

OSSE
Office of Dispute Resolution
July 29, 2020

<p>Parent on Behalf Student,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Respondent.</p> <p>Case # 2020-0048</p> <p>Date Issued: July 18, 2020</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Dates: May 20, 2020, May 21, 2020 June 9, 2020, July 6, 2020, July 10, 2020</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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1 This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, July 18, 2020, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student’s parent (“Petitioner”) in the District of Columbia and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is a currently age ____² and attends a DCPS school (“School A”). Student is eligible for special education and related services pursuant to IDEA with a disability classification of Autism Spectrum Disorder (“ASD”). Prior to attending School A, Student had been home schooled since 2010, when Student was last enrolled in a DCPS school.

Petitioner re-enrolled Student in DCPS in 2018 and requested that DCPS offer Student a free appropriate public education (“FAPE”). DCPS evaluated Student in July 2018, found Student eligible for special education in August 2018, and drafted an individualized education program (“IEP”) for Student on August 23, 2018. Student began attending School A at the start of school year (“SY”) 2018-2019. DCPS reviewed Student’s IEP and progress on November 7, 2018, and conducted an annual review of Student’s IEP on May 30, 2019.

On February 18, 2020, Petitioner filed her due process complaint against DCPS asserting that DCPS has denied Student a FAPE by, among other things, failing to fully implement Student’s IEP, failing to failing to conduct a timely and comprehensive reevaluation of Student in July 2018, failing to develop appropriate IEPs for Student, and failing to provide Student the appropriate least restrictive environment (“LRE”) in a separate special education school as of May 30, 2019.

Relief Sought:

Petitioner seeks the following as relief: A finding of denial of a FAPE and that DCPS be ordered to conduct a functional behavior assessment (“FBA”) and an assistive technology (“AT”) assessment; develop an updated behavior intervention plan (“BIP”), amend Student’s IEP to include the following: an increase in specialized instruction and a change in the LRE to a separate day school, increase related services to previous levels: 120 minutes/month of occupational therapy (“OT”) and 240 minutes/month of direct speech language pathology services (“SLP”), revise adaptive goals and written expression goals, place and fund Student at a separate special education day school with transportation and provide Student compensatory education.

² Student’s age and grade are listed in Appendix B.

LEA Response to the Complaint:

The LEA filed a response to the complaint on February 27, 2020. The LEA denies that there has been any failure to provide Student with a FAPE. In its response DCPS asserts, inter alia, the following:

Student was registered as a home school student for SY 2017-2018. DCPS received a referral for evaluation of Student on May 1, 2018. On June 6, 2018, DCPS convened a meeting to review Student's existing data and determine what assessments to conduct. The team agreed to conduct comprehensive psychological, speech-language, and occupational therapy assessments. The team also agreed to complete the Student Difficulties Questionnaire and Motivation Assessment Scale. Petitioner did not request, and the team did not agree that FBA and AT assessments should be conducted. Student was appropriately evaluated.

On August 23, 2018, the multidisciplinary team ("MDT") convened to review the evaluations and determine Student's eligibility for special education services. The team determined student should be identified as a Student with ASD. Petitioner did not request, and the team did not determine additional assessments were necessary. Student was appropriately evaluated.

The team determined Student required 21 hours per week of specialized instruction, 240 minutes per month of SLS, 240 minutes per month of OT, and 240 minutes per month of behavioral support services ("BSS") outside general education. The IEP also requires 30 minutes per month of SLP consultation services and 60 minutes per month of BSS consultation services. The IEP was appropriate when it was developed.

The team agreed Student should receive services in a Communication and Education Supports Classroom ("CES"). On September 7, 2018, DCPS issued a location of service letter identifying School A as the school where the IEP could be implemented.

On November 7, 2018, the MDT convened to review Student's progress under the IEP. The team agreed to maintain the same level of special education and related services. On May 30, 2019, the MDT convened to review and revise Student's IEP. The team determined Student required 21 hours per week of specialized instruction, 180 minutes per month of SLP, 60 minutes per month of OT, and 240 minutes per month of BSS, all outside general education. The IEP also requires 15 minutes per month of SLP consultation services and 60 minutes per month of BSS consultation services. The IEP was appropriate when it was developed.

DCPS did not fail to implement Student's IEP during the 2018-2019 and 2019-2020 SYs.

On January 17, 2020, Petitioner's advocate requested permission to observe Student at School A. On February 12, 2020, DCPS responded denying the requested observation. Respondent requests that the Hearing Officer deny petitioner's request for relief.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on March 3, 2020, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on March 20, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on May 3, 2020. DCPS counsel submitted a motion to continue the hearing and extend the HOD due date due to the COVID-19 emergency and school closing. Petitioner's counsel opposed the motion. The Hearing Officer granted the motion setting the new hearing dates of May 20, and 21, 2020, and extending the HOD due date to June 2, 2020.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on March 11, 2020, and issued a pre-hearing order ("PHO") on March 11, 2020, and a revised PHO on April 7, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:

1. Whether DCPS denied Student a FAPE by failing to implement Student's IEP during SY 2018-2019 and/or during SY 2019-2020 (through December 2019) by failing to provide the full extent of BSS, SLS and OT services that Student's IEPs required.
2. Whether DCPS denied Student a FAPE by failing to conduct a timely and comprehensive reevaluation by July 2018 and/or thereafter.³
3. Whether DCPS denied Student a FAPE by failing to provide Student with an IEP (in August 2018 or November 2018) that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP: (a) did not prescribe AT; (b) lacked sufficient PLOPs, measurable baseline data and appropriate goals in the following areas: math, reading, speech, BSS and OT⁴; (c) lacked written language goals; and (d) lacked adaptive goals.
4. Whether DCPS denied Student a FAPE by failing to provide Student with IEP on May 30, 2019, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP did not prescribe an LRE in a separate day school with all service hours outside the general education setting.
5. Whether DCPS denied Student a FAPE by failing to provide Student with IEP on May 30, 2019, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP (a) lacked appropriate baselines and PLOPs; (b) lacked goals in the area of written expression; (c) lacked appropriate adaptive goals (d) removed goals Student had never mastered; (e) contained goals in the area of math that were not attainable or appropriate; (f) contained goals in related service areas

³ Petitioner asserts DCPS failed to conduct an AT evaluation in July 2018, and an FBA in a timely manner following commencement of SY 2018-2019, as recommended by Student's 2018 and 2019 IEPs.

⁴ Petitioner asserts the goals were inappropriate because they lacked specificity and were far beyond what Student could reasonably be expected to achieve within a year, given Student's level of deficits at the time.

that were not attainable or appropriate; (g) reduced related services without Student having demonstrated any significant progress; (h) was not based on comprehensive evaluations; (i) did not adequately consider Student's need for AT, and (j) prescribed too few hours of specialized instruction.⁵

6. Whether DCPS denied Student a FAPE by failing, since August 2018, to timely conduct an FBA and develop a BIP.
7. Whether DCPS denied Student a FAPE by failing to allow Petitioner's designee to observe Student in the classroom setting.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on May 20, 2020, May 21, 2020. DCPS was not able to complete its case and the parties agreed to continue the hearing for the following hearing dates: June 9, 2020, and July 6, 2020, and to extend the HOD due date to July 18, 2020. The parties presented oral closing arguments on July 10, 2020.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and are the sources of the findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 29 and Respondent's Exhibits 1 through 27) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

Petitioner held the burden of persuasion of issues #1, #2, #6, and #7. DCPS held the burden of persuasion on issues #3, #4, and #5 after Petitioner established a prima facie case on those issues.

⁵ Although Petitioner asserts Student's IEP should have prescribed an LRE in a separate special education day school, Petitioner, in the alternative, asserts that Student's IEP should have prescribed more hours of specialized instruction than the 21 hours per week outside general education it prescribed. This alternative argument, the Hearing Officer presumes, is being made in the event there is insufficient evidence presented that Student requires an LRE in a separate special education day school.

⁶ Petitioner presented four witnesses: (1) An Independent Occupational Therapist who testified as an expert witness, (2) Petitioner, and (3) Principal of the non-public school that Petitioner is seeking, and (4) a Psychologist who testified as an expert witness and who is an employee by the law firm representing Petitioner. DCPS presented seven witnesses, all of whom testified as expert witnesses: (1) Student's Special Education Teacher at School A, (2) DCPS Speech Language Pathologist (3) DCPS Social Worker (4) Special Education Teacher at Student's 2018 eligibility and IEP meeting, (5) DCPS Occupational Therapist who evaluated Student (6) Another DCPS Occupational Therapist who provided Student make-up OT services (7), and another DCPS Occupational Therapist who provided Student OT services. The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law.

The Hearing Officer concludes, based on the evidence adduced, that Petitioner sustained the burden of persuasion by a preponderance of the evidence on issues #1, #2 and #6. The Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #7. The Hearing Officer concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence on issues # 3, and #4. Having found a denial of FAPE, the Hearing Officer directed DCPS to authorize compensatory education and to conduct evaluations and update Student's IEP as appropriate. The Hearing Officer did not grant Petitioner's request for independent evaluations or Student's placement in a non-public special education day school.

FINDINGS OF FACT:⁷

1. Student resides with Student's parent, Petitioner, in the District of Columbia and DCPS is Student's LEA. Student attends School A, a DCPS school. Student is eligible for special education and related services with a disability classification of ASD. (Petitioner's testimony, Petitioner's Exhibit 4-1)
2. Prior to attending School A, Student had been homeschooled since 2010, when Student was last enrolled in a DCPS school. Petitioner was not satisfied with the services that Student was receiving when enrolled in that previous DCPS school, and Student did not seem to be making progress. (Petitioner's testimony, Petitioner's Exhibits 17-1, 21)
3. On May 1, 2018, Petitioner signed a DCPS referral form to initiate the eligibility determination for Student to receive special education and related services. On the form, Petitioner checked the following as the major areas of concern regarding Student: speech-language, social/emotional, cognitive impairment, attention problems, and Autism. During Petitioner's discussions with DCPS about evaluations, there was no request by Petitioner for, and no discussion of, an AT assessment. (Petitioner's testimony, Witness 6's testimony, Petitioner's Exhibit 21)
4. Thereafter, DCPS conducted the following evaluations of Student during July 2018: comprehensive psychological, OT evaluation, an SLP evaluation. (Petitioner's Exhibits 17, 18, 19)
5. The DCPS psychologist interviewed Petitioner and Student, conducted a record review, and administered the following assessments: Adaptive Behavior Assessment System-Third Edition (ABAS-3), Behavior Assessment System for Children, 3rd Edition (Parent), Reynolds Intellectual Assessment Scales – Second Edition (RIAS-2), and Woodcock-Johnson Test of Academic Achievement-Fourth Edition (WJ-IV). The evaluator reviewed the last psychological evaluation conducted by DCPS on April 26, 2012. That

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. FOFs derived from the Administrative Record, are followed by "AR" and the page number from the AR. Other documents cited are noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

evaluator found that although Student was unable to complete many subtests of the cognitive assessment and scored Far Below Average on long-term memory measures, Student had an Average score on task of visual perception recognition skill and nonverbal concept formation and had solid nonverbal reasoning skills. During the July 2018 testing, Student required consistent breaks and redirection and was uncooperative at times and had challenges managing frustrations when completing difficult tasks such as math problems. Student's cognitive assessment scores were fall below average at the first percentile for Student's age. Student's academic achievement was in the Very Low range for reading. Student was unable to complete the writing tasks and Student's spelling abilities fell in the Very Low range. Likewise, Student's math abilities fell in the Very Low range. Student showed no concerns with anxiety-based behaviors or depression. However, Student's adaptive functioning was varied from the Below Average range in communication, functional academics and self-direction skills, as high as 2% of students of comparable age, to the Extremely Low range in the social domain, as high as 2% of students of comparable age. Student's practical domain skills, which includes self-care, was in the Low range, as high as .3% of students of comparable age. The Adaptive Behavior Assessment-Third Edition (ABAS-3) was administered as part Student's 2018 psychological evaluation and the result yielded scores in the Low range in areas such as Communication, Community Use, and Leisure; scores in the Extremely Low range in areas such as Functional Academics, Self-Care, Social, Practical and General Adaptive Composite, and Below average in Conceptual, Self-Direction and Home and Safety domains. The psychologist concluded Student met the criteria for ASD. (Petitioner's Exhibit 17-1, 17-2, 17-4, 17-5, 17-7, 17-8, 17-9, 17-10 17-11).

6. The speech language pathologist concluded based on record review that when Student last received SLP services in 2013, Student was making minimal progress but when told Student could earn time on the iPad, Student would more readily follow directions and engage in lessons. Student demonstrated poor testing stamina during the July 2018 evaluation. Student's communication scores largely remained below the average range with compared with age matched peers. Student's functional language performance for addressing wants and needs was more intact. The evaluator concluded that Student's oral communication weakness did not appear to be a disorder separate and apart from Student's overall cognitive and academic functioning, but was a subset of those functionings. She noted, however, that Student had relative weaknesses in communication skills, including word retrieval and the ability to judge the appropriateness of social language. The evaluator's prognosis for Student's oral communication skills to align with typically developing peers was fair, as Student had an equal number of both positive and negative prognostic indicators. (Petitioner's Exhibit 18-3, 18-12, 18-13)
7. The DCPS occupational therapist conducted an OT reassessment report dated July 30, 2018. The evaluator reviewed Student's prior OT evaluations and the OT goals in Student's last DCPS IEP developed on March 19, 2013. In 2013 Student demonstrated significant delays in fine motor, visual motor and visual perceptual abilities with a plateau in function regarding letter and number formation. Student had made slow progress relative to the OT goals in that IEP. The evaluator interviewed Petitioner and

administered functional assessments of Student and concluded Student continued to have the previous noted deficits and also demonstrated deficits in bilateral coordination, balance, body awareness, self-care skills, functional living skills and social skills that would impact Student's access to grade expected academic and functional tasks. (Petitioner's Exhibit 19)

8. DCPS convened an eligibility meeting on August 6, 2018. Petitioner participated. The team reviewed the evaluations that had been conducted and found Student eligible for special education with the ASD disability classification. (Respondent's Exhibits 3, 5)
9. On August 23, 2018, DCPS convened an IEP meeting. Petitioner participated along with DCPS personnel, including a special education specialist, a general education specialist, a social worker, a speech language pathologist, and a case manager. The team reviewed Student's present levels of performance (PLOPs) in each area evaluated and agreed to IEP goals and services. (Respondent's Exhibits 4, 6)
10. The August 23, 2018, IEP included goals in the following areas only: math, reading, SLP, BSS and OT. The IEP noted that Student displayed repetitive behaviors, was easily distracted, had difficulty engaging, and when frustrated may use expletives and become uncooperative. The IEP noted that Student should receive an FBA and BIP when Student transitioned to an educational setting. The IEP noted that Student did not require assistive technology at the time. The IEP prescribed 21 hours of specialized instruction per week outside general education and 240 minutes each per month of SLP, OT, BSS and 30 minutes per month of SLP consultative services and 60 minutes per month of BSS consultative services. The IEP's LRE page stated that Student would be outside the general education setting 87.27% of the time. The IEP included classroom and testing accommodations that included the use of a calculation device on non-calculator sections, and a non-standard calculation device on calculator sections. (Petitioner's Exhibit 3)
11. The PLOPs for math indicated Student had not attended a traditional school in five years and noted Student's Very Low range math scores from the July 2018 WJ-IV. Student had four math goals: (1) identify and create sets of 5 to 100 objects with 75% accuracy in 4 out 5 trials, the baseline for the goal stated that Student recognizes sets up to 3; (2) identify and name numerals from 1-100 with 75% accuracy in 4 out 5 trials, the baseline for the goal stated that Student identifies numerals to 10 with scattered recognition to 20; (3) count from 1-30 with 100% accuracy and 1:1 correspondence in 4 out of 5 trials, the baseline for the goal stated that Student counts to 20, with scatter counting to 30; (4) solve simple addition problems for quantities 1-10 with 80% accuracy over 3 consecutive sessions, the baseline stated that Student was unable to solve addition problems. (Petitioner's Exhibit 3-3, 3-4)
12. The PLOPs for reading indicated Student had not attended a traditional school in five years and noted Student's Very Low range scores from the July 2018 WJ-IV. Student had five reading goals: (1) write Student's first and last name with 100% accuracy in 3 consecutive trials, the baseline for this goal was Student could write Student's first name with verbal prompting; (2) retell a familiar story in 3 parts with 75% accuracy, the

baseline for this goal was Student tells one story component spontaneously rather than when questioned; (3) be able to sort rhyming words into rhyming families with 80% accuracy, the baseline for this goal stated that Student is developing rhyme recognition skills; (4) verbally identify the main character and accurately identify the character's feelings in familiar story, in 3 out of 5 trials, baseline for this goal stated that Student will use the illustrations to answer questions by pointing; (5) demonstrate print awareness, defining some features of a book, such as title and author with 75% accuracy in 4 out of 5 trials, the baseline for this goal Student can identify the title on the cover of a book and words and letters. The academic goals that were developed were directly based upon the assessment data from the evaluations DCPS conducted. DCPS special education specialist drafted that goals and believed they addressed Student's academic needs particularly given the limited data that was available regarding Student's instruction and performance in the years prior to DCPS evaluating Student in July 2018. (Witness 6's testimony, Petitioner's Exhibit 3-5, 3-6, 3-7)

13. The PLOP for SLP noted Student's scores and descriptions from the July 2018 speech-language evaluation. Student had five SLP goals: (1) increase lexical/semantic skills through sorting and chunking items (e.g., all the ones used in the kitchen for washing dishes) 8 out of 10 opportunities over three consecutive sessions, the baseline for that goal stated two assessment scores from the July 2018 evaluation; (2) given auditory bombardment, selected word lists of targeted phonemes, minimal pairs, modeling, and tactile sensor/feedback (as tolerated), Student will suppress the phonological processes of gliding and deaffrication to 20% occurrences over three sessions, the baseline for that goal stated two other assessment scores from the July 2018 evaluation; (3) given a model, pictures and/or a word bank, Student will use subjective, objective, possessive, reflexive, and demonstrative pronouns in 8 out of 10 opportunities over three consecutive sessions, the baseline for that goal stated two other assessment scores from the July 2018 evaluation; (4) demonstrate improved grammar and syntax at the sentence level, using copula/is, noun/verb, gender/number agreement 8 out of 10 opportunities over three consecutive sessions, the baseline for that goal stated two other assessment scores from the July 2018 evaluation; (5) when presented with a real-life or hypothetical problem, situation, or scenario, Student will identify and verbalize one mutually beneficial solution to a presented problem 8 out of 10 opportunities over three consecutive sessions, the baseline for this goal was two assessment scores from the July 2018 evaluation including pragmatic language and inferences. Student SLP provider is working with Student to communicate verbally. Generally Student's responses are delayed and Student will respond with "what did you say." Student at first required maximum cuing for verbal responses, but not requires moderate cuing. Student has been using pictures to provide responses. (Witness 5's testimony, Petitioner's Exhibit 3-7, 3-8, 3-9)
14. The PLOP for BSS noted the DCPS psychologist's comments regarding Student's results for the BASC-3 and ABAS-III, and noted Student's difficulty in adapting to changing situations, social interaction with others, and Student's extremely low functional academic, self-care and social skills. Student had six BSS goals: (1) using self-calming strategies, the baseline stated that Student is unable to express frustration in a socially acceptable manner; (2) follow 2 step directions with verbal prompting and visuals in 4

out 5 opportunities, the baseline stated Student was home schooled and will experience some difficulty in the new school environment; (3) during unstructured and structured times, Student will interact with peers in an appropriate manner, the baseline stated Student has difficulty with social interactions and communication with peers; (4) when given scenarios of social conflicts Student will demonstrate problem solving skills, the baseline stated during counseling sessions Student requires support in learning and using problems solving skills, (5) given a visual schedule and visual list of school rules, Student will complete activities as assigned with fading prompts in 3 out of 5 opportunities, the baseline stated that student would benefit from a structured classroom where verbal and visual routines and procedures are given; (6) given a token board and tokens or pictures to place on the board, Student will acknowledge reason the token was earned by repeating an adult's prompt in 3 out 5 opportunities, the baseline stated Student responds well to praise and would benefit from the use of a token economy. Because Student was refusing services and due to the BSS provider being on leave for a period, Student missed some of the BSS direct and consultative services that were to be provided. Consequently, Student's BBS goals were maintained. Although Student's IEP recommended an FBA and BIP the School A social worker did not conduct the FBA or develop a BIP because she and other School A staff did not believe Student's behaviors, including work resistance and refusing services, warranted an FBA. (Witness 6's testimony, Petitioner's Exhibit 3-9, 3-10)

15. The PLOP for OT noted the results and comments from the July 2018 OT evaluation and noted Student required adult prompts for bathing and hygiene, manipulated zipper for outer wear, dressed self with reliance of elasticized garments, engaged in computer based activities such as YouTube and video gaming and when asked to form letters attempted with best effort to form upper case letters and numbers with some reversed orientation. The IEP had 3 OT goals: (1) using strategies and accommodations, Student will complete school based self-care tasks in 4 out 5 trials, the baseline noted Student required adult prompting for self-care tasks; (2) using strategies and accommodations, Student will write name on a baseline within designated boundaries with 80% accuracy in 4 out 5 trials, the baseline stated Student is able to label a page with first name only with a letter reversal; (3) using strategies and accommodations, Student will attend to preferred and non-preferred activities for 15 minutes in 4 out 5 trials, the baseline stated, among other things, that Student bumps into things failing to notice objects or people, and had not received OT during the years of homeschooling. (Witness 9's testimony, Petitioner's Exhibit 3-12, 3-13, 3-14)
16. On September 7, 2018, DCPS provided Petitioner a letter stating that School A had been identified as the school at which Student's IEP would be implemented. Student thereafter began attending School A for SY 2018-2019. (Respondent's Exhibit 7)
17. Student enrolled at School A at the end of September 2018. When Student began attending School A, Student had a difficult time adjusting to being around other students and adults. Student often refused to do classwork. Petitioner would receive daily calls or text messages from Student's teacher reporting on both Student's positive and negative behaviors. Student had an altercation with other students on the bus and no longer takes

transportation to School. Student's classroom teacher and others in DCPS recommended that Student receive at home ABA services. However, Petitioner has not yet been able to obtain those services. (Petitioner's testimony, Witness 3's testimony, Petitioner's Exhibit 22)

18. School A reviewed Student's IEP and progress on November 7, 2018, and maintained the services and goals that were prescribed in the IEP. At that point, there was no need to change any of Student's IEP goals as it was too soon to measure Student's performance relative to the goals. (Witness 4's testimony, Petitioner's Exhibit 4)
19. During SY 2018-2019 Student made minimal progress relative to IEP goals because of Student's transition from homeschooling to a traditional school. Student also often refused related services. Student's IEP progress reports indicate that some of Student's goals were not introduced during some of the reporting periods in SY 2018-2019. Student has generally made progress relative to IEP goals and has mastered some of the academic IEP goals during SY 2019-2020. Student generally gets along with peers and performs well in the general education special courses on Student's class schedule. Student interacts with general education students in those classes and during lunch and is usually accompanied by the classroom aide in those classes and at lunch. (Witness 4's testimony, Witness 6's testimony, Respondent's Exhibit 12)
20. On May 30, 2019, School A conducted an annual review of Student's IEP. Petitioner attended the meeting along with School A staff members familiar with Student. The May 30, 2019, IEP, as did the previous IEP, recommended that Student receive an FBA and BIP when Student transitioned to an educational setting. It also stated again that Student does not require assistive technology at this time. (Petitioner's Exhibit 5-2)
21. The PLOP for math in the May 30, 2019, IEP added Student's May 16, 2019, assessment in which Student overall scored at the pre-kindergarten level. Student's math goals were amended and included objectives and the baselines were also changed to reflect Student's current functioning. The PLOP for reading added Student's May 16, 2019, assessment in which Student tested at the second-grade reading level. Student's reading goals were reduced from 5 goals to four and the four were the same reading goals as in Student's previous IEP. The PLOP for SLP remained the same as Student's previous IEP and the number of goals were reduced from 5 to 4 goals, and included objectives; there one new goal and the baselines were also changed to reflect Student's current functioning. The PLOP for BSS remained the same as the previous IEP, as did the BSS goals; however, there were objectives added to the goals that restated the goals. In addition to the data from the July 2018 OT evaluation, the PLOP for OT stated that Student had made some functional gains during the school year, but demonstrated limited participation and refused therapy on occasion that impacted access to treatment activities and progress toward IEP goals. Student's OT goals were reduced from 3 to 2 goals and those 2 were repeated from the previous IEP along with the baselines. Objectives were included that restated the goals. (Petitioner's Exhibit 5)

22. The May 30, 2019, IEP prescribed 21 hours of specialized instruction outside of the general education setting, as well as, SLP, OT and BSS outside the general education setting. Student's BSS services remained at 240 minutes per month. Student's SLP services were reduced from 240 per month to 180 per month. Student's OT services were reduced from 240 minutes per month to 60 minutes per month. The LRE page stated that Student would be outside general education 57.50% of the time. The IEP also prescribed extended school year ("ESY") services for Student for summer 2019. Student's OT and SLP related services were reduced because Student was frequently refusing services and the services providers believed that Student would be served by remaining in the classroom more with peers and that the reduction in services would cause Student to be more receptive and responsive when the related services were actually delivered. Some of Student's academic and related services goals were carried over from the previous IEP because Student had not yet mastered the goals. Student's OT provider suggested that Student make a transition from writing to typing. There was no discussion by the IEP team that Student required goals in the area of written expression or that Student required an AT assessment. (Witness 4's testimony, witness 8's testimony, Witness 10's testimony, Petitioner's Exhibit 5)
23. DCPS issued Petitioner a PWN notice regarding ESY services dated July 17, 2019, noting that Student's IEP team had determined that ESY was required for Student for the provision of FAPE. (Respondent's Exhibit 16)
24. During SY 2018-2019, Student was to receive pursuant to the August 23, 2018, IEP the following amount of related services from October 2018 when Student began attending School A, through June 2019: approximately 45 hours each of SLP, OT and BSS, and 2.5 hours of consult SLP, and 9 hours of consult BSS. DCPS provides make up services to Student for any services missed except when Student is absent or otherwise unavailable. When the service provider is unavailable or when there is school closure, the services are to be made up. The DCPS service trackers indicate that Student missed significant amounts of BSS, SLP, and OT services during SY 2018-2019, that were not due to Student's unavailability. During SY 2019-2020 Student was to receive approximately 28 hours of BSS from the start of the school year until Petitioner's due process complaint was filed. Student was to receive 21 hours of SLP services during that same period and 7 hours of OT services. (Respondent's Exhibits 13, 14, 15, Petitioner's Exhibit 29)
25. In January 2020, Petitioner's educational advocate, who is a licensed psychologist and who is employed by the law firm representing Petitioner, requested of School A staff that she be allowed to observe Student in Student's School A classroom. She made the request knowing that the law firm would be filing a due process complaint. The advocate did not receive a response to her request. The advocate after reviewing Student's evaluations and IEP and progress reports arrived at the opinion that many of Student's IEP goals were unachievable given Student's level of functioning, that the baselines and PLOPs were insufficient, and that Student required a more restrictive LRE. (Witness 4's testimony, Petitioner's Exhibit 22-19, 22-20)

26. Petitioner has toured some non-public schools with the hope that Student would have a change in school location from School A. Student has been interviewed by and accepted to a non-public special education school in the District of Columbia ("School B"). School B has an OSSE Certificate of Approval ("COA"). School B has a student to teacher ratio of no more than 7 students to 1 teacher and 2 paraprofessionals in a classroom. School B can implement Student's most recent DCPS IEP and provides specialized instruction and all related services prescribed by the IEP. School B has a certificate track and diploma track program available for its students and trains students on independent life skills and public transportation travel. School B has a student body of 53, from elementary to high school; 13 of the students are on diploma track. Although Student has become much more adjusted to attending school since beginning at School A and has some friends, Petitioner believes that Student's needs would be better met at School B. (Petitioner's testimony, Witness 2's testimony)
27. Petitioner's advocate presented a compensatory education proposal in which she asserted that during SY 2018-2019 and SY 2019-2020 Student missed the following amount of related services: 23.75 hours of SLP, 6.25 hours of consult SLP, 49.3 hours of BSS, 15.5 hours of consult BSS, 20 hours of OT and 1 hour of consult OT. As compensation for the denials of FAPE alleged by Petitioner, including the above allegedly missed services, in addition to the funding independent evaluations and amending Student's IEP to prescribe all services outside general education, the advocate proposed that Student be provided the following as compensatory education: 322 hours of private tutoring, 92 hours of Applied Behavior Analysis ("ABA"). (Petitioner's Exhibit 28)
28. Petitioner presented an expert witness in the area of OT who opined on Student's OT goals and baselines and the difference between the goals and baselines in Student's two IEPs that were developed at School A. She opined that some of the OT goals and baselines were insufficient and did not actually reflect Student's performance. She also opined that Student's level of OT services should not have been reduced in May 2019, given Student's lack of progress. She also opined that there are a broad range of technology that may be available for Student's use to assist in addressing Student's deficits and achieving Student IEP goals and that an AT evaluation would identify the appropriate technology. Based upon her review of the DCPS OT services trackers she believes Student missed 19 hours and that amount is significant and affects Student's progress or lack thereof. However, she had never evaluated or worked with Student and acknowledged that IEP goals do generally address every OT deficit or need that Student may have. (Witness 1's testimony)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the

child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). In this case, Petitioner proceeded first on the day of hearing and had the burden of production and the burden of persuasion on the following issues #1, #2, #6, #7. Petitioner established a prima facie case before the burden of persuasion fell to Respondent for issues #3, #4, #5.⁸ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue 1: Whether DCPS denied Student a FAPE by failing to implement Student's IEP during SY 2018-2019 and/or during SY 2019-2020 (through December 2019) by failing to provide the full extent of BSS, SLS and OT services that Student's IEPs required.

Conclusion: Petitioner sustained burden of persuasion by a preponderance of the evidence.

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*

⁸ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

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

Columbia, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

The evidence in the case demonstrates that during SY 2018-2019 Student missed significant amounts of BSS, SLP and OT services. Some were missed as a result of Student's unavailability and refusal of services. However, there was sufficient evidence that Student missed significant amounts of these services during SY 2018-2019 due to provider unavailability and school closures. As a result, the Hearing Officer concludes that the missed related services in SY 2018-2019 was denial of a FAPE to Student.

Because Petitioner filed her due process complaint in February 2020, there was still time for any related services that had been missed to be made up by providers by the end of SY 2019-2020. Had it not been for the COVID-19 emergency and the school closure, the services may have been made up. Petitioner has asserted that Student missed the following amounts of services: 23.75 hours of SLP, 6.25 hours of SLP consult, 49.3 hours of BSS and 15.5 hours of BSS consult, 20 hours of OT and 1 hour of OT consult. However these numbers combine the alleged missed services for both school years. As a result, the Hearing Officer concludes that it is equitable to allow DCPS to make up any missed related services to Student for SY 2019-2020 by the end of the first semester of SY 2020-2021. The Hearing officer will thus reduce the amount of services that Petitioner asserted were missed in half and direct in the order below that DCPS provide Petitioner authorization for independent services in that amount, save any missed consult services.

Issue 2: Whether DCPS denied Student a FAPE by failing to conduct a timely and comprehensive reevaluation by July 2018 and/or thereafter.

Conclusion: Petitioner sustained burden of persuasion by a preponderance of the evidence.

34 C.F.R. § 300.303 provides:

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

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

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

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

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

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

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

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

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

Pursuant to IDEA, an assistive technology device is any item, piece of equipment, or product system, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. An assistive technology service is any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device.⁹

Petitioner asserts DCPS failed to conduct an AT evaluation in July 2018, and an FBA in a timely manner following commencement of SY 2018-2019, as recommended by Student's 2018 and 2019 IEPs. However, there is no evidence that any member of Student's IEP team raised any concern that Student required an AT assessment and there was no request by Petitioner for such and assessment at any meeting with DCPS.

Consequently, the Hearing Officer does not conclude that there is any denial of FAPE to Student as result of DCPS not conducting an AT assessment. However, there is evidence that despite Student's significant cognitive and academic deficits Student has taken to the use of computers and Student's DCPS service provider stated that she recommends that Student transition from writing to typing. Although an AT assessment may not be required for such a stated transition,

⁹ 34 CFR § 300.5: *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device. 34 CFR § 300.6: *Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes— (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment; (b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities; (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; (d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; (e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and (f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

the Hearing Officer finds it reasonable for an DCPS to conduct an AT assessment of Student now and directs that it do so in the order below.

However, with regard to the FBA and BIP the DCPS evaluator recommended that these be conducted and developed respectively once Student transitioned to a school setting. The fact that Student had been out of a traditional school for years, and engaged in work and service refusal when Student began attending School A, it was DCPS duty to promptly follow through with this recommendation. It was clearly stated on Student's August 2018, IEP and the update of the IEP in May 2019. The failure by DCPS to conduct the FBA and develop the BIP was a denial of FAPE to Student. In the order below the Hearing Officer directs DCPS to promptly conduct the FBA and develop a BIP.

Issue 3: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP (in August 2018 or November 2018) that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP: (a) did not prescribe AT; (b) lacked sufficient PLOPs, measurable baseline data and appropriate goals in the following areas: math, reading, behavior, speech, BSS and OT; (c) lacked written language goals; and (d) lacked adaptive goals.

Conclusion: Respondent sustained burden of persuasion by a preponderance of the evidence on this issue.

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 IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit* 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. 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, 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.

Petitioner asserts the IEP: (a) did not prescribe AT; (b) lacked sufficient PLOPs, measurable baseline data and appropriate goals in the following areas: math, reading, behavior, speech, BSS and OT (c) lacked written language goals; and (d) lacked adaptive goals. Petitioner also asserted that the goals were inappropriate because they lacked specificity and were far beyond what Student could reasonably be expected to achieve within a year, given Student’s level of deficits at the time.

Petitioner presented an independent occupational therapist and a psychologist who is employed by the law firm that represents Petitioner. These witnesses testified that in their opinion Student’s IEP goals were not appropriate, the PLOPs and baselines were inadequate and the IEP lacked adaptive goals and written expression goals. These witnesses, however, had never evaluated Student, taught Student, talked with any of Student’s teachers or service providers, except one of them during the resolution meeting for the due process complaint.

Their second guessing of the appropriateness of the PLOPs, goals, baselines and even the level of services in the IEP fell far short in credibility and weight when compared with the DCPS evaluators educators and providers who had actually worked with Student.

Prior to the due process complaint being filed, there had been no meeting or request by any of Petitioner’s representatives to review the IEP, its goals and Student’s progress. Had such a meeting been requested, their input on any changes in the IEP and its goals and other provisions could have been considered by a team. Yet, such a meeting was not requested.

Other the other hand, the DCPS witness were far more credible in relating why the goals were chosen, how they addressed Student’s needs, and that they were based on the assessment data that had been derived. Based upon the evidenced adduced, the Hearing Officer concludes that

DCPS sustained the burden of persuasion by a preponderance of the evidence that Student's August 2018 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Issue 4: Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on May 30, 2019, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP did not prescribe an LRE in a separate day school with all services hours outside the general education setting.

Conclusion: Respondent sustained burden of persuasion by a preponderance of the evidence on this issue.

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

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Pursuant to D.C. Code § 38-2561.02(c) Special education placements shall be made in the following order of priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

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

The evidence demonstrates that prior to Student attending School A, Student had been home schooled and away from any other students including typically developing students for years. It

was understandable that Student would have some difficulty making such a transition. The evidence demonstrates that over time Student had begun to make friends at School A and gets along with peers. Student also is able to engage in some special classes with non-disabled peers and has made progress since attending School A. Although Petitioner believes Student would be best served by attending School B, School B has no non-disabled students and no opportunity for Student to gain the benefit that is generally derived from a student being in his or her least restrictive environment as IDEA mandates. DCPS presented sufficient evidence both documentary and testimonial that Student is making slow but steady progress at School A and that such a setting is Student's LRE.

Issue 5: Whether DCPS denied Student a FAPE by failing to provide Student with IEP on May 30, 2019, that was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances because the IEP (a) lacked appropriate baselines and PLOPs; (b) lacked goals in the area of written expression; (c) lacked appropriate adaptive goals (d) removed goals Student had never mastered; (e) contained goals in the area of math that were not attainable or appropriate; (f) contained goals in related service areas that were not attainable or appropriate; (g) reduced related services without Student having demonstrated any significant progress; (h) was not based on comprehensive evaluations; (i) did not adequately consider Student's need for AT, and (j) prescribed too few hours of specialized instruction.¹⁰

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence.

As stated previously, in *Endrew F. ex rel. Joseph F. v. Douglas Cty. 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, 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,

¹⁰ Although Petitioner asserts Student's IEP should have prescribed and LRE in a separate special education day school, Petitioner, in the alternative, asserts that Student's IEP should have prescribed more hours of specialized instruction than the 21 hours per week outside general education it prescribed. This alternative argument, the Hearing Officer presumes, is being made in the event there is insufficient evidence presented that Student requires an LRE in a separate special education day school.

137 S. Ct. 988.

When School A reviewed Student's IEP in May 2019, Student had made some progress, but had not made sufficient progress such that all Student's IEP goals were changed. Some of the academic PLOPs, baselines and goals were changed to reflect some of Student's progress; however, many of the goals and other information was carried over to the new IEP.

As previously stated, Petitioner presented an independent occupational therapist and a psychologist who is employed by the law firm that represents Petitioner. Although these witnesses testified that in their opinion Student's IEP goals were not appropriate, the PLOPs and baselines were inadequate and the IEP lacked adaptive goals and written expression goals. These witnesses however, had never evaluated Student, taught Student, talked with any of Student's teachers or service providers, except one of them during the resolution meeting for the due process complaint.

Their second guessing of the appropriateness of the PLOPs, goals, baselines and even the level of services in the IEP fell far short in credibility and weight when compared with the DCPS evaluators, educators and providers who had actually worked with Student.

Prior to the due process complaint being filed, there had been no meeting or request by any of Petitioner's representatives to review the IEP, its goals and Student's progress prior to the due process complaint being filed. Had such a meeting been requested, their input on any changes in the IEP and its goals and other provisions could have been considered by a team. Yet, such a meeting was not requested.

As previously stated, DCPS's witness were far more credible in related why the goals were chosen, how they addressed Student's needs, and that they were based on the assessment data that had been derived. Based upon the evidenced adduced, the Hearing Officer concludes that DCPS sustained the burden of persuasion by a preponderance of the evidence that Student's May 2019 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Issue 6: Whether DCPS denied Student a FAPE by failing, since August 2018, to timely conduct a FBA and develop a BIP.

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. §300.324 (a) (2) provides: 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.

However, IDEA does not mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions do not apply to this case.

Functional Behavior Assessment or "FBA" refers to a systematic set of strategies used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. See *Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017). See, also, Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. See, e.g., *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

While an FBA is the "primary way" for an LEA to "consider the use of positive behavioral interventions and supports," it is not the only way. *Simms v. Dist. of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *14 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018)

As previously stated with regard to the FBA and BIP the DCPS evaluator recommended that these be conducted and developed respectively once Student transitioned to a school setting. The fact that Student had been out of a traditional school for years, and engaged in work and service refusal when Student began attending School A, it was DCPS duty to promptly follow through with this recommendation. It was clearly stated on Student's August 2018, IEP and the update of the IEP in May 2019. The failure of DCPS to conduct the FBA and develop the BIP was a denial of FAPE to Student. In the order below the Hearing Officer directs DCPS to promptly conduct the FBA and develop a BIP.

Issue 7: Whether DCPS denied Student a FAPE by failing to allow Petitioner's designee to observe Student in the classroom setting.

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

IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an individual may bring an action under the federal statute seeking to enforce the state standard." *Id.* (quoting *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's

educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...¹¹

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee, or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

The evidence demonstrates that Petitioner's educational advocate requested an opportunity to observe Student at School A in January 2020 and that Petitioner attorney followed with a letter stated that there had been no response received by the firm from School A. There was insufficient evidence presented that DCPS ever refused to allow the advocate to observe Student

¹¹ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

classroom at School A. There was no specific proof that DCPS ever received the written request or that there was any written, personal, or telephonic communication from DCPS that it refused the request. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ORDER:¹²

1. DCPS shall, within ten (10) business days, of the date of this order grant Petitioner authorization to obtain the following with public funding at the OSSE prescribed rates: 12 hours of independent SLP services, 25 hours of independent BSS services and 10 hours of OT services.
2. DCPS shall, within twenty (20) school days of the date of this order, once DCPS is provided Petitioner's written consent for same, conduct the following assessments: assistive technology, and FBA and thereafter promptly develop a BIP for Student.
3. DCPS shall within thirty (30) school days of the date of this order review any all recent assessments conducted of Student, review Student's academic, social-emotional and behavioral progress and any other related services progress, and review and revise Student's IEP as appropriate and review Student's LRE, educational placement and location of service for SY 2020-2021.
4. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: July 18, 2020

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

¹² Respondent deadlines for compliance any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.