

OSSE
Office of Dispute Resolution
July 21, 2023

Parent on Behalf of Student,	CORRECTED HEARING OFFICER’S DETERMINATION ¹
Petitioner,	Hearing Dates: June 1, 2023 June 2, 2023 June 20, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency “LEA”)	
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2023-0037	
Date Issued: July 3, 2023	

¹ This Corrected HOD is issued to correct typographical or grammatical errors prior to publication. The original HOD issuance date, July 3, 2023, and the applicable appeal date, remain unchanged. 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 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides in the District of Columbia with Student's grandmother. Both Student's mother and grandmother are residents of the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of autism.

On February 23, 2023, Student's mother (“Petitioner”) filed the current due process complaint alleging that DCPS had denied Student a free appropriate public education (“FAPE”) by failing to implement Student's IEP and failing to allow Petitioner meaningful participation in the development of Student's individualized education program (“IEP”) regarding the consideration of Student's need for a dedicated aide.

Petitioner seeks as relief that DCPS be ordered to fund an independent speech therapist to provide speech therapy during school hours to the extent such services as outlined in Student's October 19, 2022, IEP were not provided, fund an independent occupational therapist to provide occupational therapy during school hours to the extent such services as outlined in Student's December 12, 2022, IEP were not provided, and fund a one-on-one aide for Student during all school hours for the balance of school year (“SY”) 2022-2023 and during extended school year (“ESY”).

DCPS's Response to the Complaint:

DCPS filed a timely response to the complaint on March 6, 2023. In its response, DCPS stated, inter alia, the following:

There was a settlement agreement in response to a due process complaint Petitioner filed a year ago. That agreement settled all claims that were or could have been pursued to the date of settlement, which was early June 2022. DCPS agreed to authorize the following independent educational evaluations (“IEE”): comprehensive psychological and speech-language. The IEE speech language report was received on August 31, 2022, shortly after SY 2021-2022.

In early February 2023, the parent sought reauthorization of the independent services issued as part of the settlement agreement from June 2022. DCPS issued the reauthorization within two days of the request. Despite the authorization, Petitioner has yet to use the 100 combined hours of tutoring and speech services for nearly eight months, impacting Petitioner's current request for services.

Student has not missed the service hours alleged in the due process complaint. There is no information in the pleading from Petitioner that any discussion or inquiry was made to the providers or school personnel responsible for ensuring the provision of services. Upon inquiry to personnel, DCPS has provided Student with any missed service time for both speech-language (“SL”) and occupational therapy (“OT”). Further, any service time missed to date is de minimis.

Petitioner is not entitled to the independent assessments sought. Petitioner identifies the evaluations sought as relief as independent assessments in specific service areas (OT and SL). However, the substance of those evaluations would present as compensatory education evaluations. In the District of Columbia, such an evaluation is not favored by the Court. Further, such an evaluation would not be appropriate as relief to Student.

In this instance, Student can access the curriculum without a dedicated aide. It was not considered an IEP component and thus was not considered by the team. DCPS did not deny Petitioner meaningful participation in December 2022 IEP meeting. The data did not support consideration of such a restrictive and dependent service measure for Student's FAPE. The student has been offered FAPE. There has been no violation of IDEA.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on March 23, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on March 9, 2023. The 45-day period began on April 9, 2023, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on May 23, 2023. One party was unavailable on the hearing dates offered by the undersigned independent hearing officer ("IHO"). Petitioner filed a motion to continue the hearing and extend the HOD due date to allow for the requested hearing dates. Three additional continuances were granted, one for a third day of hearing and two for written closing arguments. The HOD is now due July 3, 2023.

The IHO conducted a pre-hearing conference on April 14, 2023, issued a pre-hearing order ("PHO") on April 5, 2023, and a revised PHO on April 25, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to timely provide Student speech-language therapy as required by Student's October 19, 2022, and December 12, 2022, IEPs?
2. Did DCPS deny Student a FAPE by failing to timely provide Student occupational therapy as required by Student's December 12, 2022, IEP?
3. Did DCPS deny Student a FAPE by failing to provide Petitioner meaningful participation in the December 12, 2022, IEP meeting regarding the need for a one-to-one dedicated aide?

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 1, 2023, June 2, 2023, and June 20, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform. Petitioner's counsel submitted

² At the outset of the due process hearing, the parties agreed that the three issues stated here are the issues to be adjudicated.

written closing arguments on June 22, 2023. Respondent's counsel submitted written closing arguments on June 23, 2023. Petitioner's counsel submitted a reply to Respondent's written closing arguments on June 27, 2023

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 28 and Respondent's Exhibits 1 through 99) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on all the issues adjudicated. Based on the evidence adduced, the IHO concluded that Petitioner sustained the burden of persuasion that DCPS denied Student a FAPE by failing to implement Student's IEP by not providing the full measure of speech-language services only. Although DCPS did not provide Petitioner the criteria for a dedicated aide, the IHO determined that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS's failure to do so denied Petitioner meaningful participation in the decision-making process resulting in a denial of a FAPE. The IHO granted Student compensatory services. The IHO also ordered DCPS to provide Petitioner a copy of the justification criteria for a dedicated aide contained in SEDS⁵ and used by DCPS when an IEP team determines that a student warrants a dedicated aide.

FINDINGS OF FACT:⁶

1. Student resides with Student's grandmother in the District of Columbia. Student's mother is also a resident of the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of autism. During SY 2022-2023, Student attended School A, a DCPS school. (Petitioner's testimony, Witness 1's testimony, Petitioner's Exhibit 16)

³ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁴ Petitioners presented six witnesses: (1) Student's mother (Petitioner), (2) Student's Grandmother, (3) an Independent Psychologist who testified as an expert witness, (3) and three DCPS staff members, (a) Student's General Education Teacher, (b) School A's Principal, and (c) School A's Special Educator/LEA Representative. Respondent presented six witnesses, all designated as expert witnesses: (1) Student's School A Speech-Language Pathologist, (2) Student's School A Substitute Speech Language Pathologist, (3) Student's School A Occupational Therapist, (4) a DCPS Resolution Specialist, (5) Special Educator/LEA School A LEA representative who Petitioner also called as a witness, and (6) Student's School A Special Education teacher and Case Manager. 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.

⁵ Special Education Data System.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses 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 submitted by more than one party separately, the IHO may only cite one exhibit.

2. At the start of SY 2022-2023, Student had an IEP that prescribed the following services: 5 hours per week of specialized instruction inside general education and 4 hours per month of speech-language pathology ("SLP") inside general education. (Petitioner's Exhibit 5)
3. During most of the first semester of SY 2022-2023, Student's School A speech-language pathologist was on maternity leave. A substitute service provider provided Student with some of the SLP services that Student's IEP prescribed during the first semester. However, all the SLP services prescribed by Student's IEP were not provided during the first semester. The SLP provider was on leave for approximately four months from the start of SY 2022-2023, in August 2022, until December 9, 2022. After Student's regular service provider returned from leave, she provided Student some, but not all, makeup services for the SLP services Student missed while the provider was on leave. (Witness 6's testimony, Witness 8's testimony)
4. In the first semester of SY 2022-2023, Student consistently displayed disruptive in-class behaviors that resulted in Student needing complete adult support. Student would run around the classroom, making a loud shrieking sound, sometimes upwards of an hour at a time. Student's behaviors were often so disruptive that there was no learning achieved by Student or any other students in the classroom. As a result of Student's disruptive behaviors, Student's classroom general education teacher suggested to Petitioner and Student's grandmother that Student would benefit from a dedicated aide in the classroom to assist in addressing Student's behaviors and to help Student learn the classroom routines. The classroom teacher also made her desire for a dedicated aide known to the School A principal, who responded by suggesting that the teacher address Student's behaviors without any additional classroom assistance. (Witness 2's testimony)
5. DCPS conducted an annual review of Student's IEP on October 19, 2022. Petitioner participated in the IEP meeting along with her attorney. As a result of Student's classroom behaviors and comments made to Petitioner by Student's general education teacher, during the meeting, Petitioner requested that Student be provided a dedicated aide. The DCPS team members, other than the classroom general education teacher, stated that Student would not qualify for a dedicated aide consideration and suggested that the team first consider increasing Student's hours of specialized instruction or placing Student in a classroom with fewer students. The DCPS team members agreed to allow more time for Student to progress under the services in the IEP rather than provide Student a dedicated aide. (Petitioner's testimony, Witness 2's testimony, Witness 10's testimony, Respondent's Exhibit 39)
6. DCPS issued a PWN dated October 19, 2022, which reflected the decisions made by the IEP team at the October 19, 2022, IEP meeting. The PWN noted, among other things, that the IEP team considered Petitioner's inquiry about a dedicated aide for Student. The School A LEA representative for the meeting explained the least restrictive environment requirements. She and the Student's special education teacher believed Student did not meet the requirements for a dedicated aide and that the conversation could be revisited at another time if the data demonstrated Student's need for a dedicated aide. (Witness 4's testimony, Witness 10's testimony, Respondent's Exhibit 39)

7. The IEP developed on October 19, 2022, prescribed the following services: 5 hours per week of specialized instruction inside general education, 1 hour per week of specialized instruction outside general education, 1 hour per month of SLP inside general education, and 2 hours per month outside general education. The IEP did not prescribe ESY. (Petitioner's Exhibit 9)
8. In November 2022, DCPS conducted an OT evaluation of Student. The evaluator noted the following regarding the impact of the areas assessed in the evaluation on Student's learning and participation: "Significant sensory processing difficulties, including [Student's] need for movement opportunities, craving tactile input, and easy visual and auditory distractibility negatively impact [Student's] ability to attend to the speaker/whole group learning, engage in independent work and center-based play, and complete classroom routines and areas of self-care. [Student's] fine motor and visual motor delays also impact [Student's] ability to complete self-care and tabletop tasks (coloring, cutting, drawing), in addition to impacting [Student's] ability to express knowledge in written form." (Petitioner's Exhibits 13, 14)
9. The OT evaluator noted the following based on her interview with Student's classroom general education teacher:

"[Student's] classroom teacher, [teacher], was interviewed via a teacher interview form on 10/31/2022 to gather more information on [Student's] performance and overall functioning within the classroom. [Teacher] reports that [Student] is an adorable, happy, friendly, social child who seems to enjoy being in school and that [Student] enjoys playing with plastic [REDACTED] wooden castle blocks, and the water table during center time. Areas of difficulty for [Student] include attention, following classroom routines, self-care, and fine motor skills. [Student] requires full adult support to stay seated on the carpet, look at the speaker, and listen with [Student's] voice off. During center time, [Student] requires support finding open centers, as [Student] does not yet understand the capacity rules and often tries to join an already full center. [Student] also benefits from reminders to hang [Student's] belongings in [Student's] cubby and/or retrieve items from [Student's] cubby during whole-group transitions. [Student's] also needs support with dressing and packing up [Student's] belongings at the end of the day. Regarding fine motor skills, [Teacher] reports that [Student] uses a fist grasp pattern on drawing utensils and has not yet formed any letters; however, [Student] draws on the table or on [Student's] skin. [Student] also reportedly has difficulty staying seated with a calm body. [Student] sits on a wobble cushion for added proprioceptive input and sits next to an adult during circle time. Peer relationships can sometimes be strained for [Student], as [Student's] behaviors can be disruptive to the whole group and subsequently frustrate peers. For example, during read-aloud, [Student] will sometimes talk over the teacher, preventing other students from hearing." (Petitioner's Exhibit 13)
10. On December 12, 2022, DCPS conducted another annual review of Student's IEP in which the IEP team reviewed the results of the OT evaluation. Petitioner participated in the IEP meeting. Student's maternal grandmother also participated in the IEP meeting. The team agreed to add OT services to Student's IEP and agreed on OT goals. The IEP developed

on December 12, 2022, prescribed the following services: 5 hours per week of specialized instruction inside general education, 1 hour per week of specialized instruction outside general education, 1 hour per month of SLP inside general education, 2 hours per month outside general education, 180 minutes per month of OT outside general education, and 30 minutes per month of consultative OT. The IEP did not prescribe ESY. (Petitioner's testimony, Witness 1's testimony, Petitioner's Exhibits 15, 16, 18)

11. During the December 12, 2022, IEP meeting, there was a discussion of, among other things, Student's need for a dedicated aide. Student's special education teacher noted the following in the IEP meeting notes regarding the dedicated aide. "Don't have data to support at this time, want student to develop [Student's] independence and see how the student progresses with supports proposed at this time." Regarding ESY, the IEP meeting notes reflect the following: "Says "no" for now, but it's not a decision they make later during the school year because this is for summer. To make a decision about ESY, they will need to look at data captured when Student returns from a longer break (Thanksgiving, Christmas). If [Student] qualifies for ESY, they would make the decision later in the year and review data from the school year to make a decision for the summer." (Petitioner's Exhibit 18)
12. Petitioner and Student's grandmother attended the December 12, 2022, IEP meeting. Based upon discussions Student's grandmother had with Student's classroom teacher in which the teacher suggested that Student would benefit from having a dedicated aide, Petitioner and Student's grandmother asked during the December 12, 2022, IEP meeting that Student be considered for a dedicated aide. The School A team members stated that Student did not qualify for dedicated aide. Student's grandmother asked for the criteria used to determine if a dedicated aide is warranted so that she could review the criteria. The School A team members informed her they would provide her with the criteria. The LEA representative told Student's grandmother that she would follow up with an email that more clearly stated the requirements for determining a student's need for a dedicated aide. To date, DCPS has not provided Petitioner or the grandmother a copy of the criteria for a dedicated aide. (Petitioner's testimony, Witness 1's testimony, Witness 2's, Witness 4's testimony, Witness 10's testimony)
13. On December 13, 2023, the day after the IEP meeting, Student's grandmother discussed Petitioner's request for a dedicated aide with School A's principal. The principal stated that Student would not be provided a dedicated aide due to funding issues. The grandmother requested that she be provided with the criteria for the dedicated aide, which the principal agreed to provide. As of the date of the hearing, DCPS had not provided Petitioner and Student's grandmother the criteria for considering whether a student qualifies for a dedicated aide. (Petitioner's testimony, Witness 1's testimony)
14. On December 14, 2022, DCPS issued a prior written notice ("PWN") regarding the December 12, 2022, IEP. The PWN stated, among other things, that "During a meeting held on 12/12/2022, the IEP team reviewed [Student's] proposed draft IEP. The team proposed goals, supports, and services that are reflective of [Student's] present levels of academic achievement and functional performance and will continue to push their progress in Motor Skills/Physical Development, including sensory processing, fine motor skills, and visual/motor integration. The team only reviewed this area of concern to add Occupational

Therapy to [Student's] existing and current IEP." The PWN notice did not state anything about a discussion regarding a dedicated aide. (Petitioner's Exhibit 17)

15. In the special education data system ("SEDS") that DCPS uses to develop Student's IEPs and to navigate the IEP meeting process, there is one question about the need for a dedicated aide. Although DCPS does not generally use a checklist for IEP teams to determine if a student qualifies for a dedicated aide, if a team concludes that a student requires a dedicated aide, a criteria list in SEDS is used to justify the dedicated aide. This justification list is only available to an IEP team if the person operating SEDS at the IEP meeting answers "yes" to whether a student requires a dedicated aide. (Witness 4's testimony)
16. Once OT services were added to Student's IEP at the December 12, 2022, IEP meeting, a School A occupational therapist was assigned to provide Student OT services. However, the occupational therapist (service provider) began providing Student OT services after winter break. Student is making adequate progress in OT goals and is on target to master the goals by the IEP date of achievement. Student's OT provider provided Student with approximately 115 minutes of makeup services for times during December 2022, January 2023, and February 2023, when the OT provider was unavailable. When a student is absent on days when OT services are scheduled, DCPS's policy does not require that the services be made up. When a student misses services because the provider is unavailable, the provider will make the service time up in the best manner for the student. (Witness 7's testimony, Respondent's Exhibit 52)
17. On March 30, 2023, DCPS convened an IEP team meeting in which the team reviewed and completed a checklist to determine whether Student qualified for ESY services. On March 31, 2023, DCPS amended Student's IEP to add ESY services. (Petitioner's Exhibits 26, 27)
18. There have been staffing challenges in DCPS related service providers, and at the end of the school year, schools can ask DCPS for authorization letters for independent services that have yet to be provided during the school year. As of the due process hearing date, DCPS had not issued the end-of-year authorization letters for any students at School A who missed services. (Witness 8's testimony)
19. Student is making progress toward Student's SLP goals. As of April 2023, Student had been provided 630 minutes of SLP services of the 1354 minutes that Student's IEP prescribed from August 2022 until April 2023. Student's SLP provider has been making up some of Student's missed SLP minutes, but a significant amount remains to be made up. At the end of the school year, DCPS will typically provide a parent an authorization letter to obtain independent services for any SLP services that have not been made up; however, DCPS still needs to issue such authorizations for School A students. As of April 2023, there were 414 minutes of SLP services out of the 1354 minutes Student was due that had not been delivered to Student, including 100 minutes that had not been provided because the provider was unavailable. (Witness 6's testimony, Witness 8's testimony, Respondent's Exhibits 54, 98)

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 5A DCMR 3053.6, 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 all three issues adjudicated.⁷ 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 timely provide Student speech-language therapy as required by Student’s October 19, 2022, and December 12, 2022, IEPs?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance that DCPS denied Student a FAPE by failing to provide Student required speech-language therapy services during SY 2022-2023.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its

⁷ 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 of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

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

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

acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.' " *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

Pursuant to 34 C.F.R. § 300.324 (b) (1) Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

Pursuant to 34 C.F.R. § 300.323, at the beginning of each school year, each public agency must have an IEP effect for each child with a disability within its jurisdiction. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). See also *O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements).

In reviewing a claim of failure to implement an IEP, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

The evidence demonstrates that at the start of SY 2022-2023, Student's IEP prescribed 4 hours per month of SLP inside general education. During the first semester, Student's SLP service provider was on leave. At some point during the semester, a substitute provider began providing Student SLP services. However, by the time Student's assigned provider returned from leave in December 2022, all SLP services that Student missed had yet to be made up. The provider has attempted to make up the large measure of missed SLP services. However, as of the date of the due process hearing, as evidenced by the document the provider presented, there remained 414 minutes of SLP services that had yet to be provided.

Although there was testimony presented that generally, DCPS will, at the end of the school year, provide parents with authorization letters to obtain independent related services that are missed, no such authorization letter had been provided to Petitioner for Student's missed services. Although the evidence demonstrates that Student has made significant progress in Student's SLP goals, the measure of a denial of FAPE in this instance is measured by the proportion of services that have been missed. The document that DCPS provided indicated that Student still had not been provided 414 minutes out of 1354 minutes, or approximately 30% of the SLP Student was due as of April 2023. Although Respondent's counsel offered an alternative interpretation of the evidence reflected in the DCPS exhibit regarding SLP services, the testimony of the provider did not add sufficient clarity of missed services to support this alternative interpretation. The IHO concludes that 30% of the services due is far from de minimus and represents a material failure to implement Student's IEP.⁸ Consequently, the IHO concludes that Petitioner sustained the burden of proof by a preponderance of the evidence that Student was denied a FAPE in this regard.

ISSUE 2: Did DCPS deny Student a FAPE by failing to timely provide Student occupational therapy as required by Student's December 12, 2022, IEP?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance that DCPS denied Student a FAPE by failing to provide Student required OT services during SY 2022-2023.

As previously stated, in reviewing a claim of failure to implement an IEP, a hearing officer must ascertain whether the aspects of the IEP that were not followed were "substantial or significant" or, in other words, whether the deviations from the IEP's stated requirements were "material." See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir.). Sept. 11, 2007). Where an LEA's failure to implement is material (not merely de minimus), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. See *Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA's material failure to implement part of the student's IEP). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement." *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

⁸ *Middleton v. District of Columbia*, 312 F. Supp 3d at 145 (20% deviation from IEP requirements was material and could not be excused as de minimis); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018)

The evidence demonstrates through the credible testimony of the DCPS occupational therapist that once Student's IEP was updated to include OT in December 2022, she was assigned to provide Student OT services. Although there was a delay until after winter break for the OT services to start, the occupational therapist began delivering services in January 2023. The provider also credibly testified that she provided Student approximately 115 minutes of makeup services for services missed due to the provider unavailability.

Student's December 2022 IEP prescribed that Student be provided 180 minutes per month for OT services. The evidence demonstrates that Student should have received approximately 370 minutes through the date of the due process complaint. DCPS presented evidence that Student received at least 235 minutes of OT services in addition to the 115 minutes of make of services for a total of 350 minutes or approximately 94% of the OT services Student was due. Based on this evidence, Student had missed 20 minutes of OT services, or approximately 6% of the OT services Student was due at the time the due process complaint was filed. The IHO concludes that 6% of the services due is de minimus and does not represent a material failure to implement Student's IEP. Consequently, the IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence that Student was denied a FAPE in this regard.

ISSUE 3: Did DCPS deny Student a FAPE by failing to provide Petitioner meaningful participation in the December 12, 2022, IEP meeting regarding the need for a one-to-one dedicated aide?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE in the determination at the December 12, 2022, IEP meeting regarding Student's need for Student for dedicated aide.

As previously stated, pursuant to 34 C.F.R. § 300.324 (b) (1), Each public agency must ensure that subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team— (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address— (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under § 300.303; (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

The Supreme Court requires parental "participation at every stage of the administrative process." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). *Koshi Wade, et al., Plaintiffs, v. District of Columbia*, 82 IDELR 92, 122 LRP 46479, U.S. District Court, District of Columbia (December 7, 2022)

The evidence demonstrates that at Student's October 2022 IEP meeting, Petitioner made a request for Student to be provided a dedicated aide, which the School A team members concluded was not warranted. This discussion of the dedicated aide was reflected in the PWN from the October 2022 IEP meeting.

Petitioner asserts that during the December 12, 2022, IEP meeting, both Petitioner and Student's grandmother requested that DCPS provide a Student a dedicated aide due Student's disruptive classroom behaviors and resulting lack of educational progress. Despite the requests, again, the School A team members determined that a dedicated aide was not

warranted. Petitioner asserts that DCPS failed to identify the fact that in SEDS, there is a worksheet specifically designed to make a team decision as to whether a student requires a dedicated aide. DCPS told them that Student did not qualify for a dedicated aide. As Petitioner aptly points out, despite the requests by both Petitioner and Student's grandmother at the December 12, 2022, meeting, no mention was made of the requests in the IEP meeting notes or the PWN following the December 12, 2022, IEP meeting.

Following the December 2022 IEP meeting, Student's grandmother asked for the criteria used to determine if a dedicated aide is warranted so that she could review the criteria. The School A team members informed her they would provide her with the criteria. The LEA representative told Student's grandmother that she would follow up with an email that more clearly stated the requirements for determining a student's need for a dedicated aide.

On December 13, 2023, the day after the IEP meeting, Student's grandmother discussed Petitioner's request for a dedicated aide with School A's principal. The grandmother requested that she be provided with the criteria for the dedicated aide, which the principal agreed to provide. As of the date of the hearing, DCPS had not provided Petitioner and Student's grandmother the criteria for considering whether a student qualifies for a dedicated aide.

Although Petitioner presented testimony from an expert witness that Student would benefit from a dedicated aide, and Student's general education teacher testified that she requested that Student be provided a dedicated aide, the issue adjudicated herein and that the parties agreed to, was not whether Student was or is entitled to a dedicated aide. Rather, the issue adjudicated is whether Petitioner was denied meaningful participation in the decision-making process regarding the dedicated aide.

As previously stated, 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)

The evidence demonstrates that at the December 12, 2022, IEP meeting, the School A LEA representative and Student's special education teacher provided cogent reasons why in their opinion Student did not qualify for a dedicated aide, including the short time that Student had been provided IEP services, the need for more data, and that a first consideration would be to increase Student's specialized instruction or time outside general education. What was not provided to Petitioner was a written criteria for a dedicated aide. The LEA representative testified that no written criteria existed that could be provided to Petitioner. However, in further testimony, that witness revealed that there is a criteria in SEDS to justify a team's decision when the team determines that a student requires a dedicated aide. Despite the promise to Petitioner and Student's grandmother that they would be provided the criteria, the criteria were never provided.

Although the School A team members chose neither of the alternatives to Petitioner's request for a dedicated aide during the December 12, 2022, IEP meeting, the evidence reflects that there was a discussion of the reasons, and that Petitioner and Student's grandmother were a part of that discussion. Consequently, the IHO concludes, based on the evidence presented, that DCPS's failure to provide Petitioner the written criteria was a procedural violation that did not significantly impede Peitioner's opportunity to participate in the decision-making process regarding the provision of FAPE or cause the Student a deprivation of educational benefits.

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.)

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.)

The IHO concludes that there was sufficient evidence to provide Student compensatory services for the missed SLP services in the amount of 414 minutes.

ORDER:

1. DCPS shall, within 15 business days of the date of this order, provide Petitioner authorization to obtain 414 minutes of independent SLP services at the OSSE approved rate.
2. DCPS shall, within 15 business days of the date of this order, provide Petitioner a copy of the justification criteria for a dedicated aide contained in SEDS and used by DCPS when an IEP team determines that a student warrants a dedicated aide.
3. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: July 3, 2023

Copies to: Counsel for Petitioners
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 ODR [\[hearing.office@dc.gov\]](mailto:hearing.office@dc.gov)