

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Dates: 6/29/20; 6/30/20</b>
<b>v.</b>	)	<b>Hearing Officer: Michael S. Lazan</b>
	)	<b>Case No. 2020-0096</b>
<b>District of Columbia Public Schools,</b>	)	
<b>Respondent.</b>	)	

## **HEARING OFFICER DETERMINATION**

### **I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on April 29, 2020. The Complaint was filed by the Student’s parent. On May 12, 2020, Respondent filed a response. A resolution meeting was held on May 18, 2020. The resolution period expired on May 29, 2020.

### **II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

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<sup>1</sup>Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

### **III. Procedural History**

A prehearing conference was held on May 28, 2020. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on June 2, 2020, summarizing the rules to be applied in the hearing and identifying the issues in the case. This order was revised twice, on June 4, 2020, and June 5, 2020.

On June 22, 2020, Petitioner moved to appear by phone only. On June 24, 2020, Respondent opposed the motion. On June 26, 2020, Petitioner's motion was denied by written order.

The matter was heard on June 29, 2020, and June 30, 2020, through the Microsoft Teams video conferencing platform, on consent. Oral closing arguments were presented on June 30, 2020. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-39 without objection. Respondent moved into evidence exhibits R-1 through R-3, R-6 through R-17, and R-20 through R-25 without objection.

Petitioner presented as witnesses, in the following order: Witness A, an occupational therapist (expert in occupational therapy); Witness B, a speech and language pathologist (expert in speech and language); and Witness C, an educational advocate (expert in school psychology and IEP development). Respondent presented Witness D, a resolution specialist, as its sole witness.

#### IV. Issues

As identified in the Second Revised Prehearing Conference Order and in the Complaint, the issues to be determined in this case are as follows:

**1. Did Respondent fail to implement the Student's Individualized Education Programs ("IEPs") that were in effect from April, 2019, through March, 2020? If so, did Respondent's act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a Free Appropriate Public Education ("FAPE")?**

Petitioner contended that the Student was not provided with required speech and language services during this time period.

**2. Did Respondent fail to comprehensively reevaluate the Student in all areas of suspected disability in or about November, 2019? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student needed an assistive technology assessment, a speech and language assessment, an assessment of attentional issues, an assessment of autism-related issues, and an assessment of social-emotional issues.

**3. Did Respondent fail to offer the Student an appropriate IEP on or about June 20, 2018? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student's IEP did not contain appropriate Present Levels of Performance ("PLOPs"), baselines, or goals (in part due to the lack of appropriate progress-monitoring data). Petitioner also contended that the IEP did not consider the Student's need for assistive technology despite his/her significant communication deficits, did not contain adaptive goals, failed to include sufficient hours

of specialized instruction, and failed to provide sufficient hours for related services.

Petitioner further contended that the IEP was not based on comprehensive assessments.

**4. Did Respondent fail to offer the Student an appropriate IEP on or about October 18, 2018? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP failed to provide or consider the Student for assistive technology services and failed to contain appropriate PLOPs, goals, and baseline data. Petitioner also contended that the IEP added behavioral support services without assessments, goals, or a description of the Student's needs in this area. Petitioner also contended that the IEP failed to provide adaptive goals, sufficient specialized instruction hours, and/or related service hours. Petitioner further contended that the IEP was not based on comprehensive assessments.

**5. Did Respondent fail to offer the Student an appropriate IEP on or about October 10, 2019? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student's IEP did not contain sufficient/any descriptions of the Student's deficits, goals in the Student's deficit areas, hours of specialized instruction, hours of speech-language pathology, hours of adaptive services, or assistive technology services, and was not based on comprehensive assessments, in particular an assistive technology assessment, a speech and language assessment, an assessment of the Student's issues with attention, an assessment of the Student's issues relating to autism, and an assessment of the Student's social-emotional issues.

**6. Did Respondent fail to offer the Student an appropriate IEP on or about December 2, 2019? If so, did Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP failed to provide for or consider assistive technology services, and did not contain appropriate PLOPS, goals, or baseline data. Petitioner contended that certain goals in the IEP (for mathematics and writing) were improperly removed. Petitioner also contended that the IEP included behavioral support services (consult) without assessments, performance information, or goals, and did not include a description of the Student's needs in this area. Petitioner further contended that the IEP failed to include sufficient specialized instruction and/or related service hours, failed to include adaptive goals, and was not based on comprehensive assessments.

## **V. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with Specific Learning Disability. The Student was originally determined to be eligible for services on November 5, 2014, as a student with Developmental Delay. P-9-1; P-2-1.

2. The Student does not read fluently and when s/he writes, the words generally do not make sense. Testimony of Petitioner. The Student has "no particular strengths" in mathematics, and weaknesses in applied problems, calculation, and math facts fluency. P-11-2. The Student also has "no particular strengths" in reading and is significantly delayed in passage comprehension, oral reading, sentence reading fluency, and other areas. The Student's teachers have commented that the Student has a "monotone expression" when s/he reads and needs 1:1 or small-group instruction in

reading. P-12-5. The Student has delayed expressive and receptive skills, though s/he has good vocal quality and fluency. P-11-4. The Student does not talk unless s/he “has to” and does not make good eye contact. Testimony of Petitioner. The Student also struggles to connect with peers, often having a “flat affect” without emotion. P-11-5.

3. DCPS first evaluated the Student in 2014. An educational evaluation report on October 15, 2014. The evaluator conducted interviews and an observation, and administered the Battelle Developmental Inventory, 2nd Edition (“BDI-2”). The assessment noted that the Student was non-verbal and that, according to Petitioner, a hospital was concerned that the Student might be autistic. On the BDI-2, the Student had low scores for “personal-social” and “cognitive,” indicating “significant” developmental delay. P-13. A speech and language assessment report on the Student, dated October 20, 2014, indicated that the Student presented with profoundly delayed expressive and receptive language skills. The Student did not verbalize during the assessment. R-19. The Student was determined to be eligible for services and was classified as a Student with Developmental Delay on November 4, 2014. P-7-1.

4. For the 2014-2015 and 2015-2016 school years, the Student attended School A, a DCPS public school. P-9-1; P-8-1. For the 2016-2017 and 2017-2018 school years, the Student attended School B, a DCPS public school. P-7-1; P-6-1.

5. An IEP meeting was conducted for the Student on October 26, 2017. The IEP that resulted from this meeting indicated that the Student had a significant delay in his/her expressive and receptive speech skills and would not speak beyond a whisper. The Student could not form his/her own sentences and mostly used gestures to communicate, though the Student had made progress in imitating words and using

receptive vocabulary. The IEP noted that the Student did not isolate different sounds in words and engaged in echolalia. It also indicated that assistive technology was not warranted for the Student. The IEP further stated that the Student could write his/her own name, showed confidence “only” in mathematics, and “loves numbers.” Goals were written for the Student in mathematics, reading, written expression, and communication/speech and language. The IEP recommended five hours of specialized instruction per week inside general education, with 180 minutes of speech-language pathology per month (120 minutes outside general education, sixty minutes inside general education). The IEP also recommended preferential seating, visual supports for oral instruction, repetition of instructions and information, additional time to give verbal responses, and modeling of spoken language. P-6-1-7. The October 26, 2017, IEP was amended on June 20, 2018, to address an issue with the “least restrictive tab.” P-5-1.

6. According to the Student’s IEP Progress Reports for the 2017-2018 school year, the Student progressed to mastery on both mathematics goals and one of the two reading goals. The other reading goal was only introduced in the fourth reporting period. The Student also progressed to mastery on one communication/speech and language goal, with progress noted on the other two goals. R-13. The Student advanced to the “B” level on the Dynamic Indicators of Basic Early Literacy Skills Test of Reading Comprehension (“DIBELS TRC”) at the end of the school year. R-17.

7. The Student continued at School B for the 2018-2019 school year. By the start of the 2018-2019 school year, the Student had regressed back to the “RB” level on the DIBELS TRC measure. P-31-1. An IEP meeting was conducted for the Student on October 18, 2018. The resulting IEP contained the same language as the prior IEP in the

section entitled “Consideration of Special Factors,” which included a brief assessment of the Student’s communication needs and indicated that the Student did not require assistive technology. The IEP indicated that the Student could now rote count from 0-20 and derive the sum and difference of numbers within the range of 1-10, and that the Student could now recognize and write grade-level words (especially when the words were written for him/her). The IEP reported that the Student progressed moderately in reading but had issues with reading comprehension. The Student also struggled to put thoughts into words and did not participate in class, though the Student did improve in comprehension of speech and use of vocabulary. The IEP again recommended five hours of specialized instruction per week, but this time recommended it all be delivered outside general education, with 180 minutes of speech-language pathology per month, and thirty minutes of behavioral support services per month on a consultative basis. The IEP again contained goals in mathematics, reading, written expression, and communication/speech and language. These goals were distinct from the goals on the prior IEP. This IEP also added a section that provided the Student with in-class accommodations, including clarification/repetition of directions, location with minimal distractions, extended time, flexibility in scheduling, and frequent breaks. P-4-1-10.

8. The Student’s report cards for the 2018-2019 school year showed mostly “1” and “2” grades, with “1” meaning that the Student did not show basic working knowledge of skills/concepts and seldom produced work of satisfactory quality, and “2” meaning that the Student showed basic working knowledge of skills/concepts, produced satisfactory work, and usually applied skills/concepts correctly. In reading, the Student was graded “1” in term one and “2” in terms two, three, and four. In writing and



language, and also in speaking and listening, the Student was graded “1” in the first term, “2” in the second term, “1” in the third term, and “2” in the fourth term. In mathematics, the Student was graded “2” in the first three terms and “3” in the fourth term. The Student’s teacher wrote that the Student had begun the year working on “reading behaviors” and has made minimal progress despite the Student’s “Level A” score on the DIBELS TRC. The teacher also reported that the Student had moved from emerging X Level to X Level in mathematics. R-9; P-31-1.

9. In reporting period one of the 2018-2019 school year, the Student’s IEP Progress Report indicated that the Student had mastered two mathematics goals and one reading goal, made no progress on any speech goal, and made some progress on the remaining goals. P-26. These were the same mathematics and reading goals that were mastered in the 2017-2018 school year. The IEP Progress Reports for reporting periods two, three, and four indicated progress on all goals. P-23; P-24; P-25.

10. The Student continued at School B for the 2019-2020 school year. P-2. Petitioner felt that the Student was doing “okay” at first. Testimony of Petitioner. The Student’s iReady mathematics assessment from September 13, 2019, found the Student to be two grades below level in four different mathematics areas. P-11-1. The Student’s DIBELS TRC assessment from September 12, 2019, indicated that the Student was far behind in reading. P-11-2. The Student did not fully understand what s/he read and was unable to write a grade-level sentence. P-11-3.

11. An IEP meeting was held for the Student on October 10, 2019. At the meeting, the Student’s speech therapist stated that the Student had made progress. R-3. After the meeting, Petitioner spoke to the Student’s special education teacher and asked

the teacher to spend additional time on the Student's writing, reading, and social issues. Testimony of Petitioner. The IEP that resulted from this meeting again contained goals in the same areas of concern as the prior IEPs. The "Area of Concern: Academic-Mathematics" section of this IEP indicated that the Student could now rote count to 120, and contained new mathematics goals. The "Area of Concern: Academic-Reading" section of the IEP indicated that the Student could independently read 133 of 160 grade-appropriate vocabulary words and sound out one- to two-syllable words, but had issues using words in a sentence. The IEP also contained new reading goals. The "Areas of Concern: Academic-Written Expression" section of the IEP indicated that the Student could copy words to create sentences, but struggled to form thoughts into words. The IEP also contained new writing goals. The "Area of Concern: Communication/Speech and Language" section of the IEP stated that the Student had improved his/her communication by using sentences, and had improved his/her ability to answer questions about a story. New goals were written for the Student's communication/speech and language issues. All four "Area of Concern" sections of the IEP repeated (from the prior IEP) a description of how the Student's disability affected his/her access to, and progress in, the general education curriculum. This IEP recommended the same amount of specialized instruction, related services, and classroom aids and services as the prior IEP, although in the "Classroom Accommodations and Statewide or Alternate Assessment Participation" section, language relating to clarification/repetition of information, location with minimal distractions, and extended time was eliminated. P-3.

12. A psychoeducational assessment of the Student was conducted by a DCPS psychologist on November 11, 2019. The psychologist reviewed the Student's records,

conducted observations and interviews, and administered the Wechsler Intelligence Scale for Children-5th Edition (“WISC-V”) and the Woodcock-Johnson Tests of Achievement-4th Edition (“WJ-IV ACH”). On the WISC-V, the Student’s Full Scale IQ was 83, at the 13th percentile. On the letter-word identification, sentence reading fluency, and passage comprehension subtests of the WJ-IV ACH, the Student’s skills were found to be in the very low range. On the spelling, sentence writing fluency, and writing samples subtests of the WJ-IV ACH, the Student’s written language skills ranged from average to low average. On the calculation, math facts fluency, and applied problems subtests of the WJ-IV ACH, the Student demonstrated mathematics skills in the average to low average range. The evaluator characterized the Student as testing “far below” grade level in reading and two grade levels behind in mathematics. The psychologist stated that the Student’s “(s)pecific areas of weakness that require intensive intervention were Numbers and Operations, Algebra and Algebraic Thinking, Measurement and Data, as well as Geometry.” The psychologist stated that Student’s mathematics delays required small-group instruction, repeated instruction, sample problems, peer teaching and computer programs as required. The psychologist concluded that the Student had made “minimal to some progress” in mathematical skills. The evaluator also spoke to the Student’s special education teacher, who said that the Student had been more social that year, was well-behaved, and seemed to do better when s/he was in a small setting. This teacher also stated that, although the Student’s attention span had “seemingly” increased, the Student benefitted from 1:1 and/or small-group instruction and seemed to be a visual learner. P-12.

13. An eligibility meeting was held for the Student on November 13, 2019, during which the Student's disability classification was changed to Specific Learning Disability. P-2.

14. Another IEP meeting was held for the Student on December 2, 2019. The resulting IEP contained much the same language as the prior IEP, except that it eliminated the "Area of Concern" sections relating to mathematics and writing. P-2.

15. In the first term of the 2019-2020 school year, the Student received a "1" grade in reading and writing, as well as in language, and a "2" grade in speaking and listening, as well as in mathematics. The Student needed frequent prompting to complete homework, but limited to no prompting in regard to following directions. The Student rarely participated in class and was more independent in mathematics. P-18-1. For the second term, the Student received "1" grades in reading, writing and language, and speaking and listening, and a "2" grade in mathematics. The teacher noted that the Student showed "constant improvement in many areas of schoolwork including decoding words and grade level math standards." P-17-1. In term three, the Student received "2" grades in reading and mathematics, and "1" grades in writing and language and speaking and listening. The Student's teacher reported that the Student was improving in verbal expression but struggled to put thoughts on paper. P-16-1. Throughout the year, the Student rarely participated in class and needed frequent prompting to complete homework, but needed limited to no prompting in regard to following directions. P-17-1.

16. During the first and second reporting periods of the 2019-2020 school year, the Student's IEP Progress Reports stated that the Student had progressed on all goals. P-19; P-21. In the third reporting period, the Student was reported to have

progressed in reading and communication/speech and language. In the fourth reporting period (when instruction was provided via distance learning), no progress was reported in reading, though progress was reported in communication/speech and language. R-11.

17. On iReady testing on January 24, 2020, the Student scored 392, higher than the prior score of 354 on September 13, 2019, but still below grade level. P-20-1; P-22-1.

18. While school was in session in the 2019-2020 school year, the Student resisted attending. Since the closing of schools during the COVID-19 pandemic, the Student has attended school very little. Testimony of Petitioner. Respondent made laptops available to students as a result of the school closures. Testimony of Witness D.

## **VI. Conclusions of Law**

The burden of persuasion in District of Columbia special education cases was changed in 2014. The District of Columbia code now states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, 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 establishes “a prima facie case.” D.C. Code Sect. 38-2571.03(6)(A)(i). The burden of persuasion for Issue #1 and Issue #2 are on Petitioner, since those issues do not directly involve the appropriateness of the child’s IEP or placement. Schaffer v. Weast, 546 U.S. 49 (2005). However, for Issue #3, Issue #4, Issue #5, and Issue #6, the burden of persuasion is on Respondent, provided that Petitioner has presented a prima facie case.

**1. Did Respondent fail to implement the Student’s IEPs that were in effect from April, 2019, through March, 2020? If so, did Respondent’s act or omission violate principles of law established in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student was not provided with required speech-language pathology during the time period in question. The testimony of Witness C was presented in support of this claim. Witness C testified that, based on service trackers in the record, the Student missed 510 minutes, or 8.5 hours, of services during this time. “Failure to implement” claims may be brought if an LEA cannot “materially” implement an IEP. A parent must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district’s school setting provided ten minutes less of specialized instruction per day than was required by the IEP). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). There is no requirement that a student must suffer “demonstrable educational harm” for the parent to prevail. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Pursuant to the applicable IEPs, the Student was recommended for 180 minutes of speech-language pathology per month during the subject time period. Witness C indicated that her missed-time count was based on services that were not actually

received by the Student each month, in effect putting the blame on the school district for services missed when the Student was absent. While IEPs should be implemented with fidelity to ensure that students receive regular related services, Petitioner did not present any authority to support the view that a hearing officer should penalize a school district for a student's absences in this context.

Witness C also did not consider that DCPS provided the Student with more than 180 minutes per month for at least two months. Petitioner contended that a hearing officer must only consider whether a student receives his or her mandate per month, and that "make up" services in other months are irrelevant. However, Petitioner did not present any authority in support of the view that a hearing officer must ignore makeup services when deciding a "failure to implement" claim.

This Hearing Officer will therefore judge this issue by assessing whether DCPS *offered* the Student sufficient speech-language pathology services during the subject time period. According to this Hearing Officer's count, which considers the service trackers submitted into evidence by both sides, the Student was offered ninety minutes of services in April, 2019; 300 minutes in May, 2019; ninety minutes in June, 2019; sixty minutes in August, 2019; 180 minutes in September, 2019; 300 minutes in October, 2019; 120 minutes in November, 2019; 180 minutes in December, 2019; 120 minutes in January, 2020; 180 minutes in February, 2020; 120 minutes in March, 2020; forty minutes in April, 2020; and eighty minutes in May, 2020. Given the above calculation, and in consideration of the fact that the first and last months of school have attenuated schedules in DCPS, the Student was offered less services than the speech-language pathology mandate in the following months: April, 2019 (ninety minutes missed); November, 2019

(sixty minutes missed); January, 2020 (sixty minutes missed); March, 2020 (sixty minutes missed); April, 2020 (140 minutes missed); and May, 2020 (eighty minutes missed). The Student was offered more services than the mandate in May, 2019 (120 minutes more), and October, 2019 (120 minutes more). In total, the Student missed 250 minutes of services, more than half of which were missed during the COVID-19 pandemic, when the Student has not been regularly accessing his/her educational services from Respondent.

It is underscored that the makeup services offered to the Student in May, 2019, and October, 2019, should be counted for the purposes of this issue. The service trackers indicate that the related services provider was aware of services that the Student was going to miss, and the provider tried to make up those services in other months. For instance, in October, 2019, the provider specifically provided extra services to make up for services that the Student was going to miss in November, 2019, and January, 2020. Under the circumstances, this Hearing Officer finds that DCPS reasonably implemented the speech-language pathology mandate on the Student's IEPs during the subject time period. This claim is therefore dismissed.

**2. Did Respondent fail to comprehensively reevaluate the Student in all areas of suspected disability in or about November, 2019? If so, did Respondent violate 28 U.S.C. Sect. 1414(b)(3), 34 C.F.R. Sect. 300.304(c), and related provisions? If so, did Respondent deny the Student a FAPE?**

A Local Educational Agency ("LEA") must ensure that a reevaluation of each child with a disability is conducted if there has been no evaluation within three years (unless the parties deem it unnecessary), if the child's parent or teacher requests such reevaluation, or if conditions warrant a reevaluation. 34 C.F.R. Sect. 300.303(a); 34



C.F.R. Sect. 300.303(b). A “reevaluation” is more than a single assessment. A reevaluation consists of a review of assessments of the child in all areas of suspected disability to assist in determining the educational needs of the child. 28 U.S.C. Sect. 1414(b)(3); 34 C.F.R. Sect. 300.304(c). When conducting a reevaluation, the LEA is directed to use a variety of assessment tools and strategies to gather “relevant functional, developmental, and academic information,” including information from the parent, which may assist in determining (i) whether the child is a child with a disability and (ii) the content of the child’s IEP. The LEA must also use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect. 1414(b)(2); 34 C.F.R. 300.304(b).

Petitioner contended that, in November, 2019, the Student needed an assistive technology assessment, a speech and language assessment, an assessment of the Student’s attentional issues, an assessment of the Student’s autism-related issues, and an assessment of the Student’s social-emotional issues. The record indicates that the Student had an initial evaluation in October, 2014. However, there is no evidence in the record that the Student was reevaluated when his/her “triennial” evaluation was due in approximately October, 2017. According to the record, no formal assessments of the Student were conducted from 2014 until November, 2019, when a psychological assessment evaluated the Student’s cognitive ability and academic achievement.

Witness B, an expert in speech and language, suggested that the Student’s speech-language pathology mandate and IEP goals were insufficient, and that the Student should have been assessed for both speech-language pathology needs and assistive technology needs. She also indicated that the Student should have been tested to determine if s/he

should be diagnosed with autism. Witness B testified that references throughout the record are “red flags” for autism. Respondent did not contest this finding. Witness C testified that the Student should have been assessed on social and emotional issues and attentional issues, since the Student was restless in class and had difficulty making friends and talking to peers. Respondent did not call the psychologist who wrote the November 11, 2019, psychological assessment report as a witness to rebut Witness C’s contentions.

The failure to conduct a comprehensive reevaluation can amount to a procedural violation unless a student’s substantive education is impacted. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828,834 (D.C. Cir. 2006) (“(a)n IDEA claim is viable only if those procedural violations affected the student’s substantive rights”); Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at \*18 (D.D.C. Aug. 26, 2016) (failure to conduct vocational and speech and language assessments). To this Hearing Officer, Respondent’s failure to comprehensively reevaluate the Student must be considered substantive given the unrebutted testimony of Witness B, who suggested that the Student has not made enough progress in speech and language and should be evaluated to identify specific areas to focus on. As a result, Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to comprehensively reevaluate the Student in November, 2019.

**3. Did Respondent fail to offer the Student an appropriate IEP on or about June 20, 2018? If so, did the Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that this IEP did not contain appropriate PLOPs, baseline data, or goals (in part due to the lack of “progress monitoring” data). Petitioner also contended that the IEP did not consider the Student's need for assistive technology despite his/her significant communication deficits, did not contain adaptive goals, failed to include sufficient hours of specialized instruction, and failed to provide sufficient hours for related services. Petitioner further contended that the IEP was not based on comprehensive assessments.

In Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), the Court explained that an IEP must be reasonably calculated to enable the child to receive benefit. Id. at 204. The Court’s decision in Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), elaborated on the doctrine established in Rowley. The Court reasoned that “a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all.” Id. At 1001. The Court held that IDEA “demands” a higher standard—“an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. The Court stated that its ruling “should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities.” Id. Still, the Court stated that courts should fairly expect those authorities to offer a “cogent and responsive explanation” for their decisions. Id. At 1002.

The June 20, 2018, IEP was an amendment of an IEP written on October 26, 2017. This IEP was only in effect for the first two months of the 2018-2019 school year, since the next IEP was written on October 18, 2018. As Respondent pointed out, there is

no requirement that an IEP contain “baselines.” 34 C.F.R. Sect. 300.320. Additionally, this Hearing Officer is not aware of any authority supporting a claim that an IEP was not based on comprehensive assessments, which would be more appropriately alleged as a violation of the school district’s duty to evaluate or reevaluate the Student (as Petitioner alleged in Issue #2).

Moreover, Petitioner’s contention that the IEP did not contain appropriate PLOPs was not convincing. Witness C testified that the PLOPs did not include enough information about the Student’s needs, but the October 26, 2017, IEP updated the Student’s academic levels in all areas of concern, and Petitioner did not show that any issues with the PLOPs had any impact on the Student. J.B. by & through Belt v. D.C., 325 F. Supp. 3d 1, 6 (D.D.C. 2018) (rejecting FAPE claim based on PLOPs as procedural violation). Petitioner’s argument that the IEP did not contain a requirement for assistive technology or adaptive goals must also fail. While Witness B indicated that the Student should be assessed for assistive technology needs, she did not clearly or specifically testify that the Student needed assistive technology. And while Witness C testified that the Student needed adaptive goals in this IEP, she did not explain, with any degree of particularity, why adaptive goals were necessary.

Petitioner did present a prima facie case with respect to the other issues raised herein. Witness C, an expert in school psychology and IEP development, testified that the Student’s reading delays would have made it difficult for him/her to understand instruction in a general education classroom. Respondent did not present a witness to rebut this testimony and meet its burden with respect to this assertion. Witness B, an expert in speech and language, testified that the Student needed more than the stipulated

180 minutes of speech-language pathology per month to make meaningful progress.

Respondent did not present a witness to rebut this testimony and meet its burden with respect to this assertion, either.

Moreover, Witness C credibly testified that the goals in this IEP were inappropriately repeated from the October 26, 2017, IEP. While this IEP amended the IEP of October 26, 2017, and was only in effect a few months, the Student's IEP Progress Report for the fourth reporting period of the 2017-2018 school year indicated that the Student had mastered both mathematics goals, one of two reading goals, and one communication/speech and language goal. Even so, Respondent included all of these already-mastered goals on the Student's June 20, 2018, amended IEP.

Respondent contended that the Student made progress during the time period in question, but presented no witnesses to explain how the Student progressed during the first two months of the 2018-2019 school year, when this IEP was in effect. In addition, no progress was reported on any of the Student's speech-language pathology goals during this time period. Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with an appropriate IEP on June 20, 2018.

**4. Did Respondent fail to offer the Student an appropriate IEP on or about October 18, 2018? If so, did the Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that this IEP failed to provide the Student with or consider the Student for assistive technology services, and failed to contain appropriate PLOPs, goals, and baselines. Petitioner also contended that the IEP added behavioral support services without assessments, goals, or a description of the Student's needs in this area.

Petitioner further contended that the IEP failed to provide adaptive goals, sufficient specialized instruction hours, and/or related service hours. Finally, Petitioner contended that the IEP was not based on comprehensive assessments.

Contentions relating to the failure of an IEP to be based on comprehensive assessments or to contain appropriate adaptive goals, assistive technology services, or baselines have no merit for the reasons discussed in the section of this HOD addressing Issue #2. Petitioner's arguments regarding the PLOPs in this IEP must also fail. The October 18, 2018, IEP contained new PLOPs in all areas of concern, though the PLOPs for written expression and communication/speech and language were partially lifted from the prior IEP. Even if these PLOPs were not written perfectly, Petitioner did not show that the failure to include a comprehensive description of the Student's needs in these sections had any substantive impact on the Student.

Nor did Petitioner show that the IEP contained inappropriate goals. Witness C contended that the goals in this IEP were inadequate because no goals were written regarding the Student's behavioral support services, which were added to this IEP. However, the behavioral support services added to the IEP were "consultation" services (for thirty minutes per month), not direct services. Goals do not need to be added to an IEP every time consultation services are recommended. The IDEA only requires that the IEP "include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that resulted from the child's disability to enable the child to be involved in and make progress in the general education curriculum." Belt, 325 F. Supp. 3d at 16 (rejecting goals claim where the goals mostly repeated from year to year).

However, as in the prior claim, Petitioner presented a prima facie case with respect to the other issues. Again, Witness C testified that the Student's reading delays would have made it difficult for him/her to understand instruction in a general education classroom. Respondent did not present a witness to contest this assertion. Witness B also testified that the Student needed more than 180 minutes per month of speech to make meaningful progress. Respondent did not present a witness to contest this assertion.

Respondent contended that the Student made progress during the time that this IEP was in effect, but presented no witnesses to show that the Student made progress during the 2018-2019 school year. While documents in the record indicate that the Student did progress in his/her IEP goals during the year, no goals were mastered, and the Student's teacher wrote that the Student showed minimal growth in reading at the end of the 2018-2019 school year. Respondent underscored that the Student was then functioning at Level A in the DIBELS TRC, but did not address the statement of the Student's teacher in the Student's end-of-year report card that the Student made minimal growth in reading.

Per Endrew F., Respondent had to present a "cogent and responsive explanation" for their decisions about the IEP at the time of its creation. No such explanation was provided by Respondent's witnesses. As a result, this Hearing Officer is compelled to find that Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with an appropriate IEP on October 18, 2018.

**5. Did Respondent fail to offer the Student an appropriate IEP on or about October 10, 2019? If so, did the Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the Student's IEP did not contain sufficient PLOPs, goals, hours of specialized instruction, hours of speech and language therapy, hours of adaptive services, or assistive technology services, and was not based on comprehensive assessments. As discussed in connection to Issue #3 and Issue #4, claims relating to the descriptions of a student's deficits, adaptive services, and assistive technology services have no merit. Moreover, as discussed in connection to Issue #3 and Issue #4, claims based on Respondent's failure to evaluate are distinct from claims that a student's IEP is inappropriate.

The claims relating to PLOPs in this IEP are also not compelling. The record shows that the PLOPs were changed from those in the October 18, 2018, IEP (though the PLOP relating to written expression was very similar to the earlier PLOP, and the communication/speech and language PLOP was derivative of the PLOP in the earlier IEP). Moreover, as with claims relating to the earlier IEPs, Petitioner did not show that any imperfections with the PLOPs had any substantive impact on the Student's educational performance.

However, Petitioner presented enough evidence to establish a prima facie case on claims that the IEP provided the Student with insufficient specialized instruction and speech-language pathology. At this point, Respondent should have provided the Student with additional specialized instruction because the Student made minimal progress in reading during the preceding year. This IEP also indicated a "large concern" in reading comprehension. Even so, the Student was placed in a general education program for most of the school day without any special education support. In that classroom, the



Student did not participate or respond when called on. Respondent did not present a witness to respond to the contentions of Witness B and Witness C to the effect that the Student's specialized instruction hours and speech-language pathology hours were inadequate in this IEP. Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with an appropriate IEP on October 10, 2019.

**6. Did Respondent fail to offer the Student an appropriate IEP on or about December 2, 2019? If so, did the Respondent act in contravention of 34 C.F.R. Sect. 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), and related authority? If so, did Respondent deny the Student a FAPE?**

Petitioner contended that the IEP failed to provide assistive technology services and did not contain appropriate PLOPs, goals, or baseline data. Petitioner also contended that mathematics goals and written expression goals were improperly removed from this IEP, and repeated allegations that the IEP needed to recommend more specialized instruction, more speech-language pathology, and more information about the Student's behavioral issues. Finally, Petitioner again contended that this IEP failed to include adaptive goals and was not based on comprehensive assessments.

As discussed in connection to Issue #3, Issue #4, and Issue #5, claims relating to PLOPs, behavioral issues, assessments, adaptive services, and assistive technology services have no merit. The main issue with this IEP is whether it was appropriate for the IEP team to eliminate the "Area of Concern" sections for written expression and mathematics. Witness C testified that the Student continued to have significant deficits in both areas during this time period, and the record bears this out. In September, 2019, a teacher indicated that the Student was unable to write a sentence. R-7. An iReady

mathematics assessment from September 13, 2019, found the Student to be two grade levels behind in four different mathematics areas.

Though Respondent did not call any witnesses to defend this IEP, it seems likely that Respondent eliminated these two areas of concern from the Student's IEP because of the November 11, 2019, psychological assessment. This assessment tested the Student's sentence-writing fluency and writing samples on the WJ-IV ACH. On this measure, the Student's skills ranged from average to low average. The psychologist also tested the Student's abilities on calculation, math facts fluency, and applied problems on the WJ-IV ACH. Again, the Student scores reflected skills in the average to low average range.

However, these scores did not lead the psychologist to suggest that the Student did not need special education services in writing or mathematics. The psychologist instead indicated that the Student "worked laboriously" in writing and that his/her writing assignments needed to be modified to allow the Student to complete written work. The evaluator also indicated that the Student was two grade levels behind in mathematics, for which s/he needed small-group instruction, repeated instruction, sample problems, peer teaching, and computer programs. The evaluator indicated that the Student had made "minimal to some" progress in mathematics. The evaluator also interviewed the Student's teacher, who said that the Student benefitted from 1:1 and/or small-group instruction and seemed to be a visual learner. Respondent did not call either the teacher or the evaluator to establish that the Student's scores on the WJ-IV ACH and the WJ-IV ACH were sufficient grounds to eliminate the Student's goals in mathematics and written

expression.<sup>2</sup> Respondent denied the Student educational benefit, and therefore a FAPE, when it failed to provide the Student with an appropriate IEP on December 2, 2019.

### **RELIEF**

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

Petitioner seeks an order to amend the Student’s IEP to include increased specialized instruction (to five hours inside general education and five hours outside general education), with adaptive goals, written expression goals, and mathematics goals that have “appropriate specificity based on progress monitoring data,” and measurable baselines for all goals on the IEP.

DCPS did not contest the statement that the Student’s teacher made to the author of the DCPS psychological assessment, to the effect that the Student “seems to do better in a small setting” and requires 1:1 and/or small group instruction. An additional five hours of specialized instruction inside general education would allow the Student to get this additional, needed attention in general education classes. The record also supports

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<sup>2</sup>Additionally, as with the other IEPs, Respondent did not call any witnesses to contest the position of Witness B and Witness C that the IEPs did not provide the Student with sufficient specialized instruction and speech-language pathology.

Petitioner's claim that the Student requires new written expression and mathematics goals. The Student is well below grade level in both areas, and DCPS did not call a witness in either area to dispute the testimony of Witness C that these concerns should be addressed in the Student's IEP.

All other requests to amend the IEP will be denied. The Hearing Officer has previously ruled that the record does not establish a need for adaptive goals, or that the IEP goals were defective because they were not specific enough and/or did not have measurable baselines.

Petitioner also requests an order directing Respondent to "conduct or fund" a comprehensive psychological assessment, an assistive technology assessment, a speech and language assessment, and an occupational therapy assessment of the Student. DCPS has already authorized all of these assessments at OSSE rates. R-23. Petitioner did not object to the use of these authorizations for the reevaluation. Petitioner's right to these assessments, at OSSE rates, will be so ordered.

During closing argument, Petitioner sought an additional order requiring Respondent to convene an IEP meeting after the completion of the assessments. Though Respondent would likely convene such an IEP meeting in any case, this Hearing Officer will order that an IEP meeting be convened to review the assessments thirty days after the completion of such assessments.

Petitioner also seeks compensatory education in the form of fifty hours of speech-language pathology, forty hours of Applied Behavior Analysis ("ABA") therapy (corresponding to "missed specialized instruction due to behaviors and BSS services"), and 325 hours of private tutoring. 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.” Reid v. District of Columbia, 401 F.3d 516, at 521-23. An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” Id. at 524. The District of Columbia Circuit Court of Appeals has “explicitly disavowed” compensatory education in the form of “cookie-cutter” lump-sum awards when a hearing officer does not explain how the remedy is tailored to provide the services the student was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005).

The record indicates that the Student benefits from 1:1 instruction and could make up for the FAPE denial if s/he is provided with tutoring and an additional speech and language program. Moreover, DCPS has already authorized the requested 325 hours of tutoring and fifty hours of speech services for the Student, which are reasonable and appropriate given that the period of FAPE denial is approximately two years.

Petitioner’s requests for compensatory ABA therapy, and a chance at additional compensatory education through a second due process complaint, are less compelling. There is nothing in the record to establish that this Student needs ABA therapy. Indeed, there is nothing in the record to explain what ABA therapy is. Nor is there any reason to allow Petitioner to bring a second due process complaint on the same facts to gain still more compensatory education. Petitioner is being awarded 325 hours of tutoring and fifty hours of speech-language pathology as a result of the FAPE denial. To this Hearing Officer, this award is a sufficient remedy for the FAPE denial in this case.

Finally, Petitioner seeks a laptop or tablet for the Student, at least in part because Petitioner testified that her computer is broken and that the Student needs a computer to access tutoring services while schools are closed. This Hearing Officer is not aware of any authority encouraging or authorizing hearing officers to order school districts to give students computers or tablets, and Witness D testified that DCPS will provide computers to students once school resumes in August, 2020. This request must be denied.

## **VII. Order**

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay for 325 hours of academic tutoring for the Student, to be delivered at the OSSE rate;
2. Respondent shall pay for fifty hours of speech-language pathology for the Student, to be delivered at the OSSE rate;
3. The above services must be delivered to the Student by December 31, 2022;
4. The IEP team shall reconvene within thirty days to provide the Student with an IEP containing written expression and mathematics goals, as well as ten hours of specialized instruction per week (five hours inside general education, and five hours outside general education);
5. Respondent shall conduct or fund a comprehensive psychological assessment, an assistive technology assessment, a speech and language assessment, and an occupational therapy assessment of the Student, all at OSSE rates;
6. Within thirty days of completion of these assessments, an IEP meeting shall be held to review these assessments of the Student;

7. Petitioner's other requests for relief are denied.

Dated: July 13, 2020

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS

### **VIII. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: July 13, 2020

Michael Lazan  
Impartial Hearing Officer