

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
July 16, 2019

Confidential

Adult Student, ¹ Petitioner, v. District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”), Respondent. Case # 2019-0107 Date Issued: July 16, 2019	HEARING OFFICER’S DETERMINATION Hearing Dates: June 12, 2019, & June 25, 2019, Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on the following days: June 12, 2019, and June 25, 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. Petitioner submitted closing written arguments on June 27, 2019, Respondent submitted closing written arguments on July 8, 2019, and Petitioner submitted a rebuttal written closing argument on July 9, 2019.

BACKGROUND AND PROCEDURAL HISTORY:

Student is an adult special education student who resides with Student’s parent in the District of Columbia and currently attends a District of Columbia Public Schools (“DCPS”) high school (“School A”). On April 19, 2019, Petitioner filed this due process complaint alleging, inter alia, that DCPS failed to provide Student an appropriate individualized educational program (“IEP”) and/or location of service for school year (“SY”) 2016-2017, SY 2017-2018 and SY 2018-2019, failed to conduct comprehensive evaluations, and failed to implement Student’s IEP(s). Petitioner alleges DCPS denied Student a FAPE for no more than two years prior to the date the complaint was filed.

RELIEF SOUGHT:

Petitioner seeks as relief that DCPS amend Student’s IEP to update goals and the transition plan, provide for specialized instruction inside and outside the general education setting for all core academic classes and any elective courses that involve reading and writing, and an increase in speech services and behavior support services (“BSS”). In addition, Petitioner seeks that DCPS provide an appropriate placement with transportation, provide extended school year (“ESY”) services for summer 2019 and conduct the following evaluations: an updated comprehensive psychological evaluation, a vocational evaluation, an adaptive assessment, and a speech and language evaluation, and reconvene an IEP team to review the results and update Student’s goals and transition plan. Finally, Petitioner seeks compensatory education for denials of a free appropriate public education (“FAPE”) alleged and that Student’s right to request additional compensatory education upon completion of re-evaluations be retained.

LEA Response to the Complaint:

The LEA filed a response to the complaint on May 1, 2019. The LEA denied that there has been any failure to provide Student with a FAPE. In its response DCPS asserted, inter alia, the following:

Student now holds educational decision-making rights. Previously, Student's mother held those rights. During SY 2016-2017 Student presented with significant levels of anxiety and work avoidance because of fears of academic failure. By the third advisory of that year, Student had made some success with the interventions both in and out of the classroom and was making progress. In April 2017, Student's IEP was appropriately amended with parental and student input. Student continued to make progress with the necessary support. Unfortunately, Student did not present for ESY 2017, although Student's IEP required it for FAPE.

DCPS convened an eligibility review meeting in March 2018. The provision of services was reviewed and proceeded through SY 2018-2019. School A developed a behavior plan, titled an "Action Plan," to provide Student needed support in the educational setting. The team agreed, with parent and Student input, that the programming remained appropriate. Student has been appropriately evaluated and assessed and appropriately progressing in Student's least restrictive environment ("LRE") throughout the relevant time period. The team was scheduled to meet at the time the response was written to review Student's programming.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on May 1, 2019, 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 May 19, 2019, and originally ended [and the Hearing Officer's Determination ("HOD") was due] on July 3, 2019. On the second day of hearing Respondent's counsel became ill and was unable to complete the hearing. As a result, Respondent's counsel filed a motion for continuance and extension of the HOD due date for 13 calendar days from July 3, 2019, to July 16, 2019, to submit written closing arguments.

A Pre-hearing conference ("PHC") in this matter was held on May 17, 2019. Petitioner's counsel represented during the PHC that DCPS has authorized the independent vocational and agreed to conduct the remaining evaluations that Petitioner sought in the due process complaint. The undersigned hearing officer, ("Hearing Officer") issued a pre-hearing order ("PHO") on May 2019, noting that some of the remedies Petitioner was seeking had been granted by DCPS, and outlining, inter alia, the issues to be adjudicated at hearing.

ISSUES: ²

The issues adjudicated are:

1. Whether DCPS denied Student a FAPE by failing to provide Student with IEPs (for the past two calendar years) that were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEPs (a) did not provide sufficient specialized instruction outside of the general education setting, and/or (b) did not

² The Hearing Officer restated the issues at the hearing, and the parties agreed that these were the issues to be adjudicated.

provide sufficient hours of related services, and/or (c) the goals and baseline data were not revised and updated, and/or (d) did not prescribe ESY services.³

2. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation in September 2018.⁴
3. Whether DCPS denied Student a FAPE by failing to implement Student's IEP and/or transition plan during SY 2017-2018 and/or during SY 2018-2019.⁵

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 60, DCPS Exhibits 1 through 43) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

Based upon the evidence adduced, the Hearing Officer concluded that Respondent did not sustain the burden of persuasion by a preponderance of evidence on issue #1. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issues #2 and #3. The Hearing Officer directs in the order below that DCPS conduct evaluations, revise Student's IEP to increase services, change Student's LRE, determine and offer Student an appropriate educational placement and location of services for SY 2019-2020 and provide Student with compensatory education.

³ Petitioner asserts Student requires specialized instruction outside general education in all core academic courses, as well as, any elective courses that involve reading and/or writing. Petitioner is also asserting the transition goals were not appropriate.

⁴ Petitioner asserts Student's last comprehensive psychological was conducted in November 2013 and despite Student's lack of progress, increase in anxiety, and decrease in motivation, a comprehensive reevaluation was not conducted. Petitioner alleges that as a result of DCPS' failure to conduct a comprehensive re-evaluation, there was insufficient data so that Student's IEP and goals could be properly amended to address Student's lack of educational progress.

⁵ Petitioner alleges Student has not met with anyone for the purpose of working on transition goals this school year or last and Student has not been receiving the specialized instruction outside the general education setting that Student received in prior years.

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A. All of Petitioner's 35 documents were presented and admitted without objection.

⁷ Petitioner presented six witnesses: (1) Student (2) Student's parent (3) Student's Educational Advocate, testifying as an expert witness in psychology, (4) an Independent Speech Language Pathologist, testifying as an expert witness, (5) another Educational Advocate, testifying as an expert witness, (5) a representative from Lindamood Bell regarding tutoring services Petitioner seeks as compensatory education. DCPS presented two witnesses: (1) a DCPS Compliance Case Manager and (2) the DCPS LEA representative from School A.

FINDINGS OF FACT:⁸

1. Student (“Petitioner”) attended a DCPS elementary school and received special education services starting in September 2003 with a disability classification of Speech Language Impairment (“SLI”). In 2007 Student’s disability classification was changed to a specific learning disability (“SLD”). Student left DCPS and attended private catholic schools during SY 2011-2012 and SY 2012-2013, where Student made minimal progress and did not receive special education services. Student returned to DCPS at School A for SY 2013-2014. Student’s parent signed consent forms for DCPS to reevaluate Student. (Petitioner’s Exhibits 24-1, 24-2, 27-1, 39-1, 40-1)
2. In October through November 2010 DCPS conducted a comprehensive psychological reevaluation. The DCPS psychologist administered the Wechsler Intelligence Scales for Children 4th Edition (“WISC-IV”) and the Test of Nonverbal Intelligence-Fourth Edition (“TONI-4”) to assess Student’s cognitive abilities. The WISC-IV generated a FSIQ score of 66 and noted significant deficits in Verbal Comprehension Index (69) Working Memory Index (59) and Processing Speed Index (70) with slightly higher functioning on the Perceptual Reasoning Index (86). The TONI-4 indicated that Student’s non-verbal reasoning ability fell within the low average range (88). (Petitioner’s Exhibit 24-1, 24-6, 24-7)
3. Overall, Student’s cognitive functioning was assessed to be in the low average range; however, Student’s oral language skills and ability to recall information presented in an auditory manner were very limited. Student’s academic functioning was approximately four grade levels behind Student’s grade at the time. At the time Student was receiving specialized instruction in a general education classroom for 10 hours per week and speech language therapy support outside the general education classroom for 120 minutes per month. (Petitioner’s Exhibit 24-1, 24-6, 24-7)
4. In October 2013 DCPS conducted a speech and language reevaluation. Student’s scores were comparable to those in Student’s previous evaluation in 2009. On the Clinical Evaluation of Language Fundamentals (“CELF”) 4th Edition Student’s scores for Core Language, Receptive Language Index and Expressive Language Index were all Below Average. Student also demonstrated a deficit in auditory processing which impacted Student’s ability to access the general education curriculum. Student’s pragmatic language skills were within normal limits. (Petitioner’s Exhibit 26-1, 26-5, 26-8,)
5. Two years later, during SY 2015-2016, in October 2015, School A conducted a Woodcock Johnson IV Tests of Achievement (“WJ-4”). Student’s academic scores, as measured in

⁸ 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.

age equivalency, demonstrated that Student was performing academically from 5 to 7 years below Student's age at the time. (Petitioner's Exhibit 22)

6. In November 2015, School A conducted an Evaluation Summary Report in which it was noted Student presented in school as shy and frequently did not ask for assistance from the teacher when Student did not understand what was being taught. Student's academic pace was significantly slower than Student's grade level peers. However, Student's oral reading assessment indicated Student's oral reading was near, but slightly below, grade level. (Petitioner's Exhibits 15-2, 15-4, 16-1)
7. On November 12, 2015, School A held an IEP meeting. The team reviewed the results of auditory processing evaluation and did not recommend continued audiology services. The team noted Student had extreme social anxiety in interacting with peers and suggested that Student have an outside evaluation to determine a diagnosis. DCPS determined that Student's continued to meet the criteria for special education services. (Petitioner's Exhibits 1, 14-3)
8. Student's November 12, 2015, IEP included academic goals in the areas of math, reading and written expression and prescribed the following services: 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, and 60 minutes per month of BSS. In April 2016, School A amended Student's IEP to make a change to related services. (Petitioner's Exhibit 2)
9. On October 7, 2016, School A conducted an annual review and updated Student's IEP. The IEP cited Student's 2015 WJ-3 scores, Student's 2016 in-school assessments and grades and noted some decrease in scores from Student's previous in-school assessment scores. The IEP prescribed the following services: 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, and 60 minutes per month of BSS. (Petitioner's Exhibit 3)
10. Student's IEP progress reports indicated that Student was progressing in some IEP goals; however, in others, including reading, Student demonstrated no progress. Student's special education teacher noted that Student continued to withdraw in all classes, did not interact with peers or teachers, did not complete in-class or homework assignments. Student was observed to only complete work during pull-out sessions with the special educator. (Petitioner's Exhibit 33)
11. On April 4, 2017, School A conducted an annual review and updated Student's IEP. Student attended the meeting in person and Student's parent participated by telephone. The resulting IEP noted that in math Student had been recently assessed at the first percentile relative to peers and needed significant support. The IEP noted that in reading, Student had recently been assessed as reading at the first-grade level and needed significant support. Student's reading goals were repeated. The transition plan in the IEP noted that Student found reading easier than math and struggled in math. Student believed Student

could perform better in a class environment with fewer students. The transition goal was for Student to attend a 4-year college. The IEP prescribed the following services: 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, 60 minutes per month of BSS, and 5 hours per year of transition counseling. (Witness 4's testimony, Petitioner's Exhibit 4)

12. On March 13, 2018, School A conducted an annual review and updated Student's IEP. The IEP noted that Student had thus far earned a "D+" in Algebra and an "F" in English. Some of Student's academic goals were repeated. The IEP continued to prescribe the same level of services as Student's prior IEP: 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, 60 minutes per month of BSS, and 5 hours per year of transition counseling. The IEP prescribed ESY services. Student's transition plan noted Student hoped to attend college and become a clinical psychologist. (Petitioner's Exhibit 5)
13. In September 2018 DCPS completed an Analysis of Existing Data ("AED") and an Final Eligibility Determination Report ("FEDR"). At the time, Student's IEP prescribed 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, and 60 minutes per month of BSS. As a part of the AED, School A conducted classroom observations of Student and noted that Student engaged in off-task behaviors and Student requested to leave the classroom to meet with Student's case manager and never returned to the classroom. The FEDR noted that Student did not always ask for help when needed, was shy and had anxious behaviors and thoughts in the educational setting. Student also struggled with transitions, incorporating into new classroom environments and building peer relationships. (Petitioner's Exhibit 7-1, 17-7, 18-6)
14. On September 27, 2018, School A convened an eligibility meeting for Student and determined Student continued to be eligible for special education services with the SLD disability classification with deficits in written expression, reading comprehension and math problem solving. School A continued the same level of services in Student's IEP: 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, 60 minutes per month of BSS, and 5 hours per year of transition counseling. (Petitioner's Exhibit 20-3)
15. In February 9, 2019, School A convened an IEP meeting. Student and Student's parent participated in the meeting. The team reviewed Student's transcript. School A informed Student that Student had not passed most second advisory classes including credit recovery classes. As a result, Student would not meet graduation requirements at the end of SY 2018-2019. The team noted Student's lack of engagement and that Student had not been attending some classes. The team outlined for Student what classes Student would have to take and pass at School A to meet graduation requirements and discussed the option of Student's transferring to another DCPS school with more flexibility in attendance hours

that might allow Student's to meet less rigorous graduation requirements than School A, and complete the requirements by December 2019. No changes were made to Student's IEP. (Witness 6's testimony, Petitioner's Exhibit 21)

16. On March 26, 2019, School A amended Student's IEP to remove ESY services. (Petitioner's Exhibit 7)
17. During SY 2018-2019, Student was enrolled in an Advanced Placement ("AP") courses. Student earned failing grades in almost all classes during SY 2018-2019. Student's attendance report noted that Student had a total of 70 days absent during SY 2018-2019, with 53 of those days unexcused. (Petitioner's Exhibit 30)
18. During SY 2018-2019, Student was having the most trouble in AP English, Math and Environmental Science and did not believe School A was being providing Student support in those classes. However, Student acknowledged meeting with Student's special education case manager who worked with Student when Student needed help at least two days per week and during the first half of these two classes. The case manager would inquire of Student's teachers about the work going on in Student's academic classes and would provide Student assistance in understanding and completing the work. Student did not meet with anyone regarding transition goals. (Student's testimony).
19. On occasion when Student would go to the case manager, the case manager was unable to work with Student because he was working with other students. Despite Student's official attendance record, Student was attending school daily, but seldom attended some of the classes Student found too difficult. On those occasions Student would go an meet with Student's case manager or related service providers. (Student's testimony)
20. Student feels significant anxiety in school and receives in-school counseling from an outside provider. The School A social worker is available to Student and provide Student's services, but Student gravitates to the outside provider because Student's feels more comfortable with that provider and is better able to discuss with the provider the issues Student confronts at school. (Student's testimony)
21. In AP courses the curriculum cannot be modified, but support can be provided to assist special education students to meet course requirements. During credit recovery Student would still had the option working with ■ special education teachers to fulfill the requirements, but Student failed to attend the credit recovery classes. Student began to have attendance issues at the beginning of SY 2018-2019. School A did not assess Student regarding attendance, but did implement contracts with Student and used monitoring. (Witness 6's testimony)
22. On May 1, 2019, School A convened an IEP meeting. Student, Student's parent and Student's attorney and educational advocate participated in the meeting. Petitioner's educational advocate requested that Student's services be increased and that Student's LRE be changed to provide Student specialized instruction in all academic subjects and that Student's related services also be increased. Petitioner's representatives were hoping to

obtain a program for Student of 25 hours per week in a DCPS Specific Learning Support (“SLS”) program and specialized instruction support for online credit recovery courses. As a result of the meeting, School A developed a draft IEP dated May 30, 2019, that proposed to increase Student’s specialized instruction to 20 hours per week outside general education. Student consented to DCPS conducting evaluations. (Witness 4’s testimony, Petitioner’s Exhibits 8, 9, 10, 11, 42-1)

23. At the May 1, 2019, meeting the School A team could not identify what location of services Student would attend with the services that were being provided in the new IEP. There was a request that Student be comprehensively reevaluation and DCPS agreed to conduct the evaluations. (Witness 4’s testimony, Petitioner’s Exhibit 54)
24. Another educational advocate employed by the law firm that represents Petitioner and who was designated as an expert in psychology reviewed Student’s evaluations and educational records opined the following at the hearing: based on Student’s academic functioning that was noted in Student’s 2013 psychological evaluation, if Student had been provided appropriate services, Student’s academic skills would have moved by now from the first to fourth grade level to at least the 8th to 10th. The advocate noted that the 2013 evaluation used best practices, but did not assess Student’s social/emotional concerns, despite the indication that Student was struggling with anxiety and difficulties with peer interaction. She also noted that although Student’s IEP included social/emotional goals and services, the were no baselines for the goals drawn from assessments. (Witness 1’s testimony).
25. Her opinion of 60 minutes per month was too little to address the goals given the level of ■ anxiety and ■ lack of academic progress. The advocate could not say exactly how much service Student needs, however. Without Student having been assessed, she cannot say for certain that Student’s anxiety is affecting Student’s working memory, and this is why Student needs to be tested not to make that determination. This advocate had not met Student, had not participated in any of the Student’s IEP meetings or conferred with any teachers of services providers. (Witness 1’s testimony)
26. Petitioner also presented at hearing an expert in speech language pathology who reviewed Student’s evaluations and met with Student through video conferencing. Based upon her review of records and interaction with Student, she opined that Student would have difficulty with verbal expression, understanding what is being said to Student, difficulty with verbal assignments and completing assignments and understating information and responding correctly to questions. She recommended that Student continue to receive speech language services to address these concerns and perhaps needs an increase in services. (Witness 2’s testimony)
27. She noted that Student’s IEP speech language goals cited that same baseline data, and although the goals were descriptive and measurable the goals were repeated in multiple IEPs. She reviewed ■ services tackers for speech and IEP progress reports that showed Student was progressing, but the goals and baseline data were not updated as they should have been if progress was being made. She opined that Student needs a speech language reevaluation and an auditory comprehension/processing evaluation. This witness had a

certification in Lindamood Bell (“LMB”) and opined that Student would benefit from LMB testing and services. (Witness 2’s testimony, Petitioner’s Exhibits 32-3, 32-4, 37)

28. Student has been assessed at LMB for compensatory services. Student demonstrated deficits in receptive and expressive language skills. Student’s word attack and oral reading of sight words were assessed as average. Student’s math calculation skills were significantly below grade level. LMB has proposed that Student be provided independent tutoring in their education programs to assist Student in addressing reading and math calculation skills for 240 hours for about 12 weeks of one to one instruction for 4 hours per day. LMB would then reassess Student to set next goals. LMB believes Student’s needs multiple rounds for as many as 40 to 50 weeks total to assist Student in reaching grade level in academic functioning. Student can receive the instruction services at LMB’s center, or online off-site. The hourly rate for the LMB services is \$136.00 per hour. (Witness 3’s testimony, Petitioner’s Exhibit 48, 52)
29. Petitioner’s other educational advocate who attended Student’s May 1, 2019, IEP meeting reviewed Student’s evaluations and IEPs and opined that Student’s IEPs from April 2017 were inappropriate because, among other things some of the goals and baselines were repeated, some of the goals were unrealistic and unattainable given Student’s academic deficits. In addition, she opined at the hearing that the IEPs prescribed too few hours of specialized instruction, were not based on comprehensive evaluations because Student’s social/emotional concerns were not assessed, and the transition plans were not realistic in light of Student’s current academic deficits. Based upon this witnesses review of DCPS’ guidelines, she opined that Student should have had a change of placement to a more restrictive LRE to even a full-time special education program. (Witness 4’s testimony, Petitioner’s Exhibit 51)
30. School A is an application school and not Student’s boundary school. School A staff have been working with Student to address attendance issues. Student has been a bit overwhelmed and as result undermotivated to do class work. In the last year or so that Student has attended School A, the School A staff have periodically asked Student whether Student wanted to attend a different school, but Student preferred to stay at School A. However, the School A team has never discussed increasing Student’s specialized instruction. (Witness 6’s testimony)
31. The educational advocate who attended the May 1, 2019, IEP meeting also prepared a compensatory education plan to compensate Student for the alleged denials of FAPE in Petitioner’s due process complaint from April 2017. The advocate proposed Student be provided 800 to 1000 hours of LMB instruction, 50 hours of social/emotional counseling, 25 hours of transition counseling, a credit recovery program with 50 hours of independent tutoring for each recovery course. (Witness 4’s testimony, Petitioner’s Exhibit 50)
32. At the resolution meeting following Petitioner’s filing of the due process complaint, DCPS authorized an independent vocational assessment and agreed to conduct the other evaluations Petitioner requested. The DCPS evaluations have been initiated and are close to being completed, if not already completed. (Witness 5’s testimony)

33. The DCPS Compliance Manager conferred with School A and Student's boundary DCPS school about graduation requirements at each. School A does not have the ability to implement the Student's draft IEP that was developed after the May 1, 2019, IEP meeting. Student's boundary school can implement the draft IEP. (Witness 5's testimony)
34. Student believes that Student would feel less anxious at school if Student had classes with fewer Students and if teachers were more readily available to assist Student when Student is in need. Student has not met with anyone during SY 208-2019 about what Student wants to do after high school or to work on transition goals. Student is aware of the requirements needed to obtain a high school diploma at School A as noted in Student's Letter of Understanding. Student believes that if Student goes to school an additional year and has sufficient support, Student can meet the requirements to graduate in SY 2019-2020. Student is open to going to another school if the school would provide Student with more support. If Student is awarded services at LMB Student is willing to participate and hopeful that with the additional support Student can make academic strides. (Student's testimony, Petitioner's Exhibit 29)

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. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Respondent held the burden of persuasion on issue #1 after Petitioner established a prima facie case. Petitioner held the burden of persuasion on issues #3 and #4.⁹ The normal standard is preponderance of the evidence. See,

⁹ 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

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).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to provide Student with IEPs (for the past two calendar years) that were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEPs (a) did not provide sufficient specialized instruction outside of the general education setting, and/or (b) did not provide sufficient hours of related services, and/or (c) the goals and baseline data were not revised and updated, and/or did not prescribe ESY services.

Conclusion: Respondent did not sustain the burden of persuasion by a preponderance of the evidence on this issue. The Hearing Officer concludes Student was denied a FAPE because the IEPs that School A developed for Student in the past two calendar years were not reasonably calculated to enable Student to make progress appropriate, in light of the Student's circumstances.

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).

persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

“The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew 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 *Endrew 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.

The evidence demonstrates that when Student was evaluated during SY 2015-2016, Student’s WJ-4 academic scores, as measured in age equivalency, demonstrated that Student was performing academically from 5 to 7 years below Student’s age at the time. School A was aware that Student presented in school as shy, frequently did not ask for assistance from the teacher when Student

did not understand what was being taught and that Student's academic pace was significantly slower than Student's grade level peers.

Student's November 12, 2015, IEP prescribed 6 hours per month of specialized instruction in general education, 6 hours per month of specialized instruction outside general education, 60 minutes per month of speech language pathology, and 60 minutes per month of BSS.

On October 7, 2016, School A updated Student's IEP and prescribed the same level of services. Yet, Student's IEP progress reports indicated in some IEP goals, including reading, Student demonstrated no progress. Student's special education teacher noted that Student continued to withdraw in all classes, did not interact with peers or teachers, did not complete in-class or homework assignments. Student was observed to only complete work during pull-out sessions with the special educator. Nonetheless, School A maintained the same level of services in Student's IEP in the same educational setting.

On April 4, 2017, School A updated Student's IEP. The IEP noted that in math Student had been recently assessed at the first percentile relative to peers and needed significant support. The IEP noted that in reading, Student had recently been assessed as reading at the first-grade level and needed significant support. Student's reading goals were repeated. Nonetheless, School A maintained the same level of services in Student's IEP in the same educational setting.

On March 13, 2018, School A updated Student's IEP. Again, some of Student's academic goals were repeated and the IEP continued to prescribe the same level of services as Student's prior IEPs. In September 2018 DCPS noted in the AED and FEDR that Student engaged in off-task behaviors did not always ask for help when needed, was shy and anxious in the educational setting.

On September 27, 2018, and on February 9, 2019, School A convened meeting and reviewed Student's progress and despite Student's lack of progress, documented academic deficits and class avoidance School A continued the same level of services in Student's IEP in the same educational setting. Although it appears that School A addressed Student attendance with an action plan, the plan did not alter Student's continued class avoidance and Student failed most if not all classes during SY 2018-2019.

Student credibly testified that about Student's desire for additional support in the general education setting. Although the evidence demonstrates Student had the support and instruction from Student's special education teacher, both inside and outside the general education classroom as Student's IEPs prescribed, the level of services as well as the setting in which the services were rendered were insufficient and inappropriate.

Petitioner's expert witnesses testified that it was their opinion Student's IEPs did not provide sufficient specialized instruction outside of the general education setting, may not have provided sufficient hours of related services, and many of the IEP goals lacked baseline data and were not revised and updated. In addition, although Student was prescribed ESY services in summer 2018 and did not attend ESY services, there was no evidence as to why Student's ESY services were removed for summer 2019.

DCPS did not present witnesses that countered the evidence or the expert opinions of Petitioner's witnesses regarding the appropriateness of Student's IEPs. In light of the evidence of Student's academic deficits, class avoidance and failure to attend the classes Student found too difficult, and Student's failure of courses during SY 2018-2019, the Hearing Officer concludes that Student's IEPs for the last two calendar years at School A, were inappropriate, principally because they lacked appropriate level of services in the appropriate educational setting. Student should have clearly had more specialized instruction and had that instruction outside the general education setting. Consequently, the Hearing Officer concludes the Respondent did not sustain the burden of persuasion by a preponderance of the evidence on this issue and Student was denied a FAPE in this regard.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive reevaluation in September 2018.

Conclusion: Petitioner sustained the burden of proof by a preponderance the evidence on this issue. The Hearing Officer concluded that School A failed to comprehensively evaluate Student and Student was denied a FAPE.

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 [REDACTED] 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 November 2013. Although Petitioner’s expert witness testified that this evaluation was sound, that witness pointed out that the evaluation did not assess Student’s social/emotional functioning. The evidence demonstrates that School A as early as 2015 was aware of Student’s significant and demonstrated anxiety and difficulties with peer interactions. School A noted did not, however, initiate any assessment of Student’s social emotional functioning. Student’s anxiety continued and resulted in class avoidance and eventually failing grades. Although School A provided Student in-school BSS and Student has had outside counseling in the school setting, there was no indication that School A ever evaluated Student to effectively address these social/emotional concerns.

Petitioner’s witness who was qualified as an expert in psychology testified that School A’s evaluation of Student did not have clinical measures to address Student’s social/emotional functioning despite the fact that Student’s educational records clearly indicated that an assessment was warranted. Petitioner’s other witness who was an expert in speech language pathology also testified that Student needed an updated speech language evaluation. These witnesses’ expert testimony about the need for additional evaluations was not refuted by any DCPS witness.

Consequently, the Hearing Officer concludes that School A’s failure to conduct additional assessments of Student’s social emotional functioning and an updated speech language evaluation was a denial of FAPE to Student. The Hearing Officer in the order below directs DCPS to conduct these evaluations.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to implement Student's IEP and/or transition plan during SY 2017-2018 and/or during SY 2018-2019.

Conclusion: Petitioner sustained the burden of proof by a preponderance the evidence on this issue. The Hearing Officer concludes that School A's failure to provide Student the transition services that were prescribed in Student's IEP was a denial a FAPE.

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).

Although Petitioner asserted that Student was not provided the specialized instruction that was prescribed in Student's IEP, Student testified that Student met with the special education teacher/case manager on a weekly basis and that the case manager assisted Student in understanding and completing the work Student was assigned in Student's classes. Consequently, the Hearing Officer concludes that School A provided Student the specialized instruction prescribed in Student's IEP and there was no denial of FAPE in this regard.

However, Student testified that Student never met with anyone regarding transition goals. There was insufficient credible testimony to refute Student's testimony in this regard. Student IEP prescribed that Student was to be provided 5 hours of transition services. Although compared to the level of instruction and related services Student's IEP prescribed, the amount of transition services is far less, the evidence demonstrates that Student was provided none of these services. As result the Hearing Officer concludes that the failure to provide Student any transition services was significant and 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.

Although Petitioner requested as relief that DCPS conduct evaluations, revise Student's IEP, provide Student an appropriate LRE and placement and provide Student compensatory education, DCPS has already authorized Student to obtain an independent vocational assessment and begun, and perhaps completed, the requested psychological and speech language evaluations. Consequently, in the order below the Hearing Officer directs DCPS, if it has not already done so, to complete the remaining evaluations, within a time certain review the evaluations and update Student's IEP to provide at least 20 hours of specialized instruction per week.

Petitioner has requested as compensatory education that Student be provided LMB services in an amount of 800 to 1000 hours. The evidence demonstrates that Student would benefit from at take advantage of the LMB instruction. However, the LMB assessments indicated that Student's academic functioning was average in some respects. Petitioner's witness from LMB opined that Student should attend LMB for virtually a year at 4 hours per day. There is little indication that Student would be able to tolerate that level of services, given the added demands that Student would have simply attending and meeting in-school demands during SY 2019-2020. In addition, the recommendations for these services, were made without the benefit of the additional evaluations that are to be completed and reviewed. Consequently, the Hearing Officer is not convinced that the requested amount of LMB instruction that has been requested is appropriate. The Hearing Officer will, however, grant Student 240 hours of LMB services as compensatory education for the denials of FAPE that have been determined in this decision. Based on the evidence of Student's academic deficits and strengths in some areas and Student's proximity to completion of high school graduation, the Hearing Officer concludes that this level of instruction is appropriate as compensatory education.

Although Petitioner also requested that Student be provided credit recovery, the evidence was not clear as to the number of credit recovery courses Student would need or be able to complete during SY 2019-2020. Consequently, the Hearing Officer directs DCPS to determine at the multidisciplinary team ("MDT") meeting to be held, the appropriate credit recovery courses and provide Student tutoring to assist in completing those courses. The Hearing Officer does not find that there is a sufficient basis to provide the other relief Petitioner requested.

ORDER: ¹⁰

1. DCPS shall, within twenty (20) business days of the issuance of this order, if it has not already done so, complete the pending comprehensive psychological evaluation and speech

¹⁰ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioners shall extend the timelines on a day for day basis.

language evaluation and convene an MDT meeting to review those evaluations and revise Student's IEP as appropriate to, among other things, prescribe at least 20 hours of specialized instruction per week outside general education.

2. In addition, when the MDT meeting it shall consider whether Student warrants additional related services and update Student's transition plan based on the results of the independent vocational assessment, if that evaluation is completed and available.
3. In addition, when the MDT meets it shall determine the appropriate number of credit recovery courses Student will be provided during SY 2019-2020 and provide Student and independent or in-school tutoring to assist Student in completing those courses.
4. DCPS shall authorize and fund 240 hours of instruction at LMB at the LMB's hourly rate, not to exceed \$136.00 per hour.
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 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: July 16, 2019

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