below grade level in word reading and spelling. On

the Woodcock Reading Mastery Test III (“WRMT-III”), the Student’s passage comprehension and listening comprehension scores were in the extremely low range. The evaluation also pointed out that the Student’s weaknesses were not fully explained by his/her borderline IQ. Testimony of Witness A; P-9; P-77.

11. A vocational report was written for the Student on December 29, 2020. The Student participated in five one-hour sessions. The Student was easily distracted, mostly by his/her phone, and needed prompting to refocus his/her attention. The Student said that s/he wanted to get a job but was unsure of what job would suit him/her. The Student expressed a preference for a slow-paced, structured environment where s/he could perform a few responsibilities, one at a time. The Student revealed limited knowledge of job skills to the evaluator. P-10.

12. In or about March 2021, after the pandemic had begun to wane, the staff at School A invited its students back to school in person. However, the Student was wary of bringing home COVID-19 to his/her mother. The Student’s attendance was poor for the remainder of the 2020-2021 school year at School A. Testimony of Witness E.

13. The Student continued at School A for the 2021-2022 school year. The Student had attendance issues from the start of the year. On September 22, 2021, the Student was administered the beginning-of-year Reading Inventory test, on which s/he scored 843, “below basic,” far below grade level. P-19-8.

14. An IEP meeting was held for the Student on January 25, 2022. At the meeting, DCPS offered to eliminate the Student’s first period to accommodate his/her absence and lateness issues, and the team decided to take the Student’s math class away

from him/her. No requests were made for changes to the IEP's goals or for trauma or school-avoidance assessments. Testimony of Witness C; Testimony of Witness E.

15. The January 25, 2022, IEP indicated that the Student was pleasant to have in class but needed to be redirected during instructional time. The IEP said that the Student's anxiety played a part in him/her not being able to focus and carry out academic tasks. The IEP also mentioned that a multidisciplinary team ("MDT") meeting was conducted, in which a plan was devised to get the Student to attend classes more and be able to complete assignments. The IEP indicated that the Student was enrolled in a "BES/SLS" classroom. The IEP contained "Area of Concern" sections with corresponding goals in reading, mathematics, writing, and social, emotional and behavioral development. The IEP recommended that the Student receive twenty hours of specialized instruction per week outside general education, with behavioral support services for 120 minutes per month. The IEP indicated that the Student would benefit from graphic organizers, sentence starters, chunking material into smaller parts, and related interventions. P-19.

16. The Student was admitted to Hospital A in January 2022 because of visual and auditory hallucinations. By February 2022, the Student was in an outpatient program. In April 2023, the Student received a letter saying that s/he was being unenrolled from School A because of nonattendance. Testimony of Petitioner; Testimony of Witness E. Witness E then told the Student that this was an error and that s/he was not withdrawn from the school. The Student came to school thereafter, though the Student's attendance continued to be very poor. Testimony of Witness E.



17. An independent educational evaluation (“IEE”) review was written by DCPS on February 25, 2022, based on the Student’s 2020 neuropsychological evaluation. The IEE review indicated that the Student’s academic weaknesses were not fully explained by his/her borderline IQ, and that the Student displayed notable weaknesses on speed measures, reading, writing, spelling, math, and comprehension of information, both read aloud and presented in writing. The IEE review said that the Student’s memory was significantly lower than expected, even when factoring in his/her IQ, and the Student showed significant weaknesses in attention, working memory, and executive functioning. The evaluator stated that, in addition to substantial educational supports, the Student would need comprehensive vocational support services to help prepare him/her for life after school. The evaluator expected that the Student’s extremely poor abilities in communication, reading, and math would be particularly problematic, and that his/her poor memory would make it especially difficult for him/her to take job instruction. R-13.

18. During the 2021-2022 school year, the Student failed all, or almost all, of his/her classes, and his/her attendance was very poor. Testimony of Witness E. The Student also avoided counseling services during the 2021-2022 school year, which consisted of individual counseling and group sessions. The counselor tried to address the Student’s trauma issues. By the end of the school year, there was some progress but “not enough.” Testimony of Witness C.

19. During the first quarter of the 2021-2022 school year, the Student made progress on his/her IEP goals in reading and written expression, but math goals were not introduced, some transition goals were not introduced, and there was no progress on social, emotional and behavioral development goals. For the second reporting period, the

Student's IEP progress report again reflected progress on reading and written expression goals, but again no math goals were introduced. One transition goal, relating to filling out an "RSA" form, was mastered, but the report noted regression with respect to one of the social, emotional and behavioral development goals. For the third and fourth reporting periods, no progress was reported on any goal. R-18.

20. During the 2022-2023 school year, the Student failed all, or almost all, of his/her classes, and s/he resisted behavioral support services on numerous occasions. R-17; Testimony of Witness E.

21. In September 2023, the Student was administered the "MAP" math assessment, on which s/he scored a 202 for geometry. Testimony of Witness B. On September 20, 2023, the Student scored in the "below basic" range on Reading Inventory testing. P-57-1.

22. During the 2023-2024 school year, the Student's attendance has been poor. In or about October 2023, Petitioner requested an IEE of the Student. Witness E responded that she would not agree to provide the Student with an IEE, but that DCPS would complete a comprehensive psychological evaluation and an FBA. Testimony of Witness E.

23. In or about October/November 2023, a shooting occurred near School A while the Student was performing a task in the neighborhood. The Student heard the gunshots and was frightened by them. Testimony of Witness E.

24. The Student's IEP progress report for the first reporting period of the 2023-2024 school year noted that the Student was progressing in reading, written expression, and math; that the social, emotional and behavioral development goal was not

introduced; and that two transition goals were “just introduced,” with one transition goal mastered. P-44.

25. An IEP meeting was held for the Student on November 28, 2023. The Student’s advocate suggested goals for the November 2023 IEP. The team also discussed assessments, and Petitioner signed a consent to evaluate. There were no specific requests for changes to the IEP goals at this meeting, or requests for any sort of trauma or school-avoidance assessment. Testimony of Witness C; Testimony of Witness E; P-21.

26. The November 28, 2023, IEP indicated that the Student’s September 2023 MAP math assessment represented a reduction in score. The IEP indicated that the Student is often absent, lacks confidence in completing work independently, and sometime says that s/he cannot complete work, even without attempting the work. The IEP indicated that the Student needs constant teacher support in clarifying directions, modeling, and one-on-one assistance. The IEP indicated that there is insufficient data on the Student because of his/her chronic problem with absences, and that when in the academic setting, the Student typically keeps to him/herself and engages minimally with peers. The IEP indicated that the Student refused behavioral support services, which were changed to consultation at his/her request, and that the Student has difficulty with taking initiative to complete tasks, remaining focused, and advocating in difficult or challenging situations. The IEP indicated that the behavior support services mandate would be reinstated at sixty minutes per month, due to, among other things, the Student’s diagnosis, and poor attendance “related to anxiety and depression.” The IEP contained “Area of Concern” sections with corresponding goals in reading, mathematics, writing, and social, emotional and behavioral development. The IEP again recommended that the

Student receive twenty hours of specialized instruction per week outside general education. The IEP indicated that the Student would benefit from graphic organizers, sentence starters, chunking material into smaller parts, and related interventions. P-19.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed as the following: “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.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on Issue #2 and Issue #3, the burden of persuasion is on Petitioner. On Issue #1, the burden of persuasion is on Respondent, provided that Petitioner presented a prima facie case.

### **1. Did Respondent provide the Student with inappropriate IEPs for the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student’s IEPs lacked appropriate content, namely: 1) goals; 2) present levels of performance; 3) specialized instruction based on peer-reviewed research; 4) behavior support services; 5) other related services; 6) a BIP; 7) a transition plan; 8) accommodations; 9) extended school year services; and 10) recommendations to address issues with course credits.

In Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), the Court

held that an IEP must be reasonably calculated “in light of the child’s circumstances.” Id. at 999-1000. The Court also held that parents can fairly expect school authorities to offer a “cogent and responsive explanation” for their decisions, and that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities, to whose expertise and professional judgment deference should be paid.” Id. at 1001-1002.

The Andrew F. decision reaffirmed the Court’s holding in Board of Education v. Rowley, 458 U.S. 176 (1982), in particular the statement that if a child is fully integrated into a regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard. However, a footnote to the opinion warns that this “guidance should not be interpreted as an inflexible rule” and is not a holding that every child advancing from one grade to the next “is automatically receiving an appropriate education.” Id. at 1001 n.2 (citation omitted).

As an initial matter, Petitioner only submitted two IEPs into evidence that were created within the two-year statute of limitations:<sup>2</sup> the January, 2022 IEP and the November, 2023 IEP. Petitioner did not disclose the interim IEP in timely fashion. Petitioner moved for such IEP to be entered into evidence, but as indicated in the Prehearing Conference Order, any party to a hearing conducted pursuant to 34 C.F.R. Sect. 300.507 through 34 C.F.R. Sect. 300.513 or 34 C.F.R. Sect. 300.530 through 34

---

<sup>2</sup> Claims relating to IEP creation should be brought within two years of the date of the IEP meeting. 34 C.F.R. Sect. 300.507 (a)(2). Accordingly, all claims relating to IEPs that were created prior to November 14, 2021 must be dismissed.

C.F.R. Sect. 300.534, or an appeal conducted pursuant to 34 Sect. C.F.R. Sect. 300.514, has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. 34 Sect. C.F.R. Sect.300.512 (a)(3). The purpose of the evidence rule is to allow all parties the opportunity to adequately respond to the impact of the evidence presented and to eliminate the element of surprise as a strategy a party may employ to influence the outcome of the hearing decision. Letter to Steinke, 18 IDELR 739 (OSEP 1992); Office of Dispute Resolution Standard Operating Procedures, Sect. 504(A). Since Respondent objected to Petitioner’s motion based on this rule, and since the rule allows hearing officers no discretion on this issue, I was compelled, on the record, to uphold the objection. I will therefore only consider FAPE denial claims with respect to the IEPs dated January 25, 2022 and November 28, 2023.

During closing argument, Petitioner argued in favor of a finding that both the January 25, 2022 IEP and the November 28, 2023 IEP denied the Student a FAPE. Petitioner contended that the IEPs were not updated in the “Area of Concern” sections, that the Student’s IEPs provided insufficient behavioral interventions, that the Student should have received an FBA and BIP in support of the IEPs, that the IEPs did not address the Student’s adaptive needs and did not contain adaptive goals, and that the IEPs kept the same transition services and plans from year to year. Petitioner also contended that the Student should have been deemed to be eligible for Extended School Year services in the IEPs.

All these issues relate to the primary issue in this case: the Student’s lack of attendance. Since 2018, the Student has had issues attending school at School A. Since

the 2021-2022 school year, the Student has missed well more than half of the school days during each school year. Why? There is certainly enough evidence in the record connecting the Student's attendance issues to the Student's disability. The January 25, 2022 IEP says as much. It indicated that, at recent MDT meeting, the team discussed a plan to get the Student to attend more and be able to complete assignments. As Petitioner and Witness B stated, the preponderance of the evidence indicates that the Student does not want to go to school because the work is too difficult for him/her in the current program, and because the Student's fragile emotional state is incompatible with the current program and setting, where the Student has been reluctant to attend since 2018.

DCPS contended that the Student made progress at School A, but the available test scores in the record does not adequately support this contention. The December, 2020 vocational assessment said the Student's reading was then in the fifth-grade range. There is nothing in the record to suggest that the Student has progressed beyond the fifth-grade range since then. Insofar as math is concerned, the most recent math testing, from September, 2023, indicated regression in some areas, which is not surprising since the Student did not get any math at all during (at least) a portion of the 2021-2022 and 2022-2023 school years (given School A's understandable but unsuccessful attempt to modify the Student's schedule).

DCPS argued that it should not have to send people into people's homes to physically make students go to school. However, there is nothing in the law to say that a school district is prevented from employing creative measures to deal with the often-vexing problem of attendance in urban public high schools. The federal requirement, as established by caselaw throughout the country, can be characterized as a requirement that

the school district at least come up with a feasible plan that might solve the Student's attendance problems. If no such plan is possible, then the school district would appear to have to consider whether the recommended school or the program is correct for the Student. Cf. Middleton v. District of Columbia, 312 F. Supp. 3d 113, 146 (D.D.C. 2018); Garris v. District of Columbia, 210 F. Supp. 3d 187, 191–92 (D.D.C. 2016); Presely v. Friendship Pub. Charter Sch., No. 12-0131, 2013 WL 589181, \*8–9 (D.D.C. Feb. 7, 2013); see also M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 256 (S.D.N.Y. 2014) (“(t)he government must find ways to open the school house doors, by helping children who suffer from emotional problems to attend school). To this Hearing Officer, a new placement is really something that the IEP teams should have more seriously considered here. The testimony of Witness A and Witness B made it clear that the Student's anxiety and depression, as exacerbated by his/her history of extreme personal trauma and his/her inability to access the material, made the Student a candidate for a new intervention such as a therapeutic placement with more staff and more intense, nurturing support.

DCPS argued that there is evidence and testimony that the Student is fine while in school at School A, but the neuropsychological report, dated October 19, 2020, indicated that on the BASC-III, the Student's score on “externalizing problems,” “internalizing problems,” and Behavior Symptoms Index were all extremely high. The Student's November 28, 2023 IEP indicated that the Student has difficulty with taking initiative in completing tasks, remaining focused and motivated, and advocating in difficult or challenging situations, and that these behavioral challenges impeded his/her ability to progress in his/her academic setting, which “perpetuates feelings of sadness, frustration,



anxiety and hopelessness” for the Student. Accordingly, the Student failed virtually every class during both the 2021-2022 and 2022-2023 school years. I agree that both the January 25, 2022 and the November 28, 2023 IEPs denied the Student a FAPE on these bases.

Petitioner also alleged that the “present levels” sections and the goals sections in the two IEPs were defective. I am persuaded only to the extent that the goals did not adequately address the Student’s main issue, which was the Student’s inability to get to school. Other claims relating to the goals are without merit. There is testimony from Witness B that the Student’s January 25, 2022 IEP contained too many IEP goals that were repeated from past IEPs. See *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016) (“the wholesale repetition” of goals and objectives “indicates an ongoing failure to respond to [a student’s] difficulties”). But a comparison of the January 25, 2022 IEP with the September 14, 2020 indicated that the goals and the present levels of performance sections of these IEPs differ. Petitioner also appears to claim that the goals in the November 28, 2023 IEP were repeated from previous IEPs, but I cannot adequately consider whether the goals have been repeated because the IEP that was issued just prior to the November 28, 2023 IEP was not admitted into evidence.

Moreover, I was not persuaded by Petitioner’s contention that the IEP did not address the Student’s adaptive needs and did not contain adaptive goals. The record reveals that the Student has some adaptive strengths, as discussed by Witness E. Witness A and Witness B were unable to convincingly explain why the Student needed adaptive skills training as part of his/her school day except to point to issues that are typically managed by the classroom teacher.

Petitioner also contended that the Student's IEP's transition services and plans remained the same from year to year, but the transition section of the January 25, 2022 IEP is entirely from the corresponding section in the September 14, 2020 IEP, including with respect to transition services and including goals. For instance, the January 25, 2022 IEP includes a new section relating to a vocational assessment, and a report on a Casey life skills assessment from a few days earlier on January 19, 2022. The same contentions were made with respect to the November 28, 2023 IEP, but this section of the November 28, 2023 IEP cannot be compared to the prior IEP because that IEP is not in evidence.

Petitioner also argued that the Student should have received Extended School Year ("ESY") services. Petitioner argued that the Student suffered regression and did not make meaningful progress over breaks. Respondent contended that there was no showing in the record that the Student regressed during breaks, but after the summer of 2023, in September 2023, the Student administered the MAP Math Assessment in which s/he scored a 202 for Geometry, a reduction from his/her score from before the summer. Especially in the context of the Student's obvious need for intensive services throughout the school year, I find the Student should have qualified for ESY services.

Finally, with respect to the claims that the IEPs did not contain sufficient "other related services," accommodations, and recommendations to address issues with course credits, these claims were not supported in the record, were not emphasized during closing argument, and are deemed to be without merit.

In sum, Respondent denied the Student a FAPE because both IEPs provided the Student with an inappropriate program with insufficient specialized instruction, ESY services, insufficient behavioral support services, and insufficient measures to address the

Student's behavioral and attendance issues, including a failure to write or implement a Functional Behavior Assessment and/or a corresponding Behavior Intervention Plan.

**2. Did Respondent fail to implement the Student's IEPs during the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that Respondent failed to provide specially designed instruction, related services, supplementary aides, services, modifications, and accommodations during the 2021-22, 2022-23, and 2023-24 school years, and that Respondent failed to provide certified teachers and related service personnel to implement the Student's IEPs during the 2021-22, 2022-23, and 2023-24 years.

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. Sect. 300.323(c)(2). "Failure to implement" claims may be brought if the Local Educational Agency ("LEA") cannot "materially" implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40-41 (D.D.C. 2013). The parent "must show more than a de minimis failure to implement elements of the IEP, and, instead, must demonstrate that the school failed to implement substantial or significant provisions of the IEP." Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP).

Petitioner contended that the Student was not provided with mathematics regularly during the school years in question. During the January 25, 2022 IEP meeting, the IEP team agreed that the Student should skip the first period, which was math, to

accommodate the Student's attendance and lateness issues. There is no question that the elimination of an entire period of math every single day for a significant period of time should constitute a material deprivation that is a denial of FAPE, and DCPS does not argue otherwise. DCPS suggested that it was appropriate to shorten the Student's schedule under the circumstances, but courts find it is improper to shorten a disabled Student's school day in this manner. In A.J.T. v. Osseo Area Sch., Indep. Sch. Dist., No. CV 21-1760 (MJD/DTS), 2023 WL 2316893, at \*1 (D. Minn. Feb. 1, 2023), the student experienced severe seizures throughout the morning, so the school district proposed the student should attend school from noon until 3:00 p.m. The parents rejected the IEP, contending that the district should educate the student from noon until 6:30 p.m. An ALJ agreed, finding a denial of FAPE. He ordered remedial instruction and required the district to provide instruction at home from 4:30 to 6 p.m. The school district appealed. The District Court agreed with the parent, citing Andrew F. and finding that the student would have made de minimis progress during a shortened school day. Here, as in Osseo, the solution to the Student's attendance problem cannot end up meaning that DCPS can give this Student less instruction than other students.

Petitioner's other contentions relating to DCPS's alleged failure to implement the Student's IEPs are unavailing. Petitioner alleged that the Student only attends school twice a week during the 2023-2024 school year, but all the evidence in the record indicates that the school district offered the Student specialized instruction virtually every day during the 2023-2024 school year. Similarly, the record indicates that the school district offered the Student behavioral support services virtually every day during the 2021-2022 and 2022-2023 school year. Petitioner does not submit any authority to

establish liability against a school district on “failure to implement” grounds where the Student refuses to attend. Petitioner also contended that there was no evidence that the Student was provided with transportation prior to December, 2023, but the burden of persuasion is on Petitioner on this issue. Finally, Petitioner’s contentions regarding the failure to implement the requirement to provide supplementary aides, services, modifications, and accommodations, certified teacher, and certified related services personnel during the 2021-22, 2022-23, and 2023-24 school years were without adequate support in the record.

In sum, I find that Respondent denied the Student a FAPE by failing to provide the Student with math instruction during the term of the January 25, 2022 IEP.

**3. Did Respondent fail to evaluate the Student during the 2021-2022, 2022-2023, and 2023-2024 school years? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that DCPS failed to evaluate the Student in the areas of school avoidance, school refusal, trauma, anxiety, and related mental health issues; that DCPS did not conduct psychological, educational, adaptive, behavioral, speech-language, or occupational therapy evaluations of the Student; and that DCPS did not perform an FBA of the Student.

The IDEA requires school districts to ensure that students are “assessed in all areas of suspected disability” and to base a student’s IEP on the most recent evaluation. 20 U.S.C. Sects. 1414(b)(3)(B), (c)(1); 34 C.F.R. Sect. 300.304(c)(4). The child’s reevaluation must consist of two steps. The LEA is required to “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the

parent.” Sect. 300.304(b). All methods and materials used must be “valid and reliable” and “administered by trained and knowledgeable personnel.”

Sect. 300.304(c)(1). These methods and materials must examine a student’s potential disabilities. Davis v. District of Columbia, 244 F. Supp. 3d 27, 49 (D.D.C. 2017).

Before an IEP is set aside on this basis, however, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of education benefits. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006).

Witness B testified that the Student needed updated evaluations in the areas of education, anxiety, and trauma to determine his/her current needs and to develop appropriate IEPs for the Student. But, as DCPS pointed out, neither of the parent’s experts clearly explained how or why an additional evaluation would have helped the Student receive a FAPE. Petitioner’s contention that the Student needed more testing, including trauma testing, was contradicted by her first Witness, Witness A, who appeared to indicate that, after the neuropsychological evaluation, the Student did not need further testing. She suggested that the Student is suffering from trauma, depression and anxiety, and that we already know this, which was the position of the DCPS witnesses, especially Witness E, who came across credibly in this proceeding.

Petitioner also argued that the Student needed adaptive testing, but the Student was given adaptive testing during the October, 2020 neuropsychological evaluation, wherein the examiner administered adaptive scales through the BASC. To the extent that Petitioner is contending that the Student’s issues are a function of insufficient

psychological testing, there is reasonably current cognitive testing in the record, there is reasonably current achievement testing in the record, and there is no real dispute about the Student's levels. It is noted that the parent did not clearly request reevaluation of the Student until November of 2023, at which point DCPS agreed to evaluate and because his/her triannual evaluation was due. DCPS then did a comprehensive psychological evaluation, occupational therapy evaluation, and speech-language evaluation at the parent's request.

Finally, while there is no dispute that the Student require an FBA, an FBA is not necessarily considered part of a reevaluation in this jurisdiction, and I have already found that DCPS has denied the Student a FAPE by failing to provide the Student with appropriate behavioral interventions, including an FBA and a BIP. E.L. Haynes Public Charter School v. Frost, No. 14-1472 (RMC) 66 IDELR 287, 115 LRP 58575 (D.D.C. 2015).

This claim must be dismissed.

### **RELIEF**

During closing argument, Petitioner emphasized the claim for compensatory education. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be "appropriate."

Hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “qualitative, fact-intensive” inquiry used to craft an award “tailored to the unique needs of the disabled student”). A petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Petitioners presented two experts with two different approaches to compensatory education relief. Witness A did not clearly connect her proposed reward to the FAPE deprivation at issue, and instead seemed to produce a plan to help the Student irrespective of the nature of the FAPE denial. Witness A’s plan also overstates the time period of FAPE deprivation, starting from 2019, when the FAPE denial period in fact ranges from January 25, 2022 to January 24, 2023 and then from November, 28, 2023 to present. Witness A’s plan, which requests well over 4000 hours of services, also includes such services as therapy for Attention Deficit Hyperactivity Disorder, Attention Deficit Hyperactivity Disorder coaching, Vocational and Habitation Services, Nutrition Counseling, and Health and Fitness coaching, none of which are the basis of the FAPE denial findings in this case.

Witness B’s compensatory education plan is fairer. She argued that 952 hours of services that were recommended for each year that the Student was denied a FAPE,



which is effectively an hour-for-hour calculation. Since I have found that the Student was denied a FAPE for about fourteen months, this means that, pursuant to Witness B's plan, the Student would appropriately receive approximately 1100 hours of compensatory education for the period of FAPE deprivation.

However, there are reasons to reduce this award. First, as DCPS suggests, Witness B's calculation is based on a 1:1 day for day calculation that is discouraged by Reid. Witness B's plan does not take into account the fact that individual tutoring instruction is inherently more intense than instruction in a classroom with a group of other children with often competing interests, and that it is not necessarily appropriate to equate the two when assessing tutoring hours. Additionally, Witness B's plan does not take into account that it is only part of Petitioner's request for compensatory education. Petitioner is also seeking tuition for placement at a post-secondary institution as compensatory education as part of her award. As a result, I will reduce the request for compensatory tutoring to 500 hours of compensatory tutoring services, to be delivered by a professional provider who is a certified special education teacher, at a reasonable and customary rate in the community, and one hundred hours of compensatory math services to compensate for the lack of math instruction during the 2021-2022 and 2022-2023 school years.

I will also order DCPS to pay for an inclusive postsecondary education program ("IPSE"), as recommended by Witness B. As explained by Witness B, an IPSE is a college-based program for individuals with intellectual disabilities. Witness B explained that for the Student, an IPSE program can make a difference in employability and independent living opportunities into adulthood. Respondent argued that Witness B's

recommendation for an IPSE was inconsistent with Reid, but in B.D. v. District of Columbia, 817 F.3d 792, 798 (D.C. Cir. 2016), the United States Court of Appeals for the District of Columbia Circuit held the compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child's needs.” 817 F.3d at 798. The language in B.D. suggesting a focus on equity and flexibility provides a basis for the finding that Witness B’s proposal for the IPSE program is reasonable, thoughtful, and worthy of being so ordered.

## VII. Order

As a result of the foregoing:

1. Respondent shall pay for 600 hours of academic tutoring for the Student, including 100 hours of math instruction, to be provided by a certified special education teacher at a reasonable and customary rate in the community, together with transportation to and from the tutoring;
2. Respondent will pay for the Student’s attendance at an inclusive postsecondary education program (“IPSE”);
3. All other requests for relief are hereby denied.

Dated: February 26, 2024

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
Attorney C, Esq.

### **VIII. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety days from the date of the Hearing Officer Determination in accordance with 20 USC Sect. 1415(i).

Date: February 26, 2024

Michael Lazan  
Impartial Hearing Officer