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OSSE
Office of Dispute Resolution
July 09, 2024

Confidential

<p>Parent on Behalf of Student, ¹</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2024-0077</p> <p>Date Issued: July 9, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: June 27, 2024</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ 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 with Student's parent in the District of Columbia. The District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”). Student has been determined eligible for special education pursuant to IDEA with a disability classification of autism. Student attended a DCPS school (“School A”) for the school year (“SY”) 2023-2024.

On April 25, 2024, Student's parent (“Petitioner”) filed a due process complaint (“DPC”) alleging that DCPS (“Respondent”) denied Student a free appropriate public education (“FAPE”) by allegedly failing to: (1) provide Student an appropriate individualized educational program (“IEP”), (2) fully implement Student’s IEP, (3) failing to evaluate Student, and (4) failing to provide Petitioner Student’s education records.

Petitioner seeks as relief, inter alia, the following: an order directing DCPS to evaluate Student, identify an appropriate educational placement and Student provide compensatory education.²

DCPS’s Response to the Complaint:

DCPS filed a response to the complaint on May 7, 2024. In its response, DCPS stated, inter alia, the following:

Student transferred into DCPS from another LEA (“LEA-2”) on August 31, 2023, days after the school year had begun. DCPS scheduled and convened an IEP meeting with Petitioner on November 2, 2023, at which DCPS sought to amend Student’s IEP. The parties scheduled and confirmed a meeting for early April 2024. Petitioner emailed DCPS seeking a specific time and date to accommodate her counsel. DCPS has sought Petitioner to address ongoing medical emergencies that relate to Student’s physical and medical needs, which presented and occurred during the school year, including February and March 2024.

² In her DPC, Petitioner noted the following requested relief: A finding that Student has been denied a FAPE; A finding that Student is entitled to compensatory education and related transportation expenses for the denials of FAPE alleged in this complaint; An order requiring DCPS to timely conduct a comprehensive psychological evaluation, functional behavioral assessment, occupational therapy evaluation, and speech-language pathology evaluation. An order directing DCPS to immediately identify an appropriate placement for the Student, potentially including a non-public placement, or in the alternative, an order requiring DCPS to reconvene the IEP team within 15 days after the completion of any new evaluations and to reconsider the Student's programming, placement, and medical, feeding, and behavioral supports including consideration of a non-public placement.

DCPS evaluated Student at the start of the school year upon Student's entry at School A. Petitioner's counsel sent a list of questions and inquiries to DCPS personnel at School A regarding the Student, which was a lengthy exchange and is relevant to many of the facts and issues alleged in Petitioner's DPC.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on May 9, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint ("DPC") was filed on April 25, 2023. The 45-day period begins on May 26, 2023, and ends [and the Hearing Officer's Determination ("HOD") is due] on July 9, 2024.

The undersigned impartial hearing officer ("IHO") conducted a pre-hearing conference on May 14, 2024, and issued a pre-hearing order ("PHO") on May 30, 2024, stating, inter alia, the issue to be adjudicated.

ISSUES:

The issues adjudicated are:

1. Did DCPS deny Student a free appropriate public education ("FAPE") by failing to provide Student with an appropriate IEP, placement and/or location of services for SY 2023-2024 because the IEP(s) (1) failed to provide appropriate direct behavioral supports and interventions and (2) failed to provide appropriate medical and feeding supports to support the Student's medical condition?
2. Did DCPS deny Student a FAPE by failing to implement Student's IEP during SY 2023-2024 by failing to provide all required speech-language and behavior support services?
3. Did DCPS deny Student a FAPE by failing to comprehensively evaluate or reevaluate Student for behavioral, psychological, occupational therapy, and speech-language issues?
4. Did DCPS deny Student a FAPE by failing to provide Petitioner Student's educational records following her request?

DUE PROCESS HEARING:

The Due Process Hearing was held on June 27, 2024, and conducted via video teleconference on the Microsoft Teams platform.

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 39 and Respondent's Exhibits 1 through 46) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each

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

party are listed in Appendix B.⁴

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on all issues to be adjudicated, except issue #1, which was held by Respondent after Petitioner presented a prima facie case regarding the Student's behavior.⁵ The IHO concluded that Respondent sustained the burden of persuasion on issue #1 by a preponderance of the evidence. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #3 relative to speech-language services. Petitioner did not sustain the burden of persuasion on the remaining issues. The IHO directed DCPS to, among other things, compensate Student for missed speech-language services.

FINDINGS OF FACT:⁶

1. Student resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education pursuant to IDEA with a disability classification of autism. (Mother's testimony, Petitioner's Exhibit 27)
2. Student presents with a severe communication disorder that impacts her/his ability to communicate effectively across the educational environment with a variety of communication partners. According to Student's most recent speech-language evaluation conducted in 2019, a variety of output methods were trialed in September 2019, including sign language, picture exchange, and a high-tech speech-generating device. Student's current IEP notes Student's need for assistive technology for communication. Student's IEP also prescribes a dedicated aide. (Respondent's Exhibit 8, Petitioner's Exhibit 27)
3. During school year ("SY") 2022-2023, Student attended a public charter school located in the District of Columbia that is its own local education agency ("LEA-2"). (Respondent's Exhibit 20)
4. In February and April 2023, LEA-2 conducted a psycho-educational reevaluation of the Student, with an evaluation report dated June 19, 2023. The psychologist assessed

⁴ Petitioners presented two witnesses: (1) Student's mother (Petitioner), (2) an educational advocate who testified as an expert. Respondent presented two witnesses, both of whom testified as expert witnesses: (1) Student's School A special education teacher, (2) School A LEA representative and special education coordinator. 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 The IHO did not conclude that Petitioner established a prima facie case relative to Student's medical needs.

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.

Student's cognitive, academic, and social-emotional functioning. (Petitioner's Exhibit 16)

5. The LEA-2 psycho-educational reevaluation noted the following about Student's functioning:

- Student's overall level of adaptive functioning is described by her/his score on the Adaptive Behavior Composite (ABC). Her/His ABC score is 56, in the Low range, which is well below the normative mean of 100 (the normative standard deviation is 15). The percentile rank for this overall score is <1. The ABC score is based on scores for three specific adaptive behavior domains: Communication, Daily Living Skills, and Socialization. The domain scores are also expressed as standard scores, with a mean of 100 and a standard deviation of 15.
- The Communication domain measures how well Student listens and understands, expresses her/himself through speech, and reads and writes. Her/His Communication standard score is 42, and in the Low range. This corresponds to a percentile rank of <1. This domain is a relative weakness for Student. The Daily Living Skills domain assesses Student's performance of the practical, everyday tasks of living that are appropriate in the school setting. Her/His standard score for Daily Living Skills is 60, and in the Low range. This corresponds to a percentile rank of <1. This domain is a relative strength for Student. Student's score for the Socialization domain reflects her/his functioning in social situations. Her/His Socialization standard score is 52, and in the Low range. The percentile rank is <1. Vineland Teacher Results: Requests for the teacher to complete the Vineland-3 form were made on 5/26/2023, 5/31/2023, and 6/6/2023. However, the form was incomplete.
- Given Student's subaverage level of intellectual functioning, an adaptive measure was administered (Vineland-3). Based on her/his parent's perspective, Student's overall level of adaptive functioning was in the Low range (SS=56). Her/His communication skills (SS=42), Daily Living Skills (SS=60), and Socialization skills (SS=52) were in the Low range. Furthermore, Student's Communication Skills were her/his relative weakness, whereas her/his Daily Living Skills were her/his relative strength, based on parent endorsements. Academically, Student's abilities were assessed on reading, mathematics, and writing on the WIAT-4. She/He demonstrated Extremely Low Listening Comprehension skills (SS=40), suggesting challenges in her/his auditory (SS=40) and visual (SS=41) receptive skills.
- Her/His basic reading skills were also in the Extremely Low range. Student performed Extremely Low range on Word Reading (SS=40). Student was unable to complete the Pseudoword Reading and Reading Comprehension subtest due to her/his significant difficulties in reading. Student performed in the Extremely Low range in Numerical Operations (SS=40) and Math Problem Solving (SS=40), indicating challenges in a series of paper-and-pencil and applied math problems. She/He was also unable to complete the Math Fluency subtests, given her/his difficulties in basic math skills. Student's spelling performance was also in the Extremely Low range (SS=40). Due to her/his challenges with writing, Student was unable to complete the Sentence Composition subtest.
- Tests of social-emotional functioning in the school setting indicated that Student presents with concerns related to Aggression, Conduct Problems, Atypicality, Withdrawal, and adaptive skills (i.e., Adaptability, Social Skills, and Functional Communication). Her/His parent's ratings highlighted concerns related to Atypicality, Withdrawal, and adaptive skills (e.g., Social Skills, Activities of Daily Living Skills, and Functional Communication skills). The Connors-

- 3 Teacher form indicated concerns related to Impulsivity and Emotional Dysregulation. The Conners-3 Parent form indicated concerns related to Inattention/ Executive Dysfunction, Hyperactivity, and Impulsivity. The Kinetic Family Drawing was unable to be completed. The GARS-3 completed by her/his parent highlighted symptoms related to Autism Spectrum Disorder. Teacher reports of the autism rating scale and adaptive skills rating scale were not returned as of the date of this report, but they would be beneficial in better understanding Student's overall functioning. (Petitioner's Exhibit 16)
6. In the Spring of 2023, the Student stopped eating consistently and lost a considerable amount of weight. In May 2023, she/he stopped eating altogether and was diagnosed with eosinophilic esophagitis. As a result, Student relies on a feeding tube for nutrition. Student is not able to swallow anything and was in hospital to insert G-Tube in May 2023. (Mother's testimony)
 7. Student is currently in ____ grade and attending School A, a DCPS school. Student began attending School A at the start of SY 2023-2024. (Mother's testimony, Petitioner's Exhibit 27)
 8. At School A, the Student is in the communication and education support ("CES") program. The program has six students in two classrooms, so Students are always in a staff-to-student ratio of no more than 3 to 1. (Witness 1's testimony)
 9. On September 22, 2023, the School A speech-language pathologist sent Petitioner an email from stating that she/he had not yet been able to deliver speech-language services to the Student but would begin the services soon. Student did not receive speech-language services until December 2023. Student received a total of 585 minutes or 9.75 hours of speech-language services from December 20, 2023, until the end of SY 2023-2024. Student should have received approximately 20 hours of speech-language services for the entire SY 2023-2024. (Mother's testimony, Petitioner's Exhibits 5, 28)
 10. On October 11, 2023, DCPS held an annual meeting for the Student to update Student's IEP. The IEP notes that Student continued to be classified as a student with autism. Student is currently a ____grader in a CES self-contained classroom at School A. Based on recent iReady [mathematics] scores, Student leveled at grade K (345), which is consistent with her/his scores from last year. Currently, Student can identify 50% of her/his alphabet in uppercase and lowercase. However, when asked to write the following letters: O, A, K, D, G, Q, B, and P, she/he was unable to do so successfully. Student needs multiple prompts to remain on task and to focus on her/his work instead of staring into space. Student is easily distracted by her/his environment. When transitioning to different classrooms, a teacher holds Student's hand or arm as she/he frequently tries to elope and run down the hall away from the rest of the class. Around the same time each day, Student will throw her/his trashcan, which she/he uses for spitting, flip furniture, or try to hit, kick, and throw adults' glasses. (Petitioner's Exhibit 27)
 11. On November 2, 2023, DCPS processed an IEP amendment because of a "[c]lerical error. All the service hours and related service providers were not included." This IEP amendment clarified that Student was entitled to (1) 23 hours of specialized instruction outside of general education; (2) 2 hours per month of speech-language pathology; (3) 2

hours per month of occupational therapy; (4) 30 minutes per month of consultative Behavioral Support Services; (5) an assistive technology device for communication; and (6) a dedicated aide. (Petitioner's Exhibit 24)

12. Since attending School A, School A staff have been tracking Student's behaviors, documenting the occurrence of behavior, and working with the DCPS applied behavior analyst ("ABA") to address and reduce the Student's disruptive behaviors in the classroom. (Witness 2's testimony)
13. Student's disruptive behaviors include throwing her/himself to the ground, grabbing others, and throwing objects and furniture. She/He is easily distracted and attempts to elope from the classroom after she/he tosses the furniture. (Witness 2's testimony, Petitioner's Exhibits, 27, 29)
14. School A staff called Student's mother frequently at the beginning of the SY 2023-2024 because of Student's behaviors. The calls had waned except when the Student broke items, and there was a request to Petitioner for reimbursement for personal items such as lunch and glasses. Petitioner was aware that Student's teachers dedicated aide is tracking Student's behavior daily. (Mother's testimony, Petitioner's Exhibit 32)
15. On December 21, 2023, Petitioner's attorney made a request to School A that DCPS conduct a functional behavior assessment ("FBA"). Student's previous FBA and behavior intervention plan ("BIP") were developed at Student's previous school in March 2022. To date, DCPS has not updated Student's FBA and BIP. (Petitioner's Exhibits 7, 15, 20)
16. On March 14, 2024, Petitioner attended a parent-teacher conference in which Student's teachers reviewed Student progress, including Student's behaviors. During the meeting, the School A staff mainly discussed instances of Student's behavior and the increase in certain behaviors, such as eloping, spitting, hitting, and aggression. (Mother's testimony)
17. The meeting notes reflect the following relative to behaviors: 1. Aggression is showing a downward trend (slow reduction). 2. Touching and Grabbing is slowly reducing. 3. Disruption is slowly increasing. 4. Throwing Items has remained steady. 5. Elopement incidents are slowly reducing. 6. Dangerous Acts incidents are slowly increasing. 7. Non-compliance has remained relatively steady, with a very slight increase. In a recent conversation with the DCPS ABA specialist, we Student's teachers discussed the fact that many of the Student's behaviors are sensory based. Student's teachers have been providing Student with classroom items and toys to address her/his sensory needs, and the ABA specialist is also planning on providing more sensory items for Student. At the May meeting, they agreed to conduct evaluations. (Mother's testimony, Witness 2's testimony, Petitioner's Exhibit 30)
18. On March 29, 2024, School A amended Student's IEP to add extended school year ("ESY") services. (Respondent's Exhibit 38)
19. On February 28, 2024, Petitioner's counsel sent an email to School A that stated the

following: On February 13, 2024, I picked up a set of educational records from the school, primarily related to behavioral concerns. This collection of documents did not include service trackers from this school year. I received a copy of an amended IEP dated October 11, 2023, but the sections for special education and related services are blank. I note that Student's October 14, 2022, IEP provided for speech-language pathology, occupational therapy, and behavioral support services... (Petitioner's Exhibit 8-61)

20. DCPS completed an occupational therapy evaluation and psycho-education evaluation in May 2024 and June 2024, respectively, and provided Petitioner evaluations on the last day SY 2023-20024. The evaluations have yet to be reviewed by an IEP team. (Mother's testimony, Petitioner's Exhibits 37, 38, 39)

21. School A is considering, because of Student's medical concerns, initiating a change in Student's placement to a DCPS medical education support ("MES") classroom for SY 2024-2025. (Witness 3's testimony)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 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). In this case, Petitioner will proceed on the first on the day of the hearing and has the burden of production. Petitioner holds that the burden of persuasion on all issues to be adjudicated. 7 The burden of persuasion shall be met by a

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

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 provide Student with an appropriate IEP, placement and/or location of services for SY 2023-2024 because the IEP(s) (1) failed to provide appropriate direct behavioral supports and interventions and (2) failed to provide appropriate medical and feeding supports to support the Student's medical condition?

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide Student an appropriate IEP, placement and/or location of services.

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 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)

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.

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 second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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

The 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 *Andrew F.*, supra, 137 S. Ct. 988.

Petitioner asserts that Student's IEP is inappropriate because it (1) failed to provide appropriate direct behavioral supports and interventions, including ABA therapy and direct behavior support, in the face of increasing behavioral concerns, and (2) failed to provide appropriate medical and feeding support to support the Student's medical condition because Student does not consistently receive his/her feedings, and Petitioner was sometimes called to School A because of Student's medical condition.

The evidence demonstrates that at School A, for SY 2023-2024, Student was in a self-contained CES classroom with a student-to-staff ratio of 3 to 1. The evidence also demonstrates that Student has historically displayed problematic in-school behavior. Although Petitioners maintained that School A was not providing Student sufficient behavior

support services, there was evidence presented from both parties that Student's behaviors had improved some and that calls from School A to the parent about Student's behaviors decreased as the school year progressed. The Student's special education teacher credibly testified that the DCPS ABA specialist regularly consulted with Student's teachers and Student's dedicated aide to monitor track and address Student's behaviors. Because Student's behaviors difficulties were not completely eliminated is not a basis to conclude that Student's IEP, placement or location at School A for SY 2023-2024 was inappropriate. Neither Petitioner nor the educational consultant who testified that School A's behavior supports were deficient had personally observed the Student's classroom, and the IHO gave their testimony limited weight in this regard.

Regarding the Student's G-tube feedings, Petitioner testified that she believed that Student was sometimes not receiving his/her feedings at School A because on occasion Student's feed pump volume would be unchanged when Student returned home from school. She also testified that some days, she received calls from the School A nurse that she did not feel comfortable administering the Student's feeds because of the Student's gastrointestinal upset or because the Student was throwing up.

The evidence demonstrates that Student began G-tube feeding just a few months before the start of SY 2023-2024. Although the Student's feeding concerns at School A appear not to have always been carried out with 100% accuracy, based upon the evidence presented the IHO concludes that School A was administering Student's feeding regularly. Despite Petitioner's testimony of Petitioner regarding Student's feeding, that testimony alone was insufficient to establish a prima facie case that Student's IEP, placement, and location of services at School A for SY 2023-2024 were inappropriate because Student's medical needs were not being met.

Based upon the evidence, the IHO concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence as to the appropriateness of Student's IEP, placement, and location of services. The IHO concludes that Student's IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances

ISSUE 2: Did DCPS deny Student a FAPE by failing to implement Student's IEP during SY 2023-2024 by failing to provide all required speech-language and behavior support services?

Conclusion:

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. See *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016); The IDEA is violated when a school district deviates materially from a student's IEP. *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011) (citation omitted). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP. *Holman v. District of Columbia*, No. 14-1836, 2016 WL 355066 (D.D.C. 2016) (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)). In other words, for the court to find a failure to implement an IEP, the school board or local authorities must have "failed to implement substantial or significant provisions of the IEP." *Wilson*, 770 F. Supp. 2d at 274 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). There is no requirement that the

child suffer educational harm in order to find a violation; rather, the proportion of services mandated compared with those provided is "the crucial measure for purposes of determining whether there has been a material failure to implement" an IEP.

A school district "must ensure that ... special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 69 (D.D.C. 2013). To meet its burden, the moving party "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, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts ... 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.' " *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)). *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 at 144 (D.D.C. 2018)

There was insufficient evidence presented that Student was not provided all required behavior support services. However, as to speech-language services, there was an email from School A to Petitioner notifying her of a delay in the start of those services; that email, coupled with a service log, demonstrated that Student did not receive the full measure of speech-language services. The evidence demonstrates that the Student was entitled to 2 hours per month of speech-language services and that the Student received less than half the prescribed services during SY 2023-2024. The IHO concludes that the amount of services that Student missed was material and constituted denial of a FAPE.

ISSUE 3: Did DCPS deny Student a FAPE by failing to comprehensively evaluate or reevaluate Student for behavioral, psychological, occupational therapy, and speech-language issues?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to comprehensively evaluate Student.

Pursuant to 34 CFR § 300.15, Evaluation means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. (Authority: 20 U.S.C. 1414(a) (c))

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability

and adaptive behavior), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5A § 3006.7(f).

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

As previously noted, pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

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Petitioner asserts that DCPS failed to comprehensively evaluate Student and should have conducted an FBA, a Conners-4, an occupational therapy evaluation, and evaluated Student in the area of speech-language. Petitioner presented the testimony of an educational consultant to support the need for the noted areas for evaluation. However, that witness' testimony was insufficient to establish the need for Student to be evaluated in the areas of speech-language or occupational therapy. She had no expertise, experience, or training in these areas. Likewise, the witness had no training in conducted psychological evaluations or administering the Conners-4.

Petitioner also asserted that DCPS should have conducted a Vineland to determine if Student had an intellectual disability ("ID"). However, the Student's prior evaluation had already diagnosed the Student with ID, and there was no evidence that had ID been reflected in Student's IEP, the Student's IEP needs, or his/her programming would have been any different than already prescribed.

Petitioner also asserted that DCPS should have conducted an FBA. IDEA does not mandate an FBA or BIP except in instances of disciplinary actions, and there is no evidence that Student behaviors led to any disciplinary actions by School A. The evidence demonstrates that Student had an FBA and a BIP that had been developed at Student's prior school and that School A was otherwise tracking and addressing Student's in-school behaviors. Consequently, the IHO does not conclude that DCPS denied Student a FAPE because a new FBA was not conducted during SY 2023-2024.⁸ Petitioner failed to sustain the burden of persuasion by a preponderance of the evidence on this issue.

DCPS has now conducted new evaluations that have yet to be reviewed by an IEP team. The IHO, in the order below, directs DCPS to do so promptly. Despite the conclusion above about an FBA, the IHO also directs DCPS to conduct an FBA and review and revise Student's BIP as appropriate.

ISSUE 4: Did DCPS deny Student a FAPE by failing to provide Petitioner Student's educational records following her request?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's educational records.

IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 CFR § 300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing ... or resolution session ... , and in no case more than 45 days after the request has been made." *Id.* In addition, a parent's right to inspect and review includes: (1) the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records"; (2) the "right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records"; and (3) the "right to have a representative of the parent inspect and review the records." *Id.* § 300.613 (b).

IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. See 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. See 34 CFR § 300.613(a).

⁸ Although Petitioner's counsel maintained that an FBA should have been conducted based upon his request in December 2023, and the DCPS's failure to do so was untimely based on that request, the IHO concluded that Petitioner's DPC did not allege a timeliness issue relative to evaluating the Student, but only the issue of whether Student was evaluated comprehensively. Any issue regarding timeliness based on the request was not adjudicated in this case.

The District of Columbia Municipal Regulations (“DCMR”) provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent’s request to inspect education records is a procedural violation of the IDEA. See, e.g., *N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent’s requests for records.)

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)

Petitioner asserts that DCPS still has not provided speech-language service trackers for SY 2023-2024 or any evaluations in this area. However, Petitioner offered no testimony about any particular educational record that she was provided late that resulted in her being unaware of Student’s academic or social-emotional progress or in her being inadequately prepared to engage in any meeting.

Absent testimony to that effect, the IHO concludes that there was insufficient evidence that DCPS's failure or delay in providing all Student’s educational records impeded Student's right to FAPE, significantly impeded Petitioner’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student a deprivation of educational benefits. Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

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 timely evaluate Student and determine eligibility.

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's educational consultant inappropriately asserted that the Student should be compensated for unsubstantiated denials of FAPE. Consequently, the IHO found the proposal to be grossly overstated. The consultant also testified that the Student needs a non-public placement. Although, the IHO found that the evidence does not support such a placement, in the order below, the IHO directs DCPS to review the Student's placement and location of services for SY 2024-2025, after reviewing the recently conducted evaluations.

ORDER:

1. DCPS shall, within fifteen (15) business days of the issuance of this order, if it has not already done so, issue Petitioner authorization to obtain 15 hours of independent speech-language services at the OSSE prescribed rate.
2. DCPS shall, within thirty (30) calendar days of the issuance of this order, if it has not already done so, convene an IEP meeting to review the recent evaluations conducted and review all other relevant available data, and review and revise Student's IEP as appropriate and determine an appropriate placement and location of services for Student for SY 2024-2025.
3. DCPS shall, within ten (10) school days of the start of ESY services during summer 2024, if has not already done so, complete an FBA for Student and review and revise Student's BIP as appropriate.
4. All other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action 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.
Impartial Hearing Officer
Date: July 9, 2024

Copies to: Counsel for Petitioner
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