

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

OSSE  
Office of Dispute Resolution  
January 15, 2020

**Confidential**

<p>Parent on Behalf of Student, Petitioner,<sup>1</sup></p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”),</p> <p>Respondent.</p> <p>Case # 2019-0273</p> <p>Date Issued: January 15, 2020</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: December 19, 2019</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
---	--

<sup>1</sup> 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 E30. The Due Process Hearing was convened on December 19, 2019, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20002, in Hearing Room 112.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student or “Student” is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> Student resides with Student’s parent (“Petitioner”) in the District of Columbia and is a child with a disability pursuant to IDEA, with a disability classification of Multiple Disabilities (“MD”) including Intellectual Disability (“ID”) and Other Health Impairment (“OHI”). District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

Petitioner filed the due process complaint on November 1, 2019, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to appropriately evaluate Student, failing to provide Student an appropriate individualized educational program (“IEP”), and failing to implement Student’s IEP and provide Student an educational placement since March 2018, when Student left the private school placement (“School A”) that DCPS was funding.

### **Relief Sought:**

Petitioner seeks as relief a finding of denial of a FAPE, and that DCPS be ordered to complete all necessary evaluations, convene a meeting and update Student’s IEP, fund Student at an appropriate placement and provide compensatory education.

### **LEA Response to the Complaint:**

DCPS filed a response to the complaint on November 12, 2019. DCPS denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserted, inter alia, the following:

DCPS placed Student at School A. However, while at School A, Student was hospitalized. Thereafter, the parent withdrew Student from DCPS. Student returned to DCPS sometime in January 2019. In response, the DCPS made referrals to several non-public schools. Unfortunately, all of the schools declined to accept Student.

During this process, DCPS made a decision to update Student’s evaluations. DCPS agreed and is the process of completing following evaluations: (1) Psychological Evaluation; (2) Occupational

---

<sup>2</sup> The student’s current age and grade are indicated in Appendix B.

Therapy; (3) Social History; and (4) Speech and Language. Thereafter, DCPS intends to review the evaluations and update Student's IEP. In the interim, DCPS provided Petitioner with an authorization letter for tutoring.

**Resolution Meeting and Pre-Hearing Conference:**

The parties participated in a resolution meeting on November 25, 2019, and did not resolve the complaint. The parties did not mutually agree to shorten the thirty (30) day resolution period. The 45-day period began on December 1, 2019, and ends [and the Hearing Officer's Determination ("HOD") is due] on January 15, 2020.

A pre-hearing conference ("PHC") in this matter was held on November 25, 2019, and the undersigned hearing officer ("Hearing Officer") issued a pre-hearing order ("PHO") on December 3, 2019, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>3</sup>

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to timely and comprehensively re-evaluate Student in all areas of suspected disability.
2. Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP because the IEP, dated February 21, 2019, was not based on current evaluations.
3. Whether DCPS denied Student a FAPE by failing to provide an appropriate placement since March 2018.
4. Whether DCPS denied Student a FAPE by failing to implement Student's IEP since March 2018.

**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 13 and DCPS Exhibits 1 through 15) that were admitted into the record and are listed in Appendix 2. The witnesses testifying on behalf of each party are listed in Appendix B.<sup>4</sup>

---

<sup>3</sup> The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

<sup>4</sup> Petitioner presented one witness: Student's Parent ("Petitioner"). DCPS presented two witnesses: (1) a Former DCPS Program Specialist for the Non-Public Residential Students, and a Current DCPS Program Specialist.

## **SUMMARY OF DECISION:**

Petitioner held the burden of persuasion on issues # 1, and # 4. Petitioner was to establish a prima facie case on issue # 2, and # 3, before the burden of persuasion fell to Respondent. Based upon the evidence adduced, the Hearing Officer concluded that Petitioner sustained the burden of persuasion on issue # 4, but did not sustain the burden persuasion on issue # 1. DCPS sustained the burden of persuasion on issue # 2, but did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. The Hearing Officer ordered DCPS to convene a meeting to update Student's IEP, provide Student an appropriate placement for the remainder of school year ("SY") 2019-2020, provide Student one year of additional eligibility for special education services beyond Student's current eligibility and, at Petitioner's choice, either provide Student an additional 200 hours of tutoring, or authorize an independent educational evaluation to determine compensatory education.

## **FINDINGS OF FACT:<sup>5</sup>**

1. Student resides with Petitioner in the District of Columbia and is a child with a disability pursuant to IDEA, with an MD disability classification including ID and OHI. DCPS is Student's LEA. (Petitioner's testimony, Respondent's Exhibit 4-1)
2. On December 12, 2016, DCPS completed a comprehensive psychological reevaluation of Student. Student is diagnosed with a medical condition ("Medical Condition"), the symptoms of which include behavior difficulties. Student also has low cognitive, academic and adaptive functioning. Student's triennial evaluation was due in December 2019 and Student's eligibility was due to be reconsidered by December 12, 2019. (Petitioner's Exhibits 1, 2)
3. During SY 2016-2017 Student attended School A, a private special education school, with DCPS funding. On September 25, 2017, while Student was attending School A, DCPS conducted an annual review and updated Student's IEP. While at School A, Student was making progress on IEP goals and, in Petitioner's opinion, School A was doing a great job of servicing Student. During the time Student attended School A, a DCPS representative participated in Student's IEP meetings and monitored Student. (Petitioner's testimony, Petitioner's Exhibit 2)
4. From August 2016 through November 2017, Student's insurance provider ("Provider") provided Student a personal care aide. The personal care aide negatively impacted Student, resulting in Student displaying inappropriate behaviors, first at home, and then at School. By March 2018, Student's behaviors had become so non-compliant and disruptive that Student was unable to attend school. During a March 7, 2018, meeting with Petitioner, School A and Provider, it was determined that Provider would pay for Student to be

---

<sup>5</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

relocated to an out of state residential hospital (“Hospital A”). Petitioner had hoped that Student’s stay at Hospital A would be short-term and that Student would eventually be placed in a residential setting that was a part of School A. However, Student remained at Hospital A from March 27, 2018, until mid-October 2018, when Student was transferred to another hospital in third state (“Hospital B”), where Student remained from October 18, 2018, until discharged on January 11, 2019. (Petitioner’s testimony)

5. During Student’s time at Hospital A, Student was to be provided two hours per day of educational instruction. However, Petitioner is uncertain whether the instruction was provided consistently. Petitioner’s visited Student 28 times while Student was at Hospital A. Petitioner communicated with the DCPS representative who monitored Student at School A on two occasions during Student’s time at Hospital A. The DCPS representative wanted Petitioner to sign a form withdrawing Student from DCPS, since Student was no longer attending School A. However, Petitioner did not sign the withdrawal form because she expected Student would return to School A once discharged from the hospital. (Petitioner’s testimony)
6. During Student’s time at Hospital B, Student was supposed to receive visiting instruction from a local educational program, but those service were never provided. In December 2018, Hospital B notified Petitioner that Student had met the goals that had been identified for Student at Hospital B and that Student was ready to return to the District of Columbia and needed a school placement. Petitioner communicated with two DCPS representatives, including the DCPS School A monitor about a school placement. (Petitioner’s testimony)
7. On December 20, 2018, Hospital B provided DCPS a document entitled “School Behavior Support Recommendations.” (Petitioner’s testimony, Petitioner’s Exhibit 4)
8. After Student returned home on January 11, 2019, Petitioner engaged in weekly telephone conferences with Provider and the DCPS representative who was actively involved in locating a school placement for Student. These were weekly updates on the services Student was being provided by Provider and progress in identifying and securing a school placement for Student. DCPS referred Student to several private schools, but none accepted Student. Petitioner toured some of the schools that were considered, but some she toured were inappropriate for Student. Student has remained at home without a school placement since January 11, 2019. (Petitioner’s testimony)
9. DCPS notified Petitioner that Student was wait listed at some schools that were being considered. However, some of the schools communicated to Petitioner that Student’s acceptance was contingent upon Student’s IEP being updated. As a result, the DCPS representative, after consulting with Petitioner, amended the dates on Student’s IEP on Student’s IEP, so that schools could consider Student for acceptance. The DCPS representative informed the schools to whom she sent Student’s information that Student had not been in school and that the IEP would have to be updated once Student began attending. (Petitioner’s testimony, Witness 1’s testimony, Petitioner’s Exhibit 13-4)

10. Student's current individualized educational program ("IEP") is dated February 21, 2019. The IEP states that Student requires a separate special education school placement and a dedicated aide the entire school day. The IEP also prescribes occupational therapy, physical therapy and speech/language therapy. (Respondent's Exhibit 4)
11. Despite DCPS sending Student's educational packets to multiple schools and its efforts to locate a school for Student attend, no school accepted Student. (Witness 1's testimony)
12. On June 25, 2019, an independent speech and language evaluation was conducted. (Petitioner's Exhibit 3)
13. During summer 2019, Student participated in summer youth employment program and engaged in individual and family therapy in which Student made good progress and had no behavioral issues. (Petitioner's Exhibits 7, 8)
14. In August 2019 the DCPS representative who had been working to secure placement for Student referred Student's case to the DCPS Centralized IEP team for a full battery of assessments and for Student's IEP to be updated. She also provided Petitioner authorization for 200 hours of independent tutoring. That DCPS representative was thereafter transferred to another DCPS assignment and Student's placement was then handled by the DCPS Centralized IEP team. That team began the process of evaluating Student, updating Student's IEP and securing a placement. Student's special education eligibility was due to expire in December 2019. (Witness 1's testimony, Witness's 2's testimony, Petitioner's Exhibit 13-10)
15. DCPS developed an Analysis of Existing Data ("AED") on September 27, 2019. (Petitioner's Exhibit 9)
16. On October 17, 2019, Petitioner provided DCPS consent to conduct evaluations of Student. (Petitioner's Exhibit 10)
17. In November 2019, DCPS completed a comprehensive psychological reevaluation of Student, a comprehensive occupational therapy re-evaluation, a review of the independent speech language evaluation, a social work report and a comprehensive physical therapy reevaluation. (Respondent's Exhibits 7, 8, 9, 10, 11)
18. DCPS made attempts to schedule an eligibility and IEP meeting for Student in December 2019, however, the dates were not confirmed by Petitioner and her representative. (Witness 2's testimony)
19. On December 10, 2019, DCPS provided Petitioner authorization for 200 hours of additional hours of independent tutoring for a total of 400 hours. (Petitioner's testimony, Respondent's Exhibit 15)

## 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 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. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on issues # 1, and # 4. Petitioner establish a prima facie case on issue # 2, and # 3, before the burden of persuasion fell to Respondent. <sup>6</sup> The normal standard is 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).

---

<sup>6</sup> 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.

**ISSUE 1:** Whether DCPS denied Student a FAPE by failing to timely and comprehensively re-evaluate Student in all areas of suspected disability.

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

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including: academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a re-evaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
  - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
  - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
  - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303(a) makes it clear that, "A local education agency ("LEA") *shall ensure* that a re-evaluation of each child with a disability is conducted...if the child's parents or teacher requests a re-evaluation." and that the reevaluation must be conducted at least once every three years. (*Emphasis added*)

Pursuant to 34 C.F.R. § 300.324 Development, review, and revision of IEP. (a) Development of IEP—(1) General. In developing each child's IEP, the IEP Team must consider— (i) The strengths of the child; (ii) The concerns of the parents for enhancing the education of their child; (iii) The results of the initial or most recent evaluation of the child; and (iv) The academic, developmental,

and functional needs of the child. (2) Consideration of special factors. The IEP Team must— (i) In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

Students are also entitled to a re-evaluation of their disability upon a parental request, provided that no re-evaluation occurs "more frequently than once a year," though a requested re-evaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, [267 F. Supp. 2d 83](#), 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303]."). According to the record, R.H.'s last speech-language evaluation occurred over twelve years ago, on March 9, 2004. AR 60. Therefore, DCPS had an obligation to administer a speech-language reevaluation at Ms. Hill's request in August 2013. See 34 C.F.R. § 300.303(a)(2).

The evidence demonstrates that Student’s last comprehensive psychological was conducted in December 2016. Student was therefore due for triennial evaluation by December 2019. The evidence demonstrates that DCPS conducted timely reevaluations of Student in November 2019, and made attempts to convene Student’s eligibility and IEP meeting prior to Student’s eligibility expiring in December 2019.

There was testimony by Petitioner that at least one of the schools that was considering Student for admission indicated that it needed updated evaluations of Student. However, there was no other evidence presented that any specific evaluations were requested by Petitioner that DCPS failed to conduct, and once Petitioner provided DCPS consent to evaluate Student, the evaluations were conducted promptly.

Based upon the evidence adduced, the Hearing Officer concludes that there was no evidence to support a conclusion that Student was denied a FAPE as a result of DCPS failing to comprehensively or timely evaluate Student in all areas of suspected disability.

**ISSUE 2:** Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP because the IEP, dated February 21, 2019, was not based on current evaluations.

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence that DCPS did not deny Student a FAPE in this regard.

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational

benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

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

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

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

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child

provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

Petitioner alleged that Student's evaluations were not current and Student's IEP was defective because it is not based on current evaluations. As noted in the issue above, there was no evidence that Student's evaluations were outdated when Student's February 21, 2019, IEP was created. Consequently, the Hearing Officer concludes that there was insufficient evidence that Student's February 21, 2019, IEP was inappropriate because it was not based on current evaluations as the issue was defined in the PHO and as reviewed at the start of the hearing.

Although Petitioner made note of, and the evidence reflects, that Student's IEP was not timely updated by November 17, 2018, and DCPS simply changed the date on the IEP, the Hearing Officer notes that these were not alleged flaws in the IEP that were specifically defined issue to be adjudicated.

In addition, there was insufficient evidence to support a finding that DCPS, by not timely updating Student's IEP while Student was out of state and hospitalized, and DCPS changing the dates in the IEP to assist in securing a placement for Student, resulted in a denial of a FAPE to Student. Consequently, the Hearing Officer concludes that Respondent sustained the burden or persuasion by a preponderance of the evidence that Student's February 21, 2019, IEP was reasonably calculated to enable Student to make progress appropriate, in light of Student's circumstances.

**ISSUE 3:** Whether DCPS denied Student a FAPE by failing to provide an appropriate placement since March 2018.

**Conclusion:** Respondent did not sustain the burden of persuasion by a preponderance of the evidence that it provided Student an appropriate placement from January 11, 2019.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.<sup>7</sup>

---

<sup>7</sup> Pursuant to 34 C.F.R. § 300.115 - Continuum of alternative placements (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must-- (1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Pursuant to DC Code § 38-2561.02. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

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 legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

Petitioner asserts that DCPS failed to provide Student an educational placement since March 2018. However, the evidence demonstrates that Student was hospitalized from March 2018 to January 11, 2019, when Student was discharged from hospitalization. Albeit Student should still have been provided educational services while hospitalized, DCPS was not required to provide Student a placement until DCPS was notified in December 2018 that Student would be discharged.

Once Student was discharged and returned to the District of Columbia on January 11, 2019, DCPS' obligation to provide Student an educational placement resumed. The evidence demonstrates that despite continual efforts by DCPS to secure a placement for Student, no school has accepted Student in the year since Student returned. This has resulted in Student missing educational services and resulted in a denial of a FAPE to Student.

Consequently, the Hearing Officer concludes that DCPS did not sustain the burden of persuasion by a preponderance of the evidence with regard to providing Student an educational placement since January 11, 2019. As a result, Student is due compensation for that denial.

**ISSUE 4:** Whether DCPS denied Student a FAPE by failing to implement Student's IEP since March 2018.

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to implement Student's IEP since March 2018.

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

provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

The evidence demonstrates that once Student was hospitalized in March 2018 until January 2019, DCPS maintained minimal contact with Petitioner and no longer monitored Student to ensure that any educational services were being provided. The Hearing Officer takes judicial notice of the fact that typically when a student is hospitalized the full level of IEP services are generally not able to be provided to the student. In this instance, however, it appears that DCPS attempted to abdicate its responsibility to ensure some level of services to Student was provided, and even attempted to have Petitioner withdraw Student because Student was hospitalized out of state.

Student remained a resident of the District of Columbia while hospitalized and DCPS was thus responsible to ensure that Student received some level services. Petitioner testified that while Student was at Hospital A some instruction was provided. However, when Student was at Hospital B, no instruction was provided. There was indication that Student was provided some of the same type services that are listed as related services in Student's IEP. However, the record is unclear as to how much of those services were provided.

The evidence clearly demonstrates, as reflected in the placement issue discussed above, that after Student returned to the District of Columbia on January 11, 2019, DCPS was responsible for implementing Student's IEP and since that date, because Student has been without a placement, Student's IEP has not been implemented. This failure to implement is material and resulted in a denial of a FAPE for which Student should be compensated.

### **Remedy:**

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

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

In the current complaint Petitioner seeks as relief that the Hearing Officer direct DCPS to update Student's IEP, provide an appropriate placement and award compensatory education. During the hearing Petitioner's counsel requested that in lieu of the full number of hours of tutoring Petitioner requested, that the Hearing Officer extend Student's eligibility by two years. However, the

evidence demonstrates that Student was without an educational placement DCPS was responsible to provide for one year from January 2019, to date. Consequently, the Hearing Officer awards in the order below that Student's special education eligibility be extended for an additional year beyond the current statutory time that Student is entitled to special education services pursuant to IDEA.

The evidence also demonstrates that DCPS has already awarded Student 400 hours of tutoring as compensation for the services missed. Although Petitioner submitted a compensatory education proposal, there was little justification in the proposal for the number of hours requested. However, based upon Petitioner's testimony about her desire for Student to be provided additional tutoring, the Hearing Officer in the order below directs that Petitioner may either be provided an additional 200 hours of independent tutoring or chose an independent educational evaluation to determine appropriate compensatory education that Student might be due beyond the 400 hours and the additional year of eligibility that the Hearing Officer has awarded.

**ORDER:** <sup>8</sup>

1. DCPS shall, within fifteen (15) business days of the issuance of this order, if it has not already done so, convene an eligibility/IEP meeting to review current evaluations of Student, update Student's IEP, determine an appropriate placement and provide Student an appropriate school that can implement Student's IEP for the remainder of SY 2019-2020.
2. Student's special education eligibility is hereby extended for an additional year beyond the current statutory time that Student entitled to special education services pursuant to IDEA.
3. DCPS shall, within ten (10) business days of the issuance of this order, provide Petitioner, at Petitioner's choice, either (1) authorization for an independent educational evaluation, at the OSSE prescribed rate, to determine appropriate compensatory education for the denials of FAPE determined in this HOD beyond the 400 hours of tutoring DCPS has already provided and the additional year of eligibility that the Hearing Officer has awarded, or (2) provide Petitioner written authorization for an additional 200 hours of independent tutoring at the OSSE prescribed rate.
4. If Petitioner chooses the option above of an educational evaluation to determine appropriate compensatory education, Petitioner is hereby authorized to seek compensatory education for the denial of FAPE determined in this HOD, with the support of the evaluation, either in a team meeting with DCPS and/or through filing and adjudicating a due process complaint.
5. All other relief requested by Petitioner is denied.

---

<sup>8</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

**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: January 15, 2020**

Copies to:     Counsel for Petitioner  
                  Counsel for LEA  
                  OSSE-SPED {[due.process@dc.gov](mailto:due.process@dc.gov)}  
                  ODR {[hearing.office@dc.gov](mailto:hearing.office@dc.gov)}  
                  [contact.resolution@dc.gov](mailto:contact.resolution@dc.gov)