

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Office of Dispute Resolution
1050 First Street, NE
Washington, DC 20002
Tel: 202-698-3819
Fax: 202-478-2956

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 # 2024-0083</p> <p>Date Issued: July 14, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: June 25, 2024 June 26, 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 (“the Student”) resides with the Student’s parent in the District of Columbia. The District of Columbia Public Schools (“DCPS”) is the Student’s local education agency (“LEA”). The Student has been determined eligible for special education pursuant to IDEA with a disability classification of specific learning disability (“SLD”). The Student attended a DCPS school (“School A”) for the school year (“SY”) 2023-2024.

On April 30, 2024, the Student’s parent (“the Petitioner”) filed a due process complaint (“DPC”) alleging that DCPS (“the Respondent”) denied the Student a free appropriate public education (“FAPE”) by failing to develop an appropriate individualized educational program (“IEP”) on March 17, 2023, because of inappropriate occupational therapy (“OT”) goals, failing to develop an appropriate IEP on March 07, 2024, because of inappropriate reduction in specialized instruction in reading, and math, inappropriate removal of direct OT services, failing to timely and comprehensively evaluate Student during the SY 2023-2024 by failing to conduct a functional behavior assessment (“FBA”) since March 2024, and failing to implement Student’s IEP during school year (“SY”) 2023-2024 by failing to provide Student all prescribed OT direct services.

Petitioner seeks as her relief that DCPS be found to have denied the Student a FAPE and that DCPS be ordered to, inter alia, reinstate direct OT services and increase specialized instruction.² The Petitioner invoked stay put under the IDEA and Student’s IEP services were delivered consistent with Student’s March 17, 2023, IEP after the DPC was filed and for the remainder of SY 2023-2024.

DCPS’s Response to the Complaint:

DCPS filed a response to the DPC on May 13, 2024. In its response, DCPS stated, inter alia, the following: The Student has not been denied a FAPE; therefore, the request for relief is unwarranted, and the DPC should be dismissed with prejudice. As to the alleged inappropriateness of the IEPs, the IEP teams relied on various sources of information in developing the March 17,

² In addition to a finding that the Student has been denied a FAPE, the Petitioner seeks reinstatement of the Student’s OT direct-related services for 45 minutes a month; that DCPS be ordered to reconvene the IEP team to review, revise, and/or amend the Student’s IEP to provide 5 hours of specialized instruction in math inside and outside the general education classroom, 2 hours of specialized instruction in reading; DCPS conduct/fund and review an FBA; provide training for the Student and staff on the assistive technology devices/software that the Student will be using to access the curriculum and incorporate assistive technology into Student’s OT goals; fund compensatory education for the Student, including reserving for future compensatory education after evaluation(s) are completed; provide transportation for the Student to accessor compensatory education services, and immediately provide copies of the requested records to the parent through counsel.

2023, and March 7, 2024, IEPs. DCPS asserts that the Student's IEPs were appropriate at the time they were developed and reasonably calculated to enable the Student to make appropriate progress considering the Student's circumstances. DCPS denies the Student was denied a FAPE when it allegedly failed DCPS to implement all the Student's OT goals from September 2023 – March 2024. Additionally, this claim is not ripe and should be dismissed.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on May 7, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on April 30, 2023. The 45-day period began on May 31, 2023. and ends [and the Hearing Officer's Determination (“HOD”) is due] on July 14, 2024.

The undersigned impartial hearing officer (“IHO”) conducted a pre-hearing conference on May 28, 2024, and issued a pre-hearing order (“PHO”) on June 5, 2024, stating, inter alia, the issue to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP on March 17, 2023, because of inappropriate OT goals?
2. Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP on March 21, 2024, because of (a) inappropriate reduction in specialized instruction in reading and math and (b) inappropriate removal of direct OT services?
3. Did DCPS deny the Student a FAPE by failing to timely and comprehensively evaluate the Student during SY 2023-2024 by failing to conduct an FBA since March 2024?
4. Did DCPS deny the Student a FAPE by failing to implement the Student's IEP during SY 2023-2024 by failing to provide the Student with all prescribed OT direct services?

DUE PROCESS HEARING:

The due process hearing was convened on June 25, 2024, and June 26, 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 58 and Respondent's Exhibits 1 through 21) that were

³ At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated the parties agreed to the issue as stated herein.

admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

SUMMARY OF DECISION:

The Petitioner held the burden of persuasion on all issues adjudicated except issues #1 and #2, which the Respondent held after the Petitioner presented a prima facie case on those issues. Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1 but not on issue #2. Petitioner failed to sustain the burden of persuasion on issues #3 and #4. The IHO directs DCPS to amend the Student's IEP to reflect the level of specialized instruction and OT services that were prescribed by the Student's March 17, 2023, IEP. The IHO directs DCPS to conduct an FBA and convene an IEP meeting after the start of SY 2024-2025 to review and revise the Student's IEP as appropriate, considering updated data and the Student's input. The IHO also granted the Student compensatory education.

FINDINGS OF FACT:⁶

1. The Student resides with the Student's parent in the District of Columbia, and DCPS is the Student's LEA. The Student has been determined eligible for special education pursuant to IDEA with a disability classification of SLD and attended School A, a DCPS school for SY 2023-2024. (Parent's testimony, Petitioner's Exhibit 10)
2. During SY 2022-2023, the Student attended another DCPS school ("School B"). While at School B, DCPS conducted the following evaluations: an OT evaluation, an assistive technology ("AT") assessment, and a psychological reevaluation. DCPS conducted an OT evaluation with an evaluation report dated February 28, 2023. The evaluator assessed the Student's fine motor, visual perception, self-care, and sensory-motor functioning. The evaluator administered the Beery-Buktenica Developmental Test of Visual-Motor Integration, 6th Edition (Beery VMI), and supplemental tests for Visual Perception and Motor Coordination were administered, and the Student scored in the low and very low range in all areas. (Petitioner's Exhibit 4)

⁴ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁵ Petitioners presented three witnesses: (1) Student's mother (Petitioner), (2) an independent occupational therapist who testified as an expert, and (3) an educational advocate who testified as an expert. Respondent presented three witnesses, all of whom testified as expert witnesses: (1) a DCPS school social worker, (2) a DCPS occupational therapist, and (3) Student's School A special education teacher/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.

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.

Test	Raw Score	Standard Score	Percentile Rank	Verbal Descriptor
Visual-Motor Integration	19	60	.8	Very Low
Visual Perception	23	76	5	Low
Motor Coordination	21	67	1	Very Low

3. To measure the Student’s fine motor functioning, the evaluator administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), with the following results: (Petitioner’s Exhibit 4)

Subtest: Composite:	Total Point Score	Scale Score	Composite Standard Score	Percentile Rank	Description of Performance
Fine Motor Precision	38	10			Below Average
Fine Motor Integration	33	7			Below Average
FINE MANUAL CONTROL		17	35	7%	Below Average
Manual Dexterity	30	9			Below Average
Upper-Limb Coordination	39	21			Above Average
MANUAL COORDINATION		30	50	50%	Average
FINE MOTOR COMPOSITE			39	14%	Below Average

4. The Student’s visual perception was assessed using the “The Developmental Test of Visual Perception – A:2 (DTVP-A:2)”. On the DTVP 2A, the Student scored in the average range in visual motor speed. She/He Scored in the Below-average range on the visual motor search subtest and scored in the Moderately Below range in the areas of eye-hand coordination, form constancy, and figure-ground. In the areas of copying and visual closure, the Student scored in the significantly Below-Average range. (Petitioner’s Exhibit 4)
5. In the evaluation summary, the OT evaluator noted the following: “[The Student’s] difficulties with visual motor integration can prove to decrease his/her overall output of written work in the classroom. If he/she cannot convey his/her thoughts through completing written work in the classroom, his/her grades will suffer. Written expression is a means for the teacher to know that he/she is grasping the information. Difficulties in visual motor skills can impact his/her participation in math class. He/She communicated consistent difficulties in classes that require angles, drawing shapes, and multi-part work being completed in class. Deficits in the area of visual perception are essential for spelling, reading, and note taking, and other classroom tasks. Visual perception can also impact his/her ability to be successful at math computation. Math requires his/her to know the correct order of operations to solve the problems. Deficits in copying can impact his/her ability to locate information on the board and may cause him/her to lose his/her place while copying work. It was reported that he/she improves his/her work output when working on a one-to-one basis. Visual perception is necessary for reading, writing, and movement activities which can impact daily tasks.” (Petitioner’s Exhibit 4)

6. DCPS administered an AT assessment with a report dated March 7, 2023. The results recommended that the Student would benefit from continued access to school technology. “To support his/her needs in reading and writing, he/she would benefit from continued use of the following assistive technology tools: dictation (inbuilt in Word), word prediction, text-to-speech (inbuilt), and editing and revision tools (paper-based checklists or MS Editor). He/She may benefit from access to audiobooks (ex: Book share) that can give him/her access to digital grade level text that will read aloud to him/her.” (Petitioner’s Exhibit 5)
7. DCPS administered a comprehensive psychological evaluation with an evaluation report dated March 8, 2023. The cognitive portion of the evaluation showed the following: “[the Student] obtained a Full-2 IQ score of 70, which also falls within the Borderline range at the 2nd percentile. [The Student] obtained a Verbal Comprehension (VCI) score of 73 which falls within the 4th percentile and places him/her verbal ability in the Borderline range. He/She obtained a Perceptual Reasoning (PRI) score of 72, which falls within the 3rd percentile and places him/her performance ability in the Borderline range. Observations during testing suggest that the Student is capable of completing tasks when it is modeled for him/her. He/She often required a few tries on sample items with further explanation to understand what the instructions required him/her to do.” The Student had the following scores: (Petitioner’s Exhibit 6)

WASI-II IQ Scores Summary (Mean of 100, Standard Deviation of 15)

Scale	IQ Score	Percentile	95% Confidence Interval	Classification
Verbal Comprehension (VCI)	73	4	68-81	Borderline
Perceptual Reasoning (PRI)	72	3	67-82	Borderline
Full Scale-4 IQ	70	2	66-77	Borderline
Full Scale-2 IQ	73	4	68-82	Borderline

8. The Student’s academic functioning, as measured by the Woodcock-Johnson Test of Achievement -IV (WJ-IV), reflected scores in reading, math, and writing in the low percentiles and significantly below the Student’s age: (Petitioner’s Exhibit 6)

CLUSTER/Test	W	AE	SS (68% Band)	PR	SS Classification
READING	488	8-11	69 (66-72)	2	Very Low
Letter-Word Identification	485	8-11	67 (63-71)	1	Low
Passage Comprehension	492	9-5	76 (72-81)	4	Low
BROAD READING	478	8-6	60 (57-64)	0.4	Very Low
Letter-Word Identification	485	8-11	67 (63-71)	1	Very Low
Passage Comprehension	492	9-5	76 (72-81)	4	Low
Sentence Reading Fluency	456	8-1	58 (52-64)	0.3	Very Low

BASIC SKILLS	READING	478	8-1	62 (59-65)	4	Low
Letter-Word Identification		485	8-11	67 (63-71)	4	Low
Word Attack		471	7-1	61 (55-66)	6	Low
READING FLUENCY		477	8-6	63 (59-67)	1	Very Low
Oral Reading		498	10-1	81 (78-85)	11	Low Average
Sentence Reading Fluency		456	8-1	58 (52-64)	0.3	Very Low
MATHEMATICS		487	9-2	67 (64-70)	1	Very Low
Applied Problems		492	9-5	76 (72-81)	6	Low
Calculation		481	8-11	65 (61-69)	1	Very Low
BROAD MATHEMATICS		489	9-3	65 (62-68)	1	Very Low
Applied Problems		492	9-5	76 (72-81)	6	Low
Calculation		481	8-11	65 (61-69)	1	Very Low
Math Facts Fluency		493	9-6	70 (64-75)	2	Low
MATH CALCULATION SKILLS		487	9-3	66 (62-69)	1	Very Low
Calculation		481	8-11	65 (61-69)	1	Very Low
Math Facts Fluency		493	9-6	70 (64-75)	2	Low
WRITTEN LANGUAGE		509	11-11	87 (83-90)	19	Low Average
Spelling		488	9-2	68 (65-72)	2	Very Low
Writing Samples		530	>30	114 (108-119)	82	High Average
BROAD WRITTEN LANGUAGE		505	11-4	83 (79-86)	0.2	Very Low
Spelling		488	9-2	68 (65-72)	2	Very Low
Writing Samples		530	>30	114 (108-119)	82	High Average
Sentence Writing Fluency		498	10-0	78 (72-85)	7	Low
WRITTEN EXPRESSION		514	15-3	99 (94-103)	46	Average
Writing Samples		530	>30	114 (108-119)	82	High Average
Sentence Writing Fluency		498	10-0	78 (72-85)	7	Low
BROAD ACHIEVEMENT		491	9-4	66 (64-68)	1	Very Low
Letter-Word Identification		485	8-11	67 (63-71)	1	Very Low
Applied Problems		492	9-5	76 (72-81)	6	Low
Spelling		488	9-2	68 (65-72)	2	Very Low
Passage Comprehension		491	9-1	74 (69-78)	4	Low
Calculation		481	8-11	65 (61-69)	1	Very Low
Writing Samples		530	>30	114 (108-119)	82	High Average
Sentence Reading Fluency		471	7-1	61 (55-66)	0.4	Very Low
Math Facts Fluency		498	10-1	81 (78-85)	11	Low Average
Sentence Writing Fluency		456	8-1	58 (52-64)	0.3	Very Low

9. During SY 2022-2023 at School B, Student was not receiving the math and reading pull-out specialized instruction in his/her IEP because School B could not accommodate such support. The Petitioner filed a DPC against DCPS on January 9, 2023, that resulted in an HOD issued on March 10, 2023. The Hearing officer determined that DCPS did not meet its burden of persuasion that the IEP team’s decision to provide only 4.5 hours of specialized instruction outside general education was appropriate for the Student. In the remedy, the hearing officer ordered: “within 21 school days of the date of this decision, DCPS shall ensure that Student’s IEP team is convened to review and revise as appropriate Student’s IEP, including to provide for enhanced specialized instruction services to include at least 8.5 hours per week of services outside of the general education setting.” (HOD issued March 10, 2023, Case No: 2023–0004)
10. On March 17, 2023, DCPS convened an eligibility meeting in which School B discussed the results of the OT, AT, and psychological evaluation. During that meeting, the Student’s IEP was amended to include the remedy ordered by the IHO. DCPS developed an IEP for the Student dated March 17, 2023, that prescribed the following services: (Petitioner’s Exhibit 9)

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Reading	General Education	03/17/2023	03/16/2024	5 hr. per wk.
Written Expression	General Education	03/17/2023	03/16/2024	5 hr. per wk.
Written Expression	Outside General Education	03/17/2023	03/16/2024	1 hr. per wk.
Mathematics	General Education	03/17/2023	03/16/2024	5 hr. per wk.
Mathematics	Outside General Education	03/17/2023	03/16/2024	5 hr. per wk.
Reading	Outside General Education	03/17/2023	03/16/2024	2 hr. per wk.

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Speech-Language Pathology	Outside General Education	03/17/2023	03/16/2024	90 min per mon.
Behavioral Support Services	Outside General Education	03/17/2023	03/16/2024	2 hr. per mon.
Occupational Therapy	Outside General Education	03/17/2023	03/16/2024	45 min per mon.

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Occupational Therapy	03/17/2023	03/16/2024	30 min per mon.

11. The Student’s March 17, 2023, IEP provided two goals in motor skills/physical development:
- With the use of assistive technology, [the Student] will be able to type a paragraph using both hands on the keyboard with no more than five sentences and correct his/her errors with no more than three verbal prompts and standby assistance on 3 to 4 opportunities.
 - With the use of adaptations, [the Student] will self-edit his/her work to correct spelling, punctuation, capitalization, and grammar on all typical classroom assignments with the use of technology with no more than 3 verbal prompts and stand-by assistance in 3 out of 4 opportunities.

12. For SY 2023-2024, the Petitioner applied to the DC School Lottery, and the Student was accepted to School A. The Petitioner reached out to School A's special education director to verify if School A would be able to implement the Student's IEP. On July 3, 2023, School A responded via email that "based on the service hours outside the general education setting, we will have to make adjustments since we are 99% an inclusion model at School A. He/She will probably receive some of his/her hours in small groups in the back of the class. Usually, our students don't have more than 5 hours outside the general education setting. As long as his/her hours are less than 20 hours outside the classroom setting, we can work with the student." (Parent's testimony, Petitioner's Exhibit 42)
13. On or about July 5, 2023, the Petitioner, through counsel, asked via email if they would also be able to implement the Student's related services. DCPS responded the same day, stating that they had "an entire team of service providers." As a result of this communication with DCPS, in August 2023 Student began his/her ____th-grade year at School A. (Petitioner's Exhibit 42)
14. On September 14, 2023, the School A occupational therapist delivered 45 minutes of direct OT services to the Student. In the service tracker notes, the therapist wrote the following: The session focused on motor skills goals. Activity: Establishing rapport and schedule with student and student team. Measurable Progress: The provider explained the purpose of occupational therapy and the proposed schedule for the student. Provider described the structure of sessions and sought student input from student regarding how to better plan therapy. Response to Intervention: student shared that he/she completed all assessments last and that he/she no longer should be receiving occupational therapy. The student also shared that he/she is doing our classes and does not need the additional support of occupational therapy. Plan: The provider will contact the student's case manager (and parent/guardian) to determine if the student should be receiving occupational therapy and if it needs to be updated. (Petitioner's Exhibit 53 pg. 32)
15. On or about September 20, 2023, the Petitioner reached out to School A to schedule a 30-day review meeting. (Petitioner's Exhibits 43)
16. The Student was vocal with his/her special education case manager that he/she had a negative experience at School B, and he/she wanted the number of pull-out hours reduced to the level he/she had experienced in the first few weeks at School A that included a reduction in specialized instruction outside general education. (Witness 5's testimony)
17. On September 21, 2023, the School A occupational therapist attempted to deliver 45 minutes of direct OT services to Student. In the service tracker notes, the therapist wrote the following: The provider attempted a session. However, the Student shared that he/she did not want to leave class and that he/she completed testing to no longer receive occupational therapy services. The provider shared that the provider would follow up with the student's case manager and mom to confirm the plan for moving forward. (Petitioner's Exhibit 53-36)
18. On September 22, 2022, the School A occupational therapist delivered 30 minutes of consultation services as reflected in the following service tracker notes: The provider consulted with the Student's case manager. Provider shared the student's concerns related to receiving OT (or not) with the provider, and a 30-day review meeting will be held with the student, the student's mom, and the attorney. Provider reviewed the student record and noted that recent testing was completed

to add (not dismiss) occupational therapy services. The provider will reach out to the Student's mom to determine the best plan forward and explain the purpose and plan for OT based on the student's IEP and current needs at School A. (Petitioner's Exhibit 53-38)

19. On October 5, 2023, the School A occupational therapist delivered 15 minutes of direct services to Student. The services tracker notes state the following: Session focused on motor skills goals. Activity: Review IEP goals and service prescription. Measurable Progress: The provider informed the student of the IEP prescription and the process of how the student received occupational therapy services in detail. Provider and student identified a good day/time for regular OT sessions. Response to Intervention: The Student stated that he/she understood how he/she ended up with occupational therapy services and stated that he/she was open to working together on his/her goals. Plan: Continue OT per student's IEP. (Petitioner's Exhibit 53-42)
20. School A convened a 30-day review meeting on October 12, 2023. At the time there was a disagreement about changing the Student's IEP to reduce hours of specialized instruction. The meeting resulted in School A agreeing to implement the IEP as it was received from School B. (Petitioner's Exhibit 15)
21. On October 24, 2023, the School A occupational therapist attempted to deliver 45 minutes of direct OT services; however, the Student was unavailable and attending a school-wide assembly. (Petitioner's Exhibit 53-47)
22. On November 2, 2023, the School A occupational therapist attempted to deliver 45 minutes of direct services; however, the Student was absent. (Petitioner's Exhibit 53-52)
23. On or about December 12, 2023, the Student was suspended due to an altercation with another student. Although the Student was suspended for five days, the conflicting peer was not suspended, and no incident report was shared with the Petitioner. (Parent's testimony)
24. On December 19, 2023, the School A occupational therapist attempted to deliver 45 minutes of direct services; however, the Student was absent. (Petitioner's Exhibit 53-58)
25. On January 9, 2024, the School A occupational therapist attempted to deliver 45 minutes of direct services; however, the Student was unavailable. The service tracker notes reflect the following: The provider attempted a session. The Student stated that he/she was working on assignments in class and would prefer to stay in class. The provider reminded the student of the regular therapy schedule and therapy location. The Student stated that he/she is doing well in classes and does not need additional support at this time. The provider will continue OT per the Student's IEP. (Petitioner's Exhibit 54-1)
26. In January 2024, the Student found himself/herself in conflict with two School A faculty members. A restorative justice circle was convened with multiple parties present (a neutral moderator, the two faculty members, the Student's case manager and social worker, and the Student). (Parent's testimony)
27. The Student's special education case manager regularly went to the Student's first period class to pull the Student out for specialized instruction, but the Student often not be at school yet for the

scheduled service. Class started at 8:40 a.m., but the Student sometimes did not arrive until 9:20 a.m. Sometimes, the case manager would invite the Student to a pull-out session in the corner of the general education classroom, but the Student’s preference was to work on the classroom work, not specifically on the IEP goals. The Student’s case manager worked with the Student to schedule the pull-out specialized instruction hours so that the Student was not missing important classroom time. (Witness 5’s testimony)

28. By the time of the Student’s annual IEP review in March 2024, the School A staff working with the Student believed there was enough data to reduce the hours of specialized instruction. The Student’s case manager conferred with the Student’s parent by telephone about reducing hours and explained why the reduction in specialized instruction was reasonable. (Witness 5’s testimony, Respondent’s Exhibit 13, Pg. 194)

29. On March 7, 2024, School A convened the Student’s annual IEP meeting, at which the School A team proposed reducing specialized instruction and removing the direct related services. The School A team shared that the Student had made academic progress but did not want to receive the pull-out services. The Student’s March 7, 2024, included the following services: (Parent’s testimony, Petitioner’s Exhibit 10)

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Reading	General Education	03/7/2024	03/6/2025	5 hr. per wk.
Written Expression	General Education	03/7/2024	03/6/2025	5 hr. per wk.
Written Expression	Outside General Education	03/7/2024	03/6/2025	1 hr. per wk.
Mathematics	General Education	03/7/2024	03/6/2025	2.5 hr. per wk.
Mathematics	Outside General Education	03/7/2024	03/6/2025	1 hr. per wk.
Reading	Outside General Education	03/7/2024	03/6/2025	1 hr. per wk.

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Speech-Language Pathology	Outside General Education	03/7/2024	03/6/2025	90 min per mon.
Behavioral Support Services	General Education	03/7/2024	03/6/2025	2 hr. per mon.

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Occupational Therapy	03/7/2024	03/6/2025	5 hours per mon.
Speech-Language	03/7/2024	03/6/2025	hours per mon.

30. The Petitioner and her educational advocate, who participated in the March 7, 2024, IEP meeting, disagreed with the reduction in services that School A proposed. As a result, the educational advocate followed up with a dissent letter dated March 27, 2024. In her letter, the advocate noted the following: “Considering the Student’s performance on his/her most recent triennial reevaluation outlined within his/her present IEP, the Student’s academic achievement skills were below age level expectancy. In reading, the Student’s overall reading score was in the “Very Low” range, displaying difficulty with reading both high-frequency words and unfamiliar words in isolation and comprehension of text with and without time constraints. The Student’s math score was in the “Very Low” range, with difficulty computing basic operations. In writing, The Student’s

abilities fell within the “low average” range with difficulty in spelling and accurately constructing sentences.” We are requesting that the Student’s special education service hours not be reduced.” (Witness2’s testimony, Petitioner’s Exhibit 46)

31. The advocate also noted in her letter that during SY 2023-2024, between September 2023 and March 2024, the Student received approximately 1 hour of OT direct services out of 3.5 hours that should have been provided and approximately 2 hours of OT consult services out of the 3.5 hours that should have been provided. (Witness 2’s testimony, Petitioner’s Exhibit 46)
32. Prior to the March 7, 2024, IEP meeting, the Student’s special education case manager had never shared with the Petitioner that the Student had refused any IEP services. These IEP changes were implemented for only one month due to the Petitioner invoking stay-put once she filed her DPC. After stay-put, the Student shared with the Petitioner that he/she was being pulled out of class more for services and, as a result, she/he was feeling overwhelmed. (Parent’s testimony)
33. On or about March 22, 2024, the Petitioner’s counsel sent an evaluation request to DCPS to conduct an FBA and an AT assessment. The Petitioner claims DCPS has not responded to this request. (Petitioner’s Exhibit 45)
34. School A occupational therapist provided the Student with both direct and consult OT services in the Student’s IEP in April and June 2024. The therapist attempted to provide the Student the direct services in May, but the Student was absent on each of the three attempts the provider made. (Witness 4’s testimony, Respondent’s Exhibit 6)
35. During the first three grading periods of SY 2023-2024, the Student earned passing grades or above-average grades in most courses. However, the Student’s reading level in a school-based assessment in April 2024 demonstrated that although the Student’s reading level had improved, he/she was reading six grade levels below the Student’s current grade. (Respondent’s Exhibits 12, 15)

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. West*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner held the burden of persuasion on all issues to be adjudicated except issues #1 and #2, which will fall to Respondent after Petitioner presented a prima facie case on those issues.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 the Student a FAPE by failing to develop an appropriate IEP on March 17, 2023, because of inappropriate OT goals?

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's March 17, 2023, had appropriate OT goals.

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).

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.

"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)

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.

The Student's March 17, 2023, IEP had the following OT goals:

- With the use of assistive technology, [the Student] will be able to type a paragraph using both hands on the keyboard with no more than five sentences and correct his/her errors with no more than three verbal prompts and standby assistance on 3 to 4 opportunities.
- With the use of adaptations, [the Student] will self-edit his/her work to correct spelling, punctuation, capitalization, and grammar on all typical classroom assignments with the use of technology with no more than 3 verbal prompts and stand-by assistance in 3 out of 4 opportunities.

In Petitioner's DPC, she asserted the OT goals created in the March 17, 2023, IEP were not aligned with the Student's 2023 AT assessment, and the support that AT provides was not reflected in the OT goals. The Petitioner presented an occupational therapist who reviewed the Student's evaluation and educational records and offered his opinion on the appropriateness of the Student's March 17, 2023, IEP OT goals and the Student's need for continued OT direct services. As to the goals, this witness acknowledged that the OT goals were functional, but asserted that because the goals lacked mention of what level of accuracy with which the Student should achieve the goal, the goal was not measurable. He offered conflicting testimony as to whether the two goals should have been combined by stating that the goals should not have referenced the use of AT but should have addressed what output(s) the Student would have been required to produce, such as writing a 250-word essay.

On the other hand, the DCPS occupational therapist testified that the OT goals were functional, measurable, and appropriate, given the results of the Student's evaluations. She noted, contrary to Petitioner's witness, that it would be inappropriate for a goal to state that the Student should write a 250-word essay because such a goal would be an academic goal, most appropriately measured by a teacher and not an occupational therapist. The IHO found both witnesses equally credible and knowledgeable in their fields, and both were designated as expert witnesses in occupational therapy. Neither witness, however, had any direct contact with the Student. Only the DCPS witness had conferred with the Student's OT provider.

The evidence demonstrates that at the time the IEP was developed, the OT goals were agreed to by the IEP team that included Petitioner and her attorney, and there was insufficient evidence presented for the IHO to conclude that the goals were inappropriate. The IHO 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." As the case law notes, the IEP should be judged from the time it was created. It was the Petitioner's burden to prove the OT goals were inappropriate, and the Petitioner failed to do so. Therefore, the IHO concludes that the Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 2: Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP on March 7, 2024, because of (a) inappropriate reduction in specialized instruction in reading and math and (b) inappropriate removal of direct OT services?

Conclusion: Respondent did not sustain 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 on March 7, 2024.

As stated above, The key inquiry regarding an IEP's substantive adequacy is whether taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress.... "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

The evidence demonstrated that per the prior HOD, the Student's March 17, 2023, IEP prescribed that the Student be provided 8 hours of specialized instruction outside general education. In addition, the Student's IEP prescribed 15 hours of specialized instruction inside general education, 45 minutes per month of direct OT services, and 30 minutes per month of consult OT services. At the March 7, 2024, IEP meeting, the School A team reduced the Student's specialized instruction hours by 7.5 hours per week, reducing the Student's out-of-general education instruction by 5 hours, from 8 hours per week to 3 hours per week. The Student's specialized instruction in general education was reduced by 2.5 hours, from 15 hours per week to 12.5.

The Student's special education case manager testified that the Student's math data demonstrated that the Student was in the average range and succeeding in math using quantitative validated assessment-based instruments and demonstrating a high degree of autonomy. He also noted that the Student expressed concern that he/she did not want to be pulled out of class for services. The team used the assessment data along with conferring with Student's teachers to justify the reduction in specialized instruction.

The Petitioner testified that she was never told by School A teachers or related service providers that the Student refused to be pulled out of class for services, and she testified that the Student told her the he/she had never refused services. The Petitioner noted that the Student is aware that he/she needs help with his/her comprehension and spelling. The Petitioner testified that had she known the Student expressed that she did not want to be pulled out for services, she would have had a conversation with the Student.

As noted in the Petitioner's advocate's dissent letter and testimony, the Student's performance on his/her most recent triennial reevaluation was outlined within his/her present IEP; "[the student's] academic achievement skills were below age level expectancy. In reading, "[the student's] overall reading score was in the "Very Low" range, displaying difficulty with reading both high-frequency words and unfamiliar words in isolation and comprehension of text with and without time constraints. "[the student's] Mathematic score was in the "Very Low" range with difficulty computing basic operations. In writing, "[the student's] abilities fell within the "low average" range with difficulty in spelling and accurately constructing sentences."

Although the Student's case manager cited the Student's improvement in school-based assessments and class performance as a basis for the reduction in specialized instruction, a major factor in the reduction was the Student's desire to not be pulled out of class. The IHO notes that despite the data that showed the Student's improvement during SY 2023-2024, the Student's reading level remained nearly six years behind the Student's age. The IHO concludes that given the Student's continued low reading level, as well as the major basis for the reduction in specialized instruction being the Student's lack of buy-in to the pull-out services, the reduction in specialized

instruction was premature without the team's full discussion of the Student's lack of buy-in, and the Student's input by some documented means.

At the March 7, 2024, meeting, School A discontinued the Student's direct OT services and offered only consult OT instead. Petitioner's expert witness testified that given the Student's lack of progress relative to his/her IEP OT goals, and the lack of training on AT, the change to consult services only was not appropriate. The DCPS occupational therapist testified that the Student's OT provider attempted to arrange with the Student to deliver services outside the classroom, but the Student would not come or come so late that she could not provide the service. She also testified that the Student expressed that he/she does not think he/she needs direct OT and thought he/she was taking the OT evaluation so he/she would not have to take OT, and the Student's teachers did not indicate that the Student has OT challenges that require additional services.

The DCPS occupational therapist testified that because there was no discontinuation of OT services but a shift in the model of service delivery from direct and consult to only consult services, there was no need to conduct an evaluation prior to the IEP change in OT services. She also testified that given the Student's age and grade, consultation services are usually the most appropriate. Nonetheless, a primary reason for the reduction in services was the Student's resistance to the services being offered.

The IHO concludes that given this factor, as well as the major basis for the elimination of direct OT services was the Student's lack of buy-in to the services, the elimination of direct OT services was premature without the team's full discussion and the Student's input by some documented means to justify the change.

Based on the foregoing discussion, the IHO concludes that DCPS did not sustain the burden of persuasion by a preponderance of the evidence that the Student's March 17, 2024, IEP was reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances

The Petitioner testified that the Student was fine with the way the special education services were being delivered when the Student first came to School A. However, when School A started to implement the IEP services after stay-put was initiated, the Student started to have breakdowns and become overwhelmed and would miss classwork because he/she was pulled out more hours than before. The Petitioner noted that although the Student is nearing his/her final year of high school, the Student has never participated in an IEP meeting over concern that the Student might get discouraged. Nonetheless, the IHO is concerned that with the Student's absence from the IEP meeting, particularly when the Student's teachers and service providers are advocating for what the Student has shared with them, the Student's input might not have been given full voice, and as a result, there is little if any chance for the Student's "buy-in" to the special education services.

ISSUE 3: Did DCPS deny the Student a FAPE by failing to timely and comprehensively evaluate the Student during SY 2023-2024 by failing to conduct an FBA since March 2024?

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

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).

Petitioner asserts that DCPS denied the Student an FAPE when it failed to conduct an FBA during SY 2023-2024 despite the fact that the Student's March 17, 2024, IEP outlines the Student's difficulties with self-regulation and coping strategies and documents incidents of the Student having conflicts with both faculty and peers, which led to out-of-school suspensions.

IDEA does not mandate an FBA or BIP except in instances of disciplinary actions, and there is no evidence that Student behaviors led to the level and duration of disciplinary action by School A that would have mandated an FBA or BIP.

The School A social worker testified that she met with the Student on Fridays in the last period so the Student could report on his/her week. She also met with the Student during the week on occasion when something happened that the Student needed to work through, and the Student reported his/her academic successes to the social worker, as the Student is very academically motivated.

The School social worker had never considered conducting an FBA because the Student was not having behavior issues and was working well with his/her intervention strategies. She testified that the Student's mature response in the resolution of both the behavior incidents that were noted in the IEP and that these did not raise to the level of needing an FBA.

The IHO concludes, based on the evidence, that there was insufficient evidence presented to conclude that School A should have conducted an FBA prior to the request from the Petitioner's attorney on March 22, 2024. The IHO notes that by the time the Petitioner's DPC was filed, there was no marked delay in DCPS's response to the request and concludes that there was no denial of a FAPE because DCPS has not yet conducted an FBA.

The IHO notes that the School A social worker also testified that she consulted with the Student's special education case manager to add incentives for the Student to participate in pull-out special education services. She did not consider the Student's response to the pull-out services to be service refusal and thought it could be handled with the support that the Student was being provided. Although there was no denial of a FAPE because an FBA was not yet conducted, the IHO in the order below directs DCPS to conduct an FBA, particularly to assist an IEP team in accessing the Student's perspective on and response to pull-out and push-in special education services.

ISSUE 4: Did DCPS deny the Student a FAPE by failing to implement the Student's IEP during SY 2023-2024 by failing to provide all prescribed OT direct services?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied the Student a FAPE by

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)

The evidence demonstrates that the School A occupational therapist attempted repeatedly to deliver the direct OT services that the Student's IEP prescribed, and she was met with continual refusal by the Student to engage in the OT services. Despite the Student's refusal, the occupational therapy conferred with the Student's case manager and with the Student on several occasions in an attempt to convince the Student to take advantage of the services.

In addition, as DCPS's attorney pointed out, by the date the Petitioner filed her DPC, there was ample time for School A to make up any missed services that had not yet been delivered to Student in SY 2023-2024. The evidence demonstrates that in April and June 2024, direct OT services were provided. They were not provided during May 2024 due to the Student's absences.

Based on the evidence of School A's repeated attempts to deliver the OT services and the Student's refusal to take advantage of the services, coupled with the fact that there was additional time for the few hours of OT services that had been missed to be either made up or provided as an authorization at the end of the school year, the IHO concludes that the Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that the Student was denied a FAPE by School A failing to implement the Student's IEP.

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.)

The evidence demonstrates that the Student's IEP was changed at the March 7, 2024, IEP meeting. On April 30, 2024, the Petitioner filed her DPC. The Petitioner invoked a stay put under the IDEA, and the Student's IEP services were delivered consistent with the Student's March 17, 2023, IEP for the remainder of SY 2023-2024.

The Petitioner's educational advocate proposed that the Student be provided make-up services for the missed academic specialized in the amount of thirty (30) hours of private tutoring. The IHO found the proposal to be reasonable.

ORDER:

1. DCPS shall, within 10 business days of the issuance of this order, amend the Student's IEP to reflect the amount and setting of specialized instruction and OT direct and consultative services that were prescribed in the Student's March 17, 2023, IEP and grant Petitioner authorization to obtain thirty (30) hours of independent tutoring at the OSSE prescribed rate.
2. DCPS shall, within 30 calendar days of the start of SY 2024-2025, conduct an FBA to consider any behavioral concerns of the Student, including any reluctance or refusal to engage in pull-out or push-in special education and related services.
3. DCPS shall, within 60 calendar days after the start of SY 2024-2025, convene an IEP meeting to consider the Student's academic and OT performance for SY 2023-2024 and SY 2024-2025, including the Student's input to the team by some documented means regarding his/her learning, instructional and scheduling preferences, and review and revise Student's IEP as appropriate given the updated data and Student's input.
4. All other relief requested by the 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 14, 2024

Copies to: Counsel for Petitioner
Counsel for LEA
ODR hearing.office@dc.gov