



## **JURISDICTION:**

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

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing (“Student”) resides with Student’s parent (“Petitioner”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is a currently age \_\_\_<sup>2</sup> and has been found eligible for special education pursuant to IDEA with a disability classification of Intellectual Disability (“ID”). Student currently attends a DCPS school (“School A”).

On June 16, 2020, DCPS convened a team meeting to review an independent speech language evaluation (“IEE”) and independent testing administered to determine if Student had Attention Deficit Hyperactivity Disorder (“ADHD”). Petitioner alleges that after review of the IEE, DCPS rejected the validity of the IEE because of concerns with the testing protocols and did not agree to provide Student the speech language services recommended by the IEE.

Petitioner alleges the team recommended that Student be reevaluated with a comprehensive psychological evaluation to determine whether Student’s current disability classification is correct, or a specific learning disability (“SLD”).

On September 14, 2020, Petitioner filed her due process complaint alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to provide Student speech language services as a part of Student’s individualized education program (“IEP”) developed on June 16, 2020. Petitioner also alleged that DCPS failed to conduct a functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”) for Student that the team allegedly agreed to conduct at the June 16, 2020, meeting.

On October 5, 2020, Petitioner filed an amended complaint which removed the claim regarding the FBA and BIP apparently because that issue had been resolved by the parties. Petitioner added to the amended complaint a claim that DCPS failed to conduct a comprehensive psychological evaluation that the team allegedly agreed to conduct at the June 16, 2020, meeting.

## **Relief Sought:**

Petitioner seeks the following as relief: a finding that Student has been denied a FAPE and that DCPS be ordered to fund an independent comprehensive psychological evaluation and convene a meeting to review the evaluation and review and revise Student’s IEP to include review of Student’s disability classification and to add 60 minutes per week of speech language services. Petitioner also seeks compensatory education.

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<sup>2</sup> Student’s age and grade are listed in Appendix B.

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

The LEA filed a response to the original complaint on September 24, 2020, and a response to the amended complaint on October 19, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

DCPS evaluated Student as needed for Student's eligibility consideration in April 2018. Student was, as a result of the assessments and evaluations, determined eligible as ID. In May 2019, Student's IEP was reviewed for an annual IEP review. Student's IEP provided for 27 hours of specialized instruction outside of the general education setting with occupational therapy ("OT"), behavior support services ("BSS") and extended school year ("ESY"). In October 2019, the parties settled a due process complaint and agreed to, among other things, a speech language evaluation.

DCPS issued IEE authorizations in December 2019 for the evaluations from the settlement and those reports were received in June 2020. The reports were received days before SY 2019-2020 ended and while DCPS had been in virtual learning due to the pandemic from mid-March 2020.

DCPS met in June 2020 to review the reports and DCPS determined additional supports for speech and behavior would be added to Student's IEP. DCPS also amended the IEP by adding social emotional goals to help with Student's behavior in school. DCPS was in the process of creating a BIP and then meeting to review it.

DCPS' review of the speech-language IEE report was not favorable. There were invalidities noted in DCPS' review and thus the entirety of the report and recommendations were not accepted by DCPS for Student's programming. Student has been determined ID and not as having a speech and language disorder.

Student was comprehensively and formally evaluated with a psychological assessment in 2018 and 2020. Student's eligibility was appropriately evaluated and identified in 2018. This continued through to 2020. There were no additional areas of concern or disability identification required.

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

The parties participated in a resolution meeting on the amended complaint on November 6, 2020, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on November 4, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on December 19, 2020. The parties agreed to file a motion to continue and to extend the HOD due date to accommodate their selected hearing dates. That motion was granted and the HOD is now due to January 1, 2021.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on November 10, 2020, and issued a pre-hearing order outlining, inter alia, the issues to be adjudicated.

### **ISSUES ADJUDICATED:**

1. Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, specifically, by not conducting the comprehensive psychological evaluation that the MDT/IEP team agreed to conduct on June 16, 2020.

2. Whether DCPS denied Student a FAPE by failing to provide Student speech language services as a part of Student's June 22, 2020, IEP.

**DUE PROCESS HEARING:**

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on December 16, 2020. The parties presented written closing arguments as of December 22, 2020.

**RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 26 and Respondent's Exhibits 1 through 33) that were admitted into the record and are listed in Appendix A.<sup>3</sup> Witnesses' identifying information is in Appendix B.<sup>4</sup>

**SUMMARY OF DECISION:**

The Hearing Officer concludes, based on the evidence adduced, that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner established a prima facie case on issue #2 and Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #2.

Having found a denial of FAPE to Student, the Hearing Officer directs DCPS to amend Student's IEP to include speech language services in the amount of 60 minutes per week and directs DCPS to convene an IEP meeting to develop goals for the speech language services based upon the findings of the independent speech language evaluation that the team reviewed on June 16, 2020.

The Hearing Officer also grants Petitioner authorization for an independent educational evaluation ("IEE") to determine the appropriate amount of compensatory education that Student is due for missed speech language services that Student should have received since June 16, 2020, to the date of this HOD.

Finally, because there was credible testimony presented that Student's current ID disability classification may not be appropriate, the Hearing Officer also directs DCPS (if has not already done so, or not already granted Petitioner authorization for an independent evaluation) to conduct a comprehensive psychological reevaluation of Student within the next 30 calendar days to specifically determine Student's most appropriate disability classification.

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<sup>3</sup> Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

<sup>4</sup> Petitioner presented three witnesses: (1) Petitioner, (2) An Independent Speech Language Pathologist who evaluated Student and who testified as an expert witness, and (3) An Independent Psychologist, who evaluated Student. and who testified as an expert witness. DCPS presented two witnesses both of whom testified as expert witnesses: (1) a DCPS Psychologist, 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.

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

1. Student resides with Petitioner in the District of Columbia and DCPS is Student's LEA. Student has been found eligible for special education and related services pursuant to IDEA with a disability classification of ID. Student currently attends School A, a DCPS school, and is assigned to School A's self-contained Independent and Learning Support ("ILS") special education classroom. (Petitioner's Exhibits 7-4, 11)
2. During school year ("SY") 2017-2018, Student attended a public charter school located in the District of Columbia ("School B"). While Student was attending School B, a psychological evaluation was conducted in March 2018 that assessed Student's cognitive, academic, social/emotional and behavioral functioning. In addition to conducting assessments, the evaluator interviewed Student, Student's parent and teacher, and conducted a classroom observation. (Petitioner's testimony, Petitioner's Exhibit 17)
3. Student attained a Full-Scale IQ score of 62, which placed Student in the 1st percentile and was classified as Extremely Low. Student's academic functioning was significantly below grade level and the evaluator determined that Student exhibited overall delays in ability to demonstrate age-appropriate skills of personal independence and social responsibility. The evaluator concluded Student's learning profile was consistent with an intellectual disability. The evaluator recommended, among other things, consultation with a speech language pathologist to further assess Student's expressive, receptive and pragmatic language development. (Petitioner's Exhibit 17)
4. School B developed an IEP for Student dated May 17, 2019. Student's IEP reported the ID disability classification. Petitioner participated in the development of the IEP along with her attorney. The IEP prescribed 27 hours per week of specialized instruction outside general education, 190 minutes per month of BSS and 45 minutes per week of OT. (Petitioner's Exhibit 10)
5. Student enrolled at School A for SY 2019-2020 with the School B IEP. Petitioner filed a due process complaint against DCPS a result of Petitioner's request to DCPS for Student to be evaluated for ADHD and that a speech language evaluation be conducted as recommended by the March 2018 psychological evaluation. Petitioner and DCPS settled the complaint and DCPS agreed to conduct a speech and language evaluation and to conduct testing to rule out ADHD. DCPS also agreed to provide Petitioner authorization for independent tutoring. (Petitioner's Exhibit 4)
6. After Petitioner's counsel notified DCPS of its non-compliance with the settlement agreement by not conducting the evaluations, DCPS issued Petitioner authorization for independent evaluations on December 10, 2019. (Petitioner's Exhibit 5)
7. The independent speech language evaluation was not conducted until April 2020, due in part to Covid-19 restrictions. The evaluation report was completed on May 6, 2020. The evaluation, which was conducted by video-teleconference as a result of the global pandemic, included administration of the Clinical Evaluation of Language Fundamentals – Fifth Edition ("CELF-5"), interviews and discussions with Student's mother and teachers. The evaluation included, among other things, a measure of Student's receptive and expressive

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<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. Documents cited are noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

language, the ability to follow directions; sentence formulation; sentence recall, understanding spoken paragraphs; word definitions; sentence assembly; semantic relationships; pragmatic profiles; core language; vocabulary. Although the evaluator was unable to observe Student in the distance learning classroom as a part of her evaluation, she was able confer with Petitioner and Student's teachers as a part of the evaluation. (Witness 1's testimony, Petitioner's Exhibit 20)

8. Student scored Below Average, Moderately Below Average, or Severely Below Average in 21 out of 23 subtests administered. Although Student scored in the 90<sup>th</sup> percentile in articulation and speech intelligibility, the evaluator recommended, among other things, that Student be provided, 60 minutes per week of direct speech language therapy and that Student's goals and objectives be focused on language, chunking verbally presented information, segmented classwork and homework, and securing Student's attention before presenting oral directions. (Witness 1's testimony, Petitioner's Exhibit 20)
9. The independent assessment for ADHD was conducted by an independent psychologist and included the Behavior Assessment for Children, Third Edition ("BASC-3"), which consisted of teacher and parent rating scales and a self-report by Student. The psychologist also interviewed Student's teachers. Both of Student's teachers responses suggested Student's had clinically significant problems with hyperactivity in school. However, rating scales from Student's parent did not support a finding of ADHD behavior at home, thus an ADHD diagnosis could not be given. The psychologist recommended that Student be provided a BIP at school and that Student continue to receive BSS in school. (Witness 2's testimony, Petitioner's Exhibit 19)
10. Petitioner's attorney provided DCPS copies of the independent speech language evaluation and the independent BASC testing on May 11, 2020, along with a request that a meeting be convened to review the evaluation reports. (Petitioner's Exhibit 26-6)
11. On May 16, 2020, a DCPS speech language pathologist conducted a review of the independent speech language evaluation. In addition to reviewing the evaluation, the DCPS evaluator reviewed Student's educational records, conducted a teacher interview and observed Student during distance learning. She concluded that the independent speech language evaluation was not valid for a number of reasons including the administration of certain subtests of the CELF-5 via tele-evaluation that, according to the CELF-5 publisher, should not have been conducted in that manner, and because there was insufficient detail in the evaluation report describing the testing method and environment employed by the evaluator. (Witness 3's testimony, Petitioner's Exhibit 21)
12. School A convened an eligibility and IEP meeting on June 16, 2020. During the meeting, the team reviewed the independent speech and language evaluation and independent BASC testing. After a review of the speech and language evaluation, the DCPS evaluator advised that she was rejecting the evaluation because it was done virtually, and was not comprehensive enough in her opinion. Petitioner and her representatives disagreed and expressed that the evaluation was valid and Student should receive the recommended speech/language services. (Petitioner's Exhibits 7, 9)
13. School A concluded that it could not add Other Health Impairment ("OHI") to Student's disability classification for ADHD because Student did not display ADHD behavior at home. The team concluded it would complete a BIP and once in-person school resumed in the fall of 2020, more testing would be completed to determine Student's need for speech services. "In conclusion, we will do a full reevaluation in the 20-21 school per as agreed with Team." (Respondent's Exhibit 9 page 60)

14. School A determined Student's continued eligibility for special education and related services with the ID disability classification. The team amended Student's IEP to update the present levels of performance and annual goals. The team did not include speech language services in the IEP. (Petitioner's Exhibits 9, 11-1, 11-2, 11-12)
15. DCPS issued a prior written notice ("PWN") following the June 16, 2020, meeting that stated among other things "After reviewing the evaluations speech needs to do more testing in order to determine if speech is needed. At this time there are not enough supporting evidence to add speech to [Student's] services." DCPS advised the parent that "more observation and testing is needed for speech determination" "Also since mom and Educational Lawyer [is] do not agree with the Speech evaluation, the team needs to reconvene to address speech as previous[ly] indic[a]ted needed in previous evaluation from previous school." (Petitioner's Exhibits 7-6, 11, Respondent's Exhibit 4 pages 16, 18).
16. DCPS conducted an FBA on June 20, 2020, and developed a BIP for Student on June 22, 2020. (Petitioner's Exhibits 22, 23)
17. Prior to Petitioner filing her due process complaint, no one had contacted Petitioner from DCPS regarding conducting additional evaluations of Student during SY 2020-2021. (Petitioner's testimony)

## CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). Petitioner held the burden of production on both issues to be adjudicated and the burden of persuasion on issue #1. The burden of persuasion fell to Respondent once Petitioner established a prima facie case on issue #2. <sup>6</sup> The normal standard is the preponderance of the evidence. See, e.g.,

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<sup>6</sup> Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party

*N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**Issue 1:** Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability, specifically, by not conducting the comprehensive psychological evaluation that the MDT/IEP team agreed to conduct on June 16, 2020.

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

34 C.F.R. § 300.303 provides:

(a) General. A public agency must ensure that a reevaluation 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 reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation 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].").

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).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in

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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.



all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

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).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

Petitioner alleges that at the June 16, 2020, IEP meeting, the team agreed to conduct a comprehensive psychological evaluation and DCPS has failed to conduct that evaluation. The weight of the evidence does not support a finding that the June 16, 2020, IEP team agreed to conduct a comprehensive psychological evaluation.

Although Petitioner testified that at the June 16, 2020, eligibility meeting the team did not think that Student's correct disability classification was ID, Petitioner did not testify that at the June 16, 2020, meeting the team agreed to conduct a comprehensive psychological evaluation or take action to specifically rule in or out the ID classification. That specific issue as to the ID classification is also not mentioned in the PWN that DCPS issued. The PWN mentions conducting an evaluation to determine Student's need for speech. Although the PWN also stated that when in-person school resumes School A would conduct a full reevaluation, there was no specific reference to a comprehensive psychological evaluation. The Hearing Officer cannot infer from this statement in the PWN that a comprehensive psychological evaluation is what the team agreed to conduct.

In addition, at that meeting, the team reviewed an evaluation conducted by the independent psychologist who testified at the hearing. The question posed to this Psychologist for her evaluation was Student's possible ADHD diagnosis. Although the psychologist questioned Student's ID classification during the hearing, she obliquely

referred to Student's ID classification in her evaluation report, and made no direct recommendation in her report for any assessment(s) to rule out or confirm Student's ID classification.

Petitioner did not say that at the June 16, 2020, meeting the team agreed to conduct a comprehensive psychological evaluation or to specifically rule in or out the ID classification. Consequently, the Hearing Officer does not conclude that Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS failed to conduct a comprehensive psychological evaluation that the June 16, 2020, team agreed to conduct.

However, based upon the fact that Student's continued ID classification was questioned during the hearing, the Hearing Officer finds it equitable to direct DCPS to conduct an evaluation to rule in or out the ID disability classification, but will not grant Petitioner's requested relief for an independent comprehensive psychological evaluation.

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide Student speech language services as a part of Student's June 22, 2020, IEP.

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

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

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

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

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate, in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate, in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the

IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious, in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child’s anticipated needs; or (E) Other matters.

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

The evidence demonstrates that DCPS and Petitioner settled a prior due process complaint in 2019 regarding, among other things, a requested speech language evaluation. DCPS agreed to conduct this evaluation. When DCPS failed to meet its obligation under the settlement agreement to conduct the evaluation, DCPS instead granted Petitioner authorization for an independent speech language evaluation. Because of the Covid-19 emergency and subsequent school closing, the independent evaluator was unable to conduct the evaluation in person and had to conduct the evaluation of Student through video-teleconferencing. The evaluator was able to confer with Petitioner and Student’s teachers regarding Student’s speech-language concerns. This evaluator credibly testified the she conducted the evaluation and the testing instruments she used to assess Student’s speech language skills were done in a manner that maintained the integrity of her evaluation despite the limitations and restrictions that were necessary because of the Covid-19 emergency.

The evidence demonstrated that a DCPS speech language pathologist reviewed the evaluation and principally rejected its validity because it was conducted using video-teleconferencing. That witness testified that the publisher of the assessment instrument that the evaluator used had not yet approved all of the subtests of the assessment to be done through video-teleconferencing. However, that witness did not present any authority to support her contention. Both these witnesses testified as experts. The Hearing Officer found Petitioner’s expert witness’ testimony of the appropriateness of her evaluation methodologies more convincing because she explained how she engaged Student in conducting the evaluation that supported her assertion that the scores and findings she adduced are a valid. The results adequately assessed Student’s speech-language functioning and confirmed

Student's need for direct speech language interventions of 1 hour per week.

The June 16, 2020, IEP team concluded that more assessments were needed to definitively determine Student's need for speech language services. DCPS was to conduct this additional testing and was to do so at the start of SY 2020-2021. Although it appears that the team at the time anticipated that in-person schooling would occur by the start of SY 2020-2021, that has clearly not been the case. Petitioner credibly testified that there has been no action by DCPS to conduct the evaluations. It would be inequitable for Student to have to continue to go without services that an qualified evaluator has already determined Student needs, while DCPS continues to delay on an evaluation and determination about services that DCPS was to have made more than one year ago. Consequently, the Hearing Officer concludes that DCPS' continued failure to provide Student speech language services as a part of Student's IEP based on this unreasonable delay in validating evaluation results that the Hearing Officer has concluded are valid has resulted in an IEP that is not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances and is a denial of a FAPE.

### **Remedy:**

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

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

There was no evidence presented from which the Hearing Officer could conclude the appropriate compensatory education that Student is due. Consequently, in the order below the Hearing Officer grants Petitioner authorization for an evaluation to determine compensatory education for the missed speech language services of 1 hour per week since June 16, 2020.

### **ORDER:** <sup>7</sup>

1. DCPS shall within 15 business days of the date of this order, amend Student's IEP to include speech language services in the amount of 60 minutes per week and DCPS shall convene an IEP meeting to develop goals for the speech language services based upon the findings of the independent speech language evaluation that the team reviewed on June 16, 2020.
2. The Hearing Officer also grants Petitioner's authorization for an independent educational evaluation ("IEE") at the prescribed OSSE rate to determine the appropriate amount of compensatory education that

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<sup>7</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.

Student is due for missed speech language services that Student should have received since June 16, 2020, to the date of this HOD.

3. Because there was credible testimony presented that Student's current ID disability classification may no longer be appropriate, the Hearing Officer directs DCPS (if it has not already done so, or not already granted Petitioner authorization for an independent evaluation) to conduct a comprehensive psychological reevaluation of Student within the next 30 calendar days of the date of this order to specifically determine Student's most appropriate disability classification.
4. Petitioner is authorized to pursue compensatory education pursuant to this HOD in a subsequent due process complaint, if need be, after presenting the IEE referenced above to DCPS for a determination of appropriate compensatory education.
5. All other relief requested by Petitioner is denied.

### **APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action concerning the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: January 1, 2021**

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