

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
January 01, 2024

---

PARENT, on behalf of STUDENT, <sup>1</sup>	)	Date Issued: January 1, 2024
	)	
Petitioner,	)	Hearing Officer: Peter B. Vaden
	)	
v.	)	Case No: 2023-0208
	)	
DISTRICT OF COLUMBIA	)	Online Videoconference Hearing
PUBLIC SCHOOLS,	)	
	)	Hearing Date: December 13, 2023
Respondent.	)	
	)	

---

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner parent under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the parent seeks compensatory education and other relief against Respondent District of Columbia Public Schools (DCPS) on the grounds that DCPS allegedly denied her child a free appropriate public education (FAPE) by failing to offer Student appropriate Individualized Education Programs (IEPs) and educational placements in the 2021-2022 and 2022-2023 school years and by failing to fully implement Student’s IEPs.

---

<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on October 24, 2023, named DCPS as Respondent. The undersigned hearing officer was appointed on October 25, 2023. The parties met for a Resolution Session Meeting on November 8, 2023 and did not resolve the issues in dispute. On November 9, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

With the parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on December 13, 2023. The parent appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by ASSISTANT PRINCIPAL and DCPS' COUNSEL. Petitioner's Counsel and DCPS' Counsel made opening statements. Mother testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called as witnesses SPECIAL EDUCATION TEACHER, LEA REPRESENTATIVE and Assistant Principal.

Petitioner's Exhibits P-1 through P-19 and DCPS Exhibits R-1 through R-13 were admitted into evidence without objection. Exhibit R-14 was not offered. Following completion of the presentation of evidence, Petitioner's Counsel and DCPS' Counsel made oral closing arguments. There was no request to file written closings.

**JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and 5A DCMR § 3049.1.

**ISSUES AND RELIEF SOUGHT**

The issues for determination in this case, as set out in the November 9, 2023 Prehearing Order are:

- a. Whether DCPS denied the Student a FAPE by failing to provide him/her with an appropriate IEP, educational placement, and/or location of services for the 2021-2022 and 2022-2023 school years in that the October 25, 2021 and March 8, 2022 IEPs were inappropriate because they (1) only provided the Student with a total of 10 hours per week of specialized instruction, when his/her academic deficits required a full-time placement and (2) failed to provide transportation supports when the Student had well-documented mobility concerns; and DCPS failed to provide the Student with an appropriate placement or location of services, pursuant to the March 8, 2023 IEP, because City School 1 was not equipped to provide the Student with the full-time program to which the Student was entitled and actually failed provide the full-time program.
  
- b. Whether DCPS denied the Student a FAPE by failing to implement his/her IEPs for the 2022-2023 and 2023-2024 school years in that during the 2022-2023 school year, DCPS failed to provide the Student with all of the specialized instruction to which he/she was entitled and failed to submit a transportation request to the D.C. Office of the State Superintendent of Education (OSSE) until the end of the school year. In the 2023-2024 school year, DCPS has failed to implement the Student's IEP provision to provide the Student with an assistive technology device.

For relief, Petitioner requests that the hearing officer award Student compensatory education and related transportation expenses for the denials of FAPE alleged in the complaint; Order DCPS to immediately provide the Student with an appropriate assistive technology device and order such other relief as the hearing officer

deems just and reasonable.

**FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case on December 13, 2023, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, resides with the parent in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education as a child having Multiple Disabilities, based on coexisting Specific Learning Disability (SLD) and Other Health Impairment (OHI) disabilities. Apparently the coexisting OHI disability is Cerebral Palsy. Exhibit P-10.

3. Student was born in the District of Columbia. Student was initially evaluated in March 2018 by the Strong Start DC Early Intervention Program. Exhibit P-

5. The parent moved to Alabama in 2017 and moved back to the District in January 2020. The parent enrolled Student in City School 1 in the winter of 2020. Testimony of Mother.

4. In the City School 1 October 27, 2020 IEP, areas of concerns and services were reported to include Specialized Instruction/Cognitive support, 5 hours per week in the general education setting; Communication/Speech and Language Pathology, 4 hours per month outside general education; Health/Physical Therapy, 120 minutes per month

outside general education to address decreased dynamic balance and coordination; and Motor Skills/Physical Development or Occupational Therapy, 60 minutes per month inside and 60 minutes per month outside general education to address sensory motor development. Exhibits P-5, P-7.

5. The City School 1 IEP team conducted its annual review of Student's IEP on October 25, 2021. As a consideration for Communication, the IEP team reported that Student had significant communication needs that negatively impacted his/her ability to access the general education curriculum and that if the child could express him/herself it would allow him/her to participate more. The IEP team identified Cognitive, Communication/Speech and Language, Health/Physical and Motor Skills/Physical Development as IEP Areas of Concern for Student. For Cognitive, the IEP team reported that Student was attempting to learn the current grade curriculum in a large setting (24 students) and that was unsuccessful for the most part, and that Student was reading on a pre-K and below level and had made little progress in the last 2 years; For Special Education and Related Services, the IEP provided for Student to receive 10 hours per week of Specialized Instruction Services, divided equally between inside and outside of general education; 4 hours per month of Speech-Language Pathology, 120 minutes per month of Physical Therapy (PT) and 60 minutes per month of Occupational Therapy (OT), all outside general education, and 60 minutes per month of OT in the general education setting. Exhibit P-8.

6. In October 2021, DCPS PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student. In her October 26, 2021 report, DCPS Psychologist reported, *inter alia*, that Student demonstrated global cognitive deficits. As measured by the Wechsler Preschool & Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), Student's overall FSIQ fell in the Borderline range when compared to other children his/her age (FSIQ = 71). Student showed somewhat weak performance on working memory tasks (WMI = 84, Low Average), which measures concentration and mental control. However, this was an area of strength relative to his/her overall level of ability, when compared to verbal comprehension (VCI = 69, Extremely Low), visual spatial (VSI = 70, Borderline), and processing speed (PSI = 68, Extremely Low) performance. Student's fluid reasoning (FRI = 74) abilities were measured in the Borderline range of functioning. On the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II) test of visual-motor integration and visual-motor memory, Student performed within the Very Low range on the Copy (66) phase but within the Average range on the Recall (95) phase. On tasks that measured fine motor and visual-perception skills separately, Student's scores fell within the Low range, respectively. The Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) was used to assess Student's academic functioning. Student's Total Achievement Composite score (51) was measured in the Extremely Low range of functioning when compared to same-grade peers. His/her scores across the Reading (57), Written Expression (57), and Mathematics (60)

Composites were measured in the Extremely Low range of functioning when compared to same-grade peers. Student's subtest scores were consistently measured between the Extremely Low and Very Low range, suggesting global academic deficits. The parent's responses on the Behavior Assessment System for Children, Third Edition (BASC-3) rating scales revealed At-Risk scores on the Externalizing Problems Composite, the Behavior Symptoms Index, Atypicality and in the area of Adaptability. The classroom teacher's responses on the BASC-3 indicated At-Risk challenges on the Externalizing Behaviors, Conduct Problems, School Problems, Learning Problems, the Behavior Symptoms Index, Withdrawal, and in the areas of Social Skills, Leadership, Study Skills and Functional Communication. Results of the House-Tree-Person drawing projective measure suggested that Student might feel some anxiety around managing his/her medical diagnosis which contributed to mixed feelings regarding his/her independence. Overall, Student was capable of making interpersonal adjustments with support. DCPS Psychologist reported that based on the results of her evaluation, Student appeared to share the academic profile of a student with a Specific Learning Disability in the areas of Reading and Mathematics and challenges with functional communication. DCPS Psychologist noted that Student's challenges in those areas might contribute to interpersonal challenges that impact Student's access to and progress in the general education curriculum. DCPS Psychologist recommended, *inter alia*, that Student would also highly benefit from academic supports in the area of writing; that interventions be

provided for classroom activities which involve listening comprehension, verbal reasoning, and oral responding; that children like Student with relatively low visual spatial skills may have difficulty understanding information that is presented without using words; that with lower working memory skills, Student may have difficulty concentrating and attending to information; that computerized interventions may be helpful in building Student's capacity to exert mental control, ignore distraction, and manipulate information in his/her mind; that Student was observed to experience significant challenges with speech and language development and continued Speech and Language supports were recommended. DCPS Psychologist also recommended continued Occupational Therapy supports for Student, as well as sensory supports to aid in self-regulation and other coping strategies for managing Student's behavior and emotions. Exhibit P-5.

7. On October 29, 2021, the City School 1 eligibility team confirmed Student's special education eligibility as a child with MD. Exhibit P-6. The eligibility team reported, *inter alia*, that Student required consistent 1:1 support from an adult to stay on task; that Student did not have basic reading skills or know names or sounds; that Student was reading below Pre-K levels; that Student was not able to form letters correctly or copy or trace accurately; that Student needed verbal prompts to close his/her lips to produce syllable ending bilabial sounds for closure of syllables; that current speech production skills were severely below expectations and negatively



impacted his/her ability to be clearly understood during oral classroom activities and discussions; that Student presented with some deficits in gross motor skills that may affect his/her access and participation in the school environment and that Student struggled with fine motor skills to isolate finger movements and to manipulate small items. Exhibit P-6.

8. As of February 16, 2022, Student was reported, after two reporting periods, to be Progressing on IEP goals except for having “Mastered” a counting goal and made “No Progress” on a fine motor OT goal. Exhibit R-4.

9. The City School 1 IEP team met to review Student’s IEP on March 28, 2022. As a consideration for Assistive Technology (AT) needs, the team reported that Student required an AT device to help him/her communicate and that the device needed to be a tablet or computer application that would allow Student to communicate every day things to teachers and peers, as well as communicate his/her thoughts during instruction. The IEP team identified Mathematics, Reading, Written Expression, Communication/Speech and Language, Health/Physical and Motor Skills/Physical Development as Areas of Concern for Student. For Reading, Student was reported to be reading on a pre-K and below level and to have made little progress in the last 2 years. For Mathematics, Student was reported to be attempting to learn the current grade curriculum in a large setting (24 students) and that was unsuccessful for the most part. Student scored at Emerging K level on a computerized, standardized test. The current

grade curriculum required teachers to move through the lessons at a pre-determined pace without modification or altering pacing for student learning, so Student was reported not able to access the lessons in the general education setting. Student was not able to show that he/she could manipulate numbers to add and subtract within 10. Student could recognize numbers through 10 and rote count to 39, with skipping 15. Student's Present Levels of Performance for Communication/Speech and Language were not updated from the 2018 Strong Start initial evaluation. For Special Education and Related Services, the IEP team continued unchanged the provisions in the October 2021 IEP for Student to receive 10 hours per week of Specialized Instruction Services, divided equally between inside and outside of general education; 4 hours per month of Speech-Language Pathology, 120 minutes per month of Physical Therapy (PT) and 60 minutes per month of Occupational Therapy (OT), all outside general education, and 60 minutes per month of OT in the general education setting. Exhibit P-9.

10. As of February 14, 2023, Student was reported to have Mastered or to be Progressing on all March 28, 2022 IEP annual goals, except to have made No Progress on an OT goal to attend to and participate in structured and directed classroom activities. Exhibit R-5.

11. On March 8, 2023, the City School 1 IEP team met for the annual review of Student's IEP. For current academic levels, the IEP team reported that Student had scored at 330 (Emerging K) level on the i-Ready standardized math test and 340 on the

i-Ready reading assessment (Kindergarten level). Student was able to write his/her first name but was unable to write a 3-word sentence or spell 3-letter words. The team reported that Student's attendance had been poor and his/her compliance had been inconsistent; that Student had received his/her augmentative and alternative communication device (AAC device) and had been learning to use it. For Special Education and Related Services, the IEP team increased Student's Specialized Instruction to 20 hours per week outside of general education. For related services, the March 8, 2023 IEP provided for 4 hours per month of Speech-Language Pathology, 60 minutes per month of PT and 60 minutes per month of OT, all outside the general education setting, and 60 minutes per month of OT in general education. Exhibit P-9.

12. The increased Specialized Instruction hours in the March 8, 2023 IEP would be provided in a Specific Learning Support (SLS) program classroom for children with learning disabilities. City School 1 did not have an SLS classroom. DCPS did not issue a change of location of services for Student to City School 2, which could provide an SLS classroom, until June 23, 2023. Student remained at City School 1, primarily in the general education setting, until the end of the 2022-2023 school year. Testimony of Assistant Principal.

13. For the 2021-2022 and 2022-2023 school years, while Student was attending City School 1, Mother walked Student to school from the family's home. Student had mobility challenges and Mother would often pull the child to school in a

wagon or carry him/her on her back. Mother testified that on multiple occasions, she asked Student's teachers for school transportation. Testimony of Mother. Assistant Principal testified that, if requested, the school would have arranged for special education transportation for Student. However, according to Assistant Principal, Mother would tell him that "you know I walk my babies [Student and siblings] to school" and that she did not need transportation for Student. Testimony of Assistant Principal. For the current, 2023-2024, school year, Student has moved from City School 1, the neighborhood school, to City School 2 and is being provided special education transportation in the current school year. Testimony of Mother. Mother did not allege in her due process complaint that she requested special education transportation for Student. Nor was there corroborating evidence that Mother requested transportation prior to the 2023-2024 school year. I find that the hearing evidence does not establish that Mother requested school transportation for Student while he/she attended City School 1, his/her neighborhood school.

14. When Student enrolled in City School 2 for the start of the 2023-2024 school year, City School 2 staff was not aware that the child had been provided an i-Pad tablet at City School 1. The device had actually been left for Student in the City School 2 office at the start of the school year. When LEA Representative learned about the i-Pad at an October 5, 2023 multidisciplinary team (MDT) meeting, the device was immediately restored to Student and he/she was able to use it thereafter. In addition,

from the start of the 2023-2024 school year, Student was issued, and used, a tablet computer device in his/her City School 2 SLS classroom. Testimony of LEA Representative.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP 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. *See* D.C. Code § 38-2571.03(6).

#### **ANALYSIS**

In this due process proceeding, the parent alleges that DCPS has denied Student a free appropriate public education (FAPE) by not offering appropriate Individualized

Education Programs (IEPs) in October 2021 and March 2022 and by failing to fully implement the child's IEPs in the 2022-2023 and 2023-2024 school years. For the reasons explained below, I find that DCPS has not met its burden of persuasion on the appropriateness of the child's IEPs and that parent has established, in part, that DCPS has failed to timely implement Student's March 8, 2023 IEP.

IEP Appropriateness

- Did DCPS deny the Student a FAPE by failing to provide him/her with an appropriate IEP, educational placement, and/or location of services for the 2021-2022 and 2022-2023 school years in that the October 25, 2021 and March 28, 2022 IEPs were inappropriate because they (1) only provided the Student with a total of 10 hours per week of specialized instruction, when his/her academic deficits required a full-time placement and (2) failed to provide transportation supports when the Student had well-documented mobility concerns?

Petitioner contends that DCPS' October 25, 2021 and March 28, 2022 IEPs were inappropriate for Student because the IEPs provided insufficient Specialized Instruction Services and did not provide for special education transportation. I find from the hearing evidence, including the testimony of the parent's expert, Educational Advocate, that Petitioner established a *prima facie* case that the IEPs at issue were inadequate. Therefore, DCPS holds the burden of persuasion on the appropriateness of its IEPs and educational placements for Student. DCPS has not met that burden.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), how a court or a hearing officer must assess an IEP:

In reviewing a challenge under the IDEA, courts conduct a two-part inquiry: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (footnotes omitted).

*Middleton* at 128. In this case, Petitioner has not alleged that DCPS did not comply with IDEA procedures to develop the IEPs. I turn, therefore, to the substantive prong of the *Rowley* inquiry – Were the October 25, 2021 and March 28, 2022 IEPs appropriate for Student?

In *E.W. v. District of Columbia*, No. 21-CV-1598 (FYP/GMH), 2022 WL 2070869 (D.D.C. May 11, 2022), *report and recommendation adopted*, No. 21-CV-1598 (FYP), 2022 WL 2070858 (D.D.C. June 1, 2022), U.S. Magistrate Judge G. Michael Harvey set forth the legal standard for evaluating IEPs.

The IDEA guarantees children with disabilities the right to a FAPE, which is defined as “special education and related services” provided at public expense that “conform[ ] with the [student’s] individual education program,” also known as an IEP. 20 U.S.C. §§ 1400(d)(1)(A); 1401(9); 1412(a)(1). Thus, the primary vehicle for ensuring that students identified as disabled receive a FAPE is the creation and implementation of an IEP setting forth the services to be provided to meet that student’s needs. 20 U.S.C. § 1414(d)(1)(A)–(2)(A); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 368, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (describing the IEP as the “*modus operandi*” of the IDEA). The plan is developed by the student’s IEP team, which includes the student’s parents, teachers, and other educational specialists. 20 U.S.C. § 1414(d)(1)(B). An IEP contains assessments of the student’s needs, strategies to meet those needs, and goals used to measure the effectiveness of the plan. 20 U.S.C. § 1414(d)(1)(A). The IEP team must develop an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ----, ----, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). The IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. *See* 20 U.S.C. § 1412(a)(5)(A).

*E.W.*, 2022 WL 2070869, at \*3. "[A]n IEP's adequacy thus 'turns on the unique circumstances of the child for whom it was created,' and a reviewing court should defer to school authorities when they 'offer a cogent and responsive explanation' showing that an IEP 'is reasonably calculated to enable the child to make progress appropriate in light of [his/her] circumstances.'" *Endrew F.*, 137 S. Ct. at 1001-02." *A.D. v. Dist. of Columbia*, No. 20-CV-2765 (BAH), 2022 WL 683570, at \*7 (D.D.C. Mar. 8, 2022).

In both the October 25, 2021 and March 28, 2022 IEPs, the City School 1 IEP teams provided for Student to receive 10 hours per week of Specialized Instruction Services, divided equally between inside and outside of the general education setting. Petitioner's expert, Educational Advocate, opined that with Student's academic deficits; 10 hours per month of special education was not appropriate. I agree. In both the October 25, 2021 IEP and the March 28, 2022 IEP, the respective IEP teams reported that Student was attempting to learn the current grade curriculum in a large setting (24 students) which was "unsuccessful for the most part" and that the child was reading on a pre-K and below level and had made "little progress" in the preceding 2 years. Shortly after the October 25, 2021 IEP meeting, DCPS Psychologist issued her psychological evaluation report on Student. DCPS Psychologist reported, *inter alia*, that



Student demonstrated global cognitive deficits and that Student consistently measured between the Extremely Low and Very Low ranges on educational testing, suggesting global academic deficits. When Student's IEP team next met on March 28, 2022, the IEP team did not increase the child's special education services.

In her hearing testimony, DCPS' expert, Special Education Teacher, opined that the special education hours in the March 28, 2022 IEP were appropriate for Student because Student made "great progress" working with her. Similarly, Assistant Principal, opined that Student did not need a full-time IEP program in the 2021-2022 school year because Student was making some progress. These opinions about the child's progress were at odds with the City School 1 IEP teams' reports that Student had made little progress and was unsuccessful for the most part in the general education setting. I did not find the DCPS experts' opinions persuasive. I find that DCPS has not offered "cogent and responsive explanation" for the decisions of the October 25, 2021 and March 28, 2022 IEP teams to provide Student only 10 hours of specialized instruction per week or to maintain Student's placement in the general education classroom for all but 5 hours per week. I conclude that DCPS has not met its burden of persuasion that the provisions for 10 hours per week of Specialized Instruction Services in the October 25, 2021 IEP and March 28, 2022 IEP were reasonably calculated to enable Student to make progress appropriate in light of his/her circumstances. *See Andrew F., supra*, 137 S. Ct. at 1001-02.

Petitioner contends that the October 25, 2021 and March 28, 2022 IEPs were also inappropriate because both City School 1 IEP teams determined that Student did not require special education transportation. Assistant Principal testified that City School 1 was the child's neighborhood school and that Mother would tell him that "you know I walk my babies to school" and that she did not need transportation for Student. While Mother disputed that account in her testimony, the hearing evidence did not establish that the parent let the City School 1 special education team know that she needed transportation for Student. In light of Assistant Principal's understanding of Mother's preference to walk her children to school, I find that DCPS met its burden of persuasion on the appropriateness of the IEP teams' decisions that Student did not require special education transportation when attending City School 1.

Failure to Implement IEP

- Did DCPS deny Student a FAPE by not timely implementing the March 8, 2023 IEP provision for 20 hours per week of Specialized Instruction Services?
- In the 2023-2024 school year, has DCPS failed to implement Student's March 8, 2023 IEP provision to provide the child with an assistive technology device?

On March 8, 2023, the City School 1 IEP team met for the annual review of Student's IEP. For special education services, the IEP team increased Student's Specialized Instruction Services to 20 hours per week, all outside of general education. The increased Specialized Instruction hours were to be provided in a Specific Learning Support (SLS) program classroom for children with learning disabilities. City School 1

did not have an SLS classroom but DCPS did not issue a change of Student's location of services to City School 2 until June 23, 2023. In the meantime, from March 8, 2023 until the end of the school year, approximately 13 school weeks, Student remained at City School 1, primarily in the general education setting. Petitioner contends that DCPS' delay in moving Student to an SLS classroom constituted a failure to implement the March 8, 2023 IEP. I agree.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

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

*Middleton* at 144. The parent holds the burden of persuasion on her failure to implement claims.

The IDEA does not set a specific time period for implementation of an IEP, but

requires that special education and related services must be made available “[a]s soon as possible following development of the IEP.” 34 C.F.R. § 300.323(c)(2). *See, also, Spiegler v. District of Columbia*, 866 F.2d 461, 466 (D.C. Cir. 1989) (Federal regulations provide that an IEP must be implemented “as soon as possible following the meetings [producing the IEP].” (emphasis in original).) As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh’g*, 480 F.3d 138 (2d Cir. 2007),

Plaintiffs’ right to a free appropriate public education requires that their IEPs be implemented as soon as possible. “As soon as possible” is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP.

*D.D., supra* at 513-14.

In the present case, DCPS provided no reasons at the due process hearing for its delay in moving Student to an SLS classroom following the March 8, 2023 IEP team meeting. Considering that I have determined in this decision that the provision of only 5 hours per week of special education outside the regular classroom in Student’s prior IEPs was inappropriate, I conclude that DCPS’ 13 week delay in moving Student into a 20 hour per week special education program was a failure to implement a substantial

provision of the March 8, 2023 IEP. This was a denial of FAPE.

Petitioner did not establish that there was a material failure to provide Student an AT device in the current, 2023-2024, school year. For a few weeks, by error, City School 2 did not provide Student the i-Pad device acquired for him/her at City School 1. However, the i-Pad was restored to Student on October 5, 2023 when City School 2 staff learned it was available. Moreover, from the start of the 2023-2024 school year, City School 2 provided Student a different AT device, a tablet computer, for his/her individual use. I find that City School 2's delay in providing the i-Pad device to Student did not rise to a failure to implement substantial or significant provisions of the March 8, 2023 IEP.

#### Relief Requested

In this decision, I have determined that DCPS denied Student a FAPE by not providing appropriate Specialized Instruction Services in the October 25, 2021 and March 28, 2022 IEPs and by not implementing the March 8, 2023 change in Student's educational placement to an SLS classroom until the start of the 2023-2024 school year. For relief, the parent requests, *inter alia*, a compensatory education award for Student.

In the Court's recent decision in *J.T. v. District of Columbia*, No. CV 21-3002 (RBW), 2023 WL 8369938, (D.D.C. Dec. 4, 2023), U.S. District Judge Reggie B. Walton explained the compensatory education remedy:

When a [hearing officer] finds that a school district has denied a student a

FAPE under the IDEA, “it has ‘broad discretion to fashion an appropriate remedy,’ which can go beyond prospectively providing a FAPE, and can include compensatory education.” *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016) (*quoting Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015)). In assessing whether an equitable remedy should be provided, however, “[courts] must consider all relevant factors.” *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (*quoting Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993)). . . .

Typically, “[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student.” *Id.* at 523 (internal quotation marks omitted) (*quoting G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003)). However, “[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Id.* at 524 (*quoting Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994)). Nevertheless, “the inquiry must be fact-specific and . . . 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.” *Id.*

*J.T.*, 2023 WL 8369938, at \*13. “[T]he plaintiff has the burden of proposing a well-articulated [compensatory education] plan that reflects the student’s current education abilities and needs and is supported by the record.” *Smith v. District of Columbia*, No. 22-CV-2755-TSC-ZMF, 2023 WL 6291637, at \*4 (D.D.C. July 31, 2023), *report and recommendation adopted sub nom. Mabel Smith, Guardian of the minor child K.C., v. District of Columbia*, No. 22-CV-2755 (TSC/ZMF), 2023 WL 8519987 (D.D.C. Dec. 8, 2023), *quoting Phillips ex rel. T.P. v. District of Columbia*, 736 F. Supp.

2d 240, 248 (D.D.C. 2010) (cleaned up).

In her compensatory education plan, Exhibit P-19, Petitioner's expert, Educational Advocate, recommends that Student be awarded 210 hours of tutoring, outside the school setting, to address the child's academic deficits. Educational Advocate explained that after the March 8, 2023 IEP team meeting, Student should have received 20 hours per week of Specialized Instruction Services outside the general education setting, but, through the end of the school year, the child only received 5 hours per week of pull-out Specialized Instruction. Educational Advocate based her compensatory education recommendation on her mathematical calculation that Student had missed 210 hours of pull-out special education services (15 hours x 14 weeks). DCPS' expert, Assistant Principal, opined that 100 to 150 hours of compensatory education was warranted for the delay, after March 8, 2023, in moving Student to a 20 hour per week program.

Educational Advocate's recommendation is problematical. First, in *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C.Cir.2005) the District of Columbia Court of Appeals rejected "mechanical hour-counting," and emphasized that an award must be designed to meet the student's unique needs. *See Reid*, 401 F.3d at 524. Moreover, Educational Advocate's recommendation of 210 hours does not account for the enhanced benefit Student should received from 1:1 direct instruction from a tutor. Assistant Principal's compensatory education opinion also is flawed because it does not

account for my finding that DCPS did not establish the appropriateness of Student's services and placement – mostly in the large, regular education, classroom – in the October 25, 2021 and March 28, 2022 IEPs.

Notwithstanding, perfection is not required. *Cf. Z. B. v. District of Columbia*, 888 F.3d 515, 528 (D.C. Cir. 2018) (Congress has not committed to educational perfection.) Therefore, I will adopt Educational Advocate's recommendation and award Student 210 hours of compensatory education tutoring for the denials of FAPE determined in this decision.

Additionally, Educational Advocate recommended a compensatory award for Student of 10 hours of tutoring on the use of his/her augmentative and alternative communication (AAC) device. Petitioner did not establish her claim that there was a material failure to implement the March 8, 2023 IEP provision for the AT device and I deny this request.

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education for the denials of FAPE found in this decision, DCPS shall, within 15 school days of the date of this decision, issue funding authorization to the parent for Student to receive 210 hours of individual academic tutoring by a qualified tutor. If the services are provided away from Student's home, DCPS shall fund Student's transportation expenses in accordance with OSSE regulations.



2. All other relief requested by the Petitioner herein is denied.

Date: January 1, 2024

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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 (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record  
Office of Dispute Resolution