

OSSE
Office of Dispute Resolution
July 07, 2022

Parent on Behalf of Student,	CORRECTED HEARING OFFICER’S DETERMINATION ¹
Petitioner,	Hearing Dates:
v.	June 7, 2022 June 8, 2022 June 15, 2022
District of Columbia Public Schools (“DCPS”) (Local Education Agency “LEA”)	Counsel for Each Party listed in Appendix A
Respondent.	
Case # 2021-0186	
Date Issued: June 20, 2022	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

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, June 20, 2022, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent ("Petitioner"). Student has been determined eligible for special education and related services pursuant to IDEA. During school year ("SY") 2018-2019, SY 2019-2020, and SY 2020-2021, Student attended District of Columbia Public Schools ("DCPS"), and DCPS was Student's local education agency ("LEA"). While enrolled in DCPS, Student attended Student's neighborhood DCPS school ("School A").

On November 12, 2021, Petitioner filed her due process complaint ("DPC") and asserted that DCPS ("Respondent") denied Student a free appropriate public education ("FAPE") by failing to timely identify Student as a child with a disability under DCPS's child find obligations, and thereafter, failing to provide Student an appropriate individualized educational program ("IEP") after Student was later found eligible for special education.

Relief Sought:

Petitioner seeks a finding that DCPS denied Student a FAPE and an order that DCPS reimburse Petitioner for tutoring fees that Petitioner paid that were provided to Student by a dyslexia specialist, and for two summer academic enrichment programs that Petitioner paid for Student to attend that Petitioner asserts resulted in the academic progress Student should have made had DCPS timely evaluated Student, found Student eligible and provided Student appropriate IEPs.

LEA Response to the Complaint:

On November 22, 2021, DCPS filed a timely response to the DPC and denied that there had been any failure to provide Student with a FAPE. In its response, DCPS stated, inter alia, the following:

Student formerly attended School A during the 2020-2021 school year and was eligible to receive special education as a student with a specific learning disability. Student no longer attends a DCPS school. In January 2020, School A received a request to evaluate from Petitioner. In February 2020, the School A team agreed to evaluate Student. In March 2020, DCPS found Student eligible for specialized instruction and developed an IEP.

DCPS denies failing to provide an appropriate IEP from March 2020 until June 2021. The IEP team considered goals in written expression. However, based on the psychological report, there was not a significant discrepancy between Student's cognitive ability and ■■■ performance in written expression, so the team did not find that Student required goals in written expression. A review of Student's performance in reading and written expression places Student on grade level in all academic areas. In developing the IEP, the school team relied on data compiled from

benchmark data, grades, progress reports, and formal evaluations, including a psychological assessment, teacher reports, and observations. When Student's IEPs were developed, they were reasonably calculated to enable Student to make progress appropriate considering Student's circumstances. DCPS appropriately programmed for Student. As a result, Student was able to make appropriate progress.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on November 23, 2021. The parties did not mutually agree to proceed directly to hearing in this matter. The 45-day period began on December 4, 2021, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on January 26, 2022. The parties filed motions to continue and to extend the HOD due date to accommodate selected hearing dates. The HOD is now due June 20, 2022.

The undersigned independent hearing officer ("IHO") conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on February 17, 2022, outlining, inter alia, the issues to be adjudicated.

ISSUES: ²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to comply with its Child Find obligations and timely evaluate Student and find Student eligible for special education services from November 2019 through March 2020? ³
2. Did DCPS deny Student a FAPE by failing to develop and/or provide Student with an appropriate IEP and/or placement from March 2020 to June 2021 because the IEPs did not (a) provide sufficient hours of specialized instruction and (b) academic goals for written expression? ⁴

² The IHO restated the issues at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated. Petitioner's counsel withdrew portions of issue #2 and issue #3 noted in the PHO. In a June 6, 2022, email, Petitioner's counsel stated the following: "... I am reaching out to provide notice that Petitioner is dropping portions of issue #2 (Inappropriate IEPs) from this matter. Specifically, Petitioner is dropping the allegations in issue #2 as they relate to failure to provide academic math goals, SLP services, behavior support; failure to classify Student as MD; and failure to program for Student's needs as a twice-exceptional student. Therefore, Petitioner will proceed on issue #1 (Child Find) and issue #2 (Inappropriate IEPs) only as it relates to DCPS' failure to provide (1) academic written expression goals and (2) sufficient specialized instruction."

³ Petitioner alleges that School A knew since the time Student was enrolled in 2018 that Student had a learning disorder. Petitioner shared the IEE conducted in 2018, but School A did not find Student eligible for special education and related services. Petitioner alleges that instead, School A made Student engage in English Language Learning with students who did not speak English although Student was a native English speaker. Petitioner alleges that Student should have been found eligible for special education and related services no later than November 2019.

⁴ Petitioner alleges that the IEPs should have prescribed an additional two hours of specialized instruction in the area of written expression.

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 7, 2022, and June 8, 2022. Due to the COVID-19 emergency and at the parties' request, the hearing was conducted via video teleconference on the Microsoft Teams platform. The parties gave oral closing arguments on June 15, 2022.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 63 and Respondent's Exhibits 1 through 47) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

SUMMARY OF DECISION:

Petitioner held the burden of production on both issues adjudicated and the burden of persuasion on issue #1. DCPS held the burden of persuasion on issue #2 after Petitioner presented a prima facie case on that issue. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #1. Respondent sustained the burden of persuasion on issue #2. The IHO granted Petitioner her requested relief of reimbursement for private tutoring and summer academic enrichment camps that Student attended.

FINDINGS OF FACT:⁷

1. During SY 2018-2019, SY 2019-2020, and SY 2020-2021, Student attended DCPS, and DCPS was Student's LEA. During this period, Student resided with Petitioner in the District of Columbia, and DCPS was Student's LEA. While enrolled in DCPS, Student attended School A, Student's neighborhood DCPS school. Before moving to the District of Columbia, Petitioner and Student resided in New York City, N.Y. ("NYC"), where

⁵ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is recorded in Appendix A.

⁶ Petitioner presented four witnesses: (1) Student's Mother (Petitioner) and the following individuals who were designated as expert witnesses: (2) an Independent Psychologist, (3) an Independent Reading Specialist, and (4) Petitioner's Educational Advocate, who was formerly employed by the law firm representing Petitioner. Respondent presented four witnesses, two of whom were designated as expert witnesses: (1) Student's School A Special Education Teacher, (2) Student's School A General Education Teacher, (3) a DCPS Psychologist, and (4) School A's Principal who served as DCPS's LEA Representative. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

Student attended a private school. Student received literacy support and speech-language services at the private school Student attended in NYC. (Petitioner's testimony)

2. In June 2018, while in NYC, Petitioner had Student evaluated by an independent psychologist who developed an independent psychological evaluation report ("IEE"). The IEE was a bilingual evaluation, as Petitioner, Student's father, and Student are bilingual and both English and Petitioner's native language, which is spoken in the home. The evaluator administered the Wechsler Intelligence Scale for Children 4th edition (WISC-IV) to measure Student's intellectual abilities. The evaluator noted that only the WISC-IV was conducted in both languages, and Student answered questions in English. Student's Full-Scale IQ was 88, which fell within the Low Average Range. (Petitioner's Exhibit 20)
3. The evaluator administered the Wechsler Individual Achievement Test-Third Edition ("WIAT-III") to measure Student's academic skills. The evaluator noted that Student's academic profile on the WIAT-III was consistent with Student's reported academic performance in school. Student demonstrated strength in Oral Language at Student's age level within the Average range and weaknesses in Total Reading and Written expression with standards scores of 77 and 73, respectively, which were both measured as Borderline. The evaluator administered the WIAT-III in English only and noted the following: "Given [Student's] much more developed English language skills than [other language] as well as the nature of this measurement, no directions or questions in [other language] was provided." The evaluator noted that Student's responses in English appeared to be age-appropriate but short and minimal. The evaluator concluded that Student's reading and writing skills were substantially below that expected given Student's measured intelligence and diagnosed Student with a Reading Disorder (Dyslexia) and a Writing Disorder (Dysgraphia). (Petitioner's Exhibit 20)
4. While in NYC, Student began working with a literacy tutor who specializes in supporting children with Dyslexia. Student worked with the tutor weekly, initially twice per week. (Witness 1's testimony)
5. Petitioner relocated to the District of Columbia in summer 2018 and enrolled Student at School A at the start of SY 2018-2019. Petitioner provided School A a copy of Student's June 2018 IEE. DCPS conducted a beginning of year ("BOY") reading assessment and determined that Student did not meet grade-level expectations. In October 2018, a DCPS psychologist conducted a review of the IEE, reviewed Student's academic performance since attending School A, and conferred with Petitioner and Student's School A teachers. The DCPS psychologist, despite the diagnoses in the IEE, did not conclude that Student met the criteria for special education. (Petitioner's Exhibits 45, 23)
6. School A convened an eligibility team meeting to review the IEE and other data. The team determined that Student did not qualify for special education because, based on the IEE, Student did not present with a "significant discrepancy" (2 standard deviations between Student's Overall IQ and Student's broad reading and broad writing scores). The team noted that on the English Language Learning ("ELL") screener that DCPS administered to

Student, Student's composite proficiency score in English placed Student at level "Entering" level. Although Student scored proficient in speaking English, Student's reading, writing, and literacy scores in English resulted in Student's composite proficiency score in English being at the lowest level. As a result, the team concluded that Student's lack of academic progress was due to Student's limited English proficiency. School A then provided Student ELL services and academic support through its Response to Intervention ("RTI") supports. The team noted that School A would monitor Student through RTI to determine if Student was making sufficient progress through the research-based interventions. On October 24, 2018, DCPS issued a prior written notice summarizing School A's determination that Student was ineligible for special education. (Respondent's Exhibits 5, 38)

7. Student's SY 2018-2019 report card indicated that Student was performing at the "Basic" level in Reading and Written Language, which reflected that Student was approaching grade-level expectations, but not yet rated as "Proficient," which was considered on grade level. By April 2019, Student English language proficiency scores had risen significantly in Reading, Writing, and Literacy. (Petitioner's Exhibits 40, 41, Respondent's Exhibit 38)
8. Student returned to School A for SY 2019-2020. Student's Second Advisory Progress Report from December 2019 indicated that Student's reading fluency had improved, but Student still struggled with comprehension of grade-level reading texts. (Petitioner's Exhibit 50)
9. On January 15, 2020, Petitioner requested that School A evaluate Student for special education and provide consent for DCPS to evaluate. On February 24, 2020, School A determined that Student was eligible for a 504 Plan based on Student's conditions of Dyslexia and Dysgraphia. The 504 plan provided Student accommodations in the interim while DCPS completed the evaluations to determine Student's eligibility for special education. (Petitioner's testimony, Petitioner's Exhibits 14, 15, 59, Respondent's Exhibits 39, 40)
10. DCPS conducted a psychological evaluation in March 2020. The psychologist administered the WISC-V and Woodcock-Johnson IV- Tests of Achievement ("WJ-IV") to assess Student's intellectual functioning and academic achievement. Student scored at the 99th percentile with an FSIQ of 133. Student's Broad Reading on the WJ-IV was Average, with a standard score of 103. However, Student's reading comprehension score was Below Average at 86. Student's Broad Written Language was Superior, with a Standard Score of 127. The evaluator noted that despite Student's high achievement scores, Student's report card reflected that Student was operating at a Basic level in Reading and Written Expression and that Student was not operating on grade level. The evaluator noted that Student showed a significant discrepancy between Broad Reading and Reading Comprehension. The evaluator concluded that Student qualified for a Specific Learning Disability ("SLD") in Reading. Because there was no such discrepancy in Student's Written Language scores, the evaluator did not determine Student qualified for SLD in Written Language. (Respondent's Exhibit 31)

11. On March 30, 2020, DCPS determined Student eligible for special education, and on April 20, 2020, developed Student's initial IEP that prescribed 2 hours per week of specialized instruction in Reading in the general education setting. At the time of the IEP meeting, Student's general education teacher noted that Student was completing English Language Arts ("ELA") writing assignments. Petitioner requested that writing goals be included in the IEP. DCPS issued a PWN stating that the team considered goals in the area of written expression. The March 2020 psychological report did not find a significant discrepancy in the area of written expression, and the team did not find that Student required goals in the area of Written Expression. The PWN noted Petitioner's disagreement. (Respondent's Exhibits 1, 26, 27, 39)
12. For the first three terms of SY 2019-2020, Student report card reflected that Student was performing at the Basic level (approaching grade level) in Reading, Writing, and Language. In the fourth term, the report card indicated Student was operating at the Proficient level, or on grade level, in all areas. (Respondent's Exhibit 36)
13. In July 2020, parents paid for Student to attend a summer program for students with language deficits at the [REDACTED], a nonpublic special education school. The speech pathologist who worked with Student recommended that Student receive continued speech and language interventions in the school setting. Petitioner also enrolled Student in another literacy summer program. (Petitioner's Exhibit 52, 55, 56)
14. Student returned to School A for SY 2020-2021. DCPS granted Petitioner's request for an independent psychological evaluation conducted in October 2020. The psychologist assessed components of Student's cognitive, social, emotional, and behavioral functioning and Student's academic achievement. The psychologist concluded that Student's intellectual function was consistent with that found in DCPS's 2019 psychological evaluation. She also concluded that Student had vulnerabilities in language-based academic learning that placed Student at risk of missing details in classroom instruction and discussions and failing to grasp task directives fully and the information Student reads. The psychologist noted that Student's performance in the area of Written Language reflected solid spelling skills on a word dictation task, which weakened the integrated writing process. While Student demonstrated age-appropriate sentence-writing skills on a highly structured writing task, Student's writing speed was slow, and word-retrieval, language formulation, and executive functioning problems likely made it difficult for Student to produce written assignments. The psychologist noted that Student was working below grade level per writing assignments and Student's teachers noted that Student needed to continue to work on writing complete sentences, using correct tense and ends of words, and using age-appropriate grammar. The psychologist diagnosed Student, along with other things, with a Specific Learning Disorder with impairment in grammar and clarity/organization of written expression. (Witness 2's testimony, Respondent's Exhibits 32, 33)
15. In March 2021, a DCPS psychologist reviewed the October 2020 independent psychological evaluation, reviewed Student's academic performance, conferred with Student's teachers, and reviewed a DCPS social worker's classroom observation of Student.

The DCPS psychologist noted that in the area of written expression, Student had a relative strength in answering questions using Student's own words and benefits from using sentence starters when writing. The evaluator also noted that Student needed growth in Student's ability to review Student's work to edit in both language and conventions to improve clarity and that Student did not always use appropriate punctuation and at times confused the tenses Student used in writing. (Witness testimony, Respondent's Exhibit 32)

16. School A convened an IEP review meeting on April 8, 2021. Petitioner participated in the meeting along with her attorney and educational advocate. Petitioner requested, among other things, that Student be provided goals and specialized instruction in Written Expression. School A team members concluded that because Student was operating on grade level in Written Expression, as noted in Student's report cards, that Student did not require goals or specialized instruction in the area of written expression. Student's April 8, 2021, IEP prescribed goals in the area of reading and two hours of specialized instruction per week inside general education in that area of reading. The IEP included assistive technology for reading and classroom and testing accommodations, including speech-to-text to demonstrate Student's responses in ELA/Literacy. (Petitioner's Exhibit 12, Respondent's Exhibits 9, 30)
17. On April 19, 2021, School A convened an eligibility meeting at which the team reviewed the Student's October 2020 psychological evaluation and other evaluations that School A had conducted. Petitioner attended along with her attorney and educational advocate. The team determined that Student continued to meet the criteria for SLD in reading but not in the area of written expression. DCPS issued a PWN on April 28, 2021, noting that DCPS reviewed and considered the most recent evaluation data and considered Student's eligibility for specialized instruction in the area of written expression but determined because Student was operating on grade level in written expression as noted in Student's report cards, that Student did not require goals or specialized instruction in that area. (Respondent's Exhibit 8)
18. Student's tutor from NYC continued to tutor Student remotely after Student began attending DCPS. The tutor also participated in the 504 and IEP meetings. The tutor disagreed that Student did not need support in writing. The tutor noted that Student had challenges understanding the components of a paragraph and needed to be steeped in writing step by step to write a clear paragraph. The tutor recommended that Petitioner that Student attend the [REDACTED] summer camp during Summer 2020. In December 2020, the tutor authored a letter to DCPS regarding what she viewed as Student's challenges and needs for special education. (Witness 1's testimony, Petitioner's Exhibit 51)
19. Student's tutor still acknowledges that Student now reads independently, and Student's writing has improved, but she believes that Student remains confused during writing tasks. During SY 2019-2020 and SY 2020-2021, the tutor continued to tutor Student once per week with the caveat that Petitioner would work with Student as much as possible. The direct sessions were \$80 per hour, and the tutoring was grandfathered in at a discounted

price and was paid by Student's parents. The tutor now sees Student once per month. (Witness 1's testimony, Petitioner's Exhibit 54, page 361).

20. Student's SY 2020-2021 report card reflects that Student was operating on grade level (Proficient) in all academic areas in all four terms. In the fourth term, Student was functioning above grade level (Advanced) in Writing and Language. (Petitioner's Exhibit 44)
21. On September 15, 2021, Petitioner withdrew Student from DCPS. Petitioner and Student are no longer residents of the District of Columbia. Student attends a private school outside the District of Columbia. (Petitioner's testimony, Respondent's Exhibit 42)
22. Petitioner's former educational advocate prepared a compensatory education plan that outlined what Petitioner was seeking as compensation for the alleged denials of FAPE. The advocate opined that Student made the appropriate academic progress by the end of SY 2020-2021 and was on grade level due to the continued tutoring and summer programs that Petitioner paid for during Student's time at School A. She asserts that Petitioner should be reimbursed for the out-of-pocket services as compensatory education in the amount of \$9,605.00. (Witness 3's testimony, Petitioner's Exhibits 54, 55, 56, 60)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on issue #1. The burden of persuasion fell to Respondent on issue #2 once Petitioner established a

prima facie case on that issue.⁸ The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a 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: Did DCPS deny Student a FAPE by failing to comply with its Child Find obligations and timely evaluate Student and find Student eligible for special education services from November 2019 through March 2020? ⁹

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

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Petitioner alleged that Respondent did not comply with IDEA by timely evaluating Student for special education following her requests and/or pursuant to its child find obligations.

"Child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" *Long*, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v.*

⁸ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or 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.

⁹ Petitioner alleges that School A knew since the time Student was enrolled in 2018 that Student had a learning disorder. Petitioner shared the IEE conducted in 2018, but School A did not find Student eligible for special education and related services. Petitioner alleges that instead, School A made Student engage in English Language Learning with students who did not speak English although Student was a native English speaker. Petitioner alleges that Student should have been found eligible for special education and related services no later than November 2019.

McKinley, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

An LEA must conduct initial evaluations to determine a child's eligibility for special education services "within 120 days from the date that the student was referred for an evaluation or assessment." D.C. Code § 38-2561.02(a).

Because an evaluation and eligibility determination are a prerequisite to preparing an IEP, ordinarily, an LEA's failure to evaluate the student and determine [REDACTED] eligibility strictly within the deadline would be considered a denial of a FAPE. See G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 280 (D.D.C. Feb. 20, 2013) and cases cited therein; *Latynski-Rossiter v. District of Columbia*, 928 F.Supp.2d 57, 60 (D.D.C.2013) (An IDEA violation occurs at the moment that the District fails to provide an appropriate placement for the child.)

The evidence demonstrates that DCPS evaluated Student for special education shortly after Student began attending School A in SY 2018-2019. Petitioner provided DCPS an IEE that determined that diagnosed Student with learning disorders. A DCPS psychologist reviewed the evaluation, and DCPS convened an eligibility meeting, and determined Student was ineligible for special education.

Nonetheless, the evidence demonstrates that DCPS did not conduct its own evaluation of Student during SY 2018-2019 and relied on the IEE. In addition, DCPS concluded that Student's lack of academic progress, despite Student's proficiency in speaking English, was due to a low overall score on its ELL screener. Based on DCPS's later evaluation, it appears that Student's overall cognitive functioning was in the Superior range rather than Low Average, as noted in the IEE and DCPS's review of that evaluation. Had DCPS conducted its own evaluation of Student in SY 2018-2019, a psychologist likely would have determined that there was a significant discrepancy between Student's cognitive abilities and academic performance, and Student would have been found eligible for special education. Absent an exception to the IDEA's statute of limitations, the time frame in which Petitioner could have challenged DCPS's ineligibility determination during SY 2018-2019 has long passed. Petitioner has asserted no such exception.

Petitioner asserts, however, that during the first half of SY 2019-2020, which is within the time frame allowed under IDEA's statute of limitations, DCPS was on notice of Student's continued academic deficiencies and should have initiated its own evaluation of Student by November 2019 under its Child Find obligations. The evidence demonstrates that during SY 2018-2019 Student's report card indicated that Student was performing at the "Basic" level in Reading and Written Language, which reflected that Student was approaching grade-level expectations, but not yet rated as "Proficient," which was considered on grade level. By April 2019, Student English language proficiency scores had risen significantly in Reading, Writing, and Literacy. Thus, the reason that School A asserted was a primary basis for Student being found ineligible for special education, namely, Student's lack of English language skills, should have been noted by School A as a part of the RTI process that School A had committed to pursuing.

Despite Student's increased English language proficiency on the ELL screener, Student's Progress Reports indicated that Student's reading fluency had improved, but Student still struggled with

comprehension of grade-level reading texts. Based on the evidence, the IHO concludes that DCPS was put on notice as of the end of the first term of SY 2019-2020 that DCPS should have evaluated Student for special education under its Child Find obligations starting at the latest November 1, 2019. Had DCPS initiated evaluations under the 120-day requirement, Student should have been evaluated, found eligible and had an IEP in place by April 1, 2020.

Petitioner initiated the evaluation process with her January 2020 request that DCPS evaluate Student, and Student was ultimately found eligible for special education in March 2020. DCPS developed an IEP by April 8, 2020. Had DCPS acted of its own accord based on the available data, DCPS would have fulfilled its Child Find obligations within the required time frame rather than days shy. The IHO concludes that, based on the evidence, DCPS's failure to timely evaluate Student and determine Student's eligibility denied Student a FAPE.

ISSUE 2: Did DCPS deny Student a FAPE by failing to develop and/or provide Student with an appropriate IEP and/or placement from March 2020 to June 2021 because the IEPs did not (a) provide sufficient hours of specialized instruction and (b) academic goals for written expression? ¹⁰

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

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

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

¹⁰ Petitioner alleges that the IEPs should have prescribed an additional two hours of specialized instruction in Written Expression.

time to enable the student to receive educational benefits.”

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

In *Endrew F. ex rel. Joseph F. v. Douglas 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.

The evidence demonstrates that School A developed an initial IEP for Student on April 8, 2020. As the case law noted above states, an IEP’s appropriateness is to be judged at the time it was developed. Student’s IEP that was in effect for the remainder of SY 2019-2020, was reviewed and updated based on additional evaluations in April 2021. Despite the expert testimony that Petitioner presented asserting that Student required goals and specialized instruction in written expression, the evaluations that both DCPS and the independent psychologist conducted revealed that Student’s abilities in the areas of written language were Average. Student grades during SY 2019-2020 and SY 2020-2021 reflect that Student was operating on grade level in the area of written expression. In addition, Student’s general education teacher credibly testified that Student’s performance in written expression was on grade level, despite the areas in which Student could have improved. The IHO found her testimony far more credible because she had worked with Student and instructed Student in the classroom. Although she also testified that Student received writing instruction from a special education teacher who co-taught with the general education, that factor did not sufficiently negate the evaluative data that supported the general education teacher’s assessment that Student did not require IEP goals or specialized instruction in the area of written expression. Accordingly, the IHO concludes that Respondent sustained its burden of persuasion by a preponderance of the evidence that Student’s IEPs were reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The IHO has concluded that School A denied Student a FAPE in failing to provide Student an appropriate IEP on April 15, 2020, and has directed in the order below that School A remedy that denial.

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

When a hearing officer finds denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education.... [A]n award of compensatory education 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." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Petitioner presented two expert witnesses to attest to the compensatory education for Student. The IHO concludes that the evidence presented supports the conclusion that the services that Petitioner provided for Student were reasonable and significantly contributed to Student operating on grade level in all academic areas by the end of SY 2020-2021. Thus, the IHO in the order below grants Petitioner's requested relief.

ORDER: ¹¹

Within fifteen (15) business days of Petitioner presenting DCPS documentation and receipts of payments made, DCPS shall reimburse Petitioner for tutoring and summer programs that Petitioner paid for Student to receive during the summer of 2020 and during SY 2019-2020, not to exceed the amount of \$9,605.00.

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

¹¹Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day-for-day basis for any delay in compliance caused by Petitioner.

Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: June 20, 2022

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